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“ICE” CAPADES: RESTITUTION ORDERS AND THE FCPA

*Shane Frick**

INTRODUCTION

The notion that victims should obtain compensation for their losses evokes basic principles of fairness. In Foreign Corrupt Practices Act (“FCPA”) litigation, however, the all too common theme is that victims never receive compensation. In light of the massive efforts now underway to enforce the FCPA,¹ this precedent cannot continue.

For much of its history the FCPA was inconsequential to the legal landscape.² Within the last decade that notion has changed dramatically.³ Enforcement of the FCPA has led to settlements, fines, and disgorgements totaling hundreds of millions of dollars.⁴ Looming on the FCPA enforcement horizon is the Wal-Mart investigation.⁵ The scope and scale of Wal-Mart’s potential violations could set FCPA enforcement records and will almost certainly become the preeminent FCPA enforcement case of its time.⁶ The potential for liability is com-

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¹ Drury D. Stevenson & Nicholas J. Wagoner, *FCPA Sanctions: Too Big to Debar?*, 80 *FORDHAM L. REV.* 775, 784 (2011).

² Dionne Searcey, *U.S. Cracks Down on Corporate Bribes*, *WALL ST. J.* (May 26, 2009), <http://online.wsj.com/article/SB124329477230952689.html>.

³ Mike Koehler, *The Foreign Corrupt Practices Act in the Ultimate Year of Its Decade of Resurgence*, 43 *IND. L. REV.* 389 (2009); Jordan Maglich, *Under the FCPA, Where Are Victim’s Rights?*, *FCPA BLOG* (May 25, 2011, 6:42 AM), <http://www.fcpablog.com/blog/2011/5/25/under-the-fcpa-where-are-victims-rights.html>.

⁴ Richard L. Cassin, *Pfizer Joins Our Top Ten Disgorgement List*, *FCPA BLOG* (Aug. 8, 2012, 8:02 AM), <http://www.fcpablog.com/blog/2012/8/8/pfizer-joins-our-top-ten-disgorgement-list.html>; Richard L. Cassin, *With Magyar In New Top Ten, It’s 90% Non-U.S.*, *FCPA BLOG* (Dec. 29, 2011, 1:28 PM), <http://www.fcpablog.com/blog/2011/12/29/with-magyar-in-new-top-ten-its-90-non-us.html>.

⁵ David Barstow, *Vast Bribery Case Hushed Up by Wal-Mart After Top-Level Struggle*, *N.Y. TIMES*, Apr. 22, 2012, at A1, available at http://www.nytimes.com/2012/04/22/business/at-wal-mart-in-mexico-a-bribe-inquiry-silenced.html?page_wanted=all.

⁶ Mike Scher, *Wal-Mart Will Test FCPA Enforcement in New Ways*, *FCPA BLOG* (Dec. 19, 2012, 4:10 AM), <http://www.fcpablog.com/blog/2012/12/19/wal-mart-will-test-fcpa-enforcement-in-new-ways.html>; Andy Spalding, *Wal-Mart’s Expanding*

parable to the British Petroleum (“BP”) Deepwater Horizon oil spill, with one commentator calling Wal-Mart the “BP of anti-bribery enforcement.”⁷

Whatever similarities may exist between the Department of Justice’s case against BP and the pending case against Wal-Mart, the similarities are likely to end when the discussion turns to victim compensation. When the BP prosecution ended, \$2.4 billion went directly to construction and environmental reconstruction efforts.⁸ However, assuming Wal-Mart is liable, it is unlikely that its victims will receive compensation in any fashion.

In FCPA enforcement, regardless of how a case concludes, very little if any money will see its way back to victims of the bribery.⁹ This marginalization or, perhaps more accurately, near complete ignorance of victim’s rights has led several FCPA commentators to decry the apparent injustice.¹⁰ With the potential for the largest settlement ever for an FCPA enforcement action in the near future, this injustice to the victims looms ever larger.

This comment discusses federal restitution orders and why they are not a viable source of compensation for FCPA victims. Section I provides background information on the FCPA and outlines how it is enforced. Section II discusses victims’ rights under a series of pieces of federal legislation. Section III looks at the primary precedent in the arena and explains why it shows that the restitution statutes do not provide sufficient FCPA victim restitution. Section IV discusses the pending Wal-Mart case and the issues facing Wal-Mart victims. Section V outlines other avenues of recovery for FCPA victims and proposes new measures for compensating victims.

Investigation Reveals FCPA as Trade Policy, FCPA BLOG (Nov. 15, 2012, 2:28 PM), <http://www.fcablog.com/blog/2012/11/15/wal-marts-expanding-investigation-reveals-fcpa-as-trade-poli.html>.

⁷ Andy Spalding, *If the DOJ is Compensating BP’s Victims, Couldn’t it Compensate Wal-Mart’s?*, FCPA BLOG (Nov. 26, 2012, 6:13 AM), <http://www.fcablog.com/blog/2012/11/26/if-the-doj-is-compensating-bps-victims-couldnt-it-compensate.html>.

⁸ Press Release, U.S. Dep’t of Justice, BP Exploration and Product Inc. Agrees to Plead Guilty to Felony Manslaughter, Environmental Crimes and Obstruction of Congress Surrounding Deepwater Horizon Incident (Nov. 15, 2012), *available at* <http://www.justice.gov/opa/pr/2012/November/12-ag-1369.html>.

⁹ Maglich, *supra* note 3; Spalding, *supra* note 7.

¹⁰ Gideon Mark, *Private FCPA Enforcement*, 49 AM. BUS. L.J. 419 (2012); Mike Koehler, *Where Should the Money Go?*, FCPA PROFESSOR (Mar. 26, 2012), <http://www.fcaprofessor.com/where-should-the-money-go>; Spalding, *supra* note 7.

I. A BRIEF OUTLINE OF THE FCPA

Congress passed the Foreign Corrupt Practices Act of 1977 in the wake of Securities and Exchange Commission (“SEC”) investigations that showed rampant bribing of foreign government officials¹¹ by United States companies.¹² The FCPA itself outlaws bribing foreign officials in pursuit of business objectives with a corrupt intent.¹³ In 1998, amendments to the FCPA extended its jurisdictional reach to include foreign companies and nationals who act to further a corrupt payment within United States territory.¹⁴ Indeed, the anti-bribery provisions of the FCPA are far reaching and led the Fifth Circuit to conclude that Congress intended the FCPA to “cast [a] . . . wide net over foreign bribery.”¹⁵

The SEC and Department of Justice (“DOJ”) handle enforcement of the FCPA.¹⁶ There are essentially three categories of individuals subject to these entities’ jurisdiction: domestic concerns,¹⁷ foreign companies and nationals who act in furtherance of an FCPA violation while in U.S. territory, and “issuers.”¹⁸ The DOJ is tasked with criminal enforcement against all three categories and civil enforcement against domestic concerns and foreign companies and nationals.¹⁹ The SEC handles civil enforcement against issuers.²⁰

When an individual or entity is criminally liable under the FCPA, a variety of penalties can result. Pursuant to the Alternative Fines Act, penalties can reach up to two times the “benefit that the defendant sought to obtain by making the corrupt payment.”²¹ The question of where this money goes brings a simple answer: straight into the United States Treasury.²² With a handful of rare exceptions,²³

¹¹ Maglich, *supra* note 3.

¹² *A Resource Guide to the U.S. Foreign Corrupt Practices Act*, U.S. DEP’T OF JUST. 3, <http://www.justice.gov/criminal/fraud/fcpa/guide.pdf> (last visited Apr. 28, 2013) [hereinafter *FCPA Guide*].

¹³ *Id.* at 14.

¹⁴ *Id.* at 11-12.

¹⁵ *U.S. v. Kay*, 359 F.3d 738, 749 (5th Cir. 2004).

¹⁶ *FCPA Guide*, *supra* note 12, at 4-5.

¹⁷ Domestic concerns are citizens, residents, and any business entity organized under U.S. law whose principle place of business is in the U.S. *Id.* at 2

¹⁸ Issuers are corporations registered in the U.S. or corporations required to file certain SEC reports. *Id.* at 3.

¹⁹ *Id.* at 2.

²⁰ *Id.* at 3.

²¹ *Id.* at 6.

²² *FCPA Fines: Where Does All the Money Go?*, TRACE BLOG (Feb. 13, 2009), <http://traceblog.org/2009/02/13/fcpa-fines-where-does-all-the-money-go> [hereinafter *FCPA Fines*]; Maglich, *supra* note 3; Mike Koehler, *ICE Appeal Receives Chilly Reception at 11th Circuit*, FCPA PROFESSOR (June 20, 2011), <http://fcpaprofessor>.

this has been the result of the vast majority of FCPA enforcement actions.²⁴ The question of why is a bit trickier.

The FCPA legislation itself remains largely silent on the issue.²⁵ The single reference to the Treasury in the text of the statute states that issuers who fail to file required information, documents, or reports are subject to a penalty of \$100 each day payable to the Treasury.²⁶ With the remainder of the statute seemingly silent, history proves to be the best tool for further insight into the topic, though the matter is further complicated because FCPA cases are rarely litigated.²⁷

The majority of potential FCPA violation cases never see the inside of a courtroom.²⁸ As a direct result of litigation costs²⁹ and the seemingly high probability of a guilty verdict,³⁰ corporations typically resolve criminal FCPA issues through “deferred-prosecution agreements,” “non-prosecution agreements,” or plea agreements.³¹ An additional possible outcome is a declination,³² a decision to not prosecute the individual or entity after an investigation.³³ Prosecutors base the decision to prosecute or to decline to prosecute on the *Principles of Federal Prosecution*, and a declination can occur for any number of rea-

blogspot.com/2011/06/ice-appeal-receives-chilly-reception-at.html; Thomas O. Gorman, *An FCPA Motion That May Alter Settlement Procedures*, SEC ACTIONS (May 6, 2011), <http://www.secactions.com/?p=326>.

²³ See *U.S. v. Diaz*, No. 09-cr-20346-JEM (S.D. Fla. Aug. 5, 2010), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/diazj.html>; *U.S. v. F.G. Mason Eng'g*, No. B-90-29 (D. Conn. 1990), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/fg-mason.html>; *U.S. v. Kenny Int'l Corp.*, No. 79-372 (D. D.C. 1979), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/kenny-international.html>.

²⁴ FCPA Fines, *supra* note 22.

²⁵ See 15 U.S.C. §§ 78dd-1, et seq., available at <http://www.justice.gov/criminal/fraud/fcpa/statutes/regulations.html>.

²⁶ 15 U.S.C. § 78ff(b).

²⁷ Mike Koehler, *Has the FCPA Been Amended Since 1977?*, FCPA PROFESSOR (Jan. 25, 2013), <http://www.fcpaprofessor.com/fcpa-101#q2> [hereinafter Koehler 1977]; Mike Koehler, *The Manhattan Institute Joins the FCPA Reform Conversation*, FCPA PROFESSOR (Jan. 17, 2013), <http://www.fcpaprofessor.com/the-manhattan-institute-joins-the-fcpa-reform-conversation> [hereinafter Koehler *Manhattan*].

²⁸ Koehler 1977, *supra* note 27; see also Koehler *Manhattan*, *supra* note 27.

²⁹ Koehler *Manhattan*, *supra* note 27.

³⁰ Mark, *supra* note 10, at 454-56.

³¹ Mike Koehler, *How Are FCPA Enforcement Actions Typically Resolved?*, FCPA PROFESSOR (Jan. 25, 2013), <http://www.fcpaprofessor.com/fcpa-101#q16>; see also Koehler, *supra* note 27.

³² *FCPA Guide*, *supra* note 12, at 75.

³³ *Id.*

sons.³⁴ While the raw number of declinations is not exceedingly high (combined known declinations by the SEC and DOJ between 2008 and 2012 was around 7),³⁵ they have involved high profile business entities.³⁶

II. VICTIM’S RIGHTS TO RESTITUTION

The question of how FCPA criminal enforcement money can be dispersed to victims implicates several pieces of legislation. This comment will focus on the major criminal statutory provisions, namely: the Victims of Crime Act, Victim Witness Protection Act, Mandatory Victim Restitution Act, and the Crime Victims’ Rights Act.³⁷ While these pieces of legislation contain laudable aims, they fail to address FCPA victims’ needs in almost every conceivable scenario. The causes for this failure are varied, but the conclusion is singular: change is needed.

A. *Victims of Crime Act*

The Victims of Crime Act (“VOCA”) established the Treasury’s Crime Victims Fund, which is the primary repository for money that victims of FCPA actions may receive.³⁸ The U.S. Treasury oversees the fund, and the government deposits all fines for offenses against the United States into this fund.³⁹ Besides criminal fines, the deposits come from forfeited bonds, special assessments, and various other sources.⁴⁰ The fund itself receives staggering deposits with \$2.362 billion deposited in the year 2010 alone.⁴¹ The government uses the money available for distribution in a variety of ways, including: federal and state victim assistance programs, victim compensation, and discretionary grants (to support the training of victim service providers and affiliated professionals).⁴² VOCA, however, fails to address the needs of FCPA victims.

³⁴ *Id.*

³⁵ Richard L. Cassin, *2012: The Year in Declinations*, FCPA BLOG (Dec. 27, 2012, 4:18 AM), <http://www.fcpablog.com/blog/2012/12/27/2012-the-year-in-declinations.html>.

³⁶ Namely Morgan Stanley and Academi LLC (formally known as Blackwater Worldwide). *Id.*

³⁷ The Crime Victims’ Rights Act was part of the Justice for All Act of 2004. PUB. L. NO. 108-405, 118 STAT 2260.

³⁸ 42 U.S.C. § 10601, *et seq.*

³⁹ 42 U.S.C. § 10601(b)(1).

⁴⁰ *Crime Victims Fund*, OFFICE FOR VICTIMS OF CRIME, <http://www.ojp.usdoj.gov/ovc/pubs/crimevictimsfundfs/intro.html#figure1> (last visited Jan. 25, 2013).

⁴¹ *Id.*

⁴² *Id.*

The federal government does disperse money to state governments for victims of crime pursuant to VOCA, but in a limited way. The compensations occurs through grants and these grants are only available to victims of violent crimes.⁴³ This effectively excludes non-violent crime victims like victims of FCPA violations. While money is also available for victim assistance programs whose potential use could be for victims of any type of crime, FCPA victims do not receive such assistance. Compounding these technical difficulties is the persistent issue of convincing state governments to pay (typically) foreign victims of the violation of a federal crime. The federal government almost certainly would implement a more effective program, as they are the party enforcing the law and controlling the funds. This efficiency can be seen in the Federal Victim Notification System.

VOCA provides money from the Crime Victims Fund for the Federal Victim Notification System and to pay for victim-witness coordinators in all U.S. Attorneys' Offices.⁴⁴ In conjunction, these two entities notify and inform victims about possible restitution.⁴⁵ Increased use of money in this fashion could help identify victims of FCPA violations and inform them of their rights. This identification and notification would allow FCPA victims to exercise their statutory victims' rights and would allow courts to order restitution under the Victim and Witness Protection Act or Mandatory Victim Restitution Act. For reasons discussed below, this identification and notification does not occur. Accordingly, the money VOCA sets aside from the Crime Victims Fund does not assist FCPA victims through federal action either.

B. Crime Victims' Rights Act

Passed in 2004, the Crime Victims' Rights Act ("CVRA") created a "bill of rights" of sorts for victims of crime.⁴⁶ Of note, the CVRA expressly guarantees victims the right to "full and timely restitution."⁴⁷ DOJ personnel are required to use their best efforts to ensure that crime victims receive notification of, and are accorded, this right to restitution.⁴⁸ However, the notification requirement is limited by a further clause. In cases where there are multiple victims, or if the number of victims "makes it impracticable" to afford them all their rights, the court has discretion to make a "reasonable procedure to give effect" to the CVRA "that does not unduly complicate or prolong

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Maglich, *supra* note 3.

⁴⁷ 18 U.S.C. § 3771(a)(6).

⁴⁸ *Id.* § 3771(c)(1).

the proceedings.”⁴⁹ These limitations are readily apparent in large FCPA enforcements. Perhaps most damaging to FCPA victims, the CVRA also explicitly states that a victim has no cause of action for damages based on a violation of their CVRA rights.⁵⁰ However, the CVRA does allow victims to assert their victims’ rights through a motion for relief and a writ of mandamus.⁵¹

C. Victim and Witness Protection Act and Mandatory Victim Restitution Act

Courts use restitution orders to compensate victims.⁵² However, these restitution orders are exceedingly rare,⁵³ and have been found in only a handful of cases.⁵⁴ The statutory authority for ordering criminal restitution comes from the Victim and Witness Protection Act⁵⁵ and the Mandatory Victim Restitution Act.⁵⁶ The Victim and Witness Protection Act (“VWPA”) empowers the court with the discretion to order restitution in certain cases.⁵⁷ Under the VWPA, a court may issue a restitution order for any offense falling under Title 18 of the U.S. Code.⁵⁸ When ordering restitution, the court must balance the loss of the victim, the defendant’s financial resources, and any other factor that the court finds relevant.⁵⁹ In that way, the VWPA reflects “a focus on the penal goals of the State and the situation of the defendant,” and not a focus “on the victim’s injury.”⁶⁰ Additionally, the “complexity exception” states that a court is not required to order restitution if it finds that the process of determining a victim’s loss would be too complicated or would prolong the sentencing process to such a degree that it “outweighs the need to provide restitution to any victims.”⁶¹

⁴⁹ *Id.* § 3771(d)(2).

⁵⁰ *Id.* § 3771(d)(6).

⁵¹ *Id.* § 3771(d)(3).

⁵² Maglich, *supra* note 3.

⁵³ *Id.*

⁵⁴ See *U.S. v. Diaz*, No. 09-cr-20346-JEM (S.D. Fla. Aug. 5, 2010), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/diazj.html>; *U.S. v. F.G. Mason Eng’g*, No. B-90-29 (D. Conn. 1990), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/fg-mason.html>; *U.S. v. Kenny Int’l Corp.*, No. 79-372 (D. D.C. 1979), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/kenny-international.html>.

⁵⁵ 18 U.S.C. § 3663.

⁵⁶ *Id.* § 3663A.

⁵⁷ *Id.* § 3663(a)(1)(A).

⁵⁸ *Id.*

⁵⁹ *Id.* § 3663(a)(1)(B)(i)-(ii).

⁶⁰ *Kelly v. Robinson*, 479 U.S. 36, 52 (1986).

⁶¹ 18 U.S.C. § 3663(a)(1)(B)(ii).

Congress pursued slightly different objectives when it passed the Mandatory Victim Restitution Act (“MVRA”) in 1996.⁶² The MVRA reflects “a more fundamental shift in the purpose of restitution,” as the “new restitution scheme is not merely a means of punishment and rehabilitation, but an ‘attempt to provide those who suffer the consequences of crime with some means of recouping the personal and financial losses.’”⁶³ This act, as the name implies, creates mandatory restitution in most federal cases.⁶⁴ While an FCPA violation is not explicitly among the qualifying mandatory offenses,⁶⁵ mandatory restitution is still available if the plea agreement connects the FCPA violation with what would have been a qualifying offense.⁶⁶ Working in tandem with the VWPA,⁶⁷ a court can also issue a restitution order agreed to in a plea agreement⁶⁸ in any criminal case, including an FCPA violation. In fact, a court can even provide restitution to individuals who are not “victims” of the charged offense.⁶⁹ Similar to the VWPA, a “complexity exception” tempers this availability of restitution under the MVRA.⁷⁰ An additional similarity exists between the MVRA and the VWPA in that restitution orders are nearly non-existent.

The explanation for this dearth of restitution might be simpler than it first appears. The FCPA is codified in Title 15 while the VWPA and MVRA apply only to Title 18 offenses.⁷¹ However, FCPA prosecutions usually include a conspiracy count,⁷² which would be a Title 18

⁶² *Federal Crime Victims’ Rights & Services*, U.S. DEP’T OF JUST., http://www.justice.gov/usao/briefing_room/vw/about.html.

⁶³ *U.S. v. Perry*, 360 F.3d 519, 530 (6th Cir. 2004) (quoting H.R. Rep. No. 104-16, at 5 (1995)).

⁶⁴ U.S. DEP’T OF JUST., *supra* note 62.

⁶⁵ Qualifying offenses include crimes of violence pursuant to 18 U.S.C. § 16, Title 18 property offenses, controlled substance manufacturing offenses, consumer products tampering, sexual abuse and sexual exploitation of children, domestic violence, telemarketing fraud, Child Support Recovery Act, and human trafficking. See Catharine M. Goodwin, *Restitution in Federal Criminal Cases*, U.S. COURTS ADMIN. OFFICE, http://www.ussc.gov/Education_and_Training/Guidelines_Educational_Materials/trainnew.pdf.

⁶⁶ 18 U.S.C. § 3663A(c)(2).

⁶⁷ *Id.* § 3663.

⁶⁸ *Id.* § 3663(a)(3).

⁶⁹ *Id.* § 3663A(a)(3). This apparent latitude could allow for creative victim compensation as there are serious issues with qualifying individuals or entities as “victims” under the statutory guidelines that will be discussed later.

⁷⁰ *Id.* § 3663A(c)(3).

⁷¹ 18 U.S.C. § 3663(a)(1)(A), 18 U.S.C. § 3663A(a)(1).

⁷² Maglich, *supra* note 3 (“A typical FCPA prosecution includes a count of conspiracy to violate the FCPA.”).

offense and would allow the kind of MVRA tie-in discussed above.⁷³ Additionally, the DOJ has noted other Title 18 offenses tied with FCPA enforcement actions such as violations of the Travel Act,⁷⁴ money laundering, mail fraud, and wire fraud.⁷⁵ Any of these offenses would provide the court with the ability to order restitution through the VWPA,⁷⁶ though the power is purely discretionary.⁷⁷ Given this context, and the apparent frequency of Title 18 charges, the absence of restitution orders remains puzzling. A simple explanation is that the DOJ chooses not to pursue restitution in plea agreements as they could under the statutes, but other explanations exist.⁷⁸

A second and related explanation lies in the difficulty with identifying victims in an FCPA bribery case. Certainly there are victims of FCPA violations⁷⁹ and the DOJ itself has stated as much.⁸⁰ The restitution statutes, the MVRA and VWPA, as well as the CVRA share a substantially similar definition of “victim.”⁸¹ In short, for an individual to be a victim they must be (1) directly and proximately harmed as a result of (2) an offense for which restitution can be ordered.⁸² However, the MVRA and VWPA definitions carry extra language that includes people harmed in the course of a “scheme, conspiracy, or pattern” in its definition of victim so long as that “scheme, conspiracy, or pattern” is part of the charged offense.⁸³ Congress added this language specifically to deal with situations where a guilty plea results in dropped charges.⁸⁴

These definitions are not without controversy, and the CVRA definition became the focus of litigation in a joint DOJ and SEC enforcement action against Alcatel-Lucent. The case raises several issues

⁷³ 18 U.S.C. § 371.

⁷⁴ *Id.* § 1952.

⁷⁵ *FCPA Guide*, *supra* note 12, at 48-49.

⁷⁶ 18 U.S.C. § 3663.

⁷⁷ *Id.* § 3663(a)(1)(A) (“The court . . . may order . . . restitution.”).

⁷⁸ *Id.* § 3663(a)(3).

⁷⁹ Koehler, *supra* note 10.

⁸⁰ “Bribery is not a victimless crime.” *California Company, Its Two Executives and Intermediary Convicted by Federal Jury in Los Angeles on All Counts for Their Involvement in Scheme to Bribe Officials at State-Owned Electrical Utility in Mexico*, U.S. DEP’T OF JUSTICE (May 10, 2011), <http://www.justice.gov/opa/pr/2011/May/11-crm-596.html> [hereinafter *California Company*].

⁸¹ 18 U.S.C. § 3663(a)(2); 18 U.S.C. 3663A(a)(2); 18 U.S.C. § 3771(e).

⁸² 18 U.S.C. § 3663(a)(2); 18 U.S.C. 3663A(a)(2); 18 U.S.C. § 3771(e).

⁸³ *Id.*

⁸⁴ Under the older definition of victim, if the offense to which they were a victim was dropped as part of the plea agreement, the victim would have no avenue to recover as technically the crime they were a victim of was not pled to. *U.S. v. Aguirre-Gonzalez*, 597 F.3d 46, 50-51 (2010).

around defining FCPA victims, and provides insight into why more victims have not received restitution.

III. ALCATEL-LUCENT AND ICE

A. Introduction

From the 1990's through the end of 2006, Alcatel-Lucent, a global telecommunications equipment company, and its subsidiaries repeatedly violated the FCPA.⁸⁵ The violations occurred in several locations and notably through an Alcatel-Lucent subsidiary in Costa Rica.⁸⁶ In conjunction with the award of three contracts worth over \$300 million, Alcatel-Lucent wired over \$18 million to two Costa Rican consultants who dispersed roughly \$9 million in bribes to Costa Rican officials.⁸⁷ Some of the bribed officials worked for a Costa Rican power company named Instituto Costarricense de Electricidad ("ICE").⁸⁸ In 2010, Alcatel-Lucent made an announcement that the company and its subsidiaries had reached a settlement agreement with the DOJ and SEC for approximately \$137.4 million.⁸⁹ In May 2011, pursuant to the previously discussed provision of the CVRA,⁹⁰ ICE petitioned the U.S. District Court for the Southern District of Florida to protect their CVRA rights after the DOJ failed "to protect those rights."⁹¹

In their petition, ICE argued that it had suffered massive losses as a direct result of the disloyalty of its directors and employees who had been bribed.⁹² ICE noted that it assisted in the prosecution of the case and that the SEC had already denied an ICE "Fair Fund" request without explanation.⁹³ ICE further stated that the DOJ had determined that it was not a victim due to a DOJ policy stating that

⁸⁵ Press Release, U.S. Dep't of Justice, Alcatel-Lucent S.A. and Three Subsidiaries Agree to Pay \$92 Million to Resolve Foreign Corrupt Practices Act Investigation (Dec. 27, 2010), available at <http://www.justice.gov/opa/pr/2010/December/10-crm-1481.html>; *California Company*, *supra* note 80, at 1.

⁸⁶ *California Company*, *supra* note 80, at 2.

⁸⁷ *Id.*

⁸⁸ *FCPA Motion That May Alter Settlement Procedures*, SEC ACTIONS (May 6, 2011), <http://www.secactions.com/an-fcpa-motion-that-may-alter-settlement-procedures/>.

⁸⁹ Mike Koehler, *Is ICE a Victim? And an Open Question!*, FCPA PROFESSOR (May 25, 2011), <http://www.fcpaprofessor.com/is-ice-a-victim-and-an-open-question>.

⁹⁰ See 18 U.S.C. § 3771(d)(3).

⁹¹ Petition for Relief Pursuant to 18 U.S.C. § 3771(d)(3) and Objection to Plea Agreements and Deferred Prosecution Agreement at 1, U.S. v. Alcatel-Lucent, No. CR-20907-CR-COOKE (S.D. Fla. 2011) [hereinafter ICE Petition for Relief], available at <http://www.justice.gov/criminal/fraud/fcpa/cases/alcatel-et-al/2011-05-02-ICE-Petition-for-Relief.pdf>.

⁹² *Id.* at 7.

⁹³ *Id.* at 11.

foreign governments were not victims.⁹⁴ ICE relied on the language of the MVRA’s definition of victim, which included conspiracy charges.⁹⁵ Alcatel-Lucent, on the other hand, argued that the VWPA, not the MVRA, applied.⁹⁶ The District Court denied the petition, with the Court finding that ICE was involved in the crimes and suggesting it may have been a co-conspirator with Alcatel-Lucent.⁹⁷ The District Court further held that the MVRA complexity exception⁹⁸ applied, so the Court could decline to provide restitution regardless.⁹⁹ ICE then appealed the decision to the Eleventh Circuit in two related actions: a petition for a writ of mandamus and an appeal of the denial of its petition for victim status.¹⁰⁰

B. *Writ of Mandamus*

ICE filed a writ of mandamus in the Court of Appeals for the Eleventh Circuit on June 15, 2011.¹⁰¹ Rejecting the District Court’s co-conspirator determination, ICE argued that it had not been officially charged as a co-conspirator¹⁰² and then turned to agency law for further support. Relying on 9th and 2nd Circuit precedence, ICE argued that its directors and employees were agents and the “[l]aw is clear that agents who accept bribes . . . operate for their own benefit and to the detriment of their principles.”¹⁰³

ICE then turned to the language of the CVRA and noted that the statutory language defining victims does not exclude co-conspirators.¹⁰⁴ Again arguing that it was a statutory “victim” under the CVRA, ICE argued that it was eligible for mandatory restitution under the MVRA for two reasons.¹⁰⁵ First, ICE argued that “courts have universally applied the MVRA to the conspiracy offense” to which Alcatel-Lucent pled guilty.¹⁰⁶ Second, ICE argued that one of the qualifying mandatory MVRA offenses, “offenses against property,” had been com-

⁹⁴ *Id.* at 11, n.16.

⁹⁵ Petition for Writ of Mandamus at 17, *Instituto Costarricense de Electricidad v. S.D. Fla.* (11th Cir. 2011) (No. 11-13707G) [hereinafter ICE Writ of Mandamus], available at <http://www.justice.gov/criminal/fraud/fcpa/cases/alcatel-et-al/2011-06-15-Writ-of-Mandamus.pdf>.

⁹⁶ *Id.* at 23.

⁹⁷ *Id.* at 11-13.

⁹⁸ 18 U.S.C. § 3663A(c)(3)(B).

⁹⁹ ICE Writ of Mandamus, *supra* note 95, at 25.

¹⁰⁰ *In re Instituto Costarricense de Electricidad*, No. 11-12708-G (11th Cir. 2011).

¹⁰¹ ICE Writ of Mandamus, *supra* note 95, at 1.

¹⁰² *Id.* at 22

¹⁰³ *Id.* at 20.

¹⁰⁴ *Id.* at 22.

¹⁰⁵ *Id.* at 23.

¹⁰⁶ *Id.* at 24.

mitted because money is property and the theft of money/property satisfied the MVRA guidelines.¹⁰⁷ ICE also noted, *arguendo*, that assuming Alcatel-Lucent was correct (that the VWPA and not the MVRA applied), it would still be entitled to restitution as a victim of a conspiracy charge.¹⁰⁸ Finally, ICE argued that the District Court's usage of the complexity exception was an error in light of the fact that ICE had submitted a "concise Declaration of Victim Losses"¹⁰⁹ which conceivably removed any specter that restitution "would complicate or prolong the sentencing process."¹¹⁰ Accordingly, ICE urged the Eleventh Circuit to overturn the ruling of the District Court.

On June 17, 2011, the Court of Appeals for the Eleventh Circuit denied ICE's petition for writ of mandamus in an order slightly longer than two pages.¹¹¹ The Eleventh Circuit ruled that the District Court did not err when it found ICE had been a co-conspirator.¹¹² The Court went further and agreed with the District Court's determination that ICE did not establish that it had been harmed, citing 9th Circuit precedent that "[a]s a general rule, a participant in a crime cannot recover restitution."¹¹³

C. *Petition for Victim Status*

The Eleventh Circuit reviewed ICE's petition for victim status based on two issues. First, the court looked to ICE's claim against the deferred prosecution agreement entered into by Alcatel-Lucent itself.¹¹⁴ The Eleventh Circuit ruled that it lacked jurisdiction to hear the case because a deferred prosecution agreement was not a final judgment and, as such, there was no final judgment from which ICE could appeal.¹¹⁵ Second, the Eleventh Circuit turned to ICE's contention that its CVRA rights had been violated by the settlement agreement between the government and certain Alcatel-Lucent subsidiaries.¹¹⁶

The Eleventh Circuit again concluded that it lacked subject matter jurisdiction for several reasons. The court looked to its own

¹⁰⁷ ICE Writ of Mandamus, *supra* note 95, at 14.

¹⁰⁸ *Id.* at 23.

¹⁰⁹ *Id.* at 25.

¹¹⁰ 18 U.S.C. § 3663A(c)(3)(B).

¹¹¹ *In re Instituto Costarricense de Electricidad*, No. 11-12707-G, 11-12708-G (11th Cir. 2011), available at http://jenner.com/system/assets/assets/953/original/In_re_Instituto.pdf?1317065417.

¹¹² *Id.*

¹¹³ *Id.* (citing *U.S. v. Lazarenko*, 624 F.3d 1247, 1252 (9th Cir. 2010)).

¹¹⁴ *U.S. v. Alcatel-Lucent France, SA*, 688 F.3d 1301, 1304 (11th Cir. 2012).

¹¹⁵ *Id.* at 1304-05.

¹¹⁶ *Id.* at 1305.

precedent, and the precedent of the First,¹¹⁷ Tenth,¹¹⁸ and D.C. Circuits,¹¹⁹ “that crime victims, as non-parties to the criminal action, lack standing to appeal the defendant’s sentence.”¹²⁰ The court went on to note that, under the CVRA, a writ of mandamus “is a crime victim’s sole avenue for appellate review”¹²¹ because the Victim and Witness Protection Act of 1982 (VWPA), a CVRA predecessor statute, did not create a private remedy for crime victims.¹²² As the court also denied the writ of mandamus, this denial effectively ended ICE’s quest for restitution.

D. *Aftermath*

Following the Eleventh Circuit’s denial of both petitions, ICE appealed to the United States Supreme Court.¹²³ On December 10, 2012, the Supreme Court denied the petition for writ of certiorari.¹²⁴ With this denial, the future for victim restitution in FCPA enforcement remains cloudy.

As the ICE court held, a victim’s status as a non-party¹²⁵ and the express language of CVRA¹²⁶ indicates that a writ of mandamus is a non-party victim’s only avenue for redress under the CVRA, VWPA, and MVRA if a victim is not given restitution by a district court. As the Eleventh Circuit did not move past the issue of whether ICE qualified as a victim, the Court left several questions unanswered. First, if ICE was a victim, whether they would qualify under the MVRA because of the conspiracy charge or under the alternate theory that Alcatel-Lucent’s offenses qualified as “crimes against property.” Second, if ICE would alternatively qualify for compensation under the VWPA. Third, if the case would trigger the complexity clause, despite the “concise declaration” ICE filed.¹²⁷

¹¹⁷ U.S. v. Aguirre-Gonzalez, 597 F.3d 46 (1st Cir. 2010).

¹¹⁸ U.S. v. Hunter, 548 F.3d 1308 (10th Cir. 2008).

¹¹⁹ U.S. v. Monzel, 641 F.3d 528 (D.C. Cir. 2011). Though not noted by the Court, the Third Circuit (*U.S. v. Stoerr*, 695 F.3d 271 (3d Cir. 2012)) and Fifth Circuit (*U.S. v. Slovacek*, 699 F.3d 423 (5th Cir. 2012)) have also ruled that crime victims lack jurisdiction or standing to appeal.

¹²⁰ Alcatel-Lucent France, SA, 688 F.3d at 1305 (11th Cir. 2012).

¹²¹ *Id.* at 1305-06.

¹²² *Id.* at 1305.

¹²³ Brief for the Petitioner, Instituto Costarricense de Electricidad v. U.S., 2012 WL 5492455 (2012).

¹²⁴ Instituto Costarricense de Electricidad v. U.S., 133 S. Ct. 806 (Dec. 10, 2012).

¹²⁵ U.S. v. Aguirre-Gonzalez, 597 F.3d 46, 52-53 (2010); Alcatel-Lucent France, SA, 688 F.3d at 1304-6.

¹²⁶ 18 U.S.C. § 3771(d)(3).

¹²⁷ ICE Writ of Mandamus, *supra* note 95, at 25.

Unfortunately for ICE, it was arguing a bad set of facts.¹²⁸ If the DOJ's assertions are correct, there was "profound and pervasive corruption at the highest levels of ICE."¹²⁹ Even ICE acknowledged that several members of its board of directors took bribes.¹³⁰ So, even if ICE was not a co-conspirator of Alcatel-Lucent, it certainly had some dirt on its hands. This raises a larger issue that permeates throughout anti-bribery efforts worldwide: who are the victims? The question presents an immense gray area that others have discussed at length¹³¹ and is outside the scope of this comment. Regardless of where the line is drawn, however, there are certainly individuals or groups that can be called victims. So the question becomes if there are victims, and those victims have a case with better facts than ICE, would the triumvirate of the VWPA, CVRA, and MVRA provide restitution? Further, is the current restitution legislation addressing the needs of FCPA victims in general? These unanswered questions raise a number of concerns and their impact can only be truly understood in the context of a real life example like the pending Wal-Mart case.

IV. WAL-MART

In December 2011, Wal-Mart disclosed that it had conducted internal investigations concerning possible violations of the FCPA in Mexico.¹³² While those investigations later expanded into Brazil, India, and China,¹³³ the focus has remained in Mexico.¹³⁴ *The New York*

¹²⁸ Mike Koehler, *The Foreign Corrupt Practices Act Under the Microscope*, 15 U. PA. J. BUS. L. 1, 52 (2012).

¹²⁹ Government's Response to ICE's Petition for Victim Status and Restitution at 1, U.S. v. Alcatel-Lucent. No. 10-CR-20906-COOKE (S.D. Fla. 2011), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/alcatel-et-al/2011-05-23-Gov-Response-re-Victim.pdf>.

¹³⁰ ICE Petition for Relief, *supra* note 91, at 7.

¹³¹ See, e.g., Elizabeth Spahn, *Nobody Gets Hurt?*, 41 GEO. J. INT'L L. 861 (2010); Alexandra Wrage, *Paying the Fox to Buy New Chickens*, HUFFINGTON POST (July 15, 2010), http://www.huffingtonpost.com/alexandra-wrage/paying-the-fox-to-buy-new_b_647837.html; Koehler, *supra* note 10; Maglich, *supra* note 3.

¹³² Richard L. Cassin, *Walmart Joins Our Corporate Investigations List*, FCPA BLOG (Dec. 12, 2011, 3:28 AM), <http://www.fcpablog.com/blog/2011/12/12/walmart-joins-our-corporate-investigations-list.html>.

¹³³ Richard L. Cassin, *Report of Massive Bribery by Walmart in Mexico*, FCPA BLOG (Apr. 21, 2012, 4:28 PM), <http://www.fcpablog.com/blog/2012/4/21/report-of-massive-bribery-by-walmart-in-mexico.html>; Richard L. Cassin, *Wal-Mart's Lobbying Triggers India Investigation*, FCPA BLOG (Dec. 12, 2012, 5:25 AM), <http://www.fcpablog.com/blog/2012/12/12/wal-marts-lobbying-triggers-india-investigation.html>; Stephanie Clifford and David Barstow, *Wal-Mart Inquiry Reflects Alarm on Corruption*, N.Y. TIMES (Nov. 15, 2012), <http://www.nytimes.com/2012/11/16/business/wal-mart-expands-foreign-bribery-investigation.html?pagewanted=all>; *Congressmen: Documents Show Wal-Mart CEO and Execs Told About Mexico*

Times reported in April 2012 that the bribe payments in Mexico alone totaled over \$24 million.¹³⁵ The former head of Wal-Mart Mexican subsidiary Wal-Mart de Mexico's real estate department told the *New York Times* that the bribes "bought zoning approvals, reductions in environmental impact fees and the allegiance of neighborhood leaders."¹³⁶ Further allegations state that Wal-Mart executives knew about the bribery as early as 2005¹³⁷ and attempted to cover up the payments at their Bentonville, Arkansas headquarters.¹³⁸ The headquarters cover up purportedly involved Wal-Mart's top lawyer sending the internal investigation files to the general counsel of Wal-Mart de Mexico who supposedly authorized the bribes.¹³⁹

One part of the story that has attracted particular media attention involves Wal-Mart opening a store near the UNESCO World Heritage Pre-Hispanic City of Teotihuacan.¹⁴⁰ According to reports, bribes were paid to the Municipal Council and the Director of the National Institute of Anthropology and History to clear the way for a Wal-Mart store to be built near the ancient pyramids.¹⁴¹ In exchange for the bribes, a zoning map was changed to allow the new store to be built.¹⁴² Residents objected to the move and protested for months to no avail.¹⁴³ In the end, Wal-Mart paid over \$200,000 in bribes and built its newest

Bribe Allegations in 2005, FCPA BLOG (Jan. 10, 2013, 2:45 PM), <http://www.fcpa.com/blog/2013/1/10/congressmen-documents-show-wal-mart-ceo-and-execs-told-about.html> [hereinafter *Congressmen*].

¹³⁴ David Barstow, *Vast Mexico Bribery Case Hushed Up by Wal-Mart After Top-Level Struggle*, N.Y. TIMES, Apr. 21, 2012, at A1, available at http://www.nytimes.com/2012/04/22/business/at-wal-mart-in-mexico-a-bribe-inquiry-silenced.html?_r=2&.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Congressmen*, *supra* note 133.

¹³⁸ Barstow, *supra* note 134.

¹³⁹ *Id.*

¹⁴⁰ Letter from Elijah E. Cummings, Ranking Member, Comm. on Oversight & Gov't Reform & Henry A. Waxman, Ranking Member, Comm. on Energy & Commerce, to Michael T. Duke, C.E.O., Wal-Mart Stores, Inc., in *Congressmen*, *supra* note 133 [hereinafter Cummings Letter]; Maria Dolores Hernandez J., *Fallout in Mexico From Walmart Allegations*, FCPA BLOG (Jan. 21, 2013, at 1:23 AM), <http://www.fcpablog.com/blog/2013/1/21/fallout-in-mexico-from-walmart-allegations.html>; *Pre-Hispanic City of Teotihuacan*, UNESCO, <http://whc.unesco.org/en/list/414> (last visited Jan. 25, 2013).

¹⁴¹ Cummings Letter, *supra* note 140; Hernandez, *supra* note 140.

¹⁴² David Barstow & Alejanda Xanic von Bertrab, *The Bribery Aisle: How Wal-Mart Got Its Way in Mexico*, N.Y. TIMES (Dec. 17, 2012), http://www.nytimes.com/2012/12/18/business/walmart-bribes-teotihuacan.html?_r=0.

¹⁴³ *Id.*

store “in the shadow of a revered national treasure,” the pyramids of Teotihuacan.¹⁴⁴

The ongoing Wal-Mart investigation provides a perfect example of the difficulties surrounding restitution in FCPA litigation. If the allegations made by the *New York Times* are true, and the DOJ’s assertion that bribery is not a victimless crime¹⁴⁵ is correct, who should obtain restitution? Perhaps the question is best answered by starting with assessing what damage has been done. According to the *New York Times*, the new Wal-Mart in Teotihuacan has caused numerous issues, the most serious of which include: the destruction of ancient artifacts, increased traffic congestion, lost revenue to local businesses, and the intangible harm to Mexican culture and heritage.¹⁴⁶ The list of potential victims for these harms would include numerous individuals, from the citizens of Teotihuacan up to the Mexican government itself. Analyzing these entities’ claims under current precedent, it seems unlikely that the restitution statutes would provide compensation.

The first hurdle that the potential victims would need to pass is completely out of their control. Pursuant to VWPA and MVRA requirements, Wal-Mart would need to be found guilty or plead guilty to a Title 18 offense.¹⁴⁷ Next, the potential victims would need to qualify under the statutory definition of “victim.” The statutes share a common definition of “victim” and, in essence, require a showing that an individual or entity has been directly or proximately harmed as a result of a federal offense.¹⁴⁸ To some degree, the potential victim’s ability to qualify would depend on what Wal-Mart actually was found guilty of, plead guilty to, or what charges are included in a deferred-prosecution or non-prosecution agreement. However, the statutory language extends “victims” to include those harmed by the “scheme, conspiracy, or pattern.”¹⁴⁹ Accordingly, so long as the damage is tied to Wal-Mart’s alleged scheme,¹⁵⁰ they should qualify. If the Mexican government seeks restitution, the same issues that arose for ICE may appear again. ICE attempted to claim that its own employees victimized the organization and, in many ways, Mexico would be making the

¹⁴⁴ *Id.*

¹⁴⁵ *California Company*, *supra* note 80.

¹⁴⁶ Barstow & von Bertrab, *supra* note 142.

¹⁴⁷ 18 U.S.C. § 3663(a)(1)(A); 18 U.S.C. § 3663A(c).

¹⁴⁸ *See* 18 U.S.C. § 3771(b)(2)(D); 18 U.S.C. § 3663(a)(2); 18 U.S.C. § 3663A(a)(2).

¹⁴⁹ 18 U.S.C. § 3663(a)(2); 18 U.S.C. 3663A(a)(2); 18 U.S.C. § 3771(e).

¹⁵⁰ “Under 18 U.S.C. § 3663(a)(2), any conduct that is in the course of the scheme, conspiracy, or pattern may be considered in calculating restitution. Thus, if this case involved a scheme, conspiracy, or pattern of criminal activity, the district court could properly include the suppressed evidence in the restitution order regardless of whether it was conduct of conviction.” *U.S. v. Acosta*, 303 F.3d 78, 87 (1st Cir. 2002).

same argument. Through the corruption of its own civil servants, the Mexican government provided Wal-Mart with the necessary building permits. In that light, a court may well view them as something akin to a co-conspirator as the Eleventh Circuit did with ICE. Precedent, however, may help Mexico in this instance.

In two of the rare instances where a court ordered restitution in FCPA cases, *U.S. v. F.G. Mason Engineering, Inc.* and *U.S. v. Juan Diaz*, the respective governments were able to obtain restitution for the losses they suffered as a result of their officials being bribed. In *Mason*, a manufacturer bribed a West German intelligence official in order to obtain business from the West German government.¹⁵¹ The District Court ordered restitution to the West German government in the amount of \$160,000.¹⁵² In *Diaz*, an individual was ordered to pay \$73,824.20 in restitution to the Haitian government following the discovery of a telephone rate conspiracy.¹⁵³

What makes the Wal-Mart case more difficult than *Mason* or *Diaz* is the computation of damages. Even if a court did accept the notion that individual citizens or the government of Mexico were “victims” under the statute, it is unlikely that they would obtain restitution. The previously mentioned “complexity exception” will likely be triggered and would allow a court to avoid ordering restitution if it finds that the process of determining a victim’s loss would be too complicated.¹⁵⁴ While the *Mason* court could use easily calculable sums of money that the company overcharged the West German government on contracts, and the *Diaz* court could use easily calculable sums of lost revenue from telephone rate charges, the damage caused by Wal-Mart is far more complicated and speculative.

If a private Mexican citizen or group of citizens were to assert the destroyed relics as their statutory damages, a court would face the task of calculating the value of ancient pottery, altars, plazas, graves, an 800-year-old wall, and other items that in many ways are priceless.¹⁵⁵ Similarly, local business owners may assert future business losses, but courts typically consider these types of claims too specula-

¹⁵¹ *U.S. v. F.G. Mason Eng’g, Inc.*, Case No. B-90-29(JAC) (D. Conn. 1990), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/fg-mason.html>.

¹⁵² Plea Agreement at 3, *U.S. v. F.G. Mason Eng’g, Inc.*, No. B-90-29-JAC (D. Conn. 1990), available at [http://www.justice.gov/criminal/fraud/fcpa/cases/fg-mason/1990-06-25-fg-mason-plea-agreement-\(fg-mason\).pdf](http://www.justice.gov/criminal/fraud/fcpa/cases/fg-mason/1990-06-25-fg-mason-plea-agreement-(fg-mason).pdf).

¹⁵³ *U.S. v. Diaz*, No. 1:09-20346-CR-MARTINEZ-1 (S.D. Fla. 2012), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/diazj/2012-05-23-diazj-amended-judgment.pdf>; Maglich, *supra* note 3.

¹⁵⁴ 18 U.S.C. § 3663(a)(1)(B)(ii).

¹⁵⁵ Barstow & von Bertrab, *supra* note 142.

tive.¹⁵⁶ Further allegations of cultural harm would be even more speculative.¹⁵⁷ Further complicating the Mexican government's claims are the nature and details of the alleged offenses. Unlike the governments in *Mason* and *Diaz*, where single government employees intentionally deprived their governments of money, the myriad of Mexican officials involved in the Wal-Mart bribery scheme¹⁵⁸ makes the case far more analogous to ICE and thus unlikely to end in an award of restitution to the government. Given the multitude of issues facing the potential victims, it appears unlikely that any money from the Wal-Mart case will see its way back to the victims through the restitution statutes.

V. OTHER AVENUES OF RECOVERY

While the restitution statutes are clearly an underutilized and seemingly inadequate means of recovery for FCPA victims, there are other avenues of potential recovery. For example, while the lack of a Title 15 restitution statute may prevent some FCPA victims from gaining restitution, another option is available under the Title 18 Conditions of Probation.¹⁵⁹ The Federal District Court of Utah noted in *U.S. v. Wenger* that the lack of a Title 15 restitution statute akin to the VWPA in Title 18 "appears to be a statutory 'glitch.'"¹⁶⁰ The court decried this lack of statutory authority to provide restitution as nonsen-

¹⁵⁶ There is little precedent on the interpretation of the restitution statutes in FCPA cases. Turning to courts' interpretations of the statutes in other contexts, the preeminent case, *U.S. v. Fountain*, held that "projecting lost future earnings has no place in criminal sentencing if the amount or present value of those earnings is in dispute." *U.S. v. Fountain*, 768 F.2d 790, 802 opinion supplemented on denial of reh'g, 777 F.2d 345 (7th Cir. 1985). *Fountain* was interpreting the VWPA and the Ninth Circuit held that it was not directly applicable under the MVRA. *U.S. v. Cienfuegos*, 462 F.3d 1160, 1167-68 (9th Cir. 2006). The Ninth Circuit interpreted the MVRA such that the complexity exception did not apply in the category of violent cases, but it did apply under the remaining MVRA categories. *Id.* The Eighth Circuit substantially agreed with the *Fountain* decision, but held that future claims were not categorically barred in MVRA cases as they are in VWPA cases. *U.S. v. Oslund*, 453 F.3d 1048, 1063 (8th Cir. 2006). The Fifth Circuit and Tenth Circuit have also largely agreed with the *Fountain* holding. *U.S. v. Dupre*, 117 F.3d 810, 824 (5th Cir. 1997); *U.S. v. Serawop*, 505 F.3d 1112, 1120 (10th Cir. 2007). As FCPA cases fall under the non-violent categories of the MVRA (if they fall under the statute at all) or more properly fall under the VWPA, the *Fountain* precedent is most applicable.

¹⁵⁷ Again, the lack of precedent makes finding analogous situations difficult. One case that may be instructive is *U.S. v. Bengimina*, where the Court found the valuation of restitution for a loss of corporate "good will" too complicated under the VWPA. 699 F.Supp. 214, 219 (W.D. Mo. 1988).

¹⁵⁸ Barstow & von Bertrab, *supra* note 142.

¹⁵⁹ 18 U.S.C. § 3563.

¹⁶⁰ *United States v. Wenger*, 2004 WL 724458, at *6 (D. Utah Jan. 30, 2004).

sical.¹⁶¹ However, the court did note an interesting way around their lack of Title 15 authority. While declining to follow such an option, the Court noted that it nonetheless had the authority to order restitution for a Title 15 offense as a condition of supervised release.¹⁶² This authority is admittedly limited,¹⁶³ but does provide an interesting method to grant restitution for crime victims where the defendant is put on supervised release.

Another possible avenue of recovery lies in civil litigation. There is no express private right of action under the FCPA, but victims have tried collateral civil litigation.¹⁶⁴ These efforts have included filing shareholder derivative, securities fraud, RICO, tortious interference, and unfair competition actions.¹⁶⁵ While some limited success has been found through collateral civil litigation, it too has proved to be a largely ineffective means of gaining restitution.¹⁶⁶

The Socio-Economic Rights and Accountability Project ("SERAP"), a Nigerian NGO, has put forth a very interesting solution to the problem.¹⁶⁷ In March 2012, SERAP sent a letter to the SEC outlining a plan for broader victim compensation.¹⁶⁸ Under SERAP's plan, a victim foreign government or an NGO involved in that foreign state would have 60 days after the end of an FCPA enforcement action to file a claim for part or all of the settlement proceeds.¹⁶⁹ The U.S. Government would then have 60 days to act on the request and issue a statement explaining its decision.¹⁷⁰ The plan would require the foreign government or NGO to show that they have sufficient safeguards in place to protect against further misuse of the funds.¹⁷¹ In this way, the claims of various foreign governments and other victims could be

¹⁶¹ *Id.*

¹⁶² "At most, the court has limited authority, as a condition of supervised release following any prison term, to order restitution to victims." *Id.*

¹⁶³ "This limited authority to impose restitution makes no sense. In cases such as this one where victims have suffered significant losses as a direct and proximate result of the defendant's securities fraud, the court believes it should have the authority to impose full and immediate restitution." *Id.*

¹⁶⁴ Mark, *supra* note 10, at 420, 486.

¹⁶⁵ *Id.* at 420.

¹⁶⁶ *Id.* at 486.

¹⁶⁷ Alexander W. Sierck, *African NGO Asks for Distribution of FCPA Recoveries*, FCPA BLOG (Mar. 16, 2012, 3:18 AM), <http://www.fcablog.com/blog/2012/3/16/african-ngo-asks-for-distribution-of-fcpa-recoveries.html>.

¹⁶⁸ Benjamin Kessler, *Giving Back to the Victims*, FCPA BLOG (May 2, 2012, 1:53 AM), <http://www.fcablog.com/blog/2012/5/2/giving-back-to-the-victims.html>.

¹⁶⁹ Letter from Alexander W. Sierck, Volunteer, SERAP, to Robert S. Khuzami, Dir., Enforcement Div., U.S. Sec. and Exch. Comm'n 4 (2012), available at <http://www.mediafire.com/?kkg0xg8bmwjy4aa>.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 5.

evaluated on a case-by-case basis, outside of the court system, to determine the best use of the funds obtained through FCPA enforcement.¹⁷² The SEC responded to SERAP's request by thanking them for the letter and stating that they would take the idea under consideration.¹⁷³ That consideration has ultimately led to no new policies by the SEC or DOJ in regards to victim compensation. However, the idea put forth by SERAP is a step in the right direction.

The type of plan called for by SERAP would alleviate many of the thorny problems around FCPA victim compensation. The thought of giving money back to the very governments who have been corrupted feels like "paying the fox to buy new chickens."¹⁷⁴ Under the SERAP plan, however, a foreign government would be required to show that they have taken steps to address their bribery issues before they would see a dime. Even if a government is unwilling or unable to change, the possibility that an NGO could distribute the money makes for a far better solution. Providing funds to an NGO after an FCPA violation is not unprecedented¹⁷⁵ and would alleviate the needs of further U.S. involvement while ensuring that at least some of the money is put to good use.

Unfortunately FCPA enforcement often brings about situations that have the feel of choosing the lesser of two evils. However, this difficulty should not lead to what it currently does: a bar to victim restitution. What the very real victims of FCPA violations need is new legislation or new DOJ policies that take into account the large gray area frequently found in FCPA enforcement. Whatever the final form of reform, some change must occur. The ICE case did not present ideal facts but that should not halt further reform efforts. As one commentator put it: "I am not sure where criminal fines should go when a *French* company bribes *Costa Rican* 'foreign officials,' but I am pretty sure that the answer should not be 100% to the *U.S.* Treasury."¹⁷⁶

¹⁷² *Id.* at 1.

¹⁷³ Kessler, *supra* note 168.

¹⁷⁴ Wrage, *supra* note 131.

¹⁷⁵ In 2007, following an FCPA violation in Kazakhstan, an agreement was reached by the United States, Switzerland, and Kazakhstan whereby money from the violation was given to an NGO in Kazakhstan for the benefit of underprivileged Kazakh children. U.S. DEP'T OF JUSTICE, NEW YORK MERCHANT BANK PLEADS GUILTY TO FCPA VIOLATION; BANK CHAIRMAN PLEADS GUILTY TO FAILING TO DISCLOSE CONTROL OF FOREIGN BANK ACCOUNT (Aug. 6, 2010), *available at* <http://www.justice.gov/opa/pr/2010/August/10-crm-909.html>.

¹⁷⁶ Koehler, *supra* note 89.