

Winter 2016

Dangling the Carrot, Sharpening the Stick: How an Amnesty Program and Qui Tam Actions Could Strengthen Korea's Anti-Corruption Efforts

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Sang Beck Kim, *Dangling the Carrot, Sharpening the Stick: How an Amnesty Program and Qui Tam Actions Could Strengthen Korea's Anti-Corruption Efforts*, 36 Nw. J. INT'L L. & BUS. 235 (2016).
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Dangling the Carrot, Sharpening the Stick: How an Amnesty Program and Qui Tam Actions Could Strengthen Korea's Anti-Corruption Efforts

*Sang Beck Kim**

Abstract: Corruption, both in the public and private sector, has long plagued Korea's economy. Unfortunately, the detection of corruption and bribery is inherently difficult because the crime is by its nature self-concealing. Thus, governments heavily rely on inside information for detection and prosecution of bribery. Such inside information comes through primarily two types of sources: (i) self-reporting by wrongdoers, and (ii) whistleblowers with inside knowledge. However, Korea's legal sanction regime does not sufficiently incentivize corporations and individuals to self-report or come forward to reveal misconduct. This Comment proposes that Korea's current anti-corruption laws could be strengthened by embracing the two regulatory tools that have proven very effective in bringing forth inside information in the U.S. context: (i) The Department of Justice's Antitrust Amnesty Program, and (ii) the False Claims Act (FCA) Qui Tam Enforcement Model. Overall, the adoption of these features would establish a "carrots and sticks" regulatory framework for optimal enforcement of Korean anti-corruption laws.

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INTRODUCTION

Corruption is a disease that affects all sectors of society.¹ It is not only a matter of ethics; its deleterious impact on economic, political, and social development is clear. Corruption distorts market mechanisms,² deters domestic and foreign investments, undermines the rule of law, and leads to inefficient use of public resources.³ The World Economic Forum estimates that the cost of corruption amounts to over five percent of global GDP with more than US\$ 1 trillion paid in bribes each year.⁴ Korea is no exception.⁵ Corruption, both in the public and private sector, has long plagued Korea's economy.⁶

Unfortunately, the detection of corruption and bribery is inherently difficult because the crime is by its nature self-concealing.⁷ Thus, governments heavily rely on "inside information" for detection and prosecution of bribery.⁸ Such inside information comes through primarily

¹ The most widely accepted definition of corruption is arguably that proposed by Transparency International and the World Bank: Corruption is "the abuse of entrusted power for private gain." *FAQs on Corruption*, TRANSPARENCY INT'L, http://www.transparency.org/whoweare/organisation/faqs_on_corruption/2/#defineCorruption (last visited Jan. 23, 2014). Because this definition focuses on the feature of exchange, corruption is generally treated as being equivalent to the conduct of bribery, which includes offering or promising money or advantages to officials in order to influence their decisions. See UNITED NATIONS ACTION AGAINST CORRUPTION AND BRIBERY, UNITED NATIONS CRIME AND JUSTICE INFORMATION NETWORK (1997), <http://www.uncjin.org/Documents/corrupt.htm>. This Comment uses the terms corruption and bribery interchangeably throughout its analysis.

² *Private Sector*, TRANSPARENCY INT'L, http://www.transparency.org/topic/detail/private_sector (last visited Jan. 23, 2014).

³ OECD, THE RATIONALE FOR FIGHTING CORRUPTION (2014), <http://www.oecd.org/cleangovbiz/49693613.pdf>.

⁴ WORLD ECON. F., CLEAN BUSINESS IS GOOD BUSINESS (2008), <http://www.weforum.org/pdf/paci/BusinessCaseAgainstCorruption.pdf>. But see John Hogarth, *Bribery of Officials in Pursuit of Corporate Aims*, 6 CRIM. L.F. 557, 559 (1995) (arguing that it is incorrect to assume that corruption creates costs and market inefficiencies without any counterbalancing economic benefits).

⁵ The Korean peninsula is divided into two sovereignties: the Republic of Korea, commonly known as South Korea, and the Democratic People's Republic of Korea, commonly known as North Korea. Since North Korea is not discussed in this Comment, I refer to South Korea as "Korea," and use "Korean" to mean "South Korean." This is purely for stylistic reasons.

⁶ See discussion *infra* Part I.

⁷ Christopher R. Leslie, *Replicating the Success of Antitrust Amnesty*, 90 TEX. L. REV. 171, 180 (2012).

⁸ Pamela H. Bucy, *Private Justice*, 76 S. CAL. L. REV. 1, 4-5 (2002) ("No matter how talented or dedicated our public law enforcement personnel may be . . . a public regulatory system will always lack the one resource that is indispensable to effective detection and deterrence of complex economic wrongdoing: inside information."); Susan Rose-Ackerman, *The Law and Economics of Bribery and*

two types of sources: (i) self-reporting by wrongdoers, and (ii) whistleblowers with inside knowledge.⁹ Without these resources, enforcement agencies “cannot effectively detect, prove, or deter complex economic crime or public corruption.”¹⁰ It is against this backdrop that the inadequacy of Korea’s anti-corruption efforts becomes clear: Korea’s legal sanction regime does not sufficiently incentivize corporations and individuals to self-report or come forward to reveal misconduct.¹¹

This Comment proposes that Korea’s current anti-corruption laws could be strengthened by embracing the two regulatory tools that have proven very effective in bringing forth inside information in the U.S. context: (i) The Department of Justice’s Antitrust Amnesty Program, and (ii) the False Claims Act (FCA) Qui Tam Enforcement Model. Part I

Extortion, 6 ANN. REV. L. & SOC. SCI. 217, 222 (2010) (“Successful detection of corruption depends upon insiders to report wrongdoing. Citizens and businesses victimized by extortion demands may report bribery attempts, but they may not be able to offer enough proof for prosecutors to act.”).

⁹ These sources have been identified by several authors as critical to white-collar crime enforcement, but no scholarship to my knowledge has examined them together in the context of anti-corruption. See *infra* note 108 and accompanying text. In Korea, 50.9% of all corruption reports that led to investigations by the government from 2002 to 2013 were based on whistleblower tips. More notably, 83.8% or KRW 470 billion (approximately US\$ 470 million) of the total monetary sanctions collected by the government for violations of anti-bribery laws during that time span was attributed to such tips. ACRC KOREA, ACRC KOREA ANNUAL REPORT 2013, <http://www.acrc.go.kr/eng/board.do?command=searchDetail&method=searchDetailViewInc&menuId=020504&confId=64&conConfId=64&conTabId=0&currPageNo=1&boardNum=38083> (last visited Aug. 8, 2014) [hereinafter ACRC REPORT]. In the United States, 44 of the 68 disclosed foreign bribery investigations under the Foreign Corrupt Practices Act (FCPA) in 2005–2007 were “voluntarily disclosed” to the enforcement agencies after the companies conducted internal investigations. SHEARMAN & STERLING LLP, RECENT TRENDS & PATTERNS IN FCPA ENFORCEMENT 8 (Feb. 13, 2008), <http://fcpa.shearman.com/files/9dd/9dd85aee0438b6d5da89106614e4c5ae.pdf?i=e768b7880085f9a83bf29a5515f38b6f>; see also O’MELVENEY & MYERS LLP, FOREIGN CORRUPT PRACTICES ACT HANDBOOK 92, 93 (6th ed. 2009), http://www.omm.com/files/upload/OMelvenyMyers_Sixth_Edition_FCPA_Handbook.pdf (reporting that, in 2006, “17 of 22 newly disclosed FCPA investigations were voluntarily disclosed to the DOJ or SEC after the companies conducted internal investigations”). According to the 2014 Global Fraud Report by the U.S. Association of Certified Fraud Examiners (ACFE), 42.2% of the “occupational fraud” cases in 2014 were detected due to “tips”—that is, insiders were the source of nearly half of all tips that led to the detection of fraud. ACFE classifies occupational fraud into three sub-categories: asset misappropriation, corruption, and financial statement fraud. Of these, 37% of cases involved corruption. A full 72.3% of cases were detected from sources within the organization (tips 42.2%; management review 16%; internal audits 14.1%), whereas only 12% of cases arose out of external sources (notification by law enforcement (2.2%); external audits (3%); by accident (6.8%)). ACFE, ACFE 2014 REPORT TO THE NATIONS ON OCCUPATIONAL FRAUD AND ABUSE (2014), <http://www.acfe.com/rttn/docs/2014-report-to-nations.pdf>. In China, more than 70% of all public corruption cases reported in 2008 were prosecuted based on whistleblowing tips. Wendy Wysong et al., *Blowing the Whistle on Corruption in the U.S. and China*, CORP. COMPLIANCE INSIGHTS (Sep. 29, 2011), <http://www.corporatecomplianceinsights.com/blowing-the-whistle-on-corruption-in-the-u-s-and-china/>.

¹⁰ Bucy, *supra* note 8, at 8.

¹¹ See discussion *infra* Part III.

describes the current and pervasive problem of corruption in Korea. Part II examines the substance of Korea's anti-bribery laws in light of its national policy objectives. Part III analyzes the shortcomings of these provisions through the lens of the Optimal Enforcement Theory.¹² Part IV identifies two U.S. regulatory techniques, the Antitrust Amnesty Program and the FCA Qui Tam Actions, as viable solutions to Korea's current problems and examines their applicability in the Korean context. In particular, this Comment argues that the adoption of these features would establish a "carrots and sticks" regulatory framework for optimal enforcement of Korean anti-corruption laws.

I. CORRUPTION IN KOREA

The "Miracle on the Han River" is a phrase often used to refer to Korea's rapid economic growth from the 1960s to the late 1990s. Once one of the world's poorest economies, Korea transformed into a wealthy and developed nation with a globally influential economy in less than four decades.¹³ But the system that produced Korea's remarkable success "eroded its own base."¹⁴ Corruption was an integral feature of the relationships among government officials, financial institutions, and conglomerates during the decades of Korea's rapid economic development and was one of the root causes of the nation's massive economic and financial crisis in 1997.¹⁵

In a famous case from the 1990s, the heads of nine *chaebols* were convicted of paying bribes to former Presidents Chun Doo Hwan and Roh Tae Woo.¹⁶ Chaebols are large family-owned industrial conglomerates in Korea, including, among others, Samsung, LG, SK, and the Hyundai Motor Group.¹⁷ It was found that the Daewoo Group (the second largest conglomerate in Korea after the Hyundai Group before it collapsed in 1999) paid about US\$ 31 million in bribes to Roh, including a US\$ 6.5 million

¹² See discussion *infra* Part II.A.

¹³ Korea ranks 12th by purchasing power parity (PPP) and 15th in the world by nominal GDP, identifying it as one of the G-20 major economies. *The World Fact Book*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/geos/ks.html> (last updated Jan. 7, 2014). The World Economic Forum (WEF)'s Global Competitive Index ranked Korea 19th overall in global competitiveness, among 144 nations surveyed. WORLD ECON. F., THE GLOBAL COMPETITIVENESS REPORT 2012–2013 (2013), <http://reports.weforum.org/global-competitiveness-report-2012-2013/>.

¹⁴ Craig P. Ehrlich & Dae Seob Kang, *Independence and Corruption in Korea*, 16 COLUM. J. ASIAN L. 1, 3 (2002).

¹⁵ *Id.*

¹⁶ *Id.* at 36.

¹⁷ For a comprehensive discussion on the Chaebol business practice and culture, see Joongi Kim, *A Forensic Study of Daewoo's Corporate Governance: Does Responsibility for the Meltdown Solely Lie with the Chaebol and Korea?*, 28 NW. J. INT'L L. & BUS. 273 (2008); Craig Ehrlich & Dae-Seob Kang, *U.S. Style Corporate Governance in Korea's Largest Companies*, 18 UCLA PAC. BASIN L.J. 1 (2000).

bribe to win a submarine base construction contract¹⁸; Samsung Group paid Roh US\$ 25 million to obtain permission to engage in the car manufacturing business.¹⁹ The court also found ex-Presidents Chun and Roh guilty of amassing hundreds of millions of dollars in presidential slush funds during their respective terms in office.²⁰

In response to these findings and in the wake of the 1997 Asian Financial crisis, Korea adopted several reform measures to root out corrupt practices in business and politics. These measures are further discussed in Part II. Many studies indicate that compared to other East Asian economies, Korea has performed relatively well in combating private sector corruption. Its rapid recovery from the 1997 crisis has largely been attributed to the nation's successful financial sector reforms, aiming to improve transparency and enhance business ethics in its financial institutions and capital markets.²¹ Businesses have been taking a more systematic and comprehensive approach to their internal compliance programs and are starting to align with global standards of corporate social responsibility with the launching of the UN Global Compact Network Korea in 2007.²²

While these reforms have undeniably helped the nation to overcome the crisis and enhance transparency, corruption and bribery still remain a threat to contemporary Korea.²³ Korea's public sector ranked just 46th out

¹⁸ Teresa Watanabe, *South Korean Ex-President Arrested: Corruption: Roh Tae Woo Is Jailed on Charges of Taking More Than \$300 Million in Bribes from Business Tycoons*, L.A. TIMES (Nov. 17, 1995), http://articles.latimes.com/1995-11-17/news/mn-4124_1_roh-tae-woo.

¹⁹ Ehrlich & Kang, *supra* note 14, at 36–37; see also Verena Blechinger, *Report on Recent Bribery Scandals, 1996-2000* (Transparency Int'l, Working Paper, 2000), http://www2.law.columbia.edu/course_00S_L9436_001/2004/s_korea_pape.pdf.

²⁰ Former President Roh amassed around US\$ 650 million in a presidential slush fund during his term in office, of which US\$ 300 million was unaccounted for. Watanabe, *supra* note 18; Ehrlich & Kang, *supra* note 14, at 37.

²¹ “Following the 1997–98 Asian financial crisis, South Korea made significant progress in reforming its financial institutions and capital markets.” *2013 Investment Climate Statement—Republic of Korea*, U.S. DEP'T ST., <http://www.state.gov/e/eb/rls/othr/ics/2013/204670.htm> (last visited Jan. 23, 2014). Korea is also recognized as one of the world's most improved business reformers by the World Bank and IFC's Doing Business, for several regulatory reforms on, among other things, taxation, investor protections, and bankruptcy. *Doing Business 2012: Doing Business in a More Transparent World*, INT'L FIN. CORP., <http://www.doingbusiness.org/reports/global-reports/doing-business-2012> (last visited Jan. 24, 2014); BUSINESS ANTI-CORRUPTION PORTAL, <http://www.business-anti-corruption.com/country-profiles/east-asia-the-pacific/republic-of-korea/general-information.aspx> (last visited Jan. 24, 2014).

²² BUSINESS ANTI-CORRUPTION PORTAL, *supra* note 21. The United Nations Global Compact (UNGC) is the world's largest, global corporate citizenship initiative that is committed to encouraging businesses and markets to adopt “sustainable and socially responsible policies, and to report on their implementation.” The UNGC Network Korea was established in 2007, which has 114 participating businesses. GLOBAL COMPACT NETWORK KOREA, https://www.unglobalcompact.org/NetworksAroundTheWorld/local_network_sheet/KR.html (last visited Apr. 13, 2015).

²³ One article suggests that, “corruption is based on aspects of the culture, and that what a Westerner sees as corruption a Korean may regard as an appropriate expression of friendship or

of 177 countries in the 2013 Transparency International (TI) Corruption Perceptions Index.²⁴ Nor did Korea fare well on another TI index, the Bribe Payers Index, which placed Korea 13th out of 28 exporting nations in 2011.²⁵ According to the 2013 OECD report, Korea's level of transparency (global corruption awareness) is 27th among 34 OECD member nations.²⁶ Even a survey conducted by the Korean government's own anti-corruption body showed that 40.1% of businesspeople considered Korean society to be corrupt.²⁷ Thus, despite its reforms, Korea is still perceived to have high levels of bribery and corruption.

In the past few years, there also have been a number of prominent Korean corruption cases, indicating that "illicit business behavior" is still pervasive in Korea.²⁸ A prominent example is the recent nuclear corruption scandal, which has received a great deal of media attention and public scrutiny. In early 2014, a former top state utility official and several high-ranking executives²⁹ of the state-run Korea Hydro & Nuclear Power Co. Ltd. (KHNP)³⁰ were convicted on charges of corruption and bribery over forged safety certificates for replacement parts that were supplied to some of the nation's twenty-three nuclear reactors. The corruption scandal fueled public anger, because the nation, which relies on those nuclear reactors for a third of its energy, has faced a series of shutdowns of reactors due to the falsified documents going back to 2012.³¹ As Reuters reported, the

gratitude or loyalty." Ehrlich & Kang, *supra* note 14, at 4.

²⁴ The Corruption Perceptions Index ranks countries and territories based on the perceived level of public sector corruption. *Corruption Perceptions Index 2013*, TRANSPARENCY INT'L, <http://cpi.transparency.org/cpi2013/results/#sthash.YHurW17A.dpuf> (last visited Jan. 23, 2014).

²⁵ The Bribe Payers Index ranks the perception that nationals pay bribes abroad; a higher rank indicates less perceived bribery. *Bribe Payers Index 2011*, TRANSPARENCY INT'L, <http://www.transparency.org/bpi2011/results> (last visited Apr. 12, 2015). By contrast, Korea did well in other TI ranking categories. For example, the Global Competitive Index ranked Korea 26 out of 144. Klaus Schwab, *The Global Competitiveness Report 2014-2015*, WORLD ECON. F., http://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2014-15.pdf (last visited Apr. 12, 2015). Korea's Human Development Index was also "very high," placing 15 out of 187 nations. *2014 Human Development Report*, UN DEV. PROGRAMME, <https://data.undp.org/dataset/HDI-Indicators-By-Country-2014/5tuc-d2a9> (last visited Apr. 12, 2015).

²⁶ OECD, PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN KOREA (2011), <http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/Koreaphase3reportEN.pdf>.

²⁷ 44.3% of the general public responded that Korean society overall is corrupt, followed by experts (37.0%), foreigners (15.3%), and public officials (15.1%). ACRC KOREA ANNUAL REPORT 2012, <http://www.acrc.go.kr/eng/board.do?command=searchDetail&method=searchDetail> ViewInc&menuId=020504&confId=64&conConfId=64&conTabId=0&currPageNo=1&boardNum=32064 (last visited Aug. 8, 2014).

²⁸ BUSINESS ANTI-CORRUPTION PORTAL, *supra* note 21.

²⁹ Those include an executive at Korea Electric Power Corp (KEPCO) and a former top-ranking executive at KHNP.

³⁰ KHNP is a wholly-owned subsidiary of Korea Electric Power Corporation (KEPCO), whose major shareholders are the Korean government and other state-run corporations.

³¹ Meeyoung Cho, *South Korea Should Lower Reliance On Nuclear: Study*, REUTERS, Oct. 10,

monopoly of the state-run KEPCO in the Korean nuclear industry has bred “a culture of secrecy that led to corrupt practices among officials involved in safety certification.”³² While awareness of and compliance with anti-corruption laws are noticeably improving, this case, among many others, suggests that the reforms have largely been ineffective to root out corrupt practices deeply entrenched at all levels of Korean society.

II. KOREA’S ANTI-CORRUPTION LAWS

Corruption may indicate problems with the laws and legal system of Korea, which may in turn create a problem for continued economic development.³³ Indeed, massive structural corruption in Korea’s ruling elite undermined fair competition in the market and contributed significantly to the economic and financial crisis of 1997.³⁴ The Korean government has since taken a more aggressive stance against corruption by revamping its anti-bribery laws. Legal reform efforts, which began in 1998, sped up following a series of corruption scandals in 2000 and 2001, culminated in the enactment of three new anti-corruption laws in 2001.³⁵

A. Laws Governing Domestic Bribery

Korea applies criminal sanctions with respect to corruption offences such as bribery pursuant to (i) the Korean Criminal Code (Criminal Code);³⁶ (ii) the Act on Aggravation of Punishment of Specific Crimes (Specific Crimes Act);³⁷ and (iii) the Act on Aggravation of Punishment of Specific Economic Crimes (Specific Economic Crimes Act).³⁸ Under the Criminal Code, public official bribery and private commercial bribery are

2013, <http://www.reuters.com/article/2013/10/13/us-energy-korea-nuclear-idUSBRE99C00Z20131013>. The country currently has twenty-three nuclear reactors, which generate over 20,000 MW of energy and produce about one-third of the nation’s power. Of its twenty-three reactors, three still remain offline so that cables supplied with fake certificates can be replaced. Taek-Rim (Terry) Oh et al., *Legal Issues and Trends in Enforcement of Anti-Corruption Legislation in Korea*, SHIN & KIM (June 5, 2012), <http://www.lexology.com/library/detail.aspx?g=c075a412-c0e5-45ee-aecb-5adcf0bdc1d>.

³² Cho, *supra* note 31.

³³ Ehrlich & Kang, *supra* note 14, at 7; *see also* OECD, *supra* note 3 (“The significant impact of corruption on income inequality and the negative effect of corruption on income growth for the poorest 20% of a country have been proven empirically.”).

³⁴ Ehrlich & Kang, *supra* note 14, at 3.

³⁵ For a comprehensive discussion of the corruption scandals in 2000s, *see id.*

³⁶ Hyeongbeop [Criminal Code], Act No. 293, Sept. 18, 1953, *amended by* Act No. 7623, July 29, 2005, art. 335 (S. Kor.).

³⁷ Teugjeong beomjoe beob [Specific Crimes Act], Act No. 1744, Feb. 23, 1966, *amended by* Act No. 10210, Mar. 31, 2012 (S. Kor.).

³⁸ Teugjeong gyeongje beomjoe beob [Specific Economic Crimes Act], Act No. 3693, Dec. 31, 1983 (S. Kor.).

separate and distinct crimes, each prosecuted under different provisions of the Criminal Code.³⁹

In the public domain, bribery is one of the most common crimes in Korea.⁴⁰ Articles 129–132 of the Criminal Code specify that an act of bribery will be established when a public official, in connection with his or her duty, receives a bribe as consideration for performance.⁴¹ In this context “public official” means any person or category of person recognized as such under the State Public Officials Act and/or the Local Public Officials Act. The Code of Conduct for Public Officials, the Public Service Ethics Act, and the Act on the Disclosure of Information by Public Agencies have also been adopted by the government to discourage bribery by public officials from accepting bribes.⁴²

In the private business context, a typical type of bribery is the “crime of receiving or giving a bribe by breach of fiduciary duty” prescribed in Article 357 of the Criminal Code.⁴³ The difference between the elements of private sector bribery and those of public sector bribery is that private sector bribery requires an “unlawful solicitation” of favor in disregard of fair competition (e.g., receiving a contract award in exchange for cash), which is not necessarily required for public sector bribery.⁴⁴ The Specific Economic Crimes Act also expressly prohibits the giving of illicit economic benefit to employees of financial institutions. A “financial institution” includes both government-controlled as well as private financial institutions including commercial banks, securities companies, among others.⁴⁵

Punishment for public sector bribery in Korea is stated in (i) Article 2 of the Specific Crimes Act; and (ii) Article 129 of the Criminal Code: No less than ten years to life imprisonment if the amount of the bribe is at least KRW 50,000,000 (or approximately US\$ 50,000); at least five years of imprisonment if the amount of the bribe is more than KRW 10,000,000 (or approximately US\$ 10,000); and not more than five years for lesser

³⁹ The determination of which bribery provisions of the Criminal Code apply depends on whether the individual have accepted bribe would be deemed a “public official.” Articles 129–133 deal with public officials and Article 357 deals with private sector corruption. The punishments are enhanced by the Specific Crimes Act and Specific Economic Crimes Act. Act No. 293, arts. 129–33, 357 (S. Kor.).

⁴⁰ NORTON ROSE, ANTI-CORRUPTION LAWS IN ASIA PACIFIC (2012), <http://www.nortonrosefulbright.com/files/anti-corruption-laws-in-asia-pacific-63559.pdf>.

⁴¹ Act No. 293, arts. 129–32 (S. Kor.).

⁴² BUSINESS ANTI-CORRUPTION PORTAL, *supra* note 21.

⁴³ Act No. 293, art. 357 (S. Kor.).

⁴⁴ Act No. 293, art. 357 (S. Kor.); *see also* Kurt B. Gerstner and Hyun-Ah Kim, *Anticorruption Statute Violations: How to “Bet the Company” Without Even Trying*, 56 NO. 7 DRI FOR DEF. 27 (July 2014) (explaining that, in the private context, “the lawfulness of the solicitation of business through gift-giving is decided by the courts after considering the general circumstances of the case and the relevant facts surrounding the gift-giving, including . . . various other factors such as good faith, among others.”).

⁴⁵ Act No. 3693, arts. 5–6 (S. Kor.).

amounts.⁴⁶ Article 357 of the Criminal Code defines the crime of private sector bribery.⁴⁷ The maximum period of imprisonment for a private sector officer who has received a bribe is five years and the imposed fine may not exceed KRW 10,000,000 (or approximately US\$ 10,000).⁴⁸ A bribe-giver will be subject to imprisonment of up to two years or a fine up to KRW 5,000,000 (or approximately US\$ 5,000).⁴⁹

In 2001, the Anti-Corruption Act of Korea (Anti-Corruption Act) was enacted with the stated purpose of “serving to create a clean climate of the civil service and society by preventing and regulating the acts of corruption efficiently.”⁵⁰ The Anti-Corruption Act was amended by the Act on Anti-Corruption and the Establishment and Operation of the Anti-Corruption & Civil Rights Commission (the new Anti-Corruption Act).⁵¹ The new Anti-Corruption Act established the Anti-Corruption and Civil Rights Commission (ACRC), whose role is to improve administrative systems pertaining to the processing of civil petitions for grievances and to assist in the prevention and regulation of corrupt practices.⁵²

B. Laws Governing the Bribery of Foreign Public Officials

The Act on Combating Bribery of Foreign Public Officials in International Business Transactions (Foreign Public Officials Act) governs the bribery of foreign public officials.⁵³ The Foreign Public Officials Act, enforced since it was enacted in 1998, was enacted to implement OECD Anti-Bribery Convention to which Korea has been a party since 1997.⁵⁴ Article 3 of the Foreign Public Officials Act provides criminal sanctions for

⁴⁶ Act No. 293, art. 129 (S. Kor.); Act No. 1744, art. 2 (S. Kor.); *see also* Ehrlich & Kang, *supra* note 14, at 33.

⁴⁷ Act No. 293, art. 357 (S. Kor.).

⁴⁸ Act No. 293, art. 357(1) (S. Kor.) (“A person who, administering another’s business, receives property or obtains pecuniary advantage from a third person in response to an illegal solicitation concerning his duty, shall be punished by imprisonment for not more than five years or by a fine not exceeding ten million won.”).

⁴⁹ Act No. 293, art. 357(2) (S. Kor.) (“A person who gives the property or pecuniary advantage as specified in paragraph (1), shall be punished by imprisonment for not more than two years or by a fine not exceeding five million won.”).

⁵⁰ Act No. 6494, art. 1 (S. Kor.).

⁵¹ Act No. 8878 (S. Kor.).

⁵² Act No. 8878, art. 11 (S. Kor.).

⁵³ Act No. 10178 (S. Kor.).

⁵⁴ Currently, roughly forty countries have adopted the OECD Convention. Those nations account for two-thirds of the world’s exports and ninety percent of foreign direct investment. OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, 37 I.L.M. 1 (entered into force Feb. 15, 1999), http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf [hereinafter OECD Bribery Convention]; *see also* FCPA PROFESSOR BLOG, <http://www.fcprofessor.com/fcpa-101#sthash.VNmWOrwY.dpuf/> (last visited Feb. 9, 2014).

an offer, payment, promise to pay, or authorization of payment of bribery.⁵⁵ Under Article 4, not only the wrongdoer himself but also his employer or the representative of the relevant company are also subject to penalties.⁵⁶

Korea has also participated in other multilateral forums to combat transnational corruption. It signed the United Nations Convention against Corruption in 2003 and ratified it in 2008.⁵⁷ Korea is also a party to the Asia Pacific Economic Cooperation Anti-Corruption and Transparency Experts Task Force (APEC ACT).⁵⁸

C. Whistleblower-Related Provisions

Under the original Anti-Corruption Act and the new Anti-Corruption Act, public officials are obligated to report acts of corruption by another public official to any investigative agency, the Board of Audit and Inspection, or the ACRC.⁵⁹ The Reports Act and the Proceeds of Crimes Act also impose reporting obligations on employees of financial institutions and penalties for failing to report. However, these acts do not provide any protection for the whistleblower.⁶⁰ The most recent whistleblower-related legislation, the Act on the Protection of Public Interest Whistleblowers (Whistleblower Act),⁶¹ affords whistleblowers some level of protection in both the public and private sectors and this protection equally extends to reports on foreign bribery.⁶² Under Article 2 of the Whistleblower Act, “whistleblowing” means “reporting, petitioning, informing, accusing or complaining that a violation of the public interest has occurred or is likely to occur” to an employer, the relevant administrative or investigative agency, the ACRC or other designated person or entity in the Whistleblower Act.⁶³ A “violation of the public interest” means an act that “infringes on the health and safety of the public, the environment, consumer interests and fair competition,” or acts that are subject to criminal sanctions or administrative action as defined in the Whistleblower Act.⁶⁴

⁵⁵ Act No. 10178, art. 3 (S. Kor.).

⁵⁶ *Id.* art. 4.

⁵⁷ United Nations Convention Against Corruption, G.A. Res. 58/4, U.N. Doc. A/RES/58/4 (Oct. 31, 2003); U.S. DEP'T ST., *supra* note 21.

⁵⁸ U.S. DEP'T ST., *supra* note 21.

⁵⁹ Act No. 6494, art. 26 (S. Kor.); Act No. 8878, art. 56 (S. Kor.).

⁶⁰ *See* NORTON ROSE, *supra* note 40.

⁶¹ Act No. 10472 (S. Kor.).

⁶² *Id.* arts. 11–25. Specifically, the following articles deal with whistleblower protection: Article 12 (Confidentiality Obligation for Public Interest Whistleblower, etc.); Article 13 (Protection of Personal Safety); Article 14 (Mitigation and Remission of Culpability, etc.); Article 15 (Prohibition of Disadvantageous Measures).

⁶³ Act No. 10472, art. 2 (S. Kor.).

⁶⁴ *Id.*

III. THE SHORTCOMINGS OF KOREA'S ANTI-CORRUPTION LAWS

With such a history of scandal despite these laws, one must question how effective Korea's legal framework for dealing with corruption is. The optimal enforcement theory described below provides an analytical framework for assessing Korea's current anti-bribery regime.

A. Analytical Framework: Optimal Enforcement Theory

Gary Becker's optimal enforcement theory⁶⁵ seeks to ascertain economically efficient (i.e., optimal) levels of law enforcement efforts so as to minimize the overall costs of crime and punishment to society.⁶⁶ The analysis begins with an offender who either chooses to comply with or violate the law. The offender will commit an offense if the offender's gain G exceeds the expected penalty, which is equivalent to the perceived certainty of punishment—in lay terms, the likelihood of being caught— P times the perceived severity of punishment f .⁶⁷ Thus, the offender commits the crime when: $G > Pf$. This indicates that an increase in either P or f would reduce the expected utility from an offense and would deter that offense, since either the probability of being apprehended or the severity of the punishment would increase.⁶⁸

In addition, the offense causes external harm H to other members of society.⁶⁹ The net social damage D is the difference between H and G .⁷⁰ The variable O is used to determine the aggregate effects of the total number of offenses, which can be expressed as: $D(O) = H(O) - G(O)$.⁷¹

One must also consider the costs of law enforcement. Enforcement costs such as expenditures spent on police, court personnel, prison guards, buildings, and the like⁷² are denoted by C , which is a function of both the supply of offenses—number of offenses— O , and the probability of apprehension p , and is thus symbolized as $C(p, O)$.⁷³ This means that an increase in either the probability of apprehension or the number of offenses would thus increase the total enforcement cost C .⁷⁴

⁶⁵ See generally Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968).

⁶⁶ Jeffrey S. Parker, *The Economics of Mens Rea*, 79 VA. L. REV. 741, 749–54 (1993).

⁶⁷ Becker, *supra* note 65, at 176–77.

⁶⁸ *Id.* at 177.

⁶⁹ *Id.* at 173.

⁷⁰ *Id.*

⁷¹ *Id.* at 177.

⁷² Parker, *supra* note 66, at 750.

⁷³ *Id.*

⁷⁴ *Id.*

Some punishments also generate a “deadweight” cost to society, denoted by the variable b , to the extent that the punishment imposed on the offender cannot be transferred to a socially productive use.⁷⁵ The total social loss from punishments can thus be defined as bpO , since bf represents the loss per offense punished, and pO is the number of offenses punished.⁷⁶

In aggregate, Becker’s model derives the total social loss from crime and punishment by the following formula: $L = D(O) + C(O, p) + bpO$.⁷⁷ Under this equation, the total social loss (L) equals the sum of (i) the net social damages (D); (ii) the enforcement costs (C); and (iii) the social loss from punishments (bpO).⁷⁸

This Comment’s focus is to choose variants under the control of public policy that could minimize the total social loss from crime and punishment. Becker points to P and f , which are the certainty and severity of punishment, as the social decision variables.⁷⁹ By adjusting these variables and observing how they affect the level of total social loss, one can define the optimality conditions for P and f .⁸⁰

B. The Optimal Enforcement Theory as Applied to Korea’s Anti-Corruption Enforcement⁸¹

In applying the principles of Becker’s optimal enforcement theory to Korea’s anti-bribery enforcement, increasing either the perceived certainty (P) or severity of punishment (f) would decrease the incidence of bribery. Assuming that the enforcement is carried out in a cost-effective manner, the lower incidence of bribery would decrease the net social damage and would diminish the total social loss from corruption.

In regards to the variable f —the severity of punishment—the punishment for bribery presently available under Korean law appears to be more than sufficient, because punishment for a public official who has

⁷⁵ *Id.*

⁷⁶ *Id.* at 750–51

⁷⁷ *Id.* at 751.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ The analytical framework used in this section is indebted to the work of Daniel Y. Jun and his article, Daniel Y. Jun, *Bribery Among the Korean Elite: Putting an End to A Cultural Ritual and Restoring Honor*, 29 VAND. J. TRANSNAT’L L. 1071 (1996). While this Comment concurs with Jun’s finding that the certainty of punishment should take priority over the harshness of punishment to effectively combat bribery in Korea, this Comment argues that the best solution to achieve optimal level of enforcement in Korea is by creating a regulatory framework that can most effectively elicit the two sources of inside information (with a focus on improving the rate of *detection*), rather than by “pursuing relatively larger cases of bribery under the special statutes” (with an emphasis on achieving a higher rate of *conviction*). See generally *id.*

received a bribe is no less than ten years to life imprisonment if the amount of the bribe is higher than KRW 50,000,000.⁸² KRW 50,000,000, or approximately US\$ 50,000, is not an exorbitantly high threshold, as it is about the average annual wage of public employees in Korea.⁸³ Life imprisonment is the maximum level of punishment available under Korean law, apart from the death penalty, and any punishment “approaching this extreme would be punitive.”⁸⁴ While punishment for private sector bribery is lower than that of public sector bribery, the level of punishment even for private commercial bribery is higher, or at least similar, when compared with other countries’ anti-corruption statutes. Thus, the *certainty* of punishment (P), versus the harshness of punishment (F), is the critical factor that ought to be manipulated to achieve efficiency in Korean anti-bribery enforcement.⁸⁵

Further, studies have found that harsher penalties do not necessarily lead to higher deterrence, whereas an increase in the certainty of punishment could achieve a higher deterrent effect. It is also important to remember that an increase in the probability of apprehension and conviction raises the cost of law enforcement, which in turn raises the social cost of crimes. Thus, to attain optimal enforcement, the cost of regulatory measures should not be excessive. In other words, an ideal regulatory framework for Korea is one that deters acts of bribery by raising the perceived certainty of punishment, while doing so in a cost effective matter.

C. Korean Law is Insufficient to Attract Inside Information

1. *Low Incentives for Self-Reporting by Wrongdoers*

The challenge is that detection of bribery is inherently difficult because the crime is naturally self-concealing.⁸⁶ Thus, regulators heavily rely on inside information for the detection of these cases.⁸⁷ However, Korean law does not provide sufficient incentives for insiders to come forward with information that could aid prosecutors in detecting bribery. Cooperation or self-disclosure may be a potential mitigating factor subject

⁸² Act No. 293, art. 129 (S. Kor.); Act No. 1744, art. 2 (S. Kor.).

⁸³ KOREA MINISTRY OF SECURITY AND PUBLIC ADMINISTRATION (MOSPA), <http://www.mospa.go.kr/firt/a01/firtMain.do>; see also Gong mu won Pyung guen yon bong 5200 . . . bak bong eun yet mal [Average annual income for civil servant \$52,200 . . . low salary is a thing of the past], DAILY TOMORROW (Apr. 19, 2013), <http://www.dailytw.kr/news/articleView.html?idxno=6518>.

⁸⁴ Jun, *supra* note 81, at 1105. In Korea, the last execution took place on December 1997; there is a moratorium on state-sanctioned executions in Korea. AMNESTY INT’L, AMNESTY INTERNATIONAL REPORT 2013 162–164 (2013) (on file with author).

⁸⁵ Jun, *supra* note 81, at 1106.

⁸⁶ Leslie, *supra* note 7, at 180.

⁸⁷ Rose-Ackerman, *supra* note 8, at 222.

to the prosecution's sole discretion, but there are no clear written guidelines to fetter the exercise of that discretion in Korean law.⁸⁸

Instead, Korean anti-bribery laws impose an affirmative duty to self-report.⁸⁹ There are two problems with this approach. First, this obligation only applies to public officials—the bribe receivers—meaning that it attempts to tackle the problem only from the demand side, omitting treatment of the supply side of bribery. Second, even if the duty extended both ways, a company or an individual who has violated the law is already breaking the law—it is unrealistic to expect an offender to feel a great pressure to abide by the self-report provision when he or she is already willing to violate other provisions of the statute with more serious consequences. It is concerns of this sort that have led *marginal deterrence theory*, which states that punishments for multiple or more severe crimes should be punished more severely than single or less severe crimes. The goal is to encourage criminals to limit their criminal acts, including acts intended to cover up other crimes.⁹⁰

2. Low Incentives for Potential Whistleblowers

The Anti-Corruption Act allows “any citizen to file a complaint with the commission,⁹¹ obligates a public official to do so,⁹² protects whistleblowers by protecting their identity and job security,⁹³ provides monetary rewards to persons who inform the government of corrupt

⁸⁸ Hyungkwan Park, *The Basic Features of the First Korean Sentencing Guidelines*, 22 FED. SENT'G REP. 262, 262–71 (2010) (“Korea has encountered problems in sentencing such as leniency, disparity, and instances where sentencing was not based on clear and sound reasoning [T]he comparatively broad nature of statutory sentencing ranges of major crimes allows for considerable discretion.”); see also Young-Chul Kim, *The Effective System Of Criminal Investigation And Prosecution In Korea*, in ANNUAL REPORT FOR 2001 AND RESOURCE MATERIAL SERIES NO. 60 77 (2003), http://www.unafei.or.jp/english/pdf/RS_No60/No60_00All.pdf

⁸⁹ By contrast, under the United States Sentencing Guidelines, corporations and individuals do not have an affirmative duty to self-report. In the United States, individuals have Fifth Amendment rights against self-incrimination. Corporations, on the other hand, do not have Fifth Amendment rights *per se*, but they also do not have an affirmative duty to incriminate themselves. O'MELVENY & MYERS LLP, FCPA HANDBOOK 91 (6th ed. 2009), http://www.omm.com/files/upload/OMelvenyMyers_Sixth_Edition_FCPA_Handbook.pdf. However, this does not mean that a corporation has unfettered discretion as to whether to self-report crimes of their employees that they have become aware of. The board of directors, for example, has fiduciary duties of care and loyalty under state law to the corporation and its constituencies. Robert W. Tarun & Peter P. Tomczak, *A Proposal for A United States Department of Justice Foreign Corrupt Practices Act Leniency Policy*, 47 AM. CRIM. L. REV. 153, 188 (2010).

⁹⁰ For a comprehensive overview of the marginal deterrence theory, see Steven Shavell, *A Note on Marginal Deterrence*, 12 INT'L REV. L. & ECON. 345 (1992).

⁹¹ Act No. 6494, art. 25 (S. Kor).

⁹² *Id.* art. 26.

⁹³ *Id.* arts. 32, 49.

behavior,”⁹⁴ and affords leniency to those who provided information to the government that leads to detection of misconduct.⁹⁵

However, the efficacy of these whistleblower provisions is in serious doubt. There are several reasons. First, the cap on monetary rewards for whistleblowers—the “whistleblower bounty”—is far too low to elicit knowledgeable whistleblowers to come forward especially in large corruption cases. The new Anti-Corruption Act provides monetary rewards to whistleblowers in accordance with the Awards and Decorations Act, etc.,⁹⁶ if the information leads to “recovering or increasing revenues or cutting down costs of a public institution.”⁹⁷ But the financial reward cannot exceed KRW 100,000,000 (approximately US\$ 100,000).⁹⁸ This is absurdly low given that many corruption cases in Korea involve millions and billions of dollars of bribe money.⁹⁹ Unless substantially larger rewards are made available to whistleblowers, it is unrealistic to expect anyone to come forward in cases involving large corporations or high-ranking government officials, where the whistleblower risks “the potentially life-altering consequences” of reporting corruption.¹⁰⁰

Second, Korean discovery laws make it difficult to gather enough evidence to survive a motion to dismiss, which discourages potential whistleblowers from coming forward. While NGOs have largely taken the lead in reporting business corruption and bribery in Korea, virtually none of them have been able to offer enough proof in court to survive a motion to dismiss, as it is inherently difficult for outsiders to access companies’ internal documents and reveal misconduct.¹⁰¹

Third, empirical evidence suggests that maintaining the anonymity of whistleblowers is an “essential prerequisite to safeguard confidentiality and to encourage healthy whistleblowing behaviors.”¹⁰² However, Korean law does not guarantee anonymity to whistleblowers. The Whistleblower Act requires a whistleblower to document his or her name, resident registration

⁹⁴ *Id.* art. 36; Ehrlich & Kang, *supra* note 14, at 44.

⁹⁵ Act No. 6494, art. 35 (S. Kor.).

⁹⁶ Act No. 11690 (S. Kor.).

⁹⁷ Act No. 10178, art 36 (S. Kor.).

⁹⁸ Boheom bijeuniseu beoblyul sihaenglyeong [Enforcement Decree of the Insurance Business Act], Presidential Decree No. 24097, Sep. 7, 2012, art. 22 (S. Kor.).

⁹⁹ *See supra* notes 18–19 and accompanying text.

¹⁰⁰ Aaron R. Petty, *How Qui Tam Actions Could Fight Public Corruption*, 39 U. MICH. J.L. REFORM 851, 878 (2006).

¹⁰¹ *See, e.g.,* Kim, Je Sun, *Roles of Korean NGOs in the Battle Against Corruption*, 3 KOREAN J. SOC. ISSUES 1, 245 (2003), http://www.ksrc.or.kr/~socialissues/content/vol_7/ss7_kjs.pdf; Sung-soo Joo, *20 years of ‘NGO revolution’ Reshapes Society*, KOREA HERALD (July 20, 2007, 10:02 AM), <http://news.naver.com/main/read.nhn?mode=LSD&mid=sec&sid1=001&oid=044&aid=0000066140>.

¹⁰² Rachel Beller, *Whistleblower Protection Legislation of the East and West: Can It Really Reduce Corporate Fraud and Improve Corporate Governance? A Study of the Successes and Failures of Whistleblower Protection Legislation in the US and China*, 7 N.Y.U. J. L. & BUS. 873, 927 (2011).

number, address, and occupation when reporting a corruption case to the government authorities, making it impossible for the whistleblower to submit a tip anonymously.¹⁰³ Under certain circumstances, the Whistleblower Act does guarantee confidentiality and protection of personal safety to whistleblowers, but to take advantage of such protection, they must first prove that retaliation for whistleblowing activities is highly likely and that they or their relatives are likely to suffer serious danger.¹⁰⁴ In addition to the lack of anonymity and accompanying protection, whistleblowers also have to worry about punishment for allegedly making a false accusation—all of the whistleblower-related statutes provide for punishment of persons who make a false accusation.¹⁰⁵

Finally, because many in Korean society still tend to view whistleblowers as traitors who betrayed their employers, colleagues, and friends, it is not clear that these protections are sufficient in the Korean context, despite their use in the U.S.¹⁰⁶ Korea's "strong culture of group loyalty" serves to reinforce the perception that reporting one's friend or employer is morally repugnant.¹⁰⁷

As mentioned above, focusing on the certainty of punishment is key in Korea for optimal enforcement of its anti-corruption laws. From this perspective, it becomes clear that Korea's current legal regime is

¹⁰³ Gong-gong-ui iig gija beob-ui boho [Protection of Public Interest Reporters Act], Act No.10472, Mar. 29, 2011, art. 8 (S. Kor.) ("Any person who intends to file a public interest whistleblowing case shall submit in writing . . . a statement . . . that includes the information described in each of the following Subparagraphs: 1. The name, resident registration number, address, contact numbers, etc. of the whistleblower; 2. The name of the person who violated public interest; 3. A factual description of the violation of the public interest; 4. The purport and reason of the public interest whistleblowing.")

¹⁰⁴ Article 12 (Confidentiality Obligation for Public Interest Whistleblower, etc.)

(1) No person with the knowledge of the fact that someone is a public interest whistleblower, etc., shall tell, disclose to or publicize to any third party personal information concerning the public interest whistleblower, etc., or other facts that infer the identity of the public interest whistleblower, etc. However, this provision shall not apply provided that the public interest whistleblower, etc., gives his/her consent to the revelation of such information. Act No.10472, Mar. 29, 2011, art. 12; Article 13 (Protection of Personal Safety) (1) The public interest whistleblower, etc., his/her relatives or cohabitants may request the Commission to take protective measures for their personal safety (hereinafter referred to as "personal protection measures") in the event that the public interest whistleblower, etc., his/her relatives or cohabitants have faced or are likely to face serious danger to their lives or persons. In such an event, the Commission may, if deemed necessary, request the chief of the police station or agency to provide the necessary personal protection measures.

Act No.10472, art. 13 (S. Kor.).

¹⁰⁵ ACRC REPORT, *supra* note 9, at 62.

¹⁰⁶ Ehrlich & Kang, *supra* note 17, at 22 (explaining that "due to Confucian influence . . . seniors and elders are to be respected without question, it would be difficult for staff members to challenge a CEO's decision.")

¹⁰⁷ Kim, *supra* note 17, at 315; Ehrlich & Kang, *supra* note 17, at 22.

insufficient to incentivize the two primary sources of inside information—self-reporting by wrongdoers and whistleblowing—reducing the perceived risk of detection in the eyes of criminals.

IV. CREATING A “CARROTS AND STICKS” FRAMEWORK FOR OPTIMAL ENFORCEMENT OF KOREA’S ANTI-CORRUPTION LAWS

This Comment proposes that optimal enforcement of Korean anti-bribery laws can be achieved by adopting two regulatory tools that have proven very successful in the detection and deterrence of complex white-collar crimes in the United States: (i) The DOJ’s Antitrust Amnesty Program, and (ii) The FCA’s Qui Tam Private Enforcement Model.¹⁰⁸

The expected benefit of this new legal framework is two-fold. First, it would provide sufficient incentives to effectively attract both sources of inside information—self-reporting wrongdoers and whistleblowers—while doing so in cost-effective ways. Second, the adoption of these features would establish a “carrots and sticks” regulatory framework which encourages compliance. A prudent course to take would be to combine the two proposals because, individually, both have drawbacks. From a practical standpoint, the combination of the two proposals (labeled carrots and sticks, respectively) strikes a good balance that would satisfy all interested parties—businesses should welcome this change, as the amnesty program would allow them to take advantage of this “carrot.” This change also imparts significant benefits to the general public, as the qui tam private-public partnership model will serve as the “stick,” reinforcing public regulatory efforts, thus increasing awareness of and compliance with the Korean anti-corruption laws.

¹⁰⁸ No scholarship has yet examined the applicability of an anti-bribery regulatory scheme (whether in the United States or in Korea) incorporating both of these enforcement tools. A number of authors have identified these programs separately as suitable models for improving regulatory efforts, but in varying degrees and in different contexts. For example, some scholars have advocated for an anti-bribery leniency program in the context of the FCPA, a U.S. foreign anti-bribery statute. *See, e.g.,* Tarun & Tomczak, *supra* note 89. Some authors have proposed that either (i) international law; (ii) the FCPA; or (iii) U.S. domestic anti-corruption laws should be amended to include a qui tam provision. *See* Paul D. Carrington, *Qui Tam: Is False Claims Law A Model for International Law?*, 2012 U. CHI. LEGAL F. 27 (2012); Nathaniel Garrett, *Dodd-Frank’s Whistleblower Provision Fails to Go Far Enough: Making the Case for A Qui Tam Provision in A Revised Foreign Corrupt Practices Act*, 81 U. CIN. L. REV. 765 (2012); Petty, *supra* note 100. Others have asserted more broadly that the private sector needs to be more effectively utilized in the fight against corruption. *See, e.g.,* Bucy, *supra* note 8. While this Comment owes much to the work of these scholars, the Comment argues for a combination of the two proposals into a more balanced enforcement approach (i.e., the “carrots and sticks” regulatory framework). Combining the two proposals would also have the benefit of eliciting not just one, but both of the information sources that have been critical for detection and deterrence of bribery cases in Korea.

A. Increasing Incentives for Voluntary Disclosure

1. *The U.S. Experience*

The Department of Justice's Antitrust Division has, through its Corporate and Individual Amnesty Program, "achieved an enviable record in securing landmark fines and motivating corporations and individuals to disclose illegal anti-competitive conduct to and cooperate early with U.S. law enforcement authorities."¹⁰⁹ To overcome obstacles with detection inherently difficult in antitrust cases (e.g., price-fixing schemes), regulators generally rely on a "combination of self-disclosure and voluntary cooperation by individual firms, backed up with promises of leniency."¹¹⁰

The current antitrust amnesty program succeeds in large part because it "creates distrust among cartel participants."¹¹¹ The "rewards structure" of the program "creates a race to confess," and the "trigger that starts the race is distrust."¹¹² As only the first company to qualify receives amnesty, it puts enormous pressure on each participant to hurry to confess.¹¹³ The Division "frequently encounters situations where a company approaches the government within days and in some cases less than one business day, after one of its co-conspirators has secured its position as first in line for amnesty."¹¹⁴

2. *An Anti-Corruption Amnesty Program in the Korean Context*

Leniency programs are uniquely designed to fight self-concealing white-collar crimes. To detect and prosecute more bribery cases, the Korean government may look for inspiration from the proven U.S. Antitrust Amnesty Program. Because the crimes of price fixing and bribery share some important commonalities,¹¹⁵ the success of Antitrust Amnesty Program can likely be replicated in the context of bribery. In fact, incorporating a leniency program as part of a regulatory scheme is not something new to Korean regulators—Korea's antitrust leniency program,

¹⁰⁹ Tarun & Tomczak, *supra* note 89, at 236.

¹¹⁰ Joseph W. Yockey, *Choosing Governance in the FCPA Reform Debate*, 38 J. CORP. L. 325, 348 (2013).

¹¹¹ Leslie, *supra* note 7, at 172–73.

¹¹² *Id.*

¹¹³ *Id.* at 173–74.

¹¹⁴ *Id.* at 172–73.

¹¹⁵ Both bribery and cartel cases are inherently difficult to prove and require an insider willing to cooperate. Also, cartels and bribery are both conspiracies, meaning that there are always other remaining companies/individuals left to prosecute after the first one reports the conduct. And most important, both price-fixing conspiracies and anti-bribery violations "are white-collar crimes that are hard to detect." *Id.* at 175.

modeled after that of the United States, has proven very effective in uncovering antitrust violations in Korea.¹¹⁶

Potential benefits of a new anti-corruption amnesty program in Korea are as follows:

(a) Cost-Effective Enforcement

Enforcement of white-collar crime can be costly both monetarily and in terms of personnel.¹¹⁷ Thus, giving corporations an incentive to self-report corruption saves money and effort that might otherwise be spent in identifying wrongdoers.¹¹⁸ Given that the vast majority of prosecutors in Korea are overworked and understaffed,¹¹⁹ leveraging the resources of private entities that may have “first-hand information about potential violations” would be particularly crucial to save on enforcement costs in Korea.¹²⁰

(b) Predictable and Calculable Benefits

Under Korean law, cooperation or self-disclosure may be a potential mitigating factor subject to the prosecution’s sole discretion, but there are no clear written guidelines to fetter the exercise of that discretion.¹²¹ This is problematic—if law enforcement policies are “not transparent and

¹¹⁶ For a comprehensive analysis of and statistics on the numbers and fines of total cartel cases and leniency filed cases, see Yung Jeong Choi, *An Empirical Analysis of the Corporate Leniency Program in Korea: Its Amendments in 2005*, 18 KOR. J. ECON. 255 (2011), http://yeri.yonsei.ac.kr/new/kje_data/2011/vol2/2011vol201.pdf. Korea also operates leniency programs in other areas of law (e.g., local and municipal laws involving petty offenses). But these do not create a race among participants: they simply offer a reduction in fines for self-reporting petty offenses.

¹¹⁷ Kevin Davis, *Does the Globalization of Anti-corruption Law Help Developing Countries?* 9 (NYU Center for L. Econ. Organization, Working Paper No. 09-52, 2009), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1520553.

¹¹⁸ Louis Kaplow & Steven Shavell, *Optimal Law Enforcement with Self-Reporting of Behavior*, 102 J. POL. ECON. 583, 584 (1994).

¹¹⁹ According to the Legal Profession Happiness Index Survey conducted by a major Korean legal journal in 2006, 87% of the prosecutors surveyed responded that they are on average working more than 10 hours per day. The results also showed that 96% of the prosecutors work during weekends and holidays, with 41% of them responding more than 5 times per month on average. Tae-kyung Yeo, *Bup jo in hang bok ji su sul mun jo sa* [Survey on happiness of legal professionals], LAWTIMES, Dec. 4, 2006, <https://www.lawtimes.co.kr/Legal-Opinion/Legal-Opinion-View?Serial=23237&kind=AF&key=>; see also Go-woon Lee, *Lo pum gat da com back han gum sa* “ya gun eu chu uk gu ri wot da” [Prosecutor who returned to prosecution after private practice in law firm “I missed pulling all-nighter”] HANKYUNG, Nov. 23, 2011, <http://www.hankyung.com/news/app/newsview.php?aid=2011112392831>.

¹²⁰ Mary Schapiro, Chairman, SEC, Remarks at the SEC Open Meeting: Establishing a Whistleblower Program (May 25, 2011), <http://www.sec.gov/news/press/2011/2011-116.htm> (“[F]or an agency with limited resources . . . it is critical to be able to leverage the resources of people who may have first-hand information about potential violations.”).

¹²¹ Park, *supra* note 88; see also Kim, *supra* note 88.

predictable,” then companies are “less able to weigh the costs and benefits of disclosing misconduct” to the government.¹²² However, if those policies present and promote “clear and predictable benefits from disclosure” that reduce risks to companies, then more corporations will cooperate and embrace stronger anti-corruption compliance governance principles.¹²³ In this regard, the U.S. Antitrust Amnesty Program provides clear and predictable policies that have informed directors and in-house counsels of the risk of detection and the specific rewards of self-disclosures and full cooperation.¹²⁴ Thus, the proposed anti-corruption leniency policy may provide Korean corporations with “greater certainty and predictability” regarding the benefits of self-reporting misconduct, thus affecting their decision-making regarding such reports.¹²⁵

(c) Counterarguments to a New Anti-Corruption Amnesty Program

Some argue that it would be difficult to create a race for amnesty in the bribery context because fundamental differences remain between price-fixing cartels and corruption. The argument goes as follows: First, while the briber and the bribed often share a “trusting relationship,” cartel members in a price-fixing conspiracy are “natural adversaries who distrust each other.”¹²⁶ The U.S. Antitrust Amnesty Program succeeds by exploiting the “natural distrust” among a cartel’s members, as they often have an intrinsic tendency to distrust each other.¹²⁷ From this perspective, so the argument goes, it is unclear how an anti-corruption amnesty policy can create distrust among bribery coconspirators who are essentially “natural allies.”¹²⁸ Second, the scale of participation is different between cartelization and corruption.¹²⁹ In price-fixing, the larger number of conspirators can help an amnesty program be effective.¹³⁰ In contrast, bribery involves fewer parties, namely the briber and the bribed.¹³¹ If only two parties are involved, there is less reason for each to confess if they think the other has already done so.¹³²

¹²² Tarun & Tomczak, *supra* note 89, at 155–56.

¹²³ *Id.*

¹²⁴ *Id.* at 236.

¹²⁵ *Id.* at 214–215.

¹²⁶ Leslie, *supra* note 7, at 176.

¹²⁷ *Id.* at 177.

¹²⁸ *Id.* at 178 (“The confessor in the antitrust conspiracy receives not only the benefit of amnesty, but also the benefit of injuring her competitor, who will be liable for criminal penalties and treble damages in the likely event of follow-on private lawsuits. In contrast, the briber is not better off betraying the bribed because this will hurt the briber’s ability to get contracts from that entity in the future. In sum, participants in bribery schemes would not seem as inclined to betray their partners in crime.”).

¹²⁹ *Id.* at 176.

¹³⁰ *Id.* at 178.

¹³¹ *Id.* at 179.

¹³² *Id.*

The above argument, however, overlooks the reality that a significant percentage of anti-bribery violations involve “agents, suppliers, representatives, distributors, and joint venture partners, among many others, who are coconspirators in the bribery scheme.”¹³³ Thus, a race for amnesty is created not just between two parties, but among the bribe-payer, the bribe-taker, and various third parties.

One may also argue that an anti-corruption amnesty program may give offenders unlimited opportunities to obtain a reduction in sentencing or exemption from conviction. One easy solution for this would be to prohibit repeat offenders who previously engaged in corruption from receiving additional leniency benefits within a specified period (e.g., a provision something along the lines of “Repeated offender shall not receive additional leniency benefits within five years from the date of its initial leniency application”). This would also force companies to strengthen their internal compliance procedures to prevent and avoid corrupt practices well in advance.

B. Increasing Incentives for Whistleblowers with Insider Information

As noted earlier, whistleblowers are precious sources of inside information when it comes to enforcing self-concealing crimes, such as acts of bribery. Bucy argues that information that they provide “is an *invaluable commodity* that the regulatory world must pay for.”¹³⁴ This commodity “must be priced high enough to overcome the disincentives to providing it and to alter existing personal and societal values against providing it.”¹³⁵ Indeed, in Korea (as in many countries) there have been individuals involved in major corruption investigations in the past that could have come forward with material information but chose to not do so. Thus, the law should be designed in a way that could provide a sufficient incentive for these people to come forward and provide aid to the government at an earlier stage of investigation.¹³⁶

The first part of this section introduces different regulatory models providing whistleblower incentives and protections in the United States, noting that the FCA’s private-public partnership model¹³⁷ is the best at encouraging people with inside information about violations to come forward and be a whistleblower.

¹³³ FCPA PROFESSOR BLOG, *supra* note 54.

¹³⁴ Bucy, *supra* note 8, at 8 (emphasis added).

¹³⁵ *Id.*

¹³⁶ See Petty, *supra* note 100, at 863.

¹³⁷ See *infra* text accompanying notes 159–164.

1. The U.S. Experience

(a) The Bounty System—The SEC's Whistleblower Incentives and Protection Program¹³⁸

The SEC's Whistleblower Incentives and Protection Program, established under the Dodd-Frank Act,¹³⁹ provides substantial whistleblower rewards to individuals who provide new information to the SEC that leads to the successful prosecution of securities law violations, including Foreign Corrupt Practices Act (FCPA)¹⁴⁰ violations.¹⁴¹ Under this program, individuals may receive a bounty between ten and thirty percent, if they provide information that results in monetary sanctions exceeding \$1 million.¹⁴²

Legislative history shows that the U.S. Congress created the whistleblower provision to “motivate those with inside knowledge to come forward and assist the government to identify and prosecute persons who have violated securities laws and recovery money for victims of financial fraud.”¹⁴³ The U.S. Senate Report notes that “[w]histleblower tips were 13 times more effective than external audits” in detecting fraud schemes in public companies.¹⁴⁴ The statute also includes an anti-retaliation provision that prohibits employers from taking retaliatory actions against a whistleblower.¹⁴⁵

The SEC Whistleblower Program “rests on sound principles in that it recognizes the importance of including *private citizens* in detecting financial crimes.”¹⁴⁶ Under this scheme, however, whistleblowers' role is limited to serving as “mere informants.”¹⁴⁷

¹³⁸ Dodd-Frank Act, Pub. L. No. 111-203, §922, 124 Stat. 1376, 1841-49 (2010) (codified as amended at 15 U.S.C. §78u-6). Definition of whistleblower is in 15 U.S.C. §78u-6(a)(6).

¹³⁹ *Id.*

¹⁴⁰ The FCPA prohibits corruptly offering or giving anything of value to a foreign official for the purpose of obtaining or business, or otherwise influencing that official's decision-making ability. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. §§ 78m, 78dd-1 to -3, 78ff (2006)).

¹⁴¹ 15 U.S.C. § 78u-6(A)(1).

¹⁴² 15 U.S.C. § 78u-6(b)(1).

¹⁴³ S. REP. NO. 111-176, at 110 (2010).

¹⁴⁴ *Id.*

¹⁴⁵ 15 U.S.C. § 78u-6(h). This provision gives whistleblowers a cause of action and jurisdiction in federal district court.

¹⁴⁶ Garrett, *supra* note 108, at 767 (emphasis added).

¹⁴⁷ For a comprehensive discussion of the shortcomings of the SEC's Whistleblower Program, see *id.*

(b) Citizen Suit Regulatory Model

In the United States, private citizen participation in public enforcement can also take the form of what one scholar characterizes as the “citizen suit regulatory model.”¹⁴⁸ In this model, individuals can bring a case under the “private rights of action provisions” which exist in over twenty U.S. environmental or consumer protection statutes.¹⁴⁹ A typical private right of action provision provides that “any person may commence a civil action . . . against any person . . . who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order”¹⁵⁰ This model has had some marginal success in aiding public enforcement activities by “providing needed resources, deterring future violations, and bringing unknown violations to the government’s attention.”¹⁵¹ The Environmental Protection Agency (EPA) acknowledges the contributions made by such citizen suits.¹⁵² According to the EPA, citizen suit authority “has served to leverage our scarce enforcement resources.”¹⁵³ The agency also notes that a greater deterrent effect is achieved by citizen suits “as regulatees seek to achieve compliance to avoid not only federal and state prosecution but also to avoid independent citizen actions.”¹⁵⁴

Despite these successes, however, citizen suits ultimately fail as effective supplements to government enforcement because they (i) do not sufficiently coordinate public and private efforts at prosecution, and (ii) do not offer enough incentives for lawyers to represent plaintiffs in citizen suits.¹⁵⁵ More significantly, the citizen suit regulatory model “does not offer enough of a financial reward to entice knowledgeable whistleblowers to come forward.”¹⁵⁶ It also has the “potential to mightily disrupt existing economic markets,” because it lacks a mechanism to monitor the *quality* of the information provided by whistleblowers.¹⁵⁷ Another huge problem with such private right of action provisions is that they do not limit standing to sue to original source or knowledgeable insider, thus attracting large volumes of frivolous and opportunistic claims.¹⁵⁸

¹⁴⁸ Bucy, *supra* note 8, at 32.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 41.

¹⁵² *Id.*

¹⁵³ U.S. ENVTL. PROTECTION AGENCY, ENFORCEMENT IN THE 1990'S PROJECT: RECOMMENDATIONS OF THE ANALYTICAL WORKGROUPS 5–48 (1991).

¹⁵⁴ *Id.*

¹⁵⁵ Bucy, *supra* note 8, at 60.

¹⁵⁶ *Id.* at 11 n.36.

¹⁵⁷ *Id.* at 6 (emphasis added).

¹⁵⁸ As a side note, neither the Korean anti-bribery laws nor the U.S. FCPA recognizes a private right of action. FCPA PROFESSOR BLOG, *supra* note 54 (“It is an open question whether Congress intended for the FCPA to have a private right of action. However, various courts including the Sixth Circuit in

(c) Qui Tam Action—The FCA's Public-Private Partnership Model

The FCA is widely regarded as the United States' "most effective whistleblower law in history."¹⁵⁹ The FCA contains qui tam, or whistleblower, provisions that allow for a private individual¹⁶⁰ with knowledge of fraud against the U.S. government to bring a suit on its behalf.¹⁶¹ Whistleblowers can recover fifteen to twenty-five percent of the settlement or judgment if the DOJ participates and thirty percent if the DOJ declines to intervene.

The FCA has had, by far, the most success in making whistleblowers come forward with inside information.¹⁶² The reason why the qui tam provision in the FCA has been so effective in detecting and uncovering fraud is because of its unique mechanism that uses a "rogue to catch a rogue," i.e., "using someone on the inside of the illegal act to turn on his cohorts and provide information relating to the illegal act to the enforcement agency."¹⁶³ Bucy notes that the FCA ultimately succeeds because it "recognizes that inside information of wrongdoing is a valuable commodity in regulatory efforts, that there are significant disincentives in

Lamb v. Phillip Morris, Inc., 915 F.2d 1024 (6th Cir. 1980), have held that the FCPA does not confer a private right of action meaning that only the DOJ and SEC can bring FCPA cases." It has been argued, however, that the FCPA would be more effective if it was amended to include a private right of action. See, e.g., Ethan S. Burger & Mary S. Holland, *Why the Private Sector Is Likely to Lead the Next Stage in the Global Fight Against Corruption*, 30 FORDHAM INT'L L.J. 45, 53 (2006).

¹⁵⁹ The False Claims Act (FCA) is the U.S. government's primary litigation tool for combating fraud. It imposes civil penalties of \$5,500 to \$11,000 per claim, plus treble damages (i.e., 3 times the amount of the government's damages). False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat 3153 (codified as amended at 31 USC § 3729 *et seq.* (2006)). In year 2014, the federal government recouped a record \$5.69 billion in fraud lawsuits and investigations. Press Release, The Department of Justice, Justice Department Recovers Nearly \$6 Billion from False Claims Act Cases in Fiscal Year 2014 (Nov. 20, 2014); see also TOM DEVINE & SHELLEY WALDEN, INTERNATIONAL BEST PRACTICES FOR WHISTLEBLOWER POLICIES (2013), http://www.whistleblower.org/storage/documents/Best_Practices_Document_for_website_March_13_2013.pdf (explaining that the statute increased "civil fraud recoveries in government contracts from \$27 million annually in 1985, to over \$20 billion since, including more than one billion dollars annually since 2000").

¹⁶⁰ These individuals are referred to as "qui tam relators" or "private attorneys general." See generally William B. Rubenstein, *On What a "Private Attorney General" Is—and Why It Matters*, 57 VAND. L. REV. 2129 (2004).

¹⁶¹ U.S.C. § 3729 *et seq.*

¹⁶² 31 U.S.C. § 3730(d); see generally CHARLES DOYLE, CONG. RESEARCH SERV., R40785, QUI TAM: THE FALSE CLAIMS ACT AND RELATED FEDERAL STATUTES (2013); David Freeman Engstrom, *Public Regulation of Private Enforcement: Empirical Analysis of DOJ Oversight of Qui Tam Litigation Under the False Claims Act*, 107 NW. U. L. REV. 1689 (2013); see also Dennis J. Ventry, Jr., *Whistleblowers and Qui Tam for Tax*, 61 Tax L. 357, 382 (2008) (arguing that whistleblowers "are in a unique position to deter and detect noncompliant behavior," and "qui tam provision allows whistleblowers to utilize their unique position to enforce the law").

¹⁶³ Garrett, *supra* note 108, at 786; see also Daniel K. Tarullo, *The Limits of Institutional Design: Implementing the OECD Anti-Bribery Convention*, 44 VA. J. INT'L L. 665, 689 (2004) ("Bribery takes place in the shadows. It may never be visible to anyone but the immediate actors.").

coming forward with such information, and that the regulatory world must offer adequate inducement to overcome these disincentives.”¹⁶⁴

It is also important to note that qui tam actions are actually more equitable for defendants. By contrast to the citizen suit regulatory model described above, the FCA’s qui tam enforcement model grants the government with expansive gatekeeper powers, effectively filtering out opportunistic and frivolous lawsuits. When a qui tam relator brings a lawsuit, the relator is required to do so under seal for a certain period of time and to report their evidence against the defendant to the authorities.¹⁶⁵ While the matter remains under seal, the government may investigate the allegations to determine if it should intervene as an additional plaintiff, take primary control over the case (limiting the relator’s involvement if necessary) or even seek dismissal of the case.¹⁶⁶ This “initial secrecy” surrounding qui tam cases and the guarantee of confidentiality while documents are under seal with the government help to protect defendants from unwarranted reputational damage.¹⁶⁷

Qui tam actions can also themselves increase deterrence: “Public officials may be deterred from committing illegal activity because of the increased likelihood that one of his co-conspirators will “sell him out” as a result of the incentives offered under the qui tam provisions.”¹⁶⁸

Most importantly, qui tam actions could lead to greater detection and prosecution of other low-visibility crimes, such as bribery.¹⁶⁹ In fact, a number of scholars have advocated for a qui tam provision in the FCPA, a U.S. foreign bribery statute, noting how such provision in the statute could “achieve success on par” with the FCA as the crimes addressed by both laws—fraud and bribery—are similar.¹⁷⁰

Thus, of the three ways of giving incentives to whistleblowers discussed—the bounty program, citizen suits, and qui tam actions—qui tam actions provide the strongest regulatory model.

¹⁶⁴ Bucy, *supra* note 8, at 61 (emphasis added).

¹⁶⁵ *Id.* at 70.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ Petty, *supra* note 100, at 875.

¹⁶⁹ Garrett, *supra* note 108, at 786.

¹⁷⁰ *Id.* U.S. Congress considered including a Qui Tam provision in the FCPA: Dodd-Frank . . . ordered the SEC’s Inspector General to conduct a study to determine whether that program should be built out into a full-on qui tam regime that vests whistleblowers who have already tried to pursue the case via the Commission with a private right of action Published in early 2013, the Office of Inspector General’s report did not rule out a qui tam approach, noting the need for further study. Importantly, Congress’s possible interest in bringing qui tam to Dodd-Frank may be a bellwether: in an era of deepening fiscal austerity, private enforcement should be an increasingly attractive alternative to traditional—and on-budget—regulatory mechanisms.

Engstrom, *supra* note 162, at 1750–51.

2. *An Anti-Corruption Qui Tam Provision in the Korean Context*

Potential benefits of a new anti-corruption qui tam provision in Korea are as follows:

(a) Substantial Incentives for Whistleblowers to Come Forward

The most important benefit of a qui tam provision is the large recoveries available to private plaintiffs through statutorily mandated percentages of large, fixed penalties allocated for the qui tam relator.¹⁷¹ The U.S. FCA experience shows that this is highly effective in attracting knowledgeable insiders willing to serve as whistleblowers.¹⁷² As noted earlier, plaintiffs take a substantial risk when bringing whistleblower cases. U.S. Senator Grassley once said “[w]histleblowers frequently risk everything when bringing false claim cases.”¹⁷³ Thus, an anti-bribery qui tam provision would be particularly effective in the Korean context: Korea’s tight-knit, homogeneous society serves to reinforce the perception that reporting on one’s friend or employer is morally repugnant.¹⁷⁴ A substantial inducement is required to overcome these disincentives, and the qui tam action does exactly that.

(b) Encourages High Quality Information

Empirical evidence shows that, in a typical qui tam lawsuit, government intervention leads to much higher success, though individual plaintiffs (i.e., qui tam relators) can proceed on their own without government intervention.¹⁷⁵ Since plaintiffs know that government intervention leads to much higher success, this induces plaintiff lawyers to produce high-quality work.¹⁷⁶ It should also be noted that the FCA qui tam

¹⁷¹ Bucy, *supra* note 8, at 53.

¹⁷² *Id.*

¹⁷³ Petty, *supra* note 100, at 873; *Medicaid Waste, Fraud and Abuse: Threatening the Health Care Safety Net: Hearing Before the S. Comm. on Finance*, 109th Cong. 1 (2005) (statement of Sen. Charles Grassley), <http://www.finance.senate.gov/imo/media/doc/062905cgb.pdf>.

¹⁷⁴ Kim, *supra* note 17, at 315.

¹⁷⁵ Bucy, *supra* note 8, at 51. According to a Bloomberg article, government intervention leads to successful settlement in 98% of the cases pursued, whereas individual plaintiffs who continue with their own lawsuits lose more than 95% of the time. Only about 20% of cases filed by individual plaintiffs are joined by the government. David Voreacos & Margaret C. Fisk, *AstraZeneca Case Rewards Two Whistleblowers with \$45 Million*, BLOOMBERG (May 13, 2010, 11:01 PM), <http://www.bloomberg.com/news/articles/2010-05-12/astrazeneca-s-520-million-u-s-settlement-rewards-repeat-whistleblowers>.

¹⁷⁶ Bucy, *supra* note 8, at 51–52 (“The litigational advantages to private plaintiffs of obtaining DOJ intervention are so substantial that the acknowledged goal of any experienced relators’ attorney is to obtain the government’s intervention. Such intervention is obtained by preparing a thorough, complete, and convincing written statement for the government.”).

model effectively weeds out frivolous or parasitic claims through its First-To-File Bar provided in § 3730(b)(5).¹⁷⁷

(c) Attracts Legal and Investigative Talent

In the past, NGOs mostly brought whistleblower cases in Korea. These cases were done pro bono or by attorneys working for public interest organizations with limited resources.¹⁷⁸ The qui tam private justice model, by comparison, “has proven to be highly effective in recruiting legal talent who has the skill and resources to handle complex, expensive cases.”¹⁷⁹ Because of the huge recoveries available to whistleblowers under the FCA through statutorily mandated percentages of fixed penalties,¹⁸⁰ these large fees are a “significant incentive for top legal talent to undertake qui tam plaintiffs’ work.”¹⁸¹

(d) Protects Defendants from Frivolous or Opportunistic Private Lawsuits

There are concerns that qui tam actions yield parasitic and opportunistic claims based on bare bones allegations, “whereby would-be relators merely feed off a previous disclosure of fraud.”¹⁸² Admittedly, the U.S. Congress was once concerned with the possibility of a flood of frivolous and parasitic lawsuits pouring in in relation to the FCA.¹⁸³ There are several responses to this concern. First, the qui tam private justice model contains a “dual-plaintiff mechanism” that allows for government monitoring and control of private actions.¹⁸⁴ This ensures that qui tam actions serve “the public interest and that the private litigant proceeds professionally, performing quality work.”¹⁸⁵ Second, false reporting would be further deterred in Korea, as it has a penal provision that provides for

¹⁷⁷ Under the Civil Actions for the False Claims Act’s First-to-File rule, “when a person brings an action . . . no person . . . may intervene or bring a related action based on the facts underlying the pending action.” 31 U.S.C. § 3730(b)(5).

¹⁷⁸ For examples of past whistleblower cases brought by public interest groups in Korea, see e.g., PEOPLE’S SOLIDARITY FOR PARTICIPATORY DEMOCRACY, <http://www.peoplepower21.org/Whistleblower/1050360#0>; CIVIL SOCIETY ORGANIZATIONS NETWORK IN KOREA, <http://ti.or.kr/xe/eintro>; TRANSPARENCY INTERNATIONAL KOREA, <http://www.civilnet.net/xe/>.

¹⁷⁹ Bucy, *supra* note 8, at 58.

¹⁸⁰ Under the FCA, whistleblowers can recover fifteen to twenty-five percent of the settlement or judgment if the DOJ participates, and thirty percent if the DOJ declines to intervene. *See supra* note 161 and accompanying text.

¹⁸¹ Bucy, *supra* note 8, at 58.

¹⁸² *Walburn v. Lockheed Martin Corp.*, 431 F.3d 966, 970 (6th Cir. 2005).

¹⁸³ *See* S. REP. NO. 99-345, at 2 (1986).

¹⁸⁴ *See supra* notes 164–67, 175–77 and accompanying text.

¹⁸⁵ Bucy, *supra* note 8, at 80.

enhanced sanctions for frivolous lawsuits.¹⁸⁶ Third, a corporate compliance defense is available in Korean anti-bribery laws.¹⁸⁷ Fourth, the Korean legal system compels the losing side to pay attorney fees and litigation costs for both parties.¹⁸⁸ Thus a successful defendant would be entitled to impose the costs of the defense on an unsuccessful plaintiff.¹⁸⁹ This provision should discourage cases that are frivolous or lack sufficient evidence.¹⁹⁰ Finally, defendants would also be able to take advantage of the proposed anti-bribery amnesty program outlined above.¹⁹¹

(e) Counterarguments to a New Anti-Bribery Qui Tam Provision

Opponents might argue that government oversight of qui tam actions would lead to collusion between government regulators and industry. This is a valid concern, given tightly knit relationships (which makes collusion easier) between government and chaebols in Korea.¹⁹² But that argument overlooks the fact that qui tam relators can proceed with their claim in court without the government. In the FCA context, “although historically it has been more difficult for relators to prevail when the DOJ does not intervene, the relator can go forward with the case without the DOJ.”¹⁹³ The amended

¹⁸⁶ Act No. 6494, art. 49 (S. Kor.) (“If any person makes a whistle-blowing with knowledge that the contents of his whistle-blowing are false as provided in Article 27, he shall be punishable by imprisonment for not less than one year to not more than 10 years.”).

¹⁸⁷ “[I]f the legal person has paid due attention or has exercised proper supervision to prevent the offense,” it is not liable under Korean anti-bribery laws. Act No. 10178, art 4 (S. Kor.). The United Kingdom also recognizes corporate compliance: Under the United Kingdom Bribery Act, the U.K. Ministry of Justice recognizes that “no policies or procedures are capable of detecting and preventing all bribery.” Thus, the Bribery Act provides a “full defense if [a company] can show that despite a particular case of bribery it nevertheless had adequate procedures in place to prevent persons associated with it from bribing.” By contrast, the U.S. Foreign Corrupt Practices Act (FCPA) does not allow such compliance defense. Some argue that a corporate compliance defense could “better incentivize more robust corporate compliance, reduce improper conduct, and thus best advance the FCPA’s objective of reducing bribery.” MINISTRY OF JUSTICE, THE BRIBERY ACT 2010: GUIDANCE 15 (2011), <http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf>; Mike Koehler, *Revisiting a Foreign Corrupt Practices Act Compliance Defense*, 2012 WIS. L. REV. 609, 612 (2012).

¹⁸⁸ The winning party may recover all litigation costs, such as filing fees, discovery-related expenses, service of process fees, and witness fees. Sang Ho Han & Inhak Lee, *The International Comparative Legal Guide to: Product Liability 2013: Korea chapter*, KIM & CHANG, http://www.kimchang.com/frame2.jsp?lang=2&b_id=88&m_id=81&mode=view&idx=12232; *The Legal Profession of the Republic of South Korea*, HARV. L. PROG. ON LEGAL PROF. (2001), http://www.law.harvard.edu/programs/plp/pdf/Korean_Legal_Profession.pdf [hereinafter *Study on Korean Legal Profession*].

¹⁸⁹ *Study on Korean Legal Profession*, *supra* note 188.

¹⁹⁰ By contrast, the “American Rule” shields “the losing plaintiff from liability for the legal expenses of a prevailing defendant.” Carrington, *supra* note 108, at 38–39.

¹⁹¹ See discussion *supra* Part IV.A(2).

¹⁹² Kim, *supra* note 17, at 284 (“Under a state-oriented corporate governance system, the [Korean] government operated in an intertwined, symbiotic relationship with the chaebols.”).

¹⁹³ Bucy, *supra* note 8, at 73.

law can also provide that qui tam actions “cannot be dismissed upon the government’s motion without an opportunity for the private plaintiff to be heard publicly in . . . court, and without court approval of the dismissal.”¹⁹⁴

Finally, opponents might be concerned that the high attorney fees in Korea would deter potential whistleblowers from coming forward. While attorney fees have been relatively high in Korea because lawyers have historically been low in supply and high in demand, the recent introduction of a U.S. style law school system and the government’s push to increase the number of junior Korean lawyers should result in a larger pool, bringing down litigation costs.¹⁹⁵ Also, contingency fee arrangements with plaintiffs’ attorneys are permitted and frequently utilized in Korea.¹⁹⁶

C. Other Factors That Merit Discussion

Some may be skeptical of the efficacy of the regulatory framework that this Comment seeks to establish. Some scholars believe that Korean anti-corruption legal reforms would not be possible without the establishment of an *independent prosecutor*, referring to Korean prosecutors’ lack of willingness to take on politically sensitive cases in the 1980s and 1990s.¹⁹⁷ Another concern involves tightly knit relationships (or possible collusion) between government and big business, represented by large family-owned conglomerates, the chaebols.¹⁹⁸ These are valid concerns, but acknowledging these problems does not necessarily negate the benefits of the proposals discussed in this Comment.

First, while it is true that inside information—however much of a precious commodity it may be—would be practically worthless if regulators turn a blind eye on that information, evidence shows that Korean prosecutors are increasingly willing to investigate and prosecute high-profile corruption cases involving powerful businessmen, former ministers, and even former presidents, and that Korean courts actually convict them.¹⁹⁹

¹⁹⁴ *Id.*

¹⁹⁵ Paramount among the legal reforms in Korea in recent years is the introduction of the American-style law school and civil participation in judicial decision-making. *See generally* DAI-KWON CHOI, JUDICIAL SYSTEM TRANSFORMATION IN THE GLOBALIZING WORLD (2007). For a comprehensive discussion on changes in Korean society in relation to legal reform, see TOM GINSBURG, LEGAL REFORM IN KOREA (2004).

¹⁹⁶ However, in contrast to the general practice in the United States, the Korean practice usually still requires the plaintiff to pay a certain amount as a down payment, even in the case of a contingency fee arrangement. *Study on Korean Legal Profession*, *supra* note 195.

¹⁹⁷ *See, e.g.*, Ehrlich & Kang, *supra* note 14.

¹⁹⁸ Kim, *supra* note 17, at 284 (“Under a state-oriented corporate governance system, the government operated in an intertwined, symbiotic relationship with the chaebols.”).

¹⁹⁹ *See* Jun, *supra* note 81 (“The court also found corporate executives of major Korean conglomerates guilty of bribing the former Presidents in exchange for government contracts or political favors.”).

Korea's active media and greater public attention to court actions also play important roles in exposing injustice and in pressuring courts to behave fairly and with greater competence. Further, the recent anti-corruption enforcement statistics show that the government is determined to end such practices and actively seeks to enforce its anti-bribery laws.

Much scholarship on Korea's corruption problem has focused on the issue of the lenient punishment of chaebols and prominent political figures.²⁰⁰ Indeed, the *detection* of misconduct through inside information (facilitated by the new regulatory framework outlined in this Comment) may not in all cases lead to just *punishment*—in the past, political and industrial elite convicted for bribery received favorable treatments in Korean courts by way of presidential amnesty and lenient sentencing.²⁰¹ Setting the just punishment debate aside, the proposals discussed in this Comment rest on the assumption that increasing the probability of corruption scrutiny and exposure itself discourages companies and individuals from engaging in corrupt practices. This may be particularly important in Korea as Korean culture “emphasizes the concept of one's reputation and honor,”²⁰² and the social stigma associated with the punishment of corruption could have an important deterrent effect. It should also be noted that companies always worry about reputational damage; failure to comply with the law and the resulting scrutiny can have several serious business effects on a business, on top of any fine or penalty amounts imposed by an enforcement agency or court.²⁰³

CONCLUSION

Korea has had great economic success, yet it is often perceived to be a nation that skirts the rules. Korean law has long outlawed bribery, but the problem is long standing and persistent. The Korean government (with its own successful antitrust leniency program, among many others) has demonstrated its capacity to learn from the experiences and mistakes of other countries, and to take advantage of these lessons to successfully

²⁰⁰ See, e.g., Jun, *supra* note 81; Ehrlich & Kang, *supra* note 14; Kim, *supra* note 17.

²⁰¹ Kim, *supra* note 17, at 334 (“The presidents routinely granted pardons to convicted controlling shareholders and executives of large companies.”). For legal authority governing presidential pardons in Korea, see Samyeon haeng-wi [Amnesty Act], Act. No. 2, Aug. 30, 1948, arts. 3, 5, 9–10 (S. Kor.); DAEHAN MINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] art. 79 (July 17, 1948) (S. Kor.).

²⁰² Jun, *supra* note 81, at 1107 (“According to one's position within the pyramid-structured social hierarchy, a higher level of deference is given to those with higher status. In a society that focuses on authority and status, the criminal punishment of prominent political figures would have a greater deterrent effect . . . because of the larger social stigma associated with such punishment.”).

²⁰³ FCPA PROFESSOR BLOG, *supra* note 54 (explaining that anti-bribery scrutiny could delay or terminate M&A transactions, as well as “adversely affect a company's stock price and cost of capital as credit rating agencies may downgrade corporate debt”).

formulate and enforce its own laws. Learning from the American experience while recognizing Korea's unique situations and characteristics can lead the way to optimal enforcement of Korean anti-bribery laws. The framework this Comment has presented provides a starting point for that discussion.