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Reviewing the Situation: What Is To Be Done With the Foreign Corrupt Practices Act?

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I. INTRODUCTION

The Foreign Corrupt Practices Act of 1977[1] (FCPA or Act) is one of the United States' most controversial federal laws. Supporters of the Act insist that United States export trade has increased in the years since the Act's passage, while opponents argue that, notwithstanding this apparent increase, the Act unduly restrains United States corporations. Almost every session of Congress since passage of the FCPA has included a bill to amend it, but it has thus far defied alteration. Businesses cry out in vain for guidelines. Finally, effective enforcement appears to be impossible even though the Department of Justice (DOJ) has brought a number of enforcement proceedings against United States corporations and citizens for violations of the Act.

This Article examines some of the paradoxes that the FCPA creates. Part II sets forth the sequence of events that led to the Act's passage. Part III outlines the Act, describes some of the major criticisms of the FCPA and discusses its proposed amendments. Part IV discusses the review procedures that the DOJ has adopted and assesses the chances for a new review procedure or FCPA guidelines, or both. Part V examines the enforcement actions taken under the FCPA and includes a discussion of

1. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494, 1498 (1977) (codified at 15 U.S.C. §§ 78a, 78m, 78dd-1, 78dd-2 (1982)) [hereinafter FCPA].

the investigative procedures of the DOJ. Finally, part VI of this Article considers the future of the FCPA.

II. BACKGROUND TO THE ACT

A. *Origin of the Act*

The FCPA originated in post-Watergate morality.[2] The press, whose revelations had been instrumental in the collapse of the Nixon Administration, moved quickly to report allegations of illicit United States corporate payments to foreign governments. The resulting scandal embarrassed the United States and threatened foreign relations.[3] The discovery of payments by Lockheed to the Prime Minister of Japan, for example, forced his resignation and chilled relations between the two countries.[4] Reports that Lockheed had paid Prince Bernhardt of the Netherlands $1 million compelled him to relinquish his official functions.[5] Finally, reputed payments by Lockheed, Exxon, Mobil, Gulf and other corporations to the Italian Government caused the Italian President to resign and strained United States relations with Italy, the surrounding Mediterranean area and the entire North Atlantic Treaty Organization (NATO) alliance.[6]

The extensive coverage given to these incidents, accompanied by indignant editorial comment, led the Securities and Exchange Commission

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2. G. GREANIAS & D. WINDSOR, THE FOREIGN CORRUPT PRACTICES ACT: ANATOMY OF A STATUTE 17-19 (1982); Goebel, *Professional Responsibility Issues in International Law Practice,* 29 AM. J. COMP. L. 1, 27-28 (1981); Comment, *The Foreign Corrupt Practices Act of 1977: An Analysis of Its Impact and Future,* 5 B.C. INT'L & COMP. L. REV. 405, 407 (1982) [hereinafter Comment, *FCPA: Impact and Future].*

3. HOUSE COMM. ON INTERSTATE & FOREIGN COMMERCE, UNLAWFUL CORPORATE PAYMENTS ACT OF 1977, H.R. REP. NO. 640, 95th Cong., 1st Sess. 5 (1977) [hereinafter H.R. REP., UNLAWFUL PAYMENTS]; Comment, *FCPA: Impact and Future, supra* note 2, at 408.

4. H.R. REP., UNLAWFUL PAYMENTS, *supra* note 3, at 5; Timmeny, *An Overview of the FCPA,* 9 SYRACUSE J. INT'L L. & COM. 235, 238 (1982); Wade, *An Examination of the Provisions and Standards of the FCPA,* 9 SYRACUSE J. INT'L L. & COM. 255, 256 (1982); Comment, *FCPA: Impact and Future, supra* note 2, at 408 n.25.

5. Timmeny, *supra* note 4, at 238; Comment, *FCPA: Impact and Future, supra* note 2, at 408 n.25; SENATE COMM. ON BANKING, HOUS. & URB. AFF., FOREIGN CORRUPT PRACTICES AND DOMESTIC AND FOREIGN INVESTMENT IMPROVED DISCLOSURE ACTS OF 1977, S. REP. NO. 114, 95th Cong., 1st Sess. 3 (1977) [hereinafter S. REP., FOREIGN CORRUPT PRACTICES], *reprinted in* 1977 U.S. CODE CONG. & ADMIN. NEWS 4098, 4101; H.R. REP., UNLAWFUL PAYMENTS, *supra* note 3, at 5.

6. H.R. REP., UNLAWFUL PAYMENTS, *supra* note 3, at 5; Timmeny, *supra* note 4, at 238; Wade, *supra* note 4, at 256; Comment, *FCPA: Impact and Future, supra* note 2, at 408 n.25.

(SEC) to investigate a number of companies formally and to institute a voluntary disclosure program.[7] The SEC received startling responses from businesses regarding questionable or illegal payments to foreign officials. Over 400 companies admitted or voluntarily disclosed that they had indeed made such payoffs at one time or another,[8] aggregating hundreds of millions of dollars.[9]

Congressional reaction followed swiftly. Senate and House hearings to determine the scope of the problem revealed a widespread use of bribes[10] and led to the conclusion that some form of legislation was necessary to prevent this conduct.[11] A broad consensus existed in Congress that bribery was not only unethical but also unnecessary.[12] Legislators agreed that questionable payments corrupted and short-circuited the country's competitive free-enterprise system, and created serious foreign policy problems. Congressmen and others voiced fears that such payments by American companies had already tarnished the image of our system and affected the integrity and reputation of United States corporations.[13] The

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7. *See* U.S. GENERAL ACCOUNTING OFFICE, IMPACT OF FOREIGN CORRUPT PRACTICES ACT ON U.S. BUSINESS: REPORT TO THE CONGRESS 1 (1981) [hereinafter GAO REPORT]; Atkeson, *The Foreign Corrupt Practices Act of 1977: An International Application of SEC's Corporate Governance Reforms,* 12 INT'L LAW. 703, 707 (1978); Timmeny, *supra* note 4, at 235-37; *cf.* Comment, *FCPA: Impact and Future, supra* note 2, at 408 (SEC tried to get corporations to regulate themselves voluntarily).

8. H.R. REP., UNLAWFUL PAYMENTS, *supra* note 3, at 4; GAO REPORT, *supra* note 7, at 1; Atkeson, *supra* note 7, at 707.

9. H.R. REP., UNLAWFUL PAYMENTS, *supra* note 3, at 4; GAO REPORT, *supra* note 7, at 1; Atkeson, *supra* note 7, at 707.

10. *See* GAO REPORT, *supra* note 7, at 1; Soloman & Gustman, *Questionable and Illegal Payments by American Corporations,* 1980 J. BUS. L. 67, 70; Comment, *FCPA: Impact and Future, supra* note 2, at 408.

11. H.R. REP., UNLAWFUL PAYMENTS, *supra* note 3, at 4-5; S. REP., FOREIGN CORRUPT PRACTICES, *supra* note 5, at 4, *reprinted in* 1977 U.S. CODE CONG. & ADMIN. NEWS at 4101.

12. H.R. REP., UNLAWFUL PAYMENTS, *supra* note 3, at 4-5; S. REP., FOREIGN CORRUPT PRACTICES, *supra* note 5, at 4, *reprinted in* 1977 U.S. CODE CONG. & ADMIN. NEWS at 4101.

13. H.R. REP., UNLAWFUL PAYMENTS, *supra* note 3, at 4-5; S. REP., FOREIGN CORRUPT PRACTICES, *supra* note 5, at 3-4, *reprinted in* 1977 U.S. CODE CONG. & ADMIN. NEWS at 4101; Maurice, *Questionable Overseas Payments: Going Around One More Time,* 15 GONZ. L. REV. 459, 465 (1980); Wade, *supra* note 4, at 256. Congress' decision to enact legislation recognized certain policy considerations: (1) belief that payment of bribes countered the moral expectations and values of the American public; (2) concern over public scandal and resulting foreign policy problems; (3) prevention of distortion of commercial competition; (4) termination of corruption in allied governments; and (5) minimization of foreign mistrust of United States business and improvement of American reputation for honesty. Comment, *Amending the Foreign Corrupt Practices*

SEC emphasized that hidden payments necessarily deceive investors who examine a company's balance sheets,[14] and that this deception might violate the reporting requirements of the Securities Exchange Act of 1934[15] (1934 Act).

B. *Legislative History of the Act*

The main purpose of the Act at the time of its inception was clear—to prevent United States corporations from bribing foreign officials.[16] Two methods were proposed to accomplish this goal. The first required the accurate disclosure and recordkeeping of all payments, whether made to foreign officials only or expended in the regular course of business. The second proposal criminalized foreign bribery. Much debate arose as to which of these preventive measures was more appropriate.[17] Those who argued against criminalization and the extraterritorial application of American law and values emphasized the practical difficulties and foreign policy consequences of prohibiting overseas bribery.[18] These legisla-

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Act of 1977: A Step Toward Clarification and Consolidation, 73 J. CRIM. L. & CRIMINOLOGY 1740, 1745 (1982) [hereinafter Comment, *Amending the FCPA*]; *see also* Wade, *supra* note 4, at 256-57.

14. One of the SEC's greatest concerns was that illicit payments and other corrupt practices would cast doubt on the integrity and reliability of corporate books and records, which are essential to the disclosure system established by the federal securities law. *See* SECURITIES AND EXCHANGE COMMISSION, REPORT ON QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES SUBMITTED TO THE SENATE COMM. ON BANKING, HOUS. AND URB. AFF., 94th Cong., 2d Sess. 13, 15, 23-24, 48-49 (Comm. Print 1976) [hereinafter SEC REPORT]; GAO REPORT, *supra* note 7, at 69-71. As reported by Wallace Timmeny, the former Deputy Director of the SEC's Division of Enforcement, the SEC employed several theories in analyzing the consequences of illegal corporate payments. These theories originated in the investor's fundamental right to know whether management is running a company according to sound business judgment. Accordingly, the investor had a right to know whether management: (1) had tampered with the corporate books; (2) had used or was using invested funds to violate United States or foreign laws; (3) had obtained business through bribery, or had subjected the company to loss of business if the bribes were discovered; and (4) had disbursed company funds to consultants with no accountability by the consultants for the use of those funds. Timmeny, *supra* note 4, at 235-36.

15. 15 U.S.C. § 78a (1982); *see* SEC REPORT, *supra* note 14, at 19-20.

16. Brock, *Progress Report on Efforts to Amend the Foreign Corrupt Practices Act,* 1983 DET. C.L. REV. 1083, 1085; Maurice, *supra* note 13, at 460, 467.

17. H.R. REP., UNLAWFUL PAYMENTS, *supra* note 3, at 6; Soloman & Gustman, *supra* note 10, at 71; Comment, *FCPA: Impact and Future, supra* note 2, at 408.

18. *See* G. GREANIAS & D. WINDSOR, *supra* note 2, at 53; Soloman & Gustman, *supra* note 10, at 71. A particular problem focused on the appropriateness of a criminal standard by which to measure conduct abroad. *See* G. GREANIAS & D. WINDSOR, *supra*

tors and representatives of the business community believed that enforcement problems would outweigh any effectiveness of sanctions against bribery.[19] A particular concern existed about unfairness and possible violations of the confrontation clause or lack of due process if the DOJ or SEC could not produce necessary foreign evidence and witnesses in this country.[20] Finally, those arguing against criminalization suggested that a criminal standard, more than any other preventive measure, would unduly burden United States corporations in competition with foreign companies that did engage in bribery.[21]

Equally compelling arguments existed for criminalizing foreign payoffs. Proponents perceived the outright prohibition of certain conduct as a much more direct and practical solution than mere disclosure or recordkeeping,[22] and they hoped that governmental interdiction would provide an excuse for corporate officials to resist demands for extortion.[23] Finally, proponents believed criminalization was necessary to emphasize the national policy against foreign bribery.[24]

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note 2, at 139-40. Much concern—and skepticism—existed in Washington at the start of the Carter Administration over the President's strong stance on human rights. While many believed President Carter's position was admirable from an ethical viewpoint, they were also aware that other nations might not appreciate being told that they were "evil." Despite the fact that President Carter himself and his Cabinet had very little to do with the actual passage of the FCPA, many perceived it as part of his "human rights" package and an additional attempt to export United States morality. *See id.* at 69-70.

19. *See infra* notes 316-19 and accompanying text.

20. *Id.*

21. *See* Soloman & Gustman, *supra* note 10, at 71; Comment, *Amending the FCPA, supra* note 13, at 1745; *cf.* Goebel, *supra* note 2, at 28 (United States businessmen think it inappropriate to hold them to standards that other countries do not impose upon their businessmen).

22. These legislators viewed criminalization as a greater deterrent than disclosure because the effectiveness of the latter depends heavily on actual disclosure by the reporting company. The threat of only a civil penalty would cause many businesses to choose simply to ignore the disclosure requirements as costly and unprofitable and to risk discovery of the payment. Criminalization, on the other hand, deals with absolutes: one becomes criminally liable for some act of malfeasance or nonfeasance. The enforcement burden in both cases is roughly the same because the elements of both nondisclosure and illegal payments overlap. Therefore, many lawmakers believed criminalization was the wiser approach. *See* H.R. REP., UNLAWFUL PAYMENTS, *supra* note 3, at 6; Soloman & Gustman, *supra* note 10, at 71; Comment, *FCPA: Impact and Future, supra* note 2, at 409.

23. *See* Soloman & Gustman, *supra* note 10, at 71.

24. *See* H.R. REP., UNLAWFUL PAYMENTS, *supra* note 3, at 6; S. REP., FOREIGN CORRUPT PRACTICES, *supra* note 5, at 4, *reprinted in* 1977 U.S. CODE CONG. & ADMIN. NEWS at 4101; G. GREANIAS & D. WINDSOR, *supra* note 2, at 70; Maurice, *supra* note 13, at 460.

The early bills on foreign payments acknowledged these concerns. Senate Bill S. 3664[25] required both accurate recordkeeping and disclosure as well as criminalization.[26] The Bill compelled companies that registered with the SEC to keep accurate books and records[27] and to institute a system of internal accounting controls.[28] It also prohibited the falsification of books and records,[29] the deception of auditors in the course of an audit[30] and the payment of overseas bribes.[31] The Bill passed the Senate on September 15, 1976, and was reported to the House Interstate and Foreign Commerce Committee.[32] However, the 94th Congress ended before further progress was made on the Bill.[33]

During the 95th Congress the Senate Committee on Banking, Housing and Urban Affairs heard testimony on Senate Bill S. 305,[34] which was identical to the earlier bill S. 3664.[35] S. 305 again passed the Senate after minor amendments by the Senate Committee on Banking, Housing and Urban Affairs.[36] Meanwhile, the House was considering H.R.

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25. S. 3664, 94th Cong., 2d Sess., 122 CONG. REC. 30,426 (1976).

26. *See* G. GREANIAS & D. WINDSOR, *supra* note 2, at 62; Note, *In Search of an International Solution to Bribery: The Impact of the Foreign Corrupt Practices Act of 1977 on Corporate Behavior*, 12 VAND. J. TRANSNAT'L L. 359, 367 (1979) [hereinafter Note, *In Search of an International Solution*].

27. S. 3664, 94th Cong., 2d Sess. § (2)(A) (1976); *see* Note, *In Search of an International Solution, supra* note 26, at 367.

28. S. 3664, 94th Cong., 2d Sess. § (2)(B) (1976); *see* Note, *In Search of an International Solution, supra* note 26, at 367.

29. S. 3664, 94th Cong., 2d Sess. § (3) (1976); *see* Note, *In Search of an International Solution, supra* note 26, at 367.

30. S. 3664, 94th Cong., 2d Sess. § (4)(A), (B) (1976); *see* Note, *In Search of an International Solution, supra* note 26, at 367.

31. S. 3664, 94th Cong., 2d Sess. § 30A (1976); *see* Note, *In Search of an International Solution, supra* note 26, at 367.

32. *See* S. REP., FOREIGN CORRUPT PRACTICES, *supra* note 5, at 2, *reprinted in* 1977 U.S. CODE CONG. & ADMIN. NEWS at 4099; G. GREANIAS & D. WINDSOR, *supra* note 2, at 62; Note, *In Search of an International Solution, supra* note 26, at 367.

33. *See* S. REP., FOREIGN CORRUPT PRACTICES, *supra* note 5, at 2, *reprinted in* 1977 U.S. CODE CONG. & ADMIN. NEWS at 4099; G. GREANIAS & D. WINDSOR, *supra* note 2, at 62; Note, *In Search of an International Solution, supra* note 26, at 367.

34. S. 305, 95th Cong., 1st Sess. (1977). *See generally Foreign Corrupt Practices and Domestic and Foreign Investment Disclosure Acts of 1977: Hearings on S. 305 Before the Comm. on Banking, Hous. & Urb. Aff.*, 95th Cong. 1st Sess. (1977).

35. *See* S. REP., FOREIGN CORRUPT PRACTICES, *supra* note 5, at 2, *reprinted in* 1977 U.S. CODE CONG. & ADMIN. NEWS at 4099; G. GREANIAS & D. WINDSOR, *supra* note 2, at 63; Note, *In Search of an International Solution, supra* note 26, at 367; *compare* S. 3664, 94th Cong., 2d Sess. (1976) *with* S. 305, 95th Cong., 1st Sess. (1977).

36. *See* G. GREANIAS & D. WINDSOR, *supra* note 2, at 63; Note, *In Search of an International Solution, supra* note 26, at 367.

3815,[37] a bill on unlawful corporate payments. H.R. 3815 differed from S. 305 by taking solely a criminalization approach to the problem of foreign payments.[38] A Conference Committee considered both H.R. 3815 and S. 305 and sent a modified version of S. 305—disclosure and criminalization—to both Houses.[39] Congress believed its dual approach of disclosure and criminalization would be the strongest deterrent to bribery or the concealment of bribery.[40] Congress also believed that this approach would leave no doubt about its serious intent to eliminate bribery. The Bill passed with little debate, and President Carter signed it into law on December 19, 1977.[41] The entire legislative process took less than one year. Unfortunately, the swiftness with which Congress enacted the FCPA is altogether too evident, and the inherent ambiguity of its provisions may have led to the loss of legitimate American business opportunities abroad.

III. THE FOREIGN CORRUPT PRACTICES ACT

A. *Provisions of the Act*

The FCPA was codified as an amendment to the 1934 Act.[42] The criminal prohibition of and civil injunction against foreign payments are

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37. H.R. 3815, 95th Cong., 1st Sess., 123 CONG. REC. 36,303 (1977).

38. *See* H.R. REP., UNLAWFUL PAYMENTS, *supra* note 3, at 6; G. GREANIAS & D. WINDSOR, *supra* note 2, at 63; Note, *In Search of an International Solution, supra* note 26, at 367; *compare* H.R. 3815, 95th Cong., 1st Sess. (1977) *with* S. 305, 95th Cong., 1st Sess. (1977).

39. *See* JOINT EXPLANATORY STATEMENT OF THE HOUSE COMM. OF CONFERENCE, FOREIGN CORRUPT PRACTICES, H.R. CON. REP. 831, 95th Cong., 1st Sess. 9, *reprinted in* 1977 U.S. CODE CONG. & ADMIN. NEWS 4121, 4121; G. GREANIAS & D. WINDSOR, *supra* note 2, at 63; Note, *In Search of an International Solution, supra* note 26, at 368.

40. *See* H.R. REP., UNLAWFUL PAYMENTS, *supra* note 3, at 6; Maurice, *supra* note 13, at 460; Soloman & Gustman, *supra* note 10, at 71; Comment, *FCPA: Impact and Future, supra* note 2, at 409.

41. Foreign Corrupt Practices Act of 1977, 123 CONG. REC. 38,776 (1977); *see Foreign Corrupt Practices and Investment Disclosure Bill: Statement on Signing S. 305 into Law,* 13 WEEKLY COMP. PRES. DOC. 1909 (Dec. 20, 1977). The Carter Administration had very limited involvement in the passage of the Act. The SEC and Congress had conducted most of their hearings by the time Carter took office. The Act passed through Congress far too quickly for the President to have had much input. *See supra* note 18.

42. Foreign Corrupt Practices Act, Pub. L. No. 95-213, 91 Stat. 1494 (1977); *see* Witherspoon, *Multinational Corporations—Governmental Regulation of Business Ethics Under the Foreign Corrupt Practices Act of 1977: An Analysis,* 87 DICK. L. REV. 531, 542 (1983); *cf. Foreign Corrupt Practices Act of 1977 and the Regulation of Ques-*

found in the Act's antibribery provisions. The disclosure requirements take the form of accounting provisions.

1. The Antibribery Provisions

The antibribery provisions of the Act carry criminal penalties of $1 million fines for any corporation,[43] and $10 thousand fines plus possible prison sentences of up to five years for any individual,[44] found to have violated the Act. Three conditions make a foreign payment unlawful. First, the payment must be made "corruptly."[45] This unequivocal requirement has caused a great deal of interpretive difficulty because the Act does not define "corruptly."[46] "Corruptness" itself does not suffice, however, leading to the second requirement of a "business nexus": the payment must be made to assist someone in obtaining or retaining business.[47] Finally, the payment or offer to pay (completion of the payment is not required for a violation of the Act) must be made using some

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tionable Payments, 34 BUS. LAW. 623, 641 (1979) [hereinafter *FCPA and Questionable Payments*] (statement of Harvey L. Pitt, Gen. Couns., SEC) ("[T]he Foreign Corrupt Practices Act has to be viewed as an integral part of the Securities Exchange Act and all the law and lore that has developed over the years in that context.").

43. FCPA § 104(b)(1)(A), 15 U.S.C. § 78dd-2(b)(1)(A) (1982); *see* Atkeson, *supra* note 7, at 713; Comment, *The Foreign Corrupt Practices Act: Curse or Cure?*, 19 AM. BUS. L.J. 73, 75 (1981) [hereinafter Comment, *FCPA: Curse or Cure?*].

44. FCPA § 104(b)(1)(B), 15 U.S.C. § 78dd-2(b)(1)(B) (1982); *see* Atkeson, *supra* note 7, at 713; Comment, *FCPA: Curse or Cure?*, *supra* note 43, at 75.

45. FCPA § 104(a), 15 U.S.C. § 78dd-2(a) (1982); *see* Atkeson, *supra* note 7, at 713, 715; Maurice, *supra* note 13, at 489; Shine, *The Antibribery Provisions of the Foreign Corrupt Practices Act*, in FOREIGN CORRUPT PRACTICES ACT: THREE YEARS AFTER PASSAGE 100 (Practicing Law Institute, Corporate Law and Practice Course Handbook Series, No. 360, 1981); Comment, *FCPA: Impact and Future*, *supra* note 2, at 420.

46. The United States Code contains at least twenty laws that involve a "corrupt" standard, and yet do not define "corrupt." *See, e.g.*, 2 U.S.C. § 266 (persons to whom provisions of chapter on the Congress apply); 7 U.S.C. § 12a (registration of commission merchants and brokers who have engaged in corrupt acts); 10 U.S.C. § 931 (perjury statute applicable to Armed Forces); 18 U.S.C. § 201 (bribery of public officials and witnesses); 18 U.S.C. § 215 (receipt of gifts for procuring loans); 18 U.S.C. § 1503 (influencing or injuring officer, juror or witness); 18 U.S.C. § 1505 (obstruction of proceedings).

47. FCPA § 104(a), 15 U.S.C. § 78dd-2(a) (1982); *see* Atkeson, *supra* note 7, at 715; *FCPA and Questionable Payments*, *supra* note 42, at 627 (statement of Timothy Atkeson, Chairperson, Committee on Multinational Corporations); Timmeny, *SEC Enforcement of the Foreign Corrupt Practices Act*, 2 LOY. L.A. INT'L & COMP. L. ANN. 25, 32 (1979); Comment, *FCPA: Impact and Future*, *supra* note 2, at 421.

means or instrumentality of interstate commerce or the mails.[48] Nearly anything will satisfy this requirement; of the three, it is the least difficult to establish.

The antibribery provisions apply to two classes of legal persons. They prohibit "any issuer which has a class of securities registered pursuant to [section 12 of the 1934 Act] or which is required to file reports under section [15(d) of that title], or . . . any officer, director, employee, or agent . . . or any stockholder . . . of such issuer"[49] from making foreign payments. They also subject "domestic concerns"—which the Act defines as "any individual who is a citizen, national, or resident of the United States"[50] or any "corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship"[51] that either has its principal place of business in the United States or is organized under the laws of a United States state, territory, possession or commonwealth—to the same prohibitions.[52]

The Act forbids unlawful payments to three categories of recipients. Foreign officials probably comprise the largest potential class of recipients because they include "any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or any person acting in an official capacity."[53] However, they do not include any foreign governmental employee "whose duties are essentially ministerial or clerical."[54] Commentators have interpreted this exclusion to permit so-called facilitating or grease payments.[55] The Act does not define these payments, but they are generally held to be payments "which merely move a particular matter toward an eventual act or decision or which do

48. FCPA § 104(a), 15 U.S.C. § 78dd-2(a) (1982).
49. *Id.* § 103(a), 15 U.S.C. § 78dd-1(a) (1982).
50. *Id.* § 104(d)(1)(A), 15 U.S.C. § 78dd-2(d)(1)(A) (1982).
51. *Id.* § 104(d)(1)(B), 15 U.S.C. § 78dd-2(d)(1)(B) (1982).
52. *Id.* § 104(a), 15 U.S.C. § 78dd-2(a) (1982).
53. *Id.* § 104(d)(2), 15 U.S.C. § 78dd-2(d)(2) (1982).
54. *Id.*
55. *See* H.R. REP., UNLAWFUL PAYMENTS, *supra* note 3, at 8; Atkeson, *supra* note 7, at 716; Shine, *supra* note 45, at 104; Soloman & Gustman, *supra* note 10, at 73; Comment, *FCPA: Impact and Future, supra* note 2, at 420; Note, *Is the SEC the Appropriate Federal Agency for Policing Bribery of Foreign Nationals by Multinational Public Corporations?*, 13 CASE W. RES. J. INT'L L. 517, 530 (1981); Note, *The Foreign Corrupt Practices Act: Problems of Extraterritorial Application,* 12 VAND. J. TRANSNAT'L L. 689, 698 (1979) [hereinafter Note, *FCPA: Extraterritorial Application*]. One may also imply justification for grease payments from the requirement that an unlawful payment be made "corruptly." *See* Brennan, *Amending the Foreign Corrupt Practices Act of 1977: "Clarifying" or "Gutting" a Law?*, 11 J. LEGIS. 56, 65 (1984); Maurice, *supra* note 13, at 486; Soloman & Gustman, *supra* note 10, at 73.

not involve any discretionary action."[56] The Act also interdicts payments to foreign political parties or candidates for office.[57] Finally, the FCPA prohibits payments to any person when the payor knows or has reason to know "that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly,"[58] to any foreign official, political party or candidate for office. Essentially, this part of the Act pertains to payments made through intermediary foreign agents used by a corporation to transact business.[59] A corporation may not pay commissions to an agent if it knows or suspects that the agent will use the funds to bribe a foreign official. A request for an unusually large, unmerited commission provides an immediate warning that the agent does not intend to keep the entire amount he receives. The Act prohibits any use of an agent to do indirectly what a company could not do directly, for example, bribe a foreign official. Therefore, a corporation will be liable for the acts of its agents if it knew or had reason to know that its agents would make a bribe using the commission money.

Enforcement of the antibribery provisions is bifurcated. Under section 103 of the Act, the SEC has civil enforcement authority over violations by issuers or persons related to issuers.[60] Section 104 gives the DOJ civil and criminal enforcement authority over domestic concerns.[61]

2. The Accounting Provisions

The accounting provisions of the Act may have deterred illicit payments more than any other section of the FCPA, at least with regard to public corporations. The disclosure requirements, as the accounting provisions of the FCPA set forth, apply to all issuers registered under the 1934 Act.[62] Issuers must "make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions

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56. H.R. REP., UNLAWFUL PAYMENTS, *supra* note 3, at 8; *see* Atkeson, *supra* note 7, at 716; Soloman & Gustman, *supra* note 10, at 73; Comment, *The Foreign Corrupt Practices Act of 1977: A Solution or A Problem?*, 11 CAL. W. INT'L L.J. 111, 122 (1981).

57. FCPA § 104(a)(2), 15 U.S.C. § 78dd-2(a)(2) (1982).

58. *Id.* § 104(a)(3), 15 U.S.C. § 78dd-2(a)(3) (1982).

59. S. REP., FOREIGN CORRUPT PRACTICES, *supra* note 5, at 10, *reprinted in* 1977 U.S. CODE CONG. & ADMIN. NEWS at 4108; Shine, *supra* note 45, at 105.

60. *See* Atkeson, *supra* note 7, at 705; Shine, *supra* note 45, at 98-99; Witherspoon, *supra* note 42, at 545; Comment, *FCPA: Curse or Cure?*, *supra* note 43, at 76.

61. *See* Shine, *supra* note 45, at 98-99; Witherspoon, *supra* note 42, at 545; Comment, *FCPA: Curse or Cure?*, *supra* note 43, at 76.

62. FCPA §§ 102-103, 15 U.S.C. §§ 78m, 78dd-1 (1982).

and dispositions of [their] assets."[63] They must also "devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances"[64] that all transactions are authorized and recorded in such a way as to comply with generally accepted accounting principles (GAAP) and to maintain accountability for the assets,[65] that any access to assets is authorized,[66] and that the books and records are periodically checked against existing assets to determine any possible discrepancies.[67] The SEC has civil enforcement authority against these issuers.

B. *Criticisms of the Act*

The United States business community and foreign sovereigns have not received the FCPA enthusiastically. One cannot expect the Act to succeed since it is a unilateral effort to eliminate foreign bribery.[68] Commentators have attacked it as an arrogant attempt by the United States to export its morality and enforce its laws extraterritorially.[69] These accusations cast doubt, once again, on the wisdom of having a criminalization approach to foreign payments, raising anew the issues of enforcement difficulties and potential foreign relations problems in the application of United States penal laws abroad.

1. The Antibribery Provisions

The greatest criticism of the antibribery provisions is that the language is vague,[70] which is a consequence of the Act's hasty enactment.

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63. *Id.* § 102, 15 U.S.C. § 78m(b)(2)(A) (1982).

64. *Id.* § 102(b)(2)(B), 15 U.S.C. § 78m(b)(2)(B) (1982).

65. *Id.* § 102(b)(2)(B)(i)-(ii), 15 U.S.C. § 78m(b)(2)(B)(i)-(ii) (1982).

66. *Id.* § 102(b)(2)(B)(iii), 15 U.S.C. § 78m(b)(2)(B)(iii) (1982).

67. *Id.* § 102(b)(2)(B)(iv), 15 U.S.C. § 78m(b)(2)(B)(iv) (1982).

68. Surrey, *The Foreign Corrupt Practices Act: Let the Punishment Fit the Crime,* 20 HARV. INT'L L.J. 293, 301 (1979); Witherspoon, *supra* note 42, at 553; Pierce, *Should the FCPA be Amended or Repealed?,* Legal Times of Wash., Jan. 7, 1980, at 13, col. 3; *see* Barone & Kim, *International Payoffs: Profits and Morality,* 4 INT'L J. COMP. & APPLIED CRIM. JUST. 57, 60 (1980).

69. Witherspoon, *supra* note 42, at 553; *see* G. GREANIAS & D. WINDSOR, *supra* note 2, at 122; Bader & Shaw, *Amendment of the Foreign Corrupt Practices Act,* 15 N.Y.U. J. INT'L L. & POL. 627, 628 (1983). *But see* Wade, *supra* note 4, at 260-61 ("It is an oversimplification to characterize the FCPA as merely an effort to export morality.").

70. There is a general consensus that the Act is vague. Nearly every proposed amendment has suggested clarifications to the Act. These suggestions have included new definitions of "domestic concern" and "foreign officials," deletion of the "reason to know" language, replacing it with "directs or authorizes" language and the enumeration of specific exemptions in the Act, particularly for any payment lawful in the foreign

Unambiguous interpretation of certain phrases of the FCPA antibribery provisions is crucial to effective enforcement of the Act without imposing any undue hardships on United States businesses. Key terms include "corruptly,"[71] "in furtherance of,"[72] "foreign official,"[73] "obtaining or retaining business,"[74] and "knowing or having reason to know."[75] The Act leaves most of these terms undefined,[76] causing one commentator to complain that the FCPA is "not polished legislation."[77] The Act interprets only the phrase "foreign official." It leaves unexplained other language that could easily be misconstrued or interpreted in more than one way. This lack of definition has caused commentators to remark that "every major piece of new legislation comes replete with language that will gain definition with time and practice . . . . The difference with the Foreign Corrupt Practices Act is that . . . these various words and phrases are themselves not going to admit of definition . . . ."[78]

The "knowing or having reason to know" language in the FCPA is presently one of the areas that causes the most concern in the American business community.[79] The Act and its legislative history delineate no boundaries for this uncertain standard, and commentators generally consider it too harsh for a number of reasons. Critics have noted the absence of a similar "reason to know" standard in the domestic bribery statute.[80] Furthermore, the standard holds United States companies liable for the acts of their agents overseas without giving any guidance as to the extent to which the corporations should investigate the agents.[81] Does "reason

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country. G. GREANIAS & D. WINDSOR, *supra* note 2, at 97; Brennan, *supra* note 55, at 62; Roberts & Abbott, *The Law of Questionable Foreign Payments: Implications for American International Business,* in PRIVATE INVESTORS ABROAD—PROBLEMS AND SOLUTIONS IN INTERNATIONAL BUSINESS IN 1982, at 123, 153 (1982); Witherspoon, *supra* note 42, at 560; Comment, *Modifying the Foreign Corrupt Practices Act: The Search for a Practical Standard,* 4 NW. J. INT'L L. & BUS. 203, 207 (1982) [hereinafter Comment, *Modifying the FCPA*]; *see* Bader & Shaw, *supra* note 69, at 628.

71. FCPA § 104(a), 15 U.S.C. § 78dd-2(a) (1982).

72. *Id.*

73. *Id.* § 104(d)(2), 15 U.S.C. § 78dd-2(d)(2) (1982).

74. *Id.* § 104(a)(1), 15 U.S.C. § 78dd-2(a)(1) (1982).

75. *Id.* § 104(a)(3), 15 U.S.C. § 78dd-2(a)(3) (1982).

76. G. GREANIAS & D. WINDSOR, *supra* note 2, at 97; Comment, *FCPA: Impact and Future, supra* note 2, at 406; *see* Witherspoon, *supra* note 42, at 560.

77. Surrey, *supra* note 68, at 296.

78. G. GREANIAS & D. WINDSOR, *supra* note 2, at 97.

79. Bader & Shaw, *supra* note 69, at 634; Comment, *Modifying the FCPA, supra* note 70, at 209-10.

80. Witherspoon, *supra* note 42, at 562.

81. *See* Maurice, *supra* note 13, at 483-85; Witherspoon, *supra* note 42, at 562; Comment, *Amending the FCPA, supra* note 13, at 1758.

to know" mean full, actual knowledge that an agent has conveyed or will convey part of a commission to a foreign official? Or does some constructive knowledge standard, which is less than actual knowledge, satisfy the "reason to know" requirement? If so, how much less actual knowledge is necessary? The Act never makes this standard clear.[82] An enforcement body may very well attribute knowledge to a corporation that it has only in hindsight.[83]

The definition of "foreign official" in the Act also contributes to interpretive problems. The FCPA excludes from its prohibitions any payments made to employees whose duties are essentially "ministerial or clerical."[84] However, the FCPA does not define the limits of the term "ministerial;" therefore, it becomes impossible to determine the degree of discretion a clerk may possess or to what extent the activity he performs is in fact ministerial.[85]

Perhaps no word in the Act causes as much interpretational difficulty as does the word "corruptly." Corrupt conduct is intentional conduct in which one engages with an evil motive.[86] The question arises as to whether negligent conduct can be corrupt. Normally, criminal sanctions attach only to conduct that constitutes a crime. Such conduct requires a "concurrence of an evil-meaning mind with an evil-doing hand."[87] Bribery consists of an intent to influence, which forms the *mens rea,* accompanied by the corrupt giving of something of value, which completes the *actus reus.*[88] The absence of one of these elements negates the criminal-

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82. *See* Brennan, *supra* note 55, at 62-63. A question exists whether a reckless payment will satisfy this standard. *See infra* notes 86-92 and accompanying text.

83. This may not in fact be a serious problem. No case brought during the last decade has hinged on this circumstance. *See* Statement of John C. Keeney, Deputy Ass't Atty. Gen., U.S. Dep't of Just., Crim. Div., before the Senate Subcomm. on Int'l Fin. and Monetary Pol'y Concerning S. 430 at 3 (June 10, 1986) [hereinafter Keeney Statement]; S. REP. NO. 486, 99th Cong., 2d Sess. 25 (1986) (additional views of Senator Proxmire on S. 430).

84. FCPA § 104(d)(2), 15 U.S.C. § 78dd-2(d)(2) (1982).

85. Surrey, *supra* note 68, at 299; Comment, *Amending the FCPA, supra* note 13, at 1752.

86. S. REP., FOREIGN CURRENT PRACTICES, *supra* note 5, at 10, *reprinted in* 1977 U.S. CODE CONG. & ADMIN. NEWS at 4108; Atkeson, *supra* note 7, at 715; Elden & Sableman, *Negligence Is Not Corruption: The Scienter Requirement of the Foreign Corrupt Practices Act,* 49 GEO. WASH. L. REV. 819, 828 (1981); Maurice, *supra* note 13, at 483; Shine, *supra* note 45, at 103.

87. Morissette v. United States, 342 U.S. 246, 251 (1952). This is the traditional requirement of the *mens rea* as well as the *actus reus.*

88. *See* United States v. Barash, 365 F.2d 395, 401 (2d Cir. 1966).

ity of the act, making criminal sanctions unsuitable.[89] In other words, criminal punishment is appropriate only in instances of willful, intentional and wrongful behavior.[90] The proper reading of "corruptly" in conjunction with the "reason to know" language demonstrates that acting with constructive knowledge should not suffice.[91] Corruptness requires intent and, therefore, actual knowledge.[92] Thus, it seems fairly certain that mere negligence will not result in a violation of the FCPA.[93]

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89. Questions are raised as to whether the Act exempts extortion payments from its scope. The legislative history of the FCPA indicates clearly that the antibribery provisions do not cover a true extortion payment, such as a payment made to prevent a threat of terrorist activity. S. REP., FOREIGN CORRUPT PRACTICES, *supra* note 5, at 11, *reprinted in* 1977 U.S. CODE CONG. & ADMIN. NEWS at 4108. However, the Act does not provide a defense to a claim that a governmental official demanded the payment as the price for gaining entry to a foreign market or obtaining a contract. At some point, the United States corporation would have to make a conscious decision whether to make the payment. If a corporation pays the bribe, there is a corrupt intent on the part of the payor. *Id.* at 10, *reprinted in* 1977 U.S. CODE CONG. & ADMIN. NEWS at 4108. This is precisely the type of payment that Congress intended to forbid. *See infra* notes 363-75 and accompanying text.

90. Elden & Sableman, *supra* note 86, at 828, 834.

91. *Id.* at 828. If a corporation is held liable for the acts of an overseas agent, but has only some form of constructive knowledge of the payments, then it is being held criminally liable for an act which, for the corporation, constitutes mere negligence.

92. *Id.* A corporation does not violate the FCPA merely by paying an agent commissions and suspecting that the agent will pass some portion of the payment to a foreign official. Rather, the corporation must "*corruptly* . . . pay . . . money . . . or . . . anything of value to . . . any person, *while knowing or having reason to know*" that the agent will in turn pay some government official. FCPA § 103(a)(3), 15 U.S.C. § 78dd-2(a)(3) (1982) (emphasis added). Thus, the company must intend that the agent will convey payment to a foreign official. Of course, the "reason to know" standard creates the difficulty of a reckless payment in this situation and whether recklessness satisfies the reason to know standard. *See supra* notes 82-83 and accompanying text. In any event, recklessness is not negligence. Therefore, it seems safe to say that negligence does not violate the Act.

93. A bifurcated standard may be desirable as far as "corruptness" is concerned. Proof of an evil intent requires some form of subjective standard. This does not create difficulties when the DOJ or SEC alleges that the corrupt payment was made directly by an issuer or domestic concern through one of its officers or directors. There generally is no undue burden in requiring the SEC or DOJ to prove the subjective intent of an issuer or domestic concern that they can subject to process within the boundaries of the United States. Difficulties arise, however, when the DOJ or SEC alleges that a foreign agent made the corrupt payment. In this situation, the DOJ or SEC can rarely obtain any form of jurisdiction over the agent and, therefore, cannot question him as to his motives. *See infra* notes 317-18 and accompanying text. It is also more likely that the issuer or domestic concern involved had no actual knowledge of the agent's payments. Under these circumstances an objective standard of constructive knowledge, constituting mere negli-

These ambiguities are perhaps the clearest evidence that the FCPA is a very poorly drafted piece of legislation. The interpretational problems that the FCPA creates have caused many corporations to be particularly wary about conducting transactions overseas.

The FCPA specifically prohibits bribes made by United States entities—issuers or domestic concerns—to foreign officials. Most industrialized nations, as well as many of the lesser-developed countries, forbid bribes to their own public officials but remain silent as to foreign bribery.[94] These countries, rejecting the United States initiative, have not enacted similar legislation despite the expectations of Congress.[95] Indeed, why should they? The FCPA is a major export incentive for every foreign business. Many foreign governments, if they do not implicitly encourage bribery by the nonenforcement of their domestic antibribery laws, at the very least do not discourage foreign payoffs by their corporations. Overseas competitors thus have no real legal restraints imposed on them by their governments. The United States alone polices the competitive tactics that its domestic corporations use abroad. This puts United States companies at a distinct disadvantage in doing business with foreign entities. In many nations, foreign entities not only accept bribes as a business practice but expect payment before they will complete any transaction.[96]

Accurate measurements of the effects of the FCPA are difficult to ob-

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gence, may in fact be necessary if enforcement is to be at all effective.

94. For a compilation of foreign statutes that forbid domestic bribery, see Y. KUGEL, J. CARRO & N. COHEN, GOVERNMENT REGULATION OF BUSINESS ETHICS (1981). The FCPA is unique as a law that forbids *foreign* bribery. *See Business Without Bribes,* NEWSWEEK, Feb. 19, 1979, at 63.

95. Those who enacted the FCPA believed that if the United States took a moral stance in business, backed by its economic power, the rest of the world would naturally follow suit. G. GREANIAS & D. WINDSOR, *supra* note 2, at 122. They also presupposed that the United States would maintain its position of economic hegemony through its superior technology and competitive technique. *Id.* Unfortunately, these assumptions have proved false. The rest of the world not only has failed to enact similar legislation, but it lacks any incentive whatsoever to do so. Furthermore, the period of United States economic hegemony may well be ending. "In short, the rest of the world does not agree with us, and we do not have the wherewithal—economic, diplomatic, or moral—to impose our view in lieu of theirs." *Id.* at 123; *see* 1 THE PRESIDENT'S EXPORT COUNCIL, THE EXPORT IMPERATIVE: REPORT TO THE PRESIDENT 29 (1980) [hereinafter THE EXPORT IMPERATIVE].

96. G. GREANIAS & D. WINDSOR, *supra* note 2, at 122-23; *Big Profits in Big Bribery,* TIME, Mar. 19, 1981, at 58-67; *Bribery: A Shocker in U.S., But a Tradition Overseas,* U.S. NEWS & WORLD REP., Apr. 12, 1976, at 33-34; *Coping With the New Rules of Conduct,* BUS. WK., Oct. 10, 1977, at 76; *Why Americans Pay Bribes to Do Business Abroad,* U.S. NEWS & WORLD REP., June 2, 1975, at 57-58.

tain,[97] yet empirical evidence suggests that the Act has had a deleterious impact on United States business abroad.[98] First, United States companies are turning down requests for payoffs and, consequently, are losing deals.[99] Indeed, Congress knowingly sacrificed increased sales abroad by its conscious decision that business obtainable only by bribery would be lost, in order to maintain the integrity of United States corporations. The Act is achieving precisely this purpose. Second, the Act is causing corporations to be overcautious and turn down legitimate business opportunities because they are unsure whether a proposed transaction will violate the FCPA.[100] Again, this problem hearkens back to the inherent weaknesses and ambiguities found in the Act.

2. The Accounting Provisions

The accounting provisions of the FCPA also reflect the haste with which Congress drafted and passed the Act. Interpretive debate centers on the terms "in reasonable detail,"[101] "accurately and fairly,"[102] "internal accounting controls"[103] and "reasonable assurances."[104] The major fault in these provisions is the absence of a materiality standard.[105] The

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97. *See Taxation of American Workers Overseas and the Foreign Corrupt Practices Act Are Trade Disincentives That Cost U.S. Jobs and Exports,* 126 CONG. REC. 18,601-02 (1980) (remarks of Mr. Chafee); GAO REPORT, *supra* note 7, at 14; THE EXPORT IMPERATIVE, *supra* note 95, at 17-18, 90-92; Witherspoon, *supra* note 42, at 554-55.

98. GAO REPORT, *supra* note 7, at 14-17; *see* Sweeney, *The SEC Interpretive and Enforcement Program Under the FCPA,* 9 SYRACUSE J. INT'L L. & COM. 273, 273-74 (1982); Witherspoon, *supra* note 42, at 554; Comment, *FCPA: Curse or Cure?, supra* note 43, at 427; Comment, *Amending the FCPA, supra* note 13, at 1749. *Contra* Wade, *supra* note 4, at 260-61 (many claim the FCPA has caused a loss of business, but such critics fail to produce data needed to assess extent of losses).

99. *See* Bader & Shaw, *supra* note 69, at 628; Witherspoon, *supra* note 42, at 554; Note, *The Criminalization of American Extraterritorial Bribery: The Effect of the Foreign Corrupt Practices Act of 1977,* 13 N.Y.U. J. INT'L L. & POL. 645, 659 (1981) [hereinafter Note, *Criminalization of American Bribery*]; Vicker, *U.S. Firms Lose Ground in Mideast,* Wall St. J., July 2, 1980, at 19, col. 2; *U.S. Firms Say '77 Ban on Foreign Payoffs Hurts Overseas Sales,* Wall St. J., Aug. 2, 1979, at 1, col. 6 [hereinafter *Ban Hurts Overseas Sales*]; Butterfield, *U.S. Law Against Bribes Blamed for Millions in Lost Sales in Asia,* N.Y. Times, June 26, 1978, at A1, col. 5.

100. Evidence of this phenomenon is mostly empirical or speculative. *See* Witherspoon, *supra* note 42, at 563; Vicker, *supra* note 99, at 19, col. 2; *Ban Hurts Overseas Sales, supra* note 99, at 1, col. 6; Butterfield, *supra* note 99, at A1, col. 5.

101. FCPA § 102(b)(2)(A), 15 U.S.C. § 78m(b)(2)(A) (1982).

102. *Id.*

103. *Id.* § 102(b)(2)(B), 15 U.S.C. § 78m(b)(2)(B) (1982).

104. *Id.*

105. *See* GAO REPORT, supra note 7, at 19, 25-31; Brock, *supra* note 16, at 1088.

FCPA also lacks any explanation of what constitutes "reasonable detail" in recording transactions or "reasonable assurances" that all transactions are authorized, conform to GAAP and accurately reflect the true assets of the company.[106] Furthermore, these disclosure requirements are extremely burdensome,[107] particularly for smaller companies, and are not cost-effective.[108] Finally, they apply to every issuer subject to the 1934 Act reporting requirements, even those with no overseas business.[109] The scope of the Act may, therefore, be excessive.[110]

The SEC intentionally refused to recommend a materiality standard for the Act. In its opinion, materiality was too narrow an index and would not be certain of covering every situation. For example, a $200 payment may be material if made by a small company, yet immaterial if paid by a conglomerate. By the same token, a payment of $20,000 may be immaterial to a conglomerate even if the conglomerate made the payment with an intent to influence a foreign official. The appropriate test should be one of reasonableness, which would allow flexibility in responding to particular facts and circumstances. Address of Harold M. Williams, Chm., SEC, to the SEC Developments Conference of the American Institute of Certified Public Accountants, Jan. 13, 1981, *reprinted in* 46 Fed. Reg. 11,544, 11,546 (1981). The SEC did not believe that negligent errors would violate the Act. "Neither its text and legislative history nor its purposes suggest that occasional inadvertent errors were the kind of problem that Congress sought to remedy in passing the Act." *Id.* at 11,547.

106. *See* GAO REPORT, *supra* note 7, at 20-22.

107. *See* GAO REPORT, *supra* note 7, at 13-14; Comment, *FCPA: Curse or Cure?, supra* note 43, at 85.

108. *See* GAO REPORT, *supra* note 7, at 13.

109. *The Business Accounting and Foreign Trade Simplification Act: Hearings on S. 414 Before the Subcomm. on Int'l Fin. and Monetary Pol'y and the Subcomm. on Secs. of the Sen. Comm. on Banking, Hous. & Urb. Aff.*, 98th Cong., 1st Sess. (1983) (statements of Michael A. Samuels, Vice-President, International, Chamber of Commerce of the United States; and of William Blasier, Gen. Counsel, Nat'l Ass'n of Mfrs.) [hereinafter *Hearings on S. 414*]; S. REP., FOREIGN CORRUPT PRACTICES, *supra* note 5, at 7, *reprinted in* 1977 U.S. CODE CONG. & ADMIN. NEWS at 4105; Atkeson, *supra* note 7, at 704; Goebel, *supra* note 2, at 30; Comment, *FCPA: Impact and Future, supra* note 2, at 405, 416. The SEC saw these disclosure requirements as a necessary part of their efforts to prevent the deception of unwary investors by those corporations that would attempt to conceal their slush funds. *See supra* note 14 and accompanying text. Accordingly, the drafters of the Act added the accounting provisions to section 13(b) of the 1934 Act in order to strengthen the accuracy of corporate books and records and the reliability of the audit process and to enhance public confidence in the securities markets by assuring that corporate recordkeeping is honest. S. REP., FOREIGN CORRUPT PRACTICES, *supra* note 5, at 7, *reprinted in* 1977 U.S. CODE CONG. & ADMIN. NEWS at 4105.

110. *See Hearings on S. 414, supra* note 109 (statements of John T. Subak, Group Vice-President & Gen. Counsel, Rohm & Haas Co.; Michael A. Samuels, Vice-President, International, Chamber of Commerce of the United States; and William Blasier, Gen. Counsel, Nat'l Ass'n of Mfrs.); SENATE COMM. ON BANKING, HOUS. & URB.

Most of the Act consists of ambiguities such as these, which make transacting business abroad exceedingly difficult even for American companies that fully intend to be ethical in their dealings. Many congressmen have recognized the need for clarification in the FCPA and have either authorized or sponsored bills to amend the Act.[111] These proposed amendments demonstrate that Congress is attempting to aid American businesses abroad yet still maintain the ethical position that the FCPA adopted.

C. *Proposed Amendments to the Act*

Congressmen have proposed bills to amend the FCPA almost continually since 1980. No fewer than twelve bills to that effect have been introduced in Congress, five of which appeared during 1986 and 1987.[112]

1. Past Efforts at Amendments

The Business Accounting and Foreign Trade Simplification Act, Senate Bill S. 708, was the first bill that gained any momentum along the path to amend the FCPA.[113] The Bill would have altered significantly

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AFF., BUSINESS ACCOUNTING AND FOREIGN TRADE SIMPLIFICATION ACT, S. REP. NO. 209, 97th Cong., 1st Sess. (1981) [hereinafter S. REP., BUSINESS ACCOUNTING ACT].

111. *See* 131 CONG. REC. S1298-1301 (daily ed. Feb. 7, 1985) (statements of Senators Heinz, Chaffee, Garn and D'Amato sponsoring bill to amend FCPA); 129 CONG. REC. E1127-28 (daily ed. Mar. 17, 1983) (same); 129 CONG. REC. S980-83 (daily ed. Feb. 3, 1983) (same).

112. H.R. 3, 100th Cong., 1st Sess. (1987) [hereinafter H.R. 3]; Trade and International Economic Policy Reform Act of 1986, H.R. 4800, 99th Cong., 2d Sess. § 701 (1986) [hereinafter H.R. 4800]; Export Enhancement Act of 1986, H.R. 4708, 99th Cong., 2d Sess. § 402 (1986) [hereinafter H.R. 4708]; Foreign Trade Practices Act of 1986, H.R. 4389, 99th Cong., 2d Sess. (1986) [hereinafter H.R. 4389]; Business Accounting and Foreign Trade Simplification Act, S. 430, 99th Cong., 2d Sess., 131 CONG. REC. S1299-1301 (daily ed. Feb. 7, 1985) [hereinafter S. 430]; Trade Partnership Act of 1985, H.R. 3522, 99th Cong., 1st Sess. (1985) [hereinafter H.R. 3522]; Business Practices and Records Act of 1983, S. 414, 98th Cong., 1st Sess. (1983), 129 CONG. REC. S981-83 (daily ed. Feb. 3, 1983) [hereinafter S. 414]; H.R. 2754, 98th Cong., 1st Sess. (1983), 129 CONG. REC. H2369 (daily ed. Apr. 26, 1983) [hereinafter H.R. 2754]; H.R. 2157, 98th Cong., 1st Sess. (1983), 129 CONG. REC. E1127 (daily ed. Mar. 17, 1983) [hereinafter H.R. 2157]; H.R. 2530, 97th Cong., 1st Sess. (1981); S. 708, 97th Cong., 1st Sess. (1981) [hereinafter S. 708]; S. 2763, 96th Cong., 2d Sess. (1980), 126 CONG. REC. S12484 (daily ed. May 28, 1980) [hereinafter S. 2763]. H.R. 2754 was the companion bill to S. 414; H.R. 2530 was the companion bill to S. 414; H.R. 2530 was the companion to S. 708; S. 2763 was the forerunnner to S. 708. None of these bills received much legislative consideration.

113. S. 708, *supra* note 112.

both the accounting and the antibribery provisions of the Act.

S. 708 would have amended the accounting provisions of the Act by combining its internal accounting controls and recordkeeping requirements. The Bill would have defined "reasonable detail" and "reasonable assurances" in terms of a "level . . . as would satisfy prudent individuals in the conduct of their own affairs, having in mind a comparison between benefits to be obtained and costs to be incurred in obtaining such benefits."[114] S. 708 was, therefore, the first proposal to introduce a cost/benefit analysis to the Act. The Bill would have eliminated criminal liability for the failure to institute a system of internal accounting controls and would have imposed civil liability only if the issuer could not show a good faith attempt to comply with that requirement.[115] S. 708 would have subjected all persons to civil and criminal penalties for knowingly circumventing the accounting controls requirements.[116] Finally, S. 708 would have clarified the liability of a parent corporation for the failure of a subsidiary to comply with the accounting requirements.[117]

The drafters of S. 708 attempted to amend the antibribery provisions of the FCPA. As a cosmetic alteration, they would have changed the title of the Act to the Business Accounting and Foreign Trade Simplification Act[118] in order to eliminate the negative implications of the term "Foreign Corrupt Practices."[119] The Bill would have repealed section 103 of the Act entirely, thus vesting all civil and criminal enforcement authority for the antibribery provisions in the DOJ.[120] S. 708 also would have eliminated the third category of persons to whom payments are forbidden, namely, any person to whom a payment is made by a payor who has "reason to know" that the payment will end up with a foreign official or political party. The Bill would have replaced the "reason to know" language with the phrase "direct or authorize, expressly or by a course of conduct."[121]

S. 708 specifically would have excluded five types of payments from the prohibitions of the Act: (1) "any facilitating or expediting pay-

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114. *Id.* § 6.

115. *Id.* § 4(b).

116. *Id.*

117. *Id.*

118. *Id.* § 3.

119. 129 CONG. REC. S980 (daily ed. Feb. 3, 1983) (statement of Mr. Chafee); Brennan, *supra* note 55, at 66; Witherspoon, *supra* note 42, at 578; Note, *Criminalization of American Bribery, supra* note 99, at 667.

120. S. 708, *supra* note 112, § 5(a)(1).

121. *Id.* § 5(b).

ment;"[122] (2) "any payment . . . lawful under the law and regulations of the foreign official's country;"[123] (3) any "courtesy" or "token of regard or esteem;"[124] (4) "any expenditures, including travel and lodging expenses, associated with the selling or purchasing of goods or services;"[125] and (5) "any ordinary expenditures, including travel and lodging expenses, associated with the performance of a contract."[126]

S. 708 also would have broadened the powers of the Attorney General and the DOJ in civil investigations, granting them the power to seek injunctions, subpoena witnesses and evidence and to make "such rules . . . as may be necessary . . . to implement the provisions of this subsection."[127] The Bill would have made the Act the sole criminal prosecution device for illegal foreign payments.[128] It would have required the establishment of guidelines for compliance with the Act and the creation of review procedures to provide responses to specific inquiries about enforcement intentions.[129] S. 708 would have excluded from the Freedom of Information Act[130] (FOIA) all information revealed to the DOJ in connection with such a request. Finally, S. 708 would have encouraged the President to pursue actively an international agreement on illicit foreign payments.[131]

The Senate passed S. 708 on November 23, 1981,[132] but the Bill failed to pass in the House before the end of the session. The Bill was reintroduced in 1983 as S. 414, which was substantively identical to S. 708.[133] The Senate Committee on Banking, Housing and Urban Affairs agreed to report S. 414 on May 25, 1983, but the Senate took no further action on the Bill.[134]

Both S. 708 and S. 414 were criticized extensively. Both would have replaced the "reason to know" language of the Act with "direct or au-

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122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.* § 7.
129. *Id.* § 8.
130. *Id.*
131. *Id.*
132. *See* SENATE COMM. ON BANKING, HOUS. & URB. AFF., BUSINESS ACCOUNTING AND FOREIGN TRADE SIMPLIFICATION ACT, S. REP. NO. 486, 99th Cong., 2d Sess. 1 (1986) [hereinafter S. REP., BAFTSA]; 127 CONG. REC. 28,810, 28,824 (1981).
133. *See* S. 414, *supra* note 112; S. REP., BAFTSA, *supra* note 132, at 1; *compare* S. 708, *supra* note 112, *with* S. 414, *supra* note 112.
134. S. REP., BAFTSA, *supra* note 132, at 2.

thorize, expressly or by a course of conduct" language, in order to clarify the potential liability of a corporation for the acts of a third party. Unfortunately, the new language was equally susceptible to ambiguous construction.[135] One could interpret "authorize" broadly[136] and infer a "course of conduct" from all the actions taken by a corporation after it learned of a bribe by its foreign agent, with the danger that liability might be imputed where the corporation never requested or condoned the payment.[137]

The Bills were also criticized for creating a potentially large area for abuse in the exemption section.[138] The legislative history of the Act indicated that the specific exception for "facilitating" payments codified Congress' original intent.[139] However, the FCPA itself did not make this exception clear, and one could infer the existence of the exception only from the definition of a "foreign official."[140] S. 708 and S. 414 would have improved the statute by defining the exemption in terms of purpose rather than identity of the payee,[141] yet the failure of the Bills to define a "routine governmental action"[142] perpetuated the ambiguity. Also, the exceptions for "tokens" and "courtesies" should have specified the nomi-

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135. *See* Bader & Shaw, *supra* note 69, at 634-35; Brennan, *supra* note 55, at 72; Roberts & Abbott, *supra* note 70, at 163-64; Comment, *Amending the FCPA, supra* note 13, at 1763-64.

136. *See* Roberts & Abbott, *supra* note 70, at 164.

137. *See* Bader & Shaw, *supra* note 69, at 634-35; Brennan, *supra* note 55, at 72; Roberts & Abbott, *supra* note 70, at 163-64. In addition, the use of the phrase "in furtherance of" was extremely awkward grammatically. The entire sentence should have been replaced to be less cumbersome. *See* S. 414, *supra* note 112, § 5(b); S. 708, *supra* note 112, § 5(b). The very nature of this type of legislation leads one to expect complicated language. I would suggest a slight rearrangement of the section as follows: "It shall be unlawful for any domestic concern, or any officer, director or employee, or shareholder thereof acting on behalf of such domestic concern, *corruptly* to make use of the mails or any means or instrumentality of interstate commerce to direct or authorize, expressly or by a course of conduct, a third party *to make or offer to make or promise to make a payment or gift of* anything of value to a foreign official for any of the purposes set forth in subsection (a)" (emphasis added to author's modification).

138. Roberts & Abbott, *supra* note 70, at 166; Wade, *supra* note 4, at 270; Witherspoon, *supra* note 42, at 582.

139. *See* S. REP., FOREIGN CORRUPT PRACTICES, *supra* note 5, at 10, *reprinted in* 1977 U.S. CODE CONG. & ADMIN. NEWS at 4108.

140. FCPA § 104(d)(2), 15 U.S.C. § 78dd-2(d)(2) (1982); *see* Atchinson, *The Foreign Corrupt Practices Act: A Practical Look,* 53 N.Y. ST. B. J. 342, 344 (1981); Timmeny, *supra* note 4, at 239; Witherspoon, *supra* note 42, at 561.

141. *See* S. 414, *supra* note 112, § 5(b); S. 708, *supra* note 112, § 5(b); Brennan, *supra* note 55, at 73; Wade, *supra* note 4, at 270.

142. *See* S. 414, *supra* note 112, §§ 5(b), 6; S. 708, *supra* note 112, §§ 5(b), 6.

nal character of the gifts; as originally written, they held the potential to mask large payments that were ostensibly measures of esteem but in reality bribe payments.[143]

The Foreign Trade Practices Act of 1983, H.R. 2157, was another bill introduced at about the same time as S. 414.[144] This bill would have amended the Export Administration Act of 1979 to include provisions equivalent to the antibribery provisions of the FCPA.[145] A major difference with this proposal was its shift of all authority for the accounting provisions from the SEC to the Department of Commerce.[146] The DOJ would have retained criminal enforcement responsibility.[147] H.R. 2157 also would have granted the Secretary of Commerce the authority to seek civil injunctions.[148]

With regard to the antibribery provisions, the Bill would have permitted the same five types of payments that S. 708 and S. 414 authorized[149] and would have replaced the "reason to know" language of the Act with similar "direct or authorize" language.[150] H.R. 2157 differed from S. 708 and S. 414 in that it would have doubled the fines and penalties for violations of the Act.[151]

Other than divesting the SEC of authority, the accounting provisions of H.R. 2157 were substantially identical to those of S. 708 and S. 414. H.R. 2157 would have eliminated all criminal penalties for a failure to institute internal accounting controls and provided a good faith defense to a charge of civil liability for non-compliance.[152] Finally, it defined "reasonable detail" and "reasonable assurances" in terms of a "prudent individual" standard, using a cost/benefit analysis.[153] Unfortunately, like the prior bills, H.R. 2157 fell victim to congressional inaction.

The last amendment to the FCPA proposed prior to 1986 was the Trade Partnership Act of 1985, H.R. 3522.[154] Title VII of this bill pro-

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143. *See* Comment, *Amending the FCPA, supra* note 13, at 1767-68.
144. H.R. 2157, *supra* note 112.
145. *Id.* § 2.
146. *Id.*
147. *Id.* § 3.
148. *Id.* § 4.
149. *Id.* § 2; *compare* H.R. 2157, *supra* note 112, § 2 *with* S. 708, *supra* note 112, § 5(b) *and* S. 414, *supra* note 112, § 5(b).
150. H.R. 2157, *supra* note 112, § 2; *compare* H.R. 2157, *supra* note 112, § 2 *with* S. 708, *supra* note 112, § 5(b) *and* S. 414, *supra* notes 112, § 5(b).
151. H.R. 2157, *supra* note 112, § 3; *compare* H.R. 2157, *supra* note 112, § 3 *with* S. 708, *supra* note 112, § 5(b) *and* S. 414, *supra* note 112, § 5(b).
152. H.R. 2157, *supra* note 112, § 2.
153. *Id.*
154. H.R. 3522, *supra* note 112, introduced in Congress on October 8, 1985, 131

posed changes that were substantively identical to the provisions of S. 708 and S. 414, except that H.R. 3522 would not have required the President to pursue an international agreement on illicit foreign payments.[155] Congress never took action on this bill.

Each of the proposed bills suggested essentially the same amendments to the FCPA. Each bill also expired at various stages of the legislative process, only to reappear before the second session of the Ninety-ninth Congress.

2. Bills Before the Ninety-Ninth Congress, Second Session

In 1986 Congress considered at least four bills containing amendments to the FCPA.[156] While most of the proposals had been before Congress at least once, some bills contained new provisions.

S. 430, the Business Accounting and Foreign Trade Simplification Act,[157] was yet another incarnation of bills S. 708, S. 414, and H.R. 3522.[158] S. 430 would have affected both the accounting and the antibribery provisions of the FCPA.

S. 430 would have combined the books and records requirements of the Act with the internal accounting controls requirements.[159] S. 430 would have eliminated criminal liability for failure to comply with the accounting provisions and would have provided a defense to civil liability if there was a good faith attempt at compliance.[160] Civil and criminal liability would have remained for a knowing failure to comply with or a knowing attempt to circumvent the accounting provisions.[161] In addition, S. 430 would have clarified the liability of a parent corporation for the accounting practices of a subsidiary.[162]

The antibribery sections of S. 430 would have repealed the criminal

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CONG. REC. H8507 (daily ed. Oct. 8, 1985).

155. *Compare* H.R. 3522, *supra* note 112, *with* S. 708, *supra* note 112, *and* S. 414, *supra* note 112.

156. *See* H.R. 4800, *supra* note 112; H.R. 4708, *supra* note 112; H.R. 4389, *supra* note 112; S. 430, *supra* note 112.

157. S. 430, *supra* note 112.

158. *Compare* S. 708, *supra* note 112, S. 414, *supra* note 112, and H.R. 3522, *supra* note 112, *with* S. 430, *supra* note 117. Because S. 430 was identical to its predecessor bills, all criticisms of those bills apply to it. These include criticisms of the "direct or authorize" language, *see supra* notes 135-37 and accompanying text, and the scope of exempted payments, *see supra* notes 138-43 and accompanying text.

159. S. 430, *supra* note 112, § 4.

160. *Id.*

161. *Id.*

162. *Id.*

prohibitions of the Act relating to illegal foreign payments by issuers.[163] Instead it included issuers in its definition of "domestic concern."[164] The Bill would have removed the "reason to know" language of the Act, replacing it with the familiar "direct or authorize" language.[165] S. 430 listed the same five exemptions for facilitating payments as did S. 414, S. 708 and H.R. 2157:[166] payments lawful in the foreign country,[167] payments constituting a gift, courtesy or token of esteem,[168] expenses associated with the sale or purchase of goods or services[169] and ordinary expenses associated with the performance of a contract.[170]

Using a "prudent individual" standard, S. 430 would have included a cost/benefit analysis in its definitions of "reasonable detail" and "reasonable assurances."[171] It would have broadened the investigative and subpoena powers of the Attorney General and the DOJ[172] and would have made the Act the exclusive enforcement device for foreign bribery.[173] The Bill would have required the establishment of guidelines for compliance with the FCPA and the institution of review procedures to answer specific inquiries.[174] The Bill would have exempted from the FOIA any information that a company disclosed as part of an inquiry.[175] Finally, S. 430 would have required the Attorney General and the SEC Commissioner to make yearly reports on all activities under the FCPA. It would have encouraged the President to seek an international treaty on illegal foreign payments.[176]

On June 10, 1986, the Senate International Finance and Securities Subcommittees began hearings on S. 430.[177] The Senate Committee on Banking, Housing and Urban Affairs agreed to report the Bill on September 17, 1986.[178] Congress took no further action before the end of the

163. *Id.* § 5(a)(1).
164. *Id.* § 5(b).
165. *Id.*
166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.*
171. *Id.* § 6.
172. *Id.* § 5.
173. *Id.* § 7.
174. *Id.* § 8.
175. *Id.*
176. *Id.* § 9.
177. *See* S. REP., BAFTSA, *supra* note 132, at 2.
178. *Id.*

session.[179]

The Foreign Trade Practices Act of 1986, H.R. 4389,[180] was introduced on March 12, 1986. This bill had roots in H.R. 2157;[181] however, it differed from that bill in several distinct ways. Like H.R. 2157, H.R. 4389 would have amended the Export Administration Act of 1979 by adding to it antibribery provisions similar to those in the FCPA, and it would have vested civil enforcement authority with the Department of Commerce[182] rather than the SEC. However, H.R. 4389 varied from H.R. 2157 in that it would have omitted the accounting provisions of the Act entirely. It spoke instead in terms of prohibiting "U.S. persons" from making illegal payments and would have included both issuers and domestic concerns, as found in the FCPA, in its definition of "United States persons."[183]

H.R. 4389 would have eliminated the "reason to know" language of the Act, using instead the phrase "with knowledge that a third party" will make a payment. This variation reflected the dissatisfaction with the "direct or authorize" amendments found in previous bills and would have clarified the situations in which a corporation could expect to be liable for the acts of an agent.

H.R. 4389 included only two exemptions from the prohibitions of the Act: (1) payments made to secure performance of routine governmental actions,[184] and (2) any payment lawful in the country involved.[185] This, too, was an improvement on the exceptions in previous bills because it would have narrowed the scope of permitted payments, thus decreasing the potential for abuses. However, H.R. 4389 did not go quite far enough in this area because it did not define a "routine governmental action;" it only stated that it was not "an action to award business to any United States person."[186]

Other than the provisions above, H.R. 4389 made no new proposals. The Bill would have required the establishment of guidelines for compli-

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179. The Bill did not reappear in 1987. If no amendment is signed into law this year, it seems likely that a form of S. 430 will be reintroduced at a later date.

180. H.R. 4389, *supra* note 112, introduced in Congress on March 12, 1986, 132 CONG. REC. H1093 (daily ed. Mar. 12, 1986).

181. *Compare* H.R. 4389, *supra* note 112, *with* H.R. 2157, *supra* note 112.

182. *Compare* H.R. 4389, *supra* note 112, §§ 2-3 *with* H.R. 2157, *supra* note 112, § 2.

183. H.R. 4389, *supra* note 112, § 3.

184. *Id.*

185. *Id.*

186. *Id.*

ance with the Act and the institution of review procedures.[187] It would have doubled the penalties and fines for violations of the Act.[188] H.R. 4389 would have given the Secretary of Commerce power to seek civil injunctions[189] and also would have required the Secretary to make an annual review of the impact of the Act on export activities.[190] Finally, the Bill would have encouraged the President to seek an international agreement on the problem of foreign bribery.[191] The Economic Policy Subcommittee of the House held hearings on H.R. 4389 on April 16, 1986.[192] Congress subsequently adopted it into H.R. 4800, the Trade and International Economic Policy Reform Act of 1986.[193]

The Export Enhancement Act of 1986, H.R. 4708,[194] introduced on April 30, 1986, contained a section that would have amended the FCPA. The House Committees on Agriculture, Banking, Finance and Urban Affairs, Energy and Commerce, and the Judiciary discharged the Bill on May 9, 1986.[195] The provisions of the section that would have amended the FCPA were essentially the same as section 701 of H.R. 4800.

Section 701 of H.R. 4800 did not disturb the accounting provisions of the Act.[196] The Bill would have retained the Act's dichotomy with respect to separate prohibited payments provisions for both issuers and domestic concerns.[197] Section 701 also would have kept the original structure of the Act in forbidding payments to foreign officials, foreign political parties or any third person.[198] However, the provision would have eliminated the "reason to know" language of this last part, replacing it with "while knowing or recklessly disregarding"[199] the fact that a payment would ultimately reach a foreign official or political party.

H.R. 4800 would have instituted several defenses to charges of violat-

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187. *Id.*
188. *Id.* § 4.
189. *Id.*
190. *Id.* § 7.
191. *Id.* § 8.
192. *See* HOUSE COMM. ON FOREIGN AFF., EXPORT ENHANCEMENT ACT OF 1986, H.R. REP. NO. 580, 99th Cong., 2d Sess. 1 (1986).
193. LEGISLATIVE REPORT NO. 13, 1 Foreign Corrupt Practices Act Reporter (Bus. L. Inc.) at 13-01 (July 1, 1986) [hereinafter FCPA Rep.].
194. H.R. 4708, *supra* note 112, introduced in Congress on April 30, 1986, 132 CONG. REC. H2282 (daily ed. Apr. 30, 1986).
195. H.R. 4708, *supra* note 112, preamble; 132 CONG. REC. H587 (daily ed. May 9, 1986).
196. *See* H.R. 4800, *supra* note 112, § 701.
197. *Id.* § 701(a), (c).
198. *Id.*
199. *Id.*

ing the Act. One of these was a due diligence defense.[200] An issuer or domestic concern would not have been held vicariously liable for the offense of an employee if the issuer or domestic concern "established procedures which can reasonably be expected to prevent and detect, insofar as practicable, any such violation by such employee or agent"[201] and if a senior official with supervisory capacity over the employee "used due diligence to prevent the commission of the offense."[202] The issuer or domestic concern would have had the burden of proving this defense by a preponderance of the evidence.[203]

Defenses to charges of direct violations by an issuer or domestic concern would have required proof that the payment was made to secure performance of a "routine governmental action by a foreign official"[204] or that the payment was "expressly permitted under any law or regulation of the government of the country involved."[205]

H.R. 4800 explicitly defined the terms that it would have used to establish liability. A "routine governmental action" was an action "ordinarily and commonly performed by a foreign official,"[206] including processing papers, loading and unloading cargo and scheduling inspections, but specifically excluding "any decision by a foreign official on the question of whether, or on what terms, to award new business to or to continue business with a particular party."[207] H.R. 4800 defined "knowing" as being "aware or substantially certain,"[208] or being "aware of a high probability, which [the person] consciously disregards, in order to avoid awareness or substantial certainty, and does not have an actual belief to the contrary, that a third party will offer . . . anything of value."[209] Under H.R. 4800, "recklessly disregarding" meant being "aware of a substantial risk"[210] that a third party would make a payment, but disregarding that risk. Finally, H.R. 4800 defined a "substantial risk" as one "of such a nature and degree that to disregard it constitutes a substantial deviation from the standard of care that a reasonable person would exer-

200. *Id.*
201. *Id.*
202. *Id.*
203. *Id.*
204. *Id.*
205. *Id.*
206. *Id.*
207. *Id.*
208. *Id.*
209. *Id.*
210. *Id.*

cise in such a situation."[211]

The last major proposal in H.R. 4800 would have changed the fines and penalties of the Act, depending on which section was violated,[212] whether the violation was by an issuer or domestic concern or by another on its behalf and whether the violation was knowing, willful, or knowing and willful.[213] Other provisions of H.R. 4800 would have required the institution of guidelines and review procedures,[214] exempted any information disclosed in a review request from the FOIA[215] and required the President to seek an international agreement on illegal foreign payments.[216]

H.R. 4800 was a tremendous improvement over all prior bills proposed to amend the FCPA. It would have clarified instances of liability by removing the troublesome "reason to know" language and replacing it with the defined terms "knowing" and "recklessly disregarding." This latter term is still somewhat awkward, considering its use of the phrase: "and does not have an actual belief to the contrary."[217] The meaning of the sentence—that a person "knows" something if he is aware of a high probability that a third party will make a payment, if he consciously disregards that probability and if he does not actually believe that a third party will not make such a payment—is difficult to discern on first reading. Still, this definition of "knowing" and "recklessly disregarding" would have eliminated past fears, concerning the "reason to know" and the "direct or authorize" language, that a company would be able to look the other way to avoid liability or that a company would be liable unless it constantly monitored its overseas agents.

The "safe harbor" that the due diligence defense created also would have helped relieve some of the worries that now burden companies by instructing them how to prevent liability for the acts of renegade agents or employees. This standard remains somewhat vague because the employee's supervisory official must have "used due diligence to prevent commission of the offense."[218] One might raise a question as to whether a mere good faith attempt to prevent commission of the offense suffices or whether the company officer must actually prevent the offense. However, within the context of the provision, a good faith attempt should be

211. *Id.*
212. *Id.* § 701(b).
213. *Id.*
214. *Id.* § 701(a), (c).
215. *Id.* § 701(a), (e).
216. *Id.* § 701(d).
217. *Id.* § 701(a), (c).
218. *Id.*

sufficient. Logically, if a company prevents the commission of the offense, no violation of the Act has occurred. The defense works only if an employee has actually violated the Act, and if the issuer or domestic concern establishes, by a preponderance of the evidence, its good faith effort to prevent the violation.

H.R. 4800 also would have removed the potential for abuse by refusing to exempt any payments from the prohibitions of the Act. Rather, it would have permitted a company to raise as a defense the fact that a payment was to secure a routine governmental action or that a payment was lawful in the foreign country where made. The scope of the facilitating payments defense would have been quite narrow: the Bill defines routine governmental action to show not only what it is but also what it is not. This definition would have made it relatively easy to determine which payments would support the defense. The defense for payments that are lawful where made would also have been simple to establish by reference to the laws or regulations of that country.

On the whole, the improvements that H.R. 4800 would have made to the FCPA were quite valuable and worthy of passage. Unfortunately, they were part of the 1986 House omnibus trade package. Although the House passed this Bill on May 22, 1986, and referred it to the Senate on June 2, 1986,[219] it too died with the end of the Ninety-Ninth Congress.

3. The 1987 Trade Bills

The Trade and International Economic Policy Reform Act of 1987, H.R. 3,[220] introduced in Congress on January 6, 1987, and passed by the full House on April 30, 1987,[221] contained essentially the same text as H.R. 4800.[222] Section 352 of H.R. 3 would maintain the present accounting provisions of the FCPA while clarifying ambiguities in the antibribery provisions. It would create a new standard of liability defined in terms of actual knowledge or reckless disregard of violations of the Act.[223] H.R. 3 would also create defenses to charges of violations, includ-

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219. 132 CONG. REC. S6476 (daily ed. June 2, 1986); 132 CONG. REC. H3162-H3225 (daily ed. May 22, 1986).

220. H.R. 3, *supra* note 112, was introduced in Congress on January 6, 1987, 133 CONG. REC. H101 (daily ed. Jan. 6, 1987).

221. 133 CONG. REC. H2847, H2981 (daily ed. Apr. 30, 1987).

222. *See* Int'l Trade Rep. (BNA) 1417, 1428 (Nov. 26, 1986). The two bills differed, for the most part, only in regard to the amounts of fines and penalties and when each would be imposed.

223. H.R. 3, *supra* note 112, § 352(a)(3).

ing a "due diligence" defense.[224] It would not create specific exemptions but would define permissible payments according to their purpose and not according to the proposed recipient.[225] H.R. 3 would authorize the institution of guidelines and review procedures[226] and would exempt any information disclosed in a review request from the FOIA.[227] Unlike previous bills, H.R. 3 would permit a request to be withdrawn prior to the issuance of an opinion. Such a request would then be without any force or effect.[228]

The Senate companion to H.R. 3, the Omnibus Trade and Competitiveness Act of 1987, S. 1420, resembles H.R. 3 in most respects. Like H.R. 3, S. 1420 would establish various defenses to charges of violations. It too would define permissible payments in terms of purpose rather than in terms of the recipient. It differs from H.R. 3, however, in that it would replace the "reason to know" language of the FCPA with the "directs or authorizes" language previously seen in S. 708, S. 414, H.R. 2157, H.R. 3522 and S. 430. As discussed above, this language is open to ambiguous construction. From the standpoint of amending the FCPA, the original text of H.R. 3 would be preferable to that of S. 1420. Nevertheless, the Senate passed S. 1420 on July 21, 1987.[229]

No further action has been taken on the trade bill or on the FCPA during this session of Congress. One can only hope that FCPA proposals similar to those in H.R. 3 and previous bills will continue to be introduced in the future.[230]

IV. The Department of Justice Review Procedures

The FCPA originally contained no guidelines to assist in the interpretation of its provisions. The DOJ did not want to provide companies

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224. *Id.* § 352(c).
225. *Id.*
226. *Id.* § 352(d)-(e).
227. *Id.* § 352(e).
228. *Id.* § 352(e)(3).
229. 133 Cong. Rec. S10249, S10372 (daily ed. July 21, 1987). The Senate passed the bill as H.R. 3 but struck all material appearing after the enacting clause and inserted the text of S. 1420, as amended. *Id.* For a comparison of H.R. 3 and S. 1420, see International Division Staff, U.S. Chamber of Commerce, Omnibus Trade Legislation: The House-Senate Conference 46 (Aug. 18, 1987).
230. Amendment of the Act this year is inextricably tied to enactment of the 1987 Omnibus Trade Bill, which President Reagan had not signed as of November 1987. Whether the President will sign the Bill before this session of Congress ends is uncertain and will depend on the pressure he receives regarding the Bill's protectionist attitude toward American trade, and not on the merits of the FCPA amendment.

with a blueprint for making a bribe without risking prosecution[231] and so refused to issue guidelines. Both the DOJ and the SEC believed that the ambiguities of the Act were desirable for deterrence[232] and that clarifications would provide incentives to circumvent the Act's prohibitions.[233]

A. *Review Procedures*

The DOJ did eventually establish a review procedure[234] and a statement of enforcement priorities under the FCPA.[235] The purpose of such a review is to provide guidance as to the application of the FCPA's antibribery provisions.[236]

1. Circumstances for Review

Any party to a proposed transaction may request a review.[237] That party must provide, in specific detail, all information relevant and material to the proposed conduct.[238] An appropriate senior official with "operational responsibility"[239] for the transaction must then verify all the

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231. *See* Atchinson, *supra* note 140, at 345; Witherspoon, *supra* note 42, at 563; Note, *Criminalization of American Bribery, supra* note 99, at 654; Landauer, *U.S. Will Clarify Statute on Corrupt Acts by American Firms Operating Overseas,* Wall St. J., Sept. 21, 1979, at 20, col. 2.

232. Note, *Criminalization of American Bribery, supra* note 99, at 654-55; Landauer, *supra* note 231, at 20, col. 2.

233. Note, *Criminalization of American Bribery, supra* note 99, at 654-55.

234. The DOJ suggested to President Carter that review procedures, instead of guidelines, might be desirable. President Carter then requested the establishment of such procedures. *See* Witherspoon, *supra* note 42, at 564; Landauer, *Antibribery Law Uncertainties Persist, Despite President's Call for Clarification,* Wall St. J., May 30, 1979, at 12, col. 2. President Carter believed that the lack of guidance on the antibribery provisions was itself an export disincentive. *See* Feller, *An Examination of the Accounting Provisions of the FCPA,* 9 SYRACUSE J. INT'L L. & COM. 245, 245 (1982). *See generally infra* notes 237-250.

235. *See infra* notes 251-54 and accompanying text.

236. Foreign Corrupt Practices Act Review Procedure, 28 C.F.R. § 50.18 (1985) [hereinafter FCPA Review Procedure]; *See* Witherspoon, *supra* note 42, at 567; Comment, *FCPA: Curse or Cure?, supra* note 43, at 82.

237. FCPA Review Procedure, 28 C.F.R. § 50.18(c) (1985); *See* Witherspoon, *supra* note 42, at 566. The DOJ will not entertain requests to review a hypothetical transaction. The information disclosed must relate to a pending business deal. FCPA Review Procedure, 28 C.F.R. § 50.18(b) (1985).

238. FCPA Review Procedure, 28 C.F.R. § 50.18(f) (1985); *See* Witherspoon, *supra* note 42, at 570; *Heymann Speech on Enforcement Priorites Under FCPA,* Legal Times of Wash., Nov. 12, 1979, at 23, col. 1 [hereinafter *Heymann,* Legal Times of Wash.].

239. FCPA Review Procedure, 28 C.F.R. § 50.18(f) (1985).

information in the request.

The requesting party must also disclose any other information that the DOJ may require.[240] Failure to disclose additional data may preclude the review. Often a company will not wish to disclose certain information because it will then be available to the general public through the FOIA. The party requesting an FCPA review can ask the DOJ to refrain from making publicly available any information disclosed for the review.[241] A company must justify this request by showing that the information is exempt from public disclosure as a trade secret, as privileged and confidential information, or as information falling under another FOIA exemption.[242] The DOJ honors such requests whenever possible; however, it will always issue a release describing the general nature of both the transaction and the identity of the parties involved.[243]

2. Options of the DOJ on Receipt of Request

The DOJ can take any one of several steps once it receives a review request. First, the DOJ has discretion to refuse a request.[244] If the DOJ agrees to review a transaction, it must make reasonable efforts to respond within thirty days.[245] If it needs additional information to examine the proposal fully, the DOJ may take another thirty days beyond the receipt of that data to respond.[246]

After this initial period, the DOJ has several options: it can decline to state its present enforcement intentions;[247] it can declare its intention to take no action with respect to the conduct; it can state that it will prosecute if such a transaction occurs;[248] and finally, it can take any other action it deems appropriate, including further investigation, with respect to any part of the transaction.[249] This action is not limited to enforce-

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240. *Id.* § 50.18(g).

241. *Id.* § 50.18(i)(1); *see* Witherspoon, *supra* note 42, at 569; Note, *Criminalization of American Bribery, supra* note 99, at 567; *Heymann*, Legal Times of Wash., *supra* note 238, at 23, col. 1.

242. FCPA Review Procedure, 28 C.F.R. § 50.18(o)(1) (1985).

243. *Id.* § 50.18(o)(2).

244. *Id.* § 50.18(d).

245. *Id.* § 50.18(i); *see Heymann*, Legal Times of Wash., *supra* note 238, at 23, col. 1.

246. FCPA Review Procedure, 28 C.F.R. § 50.18(i) (1985).

247. *Id.* § 50.18(h) (1985); *see* Witherspoon, *supra* note 42, at 566.

248. FCPA Review Procedure, 28 C.F.R. § 50.18(h) (1985); *see* Witherspoon, *supra* note 42, at 566.

249. FCPA Review Procedure, 28 C.F.R. § 50.18(h) (1985); *see* Witherspoon, *supra* note 42, at 566.

ment proceedings under the FCPA but may involve any statute that the DOJ believes has been violated.[250]

3. Review Priorities

The DOJ considers certain conduct to be particularly egregious. The likelihood of prosecution increases when: (1) an American company bribes a foreign official in a market where the only competitors are American; (2) an American company bribes a foreign official in a market where the only corrupt competitors are American; (3) an American company bribes an official of a foreign government that is attempting to eliminate bribery; (4) the bribe involves a foreign cabinet officer or other high-ranking official; (5) the bribe involves a senior management official of the offending company; or (6) the offending corporation has not taken diligent measures to monitor its officers and employees, with the result that any officer or employee has bribed a foreign official.[251] The DOJ also weighs other factors such as the size of the payment, the size of the transaction that the payment would affect and any prior history of corrupt payments that the offender has made. The absence of any of this conduct in a transaction or the presence of good faith efforts by the company to monitor its employees[252] does not mean the DOJ will decline to prosecute any given business arrangement.[253] The DOJ has merely outlined those situations that it considers to be the most egregious and most urgently requiring enforcement action.[254]

4. Effects of the Review

The DOJ permits only limited reliance on one of its review proceedings.[255] Only parties who joined in making the request may rely on the

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250. For example, the DOJ may decide to bring charges for mail or wire fraud violations. *See White Collar Crime: Third Annual Survey of Law*, 22 AM. CRIM. L. REV. 279, 515 (1985) [hereinafter *White Collar Crime*]; *FCPA and Questionable Payments, supra* note 42, at 628 (statement of Timothy Atkeson, Chm., Comm. on Multinat'l Corps).

251. Note, *Criminalization of American Bribery, supra* note 99, at 656; *Heymann*, Legal Times of Wash., *supra* note 238, at 25, cols. 2-4.

252. Note, *Criminalization of American Bribery, supra* note 99, at 656; *Heymann*, Legal Times of Wash., *supra* note 238, at 25, col. 3.

253. *See Heymann*, Legal Times of Wash., *supra* note 238, at 25, col. 4.

254. *See id.* at 25, cols. 1, 4; *cf.* Witherspoon, *supra* note 42, at 565 (list of factors given priority for possible enforcement actions); Note, *Criminalization of American Bribery, supra* note 99, at 656 (list of factors that increase likelihood of prosecution).

255. *Cf.* Witherspoon, *supra* note 42, at 569 (review gives limited guidance).

declaration of enforcement intent.[256] Further, those parties can rely only on the DOJ's written statement,[257] and only to the extent that the disclosure made in the original request continues to reflect accurately the circumstances of the transaction.[258]

The review has perhaps more nonbinding effects than binding ones. It has no application to parties who did not join in the review request.[259] This is equally true for nonrequesting parties and for complete strangers to a transaction. The scope of the review is limited to the antibribery provisions of the Act,[260] thereby excluding any consideration of a company's accounting methods or internal controls. Finally, the DOJ review is not binding on any other government agency or on the obligations of a party to that agency,[261] although the SEC has declared that it will consider the DOJ review as binding.[262]

B. *Results of Review Procedures*

As of the fall of 1986, only eighteen companies had submitted requests since the DOJ instituted the review procedures in 1980. These proposed transactions, which have caused concerned companies to seek reassurances, have involved contractual arrangements, transactions with foreign governments, joint ventures and miscellaneous proposals.

1. Discussion of Specific Reviews

Most of the contracts that create anxiety involve agreements to pay commissions to foreign agents. A company will generally avoid difficulties by requiring adherence to the FCPA on the part of the agent and by ensuring that the agent personally receives his fee, which must be reasonable, and does not share any portion of it with a foreign official. For example, in FCPA Review Procedure Release 82-02,[263] Shoup, Inc.

256. FCPA Review Procedure, 28 C.F.R. § 50.18(e) (1985).

257. *Id.* § 50.18(j).

258. *Id.* § 50.18(k); *see* Witherspoon, *supra* note 42, at 573.

259. *See infra* note 303 and accompanying text.

260. FCPA Review Procedure, 28 C.F.R. § 50.18(1) (1985). Section 102 of the Act, the accounting provisions, is not limited to foreign transactions but applies to all issuers subject to the 1934 Act reporting requirements. FCPA § 102, 15 U.S.C. § 78m (1982). This area is under the jurisdiction of the SEC. Therefore, for the DOJ to extend the review procedures to the accounting provisions is inappropriate. *See* Heymann, *supra* note 238, at 21, cols. 3-4.

261. FCPA Review Procedure, 28 C.F.R. § 50.18(l)-(m) (1985).

262. *See infra* notes 305-08 and accompanying text.

263. FCPA Rev. Proc. Release No. 82-02, Feb. 18, 1982 [hereinafter FCPA Rev. Proc. Release], *reprinted in* 2 FCPA Rep. at 716 (Oct. 18, 1982).

(Shoup) had an agreement to sell voting machines to the Federal Election Commission of Nigeria (Fedeco). Fedeco's agent, Mr. Ogirri, was a temporary clerk in the Information Section of the Nigerian Consulate in the United States. Ogirri represented that he had not used his influence to obtain the contract for Shoup, that he had no connection with Fedeco and that his finder's fee was only 1% of the aggregate amount to be paid to Shoup by Nigeria and other specified West African countries over a ten year period. Further, Ogirri represented that his duties at the Consulate were ministerial and that the Nigerian Government did not consider him a civil servant. Both Shoup and Ogirri represented that Shoup would make no payments to foreign officials (other than Ogirri), that they would evaluate the relationship every six months to determine if the FCPA had been violated and that any violation would render the contract void.[264]

FCPA Review Procedure Release 82-4 concerned the Thompson & Green Machinery Co., which employed an agent in connection with the sale of a generator to a foreign country.[265] The agency contract stated that none of the money paid as a commission would go to any third party, particularly any member of a foreign government. After discovering that the agent's brother was an employee of the government with whom it had closed the sale, Thompson obtained affidavits from both the agent and his brother that they would not violate the FCPA. The DOJ indicated that it would take no enforcement action with respect to this arrangement.[266]

In another FCPA Review Procedure Release, a California corporation had requested a review of an agreement that designated an independent Sudanese communications corporation as its agent for the sale of equipment to commercial and governmental customers in the Sudan.[267] The corporation would make payments directly to the Sudanese corporation, not to any individual. Neither party expected that any individual Sudanese official would benefit personally from the agreement. The DOJ stated that it did not intend to take enforcement action with respect to the arrangement.[268]

FCPA Review Procedure Release 84-1[269] provided general informa-

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264. *Id., reprinted in* 2 FCPA Rep. at 717.

265. FCPA Rev. Proc. Release No. 82-4, Nov. 11, 1982, *reprinted in* 2 FCPA Rep. at 718 (Dec. 31, 1982).

266. *Id.*

267. FCPA Rev. Proc. Release No. 83-01, May 12, 1983, *reprinted in* 2 FCPA Rep. at 719 (Oct. 14, 1983).

268. *Id.*

269. FCPA Rev. Proc. Release No. 84-1, Aug. 16, 1984, *reprinted in* 2 FCPA Rep.

tion regarding an agency relationship. The principals of the proposed agent corporation were related to the head of a foreign government, with one of the principals personally managing that head of state's business affairs. The American firm indicated that the agent corporation had represented that it would not make any payments to any foreign official to influence that official's acts. It also represented that none of its officers or directors would become officials of that government for the duration of the agency agreement. The agreement would provide that any violation of the FCPA by the agent corporation would render the contract void *ab initio.*[270]

A remark by a foreign agent that a small facilitating payment might be necessary prompted the review requested in FCPA Review Procedure Release 84-2.[271] An American firm wanted to sell its foreign assets to a foreign company and then invest in that company. This transaction required foreign government regulatory approval. In its request, the American firm represented that the foreign agent had declared that it had never made any payments to foreign government officials. The firm represented that it had no knowledge of any payments actually made and that its employees had discouraged the payment of the gratuity. The firm also represented that if it learned the foreign company had violated the FCPA, it would notify the DOJ and responsible foreign authorities. The firm also retained the right to sever the agency relationship with the foreign corporation.[272] The DOJ indicated that it had no enforcement intention with respect to the transaction.[273]

Another review release[274] concerned an agreement for services to be rendered by one company (SGV) to another (Bechtel) in the Philippines. This particular contract is significant for the representations that Bechtel and SGV made to ensure compliance with the FCPA. Both parties stated in the review request that they were familiar with the Act. They agreed that all payments to SGV would be made by check or bank transfer under a closely supervised set of rules.[275] SGV represented that no one connected with it was a foreign official, representative of a political party or candidate for political office and that it would not take any

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at 721 (Oct. 31, 1984).

270. *Id.*

271. FCPA Rev. Proc. Release No. 84-2, Aug. 20, 1984, *reprinted in* 2 FCPA Rep. at 722 (Oct. 1, 1985).

272. *Id.*

273. *Id.*

274. FCPA Rev. Proc. Release No. 81-1, Nov. 25, 1981, *reprinted in* 2 FCPA Rep. at 713 (Jan. 22, 1982).

275. *Id.*

action to violate the FCPA. SGV further represented that it would obtain an opinion of local counsel to the effect that the contract between Bechtel and SGV was itself lawful and that all actions taken incidental to the FCPA were lawful and would not violate Philippine law. Bechtel represented that it did not desire and would not request any action by SGV that might violate the FCPA.[276] SGV agreed in the contract that it could not assign any of its rights under the contract to a third party without Bechtel's consent and that it would not obligate Bechtel to a third party without Bechtel's consent.[277] The parties designed both clauses to prevent the possibility that a third person would, without Bechtel's knowledge, commit some act in violation of the FCPA. The contract contained a "drop-dead" clause that would permit either SGV or Bechtel to abandon the agreement if either had a good faith belief that the other had violated or would violate the FCPA.[278] SGV agreed to disclose the terms of the contract fully at any time to anyone who Bechtel's general counsel determined had a legitimate reason to know such information.[279] The contract set forth various expenses for which Bechtel could reimburse SGV and the method of disbursement that the companies would follow. Finally, Bechtel listed as one of its representations the factors it considered in selecting SGV as its consultant.[280] The DOJ stated that based on all the representations by SGV and Bechtel, it had no present enforcement intentions with respect to the contract.[281]

Transactions with foreign governments involve similar circumstances for potential FCPA difficulties. For example, when is it appropriate for a company to pay for travel expenses of a foreign delegate who is conducting business with the firm? Three releases addressed this type of problem.[282]

In an effort to promote sales of Missouri products in Mexico, the Missouri State Department of Agriculture invited Mexican representatives to a series of meetings on agriculture and agricultural products. The Agriculture Department proposed to pay the reasonable and necessary expenses of the delegation, including meals, hotels, travel and en-

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276. *Id.*

277. *Id., reprinted in* 2 FCPA Rep. at 714 (Jan. 22, 1982).

278. *Id.*

279. *Id.*

280. *Id., reprinted in* 2 FCPA Rep. at 715 (Jan. 22, 1982).

281. *Id.*

282. FCPA Rev. Proc. Release No. 193-15 [85-1], July 16, 1985, *reprinted in* 2 FCPA Rep. at 722 (Oct. 1, 1985); FCPA Rev. Proc. Release No. 83-03, July 26, 1983, *reprinted in* 2 FCPA Rep. at 720 (Oct. 14, 1983); FCPA Rev. Proc. Release No. 82-01, Jan. 27, 1982, *reprinted in* 2 FCPA Rep. at 716 (Oct. 18, 1982).

tertainment.[283] A year later, the Agriculture Department and a Missouri corporation proposed a similar set of meetings and promotions with a delegation from Singapore as a means of increasing agricultural sales to that government. The Agriculture Department and the corporation proposed to pay all the expenses of the delegation.[284] In the fall of 1985, Atlantic Richfield Corporation (ARCO) submitted to the DOJ a request for review of its proposed invitation to French industrial finance ministers. The invitation arose out of plans for an ARCO subsidiary to build a chemical plant in France. The officials would come to Pennsylvania and Texas to meet with ARCO management and inspect a similar plant. ARCO intended to pay all the necessary and reasonable expenses that the delegation incurred.[285]

Sales to foreign governments present particular difficulties that overlap with the types of problems encountered in agency relationships, as the cases of sales of voting machines to Nigeria[286] and generators to an unnamed foreign government demonstrate.[287] These situations may also involve some foreign law that requires an agency agreement with a government-controlled entity. A Delaware corporation seeking to do business with the purchasing agency for the Yugoslav Military found itself in this position.[288] To cover itself, the corporation drafted the agency agreement, which the parties executed simultaneously with the purchasing agreement, to state that the corporation would pay the agent organization its commissions directly. None of the parties expected that an individual government official would benefit from the agreement.[289]

Finally, problems may arise when a company wishes to give a foreign official a sample of wares during the course of sale negotiations. Review Release 81-02 addressed this difficulty.[290] The Iowa Beef Packers planned to give sample packages of beef to Soviet foreign trade ministers

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283. FCPA Rev. Proc. Release No. 82-01, Jan. 27, 1982, *reprinted in* 2 FCPA Rep. at 716 (Oct. 18, 1982).

284. FCPA Rev. Proc. Release No. 83-03, July 26, 1983, *reprinted in* 2 FCPA Rep. at 720 (Oct. 14, 1983).

285. FCPA Rev. Proc. Release No. 193-15 [85-1], July 16, 1985, *reprinted in* 2 FCPA Rep. at 722 (Oct. 1, 1985).

286. FCPA Rev. Proc. Release No. 82-02, Feb. 18, 1982, *reprinted in* 2 FCPA Rep. at 716-17 (Oct. 18, 1982).

287. FCPA Rev. Proc. Release No. 82-4, Nov. 11, 1982, *reprinted in* 2 FCPA Rep. at 718 (Dec. 31, 1982).

288. FCPA Rev. Proc. Release No. 82-03, Apr. 22, 1982, *reprinted in* 2 FCPA Rep. at 718 (Dec. 31, 1982).

289. *Id.*

290. FCPA Rev. Proc. Release No. 81-02, Dec. 11, 1981, *reprinted in* 2 FCPA Rep. at 715 (Jan. 22, 1982).

to demonstrate the quality of the products. The Iowa Beef Packers would furnish the packages to the trade ministers solely in their official capacities and not for their personal use. The DOJ determined that it would take no enforcement action with respect to this exchange.[291]

Other arrangements presented to the DOJ for review have included the establishment of a scholarship fund for the adopted children of an honorary official of a foreign government,[292] the eligibility of an employee of a foreign subsidiary to run for a minor political office,[293] and the dual status of a particular person as the chairman of an Arab corporation and as an outside director of a government-related corporation when the former corporation planned to transact business with the latter.[294] The DOJ had no enforcement intentions with respect to these transactions.

2. General Results

The DOJ has never expressed an intention to prosecute with respect to any of the eighteen requests submitted. The least favorable response that the DOJ has issued has been a refusal to state its enforcement intentions. The DOJ declined to review the transaction that was the subject of FCPA Review Procedure Release 80-03, stating that a review was not appropriate because the parties had submitted only a contract and a cover letter, and the DOJ could not detect from the submitted materials any facts or circumstances that would be cause for alarm.[295]

C. *Effectiveness of the Review Procedures*

Companies have not widely used the review procedures. Only eighteen requests have been made during the seven years that the procedures have existed, all receiving favorable replies. One may draw two conclusions from this: either the review procedures are ineffective to the point of being a "rubber stamp," or the Act does not constrain American business abroad in the manner originally envisioned.

No corporation would likely announce to the DOJ in a review request

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291. *Id., reprinted in* 2 FCPA Rep. at 716.

292. FCPA Rev. Proc. Release No. 80-01, Oct. 29, 1980, *reprinted in* 2 FCPA Rep. at 711 (Jan. 31, 1984).

293. FCPA Rev. Proc. Release No. 80-02, Oct. 29, 1980, *reprinted in* 2 FCPA Rep. at 711 (Jan. 31, 1984).

294. FCPA Rev. Proc. Release No. 80-04, Oct. 29, 1980, *reprinted in* 2 FCPA Rep. at 712 (Jan. 31, 1984).

295. FCPA Rev. Proc. Release No. 80-03, Oct. 29, 1980, *reprinted in* 2 FCPA Rep. at 712 (Jan. 31, 1984).

that it plans a business transaction that it considers illegal. Companies may be so concerned about disclosing sensitive information to the DOJ that they will only request a review for conduct that they believe is safe.[296] If this is so, the review procedures may be a waste of time. On the other hand, if corporations have submitted transactions that genuinely cause them concern, the streak of favorable responses may indicate that the Act's effect is not as restrictive as commentators feared, or that the Act is far less ambiguous than critics sometimes claim.[297]

1. Possible Criticisms of Review Procedures

The drafters of the review procedures intended them to provide direct guidance to the parties involved and indirect guidance to the business community at large. Whether the procedures have achieved this goal is a matter for debate. Certainly the proposed amendments indicate that congressmen and their business constituents do not believe the present methods are helpful.[298] The DOJ, on the other hand, is convinced that as a practical matter the FCPA does not create a vague area of potential liability for businesses and that the current review procedures are the simplest and most effective means of guidance available.[299]

a. Limited Use as Guidelines

The results of a review request provide little guidance to businesses because the DOJ limits each review to "the facts and circumstances as represented by the requestor,"[300] and each review states only the DOJ's present enforcement intentions. Later developments surrounding the transaction before it closes may necessitate altering the original arrangement, yet any deviation by the parties from the original proposed conduct would be cause for an enforcement action if the DOJ believed that

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296. *See* Roberts & Abbott, *supra* note 70, at 162; Witherspoon, *supra* note 42, at 568.

297. Witherspoon, *supra* note 42, at 569. Another possible explanation for the dearth of review requests is that companies are simply using in-house counsel to advise them on the FCPA consequences of a particular transaction. Interview with Peter B. Clark, Trial Attorney, U.S. Dep't of Just., in Washington, D.C. (Sept. 8, 1986) [hereinafter Clark Interview].

298. *See supra* notes 112-219 and accompanying text.

299. Keeney Statement, *supra* note 83; Clark Interview, *supra* note 297.

300. FCPA Rev. Proc. Release No. 80-01, Oct. 29, 1980, *reprinted in* 2 FCPA Rep. at 711 (Jan. 31, 1984); *cf.* FCPA Review Procedure, 28 C.F.R. § 50.18(h) (1985) ("review letter can be relied upon by the requesting party or parties to the extent the disclosure was accurate and complete").

was necessary.[301] At the very least, a material change in facts would require a new review. Circumstances occurring after the transaction is fixed may give the American parties reason to know that a foreign agent has made a questionable payment. The company must be prepared to walk away from the transaction entirely and absorb any losses it experiences.[302]

Furthermore, because the reviews are not applicable to anyone who was not a party to the request, they have no precedential value for others who are creating or structuring similar transactions. A review would have value for another company only if its problem is the same type as indicated in a review and the company is capable of doing the same type transaction.[303] The probability of this occurring is not very great.

In fact, the review procedures are not guidelines but disclosure requirements. Because the DOJ will not entertain requests to review a hypothetical transaction,[304] companies must create a transaction first and then disclose all the particulars of the arrangement. Only at that point will the DOJ decide whether it will take enforcement action with respect to the transaction. A major criticism of the present review procedures, therefore, is that even when companies use them, they produce too much hesitation and overcautiousness. Nevertheless, the present review procedures do confirm the DOJ's unchanging position that it will not teach businesses how to commit foreign bribery.

b. Possibility of Dual Enforcement Actions

A favorable review under the FCPA review procedures does not guarantee that a proposed transaction is absolutely valid under all United States laws: a favorable review is not a grant of immunity. The review procedures theoretically do not bind the SEC, which shares enforcement

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301. *See* FCPA Review Procedure, 28 C.F.R. § 50.18(k) (1985) ("review letter can be relied upon . . . to the extent the disclosure continues accurately and completely to reflect circumstances after the date of issuance"); Witherspoon, *supra* note 42, at 573 (review binding only as to facts disclosed).

302. *See* Timmeny, *supra* note 4, at 283; Clark Interview, *supra* note 297. Most foreign agency agreements contain "drop dead" clauses, which allow the American company to walk away from a contract if it discovers its foreign agent has violated the FCPA. Such clauses protect the company from further losses under the law of that foreign country, for example, for breach of a valid agency agreement. *Id.*

303. This is, in fact, part of the same rationale upon which the DOJ bases its refusal to formulate FCPA guidelines. A finite number of approved FCPA model transactions would cause too many companies to try to force their unique fact situations into the hypothetical role, having a straitjacket effect. *See infra* notes 305-06 and accompanying text.

304. FCPA Review Procedure, 28 C.F.R. § 50.18(b) (1985).

authority with the DOJ.[305] However, as a general matter, the SEC announced in August 1980 that it would not start enforcement actions against businesses that received favorable reviews prior to May 31, 1981.[306] The SEC has not issued any subsequent policies except that "as a matter of prosecutorial discretion"[307] it will accept DOJ reviews or enforcement actions under section 103 of the Act.[308]

A DOJ review is binding only as to the FCPA.[309] American businesses must also worry whether the DOJ or the SEC will bring some enforcement action under any other United States laws. In theory, the DOJ is still free to bring a suit against the company for an antitrust violation, mail fraud, wire fraud or violations of the currency reporting acts.[310]

In actuality, the likelihood of prosecution for an antitrust violation is slim because the jurisdictional overlap of the two laws is not great.[311] Congress enacted the mail and wire fraud statutes to apply to crimes within the United States and not abroad. The DOJ is unlikely to use them in an FCPA prosecution. Some commentators feel that the DOJ should not penalize a corporation for its openness in making the disclosures in the review request. However, from a layman's point of view, it is just and proper that a corporation should not be immunized from all possible prosecutions merely because it has revealed proposed conduct in a review request. If the corporation has violated another law, such as the currency reporting statute, the United States should prosecute it for the offense.

c. The Need for FCPA Guidelines

A widespread belief exists, evidenced by the proposed amendments to the FCPA,[312] that the ambiguities of the Act necessitate some alternate

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305. *See* Heymann, *supra* note 238, at 21, cols. 3-4; *see supra* notes 260-61 and accompanying text.

306. *See* Note, *Criminalization of American Bribery, supra* note 99, at 658.

307. Statement of Commission Policy Concerning Section 30A of the Securities Exchange Act of 1934, 45 Fed. Reg. 59001, 59002 (1980).

308. *Id.; see* Comment, *FCPA: Impact and Future, supra* note 2, at 425; Note, *Criminalization of American Bribery, supra* note 99, at 658.

309. *See* Witherspoon, *supra* note 42, at 573; *White Collar Crime, supra* note 250, at 515; *supra* notes 256-61 and accompanying text.

310. *See supra* note 250 and accompanying text.

311. Clark Interview, *supra* note 297.

312. Specifically, those sections of the proposed bills that would require guidelines or that would affect the existing review procedures evidence the belief. *See* H.R. 3, *supra* note 112, § 352(d)-(e); H.R. 4800, *supra* note 112, § 701(c); H.R. 4389, *supra* note 112, § 3; S. 430, *supra* note 112, § 8.

form of direction from the DOJ. This guidance would enable United States companies to know under what circumstances the DOJ will consider them to have "reason to know" of a corrupt payment or when a payment is not merely "facilitating."

Perhaps the most practical opinion that the guidelines could provide is when a payment that is lawful in a foreign country would be illegal in the United States.[313] Factors that the DOJ could consider in making this decision are the excessiveness of the payment, the nature of the payment as being particularly reprehensible and the degree of scandal that would ensue if the company revealed the identity of the bribed official.[314] The DOJ could also officially sanction business structures that it has found valid, or it could present hypothetical models that it believes to be valid. It could issue a special release of approved transactions and encourage other companies to imitate these transactions as closely as possible.

Establishment of FCPA guidelines would not eliminate the review procedures. Even when corporations have adequate models and information from which to draft lawful transactions, they may want to be assured that certain borderline transactions are in fact valid. Retention of the review procedures would also benefit the DOJ by enabling it to stay involved with proposed overseas corporate transactions.

2. Potential Advantages to Current FCPA Review Procedures

The DOJ does not share the view held by the authors of the various proposed amendments to the Act that FCPA guidelines are necessary. Quite the contrary, the DOJ has stated that "[f]rom a commercial as well as an enforcement point of view, the Department does not believe that issuing guidelines or precautionary procedures would be advisable."[315]

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313. Congress has taken a firm moral stance against bribery, yet it still wants United States firms to be able to compete overseas. An extremely pragmatic suggestion would be for the DOJ to provide examples of appropriate behavior in each country. Assume that the DOJ would take the time, once and for all, to investigate (discreetly) acceptable limits on bribery in different areas. The DOJ could do this by examining the large, highly developed European and Middle Eastern nations separately and classifying smaller countries within Southeast Asia, Africa or South America by geographic area. Assume further that the DOJ then releases its findings: what may be a bribe in West Germany may not be a bribe in Japan or Cameroon. Of course, this suggestion is totally infeasible. Barring logistical problems such as how to compile such information, the foreign policy implications of such an effort would be enormous. At the minimum, such an inquiry would intrude severely into foreign sovereignty matters.

314. *See supra* notes 252-53 and accompanying text.

315. Keeney Statement, *supra* note 83, at 10.

According to the DOJ, any attempt even to formulate a set of guidelines in this area would ultimately be impractical for two reasons. First, if the DOJ presents only a few hypothetical transactions as acceptable under the FCPA, then American companies will unduly restrict their business opportunities by trying to fit within the given examples. Second, if the DOJ attempts to list every possible permutation companies use in constructing business transactions, the result will be a voluminous compilation through which a business party must search in order to determine if his fact situation fits one already given. Both these attempts would straitjacket business dealings and possibly disadvantage American companies in foreign markets.[316]

Mere dollar limitations on payments to foreign officials serve no useful purpose: a payment may be very large, yet made with the most innocent of intentions, or very small, yet made with the most egregious intent.[317] Finally, due process would require that any position that the DOJ takes in guidelines govern any future criminal actions under the Act,[318] even if mitigating circumstances arise that were not present earlier.

For these reasons, the DOJ believes that guidelines would be more of a hindrance than a help to the American business community. On the other hand, the DOJ holds firmly that its review procedure is the least restrictive method for solving potential difficulties under the FCPA. While the reviews are not advisory opinions to private attorneys,[319] they do state the DOJ's present enforcement intent with regard to particular circumstances. Because the DOJ handles the reviews on a case-by-case basis, the DOJ examines each transaction on its merits. In this way, a company can learn that, under limited conditions, the DOJ will not prosecute a minor or technical violation of the FCPA.[320]

Furthermore, compliance with the requirements for the review requests is not difficult. The requesting party need only describe all information relevant and material to the proposed transaction.[321] The DOJ believes that this process "works well and fairly."[322]

At this writing, it does not appear likely that any FCPA guidelines are forthcoming. The DOJ will not issue guidelines without a congressional mandate. Congressional action on the proposed amendments has

316. *Id.; see also* Clark Interview, *supra* note 297.
317. Keeney Statement, *supra* note 83, at 10-11.
318. *Id.* at 11.
319. *Id.* at 9.
320. *Id.* at 9-10; Clark Interview, *supra* note 297.
321. FCPA Review Procedure, 28 C.F.R. § 50.18(e).
322. Keeney Statement, *supra* note 83, at 10.

halted at various stages of the legislative process. FCPA guidelines are thus inextricably bound to passage of amendments to the Act. The business community must continue to rely on review releases and the results of actual prosecutions by the DOJ for assistance in understanding the FCPA.

V. ENFORCEMENT ACTIONS UNDER THE FCPA

To this date, the DOJ and the SEC have brought comparatively few actions to enforce the antibribery provisions.[323] Several factors account for this phenomenon, the predominant one being the heavy burden of detection placed on these government agencies.[324] In many foreign coun-

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323. *See* Comment, *FCPA: Curse or Cure?, supra* note 43, at 86; Note, *Criminalization of American Bribery, supra* note 99, at 646, 664-65; Note, *Effective Enforcement of the Foreign Corrupt Practices Act,* 32 STAN. L. REV. 561, 569 (1980). [hereinafter Note, *Effective Enforcement*]. The actions that the DOJ and SEC have brought will be discussed *infra* in part V, sections A and B. There have been more recent reports of foreign bribery, but none have resulted in formal charges. The investigations of Ashland Oil started long before the current series of inquiries. Two Congressional subcommittees studied over $17 million in payments to a former official of Abu Dhabi. *See* Gerth, *Ashland Payments on Oil Questioned,* N.Y. Times, July 12, 1983, at 1, col. 1. Also, since the fall of former President Ferdinand E. Marcos of the Philippines on February 25, 1986, new information has been uncovered concerning payments by GTE Corp. and Westinghouse Electric Corp. *See* N.Y. Times, Feb. 26, 1986, at A1, col. 1. The DOJ has not brought charges on either of these allegations. *See* Gerth, *The Marcos Empire: Gold, Oil, Land and Cash,* N.Y. Times, Mar. 16, 1986, at 1, col. 4., at 18, col. 3.

By contrast, both the DOJ and the the SEC have brought many actions alleging violations of the accounting provisions. The DOJ will use the FCPA accounting rules to reach other felonies or felons. For example, it will allege FCPA accounting violations to reach instances of mail fraud or wire fraud, income tax evasion and false SEC filings. *See* Information, United States v. Duquette, Crim. No. H-84-64 (D. Conn. filed n.d.), *reprinted in* 2 FCPA Rep. at 696.74-.78 (Apr. 30, 1985); Information, United States v. Miller, No. CR84-76 (N.D. Ohio filed n.d.), *reprinted in* 2 FCPA Rep. at 696.72-.73 (Apr. 30, 1985). It will also use the accounting provisions to reach individual defendants. *See* Daily Report, Fraud Section, Crim. Div., United States v. Miller, *reprinted in* 2 FCPA Rep. at 696.72 (April 30, 1985).

The SEC, for its part, will routinely make allegations of FCPA violations—failure to maintain accurate books and records and failure to devise internal accounting controls—in the various securities actions it brings. In Securities and Exchange Commmission v. World-Wide Coin Investments, Ltd., 567 F. Supp. 724, 745-51 (N.D. Ga. 1983), Judge Vining gave a lucid exposition of the accounting provisions, with respect to their policies, purposes and requirements and SEC actions taken to enforce them. The most important recent examination of the accounting provisions may be found in *In re* Tonka Corp., Release No. 22,448, [1982-1987 Transfer Binder Accounting and Auditing Enforcement Releases] Fed. Sec. L. Rep. (CCH) ¶ 73,473 (Sept. 24, 1985).

324. *See* Note, *Criminalization of American Bribery, supra* note 99, at 661; Note,

tries political corruption is accepted as a given fact.[325] Efforts by the DOJ or SEC to investigate possible illicit payments may offend foreign officials and harm other United States interests. Also, any vigorous attempts to enforce the Act could lead to unexpected political or public complications that could cause American companies to lose business needlessly.[326] Willing recipients of bribes would not be anxious to deal with United States corporations knowing that any transaction may be subject to close scrutiny.

Prosecutorial difficulties may often outweigh the benefits of bringing an enforcement action.[327] The crime usually occurs on foreign soil, with the result that the DOJ or SEC cannot easily compel discovery. The cooperation of foreign individuals or governments is almost always necessary, although it may be difficult or impossible to obtain.[328] Sixth amendment problems may arise if the DOJ or SEC fails to produce a foreign witness or evidence at trial.[329] Finally, the SEC and particularly the DOJ are understaffed in this area.[330]

Thus, for a variety of reasons, the complexities surrounding enforcement of the FCPA have severely limited the number of actions brought under the antibribery provisions.[331] Nevertheless, the DOJ has com-

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Effective Enforcement, supra note 323, at 569.

325. *See* Note, *Criminalization of American Bribery, supra* note 99, at 650-51; *Big Profits in Big Bribery,* TIME, Mar. 16, 1981, at 58, 59, 67; *Bribery: A Shocker in U.S., But a Tradition Overseas,* U.S. NEWS & WORLD REP., Apr. 12, 1976, at 33, 34; *Why Americans Pay Bribes to Do Business Abroad,* U.S. NEWS & WORLD REP., June 2, 1975, at 57, 58. *See supra* note 96 and accompanying text.

326. *See* G. GREANIAS & D. WINDSOR, *supra* note 2, at 122-23; *Coping With the New Rules of Conduct,* BUS. WK., Oct. 10, 1977, at 76. *See supra* note 96 and accompanying text.

327. Timmeny, *International Aspects of the Accounting Provisions of the Foreign Corrupt Practices Act,* in PRIVATE INVESTORS ABROAD—PROBLEMS AND SOLUTIONS IN INTERNATIONAL BUSINESS IN 1980, at 205-06 (1980); Note, *Criminalization of American Bribery, supra* note 99, at 661-64; Note, *Effective Enforcement, supra* note 323, at 569-70; Note, *FCPA: Extraterritorial Application, supra* note 55, at 717-18.

328. Timmeny, *supra* note 327, at 205-06; Maurice, *supra* note 13, at 490; Witherspoon, *supra* note 42, at 560; Note, *Criminalization of American Bribery, supra* note 99, at 661-64; Note, *FCPA: Extraterritorial Application, supra* note 55, at 717-18.

329. Timmeny, *supra* note 327, at 205-06; Maurice, *supra* note 13, at 491; *FCPA and Questionable Payments, supra* note 42, at 632 (statement of Mark M. Richard, Chief, Dep't of Just., Crim. Div., Fraud Sec.); Note, *Criminalization of American Bribery, supra* note 99, at 661-64; Note, *Effective Enforcement, supra* note 323, at 569-70; Note, *FCPA: Extraterritorial Application, supra* note 55, at 717-18.

330. Note, *Criminalization of American Bribery, supra* note 99, at 663; Note, *Effective Enforcement, supra* note 323, at 570.

331. There are several other theories as to why so few convictions under the Act

menced some actions alleging instances of foreign bribery.

A. *Actions to Enjoin Foreign Bribery*

Since 1979 the DOJ has brought a total of ten reported actions to enjoin occurrences of foreign bribery by American companies.[332] Six of these cases, known as the "*Pemex*" cases, involved a conspiracy to make payments to foreign officials of Petroleos Mexicanos, the Mexican national oil company.[333] The other four suits involved separate incidents of payoffs made in Qatar,[334] the Cook Islands,[335] Mexico[336] and Nigeria.[337]

United States v. Carver[338] was the first enforcement proceeding that the DOJ brought to enjoin foreign bribery. The defendants, Roy J. Carver and R. Eugene Holley, had made a payment of $1,500,000 to Ali Jaidah, the Director of Petroleum Affairs of Qatar, to obtain an oil

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exist. One is that the strong deterrent effect of the FCPA has resulted in fewer bribes. *See* Note, *Criminalization of American Bribery, supra* note 99, at 664. Naturally, the government would commence fewer enforcement actions. On the other hand, it may be that certain extremely sophisticated businesses do still bribe foreign officials but in such a way that detection is virtually impossible. *Id.* at 665. The scope of the FCPA may also make it inherently difficult to enforce. *Id.*

332. United States v. McLean, 738 F.2d 655 (5th Cir. 1984), *cert. denied*, 470 U.S. 1050 (1985); Information, United States v. Carpenter, Crim. No. 85-353 (D.N.J. filed n.d.), *reprinted in* 2 FCPA Rep. at 696.79 (Jan. 1, 1986); Indictment, United States v. Crawford Enters, Inc., Crim. No. H-82-224 (S.D. Tex. charged Oct. 20, 1982), *reprinted in* 2 FCPA Rep. at 696.53 (Jan. 31, 1984); Information, United States v. Applied Process Prods. Overseas, Inc., Crim. No. 83-00004 (D.D.C. filed n.d.), *reprinted in* 2 FCPA Rep. at 696.42 (Jan. 31, 1984); Information, United States v. Ruston Gas Turbines, Inc., Crim. No. H-82-207 (S.D. Tex. filed Sept. 22, 1982), *reprinted in* 2 FCPA Rep. at 696.38 (Jan. 31, 1984); Information, United States v. C.E. Miller Corp., No. CR82-788 (C.D. Cal. filed Sept., 1982), *reprinted in* 2 FCPA Rep. at 696.33 (Jan. 31, 1984); Information, United States v. International Harvester Co., Crim. No 82-244 (S.D. Tex. filed n.d.), *reprinted in* 2 FCPA Rep. at 696.27 (Jan. 31, 1984); Information, United States v. Kenny Int'l Corp., (D.D.C. filed Aug. 2, 1979), *reprinted in* 2 FCPA Rep. at 649 (Dec. 31, 1982); Complaint for Permanent Injunction, United States v. Carver, (S.D. Fla. filed n.d.), *reprinted in* 2 FCPA Rep. at 645 (Dec. 31, 1982).

333. *McLean*, 738 F.2d at 655 ; Indictment, Crawford Enters., Inc., *reprinted in* 2 FCPA Rep. at 696.53; Information, Applied Process, *reprinted in* 2 FCPA Rep. at 696.42; Information, Ruston Gas, *reprinted in* 2 FCPA Rep. at 696.38; Information, C.E. Miller Corp., *reprinted in* 2 FCPA Rep. at 696.33; Information, International Harvester, *reprinted in* 2 FCPA Rep. at 696.27.

334. Complaint, Carver, *reprinted in* 2 FCPA Rep. at 645.

335. Information, Kenny Int'l, *reprinted in* 2 FCPA Rep. at 650.

336. Information, United States v. Silicon Contractors, Inc., Crim. No. 85-251 (E.D. La. filed June 27, 1985).

337. Information, Carpenter, *reprinted in* 2 FCPA Rep. at 696.79.

338. Complaint, Carver, *reprinted in* 2 FCPA Rep. at 645.

drilling concession in that country.[339] The defendants' business encountered operational and financial troubles, and they could not comply with the terms of the concession agreement. The new Director of Petroleum Affairs told them that they would lose their concession.[340] The defendants then contacted the State Department in an effort to find someone who could help them renegotiate their drilling concession. The defendants met with the United States Ambassador to Qatar, a foreign service officer, and the Director of Petroleum Affairs, but they could not reach a new agreement. Unfortunately for Carver, he revealed to the Ambassador that he had already paid $1,500,000 for the original concession. He then asked, "who do I go see now, how do I get it done?"[341] in reference to obtaining the new concession and protecting his original investment. Both the Ambassador and the foreign service officer terminated all further discussion with Carver.[342]

The DOJ responded by filing a complaint for a permanent injunction.[343] The "use of the mails or other instrumentalities of interstate commerce" requirement was met because the defendants allegedly flew to Qatar from an airport in Florida (the airport being the instrumentality of interstate transportation) and made use of wire facilities to have the payment sent to a Swiss bank account.[344] A consent order[345] in which both defendants agreed to the entry of a permanent injunction restraining them from any further violations of sections 104(a)(1) and (3) of the Act settled the complaint.[346]

United States v. Kenny International Corp.,[347] which the DOJ brought later that same year, charged the defendant corporation and its president, Finbar Kenny, with making a corrupt payment to a foreign political party in order to retain business.[348] Kenny International had possessed the exclusive rights to distribute and sell Cook Islands postage stamps outside that country in exchange for retention of 50 percent of the proceeds. Only the reelection to office of Sir Albert Henry, then the Premier of the Cook Islands and Leader of the Cook Islands Party,

339. *Id., reprinted in* 2 FCPA Rep. at 645-46.
340. *Id., reprinted in* 2 FCPA Rep. at 646.
341. *Id.*
342. *Id.*
343. *Id., reprinted in* 2 FCPA Rep. at 645.
344. *Id., reprinted in* 2 FCPA Rep. at 645-46.
345. Final Judgment of Permanent Injunction, United States v. Carver (S.D. Fla. entered Apr. 9, 1979), *reprinted in* 2 FCPA Rep. at 647 (Dec. 31, 1982).
346. *Id., reprinted in* 2 FCPA Rep. at 648.
347. Information, Kenny Int'l, *reprinted in* 2 FCPA Rep. at 650.
348. *Id., reprinted in* 2 FCPA Rep. at 651.

could assure Kenny International of the continued existence of the agreement. Sir Albert Henry proposed to transport Cook Islands Party voters from New Zealand to the Cook Islands to assure victory in the elections. Sir Albert Henry contacted Kenny and Kenny International and asked them to subsidize the flight costs for these voters. Kenny and Kenny International agreed even though the subsidy was illegal under Cook Islands law. Sir Albert Henry and Kenny met in Hawaii, where they agreed that they would deduct the payment to the Cook Islands Party from the Government's share in the postage stamp proceeds. Pursuant to this agreement, Kenny and Kenny International paid $NZ337,000 (approximately $US337,000) to the Cook Islands Party.[349]

The DOJ discovered the scheme after Sir Albert Henry won the election. The DOJ charged Kenny and Kenny International with the corrupt use of a commercial aircraft to make payments to a foreign political party in order to retain business.[350] Kenny International pleaded guilty to the charge, consented to a final judgment permanently enjoining it from violating section 104 of the FCPA and paid a fine of $50,000.[351] Finbar Kenny agreed to appear and plead guilty in the criminal case brought in the Cook Islands arising from his actions.[352] He also consented to a final judgment permanently enjoining him from violating section 104 of the Act, and he agreed to appear voluntarily in the Cook Islands to testify at any proceeding relating to the fraudulent election.[353] Finally, Finbar Kenny guaranteed to pay the Government of the Cook Islands restitution in the amount of $NZ337,000.[354]

The *Pemex* cases resulted from a complex conspiracy among a number of entities to obtain or retain business with Petroleos Mexicanos, the Mexican state-owned oil company. Crawford Enterprises, Inc. (CEI) instigated the conspiracy, which included Ruston Gas Turbines, Inc. (Ruston), the Solar Turbines International Division of International Harvester Co. (Solar), the C.E. Miller Corp. (CEMCO) and Pemex's subdirectors of purchasing and production.[355] CEI arranged to pay five

349. Offer of Proof, United States v. Kenny Int'l Corp., (D.D.C. filed Aug. 2, 1979), *reprinted in* 2 FCPA Rep. at 649-50 (Dec. 31, 1982).

350. Kenny was charged only in the civil injunctive action. Information, Kenny Int'l, *reprinted in* 2 FCPA Rep. at 650.

351. Notice of Plea Agreement and Plea Agreement, United States v. Kenny Int'l Corp., (D.D.C. filed Aug. 9, 1979), *reprinted in* 2 FCPA Rep. at 651 (Dec. 31, 1982).

352. Plea Agreement, Kenny Int'l., *reprinted in* 2 FCPA Rep. at 651.

353. *Id., reprinted in* 2 FCPA Rep. at 652.

354. *Id.*

355. Indictment, Crawford Enters., *reprinted in* 2 FCPA Rep. at 696.53-.55; Offer of Proof, United States v. Ruston Gas Turbines, Inc., Crim. No. H-82-203 (S.D. Tex.

percent (5%) of every bid that Pemex accepted to these two subdirectors—designated as the "folks."[356] In return, the "folks" would obtain purchase orders for turbine compression systems and related equipment from Pemex for the conspirators.[357]

The conspiracy operated in the following manner. CEI set the bids, inflated by five percent (5%), for itself, Ruston, and Solar. Solar and Ruston agreed to use CEMCO as the subcontractor for the fabrication of the turbine compression equipment. CEMCO's prices for the fabrication work also included a five percent (5%) markup for the "folks." The "folks" would cause Pemex to accept either CEI's, Ruston's or Solar's bid on compression systems. When Pemex awarded a contract directly to CEI, it would pay the bribe money to its Mexican agent, Grupo Industrial Delta, S.A. (Grupo Delta), which would in turn convey the funds to the "folks."[358] In those situations where Pemex awarded contracts to either Ruston or Solar, they would pay CEMCO for its work, and CEMCO would convey the five percent (5%) for the "folks" to CEI, who then forwarded the money to Grupo Delta for payment to the "folks."[359] This conspiracy of pre-arranged bids and payments to foreign officials lasted from approximately December 19, 1977 to May 1980.[360]

In the fall of 1982, the DOJ brought criminal charges against, among others, CEI, CEMCO, Ruston, International Harvester (as the parent company of Solar) and a host of individual defendants.[361] With the ex-

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filed Sept. 22, 1982), *reprinted in* 2 FCPA Rep. at 696.38-.39 (Jan. 31, 1984); Offer of Proof, United States v. C.E. Miller Corp., Crim. No. 82-788 (C.D. Cal. filed n.d.), *reprinted in* 2 FCPA Rep. at 696.33, 696.35 (Jan. 31, 1984); Offer of Proof, United States v. International Harvester Co., Crim. No. H-82-244 (S.D. Tex. filed n.d.), *reprinted in* 2 FCPA at 696.3 (Jan. 31, 1984); *see Why Pemex Can't Pay Mexico's Bills,* BUS. WK., Feb. 28, 1983, at 58, 60; Riding, *Pemex Inquiry Urged on Kickbacks,* N.Y. Times, Oct. 30, 1982, at 37, col. 3, at 47, col. 1; Lewin, *U.S. Jury Investigating Payments to Mexicans*, N.Y. Times, May 5, 1982, at D1, col. 1, at D6, col. 5.

356. Offer of Proof, Ruston Gas, *reprinted in* 2 FCPA Rep. at 696.39; Offer of Proof, C.E. Miller Corp., *reprinted in* 2 FCPA Rep. at 696.34; Offer of Proof, International Harvester, *reprinted in* 2 FCPA Rep. at 696.3.

357. *Id.*

358. Offer of Proof, Ruston Gas, *reprinted in* 2 FCPA Rep. at 696.39-.40; Offer of Proof, C.E. Miller Corp., *reprinted in* 2 FCPA Rep. at 696.36; Offer of Proof, International Harvester, *reprinted in* 2 FCPA Rep. at 696.3.

359. Offer of Proof, Ruston Gas, *reprinted in* 2 FCPA Rep. at 696.4; Offer of Proof, C.E. Miller Corp., *reprinted in* 2 FCPA Rep. at 696.35-.36; Offer of Proof, International Harvester, *reprinted in* 2 FCPA Rep. at 696.3.

360. Indictment, Crawford Enters., *reprinted in* 2 FCPA Rep. at 696.54.

361. Two related cases, United States v. King, Crim. No. 83-00020 (D.D.C. filed Jan. 31, 1983), *reprinted in* 2 FCPA Rep. at 696.5 (Jan. 31, 1984), and United States v. Bateman, Crim. No. 83-00005 (D.D.C. filed Jan. 4, 1983), *reprinted in* 2 FCPA

ception of International Harvester, which was charged only with conspiracy to violate the FCPA, each was charged with making payments to foreign officials or to third parties with knowledge that those parties would convey part of the amount received to foreign officials in order to influence those officials in the performance of their duties and to obtain or retain business for the defendants.[362]

Uncontested pleas resolved most of the actions. Ruston pleaded guilty to a charge of violating the FCPA, paid a $750,000 fine and agreed not to commit any further crimes.[363] CEMCO and its president, Charles E. Miller, both pleaded guilty to similar charges and agreed not to commit any further crimes. International Harvester pleaded guilty to conspiracy and paid $510,000 in fines and court costs.[364] An employee of Solar, Luis Uriarte, pleaded guilty to a charge of being an accessory after the fact to violations of the Act.[365] International Harvester's employee, George S. McLean, was the only defendant in the entire *Pemex* litigation to have a jury try his case.[366] Prior to trial, McLean moved to dismiss the charges against him on the grounds that International Harvester's guilty plea to a conspiracy charge did not constitute a conviction of an FCPA violation.[367] The Fifth Circuit, on appeal, said that a conspiracy to violate the Act did not constitute a violation of the FCPA, and, therefore, International Harvester did not violate the Act. It held that "in order to convict an employee under the FCPA for acts committed for the benefit of his employer, the government must first convict the employer. Because the government failed to convict Harvester and under the plea agreement will be unable to indict Harvester and try it with McLean,

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Rep. at 696.46 (Jan. 31, 1984), arose out of the *Pemex* facts, but charged violations of the Currency Reporting Act, 31 U.S.C. §§ 1058, 1101 (1982).

362. Indictment, Crawford Enters., *reprinted in* 2 FCPA Rep. at 696.61-.66; Information, Applied Process, *reprinted in* 2 FCPA Rep. at 696.42; Information, Ruston Gas, *reprinted in* 2 FCPA Rep. at 696.38; Information, C.E. Miller Corp., *reprinted in* 2 FCPA Rep. at 696.33; Information, International Harvester, *reprinted in* 2 FCPA Rep. at 696.27-.28.

363. Plea Agreement, United States v. Ruston Gas Turbines, Inc., Crim. No. H-82-202 (S.D. Tex. filed Sept. 22, 1982), *reprinted in* 2 FCPA Rep. at 696.4 (Jan. 31, 1984).

364. Notice of Plea Agreement and Plea Agreement, United States v. International Harvester Co., Crim. No. 82-2444 (S.D. Tex. filed Nov. 16, 1982), *reprinted in* 2 FCPA Rep. at 696.31 (Jan. 31, 1984); Pasztor, *Pemex Bribery Case Defendants Found Guilty*, Wall St. J., Apr. 5, 1985, at 2, col. 5.

365. *McLean*, 738 F.2d at 657 n.3.

366. *Id.* at 657.

367. *Id.*

the Act bars McLean's prosecution."[368] Although the Fifth Circuit did permit the United States to try McLean on the conspiracy charge brought against him, a jury acquitted him in April 1985.

Finally, on the eve of trial, the remaining defendants entered pleas of nolo contendere to all of the charges in the indictment.[369] As a result of these pleas, the court fined CEI $3,450,000[370] and its president, Donald Crawford, $309,000.[371] Other defendants received fines totalling $235,000.[372] Significantly, the court denied the DOJ's requests for prison terms.[373] This may indicate that the court believed prison terms were unduly harsh penalties even though the Act specifically provides for them and the conduct in this case appeared particularly egregious. The fines imposed were certainly considerable. Perhaps the court believed a corporate fine of $3.45 million was a sufficient deterrent.

United States v. Silicon Contractors, Inc.[374] demonstrates that extortion on the part of a foreign official is not a valid defense to a charge of violating the FCPA. The corporate defendant, Silicon Contractors, Inc. (Silicon), produced, marketed and installed sealant materials for use in nuclear power plants.[375] Silicon officials learned of a proposal by the Comision Federal de Electricidad (CFE), the Mexican-owned electric power agency, to build a nuclear power plant and took steps to submit a bid for the sealant material contract.[376] As part of its preparations, Silicon entered into a joint-venture arrangement with a Mexican firm, Parian Internacional S.A. de C.V. (Parian).[377] Silicon submitted a bid of $8 million for the project, which it believed was highly competitive and which would result in awarding the contract to Silicon.[378]

However, Silicon learned through Parian that CFE officials had demanded 10 million pesos (roughly equivalent to $450,000) before they

368. *Id.* at 660.

369. United States Dep't of Just., Crim. Div., Fraud Sec., Litig. Release, *U.S. v. Crawford Litigation Is Finally Resolved* [hereinafter U.S. Dep't of Just. Litig. Release], *reprinted in* 2 FCPA Rep. at 696.6601 (July 31, 1985); *see Pemex Case Convictions*, N.Y. Times, Apr. 6, 1985, at 29, col. 1.

370. U.S. Dep't of Just. Litig. Release, *supra* note 358, *reprinted in* 2 FCPA Rep. at 696.6601.

371. *Id.*

372. *Id.*

373. *Id.*

374. Crim. No. 85-251 (E.D. La., filed June 27, 1985).

375. Offer of Proof, United States v. Silicon Contractors, Inc., Crim. No. 85-251, at 1 (E.D. La. filed June 27, 1985).

376. *Id.* at 1-2.

377. *Id.* at 2.

378. *Id.*

would award Silicon the contract.[379] Executives from Silicon and Parian weighed the bribe demand and the possibility that a particular CFE official could actually block the contract. Herbert D. Hughes, the majority shareholder of Silicon as well as the owner and controller of the holding company of which Silicon was a subsidiary, and Ronald R. Richardson, a senior officer of Hughes's holding company, ultimately considered the problem.[380] Hughes decided to pay the bribe based on his belief that a failure to do so would result in the loss of the contract.[381] Hughes flew from Louisiana to the Cayman Islands as part of the scheme by which they would ultimately transfer funds to the CFE official.[382] The Louisiana airport thus became the instrumentality of interstate commerce corruptly used in violation of section 104 of the Act.[383]

This case also ended in uncontested pleas. Silicon pleaded guilty to a charge of violating the Act, consented to the entry of a permanent injunction against it from any future violations of the Act and paid a fine of $150,000.[384] Hughes and Richardson also consented to the entry of permanent injunctions against them from any future violations of the Act.[385]

The *Silicon* case raises the question of whether it is equitable or just to prosecute under the FCPA a company that is responding to a demand for money from a foreign official. At first blush it would appear that the corporation lacks the requisite evil intent because it did not initiate the corrupt payment. However, the legislative history of the Act makes clear that the drafters intended the antibribery provisions to apply to this precise situation:

> Sections 103 and 104 cover payments and gifts intended to influence the recipient, regardless of who first suggested the payment or gift. The defense that the payment was demanded on the part of a government official as a price for gaining entry into a market or to obtain a contract would not suffice since at some point the U.S. company would make a conscious decision whether or not to pay a bribe. That the payment may have been first proposed by the recipient rather than the U.S. company does not alter the corrupt purpose on the part of the person paying the bribe.[386]

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379. *Id.*

380. *Id.* at 3.

381. *Id.*

382. *Id.* at 4.

383. Information, Silicon Contractors, at 1-2.

384. Notice of Plea Agreement and Plea Agreement, Silicon Contractors, Inc., Crim. No. 85-251, at 1-2 (E.D. La. filed June 27, 1985).

385. *Id.* at 2.

386. S. REP., FOREIGN CORRUPT PRACTICES, *supra* note 5, at 10-11, *reprinted in* 1977 U.S. CODE CONG. & ADMIN. NEWS at 4108.

Thus the prosecution of Silicon under the FCPA was fully warranted.

The latest DOJ case brought to enforce the antibribery provisions resulted in a guilty plea on October 2, 1985. The case of *United States v. Carpenter*[387] charged the defendant Harry Carpenter with making payments to a third party while knowing that the third party would convey some of the money to a foreign official. Carpenter sent an international telex to the Standard Chartered Bank of New York ordering it to pay $580,973 to one Benson "Tunde" Akindele. Akindele wanted the money as a commission to help Carpenter get a $10.8 million aero-medical contract with the Nigerian Government. Akindele told Carpenter he would pay certain percentages of his commission to various Nigerian political and military figures.[388] In his plea, Carpenter agreed to disclose all information to the DOJ, the FBI and Customs, and to testify whenever the DOJ required him to do so.[389]

The DOJ has been successful in all but one of these cases: every case (except *McLean*) resulted in a guilty plea by the defendants.[390] No substantive litigation on the merits of the FCPA bribery allegations resulted from any of these cases. This is beneficial from a prosecutorial standpoint because plea agreements are a very efficient means of enforcing the law while conserving resources for other, more pressing cases. On the other hand, a plea agreement sacrifices the benefit of judicial interpretation of the FCPA. As long as the Act is not judicially construed, its ambiguities can have a strong deterrent effect.

The SEC has brought injunctive actions to enforce the antibribery provisions of the FCPA.[391] In *Securities and Exchange Commission v. Katy Industries, Inc.*[392] the SEC charged that the defendant had violated the FCPA in order to obtain an oil production contract in Indonesia.

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387. Information, Carpenter, *reprinted in* 2 FCPA Rep. at 696.79.

388. Foreign Corrupt Prac. Act Release, United States v. Carpenter, Oct. 2, 1985, *reprinted in* 2 FCPA Rep. at 696.79 (Jan. 1, 1986).

389. Notice of Plea Agreement and Plea Agreement, United States v. Carpenter, Crim. No. 85-353 (D.N.J. filed n.d.), *reprinted in* 2 FCPA Rep. at 696.80 (Jan. 1, 1986).

390. *See supra* notes 345-89 and accompanying text.

391. Complaint for Permanent Injunction and Certain Ancillary Relief, Securities and Exch. Comm'n v. Sam P. Wallace Co., Civ. No. 81-1915 (D.D.C. filed Aug. 13, 1981), *reprinted in* 2 FCPA Rep. at 683 (Dec. 31, 1982); Complaint for Permanent Injunction and for Other Equitable Relief, Securities and Exch. Comm'n v. Tesoro Petroleum Corp., No. 80-2961 (D.D.C. filed Nov. 20, 1980), *reprinted in* 2 FCPA Rep. at 637 (Dec. 31, 1982); Complaint, Securities and Exch. Comm'n v. Katy Indus., Inc., No. 78C-3476 (N.D. Ill. filed Aug. 30, 1978), *reprinted in* 2 FCPA Rep. at 616 (Dec. 31, 1982).

392. Complaint, Katy Indus., *reprinted in* 2 FCPA Rep. at 616.

Specifically, the complaint alleged that Katy had employed as a consultant a close personal friend of a high-level Indonesian official; that a Katy director and this consultant had met with the official and his representative and had agreed that if Katy received the oil production sharing contract it would compensate the consultant; and that the director was told that the consultant would give a portion of this compensation to the official and his representative. The complaint further alleged that Katy had entered into an agreement with the consultant and had later obtained a 30-year oil production sharing contract in Indonesia.[393] The SEC sought a permanent injunction of any further violations of section 103 of the Act.[394] The court entered the injunction against all defendants in the action through a consent order.

The SEC sought similar relief in *Securities and Exchange Commission v. Tesoro Petroleum Corp.*[395] The SEC alleged that the defendant had paid substantial sums to "finders" or "consultants," which sums were disproportionate to the business obtained or services rendered. The SEC also alleged that the defendant had made the payments under circumstances that indicated that the funds were passed along to foreign government officials.[396] A government injunction was issued against Tesoro pursuant to a consent order in which the corporation undertook not to make any future payments in violation of the FCPA.[397]

The last action that the SEC brought to enforce section 103 of the Act was *Securities and Exchange Commission v. Sam P. Wallace Co.*[398] The SEC again sought injunctive relief, complaining that the defendant Wallace Co. had paid at least $1.391 million to a foreign official to aid in the company's procuring and maintaining contracts with that foreign government. Wallace Co. and the individual defendants consented to the entry of permanent injunctions against them.[399] Curiously enough, this is

393. *Id., reprinted in* 2 FCPA Rep. at 618-19.

394. *Id., reprinted in* 2 FCPA Rep. at 617. The SEC also sought injunctions from any further violations of the 10(b), proxy statements and registration statement sections of the 1934 Act. *Id., reprinted in* 2 FCPA Rep. at 617.

395. Complaint, Tesoro Petroleum, *reprinted in* 2 FCPA Rep. at 637.

396. *Id., reprinted in* 2 FCPA Rep. at 638-40. The complaint also alleged violations of sections 13(a) and 14(a) of the 1934 Act. *Id.*

397. Consent and Undertaking of Tesoro Petroleum Corp., Securities and Exch. Comm'n v. Tesoro Petroleum Corp., No. 80-2961 (D.D.C. filed Nov. 6, 1980), *reprinted in* 2 FCPA Rep. at 641-42 (Dec. 31, 1982).

398. Complaint, Sam P. Wallace Co., *reprinted in* 2 FCPA Rep. at 683.

399. Final Judgment of Permanent Injunction Against Sam P. Wallace Co., Securities and Exch. Comm'n v. Sam P. Wallace Co., No. 81-1915 (D.D.C. filed Aug. 13, 1981), *reprinted in* 2 FCPA Rep. at 689 (Dec. 31, 1982).

the only case that was also the subject of a DOJ action.[400] Wallace Co. pleaded guilty to the felony charge and received a $30,000 fine for violations of the FCPA.[401] One of the individual defendants, Alfonso A. Rodriguez, the president of a Wallace Co. subsidiary, also pleaded guilty, but received a sentence of probation for reasons of ill-health.[402]

Again, each of these cases was successful for the SEC: each ended with a consent to a permanent injunction. These cases are important because they indicate how the SEC has actually enforced the antibribery provisions, and not just the accounting provisions, of the FCPA. However, there have been instances in which allegations of foreign bribery have been made but then ignored in the rest of the action.

B. *Actions Which Merely Allege Foreign Bribery*

The SEC generally alleges FCPA violations as part of its laundry list of violations[403] under either the 1934 Act or the Securities Act of 1933.[404] Usually this means the SEC will allege violations of the accounting provisions along with violations of sections 13 and 14 of the 1934 Act. Occasionally, the SEC will allege violations of the antibribery provisions but will neglect to pursue these violations and proceed solely under violations of the accounting provisions.[405]

This occurred in *Securities and Exchange Commission v. Page Airways, Inc.*[406] The SEC specifically alleged in its complaint that Page Airways had made illegal payments to government officials and employ-

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400. Information, United States v. Sam P. Wallace Co., Crim. No. 83-0034 (D.P.R. filed n.d.), *reprinted in* 2 FCPA Rep. at 690.01 (Jan. 31, 1984).

401. Notice of Plea Agreement and Plea Agreement by Sam P. Wallace Co., United States v. Sam P. Wallace Co., Crim. No. 83-0034 (D.P.R. filed n.d.), *reprinted in* 2 FCPA Rep. at 690.04 (Jan. 31, 1984).

402. Notice of Plea Agreement and Plea Agreement by Alphonso A. Rodriguez, United States v. Rodriguez, Cr. No. 83-_____ [sic], (D.P.R. dated Mar. 11, 1983), *reprinted in* 2 FCPA Rep. at 690.1 (Jan. 31, 1984). Rodriguez died shortly after the entry of the guilty plea.

403. Peloso, *Enforcement Developments,* in FOREIGN CORRUPT PRACTICES ACT: THREE YEARS AFTER PASSAGE 275 (Practicing Law Institute, Corporate Law and Practice Course Handbook Series, No. 360, 1981); *White Collar Crime, supra* note 250, at 516-17.

404. 15 U.S.C. § 77a (1982).

405. Securities and Exch. Comm'n v. International Sys. & Controls Corp., No. 79-1760 (D.D.C. filed July 9, 1979), SEC Litig. Release Dec. 17, 1979, *reprinted in* 2 FCPA Rep. at 635 (Dec. 31, 1982); Securities and Exch. Comm'n v. Page Airways, Inc., [1978 Decisions Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,393 (D.D.C. 1978).

406. [1978 Decisions Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,393, 93,389 (D.D.C. 1978).

ees in Gabon, Malaysia, the Ivory Coast, Morocco and Uganda[407] in connection with the sales of aircraft to those governments.[408] The SEC also alleged violations of sections 10(b), 13(a) and 14(a) of the 1934 Act, and of the accounting provisions of the FCPA.[409] However, in its prayer for relief the SEC requested injunctions only from violations of the 1934 Act and of the accounting provisions.[410] Page Airways consented to these injunctions. The SEC gave no explanation as to why it did not seek enforcement of the antibribery provisions.

The same situation is present in *Securities and Exchange Commission v. International Systems & Controls Corp.*[411] The complaint specifically alleged that the issuer had paid more than $23 million to foreign persons and entities in connection with the procurement of contracts.[412] However, the SEC sought injunctive relief only in relation to 1934 Act violations and violations of the accounting provisions of the FCPA.[413]

No apparent reason exists as to why the SEC has failed to pursue the antibribery allegations. Given the presence of both violations, perhaps the SEC would prefer to enforce its own territory—namely, the accounting violations. This seems implausible, however. The SEC alleged 1934 Act and accounting provisions violations in both *Katy Industries*[414] and *Tesoro Petroleum,*[415] yet chose to seek enforcement based on the antibribery provisions. Perhaps the answer lies solely with prosecutorial discretion—or personal fancy.[416]

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407. Part of these payments included a Cadillac Eldorado convertible given to Idi Amin Dada. *Id.* at 93,392.

408. *Id.* at 93,391-92.

409. *Id.* at 93,389-90.

410. *Id.* at 93,394-95; *see* Witherspoon, *supra* note 42, at 548-49.

411. No. 79-1760 (D.D.C. filed July 9, 1979), SEC Litig. Release Dec. 17, 1979, *reprinted in* 2 FCPA Rep. at 635 (Dec. 31, 1984).

412. *Id.*

413. *Id., reprinted in* 2 FCPA Rep. at 636.

414. No. 78c-3476 (N.D. Ill. filed Aug. 30, 1978).

415. No. 80-2961 (D.D.C. filed Nov. 20, 1980).

416. The SEC has admitted that the antibribery provisions are not an important part of its enforcement arsenal, partly because of the difficulties present in overseas investigations. Witherspoon, *supra* note 42, at 548-49. The SEC may view enforcement of the antibribery provisions as unnecessary, either in light of other more substantial allegations, or in the absence of available evidence of foreign bribery. Peloso, *supra* note 403, at 269-70.

C. *DOJ Investigations of FCPA Violations*

The DOJ has several enforcement mechanisms[417] at its disposal when it seeks to punish criminal violations of the FCPA. However, it employs none of these methods until a thorough investigation of an allegation of foreign bribery produces reasonable certainty that the violation did occur. Other agencies or departments, such as the SEC or the Federal Bureau of Investigation (FBI), refer allegations of wrongdoing to the DOJ.[418] The DOJ then conducts an investigation using a unique approach suited to "the unique nature of the Act."[419]

1. DOJ Investigative Procedures

The foreign policy implications of an allegation of foreign bribery require that the DOJ confine its initial investigation to United States sources. The DOJ will take evidence primarily from witnesses, corporate books and records and bank records in the United States.[420] In this fashion, the DOJ can control the dissemination of any information it obtains. The DOJ does not notify the foreign government involved that an investigation is occurring, thus avoiding the strain to foreign relations that would inevitably accompany uncorroborated allegations of corruptness in a foreign official.[421] Nondisclosure is particularly desirable in the early stages of an investigation in view of the fact that the DOJ closes a significant number of these investigations without filing charges.[422]

The DOJ does not notify the Department of State (DOS) that it is conducting an investigation.[423] The DOJ and the DOS jointly implemented this policy, which they designed "to avoid politicization of these investigations in a way that could prove embarrassing to the United States."[424] The policy eliminates the possibility that a United States ambassador to a foreign country may have to dissemble about what he may or may not know regarding an investigation.[425] The DOJ will notify the

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417. The DOJ can seek civil injunctions, criminal convictions and fines and any other relief deemed appropriate under the circumstances. FCPA § 104(b)-(c), 15 U.S.C. § 78dd-2(b)-(c) (1982).

418. Clark Interview, *supra* note 297.

419. Shine, *Enforcement of the FCPA by the Department of Justice*, 9 SYRACUSE J. INT'L L. & COM. 283, 291 (1982).

420. *Id.* at 291-92.

421. *Id.* at 291.

422. *Id.*; *see infra* notes 445-49 and accompanying text.

423. Shine, *supra* note 419, at 291.

424. *Id.* at 292.

425. *Id.* at 291-93; Clark Interview, *supra* note 297.

DOS once it reasonably anticipates that the investigation has progressed to a point where it will make the allegation or the investigation public.[426] At that time the DOJ will provide all necessary information to the DOS. The DOS will then work through normal diplomatic channels to disclose the investigation to foreign officials in the appropriate ministry.[427]

Once the DOJ has notified the foreign government of the investigation, the DOJ will generally refuse to withhold the identity of that country or its official or both from the public pleadings.[428] The DOJ will agree to nondisclosure of identity only as part of a plea bargain,[429] and even then a sufficient law enforcement or foreign policy basis must justify the agreement.[430] A significant risk of death or serious physical injury to the persons involved, if their identities are made known, is a sufficient law enforcement basis to justify nondisclosure.[431] The DOS must communicate to the DOJ in writing any foreign policy reasons that would justify nondisclosure.[432] As yet, no circumstances requiring the nondisclosure of the country or foreign officials under investigation have arisen.[433]

Often, when a DOJ investigation has uncovered violations of the FCPA, evidence also exists of violations of the foreign country's domestic bribery laws. The DOJ will disclose the results of its investigations to that country if it believes it will receive investigative assistance through that country's interest in prosecuting violations of its own law.[434] The DOJ follows a special procedure in asking for assistance. First, it will approach the foreign government only on a prosecutor-to-prosecutor basis and never through an international agency (such as Interpol).[435] Next, once the DOJ is certain that the foreign government will provide

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426. Shine, *supra* note 419, at 293. For example, a witness testifying before a grand jury on the matter is absolutely privileged to leave after the hearing, hold a press conference and disclose his testimony. Also, the DOJ may be on the verge of filing a criminal complaint. *Id.*; Clark Interview, *supra* note 297.

427. Shine, *supra* note 419, at 293.

428. This policy arose out of difficulties that the DOJ had in prosecuting United States v. Westinghouse Electric Corp., Crim., No. 78-566 (D.D.C., filed Nov. 29, 1978). *See* Shine, *supra* note 419, at 293-94.

429. In case of a litigated indictment, all details that are to be proved at trial must be alleged in the pleadings, including the identity of all parties involved. Shine, *supra* note 419, at 294.

430. *Id.*

431. *Id.*

432. *Id.* at 295.

433. *Id.*

434. *Id.*

435. *Id.*

help, it will ask for an executive agreement on mutual assistance, the terms of which limit it to that particular investigation.[436] Furthermore, the agreements are limited to investigations of illicit payments.[437] The agreements have two purposes: they obligate the DOJ and the appropriate foreign ministry to keep confidential all information exchanged as part of the agreement;[438] and they obligate the DOJ and the foreign ministry to use best efforts to assist each other in the investigation and in any possible prosecutions.[439]

2. DOJ Investigative Considerations

During its investigation, the DOJ will weigh particular considerations heavily in its evaluation of the evidence it discovers. Many of these considerations resemble the enforcement priorities in a review procedure. A primary concern is the size and nature of the payment made to the foreign official.[440] The DOJ will examine the level of influence held by the payor and the payee, including whether the payment was concealed from the payor's management, and whether the management conducted investigations of any possible illicit payments.[441] The DOJ also notes the legality of the payment in that country and the effect there of disclosure of the payment.[442]

The DOJ will also probe the method of payment. This includes the means used to accumulate funds, any possible involvement of subsidiary corporations, the general condition of the corporate account books and records, and the existence of internal corporate controls or codes of conduct.[443] The DOJ will look at the nature of the competition in the foreign country, the company's motives for making the payment and the effectiveness of the bribe. The DOJ will search particularly for any indications of commercial or political bribery in the United States as a motive for making the bribe. Finally, the DOJ will consider whether the SEC has concurrent jurisdiction over the crime.[444]

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436. *Id.* at 296-97.

437. *Id.* at 297.

438. *Id.* at 296.

439. *Id.* at 297.

440. Remarks of Roger M. Olsen, Special Couns. to the Assoc. Att'y Gen., U.S. Dep't of Just., Before the Section of Int'l L. & Prac. of the A.B.A., Aug. 2, 1983 [hereinafter Olsen Remarks], *reprinted in* 1 FCPA Rep. at 179-80 (Sept. 15, 1983).

441. *Id., reprinted in* 1 FCPA Rep. at 180-81.

442. *Id.*

443. *Id., reprinted in* 1 FCPA Rep. at 181-82.

444. *Id., reprinted in* 1 FCPA Rep. at 183.

3. Summary of Investigations Closed by the DOJ

Whether a DOJ investigation will result in an enforcement action depends on the presence and weight of the factors discussed above. The DOJ has closed a large number of investigations without prosecution under the FCPA.[445] In these cases, the primary reason not to commence an enforcement action has been a finding that the conduct in question did not violate the FCPA or that there is insufficient evidence to substantiate the allegations of foreign bribery.[446] Certain other cases involved de minimis payments or technical violations of the Act and thus did not warrant prosecution.[447] Some investigations terminated because the government could not produce for testimony a foreign witness not subject to the subpoena power of United States courts or because the foreign government involved declined to give assistance.[448] Finally, the government prosecuted certain cases of blatant wrongdoing under other United States laws.[449]

Investigations by the DOJ[450] are continuing, with most details kept strictly confidential.[451] Companies that have come under scrutiny include Westinghouse Electric Corp.,[452] General Dynamics Corp.,[453] General Electric Co.,[454] GTE Corp.,[455] United Technologies Corp.,[456] LTV

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445. Shine, *supra* note 419, at 291; Olsen Remarks, *supra* note 440, *reprinted in* 1 FCPA Rep. at 179, 191-200.01.

446. Olsen Remarks, *supra* note 440, *reprinted in* 1 FCPA Rep. at 191-200.01.

447. *Id.*

448. *Id.*

449. *Id.*

450. The SEC has also continued to investigate allegations of illegal foreign payments, most notably, alleged payments by Ashland Oil Inc. and General Dynamics Corp. *See* Ingersoll & Lubove, *SEC Charges Ashland and Ex-Chairman Made Illegal Foreign Payments for Oil*, Wall St. J., July 9, 1986, at 4, col. 2; Ingersoll, *SEC Votes to Sue Ashland, Ex-Aide in Bribery Case*, Wall St. J., Apr. 2, 1986, at 14, col. 4; *SEC Is Said to Be Probing General Dynamics Corp.*, Wall St. J., Apr. 18, 1985, at 4, col. 3.

451. Clark Interview, *supra* note 297.

452. *See* Gerth, *supra* note 323, at 1, col. 4, at 18, col. 3; Pasztor & Ingersoll, *Recent Charges of Payoffs by Companies Coincide With Bid to Relax Law Barring Overseas Bribes*, Wall St. J., July 10, 1986, at 54, col. 1; Pound, *Westinghouse's Manila Dealings are Investigated*, Wall St. J., Mar. 13, 1986, at 3, col. 1.

453. Bird & Holland, *South Korea: The Big Payoff*, THE NATION, Oct. 26, 1985, at 401; Ingersoll & Pound, *Payments by U.S. Defense Contractors to South Korean Firm are Investigated*, Wall St. J., Oct. 2, 1985, at 20, col. 2; *General Dynamics Under Fire*, TIME, Apr. 8, 1985, at 23-24. General Dynamics has also been under investigation by the SEC. *See supra* note 450.

454. Ingersoll & Pound, *supra* note 453, at 20, col. 2.

455. Gerth, *supra* note 323, at 1, col. 4, at 18, col. 3.

456. Ingersoll & Pound, *supra* note 453, at 20, col. 2.

Corp.,[457] Martin Marietta Corp.[458] and Bechtel Group Inc.[459] The DOJ's activities indicate that it has not ceased to enforce the Act despite a lack of publicity.[460]

VI. The Future of the FCPA

Rightly or wrongly, the international business community perceives the FCPA as a trade disincentive for American businesses abroad. Companies want and need reassurances that they will be able to pursue legitimate profit-making opportunites without running afoul of the Act and that they need not forego such opportunities because of uncertainty as to whether such conduct will cause them to incur liability. Two options exist that can provide these reassurances: (1) the institution of FCPA guidelines or a more informative review procedure or both, or (2) the amendment of the FCPA.

A. *Potential for Guidelines*

The DOJ has made clear that it sees no need for FCPA guidelines. It believes its policies in pursuing enforcement of the Act will provide reasonable assurances that only blatant, intentional activities by a company will result in a prosecution. Also, the DOJ feels that the promulgation of guidelines will in itself unduly restrict businesses in structuring their transactions, with the result that the impracticality of the guidelines will outweigh the benefit. The DOJ is certain that its current review procedures are the most efficient, practical and flexible means of giving guidance to the business community. Therefore, it seems safe to say that without a congressional mandate, no other assistance in construing the Act will be forthcoming from the DOJ.

B. *Potential for Amendment*

From the standpoint of the business community, the refusal of the DOJ to issue guidelines makes amendment of the FCPA an absolute necessity. Only Congress can clear away the Act's ambiguities. Recent

457. *Id.*

458. *Id.*

459. Grieves, *Korean Contact—Charges Against Bechtel,* Time, May 7, 1984, at 86-88; Taylor, *Bechtel Said to Be Linked to Bid-Rigging, Bribes in Getting Contracts in South Korea,* Wall St. J., Apr. 23, 1984, at 2, col. 3; *Bechtel Begins an Inquiry Into Korea Bribe Charges,* Wall St. J., Apr. 24, 1984, at 2, col. 2.

460. Clark Interview, *supra* note 297; *see* Pasztor & Ingersoll, *supra* note 452, at 54, cols. 4-5.

sessions of Congress have resulted in no definitive action. However, there have been indications that actual passage of a bill to amend the FCPA may occur in the not-too-distant future. In all likelihood, H.R. 3 and S. 430 will be reintroduced, with H.R. 3 probably having a better chance of ultimate passage. Certainly H.R. 3, like its predecessor H.R. 4800, is a vast improvement over the FCPA: it removes many of the imperfections of the Act and, at the same time, can hardly be said to gut the law.

VII. CONCLUSION

Because of the prevailing view that the FCPA's antibribery provisions are too vague and ambiguous, American companies have foregone legitimate business opportunities abroad rather than risk violating the Act. This chilling effect goes beyond the sacrifice of "sales for integrity" that Congress was willing to make in 1977, particularly when no other nation in the world has followed the United States example and enacted an extraterritorial antibribery law. The extreme competitive disadvantage to which the FCPA puts United States companies requires that Congress give them some guidance as to the bounds of acceptable corporate behavior. The DOJ's review procedure has not provided this assistance. The disclosure requirements of the review procedure must be amended in a way that will encourage, rather then discourage, requests from the business community. True guidelines containing acceptable model transactions, such as those that the Antitrust Merger Guidelines established, should be created. One cannot overemphasize the need for guidelines from the DOJ. This is particularly true because it appears that every enforcement proceeding will be settled, as in the past, by plea agreements. While this conserves DOJ resources by sparing it the expenses of prosecution, it also prevents adjudication of the foreign bribery issues and thereby forecloses any opportunity of a judicial interpretation of the FCPA provisions. Without case law, the Act will remain vague and ambiguous. Failing action by the DOJ, Congress must rectify this situation by passing a bill to amend the Act. If Congress will not change the antibribery provisions for fear that the international business community will perceive that as condoning bribery, it must at least issue a mandate to the DOJ to implement a new review procedure and establish guidelines.