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In Search of an International Solution to Bribery: The Impact of the Foreign Corrupt Practices Act of 1977 on Corporate Behavior

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IN SEARCH OF AN INTERNATIONAL SOLUTION TO BRIBERY: THE IMPACT OF THE FOREIGN CORRUPT PRACTICES ACT OF 1977 ON CORPORATE BEHAVIOR

I. INTRODUCTION

By enacting the Foreign Corrupt Practices Act of 1977[1] (FCPA), Congress expected that the practice of United States corporations bribing influential foreign officials in order to obtain favorable treatment, including lucrative contracts, from those governments would cease. Furthermore, Congress designed the FCPA to strengthen the United States' position in negotiations concerning bilateral and multilateral antibribery agreements and to reinforce the "bedrock elements of our system of corporate disclosure and accountability."[2] The FCPA seeks to accomplish its purposes (1) through the criminalization of certain forms of foreign bribery committed by United States citizens, corporations and other entities and (2) through the imposition of accounting standards and internal controls upon reporting companies under the Securities Exchange Act of 1934[3] (Exchange Act).[4]

Since enactment, the FCPA has been criticized for its ambiguity, pitfalls, and underlying policy weakness.[5] For instance, a payment of $10,000 to a customs official by X Corporation in order to speed a shipment of perishables through customs would be a legal facilitating payment under the FCPA. Under the same circumstances, however, a $100 payment to a Cabinet minister who has the discretionary power to clear the shipment will subject the X Corporation to a million dollar fine and expose the guilty company

1. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, Title I, 91 Stat. 1494-1498, effective December 19, 1977 (to be codified in 15 U.S.C. §§ 78a note, 78m, 78dd-1, 78dd-2, 78ff) [hereinafter cited as FCPA].

2. 123 CONG. REG. § 19399 (daily ed. Dec. 6, 1977) (remarks of Sen. Williams).

3. Securities Exchange Act of 1934 (codified in scattered sections of 15 U.S.C. §§ 77, 78 (1976)).

4. Title II of Pub. L. No. 95-213, 91 Stat. 1498-1500, the Domestic and Foreign Investment Improved Disclosure Act of 1977 requires that those who acquire in excess of five percent of the beneficial ownership of the stock of a registered company must file detailed reports with the SEC. This Note omits detailed discussion of that Title.

5. *See* Popkin, *Read this Article: For All You "Know", You May be Violating the Foreign Corrupt Practices Act,* 1 MID. EAST EXEC. R. 3 (1978); Estey and Marston, *Pitfalls (and Loopholes) in the Foreign Bribery Law,* FORTUNE, October 9, 1978 at 182.

officer, director or employee to a jail term of up to five years for violating the FCPA.

This Note will explore the background of the FCPA, the policy behind its enactment, and will provide a detailed discussion of problem areas within the law. Furthermore, a general discussion of how corporate counsel may provide adequate safeguards so as to reasonably comply with the FCPA will be included. Finally, the international efforts to eradicate bribery of government officials of all countries will be detailed.

II. HISTORY OF THE LEGISLATION

During the Watergate Committee hearings and the Special Prosecutor's investigation, it was revealed that several United States corporations had made illegal political contributions in the United States.[7] The Securities and Exchange Commission (SEC) recognized that such contributions might constitute violations of the federal securities laws.[8] In conducting investigations concerning the illegal domestic campaign contributions, the SEC discovered that a number of corporations had made questionable or illegal *foreign* payments, disguising the same through falsification of corporate financial records.[9]

As a response to these discoveries, the SEC embarked on a two-phase program, consisting of an enforcement program and a voluntary disclosure program. In the enforcement program, the SEC brought a number of injunctive actions against corporations, in which the corporations consented to the entry of a judgment of permanent injunction, without admitting or denying the allegations of the complaint. Typically, in these consent decrees, the corporation agreed not to make any future payments that would violate the federal security laws and agreed to establish a special review committee to review the payments made, analyze the corporation's accounting procedures, and make recommendations to

6. *See* Washington Post, March 10, 1979, at A-20, col. 1.

7. *Multinational Corporations and United States Foreign Policy: Hearings Before the Subcomm. on Multinational Corporations of the Senate Comm. on Foreign Relations*, 94th Cong., 1st Sess., Part 12, 1 (1975) (statement of Sen. Church). [hereinafter cited as *Senate Foreign Relations Hearings*].

8. SEC Report on Questionable and Illegal Corporate Payments and Practices, submitted to the Sen. Banking, Housing and Urban Affairs Committee, May 12, 1976, at 2 [hereinafter cited as SEC Report].

9. *Id.* at 3.

its board of directors.[10] Intense pressure forced many corporations to consent to an injunction because, prior to the FCPA, there was no United States statute clearly applicable to such corporate practices.[11] The enforcement program was criticized, however, as being entirely outside the jurisdiction of the SEC because the decrees prohibited substantive corporate conduct and sought regulation of the corporation's accounting practices.[12]

Being unsure of its statutory authority under the enforcement program and seeking to promote its traditional theme of disclosure,[13] the SEC therefore began a voluntary disclosure program. Corporations participating in this program were encouraged to conduct their own investigations and audits to uncover bribes, illegal political contributions or other questionable payments. The investigation was to be conducted by independent outside counsel and auditors answering to a committee of independent or outside board members. A final report was to be filed with the SEC on Form 8-K.[14] By the time the FCPA was enacted, more than 400 corporations had admitted making questionable or illegal payments in excess of $300 million of corporate funds to foreign government officials, politicians and political parties.[15]

Thus, prior to congressional action, the approach of government was to force *disclosure* of bribes via the securities laws. The concept behind this was that after disclosure, investors armed with

10. *Id.* at 4. Corporations consenting to decrees included: American Ship Building Company, Ashland Oil, Inc., Gulf Oil Corp., Minnesota Mining and Mfg. Co., Phillips Petroleum Co., Northrop Corp., and Braniff Airways, Inc.

11. The SEC proceeded on the theory that misleading or suppressed disclosure of improper or questionable expenditures could violate § 13(a) of the Exchange Act, 15 U.S.C. § 78m(a)(1976) and the rules and regulations thereunder, all of which relate to the filing of periodic and other reports with the SEC by registered companies. The SEC then brought the injunctive action under § 21(d) of the Exchange Act, 15 U.S.C. § 78u(e)(1976), as amended, 15 U.S.C.A. § 78u(d) (Supp. 1978), authorizing the Commission to bring an action for injunctive relief in federal court "[w]henever it shall appear . . . that any person is engaged or about to engage in acts or practices which constitute . . . a violation of the [Exchange Act]".

12. *See* Lowenfels, *Questionable Corporate Payments and the Federal Securities Laws,* 51 N.Y.U. L. REV. 1, 4-7 (1976); Note, 89 HARV. L. REV. 1848, 1853 (1976).

13. Knauss, *A Reappraisal of the Role of Disclosure,* 62 MICH. L. REV. 607, 608 (1964).

14. *See* SEC Report, *supra* note 8, at 6-13.

15. H. R. REP. No. 640, 95th Cong., 1st Sess. 4 (1977) [hereinafter cited as H.R. REP. No. 95-640].

information concerning foreign payments would pressure the corporation to remedy its practices. Through its enforcement program, the SEC demonstrated that it was prepared to deal with any corporation who violated what the SEC considered proper disclosure practices. Although the voluntary program gave the impression that corporations were willing to police their own practices, a number of problems were encountered: (1) the voluntary program overestimated the power of independent directors and outside counsel to compel disclosure of payments, (2) the consent decrees often contained ambiguous language, and (3) because of the inability of the SEC to keep the disclosures reasonably quiet and confidential as a result of the Freedom of Information Act[16] and newspaper reporting,[17] corporations became increasingly reluctant to comply with the voluntary disclosure program.[18]

The disclosures made to the SEC were testified to in hearings before the Senate Foreign Relations Committee in its Subcommittee on Multinational Corporations,[19] during the 94th Session of Congress. In addition, the Senate Committee on Banking, Housing and Urban Affairs held extensive hearings on the matter of improper payments to foreign government officials by United States corporations.[20]

A number of reasons advanced for prohibiting corporate bribery of foreign officials include:

(1) the payment of bribes to influence the acts of foreign officials is unethical and counter to the moral expectations and values of the United States public;

(2) bribery erodes public confidence in the free market system, short-circuiting the marketplace by directing business to those companies too inefficient to compete in terms of price, quality or service;

16. Pub. L. No. 93-502.

17. *See, e.g.*, Wall Street Journal, May 2, 1975, at 1, col. 6 (top officials of Gulf Oil Corp. revealed in secret testimony before the SEC that politicians in a foreign country had compelled Gulf to pay $4 million in two successive cash "contributions" in order to stay in business there), Wall Street Journal, March 6, 1976, at 1, col. 6 (Boeing said it paid close to $70 million to sell jets abroad).

18. Y. KUGEL & N. COHEN, GOVERNMENT REGULATION OF BUSINESS ETHICS, Book I, at 16-18 (1978) [hereinafter cited as KUGEL & COHEN].

19. *See generally Senate Foreign Relations Hearings, supra* note 7; *Senate Foreign Relations Hearings*, 94th Cong., 2d Sess., Part 14 (1976).

20. *See Prohibiting Bribes to Foreign Officials: Hearing Before the Senate Comm. on Banking, Housing and Urban Affairs*, 94th Cong., 2d Sess. (1976) [hereinafter cited as 1976 Senate Hearings].

(3) bribery casts a shadow upon the activity of all United States corporations;
(4) bribery creates severe foreign policy problems for the United States by embarrassing friendly governments when the payments are revealed to the public;[21]
(5) bribery by one United States corporation may cause that corporation to outcompete another domestic corporation other than on the basis of price and quality of goods produced;
(6) discouraging United States corporations from engaging in foreign bribery would improve United States relations with developing countries, leading to a more stable atmosphere for overseas investment, and promoting United States goodwill.[22]

Several arguments advanced to justify corporate payments to foreign officials include:

(1) bribery is an accepted business practice in many countries, often being demanded by the foreign officials who receive the payment;[23]
(2) the payments expedite governmental decision making;
(3) business reflects the value of society; attempting to control bribery is futile until society changes;
(4) regulation of bribery will result in a loss of business to foreign competitors, rather than improving overall business morality.[24]

After weighing these arguments, Congress determined that it was necessary to alter the behavior of United States corporations abroad. Some argued that existing statutes including antitrust laws,[25] tax laws,[26] securities laws,[27] and various other statutes[28] were

21. *See* S. REP. No. 1031, 94th Cong., 2d Sess. 3 (1976) [hereinafter cited at S. REP. No. 94-1031].

22. Murphy, *Payoffs to Foreign Officials: Time for More National Responsibility*, 62 A.B.A.J. 481 (1976).

23. In the Middle East, the "baksheesh", or tip for services rendered is a way of life and involves everything from getting a telephone installed to signing a multimillion dollar sales contract. U.S. News & World Report, June 2, 1975, at 57.

24. KUGEL & COHEN, *supra* note 18, at 2.

25. Section 1 of the Sherman Act prohibits combinations or conspiracies in restraint of trade and § 2 prohibits monopolization, attempts, and conspiracies to monopolize interstate and foreign commerce. 15 U.S.C. §§ 1, 2 (1976). Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 52 (1976) forbids unfair methods of competition and unfair trade practices in, or affecting, foreign as well as interstate commerce. Section 2(c) of the Robinson-Patman Act, 15 U.S.C. § 13(c)(1976) prohibits payments in connection with a sales transaction, except for services rendered. Some authors have argued that if these provisions could be

sufficient to accomplish this congressional goal. Most of these laws, however, emphasized the *impact of the bribe* rather than the *nature of the act* being called bribery. A new approach was deemed necessary to control bribery.

Two approaches were recommended to Congress:

(1) *The Disclosure Approach*—Under this approach, recommended by the SEC[29] and President Ford's Task Force on Questionable Corporate Payments Abroad:[30]

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given extraterritorial application, then payment of a bribe by one United States corporation to assist its sales to the detriment of another domestic corporation may violate any of the above provisions. *See* McManis, *Questionable Corporate Payments Abroad: An Antitrust Approach,* 86 YALE L.J. 215 (1976); Rill & Frank, *Antitrust Consequences of United States Corporate Payments to Foreign Officials: Applicability of Section 2(c) of the Robinson-Patman Act and Sections 1 and 2 of the Sherman Act,* 30 VAND. L. REV. 131 (1977).

26. I.R.C. § 162(c) denies a business expense deduction for payments made to an official or employee of a foreign country if the making of the payment would be unlawful under United States law as a payment to a United States official. But this does not make the foreign payment itself illegal; it only denies a deduction. *See* Chu & Magraw, *Deductibility of Questionable Foreign Payments.* 87 YALE L.J. 1091 (1978).

Other tax laws affecting, but not prohibiting overseas bribery include: I.R.C. §§ 952(a), 964(a), 995(b)(1)(D).

27. As discussed in note 11 *supra,* prior to the enactment of the FCPA the securities laws did not specifically prohibit the making of a payment to a foreign official. Rather, *disclosure* of the payment may have been required under appropriate circumstances, but this depended on whether the information was considered "material". *Cf.* TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438 (1976)(test of "materiality").

28. The Foreign Assistance Act 22 U.S.C. § 2399 (1970) requires firms conducting business under its authority to report all commissions paid in connection with such business to Agency for Internatinal Development (AID). Concealment of an improper payment on AID forms violates 18 U.S.C. § 1001 (1970), which makes it unlawful to conceal information on any matter within the jurisdiction of any United States department or agency.

Firms financing purchases through the Export-Import Bank (Eximbank) must report to that bank all commissions and fees included in the contract price. 12 C.F.R. § 401.3(c)(1977).

29. SEC Report, *supra* note 8, at 58-59.

30. The Task Force on Questionable Corporate Payments Abroad was a Cabinet-level group established by President Ford on March 31, 1976 to conduct a sweeping policy review of the overseas payments problem and to formulate a coherent national policy to deal with the problem. The first major policy statement by the Task Force was embodied in a June 11, 1976 letter from Task Force Chairman Elliot Richardson, Secretary of Commerce, to Senator William Proxmire, which is reproduced in *Prohibiting Bribes to Foreign Officials: Hearing on S. 3133, S. 3379 & S. 3418 Before the Senate Comm. on Banking, Housing and*

(a) companies would be required to make and keep accurate books and records;
(b) corporate management would be required to establish and maintain a system of internal accounting controls designed to provide reasonable assurances that corporate transactions had been executed in accordance with management's general or specific authorization, and that such transactions were properly reflected on the corporation's books;
(c) there would be civil and/or criminal penalties for falsification of corporate accounting records;
(d) there would be a prohibition against corporate officials or agents making false and misleading statements to persons conducting audits of the company's books and records and financial operations.

(2) *The Criminalization Approach*—This approach, endorsed by the Carter Administration,[31] various businessmen, and certain Congressmen, would impose specific criminal penalties for certain foreign payments defined as bribes.

Criminalization was opposed by such groups as the Chamber of Commerce of the United States,[32] the Task Force,[33] and the Ad Hoc Committee on Foreign Payments of the Bar of the City of New York,[34] on the following grounds:

(a) enforcement of the law would be difficult if not impossible. Cooperation of foreign individuals and governments would usually be required to investigate and prosecute a crime based on acts done abroad;[35]
(b) extraterritorial application of criminal laws raises serious questions of fairness and due process, specifically the right to compulsory

Urban Affairs, 94th Cong., 2d Sess., Appendix (1976) [hereinafter cited as Task Force Letter].

31. *Foreign Corrupt Practices and Domestic and Foreign Investment Disclosure: Hearing on S. 305 Before the Senate Comm. on Banking, Housing, and Urban Affairs,* 95th Cong., 1st Sess. 67 (1977) (statement of W. Michael Blumenthal, Secretary of the Treasury) [hereinafter cited as *Hearing on S. 305*].

32. *Id.* at 185 (statement of J. Jefferson Staats, Chamber of Commerce of the United States).

33. Task Force Letter, *supra* note 30, at 23.

34. *Unlawful Corporate Payments of 1977: Hearings on H.R. 3815 and H.R. 1602 Before the Subcomm. on Consumer Protection and Finance of the H.R. Comm. on Interstate and Foreign Commerce,* 95th Cong., 1st Sess. 55 (1977) (statement of Robert B. Von Mehren, Chairperson, Ad Hoc Committee on Foreign Payments, Association of the Bar of the City of New York) [hereinafter cited as *Hearings on H.R. 3815*].

35. *Hearing on S. 305, supra* note 31, at 187.

process to obtain witnesses and the right not to be subjected to double jeopardy;[36]

(c) criminalization would lead to conflicts between the United States and foreign governments. The use of certain evidence in a criminal trial might embarrass a foreign government and create foreign relations problems for the United States;[37]

(d) in the absence of effective multilateral agreements prohibiting bribery, United States corporations could not compete with foreign corporations committing bribery.[38]

(e) the disclosure of bribery to the SEC had already put an effective damper on bribery.[39]

On the other hand, it was argued that:

(a) a criminal prohibition against bribery would be a forceful statement by the United States against the practice of bribery, thus convincing the world of United States sincerity;

(b) a criminal prohibition would make it easier for United States corporations to resist demands for bribes, by citing a criminal provision;

(c) prosecution for failure to disclose bribery, and prosecution for bribery will often involve the same elements of proof;

(d) since bribery is immoral, the United States should prohibit it rather than simply requiring its disclosure.[40]

With these approaches and policies in mind, the 94th Congress embarked on a search for appropriate legislation.[41] On September

36. Critics of the criminalization approach stated that, "[I]t would be possible for an individual who has been prosecuted in the country where the bribe occurred and acquitted through testimony of foreign witnesses given under compulsory process available in the foreign country to be prosecuted under the laws of the United States without means to compel the testimony of the very witnesses who had influenced the acquittal in the foreign trial." *Hearings on H.R. 3815, supra* note 34, at 72. For an argument that such an approach would not be limited by the United States Constitution or by concepts found in international law, *see* S. REP. No. 94-1031, *supra* note 21, at 15.

37. *Hearing on S. 305, supra* note 31, at 187-88.

38. *Id.* at 208 (statement of the National Association of Manufacturers).

39. KUGEL & COHEN, *supra* note 18, at 2.

40. *Id.* at 218 (statement of Nicholas Wolfson, Professor of Law, Connecticut University).

41. Examples of bills introduced during the 94th Congress embodying the disclosure approach included: S. 3133 (would have amended the Exchange Act to require registered companies to maintain accurate records and to furnish reports relating to certain foreign payments); S. 3418 (embodied the SEC's legislative proposal).

A bill introduced during the 94th Congress embodying the criminalization ap-

15, 1976, the Senate unanimously passed S.3664,[42] which embodied both approaches to the problem of overseas bribery. This bill would have required registered companies to keep accurate books and records, and devise and maintain an adequate system of internal accounting controls. In addition, it would have made it unlawful for any person to falsify books or records, or to deceive an accountant in connection with an audit.[43] The remaining sections of the bill included a direct criminal prohibition against the payment of overseas bribes by any United States business concern. These provisions will be discussed in connection with the FCPA, *infra.*

Although S.3664 was reported to the House Interstate and Foreign Commerce Committee on September 16, 1976, the 94th Session of Congress ended prior to its consideration by that Committee.

During the 95th Congress, however, the Senate Committee on Banking, Housing and Urban Affairs heard testimony concerning S.305 which was sponsored by Senators Proxmire and Williams.[44] Title I of S.305, in substance identical to S.3664, combined accounting and disclosure provisions with other provisions outlawing certain foreign payments.[45] After making certain amendments, the Committee issued its Report[46] and sent S.305 to the floor of the Senate, where it was unanimously passed.[47]

In the House, a bill called the "Unlawful Corporate Payments Act of 1977," H.R. 3815, was reported out of the Committee on Interstate and Foreign Commerce[48] and passed.[49] This bill, an attempt to amend the Exchange Act, was in actuality, a criminal approach to the problem of foreign payments.[50]

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proach was H.R. 11987. This bill would have amended Title 18 of the United States Criminal Code to impose criminal penalties upon domestic corporations, their subsidiaries, employees and officers for bribing foreign officials.

42. S. 3664, 94th Cong., 2d Sess., 122 CONG. REC. S. 15,862 (daily ed. Sept. 15, 1976).

43. S. REP. No. 94-1031, *supra* note 21, at 3.

44. *Hearing on S. 305, supra,* note 31.

45. Title II of S. 305, with certain amendments, became Title II of the FCPA, "The Domestic and Foreign Investment Improved Disclosure Act of 1977," *supra* note 4.

46. S. REP. No. 114, 95th Cong., 1st Sess. (1977) [hereinafter cited as S. REP. No. 95-114].

47. 123 CONG. REC. S 7193 (daily ed. May 5, 1977).

48. H.R. REP. No. 95-640, *supra,* note 15.

49. 123 CONG. REC. H 11930 (daily ed. Nov. 1, 1977).

50. *See Hearings on H.R. 3815, supra,* note 34.

The two bills were sent to a conference committee. The committee submitted a modified version of S.305 in its Conference Report[51] to the House and Senate. On December 6, the Senate adopted the Conference Report[52] and the House followed suit the next day.[53]

The "Foreign Corrupt Practices Act of 1977"[54] became law on December 19, 1977, when President Carter expressed his satisfaction with the combined disclosure and criminalization approach of the FCPA.[55]

III. THE FCPA: ITS MEANING AND CONCERNS

The FCPA consists of three sections. Section 102 contains the accounting and disclosure provisions of the Act. Sections 103 and 104 prohibit improper payments abroad.

A. *Accounting Provisions*

Section 102 of the FCPA magnifies the disclosure approach by requiring reporting companies to (1) "make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer;"[56] and (2) "devise and maintain a system of internal accounting controls sufficient to provide assurances that . . . transactions are recorded as necessary to maintain accountability for assets."[57]

This section, applicable only to companies registered with the SEC pursuant to section 12 of the Exchange Act and those required to file reports pursuant to section 15(d) of the Exchange Act, was designed to prevent off-the-book slush funds which had frequently been used to make foreign payments.[58]

In reference to the first requirement, the conference committee

51. H.R. REP. No. 831, 95th Cong., 1st Sess. (1977) [hereinafter cited as Conference Report].

52. 123 CONG. REC. S 19,398 (daily ed. Dec. 6, 1977).

53. 123 CONG. REC. H 12,826 (daily ed. Dec. 7, 1977).

54. The conference committee adopted the name from S. 305. Conference Report at 9-10.

55. *See* Statement by President Carter, *reprinted in* 78 DEPT. STATE BULL. 27 (1978).

56. To be codified in 15 U.S. C. § 78m(b)(2)(A); Section 13(b) of the Exchange Act as renumbered as (b)(1) and new paragraph (b)(2) is added.

57. To be codified in 15 U.S. C. § 78m(b)(2)(B).

58. Conference Report, *supra* note 51, at 10.

qualified the "accurate and fair" standard by requiring only "reasonable detail." The committee indicated that an unqualified standard might connote an unrealistic degree of exactitude and precision.[59] Congress intends that generally accepted accounting principles be used to accurately reflect the status of the company's assets, liabilities and equity.

It is a significant development that issuers are now required to implement a system of internal accounting controls—it must be remembered that this provision applies regardless of whether or not the company operates overseas. Even without engaging in bribery, a company must be careful to comply with Section 102.

Management's decision regarding the thpe of internal accounting system to be established will be based upon a cost/benefit analysis including such factors as the size of the business, diversity of operations, degree of centralization of financial and operating management, and the amount of contact by top management with day-to-day operations.[60] As in other areas of the law, the corporation runs the risk that the SEC will apply the standard of reasonableness on the basis of hindsight.

Under section 102, the SEC could bring an action against a company otherwise immune from suit under the anti-bribery provisions to be discussed below. For instance, although a foreign subsidiary of a United States company makes a foreign payment without the requisite nexus with United States interstate commerce, the SEC can argue that the parent corporation failed to devise and maintain accounting controls adequate to expose the payment by the foreign subsidiary. Under the FCPA, the parent company cannot raise the defense that they were ignorant of bribes made by the foreign subsidiary by looking the other way.[61]

The conference committee did not include in the FCPA a provision from S.305 which would have penalized the corporation for the knowing falsification by any person of any book, record or account. Also not included was a provision which would have prohibited anyone from knowingly making a materially false or misleading statement to an accountant.[62]

In sum, the accounting provisions must be viewed as substantive requirements by which the SEC may be able to force companies

59. *Id.*

60. S. REP. No. 95-114, *supra* note 46, at 6.

61. *Id.* at 11.

62. Conference Report, *supra* note 51, at 10. It was thought this would confuse the issues raised in Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976).

to adopt one of a number of different accounting systems. This section applies to all reporting companies, whether or not the company is making either domestic or foreign questionable payments. Section 102's effectiveness as a tool for consent decree and administrative action will probably not be fully known for a number of years.[63]

B. *Antibribery Provisions*

The antibribery provisions are found in Section 103[64] and Section 104[65] of the FCPA. These provisions criminalize the payment of anything of value to any foreign official, foreign political party or candidate for foreign political office, if the purpose of the payment is to induce the foreign official to use his influence to assist the company in obtaining or retaining business. While the two antibribery sections are similar in scope and language, section 103 applies to reporting companies and section 104 applies to all other domestic concerns.[66] The following discussion explores some of the problem areas in the statute that are likely to be of concern to corporate management.

The FCPA makes it unlawful:

(1) For any: a) reporting company,
b) domestic concern, or
c) any officer, director, employee or agent, or
d) any stockholder acting on behalf of the company;
(2) to make use of the mails or any instrumentality of interstate commerce;
(3) *corruptly, in furtherance of*;
(4) a) an offer, payment, promise to pay, or authorization of the payment of any money or,
b) an offer, gift, promise to give, or authorization of the giving of anything of value to;
(5) a) any foreign official,

63. *See generally* [1978] 451 SEC. REG. & L. REP. (BNA).

64. FCPA, *supra* note 1, § 103, to be codified in 15 U.S. C. § 78dd-1, adds Section 30A to the Exchange Act.

65. FCPA, § 104, to be codified in 15 U.S. C. § 78dd-2.

66. "Domestic concern" means any individual who is a citizen, national, or resident of the United States, or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a state of the United States or a territory, possession, or commonwealth of the United States. FCPA § 104(d)(1).

b) any foreign political party or official thereof, or
c) any candidate for foreign political office;

(6) a) for purposes of influencing any act or decision of such foreign official in his official capacity, or
b) inducing such foreign official to use his influence with a foreign *government or instrumentality* to affect or influence any act or decision;

(7) in order to assist such company in *obtaining or retaining business* for or with, or directing business to any person.[67]

In addition, it is also illegal for the payment to be made to *any person,* while knowing or *having reason to know* that all, or a portion of such money will be offered, given or promised, *directly or indirectly,* to any foreign official, foreign political party or candidate for foreign political office. This covers situations where consultants or commercial agents are employed abroad.[68]

By adopting the "in furtherance of" language of S.305, the conference committee made clear that the use of interstate commerce need only be used to facilitate the corrupt payment.[69] The use of the word "corruptly"[70] to modify "interstate commerce" is intended:

> to make clear that the offer, payment, promise, or gift must be intended to induce the recipient to misuse his official position in order to wrongfully direct business to the payor or his client, or to obtain preferential legislation or a favorable regulation. The word "corruptly" connotes an evil motive or purpose, an intent to wrongfully influence the recipient. It does not require that the act be fully consummated, or succeed in producing the desired outcome.[71]

The Conference Report does not address the distinction between bribery and extortion. The Senate indicated, however, that "true extortion situations would not be covered [by the FCPA] since a payment to an official to keep an oil rig from being dynamited should not be held to be made with the requisite corrupt purpose."[72] Whether extortion will be held to encompass threats of

67. Emphasis added.
68. S. REP. No. 95-114, *supra* note 46, at 10.
69. Conference Report, *supra* note 51, at 12.
70. An expert in the field comments: "Perhaps the easiest way to visualize it is to ask if you would want to read about the payment in the *Pittsburgh Press* and have it also appear in print in the host country. If you don't want it printed, it may well be corrupt."
71. S. REP. No. 95-114, *supra* note 46, at 10.
72. *Id.* at 11.

damage to physical property or of more general potential economic loss is an open question at this point.[73]

On the other hand, the fact that the recipient first suggested the payment does not automatically require that the payment be labelled as an extortion fee, since at some point the United States company would have to make a conscious decision whether or not to pay the amount demanded.[74]

The FCPA incorporates a "business-purpose" test to make it clear that only those payments whose purpose it is to influence the foreign official or induce the foreign official to use his influence to affect a government act or decision so as to *assist a company in obtaining, retaining or directing business to any person are prohibited.*[75] The issue here is whether this language will be read narrowly or broadly.[76] Must the offer or payment be directly related to a specific piece of business? The legislative history provides no specific answer, and thus, this will probably be an area of future litigation.

One class of foreign payments that are not prohibited are facilitating payments, or so-called "grease payments." These are payments often demanded by lower level officials who fill ministerial positions as opposed to discretionary governmental positions. For instance, customs officials may demand a gratuity in order to speed the processing of customs documents; payments may have to be made to obtain adequate police protection. It was felt that such "grease payments" were not viewed as immoral in many countries and a unilateral attempt by the United States to eradicate such practices would be futile.[77] Both the House and Senate sought to exclude such payments from the prohibitions. This was accomplished in the definitional section of the FCPA, which defines "foreign official" as:

73. Difficult problems are likely to arise where the company has already obtained a contract from the government, but payment is withheld until a government official in charge of payment is paid off by the company. Arguably, the requisite corrupt purpose is lacking here on the part of the company.

74. *Id.* at 10.

75. Emphasis added. Conference Report, *supra* note 51, at 12.

76. For instance, it is an accepted practice worldwide for businessmen overseas to occasionally present a high foreign government official with gifts of greatly varying amounts. Interpreted broadly, such gifts may be said to assist the company in obtaining or retaining business.

77. H.R. REP. No. 95-640, *supra* note 15, at 8.

> any officer or employee of a foreign government or any department, agency or instrumentality thereof, or any person acting in an official capacity for or on behalf of such government or department, agency or instrumentality. Such term does not include any employee of a foreign government or any department, agency, or instrumentality thereof whose duties are essentially ministerial or clerical.[78]

Since the focus is on the particular *recipient* of the payment,[79] it might be argued that a payment to a clerical official would not be prohibited, even where the official performs a function for the payor which exceeds his normal clerical or ministerial duties. Again, the House and Senate were silent on this issue, except that all examples offered by Congress involved ministerial officials performing ministerial functions for the payor.[80] In all likelihood, in the event a clerical official exceeds his ministerial functions, the "business-purpose" test would be applied.[81] It should be noted that the distinction between prohibited and non-prohibited payments does *not* depend upon the dollar value of the payment. A payment which satisfies all other requirements of the FCPA will be actionable, even if the payment is only one dollar. Beyond this, the language defining "foreign official" is broad enough to include officers and employees of a government-owned business who performed discretionary functions. Note that in many countries, certain industries are owned by the state.

In what will certainly be the most utilized clause of the FCPA, it is unlawful for a reporting company or a domestic concern to give anything of value to *any person,* while knowing or *having reason to know* that all or a portion of such money or thing of value will be offered, given, or promised, *directly* or *indirectly,* to any of the forbidden recipients for a corrupt business purpose.[82] The clear

78. FCPA, *supra* note 1, § 103 (to be codified in 15 U.S. C. § 78dd-1(b)).

79. The exclusion applies "[a]s long as the payment is to a person who spends most of his time performing so-called ministerial functions . . . . " 123 CONG. REC. H 11937 (daily ed. Nov. 1, 1977) (remarks of Rep. Eckhardt).

80. *See* S. REP. No. 95-114, *supra* note 40, at 10; H.R. REP. No. 95-640, *supra* note 15, at 8.

81. For example, a clerk has responsibility for processing contract proposals to be sent to the Ministry of Development. Upon receiving the proposal from X Corp., the clerk is also given a "fee" to destroy proposals submitted by Y Corp. Although the FCPA does not clearly prohibit this practice, application of the "business purposes" test would indicate that a cause of action exists against X Corp.

82. Emphasis added. FCPA, *supra* note 1, § 103(a), (to be codified in 15

intent of Congress was to require United States corporations to scrutinize more carefully the acts of commercial agents abroad.[83] A certain degree of reliance on foreign agents is a necessary ingredient of doing business overseas. The agent makes contacts with the proper government authorities, speaks the language, and provides many other valuable services for the company. In fact, many countries *require* use of an agent recommended by that nation. Because of this clause in the FCPA, however, it would be a dangerous and foolhardy decision to allow the agent unbridled discretion in his dealings with foreign government officials. Safeguards that a United States corporation may consider are discussed in a later section.

This clause may cause the greatest uncertainty because of its "reason to know" language. What specific facts or circumstances should lead management to believe that their foreign agent is about to make, or has made a prohibited payment? The legislative history provides no clear answer. Obviously, a request by the agent for an unreasonably high fee in light of services rendered may indicate that at least a portion of that fee is being transferred to a foreign government official.[84]

Because the FCPA prohibits the giving of "anything of value" to a foreign official, management must be careful to consider the effect of "wining and dining" a foreign official or his representative. In addition, the giving of a job to a friend or relative of an official at the official's request may be considered giving "anything of value" to the foreign official. Also, note that a technical violation of the FCPA occurs after one *offers* a bribe, even if the offer is refused.

The greatest controversies under the FCPA, particularly the accounting provisions, are likely to involve foreign subsidiaries of United States corporations. H.R. 3815 would have extended the coverage of the FCPA to controlled foreign subsidiaries. Neverthe-

U.S.C. § 78dd-1(a)(3)); FCPA § 104(a)(3), (to be codified in 15 U.S.C. § 78dd-2(a)(3)).

83. S. REP. No. 95-114, *supra* note 46, at 10.

84. Fees would tend to become *more* reasonable:
(a) the greater the extent of the agent's obligations,
(b) the greater the extent of the risk to the agent,
(c) the greater the extent of the expenses borne by the agent,
(d) the closer in amount such fees and commissions are to those paid by other firms in the industry for similar services and under similar circumstances.

1 MID. EAST EXEC. R., *supra* note 5, at 15.

less, such coverage was not included in the final draft of the FCPA because of the inherent jurisdictional, enforcement and diplomatic difficulties raised by the inclusion of foreign subsidiaries in the prohibition.[85] The conference committee made clear, however, that "any issuer or domestic concern which engages in bribery of foreign officials indirectly through any other person or entity would itself be liable under the bill."[86] Also, citizens, nationals, or residents of the United States could be liable when they act in relation to the affairs of any foreign subsidiary of a United States company.[87]

In addition, it may be argued that with the required internal accounting controls, the United States company should be able to detect any prohibited payments made by the subsidiary. Under the accounting section, no off-the-book accounting funds could be lawfully maintained, either by a United States parent or by a foreign subsidiary whose financial statements were material to the consolidated financial statements of the parent, and no improper payment could be lawfully disguised.[88] It appears, however, that the antibribery provisions of the FCPA would *not* apply when: (1) the prohibited payment is made by a foreign employee of a foreign subsidiary, (2) neither payor is a "domestic concern," and (3) the payment is not made "on behalf of" a reporting company or "domestic concern."

The penalties for violating the antibribery provisions of the FCPA are severe. Any issuer or domestic concern, upon conviction, may be fined up to one million dollars.[89] Any individual who is a domestic concern and who willfully violates the antibribery provisions may be fined up to 10,000 dollars and/or imprisoned for up to five years.[90] Any officer or director of an issuer or domestic concern, or stockholder acting on behalf of same, who willfully violates the FCPA may also be fined up to 10,000 dollars and/or imprisoned for up to five years.[91] Any employee or agent of the company, subject to the jurisdiction of the United States, who

85. Conference Report, *supra* note 51, at 13-14. Foreign subsidiaries are outside the definition of "domestic concern." FCPA § 104(d)(1).

86. *Id.* at 14.

87. *Id.*

88. S. REP. No. 95-114, *supra* note 46, at 11.

89. FCPA, *supra* note 1, § 103(b)(2) (to be codified in 15 U.S.C. § 78ff(c)(1)); FCPA § 104(b)(1)(A) (to be codified in 15 U.S.C. § 78dd-2(b)(1)(A)).

90. FCPA § 104(b)(1)(B) (to be codified in 15 U.S.C. § 78dd-2(b)(1)(B)).

91. FCPA § 103(b)(2) (to be codified in 15 U.S.C. § 78ff(c)(2)); FCPA § 104(b)(2) (to be codified in 15 U.S.C. § 78dd-2(b)(2)).

willfully carries out the act constituting the violation, is subject to the same penalties, but only where the company itself is found to have violated the antibribery provisions.[92] Furthermore, whenever a fine is imposed upon any officer, director, stockholder, employee or agent, the United States company is prohibited from paying the fine, directly or indirectly.[93]

The FCPA divides the enforcement responsibilities between the SEC and the Justice Department. The SEC's responsibilities concerning reporting companies extend to conducting investigations, bringing civil injunctive actions, commencing administrative proceedings and referring cases to the Justice Department for criminal prosecution.[94] In the case of domestic concerns not otherwise subject to the SEC's jurisdiction, responsibility for investigating allegations of foreign bribery rests with the Justice Department.[75] Thus responsibility for *all* criminal *prosecution* rests solely with the Justice Department.

A number of reasons were advanced for this division:

> (a) the SEC has traditionally been effective in protecting the investing public by instituting civil litigation;
> (b) the SEC is in a relatively superior position to investigate reporting companies alleged to have bribed foreign officials because of its immediate access to that company's books and periodic filings;
> (c) retaining SEC jurisdiction in the case of reporting companies will avoid costly duplication of effort;
> (d) the SEC had been effective in discovering foreign bribery, even prior to the FCPA;
> (e) because some investigations are likely to be politically sensitive, it would be preferable to have investigations conducted by an independent agency answerable to Congress rather than the Executive branch.[96]

Congress expected close cooperation between the SEC and the Justice Department at the earliest stage of any investigation to insure that the evidence needed for a criminal prosecution would

92. FCPA § 103(b)(2) (to be codified in 15 U.S.C. § 78ff(c)(3)); FCPA § 104(b)(3) (to be codified in 15 U.S.C. § 78dd-2(b)(3)).

93. FCPA § 103(b)(2) (to be codified in 15 U.S.C. § 78ff(c)(4)); FCPA § 104(b)(4) (to be codified in 15 U.S.C. § 78dd-2(b)(4)).

94. S. REP. No. 95-114, *supra* note 46, at 11-12; H.R. REP. No. 95-640, *supra* note 15, at 9-10.

95. H.R. REP. No. 95-640, *supra* note 15, at 9.

96. *Id.*

not become stale.[97]

In addition, whenever it appears to the Attorney General that any domestic concern, or officer, director, employee, agent or stockholder is engaged or about to engage in an act prohibited by the antibribery provisions, the Attorney General can bring a civil action seeking a permanent or temporary injunction.[98]

On the other hand, this division of responsibilities was criticized for the following reasons:

(a) the investigation of illegal payoffs to foreign officials is at best only indirectly related to the SEC's primary responsibility to protect investors;
(b) there is likely to be duplication of efforts and resulting governmental inefficiency;
(c) the Justice Department already investigated and prosecuted domestic bribery cases.[99]

To date, no Justice Department actions have been brought under the FCPA.

IV. SEC Actions

In February 1978, the SEC issued Release No. 14478, "Notification of Enactment of Foreign Corrupt Practices Act of 1977."[100] The SEC indicated that a negligence standard would govern civil injunctive actions to enforce the FCPA.[101] Furthermore, the SEC contemplated that private rights of action could be brought on behalf of persons suffering injury as a result of prohibited corporate bribery.[102] Finally, the SEC indicated that it would *not,* on an ad hoc basis, answer questions relating to the scope of the FCPA applied to particular factual situations. Thus, until regulations are issued, corporate counsel runs the risk that his legal advice will be struck down by an SEC injunctive action applying the negligence standard with the benefit of hindsight.

97. S. Rep. No. 95-114, *supra* note 46, at 12; H.R. Rep. No. 95-640, *supra* note 15, at 10.

98. FCPA, *supra* note 1, § 104(c) (to be codified in 15 U.S.C. § 78dd-2(c)).

99. H.R. Rep. No. 95-640, *supra* note 15, at 20-21 (Minority Views to H.R. 3815).

100. [1978] Fed. Sec. L. Rep. (CCH) ¶ 72,264.

101. Federal appellate courts have never required proof of scienter in any of the SEC's own enforcement proceedings. *Cf.* Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976) *with* SEC v. World Radio Mission, Inc., 544 F.2d 535 (1st Cir. 1976).

102. *See* H.R. Rep. No. 95-640, *supra* note 15, at 10.

Ralph Ferrara, Executive Assistant to SEC Chairman Harold Williams, has indicated that the SEC's real interest in the FCPA is to see reporting companies establish independent audit committees and improve their internal accounting controls.[103] This would be accomplished through section 102 of the FCPA. According to Ferrara, the SEC considers its enforcement responsibilities to include administrative proceedings where appropriate.[104] Thus, the SEC could publish findings, issue orders, and mandate compliance.

If the SEC is most concerned at this time with internal accounting controls, their civil injunctive actions will focus on the accounting provisions of the FCPA. As indicated by several recently brought FCPA actions, the SEC will use the FCPA in conjunction with other sections of the 1933 Securities Act and 1934 Exchange Act in an effort to impose more independent and stringent accounting controls on reporting companies.[105]

SEC v. Katy Industries, Inc.[106]—In this case, a consent decree, we do *not* have the benefit of observing a dispute over the facts. We must therefore focus on the settlement agreed to by Katy Industries under the order of permanent injunction. The SEC charged that Katy Industries, its chairman, and another director violated the FCPA by bribing an Indonesian official and his close associate (consultant) in order to obtain a 30-year contract with the country's state-owned oil and gas company. The SEC charged that Katy's books and records did not reflect the true nature and purpose of the undisclosed arrangement between Katy and a Cayman Island corporation owned by the foreign consultant which had channeled Katy funds to the Indonesian government official.[107]

The SEC brought these FCPA charges together with the claims that the company had violated the antifraud, proxy solicitation, and reporting provisions of the securities laws by disseminating to the investing public and filing with the SEC documents containing

103. [1978] 451 SEC. REG. & L. REP. (BNA) at D-1.

104. *Id.* at D-2. Ferrara confessed that while section 103, the antibribery provision has "short-term sex appeal . . . [section 102 is] . . . the long-term shot."

105. SEC General Counsel Harvey L. Pitt hinted at this intent of the SEC in [1978] 466 SEC. REG. & L. REP. (BNA) at A-4.

106. SEC v. Katy Industries, Inc., No. 78-3476 (N.D.Ill. Aug. 30, 1978). *Discussed in,* [1978] 469 SEC REG. & L. REP. (BNA) at A-1.

107. Of interest is the fact that no payments were made under the arrangement after May 1976, well before the FCPA was enacted. Apparently, other facts and circumstances induced Katy Industries to agree to the injunction.

untrue statements of material facts and omitting material facts concerning the foreign payments.

The district court enjoined the company and the two individual defendants from further violations of the securities laws, including the antibribery provisions of section 103 of the FCPA. In addition, Katy Industries was ordered to establish a Special Committee to be composed of three of its outside directors to review the matters alleged in the complaint and to conduct further appropriate investigations. This Special Committee was also ordered to issue a report containing its findings and recommendations including:

> (1) a description of the scope of its investigation and review;
> (2) recommendations for the implementation of appropriate policies and procedures to prevent the reoccurrence of the matters alleged in the complaint and of any additional matters, if any, identified during its review;
> (3) recommendations as to what action, if any, should be taken by Katy for the protection of its shareholders.[108]

This report must be submitted to the board of directors who must act upon all recommendations of the Special Committee. A copy of the report will be filed with the SEC.

SEC v. Page Airways, Inc.[109]—In this case, a corporation and six of its officers and/or directors were charged with promoting sales of aircraft, products, and services by making payments to foreign government officials and employees and by making other corrupt, illegal, improper or unaccountable payments. As in Katy, the SEC also charged Page Airways with violations of other securities laws.[110] The SEC sought injunctions and other equitable relief. Charging Page Airways with violations of the accounting provisions of the FCPA, the SEC alleged that between 1975 and 1978, Page Airways sold aircraft worth far in excess of 8.5 million dollars to Uganda and established a relationship with that country whereby a subsidiary of Page Airways operated and maintained the aircraft at the direction of Uganda's government. The SEC

108. SEC v. Katy Industries, Inc., *supra* note 106, at 7 of the Final Judgments.

109. SEC v. Page Airways, Inc. [1978] FED. SEC. L. REP. (CCH) ¶ 96,393 (D.D.C. April 12, 1978) (complaint in full text); ¶ 96,717 (D.D.C. Nov. 18, 1978) (Transfer of venue to W.D.N.Y., where company's marketing headquarters is located).

110. Other violations of the Exchange Act with which Page is charged include sections 10(b), 13(a) [15 U.S.C. §§ 78j(b) and 78m(a)(1976) and Rules 10b-5, 12b-20, 13a-1 and 13a-11] [17 C.F.R. 240.10b-5, 240.12b-20, 240.13a-1 and 240.13a-11] promulgated thereunder.

further alleged that, in connection with these operations, this subsidiary received substantial amounts of cash from the Ugandan government for expenses incurred in connection with the subsidiary's operations. The receipts and disbursements of these funds were allegedly not recorded in the books and records of Page Airways. Additionally, it is alleged that Page gave a Cadillac Eldorado convertible automobile to the former Chief of State, Idi Amin.

Once again, because the SEC is primarily concerned with the adequacy of the company's internal accounting controls, it sought to enjoin Page from violating the FCPA and urged the appointment of a Special Officer. Such a Special Officer would examine the books and records of Page and of its affiliates and subsidiaries in order to render a correct accounting of Page's financial position and would issue a report to be filed with the SEC. Page Airways, Inc. has indicated that they will contest this suit.[111]

SEC v. Aminex Resources Corporation[112]—The SEC charged Aminex, its former officers, and companies owned by the former officers with violating the accounting provisions of the FCPA and the antifraud and reporting provisions of the federal securities laws. Aminex had allegedly diverted approximately 1.24 million dollars in corporate assets by means of false and improper accounting methods. Once again, the SEC indicated its primary concern was with the inadequate accounting control system.

This case is of major importance because *no bribery of a foreign official had occurred.* Rather, the defendants had schemed, wholly within the United States, to misappropriate corporate funds, receive kickbacks, and receive unauthorized salary. *Aminex* thus underlines the earlier observation that section 102, of the FCPA applies to *all* reporting companies and acts independently of the antibribery provisions.

A temporary restraining order enjoined the defendants from violating the securities laws, including section 102 of the FCPA. In addition, a temporary receiver was appointed to account for all of the assets and liabilities of Aminex.

In sum, these civil suits brought by the SEC under its authority pursuant to section 21(d) of the Exchange Act,[113] demonstrate that

111. [1978] 449 SEC. REG. & L. REP. (BNA) at A-15.

112. SEC v. Aminex Resources Corporation, [1978] FED. SEC. L. REP. (CCH) ¶ 96,352 (D.D.C. March 9, 1978) (Complaint and T.R.O. in full text); Facts taken from FERRARA & GOELZER, SAINTS AND SINNERS CONCLUDED: THE FOREIGN CORRUPT PRACTICES ACT at 18 (1978).

113. 15 U.S.C. 78u(d) (1976).

the FCPA is another tool with which the SEC can require that reporting companies follow accounting practices designed to "accurately and fairly reflect" the transactions of the company.

During the SEC enforcement program prior to the FCPA, corporations consented to the establishment of special review committees to analyze the corporation's accounting procedures and report to the board of directors and the SEC. Thus corporations which had modified their internal accounting procedures to comply with the requirements established during the SEC enforcement program in 1975-76 found few new surprises in the demands embodied in section 102 of the FCPA.

V. SAFEGUARDS

Since the SEC has declined to answer questions relating to the FCPA on an ad hoc basis and no rules or regulations have been promulgated, corporate management has struggled to comply with the provisions of the law and the demands of the SEC. While some members of the business community have demanded that the SEC and Justice Department provide guidance in this area,[114] SEC Chairman Harold Williams has indicated that the SEC prefers to rely on private sector initiatives with corporate management shouldering the ultimate responsibility.[115]

In the area of accounting procedures, the SEC has provided no specific guidance stating only that "it is important that issuers subject to the new requirements review their accounting procedures, systems of internal accounting controls and business practices . . . ."[116] The American Institue of Certified Public Accountants (AICPA), however, has issued a tentative report (Report) to help corporate management comply with the FCPA.[117] The Report suggests that management first make a "preliminary assessment" of its existing internal accounting controls and procedures. Companies should also consider "the need for more explicit documentation."[118]

In addition, many of the large accounting firms have published guides to help corporations comply with the accounting provisions

114. *See* [1978] 479 SEC. REG. & L. REP. (BNA) at A-10.

115. [1978] 473 SEC. REG. & L. REP. (BNA) at D-5.

116. Release No. 14478, *supra* note 100.

117. Full Text of Report appears in [1978] 470 SEC. REG. & L. REP. (BNA) at F-1.

118. *Id.* at F-3.

of the FCPA.[119] The FCPA is likely to lead to a growth of independent audit committees and sophisticated internal accounting controls. Though accounting firms should be utilized in complying with section 102 of the FCPA, it should be noted that the SEC intends to dictate more specific measures under section 102 if the private sector's standard-setting effort fails to achieve the SEC's desired results. The SEC may require the maintenance of specific books and records to assure compliance.[120]

Achieving compliance with the antibribery provisions of the FCPA can often be extremely difficult. Many United States corporations deal on a daily basis with foreign government officials, usually through representatives and agents. It is often arduous for the company to determine whether a specific act is prohibited by the FCPA because of the ambiguity of such phrases as "obtaining or retaining business," "corruptly in furtherance," and "foreign official." In addition, it is not necessary that the corporation have actual knowledge of a prohibited act. It is sufficient that it have "reason to know"[121] that "anything of value"[122] will be "offered, given or promised directly or indirectly, to any foreign official."[123] As discussed above, the SEC is likely to argue that a company's lacking "reason to know" of a prohibited act committed by an agent, employee or subsidiary is an indication that the proper internal accounting controls have not been installed. A company may thus avoid the antibribery provisions of sections 103 and 104,

119. Most of the Big Eight accounting firms provide literature for clients and prospective clients. These guides typically recommend that management:

1) formulate a management policy clearly establishing:
   (a) business ethics and practices,
   (b) objectives and requirements for an internal accounting control system, and
   (c) objectives and requirements for accounting systems;
2) formulate an organization plan fixing lines of authority and responsibility;
3) organize an internal monitoring group that has access to top executive management and the board of directors.

120. Ralph Ferrara, Executive Assistant to SEC Chairman Harold Williams, has indicated that the SEC might, under its rulemaking authority, require corporations to report on the adequacy of internal controls or, further, require auditors to file reports concerning their client's compliance. [1978] 466 SEC. REG. & L. REP. (BNA) at A-5.

121. FCPA, *supra* note 1, § 104 (to be codified in 15 U.S.C. § 78dd-2(a)(3)).

122. FCPA, *supra* note 1, § 104 (to be codified in 15 U.S.C. § 78dd-2(a)).

123. FCPA, *supra* note 1, § 104 (to be codified in 15 U.S.C. § 78dd-2(a)(3)).

but back into a section 102 accounting violation if it is a reporting company.

The corporation must, therefore, provide adequate safeguards to reasonably assure itself that its officers, directors, agents and employees do not act on behalf of the corporation in such a way as to render the corporation liable under the FCPA. Corporations should adopt their own "Code of Conduct" or "Policy Guide" which, in strictest terms, prohibits any unauthorized transactions with foreign government officials, political parties and candidates for office.[124] Distributed to all employees, directors, officers, agents and subsidiaries, such Codes would help assure compliance with the FCPA.[125] The SEC is most concerned that a diligent effort be made to prevent overseas bribery. Procedures recommended as evidence of good faith include, issuing directives to employees prescribing standards of conduct, holding seminars to discuss their implementation, and monitoring compliance by spot checks.[126]

Relationships with foreign commercial agents will pose difficult problems under the FCPA. To safeguard itself from such problems, the corporation should thoroughly investigate its agent to determine what connections exist between the agent and the foreign government and to ascertain the reputation of the agent. An agent who is known to have made bribes in the past or who insists that bribes are a necessary way to do business in that country, should not be employed.[127] Many foreign nations advise or require that the commercial agent be a foreign national; this fact, alone, need not disturb a United States company, as long as no portion of the agent's fee finds its way into an official's hands for a "corrupt purpose." As discussed earlier, the corporation should consider the size of the fee going to the agent. Unreasonably high fees may indicate that a portion of the fee may be paid by the agent to a foreign official.[128]

124. Such "Codes of Conduct" are applicable, as well, to setting guidelines for domestic activities.

125. One form of such a Code appears at [1978] CORP. GUIDE (P-H) ¶ 236.

126. [1978] 466 SEC. REG. & L. REP. (BNA) at A-4 (comments by SEC General Counsel Harvey Pitt).

127. Reputation can be verified by one or more of the following sources: the U.S. Embassy in the foreign country; the Department of State; the Justice Department; reputable businessmen and government officials of the foreign country; local banks in the foreign country.

128. One might be suspicious when an agent has requested that the fee be paid to him in a third country, such as a numbered Swiss bank account.

One technique that may provide additional safeguards for the United States company is the use of an agreement between the company and the agent. Such an agreement will typically provide that:

(a) the agent shall not give anything of value to a foreign official;[129]
(b) there be certain limitations on the agent's authority;[130]
(c) the agent diligently report in writing to the company on all local developments within the foreign country that relate to the contract;
(d) the agent fully comply with all applicable laws, rules, regulations and decrees promulgated by the foreign government;
(e) the agent will not make any payment to any person in connection with the performance of the agreement where (1) the identity of the person and the nature of the payment have not been fully disclosed by the agent to the company in advance and (2) the company has not authorized the payment in advance;
(f) the agent maintain books and records to record all fees received by the agent and all expenses, disbursements, fees, taxes or other amounts incurred or paid by the agent in connection with the agreement;
(g) the agreement is voidable by the company if it determines that continued performance of the agreement by either party would constitute a violation of any law, regulation or policy of the United States or foreign country;
(h) there be a right of action against the agent in the event that the company becomes liable under the FCPA as a result of the agent's unauthorized acts.[131]

Such agreements should be disclosed by management in appropriate communications to shareholders of the company and in reports and other documents filed with the SEC.

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129. Such a provision might read: "Agent [Consultant/Sponsor] shall not retain or employ in any capacity, directly or indirectly, any governmental, political, or other public official or candidate for public office of any government or country. Further, Agent shall not give anything of value to any government or country for the purpose of obtaining, retaining or directing business, or influencing government activity".

130. The agent should be prohibited from binding or committing the company in any way withut express authorization from company management.

131. Even with such an agreement, the corporation may still be liable if the agent makes a prohibited payment to a foreign official on behalf of the company. Legislative history indicates, however, that the FCPA was not intended to establish such liability for the acts of "an agent who had run amuck and was not acting pursuant to corporate order". *Hearings on H.R. 3815, supra* note 32, at 231 (statement of SEC General Counsel Harvey L. Pitt).

In summary, management must show that it has conducted investigations concerning the agent and demonstrate that reasonable care has been exercised to avoid violations of the FCPA.[132]

VI. International Efforts

Actions by the United States government, acting alone, will not be fully effective in dealing with bribery until those efforts are matched by similar action by other nations. Critics of the FCPA assert that if only United States corporations are prohibited from bribing foreign officials, then United States corporations are likely to lose their competitive position vis-à-vis foreign corporations whose governments take a more benign view toward the payment of corporate funds to foreign officials.[133] Where a substantial number of questionable payments are the result of demands made by foreign officials or their representatives, a corporation's refusal to comply will mean certain economic loss.[134] In addition, it was recognized that enforcement of the FCPA would require investigations of the questionable payments. Such investigations would necessitate the active cooperation of foreign individuals and governments. "Without such cooperation, the difficulties of obtaining witnesses and evidence to successfully investigate and prosecute the case would be insurmountable."[135]

An international approach is therefore needed to eradicate corporate bribery. An international effort would:

(a) establish standards of ethical and equitable conduct of international business;
(b) provide a greater degree of foreign cooperation in enforcement;

132. Where the agent acts for a foreign subsidiary of the corporation, the question becomes one of how much control the corporation exercises over the subsidiary and thus over the agent. Again, this may be a situation where the company backs into a section 102 violation by not having adequate accounting controls. To the extent that the parent has control over the subsidiary, the parent should endeavor to have its foreign subsidiary devise adequate methods of accounting controls, establish corporate policy prohibiting corrupt payments in violation of local law and the FCPA, and prepare guidelines with respect to these and other ethical considerations for distribution to appropriate officers and personnel. *Comment courtesy of Richard A. Popkin, Surrey, Karasik and Morse—Washington, D.C.*.

133. 19 Harv. Int'l. L.J. 726 (1978).

134. *Hearing on S.305, supra* note 31, at 188 (Statement of the Chamber of Commerce of the United States).

135. H.R. Rep. No. 95-640, *supra* note 15, at 19 (Minority Views to H.R. 3815).

(c) provide a wide divergence of opinions and expertise in formulating an international solution to bribery;
(d) protect United States corporation's competitive interests by causing foreign corporations to honor an international agreement, and;
(e) create pressures or impose obligations on governments to vigorously enforce relevant domestic law.[136]

Various associations and organizations have addressed the problem of bribery. The following section offers a brief discussion of the work of each of these organizations. Additionally, the United States' solicitation of worldwide support to eradicate corporate bribery will be mentioned.

1. *The Organization of American States* (OAS).[137] In July 1975, the Permanent Council of the OAS passed a resolution[138] condemning "in the most emphatic terms any act of bribery, illegal payment or offer of payment by any transnational enterprise."[139] The resolution urged that the member states clarify their national laws with regard to such payments. This document was a statement of policy, having no enforcement provisions.

2. *The Organization for Economic Cooperation and Development* (OECD).[140] In January 1975, the OECD established a Committee on International Investment and Multinational Enterprises[141] to write a code of conduct dealing with a broad range of matters of concern to multinational corporations. The code of conduct was formally adopted by the OECD Council in June 1976.[142] The OECD code consists of a Declaration on International Investment to which is annexed "Guidelines for Multinational Enterprises." While only a portion of this document deals with questionable payments, the general policies included in the Guidelines indicate that enterprises should:

136. Over sixty countries have written statutes dealing with bribery of their public officials. Many countries, however, do not enforce their statutes, or provide for only minimal penalties. *See generally,* KUGEL & COHEN, *supra* note 18, Book III, at 6.

137. An earlier and more complete discussion of the work of this organization appears in Note, 10 VAND. J. TRANS. L. 459 (1977).

138. CP/RES. 154 (167/75).

139. *Id.*

140. *See* Note, 10 VAND J. TRANS. L. 459 (1977).

141. Resolution of the Council Establishing a Committee on International Investment and Multinational Enterprises, *adopted* Jan. 21, 1975, OECD Doc. C(74) 247.

142. OECD Doc. PRESS/A (76)20 (1976).

7. not render—and they should not be solicited or expected to render—any bribe or other improper benefit, direct or indirect, to any public servant or holder of public office;
8. . . . not make contributions to candidates for public office or to political parties or other political organizations [unless legally permissible];
9. abstain from any improper involvement in local political activities.[143]

Although the OECD code resulted from a concerted effort by Western industrialized nations to establish guidelines for multinational corporate behavior, the code is entirely voluntary and not legally enforceable.[144]

3. *International Chamber of Commerce* (ICC).[145] In December 1975, the ICC set up an ad hoc Commission on Ethical Practices composed of representatives from both developed and developing countries. The Commission investigated the extent to which individual countries had enacted legislation to prohibit extortion and bribery. In its report adopted by the 131st Session of the Council of the ICC, on November 29, 1977,[146] the Commission indicated that while antibribery laws exist in most countries, their enforcement varies from nation to nation. The report recognized that bribery is often a response to extortion by a corrupt government, and thus advocated a "complementary" approach to the problem of bribery by both governments and the business community.[147] The report urged all governments to enact strict laws prohibiting and punishing all forms of curruption. Recognizing enforcement problems in such laws, the report advocated the drafting of an inter-governmental agreement on corruption. Specific reference was made to the United Nations effort, discussed below. Addressing the business community, the report stressed that self-regulation may be the most effective way to eliminate corruption.[148]

143. Declaration on International Investment, 15 INT'L LEGAL MAT. 967, 972 (1976).

144. 15 INT'L LEGAL MAT., *supra* note 12, at 970.

145. The International Chamber of Commerce is "the nearest thing there is to a 'United Nations' of business". *Economist,* March 19, 1977 at 88-9.

146. *Reprinted in* 16 INT'L LEGAL MAT. 417 (1978).

147. "Neither governments nor business can alone deal effectively with this problem. Therefore, complementary and mutually reinforcing action by both governments and the business community is essential." *Id.* at 418.

148. *Id.*

One of the most attractive aspects of the ICC report is that by encouraging self-regulation, further government legislation may be unnecessary. In addition, a self-regulating approach may raise the public's esteem for multinational corporations. In this regard, the report contained a voluntary code of conduct, "Rules of Conduct to Combat Extortion and Bribery," intended to set a moral tone for the multinational community.[149] In its "Basic Rules" section, the Rules of Conduct prohibit anyone from demanding or accepting a bribe.[150] In language similar to the FCPA, the Rules of Conduct both prohibit any enterprise from offering or making a bribe, directly or indirectly, in order to obtain or retain business, and require all financial transactions to be properly and fairly recorded, prohibiting off-the-book or secret accounts.[151]

In its "Guidelines" section, the Rules of Conduct encourage companies to draw up their own codes of conduct consistent with the ICC Rules[152] and to establish independent systems of auditing in order to discover any transactions that might contravene the Rules. President Carter cited with approval the ICC's Rules of Conduct when he signed the FCPA into law.[153]

4. *Need for an International Agreement.* In its Report on S.3664, the Senate Committee on Banking, Housing and Urban Affairs recognized "that pending multilateral measures are largely hortatory in nature and do not include reliable enforcement machinery or sanctions for violators. Clearly where countries do not vigorously enforce their domestic bribery laws, there will be little likelihood that a redundant, voluntary code will have significant impact."[154]

The Senate, by resolution,[155] recognized that an international agreement was necessary to control illicit payments that distort international trade. Since that resolution, the United States has

149. "These Rules of Conduct are intended as a method of self-regulation. Their voluntary acceptance by business enterprises will not only promote high standards of integrity in business transactions, whether between enterprises and public bodies or between enterprises themselves, but will also form a valuable defensive protection to those enterprises which are subjected to attempts at extortion." *Id.* at 419.

150. *Id.* at 420.

151. *Id.*

152. *Id.* at 421.

153. *See* Statement by President Carter, *reprinted in* 78 DEP'T STATE BULL. 27 (1978).

154. S. REP. No. 94-1031, *supra* note 21, at 6.

155. S. Res. 265, 94th Cong., 1st Sess. (1975).

actively pursued efforts to draft an international treaty dealing with bribery.[156] Such a treaty would incorporate any number of the following provisions:

(a) enforcement of host country criminal laws;
(b) international cooperation on exchange of information and judicial assistance in enforcement;
(c) uniform provisions for disclosure of payments to foreign officials and agents made to influence official acts;[157]
(d) further definition of what constitutes a corrupt payment, or corrupt practice in connection with the international commercial transactions.[158]

Under an effective international agreement, United States corporations would need not fear competition from foreign corporations which would otherwise be free to bribe government officials. Furthermore, enforcement difficulties encountered under the FCPA would be decreased. However, as the group of draftsmen increases in number and diversity, it becomes more difficult to reach a consensus on details of the treaty. Such a treaty is likely to be more broadly worded, offering little assistance to businessmen seeking concrete advice.[159] Naturally, the organization being looked to in order to draft an international agreement is the United Nations.

5. *The United Nations* (UN). On December 15, 1975, the General Assembly passed Resolution 3514:

(a) reaffirming "the right of any state to adopt legislation and to investigate and take appropriate legal action, in accordance with its national laws and regulations, against transnational and other corporations, their intermediaries and others involved, for such corrupt practices;"
(b) calling upon governments to take all necessary measures to prevent such corrupt practices;
(c) calling upon governments to exchange information on such corrupt practices, and;
(d) requesting the Economic and Social Council (ECOSOC) to consider the issue of corrupt practices and to make recommenda-

156. *See Hearing on S. 305, supra* note 31, at 69 (Statement of W. Michael Blumenthal, Secretary of the Treasury).
157. *Id.*
158. *Corporate Business Practices and United States Foreign Policy: Hearing Before the Subcomm. on International Economic Policy and Trade of the House Comm. on International Relations,* 95th Cong., 1st Sess. 18 (1977).
159. *See* 51 N.Y.U.L. REV., *supra* note 12, at 13.

tions on ways and means whereby such corrupt practices can be effectively prevented.[160]

ECOSOC, by resolution of August 5, 1976, established an Ad hoc Intergovernmental Working Group on the Problem of Corrupt Practice (Working Group) "to conduct an examination of the problem of corrupt practices, in particular bribery, in international commercial transactions by transnational and other corporations, their intermediaries and others involved, to elaborate in detail the scope and contents of an international agreement to prevent and eliminate illicit payments, in whatever form . . . ."[161]

On July 5, 1977, the Working Group submitted its report[162] to ECOSOC. This report reiterated the above mentioned general policies to be incorporated in an international agreement and included provisions prohibiting bribery, providing for mutual judicial assistance, and encouraging the exchange of information.[163]

ECOSOC, by resolution on August 4, 1977,[164] decided to continue the Working Group and requested that the Group draft an international agreement on illicit payments. In July 1978, however, the Working Group disbanded when ECOSOC established a "preparatory" committee to advance the work toward a diplomatic conference to conclude an international agreement concerning illicit payments. The conference is tentatively planned for 1980.[165] Of course, any UN treaty that emerges from ECOSOC would still have to be ratified by the General Assembly.

With no immediate prospects for an international agreement, the United States has sought bilateral agreements with over a dozen nations in order to enforce more adequately the FCPA and other bribery laws.[166] However, one must have serious doubts about the longevity of the FCPA in the absence of an effectively implemented international agreement.

160. G.A. Res. 3514, 30 U.N. GAOR, Supp. (No. 34) 69-70, U.N. Doc. A/10034 (1975).

161. E.S.C. Res. 2041, 61 U.N. ESCOR, Supp. (No. 1) 17, U.N. Doc. E/5889 (1976).

162. *Reprinted in* 16 INT'L LEGAL MAT. 1236 (1977).

163. *Id.*

164. E.S.C. Res. 2122, 63 U.N. ESCOR, Supp. (No. 1) 14, U.N. Doc. E/6020 (1977).

165. 79 DEP'T STATE BULL. 33 (1979).

166. *Hearing on S. 305, supra* note 31, at 69.

VII. Conclusion

Congress' initial expectation that the FCPA would halt corporate bribery of foreign officials may not be fulfilled for a number of years, if ever. Without a strong ethical foundation supporting the prohibition of bribery among both businessmen and government officials, such legislation will have little chance of being effectively enforced. If earlier criticisms are true, that is, that many societies condone bribery, then the FCPA will be ineffective in halting worldwide bribery and may only lead to a competitive disadvantage for United States companies vis-a-vis foreign businesses. If the only impetus of the antibribery movement was this country's immediate reaction to Watergate, then the Justice Department will bring fewer actions under the FCPA antibribery provisions in the future. To date, no such actions have been brought. Perhaps earlier criticisms that criminalization of foreign bribery would lead to conflicts between the United States and foreign governments may come true—evidence and testimony adduced at such a trial may embarrass officials of those foreign governments, or our own.

Nevertheless, in view of the tarnished public image of United States corporations, it may be that halting corrupt practices will be ultimately in their best interests. The FCPA is a valid attempt to demonstrate to the rest of the world that the United States intends to take a strong stand against the bribery of foreign officials. In spite of the often sloppy language of the statute, United States companies now have something to point to when resisting demands for extortion or bribes.

Many United States companies have demonstrated genuine concern for these problems by adopting codes of conduct, policy guides, and by more carefully supervising the actions of their foreign subsidiaries and commercial agents. If corporations do not set their own standards in order to eradicate bribery, the government will surely step in, and the latter action is never painless.

Furthermore, the need to prevent bribery committed by foreign corporations must not be discounted and thus, an international effort in this area is urgently needed. A treaty or international agreement is the preferable solution. However, the United Nations seems to be having difficulty approving one. The alternative, then, is to encourage companies to abide by the ICC Rules of Conduct. This self-policing approach has the advantage of allowing companies to clean their own house thereby obviating the need for a formal international agreement.

As for the FCPA, clarification of ambiguous terms, such as "obtaining or retaining business," "reason to know," and "anything of value" is needed. Recall that if a company asserts that it did not have "reason to know" that a prohibited payment was made by a commercial agent or foreign subsidiary, then the company may still be guilty of a section 102 violation for failing to have an adequate system of international accounting controls. Without guidelines issued by the SEC and Justice Department, resolution of such terms will be left to the courts. Judicial resolution, always a slow process, would force United States corporations to bear the risk of calculating the extent and limits of the FCPA.

Paradoxically, in the long run, the FCPA may not be used to combat bribery at all. Instead, section 102 will provide a powerful tool for the SEC, in connection with existing mechanisms, to require reporting companies to make and keep books and records and to devise and maintain systems of internal accounting controls. In time, specific requirements will surely be imposed. *Aminex,* involving no foreign payments, lends support to this statement. During its enforcement and voluntary disclosure program in 1975-76, the SEC asked for such requirements. Because political and economic factors[167] have delayed implementation of sections 103 and 104 by the Justice Department, the FCPA may yet find greatest utilization in cases imposing specific accounting practices upon reporting companies.

Conducting business abroad involves numerous risks. A company pursuing business abroad must recognize these risks and prepare for them. Even good-faith compliance with the FCPA will not insure against the possibility of prosecution by United States or foreign authorities. The FCPA, international agreements, and the self-imposed conduct codes of United States corporations, however, may diminish the incidence of corruption in international business transactions in the future.

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167. Because of the United States' castastrophic balance of payments problem, query whether the country can afford to allow domestic companies to be outbid by foreign competitors.