Notes

THE ANTIBRIBERY PROVISIONS OF THE FOREIGN CORRUPT PRACTICES ACT OF 1977: ARE THEY REALLY AS VALUABLE AS WE THINK THEY ARE?

I. INTRODUCTION

Illegal or improper payments by United States corporations to foreign officials have been a problem this country has faced for many years.[1] After holding extensive hearings on this illegal payments issue, during the 95th session, Congress enacted the Foreign Corrupt Practices Act of 1977 (FCPA).[2] The Senate Committee in which the legislation originated described the Act as a "strong antibribery law" and recommended its enactment because of the need "to bring corrupt practices to a halt and to restore public confidence in the integrity of the American business system."[3] Enacted as an amendment to the Securities and Exchange Act of 1934 (SEA),[4] the FCPA addressed two major issues: (1) the problem of bribery of foreign officials by United States corporations;[5] and (2) the strengthening of internal corporate accounting as a device for eliminating off-the-book slush funds,[6] the method often used to make such illegal payments.

In 1981, approximately four years after Congress passed the Act, numerous complaints arose from the business, accounting, and legal communities.[7] Instead of solving the problems of international bribery, the application of the Act's prohibitions had a detrimental effect on the "willingness or ability of public companies to engage in foreign commerce."[8] American multinational corporations found the provi-

1. Illegal payments come in many forms, including bribes, facilitating or grease payments, extortion payments, political contributions, and kickbacks.

2. 15 U.S.C. §§ 78a, 78m, 78dd-1, 78dd-2, 78ff (1982).

3. *S. Rep. No.* 95-114, 95th Cong., 1st Sess. (1977). Foreign Corrupt Practices and Domestic and Foreign Investment Disclosure, Hearing Before the Comm. on Banking, Housing and Urban Affairs, 13 Weekly Compilation of Presidential Documents 1909 (Dec. 21, 1977).

4. 15 U.S.C. §§ 78a-78kk (1982).

5. 15 U.S.C. § 78dd-1 (1982).

6. 15 U.S.C. § 78m(b)(2)(A) (1982). This was enacted as § 102 of the Foreign Corrupt Practices Act and set recordkeeping and internal control requirements.

7. Brennan, *Amending the Foreign Corrupt Practices Act of 1977: "Clarifying" or "Gutting" a Law?*, 11 J. LEGIS. 56 (1984) (quoting 127 CONG. REC. S2126 (daily ed. Mar. 12, 1976)) [hereinafter cited as Brennan].

8. *See* Securities Exchange Act Release No. 16593 (Feb. 21, 1980); 45 F.R. 12574 (Feb. 26, 1980); 19 SEC Docket 691 (Mar. 4, 1980).

sions of the FCPA to be thoroughly inconsistent with the practical aspects of engaging in business transactions in foreign countries, and as a result, protested the enforcement of the Act's provisions.

In response to these inconsistencies, government officials proposed amendments to the Act and presented them before both the Senate and the House of Representatives. To date, approximately seven proposals have been submitted to the Senate and House, most of which have been rejected or withdrawn.[9]

This note will examine the inconsistencies of the FCPA as well as the impracticality of its antibribery provisions. The discussion will also analyze the proposed amendments to the FCPA, addressing both their economic and political implications. This is followed by an analysis of the legislative history of the Act and consideration of the question of whether the antibribery provisions have accomplished the purposes originally intended.

II. THE HISTORY AND PROVISIONS OF THE FCPA

The use of bribery or questionable payments as a method of obtaining favorable business transactions overseas historically has been an accepted international business custom. Incidents of this nature have occurred as early as the 1600s.[10] Although the methods of making such payments have changed over the years, each company's goal appears to be the same: the distribution of corporate funds to develop a competitive edge in international commerce.[11]

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9. Proposals to amend the FCPA have been introduced for the last five years. Senator John Chafee introduced the first set of amendments in 1980, specifically S. 2763. In March of 1981, Senator Chafee reintroduced the same bill under the heading of S. 708. At the same time, the companion bill, H.R. 2538, was introduced to the House. In November of that same year, S. 708 was passed by the Senate, but not by the House of Representatives. As a result, at the commencement of the 98th Congress, the bill was reintroduced as S. 414. This bill is still pending. Since that time, H.R. 2157 was presented to the House of Representatives by Dan Mica of Florida (Mica Bill-March 1983) and H.R 2754 was introduced into the House by Timothy Wirth (Wirth Bill—April 1983). *See* Brock, *Progress Report on Efforts to Amend the Foreign Corrupt Practices Act*, 1983 DET. C.L. REV. 1083, 1083-84 (1983) [hereinafter cited as Brock].

10. Gritzman & Novak, *Reform of Bribery Abroad Involves U.S. Policy*, L.A. Times, Oct. 5, 1975, § 4, at 1, col. 8.

11. In the course of its investigation of questionable expenditures made by multinational corporations, the U.S. Subcommittee on Multinational Corporations revealed the payment of an estimated $50 million by Exxon Corporation to Italian officials. Approximately $5.5 million was paid by Gulf Oil to other foreign officials. While under investigation, Northrop Corporation disclosed to the Subcommittee that it distributed $450,000 to several Saudi Arabian generals, $15,000 to an Indonesian politician, and $4500 to an Iranian government official. In addition, Northrop allegedly

Prior to 1977, the regulations of the Securities and Exchange Commission (SEC) required disclosure of questionable payments, thus indirectly discouraging the use of corporate funds for any improper overseas purpose. Corporations that failed to disclose these payments were charged with violating sections 13(a) and 14(a) of the SEA.[12] By filing complaints against multinational corporations that were in violation of the disclosure requirements[13] the SEC succeeded in deterring the distribution of bribes or similar illegal payments abroad.

Illicit payments discussed herein include bribes,[14] extortion,[15] facilitating payments,[16] and, depending on the circumstances, political

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established a $30 million slush fund for payments to foreign governmental authorities. *Hearings on Political Contributions to Foreign Governments Before the Subcomm. on Foreign Relations*, 94th Cong., 1st Sess. 167 (1975).

12. 15 U.S.C. §§ 78m(a), 78n(a) (1982).

13. For example, the SEC filed a complaint in the U.S. District Court for the District of Columbia against Gulf Oil Corporation. Complaints have also been filed in the U.S. District Court for the District of Columbia against Ashland Oil Corporation and the American Ship Building Co. In each of these cases, the SEC had the burden of showing a violation. *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. 1 (1975) (statement of Sen. Frank Church, *cited in* Note, *Corruption and the Foreign Corrupt Practices Act of 1977*, 13 U. MICH. J.L. REF. 159 n.17 (1979) [hereinafter cited as Note, *Corruption*].

14. A bribe is defined as:

> any money, goods, right in action, property, thing of value, or any preferment, advantage, privilege, or emoluments, or any promise or undertaking to give any, asked, given, or accepted, with a corrupt intent to induce or influence action, vote, or opinion of person in any public or official capacity. A gift, not necessarily of pecuniary value, bestowed to influence the conduct of the receiver.

BLACK'S LAW DICTIONARY 173 (5th ed. 1979). See SEC v. McDonnell-Douglas Corp., 484 SEC. REG. & L. REP. (BNA) A-6 (D.D.C. Dec. 14, 1978), where the SEC charged the company with making at least $15.6 million in bribes to secure contracts in 17 countries. The corporation admitted to the allegations without hesitation or denial.

15. Extortion can be defined as "the obtaining of property from another induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." BLACK'S LAW DICTIONARY 525 (5th ed. 1979). Although a bribe and an extortion payment are distinct, both are a violation under the Act. For example, extortion occurred when a South Korean government official threatened to interfere with Gulf Oil operations unless a $4 million contribution was made to his presidential election campaign. *See generally Hearings on Political Contributions to Foreign Governments Before the Subcomm. on Multinational Corporations of the Senate Comm. on Foreign Relations*, 94th Cong., 1st Sess. 167 (1975).

16. Facilitating payments are usually given to secure or accelerate performance by one who is obligated to perform the services without the payment. *See* Note, *The Foregin Corrupt Practices Act of 1977: A Solution or a Problem?*, 11 CAL. W. INT'L L.J. 111, 115 (1981). Facilitating payments are not proscribed by the FCPA. Such payments are excluded from the coverage of the FCPA as a result of the definition of the term "foreign official." *See* R. SHINE, THE ENFORCEMENT OF THE FOREIGN CORRUPT

contributions and kickbacks. Bribes have been noted as the most recognized of these illicit payments by reason of their illegal character. In *SEC v. United Brands*,[17] the SEC brought its first case concerning multinational bribery. In this case, the corporation's goal was to gain favorable regulation in the Honduras. This was achieved by paying $2.5 million in bribes to the president of the country. By "paying off" the government official, the company received a reduced local tax for one of the country's least exported products.[18]

This type of scandal, coupled with others of a similar nature, resulted in the SEC's release of a report notifying American corporations of its concern about such illegal action.[19] Through the SEC's disclosure method, over 400 corporations reported making questionable or illegal payments, with a total exceeding $300 million.[20] In 1976, the SEC submitted a report to the Senate Banking Committee which prompted a series of hearings on questionable overseas payments made by United States corporations.[21] For the first time, multinational corporations began to fear the possible consequences of their foreign business practices. After approximately six months, Senator William Proxmire, former chairman of the Senate Banking Committee, introduced Senate Bill 305.[22] Not surprisingly, the bill unanimously passed both houses. In December of 1977, Congress passed S. 305, titled the Foreign Corrupt Practices Act of 1977. This was subsequently signed by President Carter.

PRACTICES ACT BY THE REAGAN ADMINISTRATION 1-2 (1984) [hereinafter cited as SHINE]. As we will explain, payments to those officials whose duties are "clearly ministerial or clerical" are excluded from the definition of foreign official. However, an issuer would still be required to comply with the provisions of § 102 of the FCPA by accurately recording such facilitating payments in its books and records. *Id.* at 14.

17. No. 75-0509 (D.D.C. Jan. 27, 1976), *reprinted in* [1975-1976 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,420.

18. *Id.* This form of bribery is excluded from the authority of the Foreign Corrupt Practices Act through the business purpose limitation. *See* Note, *Corruption, supra* note 13, at 161 n.17.

19. SEC Report on Questionable and Illegal Corporate Payments and Practices (Comm. Print 1976) (submitted to the Senate Comm. on Banking, Housing and Urban Affairs, 94th Cong., 2d Sess. (1976)), *cited in* Brock, *supra* note 9, at 1084 n.3.

20. *See* Brock, *supra* note 9, at 1084.

21. *Id.* During the hearings, American companies voluntarily disclosed that illegal payments had been used to obtain or retain business overseas. These illegal payments came in all forms: bribes, kickbacks, political contributions, and facilitating payments, with the primary recipients being foreign officials. *See Business Without Bucks*, Newsweek, Feb. 19, 1979, at 63.

22. *Hearings on S. 305 Before the Senate Comm. on Banking, Housing and Urban Affairs*, 95th Cong., 1st Sess. (1977) [hereinafter cited as *Hearings*], *cited in* Brock, *supra* note 9, at 1084.

Proponents of the FCPA emphasized the need to regulate the amount of illegal activity occurring in overseas business transactions. Additionally, they stressed that bribery of foreign officials by American companies had caused "severe adverse effects" on the conduct of the nation's foreign policy and threatened "the long range interests" of American corporations conducting business overseas.[23]

The central purpose of the Act was to deal with the continuing problem of foreign bribery by United States corporations. In an attempt to solve the problem, Congress divided the Act into two parts: the antibribery provisions and the accounting requirements.[24]

The antibribery provisions prohibit the bribery of any foreign official.[25] These provisions embrace all domestic concerns[26] and any issuer having a class of securities registered pursuant to section 12 of the SEA, or whom is required to file reports under section 15(d) of the Act. The provisions also apply to any officer, director, employee, or agent of such issuer[27] and proscribe the use of any means or instrumentality of interstate commerce for a corrupt purpose or in the furtherance of an offer or promise of anything of value given to influence a foreign official.[28] The Act prohibits payments by any covered person acting with either knowledge or reason to know that any part of such payment, whether in money or in some item of value,[29] will be

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23. *See* S. Rep. No. 95-114, *supra* note 3.

24. FCPA § 102 (codified at 15 U.S.C. § 78m(b)(2), (3) (1982)) is an amendment to the SEA. It requires all corporations subject to the jurisdiction of the SEC to: (1) keep accurate books and records, and (2) to maintain a system of internal accounting controls capable of accomplishing certain goals set forth in the statute itself. This section is not limited to records relating to foreign bribery activity. SHINE, *supra* note 16.

25. 15 U.S.C. §§ 78dd-1, 78dd-2 (1982).

26. 15 U.S.C. § 78dd-2(d)(1) (1982). As used in this section, the phrase "domestic concern" means (A) any individual who is a citizen, national, or resident of the United States; or (B) 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.

27. *Id.*

28. 15 U.S.C. §§ 78dd-1(a), 78dd-2(a) (1982). Before a corporation or company is subject to penalties for making bribes or illegal payments, a corrupt intent must be proved. A corporation must induce the foreign official "to misuse his official position to obtain or retain business" to the corporation. *See* 452 SEC. REG. L. & REP. (BNA) A-3 (1978).

29. 15 U.S.C. §§ 78dd-1(a)(3), 78dd-2(a)(3) (1982). This is the point where the corrupt intent is actually established. A corrupt intent may be inferred from the size of the bribe, the past conduct of the corporation, and the duties of the official making the payments. *See* 452 SEC. REG. L. & REP. (BNA) A-3 (1978).

used to pay foreign officials to obtain or retain business for the issuer or domestic concern, or to direct business to another person.

Within the context of these provisions, reference is made to two separately covered entities. A "domestic concern"[30] under the FCPA includes all United States citizens and residents, as well as all entities whose principal place of business is in the United States, or which are incorporated under the laws of a state or commonwealth of the United States. A "foreign official," on the other hand, is "any officer or employee of a foreign government or instrumentality thereof, or any person acting in an official capacity for or on behalf of any such government or instrumentality."[31] However, those individuals whose functions and duties are "essentially ministerial or clerical"[32] are excluded. Thus, the FCPA does not prohibit "facilitating" or grease payments.[33] Such payments do not result in the retention of business, but only facilitate a business-related activity that a government official is already required to perform. Although such payments are illegal within the United States, they are not prohibited by the FCPA.[34]

The criminal penalties for violation of the Act are severe. A domestic concern or corporation may be subject to fines up to $1 million, while other individuals who are found to have willfully violated the Act may be fined up to $10,000, imprisoned up to five years, or both.[35]

The antibribery provisions applicable to corporations whose securities are registered under section 12 or which file reports under section 15(d) of the Exchange Act are incorporated into the SEA as

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30. *See supra* note 26.

31. 15 U.S.C. §§ 78dd-1(b), 78dd-2(d)(2) (1982). Specifically, a foreign official is defined as

> 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.

Id. § 78dd-2(d)(2).

32. *Id.* § 78dd-2(d)(2).

33. *See supra* note 16.

34. There are many foreign countries that do prohibit facilitating or grease payments. Several include France, Switzerland, El Salvador, and Saudi Arabia. *See* Note, *Modifying the Foreign Corrupt Practices Act: The Search for a Practical Standard*, 4 NW. J. INT'L. & BUS. 203, 207 (1982) [hereinafter cited as Note, *Search*].

35. 15 U.S.C. § 78dd-2(b)(1) (1982). The Foreign Corrupt Practices Act amended § 32 of the Securities Exchange Act of 1934 to create specific penalties for violations of this provision.

new section 30A.[36] The SEC, therefore, has primary civil enforcement authority and, while the Justice Department has similar jurisdiction, its authority is restricted to those concerns not subject to SEC reporting requirements. The Department of Justice also has jurisdiction over all criminal cases.[37]

The bribery provisions of the Act are set forth in two sections: section 103, which prohibits payments by a security issuer to certain government officials;[33] and section 104, which section

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36. 452 SEC. REG. L. & REP. (BNA) A-3 (1978).

37. *Id.*

38. Section 103 of the Foreign Corrupt Practices Act, excluding § 103(b)(2), amends § 30 of the Securities Exchange Act of 1934 and creates § 30A in its place. It is codified at 15 U.S.C. § 78dd-1(a) (1982), and reads:

Sec. 103 "FOREIGN CORRUPT PRACTICES BY ISSUERS"

Sec. 30A.(a) It shall be unlawful for any issuer which has a class of securities registered pursuant to section 12 of this title or which is required to file reports under section 15(d) of this title, or for any officer, director, employee, or agent of such issuer or any stockholder thereof acting on behalf of such issuer, to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to—

(1) any foreign official for purposes of—

(A) influencing any act or decision of such foreign official in his official capacity, including a decision to fail to perform his official functions; or

(B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality, in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person;

(2) any foreign political party of [sic] official thereof or any candidate for foreign political office for purposes of—

(A) influencing any act or decision of such party, official, or candidate in its or his official capacity, including a decision to fail to perform its or his official functions; or

(B) inducing such party, official or candidate to use its or his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality, in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person; or

(3) 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 foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office, for purposes of—

(A) influencing any act or decision of such foreign official, political party, party official, or candidate in his or its official capacity, including a decision to fail to perform his or its official functions; or

103.[39]

In 1978, the SEC brought its first enforcement action under the FCPA.[40] The Commission found that Katy Industries, Inc., violated the Act when an Indonesian official and his associates were bribed in order to obtain a thirty-year contract with the country's state-owned oil and gas company.[41] Since that decision, the SEC has brought only three civil actions to enjoin violations of the antibribery provisions.[42] Similarly, since the FCPA became law, the Justice Department has filed six civil actions[43] and fewer than ten criminal actions alleging violations of the same provisions.[44] The lack of judicial action under the FCPA has been attributed to its ambiguous language.

In February of 1980, the SEC issued a release requesting comments and opinions on the impact and effectiveness of the FCPA.[45] As the SEC expected, the responses were not favorable. They were uniform in the view that the uncertainty in the application of the bribery pro-

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(B) inducing such foreign official, political party, party official, or candidate to use his or its influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person.

39. Section 104 of the Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-2(d)(1) (1982), contains the same prohibitions and penalties that are applicable to reporting companies and their officers, employees, and agents under the Securities Exchange Act. It is not a part of the federal securities laws.

40. SEC v. Katy Indus., No. C78-3476 (N.D. Ill. filed Aug. 30, 1978).

41. *Id.* According to the complaint that was filed, a Katy director, an Indonesian official, and a representative of Indonesia agreed that the official would help the company obtain an oil production agreement with Pertamina, Indonesia's government-owned oil corporation. It was agreed that Katy would make payments to the representative, who in turn would pass them on to the foreign official. By 1974, the SEC reported, the two had received over $65,000. As a result of their negotiations, in January of 1974, Katy entered into a $10 million contract with Pertamina, which ultimately gave Katy "the exclusive right to explore and develop oil and gas within a designated area of Indonesia."

42. *See* SEC v. McDonnell-Douglas Corp., 484 SEC. REG. L. & REP (*BNA*) A-6 (D.D.C. filed Dec. 14, 1978); SEC v. International Sys. & Controls Corp., [1979 Transfer Binder] FED. SEC. L. REP. ¶ 96,922 (D.D.C. filed July 9, 1979); and SEC v. Sam P. Wallace Co., No. 83-0034 (D.P.R. filed Aug. 13, 1981).

43. *See* United States v. Roy J. Carver, No. 79-1768 (S.D. Fla. filed Apr. 9, 1979); United States v. Finbar B. Kenny, No. 79-3028 (D.D.C. filed Aug. 2, 1979). *See also infra* notes 103, 106.

44. *See* United States v. Kenny Int'l Corp., No. 79-00372 (D.D.C. filed Aug. 2, 1979); United States v. C.E. Miller Corp., No. 82-788 (D.C.C. Cal. filed Sept. 17, 1982). *See also infra* notes 105, 109.

45. Securities Exchange Act Release No. 16593 (Feb. 21, 1980); 45 F.R. 12574 (Feb. 26, 1980); 19 SEC Docket 691 (Mar. 4, 1980).

visions had caused a steady decline in the ability of corporations to engage in foreign business.[46]

III. PROBLEMS RESULTING FROM THE PROVISIONS

Beginning in 1978, both the SEC and the Justice Department began receiving complaints that the antibribery provisions were confusing and ambiguous.[47] Governmental and corporate authorities criticized the provisions of the Act for failing to set forth clear and comprehensible guidelines. Among the criticisms of the Act was the comment that "[t]he vagueness of the definitions has forced American corporations to forego business opportunities abroad for fear of violating the FCPA and incurring its stiff criminal sanctions."[48]

In 1981, the General Accounting Office (GAO) released a survey containing comments and criticisms made by members of the legal and business communities regarding the provisions of the FCPA.[49] Although the opinions varied, the most prevalent ambiguities cited included: (1) the degree of responsibility a company has for the actions of its foreign agents; (2) the definition of the term "foreign official"; (3) whether a payment is a bribe, deemed illegal under the FCPA, or a facilitating payment, legal under the FCPA; (4) the dual jurisdiction of the SEC and the Department of Justice; and (5) the language contained in the "reason to know" provisions.[50]

Perhaps the most confusing provisions are those referring to the "reason to know" standard.[51] Advocates of the Act continually argue that a "reason to know" standard increases the potential liability of a company and its officers for the acts of foreign agents or more closely affiliated third parties.[52] The failure to understand fully the language

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46. *Id.*

47. *See generally* Note, *Search*, *supra* note 34.

48. *Business Accounting and Foreign Trade Simplification Act: Joint Hearings on S. 708 Before the Subcomm. on Securities and the Subcomm. on International Finance and Monetary Policy of the Senate Comm. on Banking, Housing and Urban Affairs*, 96th Cong., 1st Sess. 4 (1978), *construed in* 11 J. LEGIS. 56, 63 (1984).

49. *See* UNITED STATES GENERAL ACCOUNTING OFFICE, IMPACT OF FOREIGN CORRUPT PRACTICES ACT ON U.S. BUSINESS: TO THE CONGRESS (1981) [hereinafter cited as GAO REPORT]. In this report, it was found that 70% of those who answered the survey stated that the FCPA had little impact on foreign business. FCPA had little impact on foreign business. In addition, none of those surveyed thought that the FCPA had a positive effect on business relations, 30% reported that the Act had caused a decrease in overseas business, and 70% rated the clarity of the antibribery provisions as inadequate.

50. Brennan, *supra* note 7, at 63.

51. *See, e.g., id.*; Note *Search*, *supra* note 34, at 208; Brock, *supra* note 9, at 1090.

52. Brennan, *supra* note 7, at 63.

of the "reason to know" provisions can be attributed largely to the absence of precedent on the subject. It is well known that without prior judicial decisions construing a statute, it is difficult to identify and understand the practical application of the statute's provisions. Additionally, because the SEC and the Justice Department have concurrent enforcement authority, questions have arisen as to whether both organizations interpret the "reason to know" language in the same way.[53] This, too, is a subject that has been commented on rarely in the United States' courts. The only court decision addressing this issue is *SEC v. Dresser Industries, Inc.*,[54] in which the District of Columbia Circuit Court of Appeals held that a court "should not prohibit parallel investigations" by both the SEC and the Justice Department so long as these investigations are performed independently.[55] If each governmental agency has the authority to interpret the Act's provisions independently,[56] confusing and inconsistent applications of its standards can be expected. For this reason, the "reason to know" standard often results in corporations actually violating a rule with which they are attempting to comply.

Another recurring problem with the provisions relates to the application and definition of a facilitating payment.[57] Under section 103 of the FCPA, the penalties do not apply to the receipt of facilitating payments by any employees of foreign countries whose duties are ministerial or clerical. Does this mean that any employee whose duties do not fall within the definition of a "foreign official" has the legal right to receive facilitating payments? Or does this mean that only employees whose functions fall within the realm of "ministerial or clerical" have the legal right to receive facilitating payments without liability? The language is vague and ambiguous. Consider, for example, whether an excluded "ministerial" employee can be paid a facilitating payment to use his influence to induce a foreign official to act as long as this "ministerial" employee does not pay the official from funds received from a United States corporation.[58] This section of the Act

53. *Id.* at 64.

54. 628 F.2d 1368 (D.C. Cir. 1980), *cert. denied*, 449 U.S. 993 (1980).

55. *Id.* at 1369. The United States Court of Appeals held that a parallel investigation by the Department of Justice into alleged questionable foreign payments made by Dresser Industries, Inc. did not preclude the SEC from enforcing a subpoena issued in conjunction with an investigation into the use by the corporation of funds to make such payments. The only requirement was that both governmental organizations conduct their investigations independently. *Id.*

56. *Id.*

57. *See supra* note 16.

58. Brennan, *supra* note 7, at 65. This is one example of the ambiguity which

raises a multitude of questions. Unfortunately, the cases and interpretations offered provide no answers.[59] Solutions to several of these questions have been formulated through the proposed amendments to the FCPA[60] and will be discussed later.

A related controversy has resulted from the "lack of uniformity" in the application of the rules related to facilitating payments.[61] It has become a well-known principle that a foreign official may legally receive such a payment from a company under the laws of his country, while a United States concern making such a payment may be in violation of the FCPA.[62] U.S. corporations are immediately at an economic disadvantage when forbidden from acting in a manner legally permissible in foreign countries.[63] In the 1981 GAO survey,[64] it was stated that "by [the U.S.] prohibiting practices and payments that have become standard and well-accepted methods of doing business in a country, foreign corporations operating without such restrictions gain an advantage in that country."[65]

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lies in the interpretation of who is and is not legally permitted to receive facilitating payments. Critics of the FCPA argue that its vague definition and the Act's ambiguous provisions as to whom these payments apply cause constant confusion to the legal and business sectors. Basically, the critics argue that without comprehensive terms, there is no reason to apply the Act's provisions.

59. *See* S. REP. No. 114, 95th Cong., 1st Sess. 10, *reprinted in* 1977 U.S. CODE CONG. & AD. NEWS 4098, 4108.

60. There have been at least six sets of proposed amendments since the Act was codified into law. Each series of amendments introduce proposals to change this provision as well as other important sections of the Act. For an in-depth look at these amendments, see *supra* note 9.

61. *See* Comment, *The Foreign Corrupt Practices Act of 1977: A Solution or a Problem?*, 11 CAL. W. INT'L L.J. 111, 129-31 (1981). The problem arises because many foreign governments permit such grease payments even though they are illegal in the United States. Because there is confusion as to the precise definition of facilitating payments, confusion also results regarding its proper application.

62. *Id.*

63. *See Business Accounting and Foreign Trade Simplification Act: Joint Hearings Before the Subcomm. on Securities and the Subcomm. on International Finance and Monetary Policy of the Comm. on Banking, Housing and Urban Affairs*, 97th Cong., 1st Sess. 11 (1981) [hereinafter cited as *Joint Hearings*]. If the goal of this section pertaining to facilitating payments is to prohibit payments for specified purposes only, then a comprehensible guideline must address these purposes. In the eyes of those evaluating the Act's provisions, it has failed to achieve this goal with requisite specificity.

64. *See* GAO REPORT, *supra* note 48, at 38, 59.

65. *Id.* For example, in several countries, gifts and other socially-related gestures are not only permitted under local laws, but are necessary before business transactions can be completed. As previously mentioned, a problem results because a foreign agent of a United States corporation may comply with his country's rules and regulations, yet the corporation may be in violation of the FCPA.

As a result of this confusion, foreign officials have been unwilling to conduct business with United States corporations.[66] They are apprehensive that the slightest mistake might result in their being labeled as "corrupt,"[67] and, as a result, have withdrawn from relations with some multinational firms. This type of cautious activity led to a substantial decline in the affiliation of U.S. corporations with foreign based entities.

Although the FCPA has succeeded in preventing bribery by U.S. agents in foreign countries, it has also resulted in the loss of a substantial amount of business.[68] This is contrary to the intended purpose of the Act. As a result of this decline in overseas business, several senators have proposed amendments to the FCPA.[69] Their goal is not to eliminate the provisions of the Act, but to restructure them to maintain the decreased level of bribery overseas and, at the same time, to remove the obstacles faced by U.S. corporations doing business in foreign countries.

IV. LEGISLATIVE ATTEMPTS TO AMEND THE FCPA

The complaints and criticisms resulting from the FCPA surfaced approximately one year after its effective date. Members from each sector of the business community found that their profits were decreasing from lost foreign business. Moreover, the ambiguities in the provisions of the Act caused serious losses of international trade by the U.S. business community.[70]

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66. *See generally* H. WEISBERG & E. REICHENBERG, THE PRICE OF AMBIGUITY: MORE THAN THREE YEARS UNDER THE FOREIGN CORRUPT PRACTICES ACT 4 (1981) [hereinafter cited as H. WEISBERG & E. REICHENBERG], *construed in* Note, *Search, supra* note 34, at 210.

67. H. WEISBERG & E. REICHENBERG, *supra* note 66, at 13.

68. *See generally* GAO REPORT, *supra* note 49, at 15-18. *See also* DEPARTMENT OF COMMERCE, REPORT TO THE PRESIDENT ON EXPORT PROMOTION FUNCTION AND POTENTIAL EXPORT DISINCENTIVE (Comm. Print 1980); DEPARTMENT OF STATE, THE FOREIGN CORRUPT PRACTICES ACT: REPORTS FROM THE FOREIGN SERVICE 6 (Comm. Print 1981). Each of these three documented reports show examples where corporations have lost business overseas.

69. For the proposed amendments to the FCPA, see *supra* note 9.

70. In 1981, accountants, lawyers, and others directly affected by the FCPA were brought in to testify before the Joint Senate Hearings. The hearings were held in order to make a determination as to whether the FCPA should be amended. The hearings were held in May, June, and July of 1981 and resulted in the investigation of individual, corporate, and national ethical standards. The problem of multinational bribery was growing stronger every day and Congress decided that something had to be done to cure this problem. *See generally Joint Hearings, supra* note 63, at 4; SHINE, *supra* note 16.

In 1980, members of the House and Senate decided to take legislative action. Senate Bill 2763, introduced by Senator John Chafee of Rhode Island in May of 1980, was the first attempt to amend the FCPA,[71] but was introduced too late in the 97th Congress for legislative action. In March of 1981, the same bill was presented to the Senate as S. 708,[72] and a companion bill, H.R. 2538, was introduced in the House.

The reactions to S. 708 varied, but members of the Senate were interested in hearing any proposal that would possibly solve the problem of diminished business overseas. After extensive hearings on the bill's proposed changes, several conclusions were reached with respect to the antibribery provisions.[73] Two specific areas needed refinement. The first was the ambiguity of the "reason to know" standards; the second was the provisions relating to facilitating payments.[74]

On November 23, 1981, S. 708 was passed by the Senate.[75] It amended the FCPA by:

(a) replacing the reason to know standard governing third party liability;[76]

(b) transferring the SEC's civil jurisdiction over issuers to the Justice Department in order to put all jurisdiction in one governmental organization;[77] and

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71. The Carter Administration took no formal position on S. 2763. As a result, no committee hearings on S. 2763 were held in either the House of Representatives or the Senate during the 96th Congress. *See* SHINE, *supra* note 16, at 50.

72. Senator Chafee and several co-sponsors introduced S. 708. The Reagan Administration supported the enactment of the bill, and because of this support, joint hearings on S. 708 were held by the Subcommittee on Securities and the Subcommittee on International Finance and Monetary Policy of the Senate Committee on Banking, Housing and Urban Affairs on May 20, May 21, June 16, July 23, and July 24, 1981. *See* SHINE, *supra* note 16, at 51; Brennan, *supra* note 7.

73. On September 16, 1981, the Senate Committee on Banking, Housing and Urban Affairs, agreed to report S. 708 to the full Senate. SHINE, *supra* note 16, at 51.

74. *Id.* at 51-52.

75. 127 CONG. REC. S 13983 (daily ed. Nov. 23, 1981).

76. Senators Chaffee and Heinz made the following remarks with respect to the "reason to know" standard:

> The "knowing or having reason to know" standard of the FCPA would have been replaced with a new provision thereby making principle offenders liable for the acts of third parties only if they "direct or authorize, expressly or by a course of conduct" corrupt payments to be made by those third parties. The government would now be required to show actual knowledge in order to establish an authorization through a specific course of conduct.

127 CONG. REC. S 13980 (daily ed. Nov. 23, 1981) [hereinafter cited as Reason to Know Standard], *cited in* SHINE, *supra* note 16, at 56.

77. The Department of Justice would have complete jurisdiction over all criminal and civil cases resulting from a violation of the antibribery provisions. *See* Brennan,

(c) expanding and clarifying the types of payments excluded from the provisions of the Act.[78] Unfortunately, S. 708 never went beyond the Senate. No hearings were held on either S. 708 or H.R. 2530 in the House of Representatives,[79] and neither bill survived the 97th Congress. At the opening of the 98th Congress, Senator John Chafee, with Senator John Heinz, reintroduced S. 708 under the title of S. 414.[80] No companion bill, however, was introduced in the House.

The preface to S. 414 expresses the purposes and objectives of the bill. Congress stated that its primary goal was to maintain the same objectives as were already set forth in the Act, but to place a special emphasis on "a solution to the problem" of U.S. corporations making corrupt payments to obtain or retain business in foreign countries.[81]

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supra note 7, at 67. Although the references to Brennan's article relate to the changes that would result from S.414, it is important to note that S.708 was re-introduced into the 98th Congress as S.414. The modifications were one and the same.

78. The following payments would not have resulted in a violation of the Act:

(1) any facilitating or expediting payment to a foreign official the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official;

(2) any payment, gift, offer or promise of anything of value to a foreign official which is legal under the laws of the foreign official's country;

(3) any payment, gift, offer or promise of anything of value which constitutes a courtesy, a token of regard or esteem, or in return for hospitality;

(4) any expenditures, including travel and lodging expenses, associated with the selling or purchasing of goods or services or with the demonstration or explanation of products; or

(5) any ordinary expenditures, including travel and lodging expenses, associated with the performance of a contract with a foreign government or agency thereof.

See SHINE, *supra* note 16, at 57; Brennan, *supra* note 7, at 71.

79. Members of the House saw no need to amend the FCPA. Representative Timothy Wirth, chairman of the Subcommittee on Telecommunications, Consumer Protection and Finance of the House Committee on Energy and Commerce, refused to hold hearings on S. 708 as passed by the Senate or on H.R. 2530 when it reached the House. H.R. 2530, 97th Cong., 2d Sess., 127 CONG. REC. H4500 (daily ed. July 16, 1981).

80. As was set forth in *supra* note 77, the provisions of Senate Bill 414 are identical to those set forth in S. 708 as passed by the Senate in the 97th Congress.

81. 129 CONG. REC. S 980-81 (daily ed. Feb. 3, 1983).

(1) the principal objectives of the [FCPA] of 1977 are desirable, beneficial and important to our Nation as well as to our relationship with our trading partners, and these objectives should remain the central intent of the Act.

(2) exporters should not be subject to unclear, conflicting and potentially damaging demands by diverse United States agencies responsible for enforcement of the [FCPA] of 1977;

. . . .

(4) general compliance and enforcement practices associated with the

The primary goal of S. 414, like that of both S. 708 and H.R. 2538, was to "clarify ambiguities in the FCPA which have caused anxiety among businessmen and corporate counsel."[82] To achieve this goal, Senators Heinz and Chafee proposed several important changes to the FCPA.

The most controversial proposal of S. 414 concerned the "reason to know" standard recognized in section 103 of the Act. By incorporating the changes under S. 414, the content of the reason to know standard would be replaced with the phrase: "corruptly to direct or authorize, expressly or by a course of conduct."[83] Under the new language, leading offenders would incur liability for the actions of third parties only if it were proven that the corporation directed or authorized the payment.[84]

Although Messrs. Heinz and Chafee felt that this language would prove beneficial, several witnesses at the hearings argued that the revision would increase the level of bribery to foreign officials.[85] In the

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> [FCPA] of 1977 should be developed in accordance with considerations underlying foreign policy relations, international trade, export promotion, international monetary policy, and other related civil and criminal statutes; and
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> (5) a solution to the problem of corrupt payments by firms to obtain or retain business demands an international approach; accordingly, appropriate international agreements should be initiated and sought by the United States agencies responsible for trade agreements and by the President.

It is important to note that this statement was made in the opening of the hearings pertaining to S. 708. Because the provisions of the Senate bills were similar, Congress anticipated the same results from both.

82. *Id.* S. 414 would change the name of the Foreign Corrupt Practices Act to the Business Practices and Records Act. *See infra* note 85 (S. 414).

83. Reason to Know Standard, *supra* note 74. The present phrase is "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 foreign official. . . ." *Id.*

84. S. 708, 97th Cong., 1st Sess., 127 CONG. REC. S 13983 (daily ed. Nov. 23, 1981). S. 708 was reintroduced in the 98th Congress as S. 414, 98th Cong., 1st Sess., 129 CONG. REC. S 980, at S 903 (daily ed. Feb. 3, 1983). The phrase "direct or authorize, expressly or by a course of conduct" is taken from S. 414, § 5(b).

85. The leading opponent of the incorporation of the amended provisions was Senator William Proxmire. He had the following opinion on the "reason to know standard.":

> S. 708 guts the antibribery law, the bribery law, in still another way. The current law has a prohibition on payments to an agent where a company "knows or has reason to know" that the payment will be passed on to a government official. The current law places a duty on companies to police their agents. S. 708, true to form, guts the standard. No liability attaches unless the company "directs or authorizes" such payment. S. 708 will allow companies to wear legal blinders and escape liability and then burn what's

eyes of the opponents of the bill, this would be a most difficult burden for the enforcing officials.

Conversely, proponents of the revision favored adoption of the amendment. The leading proponent of the bill was Robert McNeill, executive vice-chairman of the Energy Committee for American Trade. Mr. McNeill indicated that the Chafee bill would be a solution to the problem that this country had faced since the introduction of the FCPA. It would clarify potential liability for third party conduct while, at the same time, eliminate the uncertainty and excessive hardships American businesses have been facing under the present statute.[86]

A second goal of S. 414 is to alter the enforcement authority granted to the SEC and Justice Department.[87] The Department of Justice, which maintains sole jurisdiction under the Act's provisions for criminal enforcement of both privately and publicly-held corporations, would be given sole jurisdiction for civil violations of publicly-held corporations as well.[88] This proposed change received little criticism or argument as members attending the hearings realized that such a modification would most likely result in more uniform decisions with respect to violations of the Act's provisions.

A final area that received considerable attention pertained to the definition and application of facilitating payments. S. 414 defines a facilitating payment in terms of the purpose of the payment rather than with respect to who will receive the payment, as now provided.[89]

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left to a cinder. S. 708, in my judgment, does its job. It guts the law. Under S. 708, bribery will flourish, foreign governments will be corrupted, and free markets will take a back seat.

Remarks of Senator William Proxmire, *Joint Hearings, supra* note 63, at 5.

86. Mr. McNeill's full statement included the following viewpoints:

ECAT members find the absence of clarity in the "know or reason to know" provision to be a serious impediment to developing export markets. The Chafee bill will establish a clearer line of liability for third party conduct. Specifically, the Chafee bill would impose liability if a U.S. business has circumvented the bribery prohibition of the FCPA by authorizing or directing a third person to make an improper payment. In taking this approach, the Chafee bill would return to the issue that Congress sought to address in 1977—the deliberate use of foreign intermediaries to evade a prohibition on foreign bribery. At the same time, the amendments would remove the ambiguity and unnecessary burden for American business resulting from the standard included in the present statute.

Remarks of Robert McNeill, *Joint Hearings, supra* note 63, at 480.

87. This viewpoint was expressed at the Senate Hearings for both S. 708 and S. 414. The goal of granting the Justice Department sole enforcement authority would be to solve the problems of inconsistent decisions made by the SEC and the Department of Justice with respect to violations of the FCPA.

88. *Id.*

89. S. 414, *supra* note 83, § 5.

The problems with respect to facilitating payments can be attributed to the fact that the FCPA addresses the problem indirectly. The FCPA sought to deal indirectly with the question of facilitating or grease payments by defining the type of official involved.[90] In application, this approach has failed to achieve Congress' initial intent. It has been difficult to determine when an official has "essentially ministerial or clerical" duties. The Chafee-Heinz Bill would focus on the purpose of the payments rather than on the recipient.[91] Thus, the key inquiries would deal with the reason for the payment, and whether it is customary in the foreign country to make such a payment to facilitate or expedite performance.[92]

On May 25, 1983, the Senate Committee on Banking, Housing and Urban Affairs reported S. 414, as introduced by Senators Heinz and Chafee to the Senate.[93] Although there was no companion bill introduced in the House to accompany S. 708, other similar bills were presented to the House. Representative Daniel Mica of Florida sponsored H.R. 2157,[94] a bill to amend the Export Administration Act

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90. Mr. Shine made the following statement with respect to facilitating payments:

> It is asserted in the House Report because facilitating payments are exempted, the FCPA does not prohibit payments to secure the performance by a foreign official of "duties of an essentially ministerial or clerical nature which must of necessity be performed in any event." This language has also generated confusion. The clear implication is that a payment made to a foreign official of any rank to perform a nondiscretionary act is exempt from the criminal prohibition. However, that implication is contrary to the plain language of the statute. Those foreign government employees "whose duties are essentially ministerial or clerical" are excluded from the statutory definition of a foreign official. The words "essentially ministerial or clerical" are used to define a category of foreign government employees to whom all payments are lawful, whether they are made in return for a discretionary act or a nondiscretionary act. Therefore, notwithstanding the legislative history to the contrary, it would appear that the statue prohibits a payment to a foreign government official, as defined by the statute, in return for the performance of either a discretionary or a nondiscretionary act. The focus has thus been placed upon the duties of the foreign government official, not on the purpose of the payment.

See SHINE, *supra* note 16, at 87-88.

91. *See* S. 414, *supra* note 85, § 5.

92. *Id.*

93. Although there was a forceful dissent on the part of Senator William Proxmire, the bill was still passed by the Senate Committee. No action has been taken on the bill since the time it reached the Senate in 1983. *See* SHINE, *supra* note 16, at 69.

94. H.R. 2157, 98th Cong., 1st Sess., 129 CONG. REC. E 1127 (daily ed. Mar. 17, 1983), was practically identical to H.R. 2530. The Mica Bill, which is what most commentators have named it, is also very similar to S. 414, but contains several modifications. *Id.*

of 1979[95] by adding antibribery provisions to the Act. When H.R. 2157 was first introduced, it was referred to the House Committee on Foreign Affairs. After several discussions on the implications of the bill, the Subcommittee on International Economic Policy and Trade decided that if H.R. 2157 was to be enacted, the FCPA would have to be repealed.[96]

Significant differences between H.R. 2157 and S. 708 make comparisons of the two bills difficult. Several of the changes proposed by the Mica Bill include transferring civil enforcement authority of the antibribery provisions from the SEC and the Department of Justice to the Department of Commerce, changing the jurisdictional requirement of the antibribery provisions, and implementing new procedural guidelines concerning interpretative regulations and opinions.[97] Although the House Committee on International Economic Policy and Trade held hearings on H.R. 2157 on April 18 and 25, 1983, no further action on this bill has been taken to date.

H.R. 2754,[98] which attempted to amend both the provisions of the FCPA and the proposed changes set forth in S. 708, S. 414, and

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95. 50 U.S.C. app. §§ 2401-2420 (Supp. V. 1981).

96. H.R. 2157 was sent to the Subcommittee on International Economic Policy and Trade for one reason: because this Committee has jurisdiction over all matters pertaining to the Export Administration Act, it would now have jurisdiction over H.R. 2157. In addition to its decision with respect to repealing the FCPA, the Subcommittee also decided that the bill's enactment would result in retitling the Act as the Foreign Trade Practices Act of 1983.

97. Much of the information concerning the proposed changes set forth in the Mica Bill can be found in SHINE, *supra* note 16, at 71.

Mr. Shine was formerly chief of the Multinational Fraud Branch, Criminal Division, in the U.S. Department of Justice, and presently is in a private law practice in Washington, D.C. On page 71 of his text, he specifically identifies the changes proposed by the Mica Bill.

> (a) [A]ll civil enforcement authority for the antibribery provisions of the FCPA would be transferred from the Securities and Exchange Commission and from the Department of Justice to the Department of Commerce;
> (b) the jurisdictional element of the antibribery provisions would be changed so that it would be the same as the jurisdictional element contained in the antiboycott provisions (Section 8) of the Export Administration Act. Such a proposal was rejected by the Senate when S. 708 was passed.
> (c) payments to foreign officials which were permitted by the "policy" of the foreign government would be exempt from the prohibition; and
> (d) the Secretary of Commerce, rather than the Attorney General, would promulgate guidelines or regulations interpreting the antibribery provisions and the Department of Commerce would administer the Review Procedure program and issue interpretative "opinions".

98. H.R. 2754, 98th Cong., 1st Sess., 129 CONG. REC. H 2369 (daily ed. Apr. 26, 1983). The Wirth Bill, as it is more commonly known, appeared to be more of an attack on S. 414 and H.R. 2157, than an actual attempt to develop amended

H.R. 2157, was the final bill introduced. Representative Timothy Wirth sponsored H.R. 2754 in response to Congressman Mica's introduction of H.R. 2157.[99] The bill deals primarily with two specific issues: (1) the accounting provisions, and (2) the facilitating payment section of the antibribery provisions.[100] Mica's goal is not to change the actual context of the latter provisions, but to refine the facilitating payment exemption.[101] Although the House Subcommittee on International Economic Policy and Trade will consider the Worth Bill,[102] currently, no action has been taken.

V. PROSECUTIONS BROUGHT FOR VIOLATIONS OF THE FCPA

The application of the antibribery provisions of the FCPA has resulted in confusion in both the public and private sectors. Although a limited number of actions have been brought by the SEC and the

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provisions to the FCPA. In April of 1983, Representative Wirth sent a letter to each member of the House, including in each correspondence a copy of his bill. In part, it read:

> Under the guise of promoting trade and "clarifying" a law, the Congress is being pressured to legislate a return to the free-wheeling days of the 1970's when unscrupulous multinational corporations undermined our foreign policy interests and domestic politics with millions of dollars in bribery payments, and when shoddy accounting practices were acceptable in some of the nation's largest corporations. That can happen again it S. 414 or H.R. 2157 are enacted into law.

See SHINE, *supra* note 16, at 72.

99. Not only was H.R. 2754 an attempt to attack the possible enactment of S. 414 and H.R. 2157, but additionally, was an attack on the supporters of these two bills.

100. SHINE, *supra* note 16, at 74.

101. *Id.* As set forth in the body of Mr. Shine's text, the Mica Bill would refine the facilitating payment section in the following manner:

> A foreign government employee's duties would be deemed to be essentially ministerial or clerical (and payments to such an employee therefore not prohibited) if the employee (1) is not authorized to make a legislative or judicial decision or a rule-making or adjudicatory administrative decision on behalf of the foreign government or any department, agency or instrumentality thereof; (2) is not authorized to make a decision on behalf of the foreign government, or of any department, agency or instrumentality thereof, to enter into any contractual obligation or licensing arrangement, to participate in the making of any such decision, or to have signatory power with respect to such arrangement; (3) does not otherwise make significant policy decisions on behalf of the foreign government, or any department, agency or instrumentality thereof; and (4) does not, because of his position in the foreign government, exercise authority or influence over any official who is authorized to make any decision described in paragraph (1), (2), or (3) of this subsection.

Id.

102. *Id.* at 75.

Department of Justice for alleged violations of the Act, each has kept a surveillance for possible violations. This section will discuss these cases with special emphasis on the particular subsections of the FCPA that have been the subject of litigation.[103]

A. Department of Justice Prosecutions

1. *United States v. Carver*[104]

The plaintiff brought this action to enjoin the defendants from engaging in practices that constituted violations of sections 104(a)(1) and (3) of the FCPA.[105] Defendants Carver and Holly were top executives of the Holcar Oil Corporation from the time of its incorporation, in the Cayman Islands in October 1975. In September of 1975, the two defendants, along with government officals of Qatar, went to Doha, in the Emirate of Qatar, to explore the possibility of engaging in petroleum exploration. In a meeting in Doha with Ali Jaidah, a government official of Qatar, it was determined that an oil drilling concession could be obtained from Qatar if a substantial payment of money was made to Ali Jaidah for his approval of a concession agreement. The defendants agreed to make the payments and were instructed to deposit $1.5 million into the bank account of Ali's brother, Kasim Jaidah, at the Swiss Credit Bank of Switzerland.

In 1978, after extensive financial difficulties and internal problems with the government of Qatar, United States officials were informed of the illegal activities of the defendants. Actions against the defendants were commenced shortly thereafter.

2. *United States v. Kenny International Corp.*[106] and *United States v. Kenny*[107]

In December of 1965, Kenny, an officer and director of the defendant, Kenny International Corporation, entered into an agreement with the government of the Cook Islands whereby the corporation obtained the exclusive rights to the distribution and sale of the Cook Islands' postage stamps outside the Cook Islands.

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103. The cases to follow are individually analyzed in SHINE, *supra* note 16, at 359-525.

104. No. 79-1768 (S.D. Fla. 1979).

105. FCPA §§ 104(a)(1), (3) (codified at 15 U.S.C. §§ 78dd-2(a)(1), (3) (1982)).

106. No. 00372 (D.D.C. 1979).

107. No. 2038 (D.D.C. 1979). The fact pattern in this civil suit brought by the United States is clearly identical to that of United States v. Kenny Int'l Corp., No. 79-00372 (D.D.C. 1979).

On February 18, 1978, Kenny used an instrumentality of interstate commerce, i.e., a commercial aircraft, in furtherance of a promise to pay approximately $337,000 to the Cook Islands party through Sir Albert Henry, an official of the foreign political organization. The purpose of this payment was to induce Sir Henry and the foreign party to use their influence to cause the renewal of the stamp distribution agreement between Kenny and the government of the Cook Islands. The acts of Kenny were held to be violations of section 104(a)(2) of the FCPA.[108]

3. *Pemex* Cases

The following set of cases can be labeled the *Pemex* cases. Each, either directly or indirectly, involves Petroleus Mexicanos (Pemex), a national oil company owned by the government of the Republic of Mexico. Pemex is an instrumentality of the Mexican government as defined in 15 U.S.C. section 78dd-(d)(2).[109]

a. United States v. C.E. Miller Corp.[110]

C.E. Miller, the defendant, was a California corporation engaged in the engineering and fabrication of turbine compression systems. Other parties in the litigation included: Petroleum Mexicanos; Ignacio DeLeon, director of Pemex's purchasing department; Crawford Enterprises, Inc., a Texas corporation which sold turbine compression systems to Pemex; and Grupo Industrial Delta S.A., a company organized under the laws of Mexico which held itself out to be a representative of Crawford Enterprises and other companies selling to Pemex.

On January 27, 1978, the defendant, Crawford Enterprises, paid approximately five percent of the price of each contract it obtained to Grupo Industries Delta. With complete knowledge on the part of Crawford, each payment was then forwarded to Ignacio DeLeon for the sole purpose of inducing his official action in obtaining and retaining contracts for the sale of the compression system to Pemex. Defendants

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108. FCPA § 104(a)(2) (codified at 15 U.S.C. § 78dd-2(a)(2) (1982)).

109. The leading case in this area is United States v. Crawford Enterprises, Inc., No. H-82-224 (S.D. Tex., Houston Div., filed Dec. 12, 1982). As in all other Pemex cases, Crawford Enterprises, together with several other co-defendants, was charged with conspiring to use the instrumentalities of interstate commerce to make improper payments to officials of Pemex for the purpose of obtaining foreign business. As of today, no final decision has been reached with respect to the guilt or innocence of the defendant corporation.

110. No. 788 (C.D. Cal. 1982).

C.E. Miller Corporation and Charles E. Miller aided and abetted Crawford in their illegal enterprise. C.E. Miller received approximately $79 million in process fabrication contracts in return for its assistance in the distribution of the improper payments. All parties involved were held in violation of the FCPA.[111]

b. United States v. Applied Products Overseas, Inc.[112]

The defendant, Applied Products Overseas, Inc., was a Texas-based corporation. The company represents U.S. companies with respect to sales to Pemex. On March 11, 1981, an employee[113] of the defendant offered to pay money to a foreign official for the sole purpose of convincing him to help obtain, as well as retain, business. The employee traveled via commercial airline from Texas to Mexico City to deliver a payment of $61,464.80 to Guillermo Cervera, administrative secretary to the chief purchasing agent for Pemex. This payment was one of several totaling $340,000 made to Cervera to obtain contracts from Pemex for compression-related equipment. It was the use of this interstate instrumentality coupled with the payment of the bribe which formed a violation of the FCPA.

c. United States v. Ruston Gas Turbines, Inc.[114]

This case, brought in 1982, is similar to *United States v. C.E. Miller Corp.* Payments were made by the defendant to a foreign official of Pemex for the sole purpose of obtaining and retaining favorable business in Mexico. Ruston Gas Turbines pled guilty to violations of section 104(a)(3) of the FCPA[115] and was fined $750,000.

d. United States v. International Harvester Co.[116]

Several of the defendants named in this case have been referred to in previous cases, however, three others should be mentioned.[117] One such defendant was Solar Turbines International, a division of

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111. The parties were held in violation of FCPA § 104(a)(3) (codified at 15 U.S.C. § 78dd-2(a)(3) (1982)).

112. No. 00004 (D.D.C. filed Jan. 5, 1983).

113. The employee in this case was Gary D. Bateman, who later was convicted of separate charges independent of the present cause of action.

114. No. H-82-207 (S.D. Tex. filed Sept. 22, 1982).

115. FCPA § 104(a)(2) (codified at 15 U.S.C. § 78dd-2(a)(2) (1982)).

116. No. H-82-244 (S.D. Tex. filed Nov. 18, 1982).

117. *See* United States v. C.E. Miller Corp., No. 788 (C.D. Cal. 1982).

the International Harvester Company, a Delaware-based corporation. The defendant Solar Turbines was engaged in the manufacture and sale of turbine compression equipment. A second defendant was George S. McLean, vice-president of Solar Turbines, who was primarily responsible for the sales of compression equipment made by Solar Turbines and distributed to Pemex and Crawford Enterprises. A third defendant, Luis A. Uriarte, was the Latin American regional manager of Solar Turbines responsible for all bids and sales of compression equipment made by the company.

The defendant, International Harvester Company, was found to have conspired willfully with Crawford Enterprises, Inc. and nine other co-conspirators[118] from December 1977 to May 1980 to commit offenses against the United States. The conspiracy consisted of using an instrumentality of interstate commerce in order to pay bribes to foreign officials of Pemex and Grupo Industries Delta. As in similar violations, the purpose of making such payments was to induce those officials to assist the defendants, Solar Turbines, Crawford Enterprises, and other co-conspirators in obtaining business.

On November 16, 1982, a plea agreement was set forth stating that International Harvester and the other co-conspirators had waived indictment and pled guilty to violations of sections 104(a)(1) and (3)[119] of the FCPA. International Harvester paid fines of $10,000.

4. *United States v. Sam P. Wallace Co.*[120]

This case arose upon an alleged violations of sections 103(a)(1) and (3)[121] of the FCPA. The defendant, Sam P. Wallace Company, is a company engaged in the business of mechanical and industrial contracting in the United States and abroad.

The evidence showed that in January of 1980, the Wallace Company, acting through Alforno A. Rodriguez,[122] agreed to pay a

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118. Additional charges were brought against each of the co-defendants (co-conspirators) in the International Harvester litigation. United States v. Crawford Enterprises, Inc., Donald G. Crawford, William E. Hall, Mario Sergio Gonzalez, Ricardo Garcia Beltran, Andrew I. Garcia, George J. McClean, Luis A. Uriarte, A Lee Eyster, James R. Smith, No. H-82-224 (S.D. Tex. Nov. 22, 1982).

119. FCPA § 104(a)(1), (3), (codified at 15 U.S.C. § 78dd-2(a)(1), (3) (1982)).

120. No. 83-0034 (D.P.R. filed Feb. 23, 1983). Similar actions were brought by the SEC in 1981 in SEC v. Sam P. Wallace Co., (D.D.C. filed Aug. 13, 1981).

121. FCPA §§ 103(a)(1), (3) (codified at 15 U.S.C. §§ 78dd-1(a)(1), (3) (1982)).

122. Separate criminal actions were filed by the Department of Justice against Rodriguez—United States v. Rodriguez, No. 83-H-44 (D.P.R. 1983). Here, the evidence showed that in January 1980, Rodriguez, then president of Sam P. Wallace

bribe to John H. O'Halloran, chairman of the Trinidad and Tobago Racing Authority. The improper payment, a check equaling $275,000, was made to induce O'Halloran to assist the defendant in obtaining a contract from the foreign-based racing authority to build the grandstand and receiving building portion of a proposed racetrack.

On April 11, 1980, the defendant, in furtherance of its attempt to gain the contract, made a second payment to O'Halloran. In May of the same year, the defendant was awarded the contract to construct the grandstand and receiving building. The evidence further showed that by March 3, 1981, the defendant had succeeded in making a total of $1,391,000 in unlawful payments. Because the company had caused the payments to be transmitted by mail, a foundation was laid for violations of sections 103(a)(1) and (3) of the FCPA.

On February 23, 1983, Sam P. Wallace Company, Inc. entered into a plea agreement with the United States, waiving both venue and indictment charges, and pleading quilty to the violations charged.

VI. CONCLUSION

Many articles have been written evidencing discontent with the present version of the antibribery provisions of the FCPA. In fact, proposed suggestions for improvement have gone as far as to the entire revision of the contents of the provisions. By revising the provisions, many feel that the ambiguities in the FCPA would be eliminated. Others fear that such a decision would result in even more confusion.

The bribery provisions of the FCPA prohibit bribes paid to: (1) foreign government officials, (2) foreign political party officials, or (3) "any person, while knowing or having reason to know" that the bribe will be passed on to one of the parties mentioned in (1) or (2) above.

Proposed amendments to the Act have focused specifically on changing this "reason to know" standard in addition to modifying the provisions pertaining to facilitating payments. After careful analysis of each set of proposals, it appears that none of them solves the controversies surrounding the FCPA.

The real problems appear to arise from a basic misunderstanding by members of both the legal and business communities as to what

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Company of Puerto Rico, a subsidiary of Sam P. Wallace Company, Inc., agreed to make all of the improper payments to John H. O'Halloran, then chairman of the Trinibad and Tobago Racing Authority. In response to the allegations charging him with violations of § 103(a) of the FCPA, Rodriguez waived indictment and pled guilty. As of March 11, 1983, no agreement was reached between the United States and the defendant concerning fines and sentencing.

the FCPA is actually stating. This does not mean that section revisions are not necessary. However, before such revisions can be submitted, it is essential that those directly and indirectly involved in the corporate community understand the implications of the Act's provisions. It will be then, and only then, that the SEC and Justice Department can enforce the provisions, those affected can understand what these departments are enforcing, and consistent decisions can be reached with respect to alleged violations of the FCPA. As a result, it may become apparent that the antibribery provisions really *are* as valuable as originally intended when first enacted in 1977.

Robert S. Levy