2011

The Impact of the Foreign Corrupt Practices Act on American Business from 1977-2010

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SUBMITTED TO

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AND

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FOR SENIOR THESIS

SPRING 2011

APRIL 25, 2011

Acknowledgements

In memory of my father. You are the reason I am where I am now. You are the reason I am who I am. I love you.

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Introduction

The Foreign Corrupt Practices Act of 1977 was a pioneering step taken by the United States government to confront the growing realization of the amount of improper payments occurring abroad. It's not that American companies were the sole culprits of these practices, but it was the first country to try and shape its international interest.

The Foreign Corrupt Practices Act (FCPA) was passed as a direct progeny of the Watergate Scandal in the 1970s[1]. It was at that time that US government officials found evidence supporting claims that many US companies took part in illegal payments to foreign government officials. Public outrage prompted Congress to pass legislation to combat such activity. The FCPA also requires stricter guidelines in maintaining internal control systems that would actively discover bribes, kickbacks, and other illegal payments. The new provisions were enacted to increase the accuracy and dependability of reported financial statements that conform to Generally Accepted Accounting Principles.

As with all legislation, there are two opposing parties on the bearing that the FCPA has had on American businesses' performance abroad. The consenting view argues that illicit payments are morally and ethically wrong. The immense amount of bribes and kick-backs that were taken place abroad were negatively affecting the United States image as a moral, world

[1] Weismann, Miriam F. "The Foreign Corrupt Practices Act: The Failure of the Self-Regulatory Model of Corporate Governance in the Global Business Environment." *Journal of Business Ethics* 88.4 (2009): 615-661.

leader. That the anti-bribery and internal accounting provisions are necessary moves to regulate this behavior as well as balance out the market so that every company has a equal and fair opportunity to compete.

The dissenting view scrutinizes the FCPA for being a hindrance to American businesses performance abroad. They present several arguments in opposition to the current legislation. The first being the FCPA does not apply to foreign competitors who conduct business free of moral scruples giving them the competitive advantage in many markets. Those so called “grease payments” are a necessity in the ordinary course of business to expedite transactions. One of the largest deterrents for this side is that many companies are unsure of the amount of disclosure needed to meet the accounting provisions. These companies either over spend trying to meet these requirements or aren’t disclosing properly.

This structure of this paper seeks to present the moral and ethical frameworks in which to consider the effect of bribing on business and the great community; confront the cultural differences that lie between American businesses and its potential interest abroad, as well as the growing international move to implementation similar to that of the FCPA; analyze prior anti-bribery legislation and the historical events that prompted the need for a policy like the FCPA, discuss the basic elements of the policy’s two pronged approach of anti-bribery and disclosure regulation; examine several cases in the enforcement of the FCPA on American businesses; and consider the advantages and disadvantages of the statute on the performance of American businesses as a factor of total international exports.

Introduction

I investigated the enforcement of the FCPA from the perspective of American businesses by exploring the effect of the 1977 legislation on US corporation performance in the International markets. I believe that the FCPA has had a negative impact on the performance, and, therefore, profitability of American firms.

Ethics in Bribing and Management

Bribery is broadly defined as a technique used by an agent to purchase influence or loyalty of another. From a legal standpoint, a bribe can be defined as:

> The crime of giving or taking money or some other valuable item in order to influence a public official (any governmental employee) in the performance of his/her duties. Bribery includes paying to get government contracts (cutting in the roads commissioner for a secret percentage of the profit), giving a bottle of liquor to a building inspector to ignore a violation or grant a permit, or selling stock to a Congressman at a cut-rate price.[2]

But primie facie what is a bribe? The most common form of bribery is Commercial Bribery where an outsider purchases an agent in order to induce more favorable treatment.[3] Bribes are most often witnessed when an entity wishes to increase their sales, or enter a new market, or positively or negatively influence the direction of public policy.[4] These types of economic transactions can prove difficult to detect; so if a favorable response is expected after the gift is offered, it is most likely a bribe.

There are three substantially different types of bribes that are known to have varying effects on the legal and social systems they occur in: Transaction Bribes, Variance Bribes, and Outright Purchase. The Foreign Corrupt Practices Act's anti-bribery provision bars specific US

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[2] Black's Law Dictionary. "Commercial Bribery." *Black's Law Dictionary*. Web. 23 Jan. 2011. <http://www.blackslawdictionary.com/>.

[3] Fritzsche, David J. *Business Ethics: A Global & Managerial Perspective*. Boston: McGraw-Hill/Irwin, 2005, 10.

[4] Ibid., 11.

companies (those who have filed with Securities and Exchange Commission) and their affiliates from being directly or indirectly involved in making illicit payments to foreign officials and associated agents for the purpose of influencing a business decision.[5]

A Transaction Bribe is the most common of the three because it seen as more as a facilitating payment rather than an immoral corrupt transaction. Riesman defines a Transaction Bribe as "a type of payment, usually impersonally made, to a public official to secure or accelerate performance of his prescribed function.[6] This type of bribe is not utilized to procure any business favoritism. Its sole purpose has to do with an already assured performance. In this instance, we should view time as an important economic commodity and a Transaction Bribe as a tool employed to maximize the value of that economic transaction and minimize the gratuitous phase in the economic event.[7] For example, many restaurant patrons might tip the Maitre de in order to expedite their seating process or to ensure they are not seated at a table too close to the kitchen.

The use of a Transaction Bribe would be categorized as a public tool. Typically, the type of environment dictates whether the disbursement is an acceptable device and once it is established society it becomes common knowledge.[8] To continue with our example, any person who walks into the restaurant has the option (not the capacity in situations where a low-income person visits the establishment) to approach the Maitre de and solicit assistance. The

[5] Mooney, Elizabeth V. "Bribery Norm In Foreign Markets Poses Legal Challenge For U.S. Firms." *LexisNexis Academic*. LexisNexis, 30 Mar. 1998. Web. 5 Feb. 2011.
[6] Reisman, W. Michael. *Folded Lies: Bribery, Crusades, and Reforms*. New York: Free, 1979, 69.
[7] Ibid., 70.
[8] Ibid., 74.

payment functions as a general service that is not implicitly secret but explicitly discreet. There is customarily a going rate, a payment whose value will secure the necessary action to expedite a specific action.[9] If that payment amount is uncharacteristically larger than the typical Transaction Bribe then it would reclassify the payment.[10]

Transaction Bribes are viewed in a negative light in Western cultures because even if a small number of administrators partake in the transaction then it cast doubt upon the whole. The system will suffer humiliation and the public will lose faith in the government. However, in monarchial societies, kings often used titles and land rights to encourage nobles to assent to their authority and conduct their orders. The practice became acceptable within a monarchy but would be detrimental to a democratic government.[11]

The second type of bribe, a Variance Bribe, is more deleterious to society. In most cases this form of a bribe is applied to "secure the suspension or non-application of a norm to a case where the application would otherwise be appropriate."[12] The appellation given to this type of bribe is appropriate because it requires a variation from the law or principle regulations. A person makes a variance bribe when a person wants the system to operate in their favor. For example:

- Payment to a building inspector to intentionally overlook building code violations;
- Payment to a recruiter remove your name from a draft lottery;
- Payments to an Internal Revenue Service agent discharge you from you tax obligations.

[9] Ibid., 71.
[10] Ibid., 72.
[11] Ibid., 74.
[12] Ibid., 75.

A Transaction Bribe has always proven difficult to track because the bribe does not require the agent in the organization to deviate from their proscribed duties or visibly interfere with their fiduciary duty, while a Variance Bribe is unequivocally apparent.[13] Variance Bribes offer the payer private favor and in turn hurt the community because of the departure from the principle of fair competition.[14] In the long run, these types of bribes alter the normal course of the system.

Many developing countries experience Variance bribes that centralize power to an individual or group of elites. In democratic countries politicians try to gain control of non-civil service appointments. The ability to grant government contracts awards these public officials with a lot of power and grants them agency to realize countless lucrative schemes. [15]

The final type of bribe is the most detrimental to the community because it completely shifts the agent's loyalty from the organization to another party. The Outright Purchase payment is not as much of a bribe as it is a payment to attain a new employee.[16] The agent will maintain the façade of loyalty, yet in reality he shifts his loyalty and completely disregards his fiduciary duty. An Outright Purchase allows you to buy and pocket an official. This technique is commonly used in espionage when governments buy foreign agents.[17] The Outright Purchase is a conflict of interest and corrupts the motive of that agent's actions. It requires an extreme

[13] Ibid., 74.
[14] Ibid., 78.
[15] Ibid., 88.
[16] Ibid., 89.
[17] Ibid., 90.

degree of secrecy because of the implication to both parties involved in the transaction. Determining whether any of these modes of payments are fair can be determined by exploring them through moral frameworks. Utilitarianism, morality, and social justice will provide the deciding framework as to the efficacy of legal administration effects of bribes on the behavior of American businesses.

There are several interpretations of the utilitarianism principle but the general interpretation of the ideal is that any decision can be ethical if the greatest good is reached for the greatest number of people. The action must provide the community with the greatest net benefit compared to other possible decisions.[18] The simplest way to approach utilitarianism is to think of it as a basic equation. One side of the equation consists of an assortment of variables that represent the actions taken by individuals. The equality sign of the equation is not an equal sign (=) but a greater than or equal sign (≥). The final component of the utilitarian equation is simply "good." This inequality allows stakeholders to view actions as a group or singular and consider specific interest to devise alternatives that will equal the greatest good for all.[19]

Utilitarianism is the most intuitive thought process for business entities because it is essentially a Cost-Benefit analysis method.[20] Companies approach each decision by defining and weighing the social, economic, moral, and monetary cost and benefits that accompany each

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[18] Fritzsche, David J. *Business Ethics: A Global & Managerial Perspective*. Boston: McGraw-Hill/Irwin, 2005, 48.
[19] Weiss, Joseph W. *Business Ethics: A Stake and Issues Management Approach*. 4th ed. Mason, OH: Thomson South-Western, 2006, 120.
[20] Adler, Matthew D., and Eric A. Posner. *New Foundations of Cost-benefit Analysis*. Cambridge, MA: Harvard UP, 2006, 22.

business decision.[21] In determining whether this moral framework is helpful in determining the morality of Transaction Bribes, Variance Bribes, and Outright Purchases, the assessor would have to determine societal benefits, the business increase, and the negative notoriety and financial fines that could ensue if a company takes action.[22] Because of the quantity and intricacy of each factor, the utilitarianism framework is believed to be exclusive to particular situations.

The next framework is a person's moral rights. A person has legal and moral rights that are derived from different distinct authorities. Legal rights are privilege afforded to citizens by the government of a specific country. The United State Declaration of Independence confers the right "to life, liberty and the pursuit of happiness."[23] On the other hand, moral rights are universal rights that all human beings have the faculty to enjoy.[24] You have the responsibility to not violate another's moral rights and they in turn have that same duty in protecting your moral rights. Within the scope of our bribes, the analysis of the transaction must not impede on another's rights. Because the elementary concepts of the bribes differ we must examine each separately.

Transaction bribes are generally used in services that are available to any and every citizen. It does not function to tip the scales in anyone's particular favor and does not obscure the market's ability to operate fairly. In the scope of moral rights, a Transaction Bribe would be

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[21] Weiss, Joseph W. *Business Ethics: A Stake and Issues Management Approach*. 4th ed. Mason, OH: Thomson South-Western, 2006, 124

[22] Shaw, Bill. "Foreign Corrupt Practices Act: A Legal and Moral Analysis." *Journal of Business Ethics* 7 (1988): 789-95, 791.

[23] 111th Cong., U.S. G.P.O. (2009) (enacted). Print.

[24] Weiss, Joseph W. *Business Ethics: A Stake and Issues Management Approach*. 4th ed. Mason, OH: Thomson South-Western, 2006, 126.

considered ethical in the normal course of business. Variance Bribes and Outright Purchases would be considered immoral because it violates a competitor's ability to contend on an equal playing field. One party would have an inside agent constantly acting in his/her favor and destabilize the concepts of fair competition.[25]

Social Justice is the last framework to examine in conjunction with the three types of bribes. Social Justice is generally associated with the fair distribution of benefits (education, job, wealth leisure) and burdens (taxes, work, social and civic responsibilities).[26] Every person in a society has the right to take advantage of these basic liberties. Since we do not live in a perfect environment where these opportunities can be equally distributed, we refine the definition so that all people of all economic backgrounds have the best possible access the broadest liberties.[27] The Social Justice framework proves that all three types of bribes will fail to meet ethical standards.

Companies might all have the opportunity to expedite service through Transaction Bribes but under the Social Justice framework if all but one company chooses against participating in this behavior that would skew the normal distribution required for the bribe to be just. A Variance Bribe buys favoritism. Any type of preferential treatment immediately makes the Variance Bribe unethical. Finally, the Outright Purchase mitigates an organization's

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[25] Shaw, Bill. "Foreign Corrupt Practices Act: A Legal and Moral Analysis." *Journal of Business Ethics* 7 (1988): 789-95, 791.
[26] Miller, David. *Principles of Social Justice*. Cambridge, MA: Harvard UP, 1999, 10/
[27] Fritzsche, David J. *Business Ethics: A Global & Managerial Perspective*. Boston: McGraw-Hill/Irwin, 2005, 52.

impartiality because one player in the market would have an inside agent acting on their behalf ultimately making the last type of bribe immoral additionally.[28]

Understanding the different types of bribes and the potential immorality in the transactions is of no substance if the officers in charge disregard the ethical dilemmas for private or corporate gain. An important question that must be asked is where do managers owe their loyalty— to shareholders or stakeholders? On one hand, you have your everyday citizen who invests in a firm to own a piece of the corporation, while on the other you have actual stakeholders in the company, including executives, employees, creditors, and suppliers.

Corporate Governance is a term that encompasses the processes, rules, and laws by which a business is regulated, operated, and controlled. The term broadly refers to internal drivers of a corporation such as officers and stockholders as well as external vehicles such as clients, government regulations, and consumer groups.[29] Corporate Accountability deals with the relationship between a corporation and the society that has authorized the corporation to function. In turn for being allowed to operate, the corporation owes society duties outside the customary legal regulation must also maintain a high ethical standard.[30] It is the duty of managers to preserve these standards as well as maximize the value of the firm. Because the expanded definition of Corporate Governance and Accountability has moved to embrace the

[28] Shaw, Bill. "Foreign Corrupt Practices Act: A Legal and Moral Analysis." *Journal of Business Ethics* 7 (1988): 789-95, 791.
[29] Malik, Fredmund. *Managing, Performing, Living: Effective Management for a New Era*. Frankfurt, M.: Campus-Verl., 2006. Print, 135
[30] Bostrom, Robert E. "Corporate Governance: Developments And Best Practices One Year After Sarbanes-Oxley." *LexisNexis Academic*. LexisNexis, Oct. 2003. Web. 05 Feb. 2011.

community as another patron, managers' scope of concerns has expanded to maximize value for not just its immediate interest.

Social Responsibility is closely related to notion of Corporate Accountability in that both concepts view the corporation on a larger scale not just as an economic entity but also as a social institution in the community. Corporations are facing increased pressures as players in society because they occupy major economic roles that are elaborately intertwined in every facet of our daily lives.[31] The recent federal bailout proves that society cannot allow these companies to fail because of the immediate consequences that would ripple through our lives. The government has a responsibility to maintain a corporate environment that not only is economically successful but also morally sincere. In recent years, the government and corporations have formed a new relationship built to foster a sound economic environment. Recently, commercial regulation has made progressive moves toward having a larger social effect.[32] Stakeholders continue to focus on obtaining more influence over executive decisions through legal channels while managing public/media relations. The new corporate-business relationship is rooted in the public sector. Because the two are linked, legislation like the Foreign Corrupt Practices Act functions to increase public attitude towards the system.

[31] De Kluyver, Cornelis A. *A Primer on Corporate Governance*. New York, NY: Business Expert, 2009.
[32] Ibid.

Cultural Aspects of Facilitating Payments

The Sherman Act (U.S. antitrust law) regulates the formation of monopolies and cartels. It gives the federal government the responsibility and power to legally pursue any group, company, or organization who might be engaged in monopolistic behavior.[33] The Sherman Act defined a trust as a corporation that had the ability to achieve undue profits by way of price fixing, quantity, and quality manipulation of goods and services.[34] The original act was passed in the late nineteenth century in response to the negatively affected American business that weren't given the chance to compete because of the trusts' large market control[35] The dominant economic theory for most of the nineteenth century encouraged the formation of trust until public outcry prompted government response by Ohio Senator John Sherman, the legislation's chief proponent. The Sherman Act saw little action until the twentieth century and the formation of the Federal Trade Commission through the FTC Act of 1914.[36]

The antitrust law and the FCPA were moves by the United States government to attempt to corral unfair business practices, and with that, corruption. General public opinion says that corruption has a negative effect on economic performance. Our moral and ethical frameworks stand as a concurrent position against the practice of bribes. Yet there is significant evidence that bribery has a monopolizing effect for incumbent firms. A corrupt

[33] "Sherman Antitrust Act." *Encyclopedia Britannica. Encyclopedia Britannica Online*. Encyclopedia Britannica, 2011. Web. 20 March. 2011.
[34] "Competition and Monopoly: Single Firm Conduct Under Section 2 of the Sherman Act." *Welcome to the United States Department of Justice*. 1 Sept. 2008. Web. 25 Mar. 2011.
[35] "Sherman Antitrust Act." *Encyclopedia Britannica. Encyclopedia Britannica Online*. Encyclopedia Britannica, 2011. Web. 20 March. 2011.
[36] Ibid.

government official will be hesitant to allow new firms to function within their region when they are regularly receiving payments from incumbent firms. [37] New firms do present more competition to the market and potentially higher profits through illegal payments for the bureaucrat but there's no guarantee that the new firm will be willing to participate in the "grease wheel" approach. Corruption can decrease the degree of potential competition that would optimize a market.[38] Bribery undermines accountability, law, and market-based decision making.[39]

A study in Brazil shows that corruption prevents new firms from having the ability to enter the market and serves to increase the market share of incumbent firms. Of the electronics and textile CEOs that were surveyed, seventy-percent of them labeled corruption as the leading barrier to entry. The study showed that the certainty of a company's willingness to bribe had a positive effect on the firm's performance. While the actual size of the bribe didn't correlate to firm performance, corruption imposes a considerable learning curve and cost to possible new competitors in a market. These new firms are uncertain of the frequency of the required bribe, the amount to be paid, or when a particular bribe can be avoided.[40]

A study conducted in Russia revealed that many Russians believe that bribery is an acceptable practice and don't view it as morally wrong. The common consensus is that if no money changes hands then it doesn't constitute a bribe. Exchanging gifts, services, or favors for

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[37] Campos, Nauro F. "Guest Post: Corruption as a Barrier to Entry « Naked Capitalism." *Naked Capitalism*. 5 Nov. 2010. Web. 5 Mar. 2011.
[38] Ibid.
[39] U.S. Department of Commerce. International Trade Administration. *Addressing the Challenges of International Bribery and Fair Competition 2004*. Washington, 2004. Print, 1.
[40] Campos, Nauro F. "Guest Post: Corruption as a Barrier to Entry « Naked Capitalism." *Naked Capitalism*. 5 Nov. 2010. Web. 5 Mar. 2011.

a specific action is just ones' neighborly duty. 21% of people across Russia admitted to paying a bribe in the past year, while that figure was 40% in Russia's capitol, Moscow. In the health services industry, 44% of people said that it was customary to additionally compensate doctors and nurses for better health services. One disturbing figure was that a third of Russians said it was morally acceptable to bribe a higher education official in order to place their child in college or university. The government employees that were surveyed as well were just as likely to view bribes as moral. It would cost an entrepreneur $135,000 to set-up a new business. This type of payment has long been viewed as a "victimless crime" in Russia. Recent democratic reforms have stated that bribes undercut the quality of life, especially for those who don't have the means to participate in the culture, but few people agree with this sentiment. The most alarming conclusion from the study was the fact younger Russians, aged 15 to 24, are more likely to approve of bribing than older Russians who remember the Soviet Union.[41]

In countries like Russia that are bribery prone, some cases show that American executives are the targets of extortion schemes and are not willing participants in the illegal business method.[42] Foreign officials hold a lot of power: sway over the timing of a shipment promptness of which necessary paperwork needs to be filed, and even the selection in government contracts. If a firm is first approached by a foreign bureaucrat and informed that

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[41] Gradirovski, Sergei, and Neli Esipova. "Corruption in Russia: Is Bribery Always Wrong?" *Gallup.Com - Daily News, Polls, Public Opinion on Government, Politics, Economics, Management*. 15 Nov. 2006. Web. 23 Feb. 2011.
[42] Boylan, Michael. *Business Ethics*. Upper Saddle River, NJ: Prentice Hall, 2001. Print.

"it would be in their interest" to deposit a payment to guarantee business that would leave few options available to American firms.[43]

American firms were at a constant disadvantage throughout the nineties. During the first decade after the inception of the FCPA, The SEC and DOJ investigated only twenty instances of possible violations. The nineties increased scrutiny from both regulation agents, and increased anxiety in American companies because of possible violations by foreign subsidiaries. Strang Hayes Consulting Inc., an investigative management firm, concluded that the US persistently has trouble competing with foreign competitors. Many similar professionals view the original legislation as "naïve" because it failed to account for the widespread adoption of bribery as a necessary business practice. The OECD anti-bribery convention led the initiative to deem bribery as bad for business. The reality is that many foreign countries are looking for a competitive advantage to gain market share. The 1988 amendment currently allows grease payments, or transaction bribes, but other types of bribes (variance bribes and outright purchases) are utterly unlawful. The last factor in curtailing the corruption is the existence of an organization whose sole duty is maintain business integrity. It's 2011 and the world still lacks one international regulation agency to police bribery activity. Neither the United Nations nor World Court has accepted the responsibility of assuming this role.[44]

The US Department of Commerce has continuously sought strategies to encourage US and international commerce. Since the passing of the FCPA, The US government has received

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[43] Campos, Nauro F. "Guest Post: Corruption as a Barrier to Entry « Naked Capitalism." *Naked Capitalism*. 5 Nov. 2010. Web. 5 Mar. 2011.

[44] Mooney, Elizabeth V. "Bribery Norm in Foreign Markets Poses Legal Challenge for U.S. Firms." *Radio Communication Report* (1998): 26-28. *Lexis Nexus*. Web. 5 Feb. 2011.

information pertaining to the disadvantages American companies face abroad because of the lack of legislation in competing company countries. The DOC has directly attacked international corruption by engaging in trade agreements with its international trading partners and monitoring their efficiency.[45] “Bribery to corrupt those charged with the public trust but who lack a moral compass deprives countries of the resources needed to promote growth and development.[46] Real progress was made with the aid of the Organization for Economic Cooperation (OECD) and the passing of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions by the thirty-eight OECD member countries.[47] The OECD is always actively seeking out more nations to ratify the Convention. In 2001 and 2002, Slovenia and Ireland ratified the Convention, respectively.[48]

Originally founded in 1961, the OECD’s main focus is a democratic forum that provides an arena for policy discussion, seek answers to problems, as well as coordinate international strategies to cross-border issues ranging from money-laundering, tax evasion, and corruption The OECD is headquartered in Paris and is currently composed of an array of member countries located on every continent. The OECD maintains working relationships with over seventy countries that follow many of the pronouncements published by the organization.[49]

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[45] Darrough, Masako N. The FCPA and the OECD Convention Some Lessons from the U.S. Experience. New York: CUNY, 2004. Print, 255.
[46] U.S. Department of Commerce. International Trade Administration. Addressing the Challenges of International Bribery and Fair Competition 2004. Washington, 2004. Print, 1.
[47] Darrough, Masako N. The FCPA and the OECD Convention Some Lessons from the U.S. Experience. New York: CUNY, 2004. Print, 255.
[48] U.S. Department of Commerce. International Trade Administration. Addressing the Challenges of International Bribery and Fair Competition 2004. Washington, 2004. Print, 7.
[49] BBC. "BBC NEWS | Business | OECD: What Is It and What Does It Do?" *BBC News - Home*. 12 Feb. 2003. Web. 23 Feb. 2011.

After many years of US petitioning, the OECD Anti-Bribery Convention was signed on December 17, 1997 and came into force on February 15, 1999.[50] The OECD is not an international oversight agency and has no actual authority to implement or enforce legislation so it relies on its member countries to sanction anti-bribery regulation. "The signatory nations effectively form a cartel to reduce the cost of doing business."[51] Many American companies argued that the FCPA placed them at a competitive disadvantage against its foreign competitors.[52] US companies lost $45 billion in 1994 to foreign competitors who illicitly solicited bribes. With the ratification of the OECD Convention US firms had a fighting chance in the international market.[53] In a study conducted by Masako N. Darrough, US companies showed a decline in bribery prone countries and were discouraged from even competing. These firms consciously decided to reduce activity in these countries.[54]

The OECD Convention is viewed as a "supply side" agreement because it seeks to halt those who offer, promise or pay a bribe.[55] Because of the US involvement in spearheading this initiative the Convention is very similar to the FCPA. A foreign public official is defined as any individual who exercise his duties as a public function. This includes officers of international organizations as well as consultants and other third party agents. It requires its member countries to install "effective, proportionate, and dissuasive criminal penalties" to any person who violates the legislation. Penalties are to include confiscation or seizure of monetary or

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[50] Darrough, Masako N. *The FCPA and the OECD Convention Some Lessons from the U.S. Experience*. New York: CUNY, 2004. Print, 255.
[51] Ibid., 270.
[52] Ibid., 258.
[53] Ibid., 259.
[54] Ibid., 261.
[55] Ibid., 4.

property of similar value. Each country must establish criminal liabilities for entities that violate the legislation as well as make bribery of foreign officials signify a prior offense for money laundering. The same conditions will apply to bribing a domestic official. The legislation must implement standards to regulate internal controls and prevent off-book accounts. Lastly, any violation in any member country would be considered an extraditable offense.[56]

Prior to the OECD Convention, almost half of the member countries recognized bribes as a legitimate business expenses and included in its tax code exemptions for bribes.[57]

Despite the constructive moves already in place, the US remains worried about the tax deductions of bribes in many foreign countries. The legal framework in many countries does not cover companies below a certain size or bribes of a certain type. The relevant laws may not be specific enough to disallow tax deductibility. The legislation many not extend to a countries territories or dependents. As well as overly broad tax deductibility categories may provide companies with wiggle room to disguise bribes as legitimate expenses.[58] The US has suggested that the OECD expressly disavow the deductibility of bribes in member countries' legislation and increase tax authorities and public official's awareness and education of the guidelines that help them detect bribes of foreign officials.[59]

There are other issues the Department of Commerce believes that the OECD needs to address to solidify its position on corruption. They include acts of bribery including foreign

[56] Ibid., 4.
[57] Darrough, Masako N. *The FCPA and the OECD Convention Some Lessons from the U.S. Experience*. New York: CUNY, 2004. Print, 258.
[58] U.S. Department of Commerce. International Trade Administration. *Addressing the Challenges of International Bribery and Fair Competition 2004*. Washington, 2004. Print, 34.
[59] Ibid., 35.

political parties and foreign political candidates (which is covered in the FCPA). Make bribery of public officials a predicate offense to money-laundering. The Convention would benefit also if the OECD clearly defined the role of foreign subsidiaries in bribery transactions as well the role of off-shore centers in bribery transactions.[60]

The FCPA as well as the OECD Convention covers international organizations. The International Anti-Bribery and Fair competition Act of 1998 covers more than 80 international organizations including the International Monetary Fund, the World Bank, and World Trade Organization.[61] Currently these organizations all participate in transparency programs that encourage ethical behavior.[62] The continued transparency in these organizations can only serve to benefit the international business community.

From May 1, 2003 to April 30, 2004, information shows that the awarding of forty-seven contracts worth $18 billion may have been affected by bribes. The year before forty contracts valued at $23 billion were believed to have been affected by illegal transactions. The OECD estimated that bribes won ninety percent of these contracts. The OECD has concluded that the US lost eight of these contracts valued at $8 billion dollars. Just two years ago the number of contracts thought to be procured by bribing was over sixty. Prosecution against the firms discovered to have participated in this behavior is meant to send a message to the world and help curtail bribing action.[63]

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[60] Ibid., 37.
[61] Ibid., 39.
[62] Ibid., 44.
[63] Ibid., 52.

The OECD is also facing a major push by the US to implement section 404 of the Sarbanes-Oxley Act of 2002. This particular section on internal controls requires each annual report to contain a statement of management's responsibilities for establishing and maintain internal controls by requiring the CEO and CFO to sign off on financial statements. This would also require the independent auditor to attest the entities effectiveness of internal controls.[64]

Control and oversight is an important factor in the success of the OECD Convention. That is why the OECD formed the Working Group on Bribery, which consists of different representatives of every party of the convention. The group's main focus is the development and research on the implementation of anti-bribery legislation in member countries and the monitoring of that legislation. The OECD developed an initial two phase approach to tackle this issue.[65]

Phase One monitoring reviews are intended to verify that all parties to the Convention have working domestic laws in place that prohibit bribing foreign officials.[66] This initial step allows not only for the OECD to evaluate the country but also a self-assessment provided through a questionnaire. The OECD committee is comprised of two lead countries that chose the experts who are in responsible for the evaluation. The self-evaluation requires specific and ample information about the country's legal system and other applicable laws so that the examiners may perform an adequate assessment. It's mandatory for the replies to the

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[64] Ibid., 51.
[65] Nickerson, Kathryn. "International Enforcement of the OECD Anti-Bribery Convention." *Federal Ethics Report* 12.3 (2003): 1-10. Print, 3.
[66] Ibid., 3.

questionnaire to be reported in English or French, the two official OECD languages[67]. A report is then drafter with the examiner's conclusion, suggested amendments to current legislation, and overall performance.[68] The Working Group completed all of the Phase One reviews in 2004 with the exception of Slovenia which was completed in 2005.[69]

Throughout the Phase One reviews several key shortcomings were identified. Many countries were lacking the basic elements of the Convention. Their legislation didn't explicitly cover giving, promising, or offering a bribe. Several countries omitted the third party clause or even didn't include the definition of a "foreign public official."[70] Appropriate liability wasn't placed on corporations or senior individuals to properly prosecute violators. Financial and incarceration punishment weren't adequate enough to deter violation. The maximum statutes of limitations were too brief. Many countries were found to have laws that lacked appropriate or adequate extradition clauses or mutual legal assistance.[71]

Phase Two's primary goal was to gauge the structure of a country's laws in place to enforce the OECD convention and assess their utilization in its practice. The US views Phase Two as a long time commitment, as enforcement laws should ever be evolving.[72] Phase Two is similar to Phase One in that two countries are chosen to lead the review and it requires the

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[67] OECD. "Phase 2 Country Monitoring of the OECD Anti-Bribery Convention." *Organization for Economic Co-operation and Development*. Web. 16 Mar. 2011.
[68] Nickerson, Kathryn. "International Enforcement of the OECD Anti-Bribery Convention." *Federal Ethics Report* 12.3 (2003): 1-10. Print.
[69] U.S. Department of Commerce. International Trade Administration. *Addressing the Challenges of International Bribery and Fair Competition 2004*. Washington, 2004. Print, 28.
[70] Nickerson, Kathryn. "International Enforcement of the OECD Anti-Bribery Convention." *Federal Ethics Report* 12.3 (2003): 1-10. Print, 3.
[71] Ibid., 3.
[72] Ibid., 5.

member country to complete a questionnaire. The questionnaire is a scenario provided by the examiners and the member country must complete it in accordance with their current enforcement laws. The review committee then analyzes it and forms their conclusion on that basis.[73] The working group aims to complete a process that is "flexible, transparent, rigorous, and credible.[74]

Issues arose in various phase 2 reports varying from anti-bribery awareness and training, to technical cooperation, to accounting provision, to sanctions and jurisdiction. Public officials in many member countries were unaware of the new legislation and countries were putting in place programs to increase awareness to help combat bribery. Some countries don't have in place guidelines for international cooperation in order to take advantage of the Convention. Accounting issues are a primary signaler to corruption and some countries weren't adequately enforcing the accounting provision standards. Many countries aren't imposing large enough fines in order to prevent future similar behavior in companies. Companies must see that bribery is bad for business.

A third phase was implemented in December 2009 to function as a permanent check for individual member countries. Phase Three can be considered a shorter more focused version of

[73] OECD. "Phase 2 Country Monitoring of the OECD Anti-Bribery Convention." *Organization for Economic Co-operation and Development*. Web. 16 Mar. 2011.
[74] U.S. Department of Commerce. International Trade Administration. *Addressing the Challenges of International Bribery and Fair Competition 2004*. Washington, 2004. Print, 28.

Phase Two. Its purpose is to maintain anti-bribery legislation that will constantly be revised as the OECD implements greater and more efficient rules.[75]

The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions isn't the only international treaty that exists. The United Nations Convention against Corruption was entered into force on December 15, 2005. The regulation is very similar to the FCPA as well as the OECD Convention but includes a new asset recovery clause that allows countries to recover monies or properties lost by corrupt officials. Many officials that succumb to bribery live in some of the poorest countries. This law allows them to recover millions of dollars and or resources that could be lost in these corrupt transactions.[76]

The Inter-American Convention against Corruption (IACAC) predated the OECD Convention and was the first international legislation that tackled the corruption dilemma facing the world. It was adopted by the OAS (Organization American States) on March 29, 1996 and came into force on March 6, 1997. The OAS is comprised of the thirty-five states that compromise North America, Central America, and South America except for Honduras (which was suspended for political reason). IACAC has two primary goals. The first is to promote and strengthen the elements member states used to prevent, detect, and reprimand and eradicate corruption. "To promote and strengthen the development by each of the States Parties of the mechanisms needed to prevent, detect, punish and eradicate corruption; and to promote, facilitate and regulate cooperation among the States Parties to ensure the effectiveness of

[75] OECD. "Phase 2 Country Monitoring of the OECD Anti-Bribery Convention." *Organization for Economic Co-operation and Development*. Web. 16 Mar. 2011.
[76] United Nations. "Convention against Corruption." *United Nations Office on Drugs and Crime*. Web. 15 Feb. 2011.

measures and actions to prevent, detect, punish and eradicate corruption in the performance of public functions and acts of corruption specifically related to such performance."[77]

The combined efforts of the world's leading powers are meaningful to halting dishonest business practices and promoting a stronger world economy and international relationships. Companies will understand that commerce that follows the letter of the law not only best serves them but also the countries they conduct business with.

[77] Trade Compliance Center. "Inter-American Convention Against Corruption." *Trade Compliance Center - Making America's Trade Agreements Work for You!* Web. 28 Mar. 2011.

Analysis of the Foreign Corrupt Practices Act

Governments have been creating laws to disallow officials from accepting bribes throughout history. The FCPA was not the first attempt by congress to curtail corporate bribery. The Interstate Commerce Act was passed in 1887 to forbid any bribe to a railroad employee to influence a business decision.[78] The Twentieth century saw similar laws passed in the shipping, meat and grain industries. The Internal Revenue Code Section 162 was amended to bar illegal payments from being tax deductable.[79] Like the Interstate Commerce Act, most of the regulation was only specific to domestic business transactions. Operations abroad usually just required a disclosure of business activities. It was the public outcry after the numerous scandals of the early seventies that prompted new, more cumbersome action.

Amid the malignant stalemate of the Vietnam War, Americans were frustrated with continuing actions of the government. Public opinion craved for an end that was nowhere in sight. Then in 1972, it was discovered that President Nixon's reelection campaign had received $60 million in donations from various corporations.[80] The Tillman Act of 1907 was the current legislation regulating campaign donations prohibited corporate donations to political campaigns.[81] Some of the largest companies in the nation at the time had illegally funneled thousands of dollars to Nixon's campaign. Some of the companies include: "American airlines, $55,000; Brainaff Airways, $40,000; Ashland Oil, $100,000; Goodyear Tire and Rubber, $40,000;

[78] Dempsey, William H. "Antitrust and Regulation." *Antitrust Law Journal* 363.50 (1981). Print.
[79] Cornell University. "United States Code: Title 26,162. Trade or Business Expenses | LII / Legal Information Institute." *LII | Legal Information Institute at Cornell Law School*. Web. 3 Mar. 2011.
[80] Evans, Leslie, and Allen Myers. *Watergate & the Myth of American Democracy*. New York: Pathfinder, 1974. Print, 90.
[81] Genovese, Michael A. *The Watergate Crisis*. Westport, CT: Greenwood, 1999. Print, 22.

Gulf Oil, $100,000; Northrop, $150,000; and Phillips Petroleum $100,000."[82] The findings of the investigation opened the floodgates for an SEC investigation into the appropriation of illegal corporate expenditures.

One of these investigations was prompted by the suicide of Eli M. Black, chairman and President of the United Brand Company, on February 3, 1975. Black was initially heralded as a financial wizard as he was able to acquire several companies to diversify United's holdings. United ran into some difficulty in April of 1974 when numerous Central American governments began increasing taxation on banana exports. Later that year, hurricane Fifi ravished Central American crops destroying over seventy percent of the regions banana crops. United reported a sixty million dollar operating loss for the year and was forced to begin measures to offset its losses. The SEC's investigation into Black's death discovered a $1.25 million payment to Honduran President Oswaldo Lopez Arellano and another promised installment of $1.25 million to significantly decrease the banana tax. A $750,000 payment to Italian official to reduce importing restrictions also was discovered. Even though at the time the payments were made they weren't considered illegal, but concealing the payments off-book was a major SEC violation. This series of events was then dubbed "The Bananagate Scandal."[83]

The public reached their limit and their outcry finally resulted in government intervention. The basic proscription of the FCPA: Any citizen, national, or resident of the US, and corporation (foreign or domestic) that has filed with the Securities and Exchange Commission, and any business unit whose primary arena of commerce is centralized in the US is

[82] Ibid., 23.

[83] Funding Universe. "Chiquita Brands International, Inc. -- Company History." *Find Funding with Banks, Investors, and Other Funding Sources | FundingUniverse*. Web. 2 Feb. 2011.

subject to the rules of the FCPA. Each of the previously stated parties is barred from “knowingly making use of instruments or interstate commerce to corruptly to pay, offer to pay, promise to pay, or to authorize the payment of any money, gift, or promise to give, anything of value to any foreign official for purposes of influencing any act… in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person.[84] A similar prohibition applies with respect to payments to a foreign political party or official thereof or candidate for foreign political office.”[85] The FCPA also contains one exception and two affirmative defenses to prosecution. The exception allows companies to participate in grease payments which allow the company to expedite routine governmental action.[86] While the first defense makes a payment to an official legal if it falls under the statues of that foreign company. Legitimate and reasonable expenditure directly related to the promotion, demonstration, or explanation of products or services, or execution or performance of a contract is protected as an affirmative defense.[87]

The FCPA contains two provisions: the anti-bribery provision and the accounting standard provision. The bribery provision consists of two stipulations that could be defined as a bribe. The first prohibits any payment made directly by any US company. The second specification prevents an organization from knowingly funneling a bribe through a third party agent. The accounting provision requires companies to maintain their books, records, accounts, and internal controls to a reasonable specification. A company must accurately and honestly

84 The Foreign Corrupt Practices Act of 1977. Pub. L. 105-366. 15 Stat. 15 January 2011. Print.
85 Ibid.
86 Ibid.
87 Ibid.

reflect normal transactions and the value of assets.[88] This second provision obscures creative accounting activity as well as makes it difficult for a corporation to hide corrupt payments and maintain slush funds. Substantially effective record keeping can prevent overpayments, missing receipts, records, unrecorded transactions, and misclassification of cost (i.e. phony consulting fees). Operational internal accounting controls verify that transactions are management authorized, recorded as necessary, and that only the proper authorities have access to company assets.[89]

The United States Code 15 is composed of three sections.[90] The first section specifically covers the securities issuer; the entity that must file with SEC. 78dd-2 includes any company agent or stockholder acting on behalf of the domestic concern. The final section pertains to non-US nationals who act within the territory of the United States. The legislation expressly defines the terminology it employs to disrupt and possible grey area.

A foreign official is any employee or officer of a foreign government, or any government owned unit, or a public international organization; including any person acting in an official capacity for a foreign government or public international organization. The definition of a public international organization is outlined in the U.S.C 22. A person is considered to have the knowledge of the act if they have a firm belief (there exist a high probability) or is aware of the misconduct. A routine governmental action is procuring licenses, permits or other foreign government documents to conduct business. A government agent fulfilling ordinary duties in his capacity: such as processing government papers, performing police services, mail delivery

[88] Ibid.
[89] Ibid.
[90] Ibid.

and pick-up, contract inspections, providing utility service, and other actions of a similar disposition. Use of interstate instruments to conduct commerce, transportation or communication between states or any foreign country or any place outside of the previous locations qualifies as interstate commerce.[91]

The SEC and the Department of Justice share responsibility in enforcing criminal and civil violations of the FCPA. It is the responsibility of the Department of Justice to enforce the FCPA against those who haven't registered with the SEC while the SEC handles companies that have registered securities.

Penalties under the FCPA include a fine not to exceed five million dollars for a US natural or a detention sentence no longer than twenty years for a willful violation, or making a false/misleading statement. The fine for a non-US citizen increases to twenty five million dollars. For failure to file the necessary documents by their due date the fine is one hundred dollars per missing day. Failure to comply with the FCPA can result in a two million dollar for any issuer, officer or agent of the corporation, or stockholder as well as a prison term up to five years for liable individuals. The SEC can also bring civil action against culpable agents resulting in fines up to ten thousand dollars. 78 ff also prohibits the issuer from "directly or indirectly" pay the fines of any officer, agent, or stockholder.[92]

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[91] Ibid.
[92] Ibid.

In 1998 President Clinton signed a major amendment to the FCPA at the conclusion the OECD Convention on December 17, 1997.[93] The major expansions consist of a clause that prohibits payments to secure any type of improper advantage. This clause is a step beyond the original language that only prohibited companies from influencing acts or inducing a violation of lawful duties to maintain or retain business.[94] The amendment, additionally, expanded the application of the FCPA past the use of mail and interstate commerce to any means that result in an improper payment even outside the United States. The FCPA currently extends to any foreign nationals or businesses that perform any activity to violate the act while inside the borders of the United States Simpson.[95] The penalty provisions of the FCPA now apply to any foreigner employed by a US company or any foreign agents acting on behalf of the American company. Finally, the 1998 amendment added officials of public international organizations (i.e. Red Cross, United Nations) as foreign officials whom could be influenced.[96]

[93] Simpson Thatcher & Bartlett LLP. "The International Anti-Bribery Act of 1998 Amends the Foreign Corrupt Practices Act and Implements the OECD Convention Combating Bribery of Foreign Public Officials." (1998): 1-16. Print, 1.
[94] Ibid., 2.
[95] Ibid., 6.
[96] Ibid., 9.

Triton Energy

Triton Energy Ltd was founded in 1962 by E.R. Wiley. The early Sixties saw abundant growth in the petroleum industry as many small, independent exploration companies were being created. During the next two decades many of these operational businesses were forced to shut down operations because of the volatility of the oil and gas industry. Triton was primarily a wildcatter oil company, meaning that the company specially sought petroleum in areas unknown to contain oil.[97] These were very risky ventures because there is always a high probability that these types of companies would not strike oil. Because of the larger oil and gas companies who already had a majority control on the more lucrative, domestic oil fields, many small companies such as Triton were forced to venture elsewhere, generally abroad, to obtain petroleum. The saturated oil market in the Eighties caused huge dips in oil prices leaving many of the thirty thousand petroleum companies that had existed twenty years earlier defunct.[98]

Bill Lee, who had joined the firm in 1960, was promoted to chief executive officer in 1966. Lee commenced exploration abroad in many countries and found several large successful areas. Lee discovered a large petroleum pocket in Thailand in the early Seventies. Triton was unable to begin operations in Thailand for a decade because of local government interference. Lee quickly learned that having a good rapport with foreign officials would be crucial if Triton would realize any prosperity in these countries.[99]

[97] Knapp, Michael Chris. *Contemporary Auditing: Real Issues and Cases*. Australia: South-Western College Pub., 2001. Print, 223.
[98] Ibid., 224.
[99] Ibid., 224

In 1989, Triton Energy sent a new internal audit director to complete an assessment of Triton Indonesia's operations. The report compiled by the director contained damaging factual information. The report stated that in order to merely maintain operations the company paid illegal contributions to government and custom officials, inspectors, and auditors just to name a few. Senior managers were appalled by the director's findings and ordered all copies of the memorandum to be destroyed.[100] The accountant resigned from his post and promptly filed a report with the US Embassy in Indonesia after concern for his professional career came into question. Peat Marwick, Trion's external auditors, voiced concern over internal controls after the former Triton accountant's report was published. It is the responsibility of the audit firm to verify that the reported financial statements are adequate and conform to GAAP. The FCPA requires firms to disclose any bribery, kickbacks, or other illegal payments made to government officials. Triton was able to convince its auditors that all copies of the memo had been destroyed and formally responded to Peat Marwick's inquest into the internal controls by neglecting important facts of the report. However, one copy of the report survived and was crucial substantive evidence in a 1991 lawsuit.[101]

A former Triton controller sued the company on wrongful termination charges after he refused to sign off on 10-K filings because he voiced concern over the documentations lack of inclusion of illegal payments made to numerous foreign officials. He accused Triton of paying

[100] Ibid., 225
[101] Ibid., 227.

off officials from every facet of business for Triton Indonesia. The jury ruled in the accountant's favor and opened the flood gates into Triton's questionable practices abroad.[102]

An SEC investigation into the conduct of Triton Indonesia revealed that the company had employed a longtime resident of Indonesia, Roland Siouffi, as a consultant (in reality, a go-between with Indonesian officials). Two Indonesian audit teams were responsible for auditing Triton's financials to determine the company's taxable amounts that must be contributed to the government in order for Triton to fulfill contractual obligations with the state-owned Pertamina. The audit teams' initial assessment required Triton to pay a total of $618,000 to the Indonesian government. Triton accounted for the payments in the records as legitimate business expenses. Siouffi would bill Triton for seismic data or oil exploration equipment repair.[103] After meetings with Siouffi, the audit teams reported that all tax obligations had been settled. The SEC revealed that Triton had made similar payments totaling $450,000 for the years 1989 and 1990.[104]

The SEC brought legal suit against Triton and two senior managers, Philip W. Keever and Richard L. McAdoo in February of 1997. None of the three defendants admitted or denied the allegations brought against them in court. Both senior managers signed cease and desist orders from committing or causing any violation of the FCPA. The final judgment in the case fined Triton $300,000 and both senior managers a total $85,000. Because the violations also occurred

[102] Ibid., 227.
[103] Securities and Exchange Commission v. Triton Energy Corporation. United States District Court for the District of Columbia. 27 Feb. 1997. Print, 7.
[104] Knapp, Michael Chris. *Contemporary Auditing: Real Issues and Cases*. Australia: South-Western College Pub., 2001. Print, 228.

under former management, the court acknowledged that new and appropriate policies have been put in place.[105]

The Triton energy case was meant to serve as an example to other US companies of the consequences that await those who continue to illicit illegal payments. However, many transnational US based companies continue to enter emerging markets and use cash payments to approach the difficulty of grasping part of the market as evidence by the next two FCPA violations.

[105] Litigation Release No. 15266. 27 February 1997. Print.

Lucent Technologies

Lucent Technologies, Inc. was a former division of AT&T Technologies that was spun off from the parent corporation on September 30, 1996. A decade later, the French based Alcatel SA purchased the new entity to form the merger Alcatel-Lucent.[106] The global telecommunications corporation has securities listed on the New York Stock Exchange, and thus falls under the subject to the authority of the Securities Exchange Commission.[107] During the late nineties, Lucent China was awarded a high-speed optical transmission system contract as well signed as a Memorandum of Cooperation in the Telecommunication Industry with the Chinese government agency—Ministry of Post and Telecommunication. Bell Labs, a Beijing research center, was created by Lucent in 2000. The Chinese subsidiary accounted for 11% of Lucent's consolidated revenues by securing millions of dollars in contracts with the Chinese government.[108] The economic downturn has had taken a toll on the telecommunications sector, and Lucent has not been spared.

On December 21, 2007, the SEC brought suit against Lucent for improperly recording travel and entertainment for Chinese government officials which violated the FCPA. The telecommunications firm allegedly spent over $10 million from 2000 to 2003 on 315 trips to the

[106] Securities and Exchange Commission v. Lucent Technologies Inc.,. United States District Court for the District of Columbia. 21 Dec. 2007. Print, 4.
[107] Ibid., 3.
[108] Ibid., 4.

various locations, mostly the United States.[109] Inter-company emails serve as the major evidence against the telecommunications giant.

Lucent normally prepared “Customer Visit Request Forms” to collect information on the trip and its potential participants. The form included the specific division and title of the officials as well as asked whether the visitors were “decision makers” or “influencers,” most qualified as “influencers.” The form was then sent to the China Operations Support team in Lucent’s US headquarters in New Jersey and the logistics of the trip was planned. The itineraries were then remitted back to Lucent China executives for approval.[110] At no point in time did Lucent China or Lucent US consider if the travel arrangements violated the anti-bribery provision of the FCPA.

Lucent categorized the trips into two types depending on the purpose of the visit. The trip was labeled “pre-sale” if the officials were potential business associated and did not currently posses a contract with Lucent. The trip was classified as “post-sale” if the officials currently held contracts with Lucent and were typically justified as factory visits or training seminars. Fifty-five of these trips were classified as “pre-sale” while the remaining 260 were identified as “post-sale.”[111]

An example of a “pre-sale” trip occurred during two weeks in the month of April 2001. The trip included six officers of various levels that spent five of the days visiting the Lucent

[109] Ibid., 5.
[110] Ibid., 6.
[111] Litigation Release No. 20414. 21 December 2007. Print.

facilities in Colorado, Illinois, and New Jersey. The remainder of the visit (almost twice the business related days) was spent in other US cities such as Las Vegas and Boston and visiting locations such as Hawaii and the Grand Canyon. Lucent employees inappropriately recorded the $73,000 in the “Services Rendered- Other Services” or “International Travel” accounts. Neither account is supposed to be used for this type of expense because they both typically deal with product and service expenses. An internal email revealed that the trip could ultimately result in $500 million in revenues for Lucent[112]

Lucent used two techniques two facilitate a “post-sale” excursion to the States. The first is a “factory inspection” trip that was included as a requirement in provisions for many of Lucent’s contracts.[113] Many of these visits became principally sight-seeing expeditions because after 2001 Lucent had outsourced many of its manufacturing facilities. The basic make up for these two weeks generally only included a single day for business related events. On one occasion, Lucent hosted nineteen Chinese officials expending $130,000 to go on a sight-seeing tour throughout the US. Lucent estimated that a contractual opportunity existed totaling four million dollars.[114] “Training visits” were also a favorite of Lucent China employees. The trip would usually include one or two days conducting business related activities while the remainder of the States-side visit was a leisurely voyage to major US tourist destinations.[115] Like

[112] Securities and Exchange Commission v. Triton Energy Corporation. United States District Court for the District of Columbia. 27 Feb. 1997. Print, 7.
[113] Ibid., 8.
[114] Ibid., 12.
[115] Ibid., 12.

the "pre-sale" trips, Lucent employees were prone to booking these expenses to the "Service Rendered – Other Services" account.[116]

On December 21, 2007 Lucent entered into an agreement with the Department of Justice to pay a $1 million settlement.[117] The settlement expresses that Lucent violated several of the FCPA anti-bribery provisions. In addition, Lucent "without admitting or denying the allegations," settled the outstanding civil suit with the SEC for $1.5 million.[118] Both non-prosecution agreements outline the typical result of many FCPA violation cases.

The fines were mean to reprimand the firm for violating the FCPA, but, like many companies, Alcatel-Lucent views these fines as anther cost of business. Between 2001 and 2006, Alcatel allegedly paid out eight million dollars directly or indirectly to foreign officials.[119] The firm sustained the same internal controls that caused an investigation into pre-merger Lucent's business activity. The lawsuit stretches across multiple countries. The firm paid millions of dollars in bribes to either obtain or retain $303 million in contractual obligations in Costa Rica, $48 million in contractual obligations in Honduras, $27 million in contractual obligations in Taiwan, and $85 million in Malaysia.[120] The bribery schemes in these countries consisted of a consultant that served as a middleman in the transactions. In all of these cases, high-level management executives knew or should have known what was transpiring in these large cash outlays.

[116] Ibid., 13.
[117] Litigation Release No. 20414. 21 December 2007. Print.
[118] Ibid.
[119] Securities and Exchange Commission v. Triton Energy Corporation. United States District Court for the District of Columbia. 27 Feb. 1997. Print, 1.
[120] Litigation Release No. 20414. 21 December 2007. Print.

Alcatel-Lucent owns subsidiaries in all of these countries that are responsible for day-to-day activities in their respective countries. Alcatel Standard A.G. is an auxiliary that is responsible for employing business consultants for the majority of Alcatel-Lucent country subsidiary.[121] The senior Alcatel executive composes a description of the responsibilities needed for their region and Alcatel Standard would solicit for an appropriate local consultant. The SEC recognized that Alcatel had an active 235 consultants in over 70 countries and weak internal controls to manage overpayments to business consultants.[122] In some cases, Alcatel employees falsified documents or submitted incomplete and vague reports to controllers.[123]

In December of 2009, Alcatel reached agreements with both Department of Justice and Securities Exchange Commission. The firm would neither "admit nor deny violations of the anti-bribery, internal control and books and records provisions of the FCPA."[124] The settlement does require that the firm refrain from future violations of the FCPA as well as requiring three of Alcatel subsidiaries (Alcatel-Lucent France, Alcatel- Lucent Trade international AG and Alcatel Centroamerica) plead guilty to violating both provisions of the FCPA. The financial consequences that will impact Alcatel include a $45.4 million to the French government and a $92 million to DOJ and SEC. Both fines are payable in equal installments over four years.[125]

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121 Securities and Exchange Commission v. Triton Energy Corporation. United States District Court for the District of Columbia. 27 Feb. 1997. Print, 5.
122 Ibid., 6.
123 Ibid., 19.
124 Yeo, Vivian. "Alcatel-Lucent Pays $137m to Settle Bribery Case | Compliance | ZDNet UK." ZDNet UK | Business IT News, Reviews and White Papers for Tech Professionals. Web. 23 Feb. 2011.
125 Ibid.

KBR and Halliburton

The multinational corporation, Dresser Industries, acquired M.W. Kellogg in 1998. Halliburton, Dresser's main rival, then merged with the company a decade later to become known as the Halliburton Company. M.W. Kellogg was then merged with Halliburton's Brown & Root, Inc to become KBR, a wholly owned subsidiary of the Halliburton Company.[126] KBR specializes in construction, engineering and military contracts. It participates in a contract market that becomes more and more competitive every year. By April of 2007, Halliburton and KBR agreed to sever ties and liquidate its equity in its subsidiary.[127]

On February 6, 2009 the US Department of Justice and the Securities Exchange Commission filed suit against Halliburton and KBR on grounds of violating the FCPA. The construction giant allegedly funneled tens of millions of dollars in bribes to third parties between 1995 and 2004 that would later be used to influence Nigerian officials to win construction contracts totaling approximately six billion dollars.[128] The Halliburton Company also failed to devise adequate internal controls to detect fraudulent information in its books.

Nigeria created Nigeria liquefied natural gas (LNG) to develop its crude oil production. At all times the Nigerian government owned 49% of Nigeria LNG which would capture and sell the natural gas.[129] The Nigerian government solicited bids in 1991 to build a LNG train, a facility

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[126] Halliburton Watch. "Halliburton and Nigeria." *Halliburton Watch*. Web. 14 Feb. 2011.
[127] Ibid.
[128] Ibid.
[129] Securities and Exchange Commission v. Halliburton Company. United States District Court for the District of Texas Houston Division. 11 Feb. 2009. Print, 3.

that would convert the crude oil into useable material. In the same year, KBR, Technip of France, Italy's Snamprogetti and Japan Gasoline Corporation formed an equal partnership (TSKJ) to pursue the Nigerian contract.[130] The four companies formed a "cultural committee" whose main focus was attaining the Nigerian contract valued at $2.2 billion. Top level executives of all four companies composed the committee including KBR CEO Albert "Jack" Stanley.[131] The committee ultimately believed that the only way to guarantee they would acquire the contract was to create a bribery scheme to sweeten the deal TSKJ held several meetings with Nigerian officials on various occasions to determine what amounts should be paid out. [132]

The scheme would involve two foreign agents that would act as a third party to funnel money to all levels of Nigerian officials. TSKJ then hired Jeffrey Tesler, a London based lawyer who had strong ties with senior Nigerian officials, and a Japanese global trading company as consultants. The falsified service contracts officially stated that the two agents would act as "cultural advisors."[133] The UK consultant would be primarily responsible for paying high-ranking officials while the Japanese consultant would pay lower-level officials.[134] Over the almost ten-year span, TSKJ paid Tesler $132 million and the Japanese agent $50 million to redistribute to Nigerian officials.[135]

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[130] Halliburton Watch. "Halliburton and Nigeria." *Halliburton Watch*. Web. 14 Feb. 2011.
[131] Securities and Exchange Commission v. Halliburton Company. United States District Court for the District of Texas Houston Division. 11 Feb. 2009. Print, 7.
[132] Ibid., 7.
[133] Halliburton Watch. "Halliburton and Nigeria." *Halliburton Watch*. Web. 14 Feb. 2011.
[134] Securities and Exchange Commission v. Halliburton Company. United States District Court for the District of Texas Houston Division. 11 Feb. 2009. Print, 5.
[135] Halliburton Watch. "Halliburton and Nigeria." *Halliburton Watch*. Web. 14 Feb. 2011.

In December of 1995, the Nigerian government awarded KBR the contract to build two LNG Trains for $2.2 billion. Just nine months earlier, TSKJ paid Tesler $60 million to begin distributing bribes to Nigerian officials.[136]

The joint venture pursued a third LNG train contract in 1999 when Stanley and several other committee members met with Nigerian officials to settle on the $32.5 million that would again be paid to Tesler and distributed to accounts owned by Nigerian officials. The contract was awarded to TSKJ in the same month the private meeting took place.[137]

Another meeting occurred between "cultural committee" members and Nigerian government officials in late 2001 to discuss the possibility of two more LNG train contracts. The two parties agreed on the sum of $51 million for contracts four and five which were valued at $1.6 billion.[138] Tesler began using a subcontractor on the LNG contracts to make donations to Nigerian political parties or even hand deliver millions of dollars in US and Nigerian currency.[139]

Documentation shows that TSKJ and the Japanese trading company entered into three separate contracts between 1996 and 2004 totaling $50 million. The consultant was then expected to distribute the funds to lower-ranking Nigerian government officials to help facilitate awarding TSKJ the LNG contracts.[140]

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[136] Securities and Exchange Commission v. Halliburton Company. United States District Court for the District of Texas Houston Division. 11 Feb. 2009. Print, 6.
[137] Ibid., 7.
[138] Ibid., 8.
[139] Ibid., 9.
[140] Ibid., 9.

Halliburton and KBR are also charged with violating the accounting provision of the FCPA. The firms failed to perform the necessary due diligence according to its policy on its consultants. The Halliburton executives relied on statements of Stanley to continue the employment of the UK and Japanese firms. Their former policies did not require that the duties of the consultants be explicitly outlined.[141] If the firm had performed the required due diligence, falsified documents would have been uncovered in relation to the references. The company refused to face the issues at hand and happily took the easy road to conducting their international business.

On February 11, 2009, The Department of Justice and Securities Exchange Commission announced the Halliburton and KBR agreed to settlements with both government agencies. The two firms pleaded guilty to multiple counts of breaching FCPA. The settlement includes $570 million in fines, permanently dictating that neither firm violate the FCPA in the future, and requires an independent overseer to review its FCPA compliance programs and internal controls.[142] Technip and Snamprogetti were also fined $338 million and $365 million, respectively. The Japanese Gasoline Corporation is expected to receive a fine in the amount of $220 million.[143] The present total fine currently sits at $1.29 billion which represents the second largest FCPA settlement.

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[141] Ibid., 10.
[142] Halliburton Watch. "Halliburton and Nigeria." *Halliburton Watch*. Web. 14 Feb. 2011.
[143] FCPA Blog. "KBR and Halliburton Resolve Charges." *The FCPA Blog - The FCPA Blog*. 11 Feb. 2009. Web. 15 Feb. 2011.

Implications for American Business

A forty year snapshot (or span) of the United States percentage of total world exports reveals a rather sporadic trend. Until 2000, total US exports has maintained a consistent market share fewer than twelve percent as shown in Table One. The 2000s saw many recessionary movements, beginning with the burst of the Dot-com bubble at the beginning of the decade and ending with the most recent subprime mortgage crisis in that began in 2007 and evolved into a global recession. Numerous factors may have contributed to the decline of the US exports as a percentage of the total world market; these factors can be directly linked to the 1977 passage of the FCPA. Utilizing regressions in our analysis will be crucial in approaching a conclusion.

Hines developed four index indicators that mark the effects of the FCPA on American companies in foreign markets related to the measure of foreign direct investment (FDI), capital/labor ratios, joint venture activity, and aircraft exports. Because a numerous collection of economic activities can contribute to the manipulations of an economy, Hines' study includes several variables to control for external factors. An initial conclusion from the study observed that US firms experienced a business decline of thirty percent in local GDP terms.[144]

[144] Hines, Jr., James R. *Forbidden Payment: Foreign Bribery and American Business After 1977*. Working paper no. 5266. Cambridge: John F. Kennedy School of Government, 1995. Print, 2.

The first indicator is a measure of foreign direct investment. The FDI is defined as the net inflows of investment (which includes equity capital, long-term and short-term capital) in a firm by foreign investors. The FDI is a measure of ownership by foreign shareholders.[145] Hines' index identified the effect of the FCPA through:

$$g_{i,us} = \propto + \beta_1 Corrupt_i + \beta_2 \Delta GDP_i + \beta_3 g_{i,f} + \epsilon_i$$

The terms are defined as following. The growth rate in the US in the sample period ex-ante and ex-post 1997 is represented by the term$g_{i,us}$. $Corrupt_i$ is measured by the necessity of participating in paying bribes to conduct profitable business in country i. ΔGDP_i is the percentage change of GDP in country i during the sample period.[146] $g_{i,f}$ is the measure of the growth rate of FDI into country i from all countries. ϵ_i is a normally distributed residual from zero with limited variance. β_2 and β_3 are considered unknown parameters while estimating $\beta_1$is the goal. Hines assumes that since the index is a ratio of US FDI before and after the passage of the FCPA that a factor like locality will not affect the index.[147]

Hines employed the Economist Intelligence Unit's *Business International* corruption level index. *Business International* measures the extent to which corruption is implicated into business transactions, and they sell their measurements to

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[145]Investopedia. "Foreign Direct Investment (FDI) Definition." *Investopedia.com - Your Source For Investing Education*. Web. 1 Apr. 2011.
[146] Hines, Jr., James R. *Forbidden Payment: Foreign Bribery and American Business After 1977*. Working paper no. 5266. Cambridge: John F. Kennedy School of Government, 1995. Print, 6.
[147] Ibid., 7.

investors.[148] The BI scale covers fifty-six risk factors for an individual country and then the country is assigned an integer from zero to ten. Ten being completely absent of corruption and zero being practically every transaction has some level of bribery. BI uses a mixture of internal country reports from locals and analytical research which is then reviewed by regional and central supervisors. GDP and FDI statistics were provided by the World Bank and the US Department of Commerce.[149] Corrupt countries were defined as those countries assigned a BI rating of 0-7, while less corrupt countries were those assigned a BI rating 8-10. Ten of the thirty-five countries were considered corrupt. The countries were then divided as high GDP growth and low GDP growth. High GDP growth countries had a real GDP growth over a five year span (1977-1982) over the sample median.[150]

From 1977-1982, FDI in corrupt high-growth countries had a median of 1.38, while the median for less corrupt high-growth countries was .80. FDI specifically from US firms in corrupt high-growth countries the median was .80, while the median for less corrupt high-growth countries was .99. US firms display a contrary trend compared all other countries.[151] Results from the FDI index indicate that the FCPA dissuaded US firms from conducting business in countries that were considered more corrupt. This could mean that many US companies viewed the business in corrupt countries as too risky and

[148] Ibid., 7.
[149] Ibid., 8.
[150] Ibid., 9.
[151] Ibid., 10.

the cost imposed by the FCPA as too high of a cost without a comparably adequate benefit.

Firms were constantly searching for ways to subvert anti-bribery legislation through other means. A common practice was substitute financial contributions for hiring additional labor. The deduction would be that American companies would reduce their capital-to-labor ratio. The US Department of Commerce reports statistics on firms' annual labor payments.[152] Because of the differences in currency, industry focuses, and other external factors, Hines performed several regressions to control for these factors.[153]

The first test performed was consistent with the conclusion that capital-to-labor ratios would decreased. In the corrupt countries with high-growth GDP, the median fell (-3.12%) during the sample period. In less corrupt high-growth GDP countries, the median capital-to-labor ratio rose (5.32%).[154] The second regression controlled for external national differences. The results of this second test show that the capital-to-labor ratio in more corrupt countries fell 87% compared to that of less corrupt countries. These numbers are consistent with the conclusion of the negative impact of the FCPA. The last regression using this dependent variable seeks to invalidate any effects of prior declining capital-to-labor trends during the sample period, from 1996-

[152] Ibid., 11.
[153] Ibid., 12.
[154] Ibid., 12.

1997.[155] However, this regression did not yield any statistically significant data but is consistent with that of the second regression. Hines was able to refute declining capital-to-labor trends from having any effect.[156]

The Government Accountability Office reported that many American firms decided to abandon some foreign joint ventures because of the liability they would be exposed to in countries where it was culturally acceptable to engage in bribery. The third indicator sought to prove whether the FCPA was a cause to American firms' avoidance of joint ventures in corrupt countries. The measurement metric used in this indicator is the US Department of Commerce report of percentage owned property, plant, & equipment in US majority owned companies and US partners.[157]

The median PPE growth in corrupt, high GDP countries for majority-owned partners surpassed the median of PPE growth in all affiliates by .29. A conflicting relationship can be found in less corrupt countries. In majority-owned partners the growth rate was .82 while for all affiliates the growth rate was 1.00. The level of investment by US minority owned companies decreased in corrupt countries and increased in those countries viewed as less corrupt.[158]

The final indicator used to assess the impact of the FCPA is the measure of Aircraft Exports. The US government has labeled the construction and aircraft industries

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[155] Ibid., 13.
[156] Ibid., 14.
[157] Ibid., 14.
[158] Ibid., 15.

as the two industries most likely to be affected by the FCPA.[159] It's in these two industries that contracts tend to be very lucrative and competition for these countries very competitive. This test can control for external factors specific to particular countries. Statistics for this test were gathered from reported numbers from the United Nations.[160]

The initial test showed that US aircraft exports fell as a percentage of the world market after the passage of the FCPA. The decline in more corrupt countries was far more pronounced in less corrupt countries at 21.18% and 6.37%, respectively. Hines next controlled for the total decline of all US exports in his second regression. The data from this test showed that US exports actually slightly rose during this time period. Imports from the US to corrupt countries rose .72% while slightly less in less corrupt countries at .68%. Hines performed a third regression to test if the aircraft industry had been experiencing a general decline in exports and the test concluded no significant data. [161]

The four indicators included in Hines study all concluded that the FCPA had a negative effect of American firms' performance in foreign markets directly after its passage. The study explicitly showed that American firms consciously decreased their business activity in those countries labeled as "more corrupt." It was unclear if those companies that chose to continue business operations in corrupt countries repeatedly

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[159] Ibid., 16.
[160] Ibid., 17.
[161] Ibid., 17.

engaged in illegal business practices.[162] Hines concluded by articulating the effect an international legislation could have by decisively curtailing bribery in international business.[163]

Additionally, a 2007 study concluded that the FCPA and OECD convention has had a positive affect on decreasing the amount and frequency of international bribery. Cuervo-Cazurra argued that the multilateral movement to outlaw bribery in business was the only solution to create a free and competitive business arena. Anti-bribery legislation not only increases the cost of participating in illegal payments, but also reduces the supply side of corruption.[164] Continued international collaboration is a necessary step in order to element bribery as acceptable business expenditure.

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[162] Ibid., 18.
[163] Ibid., 20.
[164] Cuervo-Cazurra, Alvaro. "The Effectiveness of Laws Against Bribery Abroad." *Journal of International Business Studies* 39 (2008): 634-51. Print.

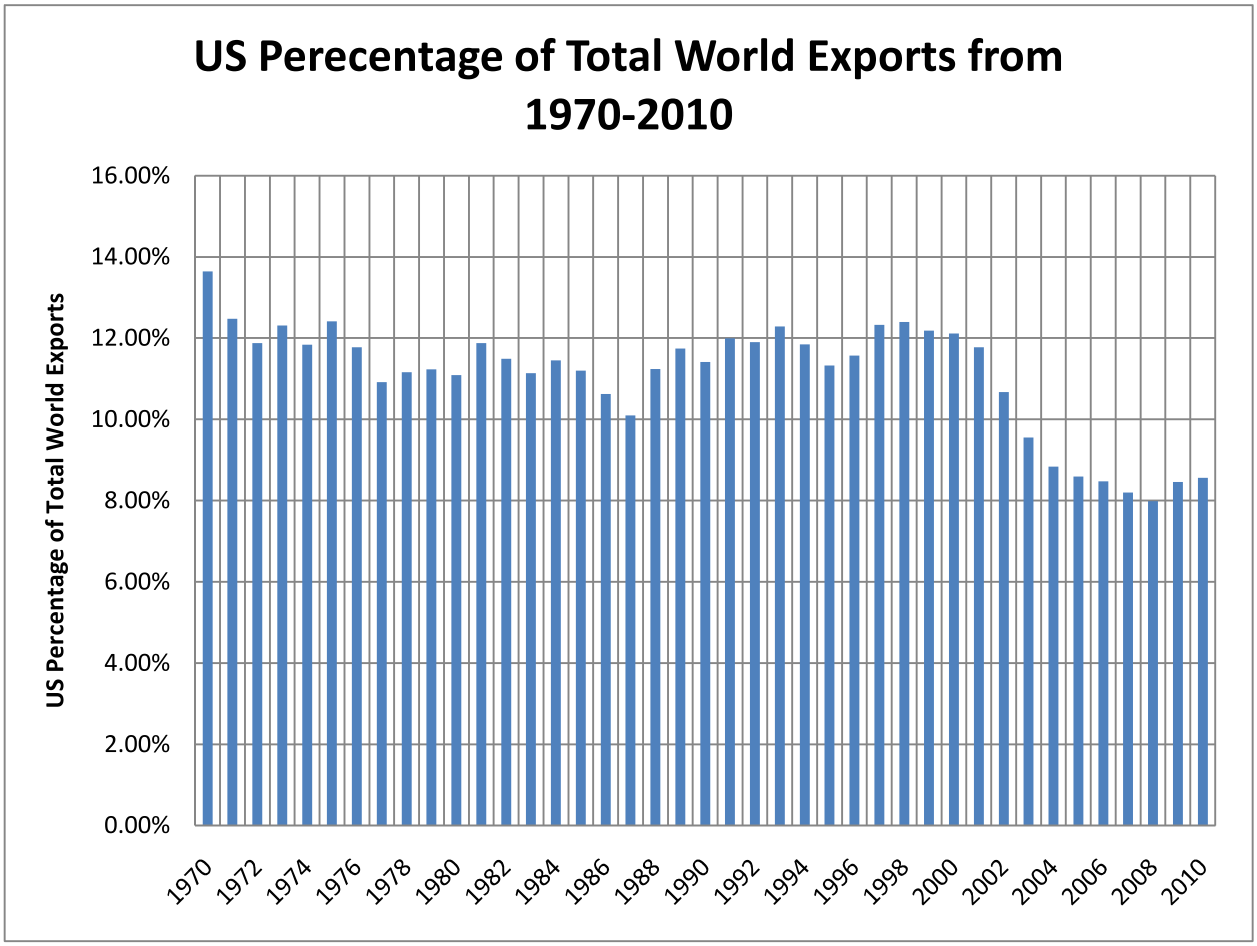
Conclusion

In this paper I set out to answer the question: What affect has the FCPA had on American businesses performance abroad. My initial hypothesis was that the FCPA created an uneven playing field for American businesses and that foreign competitors would persistently seek to take advantage of this fact. There is evidence that American companies have consistently lost business because of the FCPA, but I discovered that at the root of the issue was corruption. Corruption occurs when officials are willing to sell their services and private individuals or companies are willing to buy an unfair advantage. The public is weary of the scandals that plaque American business and demands the continued transparency and access into these companies. The international movement to prevent these types of transactions seeks to choke the supply side of bribery.

The countries that have adopted signed the OECD convention or similar anti-bribery legislation has showed that they will hold their companies to a higher standard of business practices and corporate governance. The success of the FCPA requires mutual administration throughout the world and a stronger defined approach for companies to adhere to. It will take a resolute effort from every level of private and public officials to have a permanent impact that on business and to promote business practice.

Appendix

Table One[165]



[165] Data compiled from the World Trade Organization database

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