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Foreign Corrupt Bribery Act: Long-term Benefits Should Outweigh Short-term Burdens

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Abstract

The purpose of this thesis is to examine the Foreign Corrupt Practices Act. Specifically, do long-term benefits from the FCPA outweigh short-term burdens? The paper begins with a short Introduction that provides a roadmap for the overall thesis. Chapter I discusses the business and economic environment of America during the 1970s. Specifically, the focus is on the Watergate scandal and how it played a crucial role in the enactment of the FCPA. Chapter II explains and analyzes specific provisions of the FCPA. It also demonstrates the FCPA's relationship to the Securities and Exchange Act of 1934 and the Sarbanes-Oxley Act of 2002. Chapter III provides a cost/benefit analysis of the FCPA, particularly by looking at the short-term burdens and the long-term benefits of the act. Chapter IV provides two case studies. My conclusion is that with proper adjustments, long-term benefits from the FCPA can outweigh short-term burdens.

Introduction

In 1977, widespread corruption in American international business practices fueled Congress to enact the Foreign Corrupt Practices Act (FCPA). Just as it faced criticism upon its enactment, it continues to be scrutinized today. This scrutiny, in large part, comes from business owners and large corporations. There are two parts to the FCPA: bribery of foreign officials and accounting transparency. Specifically, the FCPA forbids any citizen, business, or corporation from paying bribes to foreign officials. It also requires full disclosure on corporate accounting books. That is, any corporation registered under the US stock exchange is prohibited from concealing its bribes by utilizing “creative” accounting techniques. For example, Triton Indonesia, a subsidiary of Triton Energy, concealed its bribes by utilizing a third party. Instead of bribing foreign officials directly, Trition Indonesia issued money to a “consultant.” The intermediary then transferred the money directly to the foreign official.[1] The FCPA sought to eliminate this type of corruption. However, there are two sides to the debate: many people believe companies (such as Triton Energy) are acting in their best economic interests and the issuance of bribes is simply part of international business; others believe this type of corruption defrauds investors and creates illegitimacy in American business. The truth is, in an ideal world, the FCPA would not exist. Given business and corporate scandals, though, enforcement of the FCPA is vital in order to preserve the integrity and legitimacy of American business. With proper adjustments, including greater scrutiny by auditors

[1] Knapp, Michael. Ed. *Contemporary Auditing*. 8. Mason: South-Western, 2011. 223-31. Print.

and increased publicity of FCPA violations, the FCPA's long-term benefits should outweigh short-term burdens.

Chapter I. The 70's and the Business Environment

The United States during the 1970s was a difficult and troubling time period. The country had just concluded the Vietnam War and as a result, the economy was struggling. In the early 1970's, the United States entered into a recession: high inflation, high unemployment, and an energy shortage. This created anxiousness and uneasiness in American society. Adding to this economic anxiety was a shortage in the worldwide oil supply. Countries worldwide began to rely on the Middle East—an area in which oil remained abundant. When United States provided assistance to Israel during the Yom Kippur War, several oil exporting nations in the Middle East retaliated by forming an alliance and imposing an "Arab Oil Embargo" on the West.[2] Gasoline prices nearly quadrupled, creating a sudden and substantial stress on the United States economy. As author Robert Samuelson writes, "It's ... true that oil aggravated inflation, but the real reason for oil's outsized role in the inflation story is that it scarred the American psyche.... From September 1973 to January 1974, the office price of Saudi Arabian oil went from $2.59 to $11.65 a barrel."[3] Although adoption of government policies attempted to fix the rising inflation, these policies were largely unsuccessful because "the quantity of money in the economy was increasing faster than its output."[4] The American public began to blame its own government for the poor economy. "It is [..] off the charts

[2] . "1950-1975." *US History*. N.p., n.d. Web. 21 Nov 2011. <http://elcoushistory.tripod.com/economics1970.html>.

[3] . "CBS news." *What Causes Inflation? Lessons from the 1970s, Vol. 3*. CBS, 26/05/09. Web. 17 Nov 2011. <http://www.cbsnews.com/8301-505123_162-36740553/what-causes-inflation-lessons-from-the-1970s-vol-3/>.

[4] ibid.

in financial dislocation as well as federal intervention. And we expect that, someday, it will prove to be a record-setter in the unintended consequences of the government policies it called forth."[5] Frustrated with the Vietnam War and dissatisfied with the economy, many Americans began to view the Federal Government negatively.

The 1970's were also a challenging time for American business. The lack of economic growth at home caused many American companies to expand business abroad. One byproduct of this expansion was that many companies also increased the use of bribery to facilitate their overseas business. For example, former Rabbi turned investment banker Eli Black learned first-hand the detrimental effects of bribery and how it can lead to a company's downfall. Black, a descendant of ten generations of Rabbis, chose to switch careers by becoming an investment banker. In the late 1960s he created AMK Corporation, a manufacturing company that eventually merged with John Morrell Meat Products. Black also acquired large holdings in companies Baskin-Robbins and A&W Root Beer. In 1969, he used these companies to create a $2 billion conglomerate, United Brand Corporation. United Brand became a successful corporation that generated substantial revenues by growing and transporting bananas. A majority of the bananas were cultivated on plantations in Honduras and other Latin American countries. However, problems arose in 1974 when United Brand fell behind as the leader in banana sales to Dole, a major competitor in its industry. Compounding United Brand's problems

[5] ibid.

was a newly enacted joint tax Panama, Costa Rica, and Honduras imposed on exported fruit. Fearing pressure from investors, Black authorized the payment of a $1.25 million bribe to the Honduras government. At about the same time United Brand also paid $750,000 to Italian government officials in a scheme to expand its business in Europe. Shortly thereafter, United Brand attorneys alerted the SEC of the company's corrupt behavior. Rather than face public embarrassment, Eli Black jumped out of his 44th floor office. Black's suicide provides a stark example of the corruption that was spreading into American business. Combined with anxiety over the economy, and disenchantment with the federal government, the stage was set for change. The Watergate scandal was the final straw.[6]

Watergate

The Watergate scandal of the Nixon administration played a substantial role in the creation of the FCPA. If the scandal had not occurred, there would have been no pressure on Congress to enact the FCPA. Details from the scandal not only embarrassed the Nixon administration, but also illuminated the corruption that existed in corporate America. The Watergate break-in and subsequent cover-up exposed the nation not only to political corruption, but also to the corporate bribery and corruption that was uncovered during the

[6]. "The Inductees: Eli Black."Thehallofinfamy.org/inductees. Con Artist Hall of Infamy, n.d. Web. 17 Nov 2011.

Watergate investigation. Had the break-in not occurred, much of the corruption may have gone unnoticed.

The Break-In

In 1972, President Richard Nixon, who already had completed one full term, was running against Democrat George McGovern to secure a second term in office. Although Nixon won in a landslide, shortly after beginning his second term a political scandal erupted. The scandal stemmed from actions committed by the committee to re-elect the president (C.R.P). In March 1972, C.R.P mentors Jeb Magruder and G. Gordon Liddy, with the approval of Attorney General John Mitchell, who was serving as the chairman of C.R.P, initiated a covert operation to acquire information about the Democratic campaign strategy by breaking into the Democratic Headquaters, which were located at the Watergate Hotel in Washington, D.C. The proposal aimed to seek information about the Democratic strategy for the 1972 election. Aided by ex-CIA Agent E. Howard Hunt and C.R.P. security coordinator James McCord, Liddy directed the operation. Liddy also recruited several Cuban refugees to assist in the break-in, including Bernard Barker. Barker's involvement and conspicuous ties to 'dirty' money helped expose C.R.P's involvement in Watergate. To finance the operation, Barker arranged for $89,000 of illegal corporate contributions to be laundered through a Mexican bank and transferred to Barker's account in a Miami bank. He also deposited a subsequent check worth $25,000.[7]

The first successful break-in into the Watergate Hotel occurred on May 27, 1972. The team, led by McCord, trespassed inside the Watergate hotel and wire-tapped the phones of the Democratic National Chairman. Conversations were then recorded and transcripts of these recordings were passed along to Magruder and Mitchell. Unsatisfied with the recordings, Mitchell called for a second break-in. On June 17th, McCord, Barker, and three Cuban refugees broke into the Democratic National Headquarters for the second time. This time, however, their efforts were thwarted. Police arrived at the scene and confiscated McCord's surveillance equipment. Additionally, 32 sequentially numbered one-hundred dollar bills were also found, and the money was traced to Barker's bank in Miami.[8] This money left a trail of incriminating evidence, eventually leading investigators to C.R.P and ultimately its connections to the White House.

Cover-up

Subsequent efforts to cover-up the White House's connections to the Watergate break-ins broadened the corruption within the Nixon administration. It also led investigators to investigate further into the political and corporate corruption surrounding the Watergate scandal. Press Secretary Ronald Ziegler stated to the press that "no one in

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[7] "Watergate Retrosspective: The Decline and Fall." *TIME*. 19 August 1974: n. page. Web. 5 Oct. 2011. <www.time.com>.
[8] ibid.

the White House had any involvement or prior knowledge of the Watergate event." And Nixon, in a National news conference said, "I can say categorically that…no one in the White House staff, no one in this Administration, presently employed, was involved in this very bizarre incident."[9] The Nixon administration took several steps in an effort to thwart the FBI investigation. For example, Nixon ordered the CIA to block the FBI's investigation into the source of Watergate funding. The administration also attempted to pay off people in return for their silence.[10] In the end, Nixon was ordered to hand over tapes (audio recordings of Watergate conversations that took place in the White House) that contained incriminating evidence against him. On August 9th, 1974, Nixon resigned.

"Business Watergate"[11]

Nixon and his administration were not the only ones scrutinized during the Watergate investigation. Throughout the investigation, it became apparent that many American corporations were making illegal campaign contributions. American Airlines, for example, donated $55,000 to the C.R.P, an illegal contribution because corporations cannot donate directly to political campaigns. Furthermore, at the time of its expenditure, American Airlines was seeking to merge with Western Airlines, and in order to complete the merger, federal approval was required. Executives at American Airlines believed a "donation" to the Nixon Campaign would expedite the process. In order to keep the

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[9] ibid.

[10] ibid.

[11] Mattera, Phillip. "The New Business Watergate: Prosecution of International Corporate Bribery is on the Rise." CorpWatch, 18 December 2007. Web. 8 Oct. 2011. <http://www.corpwatch.org/article.php?id=14859>.

illegal payments off its books, American Airlines wired $100,000 from a corporate account in New York City to the Swiss account of Andre Tabourian, whom American Airlines had done business with previously. Tabourian later withdrew the $100,000 in cash and delivered it to an American Airline executive who placed the money inside a safe. That same money ($55,000 out of the $100,000) was then given to C.R.P.[12] On its corporate books, American Airlines showed the $55,000 transaction as a "special commission." Not only had American Airlines violated a federal statute when it contributed directly to C.R.P, its executives laundered money in an attempt to make the transaction appear legitimate. Surprisingly, American Airlines was only fined $5,000 for these violations. Another American corporation, Gulf Oil, utilized similar tactics for political purposes—making illegal contributions to the C.R.P. Uncovering the illegal contributions made to C.R.P allowed officials to investigate further into the Gulf Oil Corporation. Investigators found that Gulf Oil participated in other illegal schemes and issued bribes to foreign officials. Gulf Oil executives laundered $12.3 million through a bank in the Bahamas. With the laundered cash, Gulf Oil applied political pressure and elicited payments to foreign officials.[13] Corporations 3M and Goodyear Tire & Rubber also contributed illegally to C.R.P. They, too, received only minimal fines.[14] As 3M chairman William L. Mcknight said, "I don't know that 3M did anything different than a

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[12] Madinger, John, and Sydney zalopany. *Money laundering: a guide for criminal investigators*. Boca Raton, Florida: CRC Press, 1999. Print.

[13] "Scandals: A record of corporate corruption." *TIME*. 23 February 1976: n. page. Web. 5 Oct. 2011. <www.time.com>.

[14] Zinn, Howard. "The Seventies: Under Control?." *History is a Weapon*. Chpt. 20. Web. 8 Oct. 2011.

great many other corporations."[15] The scandals were uncovered at both the local and national level. For example, Sanitas Service Corp, a mid-tier firm, provided local politicians with more than $1.2 million. If not for Watergate and subsequent investigations, it is likely that the illegal payments issued by many American companies would have gone unnoticed. Uncovering illegal contributions made to C.R.P led to a wider inquiry into corporate payoffs in general. Eventually, investigators found a widespread business strategy many American corporations were utilizing: bribery of foreign officials.[16]

Ensuing inquires of illegal payments led investigators to press charges against Lockheed, Northrop, and Gulf Oil.[17] Each of these companies issued bribes to foreign officials. Lockheed Corp., a defense contractor, issued $25 million to Japanese officials in order to sell its Tristar L-1011. Lockheed admitted later to making payments to foreign officials in more than fifteen different countries.[18] In 1976, under pressure from the SEC, "150 publicly traded companies admitted that they had been involved in questionable overseas payments or outright bribes to obtain contracts from foreign governments."[19] Collectively, the bribes totaled over $300 million![20]

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[15] "Scandals: A record of corporate corruption." *TIME*.
[16] ibid.
[17] Mattera, Phillip. "The New Business Watergate: Prosecution of International Corporate Bribery is on the Rise."
[18] "Bribery." *Referance for Business*. 2nd. Advameg, Web. 8 Oct 2011. <http://www.referenceforbusiness.com/encyclopedia/Bre-Cap/Bribery.html>.
[19] Mattera, Phillip. "The New Business Watergate: Prosecution of International Corporate Bribery is on the Rise."
[20] ibid.

The 1970s was a decade of corruption. If not for Watergate, it's feasible the bribes would have gone unnoticed. C.R.P actions led investigators to uncover corruption in Nixon's administration, domestic businesses, and multinational corporations. In essence, Watergate opened the floodgates—it uncovered corruption and served as a catalyst for change in America. From companies' perspective, bribes facilitated business and "a certain amount of baksheesh was necessary to making deals in many parts of the world."[21] Congress, however, was appalled by the widespread use of bribes and responded in 1977 by enacting the FCPA. According to a TIMES articles, "U.S. corporations were embarrassed by publicity about their contributions even in nations where the laws condone such gifts."[22]

Since its independence in 1776, the United States has asserted itself as a moral authority on the world stage, and its citizens have held the country to a "higher standard." The corruption and bribery that was uncovered during the 1970's was a national and international embarrassment for the United States, and the public demanded reform. As a consequence of this pressure, Congress enacted the FCPA—an act that forced corporations to be accountable for acts of bribery.

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[21] ibid.
[22] "Scandals: A record of corporate corruption." *TIME*. 23 February 1976: n. page. Web. 5 Oct. 2011. <www.time.com>.

Chapter II FCPA: The Law

Enacted by Congress and signed into law by President Carter in 1977, the FCPA, for the first time in U.S. history, criminalized the bribery of foreign officials. However, in practice it was not enforced stringently due to complaints from corporations that the law placed them at a competitive disadvantage with foreign companies. According to sources, "The Carter Administration's Justice Department responded by signaling that it would not be enforcing the FCPA too vigorously."[23] The lack of enforcement from government agencies undercut the effectiveness of the FCPA. Why would U.S. corporations cease to make payments to foreign officials if the Justice Department openly announced that the law would not be aggressively enforced?

Although companies did receive penalties for FCPA violations during the 70's and 80's, active enforcement did not occur until the 90's during the Clinton administration. Despite the government's weak enforcement policy over the years, the FCPA is a relatively straight forward law consisting of two parts: prohibiting bribes to foreign officials and enforcement of SEC accounting transparency policies. As it became clear during the Watergate era, the absence of such regulations permitted a business environment to evolve in which bribes and other illegitimate tactics not only became commonplace among American businesses and corporations, but such tactics became virtually accepted as a normal way of doing business. The FCPA provides a framework

[23] Mattera, Phillip. "The New Business Watergate: Prosecution of International Corporate Bribery is on the Rise." CorpWatch, 18 December 2007. Web. 8 Oct. 2011. <http://www.corpwatch.org/article.php?id=14859>.

for restoring the moral authority of American businesses, and with certain adjustments can be made even more effective.

Anti-bribery Provisions[24]

The "Anti-bribery Provisions" and "Books & Records Provisions" of the FCPA are vital to ensure the legitimacy of American business. In 1988, the Trade Act authorized the Attorney General to provide guidance on the FCPA provisions. The Attorney General has separated the FCPA into five specific parts: 1) Enforcement, 2) Antibribery Provisions, 3) Permissible Payments and Affirmative Defenses, 4) Sanctions against Bribery, and 5) Guidance from the Government. Importantly, the Justice Department provides companies with thorough guidance on the application of the FCPA to particular business activities or conduct.

Enforcement[25]

The Department of Justice (DOJ) is responsible for all criminal and civil enforcement of domestic concerns. DOJ is also responsible for enforcing anti-bribery provisions against foreign companies and nationals. The SEC is responsible for bringing suit against any issuers of bribes paid to foreign officials.

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[24] United States. Department of Justice. *Foreign Corrupt Practices Act Antibribery Provisions*. Washington D.C.: , Print. <www.justice.gov/criminal/fraud/fcpa>.

[25] ibid.

Antibribery Provisions

Antibribery Provisions under the FCPA cover both "basic" payments and "third party" payments. Under the Basic Prohibition, "it is unlawful to bribe foreign government officials to obtain or retain business."[26] There are five elements to what constitute a violation of the Basic Prohibition: Who, Corrupt Intent, Payment, Recipient, and Business Purpose Test.

The "Who" under the Basic Prohibition applies to any "individual, firm, officer, director, employee," as well as "any stockholder acting on the behalf of the firm." The "Who" portion of the guidelines also define the term *issuer* as a "corporation that has issued securities that have been registered in the United States or who is required to file periodic reports with the SEC."[27] Parent companies are also held liable under the FCPA if their subsidiaries are involved in bribery of foreign officials. Furthermore, a foreign national or person can also be liable under the FCPA if they make any corrupt payments within the territory of the United States. The "Who" under the Basic Provision covers a large scope and covers virtually any person or company that has any business ties to the United States.

The second element under the Basic Prohibition is corrupt intent. Does the person authorizing or making the payment have corrupt intent? Under the guidelines, "the payment must be intended to induce the recipient to misuse his official position to direct

[26] ibid.
[27] ibid.

business wrongfully to the payer or to any other person." It is worth noting that the "FCPA does not require that a corrupt act succeed in its purpose."[28] The bribe does not have to be accepted. The simple "act of offering" can be a violation of the FCPA.[29] The "offer" or "bribe" influences the offeree (foreign official) to create material reward for the offeror. Accordingly, there is a prohibition against making any payment to "influence any act or decision of a foreign official in his or her official capacity."[30] For example, even relatively small non-cash gifts can be deemed corrupt under the FCPA if it can potentially influence the decision-making of a foreign official. By influencing a foreign official, an improper advantage is created and business no longer operates in a free-market. However, as a sign of respect, many officials in foreign countries expect gifts. So, where does the FCPA draw the line? Are all gifts presented to foreign officials under violation of the FCPA? Usually, it will depend on the individual circumstances and whether the gift is considered to be made with corrupt intent.

The payment portion under the Basic Prohibition states that "the FCPA prohibits paying, offering, promising to pay (or authorizing to pay or offer) money or anything of value."[31] Therefore, virtually anything given to a foreign official is likely to be scrutinized under the FCPA. For example, a company that pays for a foreign official's dinner can still constitute as something of value. Likewise, a promise to pay (even if the transaction never occurs) can also violate the FCPA.

[28] ibid.
[29] ibid
[30] ibid.
[31] ibid.

The definition of “Recipient” under the FCPA is vague and can apply to “a foreign official, a foreign political party or party official, or any candidate for foreign political office.”[32] Therefore, payment to any foreign official can violate the FCPA. For example, a bribe issued to the senator of the Philippines would violate the FCPA. Likewise, a bribe issued to a doctor working at a foreign hospital would also violate the FCPA. It does not matter who the foreign official is as “the FCPA focuses on the purpose of the payment instead of the particular duties of the official receiving the payment.”[33] American companies should especially become familiar with the “Recipient” guidelines under the FCPA. It is important to understand that “foreign official” is a vague term that can cover almost anybody directly or indirectly related to the government.

The last guideline under the Basic Prohibition is the Business Purpose Test. It is utilized by the DOJ in order to determine whether or not the bribe was made in order to “obtain or retain business.” The Attorney General notes that it applies to more than just a “mere award or renewal of a contract.”[34] For example, in Eli Black’s case with United Brand, Black authorized payments to Italy in hopes of creating business opportunities in Europe. As a result, his actions directly violated the Business Purpose Test.

Finally, Third Party Payments are also discussed under the Anti-Bribery Provisions section. That is, foreign subsidiaries and their US parent companies can both be held liable for violations. It is also a violation to utilize agents, consultants and

[32] ibid.
[33] ibid.
[34] ibid.

distributors to facilitate or cover-up bribes. As the guidelines state, "it is unlawful to make a payment to a third party, while knowing that all or a portion of the payment will go directly or indirectly to a foreign official."[35] For example, it is unlawful under the FCPA to pay money to an intermediary who then transfers the payment to foreign officials. Usually, companies will cover-up this illegal act on their books by recording a "consulting expense."

Permissible Payments and Affirmative Defenses

There are defenses companies can present when they are under scrutiny by the FCPA. That is, "facilitating payments for routine governmental action" are technically lawful under the FCPA. The DOJ lists specific examples where payments to foreign officials can be legal practices: "obtaining permits, licenses, or other official documents; processing governmental papers, such as visas and work orders; providing police protection, mail pick-up, [..] and scheduling inspections associated with contract performance or transit of goods across country."[36] Such payments, and ones similar to these, are the only lawful payments acceptable under the FCPA. Furthermore, companies under scrutiny for FCPA violations bear the burden of asserting their payments were only for "facilitating payments for routine governmental action." As the Attorney General

[35] ibid.
[36] ibid.

states, “the prosecution does not bear the burden of demonstrating in the first instance that the payments did not constitute this type of payment.”[37]

Sanctions Against Bribery

There are both criminal and civil penalties for FCPA violators. Under criminal penalties, for corporations and businesses, violators can face fines of up to $2,000,000. For company executives and other business persons, fines can reach $100,000 and they can face possible imprisonment for up to five years. Furthermore, under the Alternative Fines Act, fines can increase depending on the severity of the corrupt payment that was issued. As for civil action, the SEC may bring suit against “any firm as well as any officer, director, employee, or agent of a firm, or stockholder acting on behalf of the firm.”[38] The SEC may also impose additional fines if they determine the bribes were egregious.

Guidance from the Government

Guidance from the government is presented in order to help businesses comply with FCPA regulations. The Attorney General states that “any U.S. company or national may request a statement of the Justice Department’s present enforcement intentions under the anti-bribery provisions of the FCPA regarding any proposed business conduct.”[39] Because guidance from the government is readily available, businesses and corporations

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[37] ibid
[38] ibid.
[39] ibid.

should be able to determine the application of the FCPA to any particular business activity they may be contemplating, thereby making it easier for them to conduct business lawfully.

Securities Exchange Act of 1934 and Sarbanes-Oxley

In order to enhance the legitimacy of American business and protect investors, under the FCPA public companies must abide by the disclosure provisions under the Securities Exchange Act of 1934. By abiding by this law, companies are forced to provide full-disclosure to its investors. For example, under Section 18, "[a]ny person who shall make or cause to be made any statement in any application, report, or document filed (…) which statement was (..) false or misleading with respect to any material fact, shall be liable to any person (not knowing that such statement was false or misleading)."[40] The accounting transparency portion of the FCPA is vital because it applies to both companies and its auditors. Auditors are responsible for scrutinizing balance sheets as well as specific account transactions to ensure proper disclosure. They also must report and disclose any fraud they uncover. That said, and as witnessed during the Watergate scandal, many companies did not abide by Section 18 of the Securities Exchange Act of 1934. As a result, investors were often left in the dark regarding the questionable payoffs and tactics of the companies in which they had invested.

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[40] "Securities Exchange Act of 1934." *Liability for Misleading Statements*. Cincinnatti: The University of Cincinnatti Law School, Web. 12 Oct 2011.

In 2002 greater responsibility was imposed on auditors as a result of the enactment of the Sarbanes-Oxley Act (SOX). It established new standards for public auditing firms, public company management, and public company boards. These regulations facilitate better FCPA enforcement. Section 302 of SOX pertains to corporate responsibility and requires certification of, "a list of all deficiencies in internal controls and information on any fraud that involves employees who are involved with internal activities."[41] Applying this to the FCPA, public companies must disclose any known bribes made to foreign officials. Section 401 of SOX amended Section 13 of the Securities and Exchange Act of 1934 by adding that the "financial report […] shall disclose all material off-balance sheet transactions […] and other relationships of the issuer with unconsolidated entities or other persons."[42] Under this regulation, bribes become more difficult to conceal. Section 409 of SOX states that "issuers are required to disclose to the public, on an urgent basis, information on material changes in their financial condition or operations."[43]

Information disseminated to the public is an important aspect to the effectiveness of the FCPA. Widespread public knowledge makes it difficult for public companies to get away with using illegitimate business tactics. Section 802 of SOX "imposes penalties and/or up to 20 years imprisonment for altering, destroying, concealing [..] documents

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[41] "A Guide to Sarbanes-Oxley Legislation." Addison-Hewitt Associates, B2B Consultancy. Web. 30 Oct. 2011. <http://www.soxlaw.com/introduction.htm>.
[42] United States. United States Securities and Exchange Commision. *Report and Recommendations Pursuant to Section 401(c) of the Sarbanes-Oxley Act of 2002 on Arrangements with Off-Balance Sheet Implications, Special Purpose Entities, and Transparency of Filings by Issuers*. Web.
[43] ibid.

[..] with the intent to obstruct, impede or influence a legal investigation."[44] The section further "imposes penalties of fines on [..] any accountant who knowingly and willfully violates the requirements of maintenance of all audit or review papers for a period of 5 years."[45] These various provisions in SOX make both auditors and the officers of public companies more accountable within the context of the FCPA. Section 802 facilitates FCPA investigations by requiring public companies to provide FCPA investigators with accurate and honest information.[46]

Although there are a total of eleven titles under SOX, sections 401, 409, and 802 are most relevant to the FCPA. These sections encourage better enforcement and application of the FCPA by requiring greater corporate responsibility and an increased role for auditors. Because auditors play a more significant role, it has become more difficult for public companies to conceal bribes.

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[44] "A Guide to Sarbanes-Oxley Legislation." Addison-Hewitt Associates, B2B Consultancy.
[45] ibid.
[46] ibid

Chapter III. Cost/Benefit of the FCPA

There is substantive debate on the ethical underpinnings of the FCPA, and whether it is appropriate for the government to impose these kinds of constraints on American business. Simply put, is bribing foreign officials unethical?

According to the dictionary, a bribe is "money or any other valuable consideration given or promised with a view to corrupting the behavior of a person, especially in that person's performance as an athlete, public official, etc."[47] Although "bribe" under the FCPA is defined somewhat differently, the ethical dilemma is the same. Although American citizens may reach differing conclusions on the role of bribery in business transactions, particularly in the international context where foreign companies often do not abide by the same standards, the United States was founded under Judeo-Christian values, and its government holds itself out to the international community as a moral authority. If it were to allow its businesses to issue bribes in order to "corrupt the behavior of a person," the United States would be undercutting its image and standing on the world stage. It necessarily follows, therefore, that the United States should outlaw bribery of foreign officials.

One could argue, of course, that this is a self-defeating policy for the United States insomuch as it may be forcing U.S. businesses to abide by a restrictive set of rules that its international competitors do not follow. In fact, there are numerous countries

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[47] *bribe*. Dictionary.com, LLC. 2011. Web. 30 Oct 2011 <http://dictionary.reference.com/browse/bribe>.

where bribes are considered a legal business tactic. Arguably, therefore, multinational corporations should be allowed to abide by local government laws. However, taking a longer view, international business practices are more likely to become fair and ethical if the United States, as the world's leader in business, abides by ethical business standards. By applying FCPA regulations abroad, the United States upholds the integrity of American business and, in the long run, international business practices should improve for all nations, including the United States.

The time period in which the FCPA was enacted provides insight into this moral debate. In the 1970s, corruption encompassed the United States—both in politics and in business. It was a humiliating time for the nation, and our standing and influence in the world suffered. In response to public outcry for reform, Congress enacted the FCPA in order to restore integrity in the American business community. Had Congress not acted, it is likely the corruption from the 1970s would have spread and public faith in American institutions would have been damaged, both at home and abroad. A decline in respect for American institutions would have inevitably led to an increasingly unfair and inefficient business environment.

Short-term burdens

Undoubtedly, the enactment of the FCPA produced short-term burden on American businesses. By outlawing bribery of foreign officials, it placed US multinational companies at a competitive disadvantage. That is, multinational companies may be unable to utilize competitive business practices in the respective host country. In many countries, bribing foreign officials is legal and “questionable” payments on financial statements can even be tax deductible.[48] Thus, US companies adhering to FCPA guidelines may find it difficult to enter the market in select foreign countries. Many business transactions rely on contracts formed between the government and the respective company. For many companies, the issuance of bribes facilitates the formation of contracts. According to the FCPA reporting center, “many companies insisted they needed to engage in these questionable payments and bribes to be competitive. They claimed that companies from other countries routinely engaged in these practices.”[49] By abiding by the FCPA, many companies believe it places them at a gross competitive disadvantage. Short-term effects from the FCPA can also indirectly affect American citizens. For example, when an American corporation is thriving, growth generally occurs within the company and within the economy. Business expansion creates jobs. The income earned from jobs can increase the circulation of money within the economy. If a business cannot expand to a country where they may be at a gross competitive disadvantage, growth does not occur and jobs are not created. Therefore, in theory, short-term burdens caused from the FCPA can negatively impact the US economy.

[48] Geo-Jaja, Macleans, and Garth Mangum. "The Foregin Corrupt Practices Act's Consequences for U.S. Trade: The Nigerian example." Diss. Univeristy of Utah, Web. <http://www.afbis.com/analysis/corruption.htm>.
[49] "FCPA Information." *Foreign Corruption Practices Act*. Kyros & Pressly LLP, 2011. Web. 31 Oct. 2011. <http://www.foreign-corrupt-practices-act.org/foreign-corrupt-practices-act-information.html>.

However, two college professors at the University of Utah conducted research that alleviates fears caused by the short-term burdens. These professors reached four important conclusions:1) There is no evidence that FCPA enforcement has negatively affected U.S. trade; 2) Companies who relied on bribes generally did so as a short-cut and could have attained the same results had they utilized ethical business practices; 3) In most payments investigated, research found that American corporations issued bribes to gain a competitive advantage on other American companies; and 4) FCPA compliance creates a more balanced competition between U.S. firms.[50] If this research is accurate and the short-term burdens of the FCPA are minimal, then the goals and long-term benefits of the act become that much more useful.

Long-term benefits

The positive effects from the FCPA should outweigh any short-term burdens on U.S business because with proper FCPA regulation, ultimately, American companies should be able to compete in a more efficient international business environment. According to Congress, "bribery rewards corruption instead of efficiency and puts pressure on ethical enterprises to lower their standards or risk losing business."[51] When bribes are permitted, larger corporations have a significant advantage. They typically have more money and larger resources to utilize on bribery. Thus, smaller companies can

[50] Geo-Jaja, Macleans, and Garth Mangum. "The Foregin Corrupt Practices Act's Consequences for U.S. Trade: The Nigerian example."
[51] Mehra, Amol, and Agbool Ajoke. "The Corporate Responsibility to Prevent Corruption." *Forbes*. 7/1/11: n. page. Web. 1 Nov. 2011. <http://www.forbes.com/sites/csr/2011/07/01/the-corporate-responsibility-to-prevent-corruption/>.

be at a significant competitive disadvantage in bribe prone regions. When bribery of foreign officials is properly enforced (and companies abide by the regulations), a free, competitive market can ensue. According to DOJ Representative Greg Andres, "corruption undermines the democratic process, distorts markets, and frustrates competition."[52] Furthermore, investors will have more confidence investing in companies free of corruption since corporate scandals tend to frighten off investors. Research indicates that "investors are paying attention to studies that indicate which companies are unethical or are under legal proceedings due to dishonest behavior," and also that that employees tend to leave firms that act dishonestly.[53] Thus, the long-term effects of the FCPA can decrease corporate corruption, thereby promoting efficient markets and creating confidence in investors and employees alike.

For the FCPA to be effective, however, proper enforcement needs to improve. Although the Carter administration facilitated the enactment of the FCPA, it publicly stated that it would not be enforced stringently. Following the Carter administration, the Reagan administration attempted to weaken FCPA enforcement by dismantling its legislation.[54] Until the FCPA has strict enforcement policies, the long-term benefits from the legislation will not occur. However, throughout the years, beginning with the Clinton

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[52] Fox, Thomas. "Corporate Social Responsibility and the FCPA." *FCPA Compliance and Ethics Blog*. Thomas R. Fox, 7/12/11. Web. 1 Nov. 2011.<http://tfoxlaw.wordpress.com/2011/07/12/corporate-social-responsibility-and-the-fcpa/>.

[53] Beed, Teresa, Maureen Fleming, and Nader Shooshtari. "BRIBERY AND THE U.S. FOREIGN CORRUPT PRACTICES ACT:." Diss. University of Montana - Missoula, Print.

[54] "The Reagan Administration and Multinationals." *Multinational Monitor*. 5.8 (1984): n. page. Web. 1 Nov. 2011. <http://multinationalmonitor.org/hyper/issues/1984/08/reagan.html>.

Administration, efforts to implement FCPA enforcement have increased. For example, in 2000 there were never more than eight FCPA investigations ongoing at any given time. At a point in 2010, there were over 130 cases opened.[55] This demonstrates the government's increased interest in enforcement, but in order to fully accomplish the long-term benefits intended by the FCPA, additional modifications need to be made.

Clash Between Cultures

Despite the long-term benefits of the FCPA, the fact is the provisions constituting the FCPA create a clash between cultures. Through the enactment of the FCPA, the United States evidenced its position that bribes not only represent a corrupt practice, they have the consequential effect of corrupting government officials and making the economic environment inefficient. From this American point of view on bribery, it must necessarily follow that countries that do not have anti-bribery laws (and in some cases actually condone bribery as an acceptable way of doing business), are likely to be economically and socially worse-off.

According to research by Pak Hong Mo, there is a direct correlation between corruption and economic growth, "We find that a 1% increase in the corruption level reduces the growth rate by about 0.72% or [..] a one-unit increase in the corruption index reduces the growth rate by 0.545 percentage points." Furthermore, corruption "reduces

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[55] Greenburg, Douglas, Barry Sabin, Nathan Seltzer, and Jessica Thibodeau. "Prosecutors Without Borders: Emerging Trends in Extraerritorial Enforcement." *Latham & Watkins*. (2011): n. page. Web. 1 Nov. 2011. <http://www.lw.com/upload/pubContent/_pdf/pub4122_1.pdf>.

the return of productive activities, and, hence, makes rent-seeking and corruption activities more attractive."[56] In theory, in order to strengthen the world economy, efforts should be made to decrease corruption. The United States, among other countries, has made that effort by adopting the FCPA.

Bribery of foreign officials, when successful, benefits two groups: the corporations who actually make the bribes and the foreign officials who receive them. Bribes issued by corporations can facilitate business for their own company at the expense of all other companies that did not issue bribes. Foreign officials who receive payments presumably make decisions based not on what is best for their country but rather what benefits them personally. Such a system is inevitably detrimental to the efficient operation of both business and government. Furthermore, the corporations and foreign officials involved in bribery provide a disservice to such places. For example, the continent of Africa is widely corrupt and "has lost more than $854 billion in illicit financial outflows between 1970 and 2008."[57] Interestingly, a large portion of this outflow has been caused by large multinational corporations. In Nigeria, there has been over $400 billion in oil sales in the past 50 years. Yet, poverty in Nigeria is abundant and the money never seems to trickle down to the local economies. Rather, the money is

[56] Mo, Pak Hong (2001). "corruption and Economic Growth". Journal of Comparative Economics, 29, 66-79.

[57] Massoud, Marcus, and Skandalis Konstantinos. "Corruption, Corporate Goverance and Economic Development: The Case of Africa." Western Decision Studies Meeting. Reading.

distributed to corrupt governments and multi-national corporations. Inevitably, the people of Nigeria will continue living in poverty until corruption is reduced.[58]

From a business standpoint, multinational companies that operate in corrupt regions tend to decrease their company's value. Many investors believe it is too risky to invest in places where the rules are unpredictable and unfair.[59] Under this assumption, it can be advantageous for many U.S. companies to abide by the FCPA. Not only will investors look more favorably on them, but it sets an example on the world stage. Many nations have already followed the U.S. in an effort to combat bribery. Through the Organization for Economic Co-operation and Development, 38 countries have criminalized the bribery of foreign officials.[60] It seems unlikely that such a concerted effort against bribery would have taken place without the leadership from the world's largest economy, the United States.

Government oversight of corporate conduct is vital to both the economic and social health of countries.[61] As witnessed in the United States during the Watergate era, corporate bribery can have widespread effects. The effects can range from creating a business environment in which corporate resources are allocated to nonproductive

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[58] ibid.
[59] Christos, Pantzalis, Park Jung Chul, and Ninon Sutton. "Corruption and valuation of multinational corporations." *Journal of Empirical Finance*. 15.3 (2008): n. page. Print
[60] "Foreign corrupt practices act, and the OECD COnvention on Combating Bribery of Public Officials in International Business Transactions." *Assosiation of Corporate Counsel*. Assosiation of Corporate Counsel, n.d. Web. 19 Nov 2011. <http://www.acc.com/legalresources/quickcounsel/cbopoiib.cfm>.
[61] Massoud, Marcus, and Skandalis Konstantinos. "Corruption, Corporate Goverance and Economic Development: The Case of Africa."

activities, to a government in which officials are making decisions based on personal gain rather than looking out for the interests of their community. In a clash between cultures, it seems indisputable that an economy based on honest business practices will be far better off in the long run than one based on short-term benefits and payoffs.

Chapter IV. Case Studies/ Modifications to FCPA

Triton Energy[62]

Triton Energy, founded in 1962, was a Dallas-based oil and gas exploration firm. The company exerted its efforts abroad, focusing on countries such as Indonesia and Columbia. As a result, Triton executives worked closely with foreign officials. In 1988, upon finding abundant amounts of oil in Indonesia, CEO Bill Lee created Triton Indonesia, a subsidiary to Triton Energy. Triton Indonesia facilitated the bribery of foreign officials. For example, a Triton Energy controller refused to sign off on the 10-k because it neglected to disclose "bribery, kickbacks and payments to government officials, custom officials, auditors, inspectors, and other persons in positions of responsibility in Indonesia, Columbia, and Argentina."[63] Instead of properly disclosing information, Triton energy fired the controller. In subsequent years, Triton executives negotiated a contract with the Indonesian government, earning them rights to explore a particular oil field. The contract created a partnership between Triton Indonesia and Pertamina, Indonesia's state-owned oil company. After an audit was performed on Triton Energy, two Pertamina auditors levied approximately $385,000 in state and local income taxes. Instead of paying that amount, Triton Indonesia hired a consultant, Roland Siouffi, to pay off the Pertamina auditors. Triton Indonesia wired $160,000 to Siouffi's company,

[62] Knapp, Michael. Ed. *Contemporary Auditing*. 8. Mason: South-Western, 2011. 223-31. Print.
[63] ibid.

who then transferred the money to the auditors. Essentially, Triton Indonesia bribed the auditors in an attempt to minimize its income tax liability.

As a result of FCPA violations, the SEC fined Triton Energy $300,000; and two former Triton Indonesia executives were also fined $35,000 and $50,000. The SEC stated that "the senior management of Triton Energy simply acknowledged the existence of such practices and treated them as a cost of doing business in foreign jurisdiction." The SEC utilized Triton as a scapegoat in order to send a message: "it's not O.K. to pay bribes as long as you don't get caught."[64] Furthermore, when the company was fined in 1997, it became the first public company in the 1990's to pay penalties for FCPA violations.

The SEC fines placed on Triton Energy were largely ineffective. Even when the CEO was replaced, a journalist noted that the "Triton's new CEO seemed to be employing some of his predecessor's 'old tricks'."[65] When the case involves a multi-billion dollar corporation (like Triton), a meager $300,000 will not deter a company from utilizing corrupt tactics that facilitate business. Rather, the company will probably consider the $300,000 as a necessary expense. For example, in the early 1970's, before the company had become extremely profitable, Triton discovered a lucrative oil field off the Gulf of Thailand. But because of constant dispute with Thai officials, Triton Energy was never able to turn a profit from the oil fields. The failure prompted Bill Lee to learn

[64] ibid.
[65] ibid.

an important lesson: “if Triton’s exploration ventures were to be successful in foreign countries, the company had to foster good relationships with key governmental officials in those countries.”[66] Of course, “good relationships” was empty language; what he meant was the company would have to resort to bribery. However, if Triton Energy had not bribed foreign officials, it is likely the company would not have been as profitable in that region, at least in the short-run. Thus, in order to deter companies from bribing foreign officials, adjustments to the FCPA need to be made in order to make it more effective.

Tyson Foods

As with Triton Energy, the SEC charged Tyson Foods with violating the FCPA in February 2011. Allegedly, its subsidiary, Tyson de Mexico, “made illegal payments to Mexican government authorities responsible for certifying its Mexican subsidiary’s chicken products used in export sales.”[67] Tyson de Mexico issued payments to Mexican veterinarians, who were responsible for certifying the chicken. In order to disguise the illicit payments on its books, Tyson de Mexico placed the veterinarians’ wives on its payroll. The wives provided absolutely no service for the company. Not only did Tyson de Mexico violate the FCPA, but it also deceived investors when it recorded fictitious payroll expenses. The director of the SEC’s Division of Enforcement said: “Tyson and its subsidiary committed core FCPA violations by bribing government officials through no-

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[66] ibid.

[67] "Tyson Foods Inc. charged with violating the Foregin Corrupt Practices Act." *FCPA News*. Kyros &Pressly LLP, n. d. Web. 7 Nov. 2011. <http://www.foreign-corrupt-practices-act.org/foreign-corrupt-practices-act-news/115-tyson-foods-inc-charged-with-violating-the-foreign-corrupt-practices-act.html>.

show jobs and phony invoices and by having a lax system of internal controls that failed to detect or prevent misconduct."[68] Furthermore, reports indicate that Tyson Food executives knew bribes were being paid in Mexico.

As a result of FCPA violations, Tyson Foods Inc. agreed to pay $5.2 million in fines, of which $4 million was criminal.[69] In a news release, Tyson vice president David Van Bebber stated, "We're committed to abiding by the law as well as our company's Core Values, which call on all of our people to operate with integrity…While we're disappointed mistakes were made, corrective action has been taken and improper payments were discontinued."[70] For a company that reported over $28 billion dollars in sales for 2010, a $5 million dollar fine seems rather light.[71] Is that amount substantial enough to deter Tyson Foods from violating the FCPA in the future?

Proposed FCPA Modifications

As argued in this paper, the long-term benefits from the FCPA should outweigh the short-term burdens it imposes on a company's ability to gain business opportunities in certain countries. However, in order for the Act to be completely effective, adjustments

[68] Rubenfield, Samuel. "Tyson Foods Settles FCPA Probe, Agrees To Pay $5.2 Million." *Wall Street Journal* 10/2/2011. n. pag. Web. 7 Nov. 2011. <http://blogs.wsj.com/corruption-currents/2011/02/10/tyson-foods-settles-fcpa-probe-agrees-to-pay-52-million/>.
[69] ibid.
[70] "Tyson Foods Resolves Claims Involving Mexican Subsidiary." *GlobeNewswire* 10/02/2011. n. pag. Web. 7 Nov. 2011. <http://ir.tyson.com/phoenix.zhtml?c=65476&p=irol-newsArticle_Print&ID=1527587&highlight=>.
[71] "Form 10-K for TYSON FOODS INC." *SEC Fillings*. Tyson Foods INC, n.d. Web. 21 Nov 2011. <http://biz.yahoo.com/e/101122/tsn10-k.html>.

need to be made. First, Congress should mandate that auditors implement an FCPA screening process. If auditors implement an effective "FCPA screening," companies would be less likely to bribe foreign officials. According to two consultants at EisnerAmper, a screening process is a realistic possibility and involves three strategies in order to test for FCPA compliance: 1. Understand the channels the company uses to sell products and services; 2. Implement Geocoding; and 3. Obtain lists of "denied party lists" (DPLs) and politically-exposed persons (PEPs). Understanding channels the company uses to sell products and services is important in order to obtain knowledge of the business flowchart and sales process. Thus, "auditors can leverage this understanding to assess FCPA risk by questioning the company's contact with government officials before and after sales [..] and corroborating ethical compliance policies."[72] Geocoding is a type of address validation that can potentially detect fictitious sales, fictitious vendors, and fictitious accounts. By inputing addresses from invoices into the geocoding software, auditors can learn whether or not the street address on file "represents a physical location." Through address validation, the software enables auditors to discover phantom vendors and employees. DPLs and PEPs are lists of people that U.S. companies should typically not be involved with during the normal recourse of business. If a company is

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[72] Frank, Alan, and Joseph Termine. "5 Ways Your Audit Team Can Incorporate FCPA Screening into an ." complianceweek.com, 08/08/2008. Web. 8 Nov. 2011. <http://www.eisneramper.com/fcpa-audit-screening.asp&xgt;.

conducting business with a DLP or PEP, there is a higher risk of possible FCPA violations.[73]

An FCPA-tailored audit approach can assist in exposing companies who bribe foreign officials. Also, auditors need to ensure that companies report full disclosure of any FCPA violations. When auditors become experts on discovering FCPA violations, companies will be less likely to violate the act. Once companies realize their bribes and cover-ups are likely to be exposed in an audit, greater FCPA compliance is likely to occur. By better educating auditing firms on the FCPA, auditors can better adopt a screening process to detect FCPA violations, and should be able to assist companies in implementing strong internal controls—thereby helping to minimize FCPA violations.

In addition to improving the audit process by utilizing an FCPA-tailored audit approach, changes should be made to ensure greater publicity of FCPA violations. Widespread public knowledge of FCPA violations can have a negative effect on companies. Public investors might be less likely to invest in a company that knowingly violates the FCPA. Public knowledge and outcry can also lead to impairment of a violating company's goodwill. As it is now, companies who violate the FCPA pay their fines and move forward. In the case involving Tyson Foods, company executives issued a statement that said, "We're committed to abiding by the law as well as our company's Core Values, which call on all of our people to operate with integrity [..] and while we're

[73] ibid.

disappointed mistakes were made, corrective action has been taken and the improper payments were discontinued"[74] This statement, which is similar to that of other FCPA violators, attempts to deceive the public and its investors. "We're committed to abiding by the law" implies that Tyson executives would have reported and disclosed any and all FCPA violations. Yet, company executives were aware of Tyson de Mexico's scandal for two years before finally telling them to stop issuing illegal payments.[75]

Unlike Tyson, companies need to face greater scrutiny and larger public disapproval when FCPA violations occur. For example, Congress could add a provision that forces FCPA violators to disclose violations on future advertisements. If Tyson Foods were to air a commercial, there could be an asterisk at the bottom of the screen that reads: *recent FCPA violator*. Such a disclaimer would bring FCPA violations to the attention of the public, conveying at least a hint of corruption to its public image, further encouraging companies to comply with FCPA requirements.

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[74] "Tyson Foods Resolves Claims Involving Mexican Subsidiary." *GlobeNewswire*
[75] "Tyson Foods Inc. charged with violating the Foregin Corrupt Practices Act."

Conclusion

Certainly there are other steps that can be taken to deter FCPA violations, but I believe a larger role for auditors and greater public knowledge of violations are relatively straightforward and simple modifications that could lead to substantially greater FCPA compliance. This in turn should produce a fairer and more efficient international business environment.

While I can understand the viewpoint of some American businessmen that they face a competitive disadvantage when the U.S. prevents them from paying bribes in a nation that condones them, I believe this is merely a result of short-term thinking. Rather than companies allocating their resources to productive activities, like product development, hiring new employees, or capital investment, they will increasingly be participating in a system that requires them to use their resources for payoffs that add nothing to making their product or system for doing business better or more efficient. Worse, their participation in the bribery system almost certainly will lead to an increase in the size of the bribes necessary to gain a business advantage. Moreover, it also seems inevitable that a company that has gained favors from one set of government officials will fall out of favor in that country when there is a regime change.

Most importantly, however, is that the short-term viewpoint of any particular businessman simply cannot serve as the basis for public policy. First, if one U.S. company uses bribery to gain an advantage in a foreign country, other U.S. companies that do not engage in bribery will be at a significant disadvantage. Moreover, without the

U.S. role in anti-bribery legislation, it is unlikely the many countries around the world that have implemented their own anti-bribery laws would have done so. Therefore, public policy in this area must be based on the longer-term view of what is good for companies in general, not on the short-term gain of a single company.

The FCPA is far from perfect, both in its scope and its enforcement, but I believe it is certainly a step in the right direction. With a few modifications such as I have proposed in this paper, including increased screening by auditors and greater exposure of violations to the public, the FCPA can become even more effective at accomplishing its long-term goal of reducing the corrupting effect of bribery on both foreign governments and the international business environment.