

## Louisiana Law Review

---

Volume 61 | Number 4

*Louisiana Tax Reform: A Symposium*

Summer 2001

---

# Ambiguities in the Foreign Corrupt Practices Act: Unnecessary Costs of Fighting Corruption?

Jennifer Dawn Taylor

---

### Repository Citation

Jennifer Dawn Taylor, *Ambiguities in the Foreign Corrupt Practices Act: Unnecessary Costs of Fighting Corruption?*, 61 La. L. Rev. (2001)  
Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol61/iss4/6>

This Comment is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact [kreed25@lsu.edu](mailto:kreed25@lsu.edu).

# Ambiguities in the Foreign Corrupt Practices Act: Unnecessary Costs of Fighting Corruption?

## TABLE OF CONTENTS

I. Introduction .....	861
II. Provisions of the Act .....	862
III. Policy Considerations .....	865
A. Extraterritoriality .....	865
B. Dual Policy Concerns: Effects of Corruption v. Competitive Disadvantage .....	867
IV. Ambiguities .....	871
A. Vague Definitions of Prohibited Conduct .....	871
1. Intent and Knowledge Requirements .....	871
2. Exceptions and Defenses .....	874
B. Absence of a Standard of Conduct .....	878
C. Multicultural Considerations .....	879
V. Unnecessary Costs .....	879
VI. Potential Solutions .....	881
A. Standard of Conduct .....	881
B. Multicultural Considerations .....	882
C. Due Diligence Defense .....	883
VII. Conclusion .....	886

## I. INTRODUCTION

Congress enacted the Foreign Corrupt Practices Act ("FCPA") in 1977 to address the problem of corruption in international business transactions. The Act criminalizes payments to foreign government officials intended to influence the official or to obtain an improper advantage. However, the legislation ambiguously defines prohibited conduct and its provisions lack an adequate standard by which to determine the nature of contemplated activity. While the FCPA is a noble attempt at tackling a serious transnational problem, its flaws are subjects of continued criticism. One faction of commentators defends the Act unconditionally due to a foreseen importance in eliminating bribery in business transactions at any expense. An opposing camp considers the FCPA to be poorly drafted legislation and question the Act's utility in actually curbing corruption. These commentators argue that the Act puts American businesses at a competitive disadvantage in international business. While both sides present valid arguments, an intermediate position may represent the most viable solution. Amending the FCPA to reduce ambiguities will establish a more effective policy, by reducing unnecessary costs and promoting ethical behavior.

The policy behind the FCPA is one of substantial importance and thus the probability of the statute's repeal in the near future is low. While corruption is detrimental to international business, measures to eliminate such should be as

efficient as possible, in order to ensure the costs of compliance are not as burdensome as the corruption it seeks to eliminate. Although most recognize the harmful effects of corruption on the global economy, the difficulty lies in defining what constitutes corrupt activity. Ambiguities inherent in the Act make it difficult to determine what activity is prohibited. Further, on an international scale, the definition of bribery varies from one culture to the next. Business practices in one context, such as in the United States, are not necessarily transferable to another. Consequently, to become a more effective tool in reducing corruption, the Act should be clarified by addressing problems in defining prohibited activities and the lack of guidelines to assist compliance.

Unnecessary costs are imposed on American companies conducting business abroad due to uncertainties in complying with the Act's provisions. Additional costs result from uncertainty among businesses as to whether potential conduct may be a violation. Uncertainties deter businesses from engaging in foreign transactions and encourage overly cautious behavior. Clarifying ambiguities in the FCPA could reduce costs to American businesses by minimizing uncertainty in conducting business activity overseas. Greater certainty would strengthen the Act's objectives in eliminating corruption by promoting a policy that more effectively balances the costs and benefits of compliance.

## II. PROVISIONS OF THE ACT

The enactment of the Foreign Corrupt Practices Act emerged during the turbulent post-Watergate era.<sup>1</sup> After the discovery of illegal domestic political contributions, investigations by the Securities and Exchange Commission ("SEC") uncovered numerous payments made by American corporations to foreign government officials in return for favorable treatment.<sup>2</sup> While the payments themselves were not illegal, the SEC began prosecuting for failures to report these payments under the disclosure provisions of federal securities law.<sup>3</sup> In addition, the Internal Revenue Service prosecuted companies for illegally deducting improper payments to foreign government officials.<sup>4</sup> Concerned that these activities were undermining the integrity of American businesses at home and abroad,<sup>5</sup> Congress responded by enacting the FCPA.<sup>6</sup>

---

Copyright 2001, by LOUISIANA LAW REVIEW

1. George C. Greanias & Duane Windsor, *The Foreign Corrupt Practices Act* 17 (1982) [hereinafter Greanias & Windsor]; see also Don Zarin, *Doing Business Under the Foreign Corrupt Practices Act* 1-1 (1995) [hereinafter Zarin]; Stephen F. Black & Roger M. Witten, *Complying with the Foreign Corrupt Practices Act* § 1.01, in 1 *Business Law Monographs, International Series* (2000) [hereinafter Black & Witten].

2. Greanias & Windsor, *supra* note 1, at 17-31; Zarin, *supra* note 1, at 1-1.

3. Black & Witten, *supra* note 1, at 1-1.

4. *Id.*

5. Congressman Henry A. Waxman stated, "[r]ecent disclosure of illegal and questionable payments by U.S. corporations raise grave issues of national policy, and if they are uncorrected, this conduct threatens the public confidence in the management of public-owned corporations, in the economic system and in the integrity of the political process." House Committee on Interstate and

The Act contains provisions governing both corporate accounting regulations and anti-bribery restrictions.<sup>7</sup> The accounting provisions are a part of an amendment to the Securities Exchange Act of 1934 and are enforced by the Securities and Exchange Commission ("SEC").<sup>8</sup> Corporations, which have issued a class of securities requiring registration or which are required to file reports under the 1934 Act (hereinafter referred to as "issuers"), are obligated to comply with the accounting provisions of the FCPA.<sup>9</sup> The accounting provisions are intended to serve as a deterrent to illegal business practices, such as creating off-the-books "slush funds," misrepresenting the nature of commercial transactions, and falsifying the identify of a payment's recipient.<sup>10</sup> The provision requires the issuer to keep books, records, and accounts in reasonable detail reflecting the corporation's transactions, including any dispositions of the corporation's assets.<sup>11</sup> Additionally, issuers are required to create and "maintain a system of internal accounting controls sufficient to provide reasonable assurances that" transactions receive proper authorization, "transactions are recorded as necessary," access to corporate assets is limited, and accountability exists for differences between recorded and actual assets.<sup>12</sup>

The accounting provisions impose liability on individuals who "knowingly circumvent or knowingly fail to implement a system of internal accounting controls or knowingly falsify any book, record, or account . . ." <sup>13</sup> The terms "reasonable assurances" and "reasonable detail" are defined by the prudent man standard, which entails a "level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs."<sup>14</sup> Penalties for false and misleading statements under the accounting provisions include fines not more than \$1,000,000 and/or imprisonment for not more than 10 years for violations by individuals and a fine not exceeding \$2,500,000 for business entities.<sup>15</sup> In addition, a failure to file

---

Foreign Commerce, Subcommittee on Oversight and Investigations, Regulatory Reform, Volume V: Environmental Protection Agency, Federal Communications Commissions, Securities and Exchange Commission, 94th Cong. 2d Sess. 496 (May 20, 21, 24 and June 1, 1976).

6. Pamela J. Jadwin & Monica Shilling, Note, *Foreign Corrupt Practices Act*, 31 Am. Crim. L. Rev. 677, 677-78 (1994) [hereinafter Jadwin & Shilling].

7. Ambiguities within the accounting provisions will not be addressed within this paper.

8. See Jeffrey P. Bialos & Gregory Husisian, *The Foreign Corrupt Practices Act: Coping With Corruption In Transitional Economies* 61-71 (1997) [hereinafter Bialos & Husisian]; Black & Witten, *supra* note 1, at 6-1 to 6-14.

9. The accounting provisions apply to "[e]very issuer which has a class of securities registered pursuant to section 782 of this title [or] . . . which is required to file reports pursuant to section 780(d) of this title" 15 U.S.C. § 78m(b)(2) (1994). "[§ 781] generally requires that, for any security to trade on a national securities exchange, there must be a registration statement in effect. [§ 780(d)] generally requires issuers of securities registered in accord with [§ 781] to file periodic reports and other information with the SEC." Black & Witten, *supra* note 1, at 6-3.

10. Bialos & Husisian, *supra* note 8, at 62.

11. 15 U.S.C. § 78m(b)(2)(A) (1994).

12. 15 U.S.C. § 78m(b)(2)(B)(i-iv) (1994).

13. 15 U.S.C. § 78m(b)(5) (1994).

14. Jadwin & Schilling, *supra* note 6, at 680 (citing 15 U.S.C. § 78m(b)(7) (1994)).

15. 15 U.S.C. § 78ff(a) (1994).

information, documents, or reports will result in a fine of \$100 a day for as long as the failure to file continues.<sup>16</sup>

The Act's anti-bribery provisions criminalize any payments that are "corruptly" made to foreign officials.<sup>17</sup> The anti-bribery provisions apply to issuers,<sup>18</sup> domestic concerns<sup>19</sup> (which include American citizens and companies formed under United States law), and any person acting within the United States.<sup>20</sup> The Act prohibits offering, giving, or authorizing the payment of anything of value to a foreign official,<sup>21</sup> foreign political party, or candidate for foreign political office, for the purpose influencing any act or decision of such foreign official in his official capacity, inducing the official to do or not do any act in violation of his lawful duty, securing an improper advantage, or inducing such official to use his influence to affect any act or decision of the government in order to obtain, retain, or direct business.<sup>22</sup> Furthermore, bribery of foreign officials indirectly or through

16. 15 U.S.C. § 78ff(b) (1994).

17. The anti-bribery provisions of the FCPA contain three separate sections, each defining a different class of persons that may be subject to the Act's regulations; § 78dd -1 applies to any issuer that "has a class of securities registered pursuant to section 781 of this title or which is required to file reports under section 78o(d) of this title" or any officer, director, employee, or agent acting on its behalf; § 78dd-2 applies to *domestic concerns* and any officer, director, employee, agent or stockholder of the domestic concern, acting on its behalf; § 78dd-3 applies to *any person* (other than issuers or domestic concerns) or any officer, director, employee, agent or stockholder acting on behalf of such person, "*while in the territory of the United States.*" 15 U.S.C. §§ 78dd-1 to dd-3 (Supp. V. 1999) (emphasis added).

18. 15 U.S.C. § 78dd-1(a) (Supp. V. 1999); see text accompanying *supra* note 9.

19. 15 U.S.C. § 78dd-2(h)(1) (1994) defines "domestic concern" as:

- (A) any individual who is a citizen, national, or resident of the United States; and
- (B) any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States.

20. 15 U.S.C. § 78dd-3(a) (Supp. V. 1999).

21. "The term 'foreign official' means any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization." 15 U.S.C. § 78dd-1(f)(1)(A) (Supp. V. 1999).

22. For purposes of—

- (A) (i) influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage; or
- (B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality, in order to assist such [issuer/domestic concern/person] in obtaining or retaining business for or with, or directing business to, any person;
- (2) any foreign political party or official thereof or any candidate for foreign political office for purposes of—
  - (A) (i) influencing any act or decision of such party, official, or candidate in its or his official capacity, (ii) inducing such party, official, or candidate to do or omit to do an act in violation of the lawful duty of such party, official, or candidate, or (iii) securing improper advantage; or

third parties is also prohibited.<sup>23</sup> Violations of the anti-bribery provisions may result in a fine up to \$2,000,000 for a business entity and a fine of not more than \$100,000, or imprisonment for not more than five years, or both for individuals.<sup>24</sup> Both individuals and business entities may be subject to a maximum of \$10,000 civil penalty for violations.<sup>25</sup>

### III. POLICY CONSIDERATIONS

#### A. Extraterritoriality

The activity that the FCPA aims to regulate is the giving of a payment or gift to an individual with governmental authority in a foreign country in order to influence that person to use his or her position to grant an advantage to the payee. This activity is commonly known as a "bribe." In the United States, bribery not only constitutes an illegal act, but it also carries a social stigma and is generally considered to be an immoral activity.<sup>26</sup> Under the domestic bribery laws of the United States, both the offering of a payment to a government official and the acceptance of the payment by the official are prohibited.<sup>27</sup> By contrast, however, the FCPA criminalizes only the improper payment to the official and does not impose liability on the recipient of such

- 
- (B) inducing such party, official, or candidate to use its or his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality, in order to assist such issuer [domestic concern/person] in obtaining or retaining business for or with, or directing business to, any person; or
  - (3) any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office, for purposes of—
  - (A) (i) influencing any act or decision of such foreign official, political party, party official, or candidate in his or its official capacity, (ii) inducing such foreign official, political party, party official, or candidate to do or omit to do any act in violation of the lawful duty of such foreign official, political party, party official, or candidate, or (iii) securing any improper advantage; or
  - (B) inducing such foreign official, political party, party official, or candidate to use his or its influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality, in order to assist such issuer [domestic concern/person] in obtaining or retaining business for or with, or directing business to, any person.

15 U.S.C. § 78dd-1(a)(1), (2)(a)(1), (3)(a)(1) (1994 & Supp. V. 1999).

23. 15 U.S.C. § 78dd(1)(a)(3) (Supp. V. 1999); § 78dd(2)(a)(3) (Supp. V. 1999); § 78dd(3)(a)(3) (Supp. V. 1999); *see also* Jadwin & Shilling, *supra* note 6, at 681.

24. 15 U.S.C. §§ 78dd-2(g), § 78dd-3(e) (Supp. V. 1999).

25. *Id.*

26. "The payments of bribes to influence the acts or decisions of foreign officials, foreign political parties, or candidates for foreign political office is unethical. It is counter to the moral expectations and values of the American public." *Prohibiting Bribes to Foreign Officials: Hearing Before the Senate Committee on Banking, Housing, and Urban Affairs*, 94th Cong., 2d Sess. 10 (1976) (statement by Senator Proxmire) (quoted in Bialos & Husisian, *supra* note 8, at 144).

27. *See, e.g.*, 18 U.S.C. § 201-19 (1994 & Supp. 1999); La. R.S. 14:118 (1986 & Supp. 2001).

a payment.<sup>28</sup> Bribery in a transnational context encompasses numerous additional factors, not otherwise present in domestic cases, causing the regulation of bribery beyond territorial limits to become a far more difficult task. Countries hold differing perspectives as to what conduct should be prohibited and thus, an individual may be subject to conflicting standards of conduct. For example, an overlap may occur when one state prohibits its citizens from engaging in a particular activity while its citizens are physically located within the territorial boundaries of another country and the host country does not prohibit such activity.

Under international law, traditional theories of prescriptive jurisdiction<sup>29</sup> over extraterritorial activities provide a basis for a state to regulate conduct that occurs outside of its territorial limits.<sup>30</sup> Accordingly, a state can enact laws governing both conduct that occurs within its territory and the conduct of its nationals anywhere in the world.<sup>31</sup> When an activity is prohibited extraterritorially, the potential for conflicting regulation exists. Indeed, a citizen of the prohibiting country traveling abroad may be constrained from engaging in a certain activity while every other individual within the foreign territory is free to engage in the same conduct.

The assertion of jurisdiction over conduct occurring within another state's territory is an unfavorable practice, often regarded as intruding on the sovereignty of the foreign state.<sup>32</sup> When Congressional directives are not explicit, courts interpret legislation as not extending extraterritorially when such an extension of jurisdiction would be unreasonable in light of a foreign state's interests.<sup>33</sup> Prior to the enactment of the

28. See *Clayco Petroleum Corp. v. Occidental Petroleum Corp.*, 712 F.2d 404, 406 (9th Cir. 1983) (holding that the FCPA does not abrogate the act of state doctrine in private suits based on foreign payments and citing *Underhill v. Hernandez*, 168 U.S. 250, 252, 18 S. Ct. 83, 84 (1897), which first announced the act of state doctrine: "Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory.").

29. "The term jurisdiction may be defined as the authority to effect legal interests—to prescribe rules of law (legislative or prescriptive jurisdiction), to adjudicate legal questions (judicial jurisdiction), and to compel or induce compliance (enforcement jurisdiction)." Christopher L. Blakesley, *Terrorism, Drugs, International Law, and the Protection of Human Liberty* 94 (1992).

30. The "five traditional bases of jurisdiction over extraterritorial crime": (1) territorial-jurisdiction over conduct where an element or the effect of the crime occurs within the state's territory; (2) nationality-jurisdiction based on the nationality of the perpetrator, no matter where the activity occurs; (3) protective-jurisdiction over conduct that "threatens [a] state's sovereignty, security, or some important government function;" (4) passive personality-jurisdiction on the basis of the victim's nationality; (5) universal-jurisdiction over acts that are universally condemned "when no other state has a prior interest in asserting jurisdiction." *Id.* at 96-97.

31. See text accompanying *supra* note 30.

32. The committee commented that such an extension of jurisdiction extraterritorially "demeans the enforcement responsibility of the foreign State for such conduct, discredits the applicable foreign law and deprives the foreign States of the often critical determination as to whether, in the light of relevant legal and political considerations, to initiate prosecution for a particular offense." H. Lowell Brown, *The Extraterritorial Reach of the U.S. Government's Campaign Against International Bribery*, 22 *Hastings Int'l & Comp. L. Rev.* 407, 437 (1999) [hereinafter Brown] (citing Ad Hoc Committee on Foreign Payments of the Association of the Bar of the City of New York, *Report on Questionable Foreign Payments by Corporations: The Problem and Approaches to a Solution* (1977)).

33. "Legislatures and administrative agencies, in the United States and in other states, have

FCPA, the United States limited its assertion of jurisdiction over conduct occurring within the jurisdiction of another state to situations where "significant policy concerns outweighed the interests of the foreign state."<sup>34</sup> Some have argued that the extension of extraterritorial jurisdiction under the FCPA may constitute overreaching or "moral imperialism" by the United States.<sup>35</sup> However, others assert that the destructive effect of transnational bribery justifies the extraterritorial regulation of the activity.<sup>36</sup>

*B. Dual Policy Concerns: Effects of Corruption Versus Competitive Disadvantage*

Concerns regarding the negative impact of bribery on international commerce have been a powerful motivation in support of the FCPA since its enactment. Bribery and corruption, in general, have detrimental effects on the economic interests of everyone involved.<sup>37</sup> For the firm paying a bribe, the costs of doing business increase.<sup>38</sup> The consequences of corruption in a developing country are even more pronounced, effecting the country's economy and government in a variety of ways.<sup>39</sup> For example, corruption may result in a misallocation of resources, such as shifting scarce resources away from public works projects.<sup>40</sup> Moreover, corruption discourages foreign investment by increasing the costs associated with doing business in a country.<sup>41</sup> Corruption may also inflate the costs of goods.<sup>42</sup> Further, bribery threatens political stability<sup>43</sup> and market institutions<sup>44</sup> by threatening legitimacy and public confidence in these institutions. The whole international community is affected by corruption through economic inefficiency and inflated transaction costs in international

---

generally refrained from exercising jurisdiction where it would be unreasonable to do so, and courts have usually interpreted general language in a statute as not intended to exercise or authorize the exercise of jurisdiction in circumstances where application of the statute would be unreasonable." *Id.* at 438-39 n.112 (citing Restatement (Third) of Foreign Relations § 403 cmt. a (1986)).

34. *Id.* at 437; see *supra* note 32.

35. See Steven R. Salbu, *Bribery in the Global Market: A Critical Analysis of the Foreign Corrupt Practices Act*, 54 Wash. & Lee L. Rev. 229, 275-76 (1997) [hereinafter Salbu I].

36. Philip M. Nichols, *Regulating Transnational Bribery in Times of Globalization and Fragmentation*, 24 Yale J. Int'l L. 257, 298 (1999) [hereinafter Nichols].

37. Melissa K. Hurst, Comment, *Eliminating Bribery in International Transactions*, 6 J. Int'l L. & Prac. 111, 114-17 (1997) [hereinafter Hurst].

38. *Id.* at 116.

39. Bialos & Husisian, *supra* note 8, at 3-4.

40. Hurst, *supra* note 37, at 115-16 (pointing out that the payment of bribes to public officials in public works projects reduces the amount of money allocated to the project that may result in cost cutting and shoddy construction).

41. *Id.* at 116.

42. Mark J. Murphy, Comment, *International Bribery: An Example of an Unfair Trade Practice?*, 21 Brook. J. Int'l L. 385, 391 (1995).

43. *Id.*

44. Bialos & Husisian, *supra* note 8, at 146.



trade and investment.<sup>45</sup> Hence, the United States has a direct interest in the elimination of transnational bribery.

With such policy considerations in mind, the United States has taken positive steps to eliminate corrupt business practices internationally by forbidding such conduct even if it must do so unilaterally. While almost every country prohibits the bribery of its own officials, the United States is the only country to extend its legislative jurisdiction beyond territorial boundaries to criminalize the bribery of foreign officials.<sup>46</sup> An ongoing debate raises questions as to whether such a prohibition comes at the expense of American business by putting them at a competitive disadvantage.<sup>47</sup> The FCPA subjects only American nationals and businesses to liability for prohibited activities committed abroad,<sup>48</sup> while similar activities by foreign competitors remain unrestricted. Some argue the inequity creates an advantage for foreign companies competing with American businesses for the same government contracts, while not subject to the same regulation.<sup>49</sup>

The competitive disadvantage argument takes the position that bribery is a reality in many countries<sup>50</sup> and that prohibitions against payments by United States companies abroad cause harm to American businesses.<sup>51</sup> Commentators suggest that United States companies are extremely disadvantaged when competing against foreign companies that

---

45. "[W]hereas an occasional act of corruption may be efficient, corruption once systematized and deeply ingrained never is.' While it may seem initially innocuous to allow bribes to expedite faster bureaucratic performance—a kind of "tip" for speedy service—allowing such payments inevitably leads to an incentive for monopolistic officials intentionally to slow their efforts to encourage these tips." Bialos & Husisian, *supra* note 8, at 146-48.

46. Bialos & Husisian, *supra* note 8, at 27; Daniel Pines, Comment, *Amending the Foreign Corrupt Practices Act To Include A Private Right Of Action*, 82 Cal. L. Rev. 185, 186 (1994) [hereinafter Pines].

47. For arguments against the competitive disadvantage theory, see Pines, *supra* note 46, at 207-16 (arguing the economic harm argument is unpersuasive); Mary Jane Sheffet, *The Foreign Corrupt Practices Act and the Omnibus Trade and Competitiveness Act of 1988: Did They Change Corporate Behavior?*, 14 J. Pub. Pol'y & Mktg. 290, 297 (1995) (concluding from a survey that compliance costs have not made it impossible for U.S. corporations to compete abroad); Michael A. Almond & Scott D. Syfert, *Beyond Compliance: Corruption, Corporate Responsibility, and Ethical Standards in the New Global Economy*, 22 N.C. J. Int'l. & Com. Reg. 389, 396 (1997) (arguing there is no compelling evidence that the FCPA puts American firms at a competitive disadvantage to European or Asian counterparts).

48. Liability may also include foreign agents and subsidiaries of American individuals and businesses.

49. "The contrast between the FCPA's strict prohibition of overseas bribes and the absence of similar legislation throughout the rest of the world creates a lopsided playing field." Salbu I, *supra* note 35, at 255.

50. "A World Bank survey of 3,600 firms in sixty-nine nations revealed that forty percent of businesses are paying bribes. Fifteen percent of businesses in industrial countries pay bribes while the percentage in the former Soviet Union is a staggering sixty percent." J. Lee Johnson, Comment, *A Global Economy and the Foreign Corrupt Practices Act: Some Facts Worth Knowing*, 63 Mo. L. Rev. 979, 979 (1998); Salbu I, *supra* note 35, at 232 ("Corruption is a tenacious reality in many global markets, where foreign officials continue to solicit bribes routinely from U.S. companies and their representatives").

51. Salbu I, *supra* note 35, at 261; Amy Borrus et al., *A World of Greased Palms, Inside the Dirty War For Global Business*, Bus. Wk., Nov. 6, 1995, at 36 [hereinafter Borrus].

pay bribes for international capital projects.<sup>52</sup> Due to the unilateral nature of the restriction, U.S. firms may be handicapped or even precluded from competing.<sup>53</sup> While many interpretations of trade data and opinion surveys of American executives conducted over the years offer conflicting indications as to whether U.S. business are in fact at a competitive disadvantage, recent government reports suggest there may indeed be some truth to the speculations of lost business.<sup>54</sup> In a study conducted by the Commerce Department, tracking 100 deals worth \$45 billion in which foreign companies used bribes to undercut American companies, foreign companies were awarded eighty percent of the contracts.<sup>55</sup> A report given by Secretary of Commerce Ron Brown before the Senate Banking, Housing, and Urban Affairs Committee, estimated that in 200 overseas competitions during an eight year period, American companies lost about half of the contracts, resulting in a loss of \$25 billion, due to improper involvement by foreign governments.<sup>56</sup>

While many still debate whether the FCPA really undermines the competitiveness of American businesses abroad, the competitive disadvantage argument has been partially incorporated into public policy.<sup>57</sup> This changing policy interest is illustrated by the numerous amendments to the Act.<sup>58</sup> The inclusion of exceptions for activities

---

52. Salbu I, *supra* note 35, at 261.

53. *Id.* at 255-56.

54. See U.S. Gen. Accounting Office, Report to the Congress: Impact of Foreign Corrupt Practices Act on U.S. Business 59 (1981) (cited in Pines, *supra* note 46, at 208-09) (reporting a survey of 250 of the top 1000 corporations in the U.S. on the effects of the FCPA, where 30% claimed a decrease in business, but 67% reported little or no decrease in business). In a poll conducted by Louis Harris 78% of respondents reported difficulties in conducting business in places where bribery is common. Pines, *supra* note 46, at 208. *But see On the Take*, Economist, Nov. 19, 1988, at 21 (reporting a study by John Graham and Mark McKean comparing the share of exports in corrupt countries against non-corrupt countries and finding the U.S. market share to have increased at a roughly equivalent percentage, from which they infer that there has been no loss in business because of the FCPA); Christopher L. Hall, *The Foreign Corrupt Practices Act: A Competitive Disadvantage, But For How Long?*, 2 Tul. J. Int'l & Comp. L. 289, 304-07 (1994) [hereinafter Hall] (commenting on the Graham and McKean study and asserting, "The subjective nature of the data illustrates the principle problem in determining the FCPA's effects on United States sales abroad"); Kate Gillespie, *Middle East Response to the U.S. Foreign Corrupt Practices Act*, Cal. Mgmt. Rev., Summer 1987, at 9 (asserting from the results of a survey that the potential of the FCPA to harm U.S. exports is unproven).

55. Borrus, *supra* note 51, at 36; Salbu I, *supra* note 35, at 256.

56. Promoting U.S. Exports, Before the Senate Banking, Housing, and Urban Affairs Committee (Oct. 12, 1995) (statement of Ronald H. Brown, Secretary of Commerce); Salbu I, *supra* note 35, at 256 (citing *Hearing of the House Int'l Comm., Int'l Econ. Policy and Trade Subcomm., on U.S. Export Promotion Program*, 104th Cong. (Oct 12, 1995) (testimony of Sec. of Commerce Ron Brown)).

57. See Robert S. Levy, Note, *The Antibribery Provisions of the Foreign Corrupt Practices Act of 1977: Are They Really As Valuable As We Think They Are?*, 10 Del. J. Corp. L. 71, 82 (1985):

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

58. For example, two affirmative defenses were added in 1988 to allow an individual or company

that are legal in the host country or considered to be a routine governmental activity represents Congress's attempts to avoid overly restrictive measures against American businesses. These considerations illustrate a changing public policy that strives for an elimination of the bribery of foreign officials, but not at any cost. The elimination of corruption and the advancement of American business are both material policy considerations. Therefore, the United States must strike a balance between eliminating bribery, whether the motivation is because bribery is viewed as immoral or because of its effect on international commerce, and ensuring that the regulation does not unreasonably harm American business in the process.

One study concluded that the FCPA has primarily shifted business from American companies to foreign competitors willing to pay bribes rather than decreasing bribery overall.<sup>59</sup> Many assert that bribery remains a widespread practice in some areas.<sup>60</sup> Recognizing the potential disadvantage to American businesses under a unilateral prohibition, the United States now actively promotes a multilateral solution to eliminating bribery of government officials.<sup>61</sup> Many commentators contend that the competitive disadvantage results from the lack of prohibitions or enforcement by foreign countries of transnational bribery.<sup>62</sup> The United States has actively campaigned for the creation of multilateral legislation, modeled after the FCPA, aimed at "leveling the global playing field" in international competition.<sup>63</sup> In the beginning, many countries rejected the idea of a FCPA styled legislation.<sup>64</sup> However, changing international attitudes have resulted in increasing international condemnation of corruption and a greater receptivity to multilateral approaches.<sup>65</sup> Indeed, the efforts of several international organizations to promote the adoption of a multilateral agreement have found increasing support over the years.<sup>66</sup> While a multilateral agreement may facilitate

---

to be immune from liability under certain circumstances. One is a defense for payments that are legal under the foreign country's law. The other is a defense for expenditures that are related to demonstrating products and services. See discussion at *infra* Part IV.A.2.

59. James R. Hines, Jr., *Forbidden Payment: Foreign Bribery and American Business After 1977*, Nat'l Bureau of Econ. Res. Working Paper No. 5266, at 1 (1995) (cited in Bialos & Husisian, *supra* note 8, at 139-40).

60. "[T]he incidence of transnational bribery has increased greatly over the last few decades." Nichols, *supra* note 36, at 272.

61. "In July 1993, Secretary of State Warren Christopher announced that the United States would renew its efforts to negotiate an international agreement banning the use of bribery in international business dealings. This announcement was in direct response to complaints by American companies that they were losing business in Asia due to the FCPA." Hall, *supra* note 54, at 309.

62. Murphy, *supra* note 42 (arguing many countries have a double standard, distinguishing domestic and international bribery, which "creates a barrier that inhibits free trade by granting certain states an advantage over others").

63. Steven R. Salbu, *Battling Global Corruption in the New Millennium*, 31 Law & Pol'y Int'l Bus. 47, 57-59 (1999) [hereinafter Salbu II].

64. *Id.* at 59.

65. *Id.* at 59-60; see also Barbara C. George et al., *On the Threshold of the Adoption of Global Antibribery Legislation: A Critical Analysis of Current Domestic and International Efforts Toward the Reduction of Business Corruption*, 32 Vand. J. Transnat'l L. 1, 17-28 (1999) (suggesting certain factors have caused the changes in international attitudes towards business corruption).

66. For a description of multilateral efforts by international organizations, see generally Salbu

a resolution of the disparities between American and foreign companies, the vague standards of the FCPA in defining prohibited conduct have not commanded broad international support.<sup>67</sup>

#### IV. AMBIGUITIES

Ambiguities in the FCPA create vast uncertainty, even for companies attempting to comply with the statute's provisions. Important ambiguities in the FCPA concern the precise conduct that the statute prohibits. When prohibited conduct is not clearly defined, unnecessary costs may result from having to determine whether a transaction constitutes a violation; indeed, ultimately the company may simply have to expose itself to the risk of sanctions in the absence of a clear answer. These uncertainties call into question the effectiveness of the Act as a remedy in eliminating bribery. Deterrence is weakened when the costs of attaining policy goals are perceived as unreasonable in comparison. Critical ambiguities in the FCPA involve the vague definitions of prohibited conduct, absence of a standard by which to judge potential activity, and difficulties in applying concepts cross-culturally.<sup>68</sup>

##### A. Vague Definitions of Prohibited Conduct

###### 1. Intent and Knowledge Requirements

The FCPA holds not only individuals liable for violations, but also holds companies liable for payments made by officers, directors, employees, or agents acting on behalf of the company.<sup>69</sup> Hence, when an individual carries out an illegal payment as an employee or an agent of a business entity, the entity<sup>70</sup> that the individual represents may be concurrently liable.<sup>71</sup> The entity will be liable if it directly

---

II, *supra* note 63, at 47; Brown, *supra* note 34, at 407; Hurst, *supra* note 37, at 111.

67. See generally Stephen C. Muffler, *Proposing a Treaty on the Prevention of International Corrupt Payments: Cloning the Foreign Corrupt Practices Act Is Not the Answer*, 1 ILSA J. Int'l & Comp. L. 3 (1995).

68. However, some commentators suggest vagueness in the Act's provisions result in part from the limited number of cases brought before courts, restricting the courts ability to define ambiguous provisions. Pines, *supra* note 46, at 196-97 (also noting the small number of cases that are brought before courts usually involve blatant violations, further limiting the court's opportunity to establish precedent regarding ambiguities); Laura E. Longobardi, *Reviewing the Situation: What Is to Be Done With the Foreign Corrupt Practices Act?*, 20 Vand. J. Transnat'l L. 431, 494 (1987) (asserting that almost every enforcement proceeding is settled by plea agreements, preventing adjudication of issues and interpretation of provisions) [hereinafter Longobardi].

69. 15 U.S.C. § 78dd-2(a) (1998 & Supp. 2000).

70. Business entity is used to describe "any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship" covered under the definition of domestic concern. 15 U.S.C. § 78dd-2(h)(1)(B) (1998). For convenience, hereafter the use of "company" will imply any business entity described above.

71. Although criminally liable, the domestic concern that is not a natural person (corporation or business entity) will only be subject to fines. 15 U.S.C. §§ 78dd-2(g)(1), 78dd-3(e)(1) (Supp. 2000). This is consistent with the notion in criminal law that only fines are imposed for vicarious liability. See

instructed the individual to commit the unlawful activity. However, the company may be liable for an illegal activity of its employees, regardless of the company's intent to participate, if the employees are considered to be the company's agents.

The FCPA criminalizes payments "corruptly" made to foreign officials.<sup>72</sup> However, "corruptly" is not defined by the Act. Legislative reports characterize "corruptly" as "an intent 'to induce the recipient to misuse his official position in order to wrongfully direct business to the payor or his client and connotes an evil motive or purpose.'<sup>73</sup> Accordingly, a payment is made "corruptly" if the payor specifically intends to influence the official in the performance of an official act.<sup>74</sup> Implicit in this standard is a *quid pro quo* or the intent to give something of value in return for an official act.<sup>75</sup>

In addition, the FCPA contains an additional ambiguous intent requirement regarding the level of knowledge required to impose liability for the acts of others. Originally, the FCPA's anti-bribery provisions concerning payments made to third parties contained a knowledge requirement fashioned as a "reason to know standard."<sup>76</sup> In 1988, Congress amended the knowledge component<sup>77</sup> of the anti-bribery provisions to make a person liable when he knows that the money given to a third party will be used for a purpose that is considered a violation of the Act.<sup>78</sup> The new requirement divides the knowledge standard into three categories: (1) awareness, (2) firm belief, and (3) high probability. First, the Act deems a person to have the requisite knowledge if he is "aware": that the third person is engaged in the conduct, that the circumstance exists, or that the illegal result is substantially certain to occur.<sup>79</sup>

generally Wayne R. LaFave & Austin W. Scott, Jr., *Criminal Law* 265 (2d ed. 1986).

72. 15 U.S.C. §§ 78dd-1(a), 78dd-2(a) (1998), 78dd-3(a) (Supp. 2000).

73. James K. Lehman, *Foreign Corrupt Practices Act*, 7-APR S. C. Law 38, 40 (1996) (citing S. Rep. No. 114, 95th Cong., reprinted in 1977 U.S.C.C.A.N. 4108).

74. *Id.*

75. *Id.* (citing *United States v. Tomblin*, 46 F.3d 1369, 1379-80 (5th Cir. 1995)).

76. John W. Duncan, Comment: *Modifying the Foreign Corrupt Practices Act: The Search for a Practical Standard*, 4 Nw. J. Int'l. L. & Bus. 203, 208 (1982) [hereinafter Duncan]. This vague standard meant that "the law prohibited payments to third parties by any person knowing or 'having reason to know' that a bribe was being paid." The implications of this standard would directly affect corporations that have employees, agents, or subsidiaries abroad. Problems with this standard were that it was vague and judged on circumstances that were viewed in hindsight. This standard was so broad that it left uncertain the scope of an individual's liability and how high was the duty to inquire." Bialos & Husisian, *supra* note 8, at 37.

77. 15 U.S.C. § 78dd-1(f)(2), 78dd-2(h)(3) (1998), 15 U.S.C. § 78dd-3(f)(3) (Supp. 2000):

- (A) A person's states of mind is "knowing" with respect to conduct, a circumstance, or a result if—
- (1) such person is aware that such person is engaging in such conduct, that such circumstance exists, or that such result is substantially certain to occur; or
  - (2) such person has a firm belief that such circumstance exists or that such result is substantially certain to occur.
- (B) When knowledge of the existence of a particular circumstance is required for an offense, such knowledge is established if a person is aware of a high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist.

78. Bialos & Husisian, *supra* note 8, at 40.

79. 15 U.S.C. § 78dd-1(f)(2)(A)(i), 78dd-2(h)(3)(A)(i) (1998); 15 U.S.C. § 78dd-3(f)(3)(A)(i)

Secondly, knowledge exists when a person has a "firm belief" that the circumstance exists or is substantially certain to occur.<sup>80</sup> Third, a the knowledge standard is satisfied when the person is aware of a "high probability" of the existence of the circumstance.<sup>81</sup>

Despite the deletion of the "reason to know standard," the 1988 Amendment of the Act remains broad. Indeed, the Amendment may have done little to clarify the knowledge requirement.<sup>82</sup> In trying to construe what exactly is meant by "high probability," some commentators suggest that even though the legislative history indicates that the knowledge requirement goes beyond "recklessness," a person is still subject to liability if he is aware of the "high probability" of the circumstance but does not have actual knowledge.<sup>83</sup> Recklessness exists "when a person is 'aware that his conduct *might* cause the result, though it is not substantially certain to happen.'"<sup>84</sup> On the other hand, the legislative history of the 1988 Amendment specified that liability applies to "conscious disregard," "willful blindness," or "deliberate ignorance."<sup>85</sup> Congress stated that "conscious disregard" would include situations where "'any reasonable person would have realized' the existence of the circumstances or result and the defendant . . . consciously [chose] not to ask about what he 'had reason to believe he would discover.'"<sup>86</sup> This standard was included to eliminate the "head-in-the-sand" problem, which entails a "conscious purpose to avoid learning the truth."<sup>87</sup>

From the above descriptions, the line between these two classifications of conduct, recklessness (which is not culpable behavior) and "conscious disregard/willful blindness" (which is prohibited behavior) is extremely unclear. The difference seems to be that one implies a duty to investigate and the other does not. The problem lies in determining how much awareness is required to trigger that duty and if a quantifiable standard can realistically be determined.

The lack of a standard specifying what should alert a person to his duty to inquire or alert him to the "high probability" of a violation is problematic.<sup>88</sup> The vagueness contained in such a broad knowledge requirement still raises questions of when a duty to investigate exists and, if so, how far one must go to satisfy that duty. The absence of a specific standard allows the imposition of criminal liability for the acts of others that may be imputed without actual knowledge, intent, or participation.

When a corporation has foreign affiliates, such as subsidiaries, venture partners, or

(Supp. 2000).

80. 15 U.S.C. § 78dd-1(f)(2)(A)(ii), 78dd-2(h)(3)(A)(ii) (1998); 15 U.S.C. § 78dd-3(f)(3)(A)(ii)

(Supp. 2000).

81. 15 U.S.C. § 78dd-1(f)(2)(B), 78dd-2(h)(3)(B) (1998); 15 U.S.C. § 78dd-3(f)(3)(B) (Supp. 2000).

82. Bialos & Husisian, *supra* note 8, at 41-42.

83. *Id.* at 40.

84. Walter R. LaFave & Austin W. Scott, Jr., *Criminal Law* 239 (2d ed. 1986) (cited in Bialos & Husisian, *supra* note 8, at 41).

85. Bialos & Husisian, *supra* note 8, at 41.

86. H.R. Conf. Rep. No. 576, 100th Cong., 2d Sess. H2115 at 921 (1988) (cited in Bialos & Husisian, *supra* note 8, at 41).

87. H.R. Conf. Rep. No. 100-576, at 920 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1949, 1952-53.

88. Bialos & Husisian, *supra* note 8, at 41-42.

employees, the company may be held liable for the affiliate's illegal conduct. Possibilities for liability arise if the company knowingly participates, authorizes the activity, or if the affiliate can be considered the company's agent.<sup>89</sup> Authorization occurs when the company has knowledge and approves the conduct, either explicitly or implicitly.<sup>90</sup> Furthermore, if the foreign affiliate could be considered to be the company's agent, the company may be vicariously liable even without knowledge of the conduct.<sup>91</sup> Liability may result if the company exercises enough control over the affiliate so as to be considered the action of one unit.<sup>92</sup>

Additionally, if a company learns that a controlled affiliate has made an illegal payment, the company has the same responsibility it would have in the situation were such activity performed by its own employee.<sup>93</sup> In one case, a court ruled that if a corporation learns of an unauthorized act by someone undertaken on the company's behalf and does not repudiate it within a reasonable time, the corporation becomes liable for the act.<sup>94</sup> However, if the company only owns a minority interest in the affiliate, the responsibility of the company is more difficult to determine. One commentator suggests that a corporation should, at a minimum, refuse capital contributions that may be related to the activity and should make a formal protest demanding action to prevent further violations.<sup>95</sup> However, it is unclear whether mere protest will shield a company from liability.<sup>96</sup> Furthermore, the SEC and the Department of Justice suggest that if the board of directors refuses to act effectively, the corporation should sell its interest (even at a loss) to avoid liability through implicit authorization.<sup>97</sup>

## 2. Exceptions and Defenses

The anti-bribery provisions of the Act include an exception to the prohibition of payments to foreign officials for routine governmental action.<sup>98</sup> This exception allows for payments to government officials to facilitate or to expedite an action of the official that is considered routine.<sup>99</sup> The Act defines this activity as "only an action which is ordinarily and commonly performed by a foreign official" in an enumerated set of circumstances.<sup>100</sup> Sometimes referred to as "grease payments," these payments are

89. Black & Witten, *supra* note 1, at 3-5.

90. *Id.* at 3-6 (citing H.R. Rep. No. 95-640, at 8.)

91. *Id.*

92. *Id.* at 3-7.

93. *Id.* at 3-10.

94. In *Re R. Martin-Trigona*, 760 F.2d 1334, 1341 (2d Cir. 1985).

95. Black & Witten, *supra* note 1, at 3-11.

96. *Id.*

97. *Id.* (citing 1 FCPA Rep. 101.018 (1995)).

98. 15 U.S.C. § 78dd-1(b), § 78dd-2(b), § 78dd-3(b) (Supp. V. 1999):

Exception for routine governmental action.

Subsections (a) and (i) shall not apply to any facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party official.

99. *Id.*

100. 15 U.S.C. § 78dd-1(f)(3); 15 U.S.C. § 78dd-2(h)(4), 78dd-3(f)(4) (Supp. V. 1999):

allowed to induce non-discretionary acts when the official has an obligation to perform this task anyway.<sup>101</sup> The routine governmental action exception was added by Congress in recognition of the common practice in many foreign countries of government employees supplementing their income by receiving payments from foreign companies. Congress recognized that if forbidden under the Act, American businesses would suffer.<sup>102</sup>

The routine governmental actions exception is problematic for several reasons. First, the dividing line between what may or may not be discretionary on the part of the official can be difficult to determine. Some commentators argue that, "even if a payment is made to an official with discretionary authority in order to 'expedite' a decision he is obliged to make, the application of the exemption is difficult. After the fact, it may be difficult to prove that the payment was made purely to facilitate a timely decision rather than to influence the substantive decision itself."<sup>103</sup> One corporation was found to have violated the Act by giving money to an official to secure the payment of a debt that the country already owed to the corporation.<sup>104</sup> The court found this conduct to be an unlawful attempt to get an official to use his influence to obtain or to retain business.<sup>105</sup>

The dividing line between discretionary activity and non-discretionary activity is theoretical and an activity's characteristics often seem to overlap in many practical circumstances. For example, at a FCPA conference, an official with the Justice Department was asked about the likelihood of prosecution in a situation where the foreign official offered to expedite the processing of VAT refunds, for a percentage of each refund.<sup>106</sup> Although the company would be legally entitled to the refunds, the official said that this payment would likely not be viewed as a facilitating payment. The Justice Department official reasoned that the foreign official is exercising some discretion in deciding which application to process first and the decision involves retention of business. This hypothetical illustrates the difficulties in defining what conduct is prohibited and under which circumstances payments may fall under the

---

(A) The term "routine governmental action" means only an action which is ordinarily and commonly performed by a foreign official in—

- (1) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country;
- (2) processing governmental papers, such as visas and work orders;
- (3) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country;
- (4) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or
- (5) actions of a similar nature.

101. Bialos & Husisian, *supra* note 8, at 44.

102. *Id.* at 42-43.

103. *Id.* at 44 n.67.

104. *Id.* at 34 n.28.

105. *Id.*

106. Arthur F. Mathews, *Defending SEC and DOJ FCPA Investigations and Conducting Related Corporate Internal Investigations: The Triton Energy/Indonesia SEC Consent Decree Settlements*, 18 *Nw. J. Int'l L. & Bus.* 303, 315 (1998).



exception.

The ambiguities of the FCPA are "exacerbated by the attempt of the law to deal with questions such as what ought to be a permissible (facilitating) payment and what not (bribery), which in the end reduce to slippery ethical judgments."<sup>107</sup> As illustrated by the previous examples, whether prohibited activity meets the statutory requirements for this exception depends on the characterization of the relevant activity. Is the intended official's action an activity that he must perform anyway or is the activity motivated by the official's discretion? Most governmental activity seems to fall under both categories. To demonstrate, suppose a company wants to obtain a permit to conduct activity in a foreign country. The usual delay for such authorization is six months. However, an official is willing to move the corporation to the top of the list for a modest payment. This action seems to be something that the official would normally be required to do eventually, but he is also exercising his discretion as to when he will perform the activity. What if the official had to decide if the company met all the qualifications required to obtain such a permit? Further, what if the waiting period was purposefully imposed, serving as a mechanism to limit the number of permits in circulation? Seemingly, changing the surrounding circumstances shows that the characterization of the concerned activity is almost impossible to differentiate under the current definition.

In addition to the routine government actions exception, the FCPA provides two affirmative defenses to liability for otherwise illegal payments. The first defense permits a payment, gift, offer, or promise of anything of value to a foreign official, if such a payment is legal under the written laws of that country.<sup>108</sup> Congress created this defense in the 1988 Amendment to address concerns that foreign relations would suffer if the United States tried to prosecute for activities that took place in a foreign country, but are not considered criminal by that country.<sup>109</sup> However, due to cultural differences, a practice prohibited under the Act may be permitted in another country.<sup>110</sup> Further, the accepted practice is likely to be permitted by omitting the activity from written law.<sup>111</sup> Since most practices are unlikely to be authorized by written law, few practices are likely to qualify under the exception.<sup>112</sup>

As an affirmative defense the defendant has the burden of proving the defense's applicability.<sup>113</sup> Thus, how does a person prove that his activity was legal under the written laws of the host country? The Department of Justice recommends that a U.S.

---

107. Greanias & Windsor, *supra* note 1, at 96.

108. 15 U.S.C. §§ 78dd-1(c)(1), 78dd-2(c)(1) (1998); 15 U.S.C. § 78dd-3(c)(1) (Supp. V. 1999):

It shall be an affirmative defense to actions under subsection (a) of this section that—

(1) the payment, gift, offer, or promise of anything of value that was made, was lawful under the written laws and regulations of the foreign official's, political party's, party official's, or candidate's country;

109. Donald R. Cruver, *Complying With the Foreign Corrupt Practices Act* 21 (1999).

110. Steven R. Salbu, *The Foreign Corrupt Practices Act as a Threat To Global Harmony*, 20 Mich. J. Int'l L. 419, 425 (1999) [hereinafter Salbu III].

111. Bialos & Husisian, *supra* note 8, at 45 (noting that in transitional economies, it may be dangerous to rely on changing and uncertain laws).

112. Salbu III, *supra* note 110, at 425.

113. Bialos & Husisian, *supra* note 8, at 45.

firm receive advice of counsel or receive guidance on these issues through the Department review procedure.<sup>114</sup> In fact, the opinion of local counsel has been noted by the Department of Justice as a factor in its decision whether or not to take action under its review procedure.<sup>115</sup>

The second affirmative defense, added by the 1988 Amendments, allows a company to make reasonable and bona fide expenditures directly related to the promotion, demonstration, or explanation of products/services or the execution or performance of a contract.<sup>116</sup> This defense is not a true affirmative defense in that it is not available if the conduct is prohibited under the anti-bribery provisions and only clarifies that bona fide expenditures lacking a corrupt purpose are permissible.<sup>117</sup> The difficulty with this defense is that it does not define what constitutes a reasonable or bona fide expenditure. The absence of a standard enumerating certain factors that may be considered in determining whether the expenditures are reasonable or bona fide gives remarkable discretion to the Justice Department to define activity that is criminal on a case-by-case basis. While the expenditures are still subject to the regular anti-bribery provisions, this defense just adds to the confusion of an already ambiguous standard under the anti-bribery provisions.

The area that should be of concern to companies is when the activity in question involves paying the expenses of any foreign official that has discretion to make decisions for their government.<sup>118</sup> The Department of Justice has often approved expenses as reasonable, when the payments are disclosed to the foreign government, and payments are accurately documented in the company's records.<sup>119</sup> In several of the Department's procedure releases, it has described activities that may fall within the defense.<sup>120</sup> In a February 1992 procedure release, the Justice Department advised that the defense would apply where a party spent money to provide training, travel, and subsistence expenses for local personnel and lawful under local law, in order to increase the ability of the local officials to perform oversight functions.<sup>121</sup> In July of 1983, the

---

114. Department of Justice, Foreign Corrupt Practices Act Antibribery Provisions 7 (Feb. 1992) reprinted in Black & Witten, *supra* note 1, at §2.10[1]. The 1988 Amendments authorize the Attorney General to issue "advisory opinions in response to specific inquiries by businesses whereby DOJ issues an opinion indicating whether it would take any enforcement action." Lynne Baum, Note, *Foreign Corrupt Practices Act*, 35 Am. Crim. L. Rev. 823, 834 (1998) [hereinafter Baum].

115. Black & Witten, *supra* note 1, at 2-11-2-12.

116. 15 U.S.C. §§ 78dd-1(c)(2), § 78dd-2(c)(2) (1998); 15 U.S.C. § 78dd-3(c)(2) (Supp. 2000):

It shall be an affirmative defense to actions under subsection (a) of this section that—

(2) the payment, gift, offer, or promise of anything of value that was made, was a reasonable and bona fide expenditure, such as travel and lodging expenses, incurred by or on behalf of a foreign official, party, party official, or candidate and was directly related to—

(a) the promotion, demonstration, or explanation of products or services; or

(b) the execution or performance of a contract with a foreign government or agency thereof.

117. Bialos & Husisian, *supra* note 8, at 46.

118. *Id.* at 47.

119. *Id.*

120. Baum, *supra* note 114, at 832.

121. FCPA Procedure Release No. 92-1 (Feb. 1992), 3 FCPA Rptr. 725 (Aug. 1997) (cited in

Department allowed the defense to apply in an opinion release, where "a party invited a general manager of a state-owned entity and his wife to extend their pre-planned vacation by ten days in order to take them on a 'promotional tour' of the party's domestic facilities, where the party paid for airfare, lodging, travel, meals, and transportation."<sup>122</sup> This defense, as an exception, is highly discretionary. For example, what is reasonable? How is corrupt intent proven in this situation? An expenditure that does not demand *quid pro quo*, but is made for the purpose of later obtaining business from the government, can easily be disguised as an expense paid vacation to evaluate a merchant's products. Within this context determining the nature of an individual's intentions in order to ascertain whether the individual's conduct constitutes criminal activity may be problematic.

### B. Absence of a Standard of Conduct

Several practitioners have published guides advising companies on how to avoid prosecution under the FCPA. However, most (if not all) disclose to the reader the difficulties in prescribing a recommended course of action due to the ambiguous nature of the Act.<sup>123</sup> In addition to the ambiguous terminology, the lack of standards or guidelines by which to determine whether conduct is prohibited or not creates further uncertainty.<sup>124</sup> The need for guidance increases in transitional countries where political confusion creates additional concerns for businesses.<sup>125</sup> The Amendments of 1988 recognized the need for such a standard of conduct. The Amendments mandate that the Attorney General consult with public agencies and solicit public opinion to determine the value of guidelines in describing conduct in the Act and in providing general precautionary procedures that may be used to help conformity with enforcement policies.<sup>126</sup> However, the Attorney General determined that the publication of guidelines were unnecessary.<sup>127</sup> Some suggest that the lack of guidelines may be due to a fear by the Department of Justice that such guidelines will be used to aid circumvention of the

---

Baum, *supra* note 114, at 832 n.72).

122. Baum, *supra* note 114, at 832 n.72 (referring to FCPA Procedure Release No. 83-2 (July 26, 1983), 3 FCPA Rptr. 719 (Aug. 1997)).

123. See, e.g., "The Foreign Corrupt Practices Act is set up in such a fashion that it compels a cost-benefit assessment of these penalties by management without clear scienter or materiality standards. . . Neither lawyers nor accountants can supply final advice on this matter." Greanias & Windsor, *supra* note 1, at 100. "Thus, the statute's broad and uncertain scope creates significant liability risks and difficult compliance choices for U.S. companies doing business abroad, especially those with multinational operations." Bialos & Husisian, *supra* note 8, at 26. "In-house and outside counsel for U.S. corporations doing business abroad therefore must navigate through the extraterritorial application of a U.S. criminal bribery statute with unclear standards, in the context of complex and sensitive foreign business relationships, and in an environment where illicit payments are a common business practice of foreign competitors." Zarin, *supra* note 1, at 1-5.

124. See generally Longobardi, *supra* note 68, at 431.

125. See generally Christopher F. Dugan & Vladimir Lechtman, *The FCPA in Russia and Other Former Communist Countries*, 91 Am. J. Int'l L. 378 (1997).

126. Salbu I, *supra* note 35, at 248.

127. *Id.*

Act.<sup>128</sup> The absence of legislative or regulatory guidance contributes to the Act's ambiguity and difficulties in determining prohibited behavior.

### C. *Multicultural Considerations*

An inherent problem in regulating activity that occurs in another country involves differing cultural attitudes toward acceptable practices. While most "egregious forms" of influence are universally prohibited, difficulties may occur in gray areas due to differing legal standards for defining bribery.<sup>129</sup> For example, in Korea, it is a customary practice to give "ttokkap" or rice-cake expenses, which consists of gifts or payments, generally during major holidays.<sup>130</sup> While Korean law prohibits giving bribes to public officials and receiving bribes by public officials, a "social courtesy exception" exists that encompasses practices like the ttokkap.<sup>131</sup> To constitute bribery, the payment must relate to the official's duties and must be given in consideration for the official's duties.<sup>132</sup> Due to cultural differences, the definition of bribery may vary from one context to the next. A statutory definition that does not incorporate the possibility of this variation creates greater difficulties for an American business to determine the nature of its activity.

## V. UNNECESSARY COSTS

The primary concern in evaluating the failures of the FCPA as a policy instrument in battling international bribery is the additional costs imposed on American corporations. Legislation enacted to implement a policy should strive for maximum efficiency in attaining its goals. If the statutory vehicle creates overly burdensome regulations without concurrent success in reaching the desired end, the legislation will be viewed as overly burdensome regardless of whatever evil it intends to eliminate. In the case of the FCPA, when American businesses face unnecessary costs in transacting business abroad, the effectiveness of the Act in combating international corruption decreases.

Unnecessary costs that American businesses face when attempting to comply with the FCPA are associated with the ambiguous nature of the Act's provisions. When businesses engaging in international transactions are uncertain as to how to comply with regulatory provisions, they may become overly cautious, expending unnecessary resources or disengaging from certain activities altogether.<sup>133</sup> In a 1982 article, one

---

128. *Id.* at 263.

129. Joongi Kim & Jong Bum Kim, *Cultural Differences in the Crusade Against International Bribery: Rice-Cake Expenses in Korea and the Foreign Corrupt Practices Act*, 6 Pac. Rim L. & Pol'y J. 549, 557 (1997) [hereinafter Kim & Kim].

130. *Id.* at 561.

131. *Id.* at 562-66.

132. *Id.* at 563.

133. "The FCPA's accounting provisions provide inadequate guidance as to what is required, and companies, therefore, often employ much greater controls than would otherwise be used." Duncan, *supra* note 76, at 224.

commentator argues that uncertainties in the accounting provisions may have resulted in increased costs for accounting and internal audit controls.<sup>134</sup> While these increased costs may be considered the price those corporations had to pay in order to comply with the Act's regulations, they may also indicate, as the commentator suggests, excessive expenditures due to inadequate guidelines and the perceived need for protection from uncertainties.<sup>135</sup> However, other commentators argue that most corporations incurred insignificant compliance costs. However, difficulties in measuring actual harm has resulted in a lack of empirical evidence, leaving support for and against economic harm arguments to be gauged by anecdotal evidence.

As a direct result of uncertainties in determining what activities may constitute a violation of the FCPA, some have noted a tendency to overly cautious behavior by American companies. One manifestation of this overly cautious behavior occurs when a corporation is unable to determine whether or not a transaction violates the Act and turns down a legitimate business opportunity as a result.<sup>136</sup> The inability to determine with certainty whether an activity is not prohibited under the Act's provisions creates anxiety among businessmen leading them to "err on the side of caution," causing a loss of business.<sup>137</sup> In addition, some businesses may avoid doing business altogether in certain areas where corruption is prevalent, rather than face difficulties associated with the Act.<sup>138</sup> However, many of these notoriously corrupt countries are some of the "most dynamic markets," which provide many business opportunities for American firms.<sup>139</sup> Small businesses may also avoid markets perceived as corrupt, because many do not have the resources to staff in-house counsel or public relations specialists to help them deal with the ethical dilemmas.<sup>140</sup>

On the other hand, some commentators argue that the FCPA has served its purpose, causing American businesses to avoid questionable business deals, and that the advantages of establishing proper business practices outweighs the costs of lost business.<sup>141</sup> While the avoidance of questionable transactions may indeed

---

134. *Id.* at 205.

135. *Id.*

136. Longobardi, *supra* note 68, at 447.

137. Hall, *supra* note 54, at 304.

138. *Id.*

139. *Id.* Christopher Hall utilizes Indonesia as an example:

Indonesia is a market, however, that United States firms simply cannot ignore. With a population of nearly one hundred-ninety million people, Indonesia is a tremendous market for the United States purveyors of advanced phone and power grid systems, among a myriad of other products. With such vast infrastructure needs, developing countries like Indonesia provide United States firms with the opportunity for enormous sales. They are also markets in which bribery is tolerated and often expected.

*Id.* at 304-05.

140. Michael A. Mayo, *Ethical Problems Encountered by U.S. Small Businesses in International Marketing*, *J. Small Bus. Mgmt.*, Apr. 1991, at 51.

141. Hall, *supra* note 54, at 302-03.

indicate a reduction in corrupt activity by American business, the more important issue concerns whether such precautionary measures cause undue losses. When an ambiguous regulation deters activity broadly, decreasing both good and bad conduct, the ambiguity imposes costs in addition to what may be required to extinguish the unfavorable conduct. Such additional costs are unnecessary to achieve the desired result because the uncertainty needlessly deters acceptable activity.

The policy goals of the FCPA are weakened by such vague standards. Consequences that occur when firms avoid doing business abroad or wrongly believe that activity conforms to the law are detrimental to both American business and the objectives of the FCPA.<sup>142</sup> To be a more effective policy instrument, the benefits of the prohibitions should outweigh the costs of compliance. When the burdens of the policy seem to outweigh any benefit that may be gained, the legitimacy of the policy instrument is questioned.

## VI. POTENTIAL SOLUTIONS

### A. Standard of Conduct

The vagueness of the FCPA is not only due to the ambiguous nature of the Act's provisions, but also result from a lack of guidance to companies attempting to comply with the law. Ambiguous statutory construction in defining prohibited conduct necessitates that the Department of Justice provide some other type of direction.<sup>143</sup> This guidance may be provided by the Justice Department in creating "[t]rue guidelines containing acceptable model transactions."<sup>144</sup> With models to guide the formulation of legal transactions, the preservation of a modified version of the advisory opinion procedures could assist in the determination of the validity of borderline transactions.<sup>145</sup>

The establishment of a universal standard might also provide a level of assuredness in multinational transactions. A universal standard would allow individuals and companies of any nation, engaging in international business, to fashion its activities according to a uniform set of principles in any locality. The creation of a universal standard would create more efficient international transactions, by providing greater certainty to companies.<sup>146</sup> An international consensus would also facilitate a global effort to eliminate bribery.<sup>147</sup> Cooperation within the international community and the establishment of uniform regulations would "level the playing field" for American companies to effectively compete against foreign firms.

---

142. Pines, *supra* note 46, at 196.

143. Longobardi, *supra* note 68, at 473-74.

144. *Id.* at 494 (suggesting an approach like the Antitrust Merger Guidelines; "The DOJ could also officially sanction business structures that it has found valid, or it could present hypothetical models that it believes to be valid. It could issue a special release of approved transactions and encourage other companies to imitate these transactions as closely as possible.")

145. Longobardi, *supra* note 68, at 474.

146. Kim & Kim, *supra* note 129, at 560.

147. *Id.*

### B. Multicultural Considerations

Attempts to devise a multilateral agreement implementing a uniform standard of prohibited conduct have been unsuccessful in formulating such a standard.<sup>148</sup> Difficulties in obtaining universal support for a multilateral agreement prohibiting bribery are due to the inability to achieve an international consensus as to a definition of prohibited behavior. Reluctance to endorse a universal standard derives from cultural variations in the defining what constitutes bribery.<sup>149</sup> Most recognize the harmful consequences of corruption and agree that improper influence of government officials should be eliminated.<sup>150</sup> Thus, difficulties in achieving an international consensus arise from an inability to produce an exclusive definition of bribery to be applied universally.<sup>151</sup> However, to obtain a universal consensus, cultural differences must be taken into consideration.<sup>152</sup> Incorporating cultural differences into an "international framework" would further international efforts.<sup>153</sup>

Many of the problems encountered by American companies conducting business abroad arise from the Act's failure to incorporate varying cultural practices. In amending the FCPA to include an affirmative defense for payments considered legal in the written laws of the foreign country where the activity occurs, the U.S. recognized multicultural concerns, but did not provide a realistic remedy. For an exception of this type to function properly, it must be expanded to include the practices that are lawful in the foreign country, but not codified. However, opening the exception up to any practice not expressly prohibited would extend too broadly, allowing any activity not explicitly prohibited.

On the other hand, the civilian concept of customary law might provide the flexibility needed to reflect cultural diversity, while still limiting the expansion of the existing defense. In most civil law jurisdictions, custom is a binding source of law.<sup>154</sup> A practice becomes customary law when it is repeated over a period of time and when it is widely considered to be legally binding.<sup>155</sup> To rise to the level of custom, the

---

148. "One central problem is how to construct a forceful multilateral consensus. While agreeing that egregious forms of influence buying should be prohibited, for instance, many are skeptical that an effective universal proclamation against bribery can be constructed, particularly because many countries have different legal standards governing what constitutes bribery." *Id.* at 557.

149. *Id.*

150. *Id.* at 552.

151. "Indeed, the continuing debate and disagreement among members of the OECD Working Group concerning payments to foreign political parties and candidates reveal that despite the growing consensus on foreign bribery, there remain sharp cultural and political differences as to what constitutes international corruption." Brown I, *supra* note 33, at 520.

152. Kim & Kim, *supra* note 129, at 557.

153. *Id.* at 579.

154. "[C]ustomary law arises from 'practice repeated for a long period of time and generally accepted as having acquired the force of law.' This notion of customary law was first formulated in Roman law during the period of the Republic, and it is accepted in most civil law jurisdictions." A. N. Yiannopoulos, *Civil Law System, Louisiana and Comparative Law* 121 (2d ed. 1999).

155. *Id.* at 121:

practice must generally be considered in the community to be required by or consistent with the law.<sup>156</sup> Custom is not legislative, but evolves as the result of common behavior within a community and constitutes a social expectation.<sup>157</sup> Customary law reflects a body of accepted rules in a community because such practices are repeated over an extended period of time and become a guide for how to act in certain situations.<sup>158</sup> A custom may exist in a country when the practice of giving a certain type of payment or gratuity becomes tradition and the country's citizens widely consider the practice to be lawful. Therefore, while not qualifying as an action that would be authorized under the "written" laws of that country, the action may still be permitted by law.

### C. *Due Diligence Defense*

A common approach to preventing violations of the FCPA is the implementation of compliance programs.<sup>159</sup> Corporate compliance programs (sometimes referred to as corporate codes of conduct) provide a method of internal policing and a system of reporting misconduct, which serves as a deterrent to misconduct.<sup>160</sup> Generally, an adequate compliance program should: (1) contain standards of conduct that are effectively communicated to employees; (2) create compliance responsibility within supervisory personnel; (3) establish reporting mechanisms; (4) maintain internal

---

The definition of customary law in Article 3 of the Louisiana Civil Code indicates that customs consist of two elements: a long series of actions constantly repeated (*longa consuetudo*); and a juridical sentiment that the practice is binding (*opinio juris*). This definition makes it clear that there is a substantial difference between *usage* and custom. Usage is a practice lacking the element of juridical sentiment. However long repeated, usage is not binding.

156. "For there to be a custom, it is necessary that the subjects of the law, when they act in a certain manner, have the conviction of conforming themselves to the law." Gerard Cornu, *Droit Civil: Introduction-Les Personnes-Les Biens* 39 (4th ed. 1990) (J. Randall Trahan trans. 1999).

157. "A custom is a social happening. It is collective human behavior. It is the common behavior of the members of the community who, when prompted to act, usually take the same type of action in particular situations." J. Cueto-Rua, *Judicial Methods of Interpretation of the Law* 80-81, 86-89 (cited in Symeon C. Symeonides, *An Introduction to the Louisiana Civil Law System* 255-56 (6th ed. 1991)).

158. "In this respect, regularity of social behavior and emergence of expectations based on such regularity provide a guide for the judicial determination of what ought to be protected as 'public order' or 'good morals.'" Symeonides, *supra* note 157, at 257. "It refers to standards of social behavior, to patterns of social conduct, to accepted social expectations about what conduct is due by one person to another. *Id.* at 258.

159. See generally Jeffrey L. Snyder, *International Operations: Managing the Risks*, N.Y.L.J., May 20, 1996, at S4 [hereinafter Snyder]; Harvey L. Pitt & Karl A. Groskaufmanis, *Minimizing Corporate Civil and Criminal Liability: A Second Look at Corporate Codes of Conduct*, 78 Geo. L.J. 1559 (1990) [hereinafter Pitt & Groskaufmanis]; Alan Cohen, *Conducting Due Diligence 2000, Foreign Corrupt Practices Act*, 1176 P.L.I. Corp. 475 (2000); but see Mary Jane Sheffet, *The Foreign Corrupt Practices Act and the Omnibus Trade and Competitiveness Act of 1988: Did They Change Corporate Behavior?*, 14 J. Pub. Pol'y & Mktg. 290, 295 (1995) (asserting the results of a survey indicate that although some corporations created or modified their codes of conduct after the passage of the FCPA, the changes they did make were minor).

160. Charles J. Walsh & Alissa Pyrich, *Corporate Compliance Programs as a Defense to Criminal Liability: Can a Corporation Save Its Soul?*, 47 Rutgers L. Rev. 605, 645 (1995) [hereinafter Walsh & Pyrich].



investigation procedures; (5) contain a system of punishment; and (6) require a system of audit procedures.<sup>161</sup> In addition, while compliance programs cannot ensure complete compliance, compliance programs also assist in managing mistakes.<sup>162</sup>

Consider for example the Federal Sentencing Guidelines which provide for the mitigation of penalties if the corporation displays due diligence by maintaining an effective compliance program.<sup>163</sup> The Sentencing Guidelines serve as a motivation to create and maintain programs to promote compliance with the law and ethical decision-making.<sup>164</sup> The guidelines also reward companies for taking responsibility for employees and implementing programs to prevent misconduct.<sup>165</sup> Similarly, implementing a defense of due diligence might motivate companies to detect and prevent prohibited conduct through compliance programs. The Model Penal Code provides a due diligence defense to liability if the corporation shows it took adequate precautions to prevent the misconduct.<sup>166</sup> The preventive activity can be accomplished through a corporate compliance program. The Legislature considered incorporating a due diligence defense in the 1988 Amendments.<sup>167</sup> The defense would have shielded companies from liability for the misconduct of its employees if the company could show it had established procedures that were reasonably expected to prevent and detect violations and the violating employee's supervisor used due diligence to prevent the violation.<sup>168</sup> Although the due diligence amendment was ultimately rejected, a company's due diligence may still constitute an "implicit defense," evidencing the

---

161. *Id.* at 646-49. An effective compliance program consists of these seven elements:

- (1) written compliance standards and procedures;
- (2) senior level personnel assigned overall responsibility for compliance;
- (3) use due care not to delegate authority to individuals whose company knew or should have known had propensity for illegal activities;
- (4) communicate standards through training programs or disseminating written materials;
- (5) the company should implement procedures to achieve compliance, such as a monitoring and auditing system to deter violations, and a process for employers to report violations by others without fear of retribution;
- (6) appropriate disciplinary procedures for a violation; and
- (7) after a violation has been detected, taking appropriate steps to respond, and to prevent similar violations in the future, including modifications to its Compliance program.

United States Sentencing Comm'n, Guidelines Manual § 8A1.2 cmt. 3(k) (1997) (cited in J. Lee Johnson, Comment, *A Global Economy and the Foreign Corrupt Practices Act: Some Facts Worth Knowing*, 63 Mo. L. Rev. 979, 995 (1998)).

162. Snyder, *supra* note 159, at 54.

163. See Debbie T. LeClair et al., *Federal Sentencing Guidelines For Organizations: Legal, Ethical, and Public Policy Issues For International Marketing*, 16 J. Pub. Pol'y & Mktg. 26 (1997) [hereinafter LeClair]. For the seven requirements for an effective compliance program, see text accompanying *supra* note 161.

164. *Id.*

165. *Id.*

166. Model Penal Code § 2.07(5) (1985) ("[I]t shall be a defense if the defendant proves by a preponderance of the evidence that the high managerial agent having supervisory responsibility over the subject matter of the offense employed due diligence to prevent its commission.").

167. H.R. Conf. Rep. No. 100-576, at 922, reprinted in 1988 U.S.C.A.N. at 1955.

168. Mathews, *supra* note 106, at 339-40.

absence of the requisite knowledge or of willful blindness by management.<sup>169</sup> Further, conducting a due diligence investigation when retaining a foreign sales agent can demonstrate the lack of any circumstance that would indicate a probability of improper conduct.<sup>170</sup>

A due diligence defense might also provide a level of certainty for companies by limiting liability in exchange for good faith efforts to prevent misconduct. One commentator suggests that due diligence should be an affirmative defense to liability, whereby a corporation must show by a preponderance of the evidence it has implemented an effectively functioning program relating to the field in which the violation occurred.<sup>171</sup> The availability of this defense would encourage the creation of compliance programs, which promote the ultimate policy goal of the Act by deterring and detecting bribery. The defense may also encourage a more efficient enforcement through corporate self-regulation.<sup>172</sup> Arguably, corporations are in a better position to supervise employees, detect misconduct, and prevent violations.<sup>173</sup> The defense, however, serves as a much greater incentive for self-regulation than mere mitigation of sentencing.<sup>174</sup> Without the defense, the significant costs associated with implementing a compliance program must be weighed against the possibility of consideration in the assessment of penalties, but has little or no effect on liability.<sup>175</sup>

The inclusion of a due diligence defense may allow a corporation to set up adequate preventive measures and engage in international transactions without fear of unlimited liability. While the creation and maintenance of a compliance program may involve significant costs, the expenses that a company may incur if convicted, such as fines, legal fees, and damage to the corporation's reputation would outweigh the cost of a compliance program.<sup>176</sup> The reliability of a due diligence defense would allow a

---

169. John E. Impert, *A Program For Compliance with the Foreign Corrupt Practices Act and Foreign Law Restrictions on the Use of Sales Agents*, 24 *Int'l Law* 1009, 1023 (1990) [hereinafter Impert]; H. Lowell Brown, *The Foreign Corrupt Practices Act Redux: The Anti-Bribery Provisions of the Foreign Corrupt Practices Act*, 12 *Int'l Tax & Bus. Law* 260, 283 (1994) [hereinafter Brown II]; Walsh & Pyrich, *supra* note 160, at 689.

170. Impert, *supra* note 169, at 1014, 1018 (suggesting the adoption of a procedure for retaining foreign agents and the awareness or "red flags" that could indicate the possibility of misconduct, such as excessive commission, family or business ties with government officials, or request that the commission be paid in a third country).

171. Walsh & Pyrich, *supra* note 160, at 684-85.

172. *Id.* at 678. The International Chamber of Commerce's Commission on Unethical Practices issued a report in 1977 which "stressed self-regulation as the most effective way to eliminate corruption and set forth proposed 'Rules of Conduct to Combat Extortion and Bribery' . . . The guideline section of the rules encouraged the adoption of corporate codes of conduct and the establishment of rigorous accounting controls." Brown I, *supra* note 34, at 479.

173. Walsh & Pyrich, *supra* note 160, at 678. "[S]elf-regulation is preferable to government regulation, provided that self-regulation is subject to appropriate oversight and is pursued diligently." Pitt & Groskaufmanis, *supra* note 159, at 1561.

174. "The law currently provides insufficient incentives to engage in such regulation. While a compliance program *may* mitigate sentencing or affect the decision to prosecute, it does not obligate prosecutors or judges to treat corporations more leniently. Thus, the current scheme provides no guaranteed reward for good corporate citizenship." Walsh & Pyrich, *supra* note 160, at 678.

175. *Id.* at 679; Pitt & Groskaufmanis, *supra* note 159, at 1634.

176. Walsh & Pyrich, *supra* note 160, at 680-81 (arguing a compliance program will reduce costs

company to implement a compliance program rather than avoiding certain business transactions altogether. In addition, such a defense would promote the elimination of bribery through more efficient regulation, while providing greater certainty for corporations seeking to comply with the Act's provisions.

## VII. CONCLUSION

Ambiguities in the provisions of the FCPA detract from the Act's effectiveness as a policy tool in combating bribery of foreign officials. The Act's vague statutory construction imposes unnecessary costs on American businesses by creating uncertainty in multinational business transactions. The multiple amendments suggest that the government not only recognizes the impracticability of complying with such vague provisions, but also has changed its view as to what the statute should accomplish. When the FCPA was enacted, the country's political climate that called for the absolute elimination of bribery of government officials, foreign or domestic. However, subsequent amendments show a shift in policy, which now promotes the interests of American businesses competing abroad. In balancing the dual policy concerns (the elimination of bribery and protecting American businesses), costs must not outweigh the benefits. To reduce costs associated with the policy objectives, ambiguities should be clarified. Clarifying the ambiguities within the statute would turn the FCPA into a more effective tool in fighting bribery and could eliminate the unnecessary costs associated with compliance.

*Jennifer Dawn Taylor\**

---

by detecting potential wrongdoing to facilitate prevention, remedying harm before it becomes irreparable, or mitigating any harm that may result). "In the marketplace, public confidence is a precious commodity, and corporate codes can play a vital role in instilling and maintaining this confidence both before and after a dreaded employee defalcation." Pitt & Grokaufmanis, *supra* note 159, at 1636.

\* The author wishes to thank Professor Catherine Rogers for her guidance throughout this endeavor. She has been a continuous source of advice, patience, encouragement, and reassurance, which has been invaluable to the author personally as well as academically.