

1-1-1984

Amending the Foreign Corrupt Practices Act of 1977: Clarifying or Gutting a Law

Bartley A. Brennan

Follow this and additional works at: <http://scholarship.law.nd.edu/jleg>

Recommended Citation

Brennan, Bartley A. (1984) "Amending the Foreign Corrupt Practices Act of 1977: Clarifying or Gutting a Law," *Journal of Legislation*: Vol. 11: Iss. 1, Article 4.

Available at: <http://scholarship.law.nd.edu/jleg/vol11/iss1/4>

This Article is brought to you for free and open access by the Journal of Legislation at NDLScholarship. It has been accepted for inclusion in Journal of Legislation by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

AMENDING THE FOREIGN CORRUPT PRACTICES ACT OF 1977: "CLARIFYING" OR "GUTTING" A LAW?

*Bartley A. Brennan**

S. 708, in my judgment, does its job. It guts the law. Under S. 708, bribery will flourish, foreign governments will be corrupted and free markets will take a back seat.¹

Clarifying the Foreign Corrupt Practices Act may be the most important trade issue before us because it represents a self imposed constraint to exports that comes not from the fact that we have chosen to take a strong stance against international bribery, but because we have done so in a self defeating manner.²

Senate bill 708,³ which sought to amend the Foreign Corrupt Practices Act of 1977 (FCPA),⁴ has evoked intense comment from many sectors of society. In hearings held on S. 708 in May, June, and July of 1981, arguments on whether the FCPA should be amended were set forth forcefully by both the bill's proponents and its opponents.⁵ Few bills of such national and international import have caused such emotional debate. Individual, corporate, and national ethical standards were called into question. Corporate executives, accountants, lawyers, and academicians testified before the Joint Senate Hearings.⁶

This proposal "[t]o amend and clarify the Foreign Corrupt Practices Act of 1977"⁷ has revived a national debate on the ethics of American business. The debate gained momentum in 1976 in hearings on the FCPA.⁸ Approximately 435 corporations voluntarily disclosed to

* Associate Professor, Department of Legal Studies, Bowling Green State University. B.S., Georgetown University, 1963; M.A., Memphis State University, 1974; J.D., College of Law, State University of New York at Buffalo, 1968.

1. *Business Accounting and Foreign Trade Simplification Act: Joint Hearings on S. 708 Before the Subcomm. on Securities and the Subcomm. on International Finance and Monetary Policy of the Senate Comm. on Banking, Housing and Urban Affairs, 97th Cong., 1st Sess. 4 (1981)* (statement of Senator William Proxmire, D-Wis.) [hereinafter cited as *Joint Senate Hearings*].
2. *Id.* at 59 (statement of Ambassador William E. Brock).
3. S. 708, 97th Cong., 1st Sess., 127 CONG. REC. S13983 (daily ed. Nov. 23, 1981). S. 708 has been re-introduced in the 98th Congress as S. 414, 98th Cong., 1st Sess., 129 CONG. REC. S 980 (daily ed. Feb. 3, 1983).
4. 15 U.S.C. §§ 78a, 78m, 78dd-1, 78dd-2, 78ff (1982).
5. See generally *Joint Senate Hearings*, *supra* note 1.
6. *Id.*
7. S. 414, *supra* note 3. This bill is entitled the "Business Accounting and Foreign Trade Simplification Act."
8. *Foreign Payments Disclosure: Hearings on H.R. 15481 and S. 3664 Before the Subcomm. on Consumer Protection and Finance of the House Comm. on Interstate and Foreign Commerce, 94th Cong., 2nd Sess. (1976).*

the Securities and Exchange Commission (SEC) that they had made improper or questionable payments to foreign officials overseas.⁹ A 1976 private study by Opinion Research Corporation concluded:

Bribery, kickbacks, and political payoffs are not just the problems of a few companies whose names have gotten in the media. As this study shows, relatively few people can recall the names of specific companies involved in any alleged wrongdoing. Rather, it is *all* of business that is under public indictment. Most important, the demand for more meaningful disclosure now and in the future fits into segments of society to demand more disclosure about and to put more strictures on almost all aspects of corporate operations—whether it involves advertising, packaging, product safety, discrimination, or the environment. . . .¹⁰

Congress passed the FCPA in 1977.¹¹ In 1981, in response to numerous complaints from the business, accounting, and legal communities, Senator John Chafee (R-R.I.) introduced S. 708 to amend the FCPA.¹² After extensive hearings and minor modifications, S. 708 was passed by the Senate on November 23, 1981.¹³ H.R. 2530, a bill similar to S. 708, was introduced into the House of Representatives but failed to pass.¹⁴ Both bills have been re-introduced in the present session of Congress. Senate bill 708 has been re-designated as Senate bill 414.¹⁵

INTRODUCTION

This article will analyze the FCPA in light of the proposed amend-

9. SECURITIES AND EXCHANGE COMMISSION, REPORT TO THE SENATE BANKING, HOUSING AND URBAN AFFAIRS COMMITTEE, 94TH CONG., 2D SESS., ON QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES (Comm. Print 1976) [hereinafter cited as SEC REPORT].

The bribery of foreign officials and political parties was documented, and led to the downfall of government officials in Japan, the Netherlands, and Korea. (*See Joint Senate Hearings, supra* note 1, at 3 (statement of Senator William Proxmire, D-Wis.)).

10. 24 ORC PUBLIC OPINION INDEX: REPORT TO MANAGEMENT 80146 (June, 1976) (emphasis in original). This survey was part of a continuing confidential study of basic opinions about issues affecting business. Results were based on telephone interviews with a national probability sample of 1,016 persons of ages 18 or over, conducted between May 20 and May 23, 1976. Opinion Research Corporation recommended to its business clients that "considering the current climate of public opinion, all corporations, big and small, on their own through their associations, might well get ahead of the game by meshing their own efforts to define and control internal ethics with any proposed action ultimately undertaken by government. Failure to do so could be very costly in the long run." *Id.*
11. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (1977). Congressional action was completed Dec. 6, 1977, 123 CONG. REC. 38603 (1977) (codified at 15 U.S.C. §§ 78m, 78ff, and 78dd-1 to -2 (1982)), and President Carter signed the FCPA into law Dec. 19, 1977, 13 WEEKLY COMP. PRES. DOC. 1909 (1977).
12. 127 CONG. REC. S2126 (daily ed. Mar. 12, 1976).
13. S. 708, *supra* note 3.
14. 127 CONG. REC. H4500 (daily ed. July 16, 1981). H.R. 2530 was not reported out of committee.
15. S. 414, *supra* note 3. A bill similar to H.R. 2530 has been introduced into the House of Representatives recently: Representative Mica, D-Fla., sponsored H.R. 2157, 98th Cong., 1st Sess., 129 CONG. REC. E1127 (daily ed. Mar. 17, 1983) [hereinafter cited as Mica bill]. In addition, Representative Timothy Wirth, D-Colo., sponsored H.R. 2754, 98th Cong., 1st Sess., 129 CONG. REC. H2369 (daily ed. Apr. 26, 1983) [hereinafter cited as Wirth bill].

ments to the Act as set out in S. 414 and in two other major proposals, H.R. 2157¹⁶ (Mica bill) introduced by Representative Daniel Mica (D-Fla.) and H.R. 2754 (Wirth bill)¹⁷ introduced by Representative Timothy E. Wirth (D-Colo.). It will then examine the potential legal, economic, and ethical implications of the proposed amendments for the business community and the nation. The accounting and anti-bribery sections of the FCPA will be analyzed first in light of the criticism to which they have been subject since passage. Second, the proposed amendments to both sections will be examined for their impact on the business community and on the nation. Third, the article will raise several important policy issues which, if not addressed by the drafters of the proposed amendments, would "gut" the FCPA.

While amending the FCPA may cause the business community to experience a short-term relaxation of prohibitions, these relaxed standards may soon be replaced by a more stringent version of the FCPA, especially in light of recent reports noting alleged violations of the Act by IT&T and Ashland Oil.¹⁸ This article concludes that S. 414 and the Mica bill could be perceived by the business community and the American public as seriously weakening, if not "gutting", the FCPA. This perception is enhanced when the chief of the SEC's Enforcement Division lists the FCPA as "19th out of 21" in terms of the division's enforcement priorities.¹⁹ Furthermore, the recent elimination of the Multi-National Branch of the Criminal Fraud Division of the Department of Justice,²⁰ which reviewed hundreds of cases for criminal prosecution prior to 1981, gives reason to question whether the Act is being seriously enforced.²¹ In its conclusion, this article offers substantial proposals for legislative reform of the FCPA.

THE FOREIGN CORRUPT PRACTICES ACT OF 1977

Accounting Sections

The accounting provisions of the FCPA²² amended section 13(b) of

16. Mica bill, *supra* note 15.

17. Wirth bill, *supra* note 15.

18. See *Ashland Payments on Oil Questioned*, N.Y. Times, July 12, 1983, at 1, col. 1; *Analysis of IT&T's Report Shows Problems in Halting Questionable Foreign Payments*, N.Y. Times, June 3, 1982, at 19, col. 2.

19. Hudson, *SEC's Enforcer Runs Tight Ship, But Critics Charge He's Too Soft*, Wall St. J., June 28, 1983, at 1, col. 1.

20. In September, 1982, the Multi-National Branch and three other branches of the Criminal Division of the Department of Justice were reorganized into a general Fraud Section of the Criminal Division.

21. As of February, 1982, three prosecutors were working full-time and five were working part-time on FCPA cases. Only 14 cases remained open, and nine were thought to be prosecutable. See Jackson, *Overseas Bribery Gets a Lot Less Attention After Cutbacks by the Justice Department*, Wall St. J., February 22, 1983, at 33, col. 4.

22. Section 102 of the FCPA, 15 U.S.C. § 78m(b)(2) (1982) states:

Every issuer . . . shall—

(A) make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer; and

the Securities Exchange Act of 1934 (Exchange Act).²³ The record keeping provision²⁴ of the statute requires that every company registered under the Exchange Act, whether or not it does business internationally, maintain a system of accounting controls which will provide reasonable assurances that a company's records "accurately and fairly reflect its transactions"²⁵ and the disposition of its assets. The accounting control provisions require that each company covered by the FCPA have internal controls sufficient to provide "reasonable assurance[s]" that certain objectives will be met.²⁶ Wilful violation of these provisions by registrants or any person involved in the direction or management of a corporation is punishable under the Exchange Act.²⁷ Punishment may include a fine of up to \$10,000 and/or imprisonment for up to five years, or a Securities and Exchange Commission (SEC) civil enforcement action.²⁸ The SEC jointly administers the Act with the Department of Justice and has the power to recommend criminal prosecution or to bring a civil action. The threshold basis of liability for civil injunctive actions brought to enforce the FCPA is a negligence standard. Liability under the FCPA will result if one's actions deviate from what is expected of a "reasonably prudent business person."²⁹ In

(B) devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that—

- (i) transactions are executed in accordance with management's general or specific authorization;
- (ii) transactions are recorded as necessary (I) to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and (II) to maintain accountability for assets;
- (iii) access to assets is permitted only in accordance with management's general or specific authorization; and
- (iv) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.

23. 15 U.S.C. § 78m(b) (1982).

24. *Id.* § 78m (1982).

25. *Id.* § 78m(b)(2)(A) (1982).

26. *Id.*

27. *Id.* § 78ff(a) (1982).

28. *Id.*

29. See *Foreign Corrupt Practice Act—Oversight: Hearings Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the Comm. on Energy and Commerce, House of Representatives, 97th Cong., 1st and 2d Sess. (1981 & 1982)* [hereinafter cited as *House Subcommittee Hearings*].

Chairman Shad of the SEC, in response to the House Subcommittee request, stated that as of November, 1981, it had brought sixteen enforcement actions, all of which were civil. They included fifteen injunctive actions and one administrative action. Included in these enforcement actions were ten defendants or respondents who consented to settlements without denying or admitting guilt. Three of the injunctive actions were still pending. Violations of the FCPA accounting provisions were encountered in connection with SEC inquiries into violation of the anti-fraud provision, periodic reporting requirements, and proxy provisions of the Exchange Act, specifically sections 10(b), 13(a) and 14(a). The amount involved ranged from \$110,000 to \$23,000,000. The cases involved improper accounting in four categories of conduct: (1) questionable or illegal corporate payments; (2) exaggeration of the company sales and assets, or the failure to have adequate records; (3) misappropriation or diversion of corporate assets in cases not involving questionable or illegal payments; and (4) unauthorized management prerequisites. *Id.* at 124.

In *Aaron v. SEC*, 446 U.S. 680 (1980), the United States Supreme Court criticized this standard, and held that the SEC is required to establish a *scienter* standard for instances in which companies had failed to disclose questionable payments made domestically or abroad.

1974 the SEC determined that non-disclosure of any illegal or questionable payments abroad is material to investors because such payments affect a corporation's managerial integrity.³⁰ The SEC instituted a voluntary disclosure program based on its claim of material nondisclosure and submitted a report to Congress making recommendations which were later included in the accounting section of the FCPA.³¹ The SEC then promulgated rules and provided guidelines for those corporations subject to the FCPA.³²

Critique of the Accounting Provisions

The major criticisms of the accounting provisions of the FCPA fall into three categories: (1) the cost of compliance due to the vagueness of the standards in the record keeping and disclosure section; (2) the lack of a materiality standard as to what must be disclosed; and (3) criminal penalties for failure to meet record keeping and accounting control provisions.

In order to determine the validity of these criticisms, Congress requested that the General Accounting Office (GAO) undertake a study of corporations subject to the FCPA.³³ When companies were asked whether the cost of compliance outweighed the benefits received, 56.4% responded in the affirmative.³⁴ Of that group, when asked to determine to what extent this non-benefit cost increased the overall cost of accounting, 27.8% responded, to "little or no extent," 49.5% to "some extent," 13.4% to a "moderate extent," 4.1% to a "great extent," and 5.2% to a "very great extent."³⁵

The lack of a materiality standard regarding what must be disclosed under the FCPA has led to confusion in the business and legal communities. The American Bar Association Committee on Corporate Law

30. The SEC undertook the monitoring of questionable payments in 1974 based solely on its authority under federal securities laws to require disclosure of "material" information. While several Federal Circuit Courts of Appeals have supported the SEC enforcement staff's broad interpretation of "materiality," see, e.g., *Weisberg v. Coastal States Gas Corp.*, 609 F.2d 650 (2nd Cir. 1979), *cert. denied*, 445 U.S. 1951 (1980), others have rejected the SEC's view on the materiality of questionable payments, see, e.g., *Gaines v. Haughton*, 645 F.2d 761 (9th Cir. 1981), *cert. denied*, 454 U.S. 1145 (1982).

31. See SEC REPORT, *supra* note 9.

32. See Securities and Exchange Commission Release No. 34-14 478 (February 16, 1978), 43 Fed. Reg. 7752 (February 24, 1978), 14 SEC Docket 4 (February 28, 1978) (informing issuers of the substance of the FCPA, and noting that "legality or illegality of a particular transaction is one of the factors that must be assessed in determining its materiality [for disclosure purposes]"). *Id.* at 7753.

33. See UNITED STATES GENERAL ACCOUNTING OFFICE, IMPACT OF FOREIGN CORRUPT PRACTICES ACT ON U.S. BUSINESS: REPORT TO THE CONGRESS (1981) [hereinafter cited as GAO REPORT].

34. *Id.* at 58.

35. *Id.* at 58, 59. See *Joint Senate Hearings*, *supra* note 1, at 166 (testimony of Mr. John Subak, Group Vice President and General Counsel, Rohn and Haar Co.); *but cf. id.* at 452 (statement of John C. Burton, Professor of Accounting and Finance, Graduate School of Business, Columbia University). See also *House Subcommittee Hearings*, *supra* note 29, 1st & 2nd Sess. 176 (1981 & 1982) (testimony of SEC Chairman Shad) (discussing whether these costs are front end costs or continuing costs due to the degree of detail required by "the reasonable detail standard").

and Accounting concluded that, based on the legislative history of the FCPA, a "materiality standard" existed.³⁶ The SEC, however, concluded that Congress intended that a "reasonableness standard" be used in reviewing cases brought under the FCPA.³⁷ The GAO, on the other hand, has recommended that a "materiality standard" *not* be adopted by Congress.³⁸ The GAO concluded that the adoption of such a standard would weaken the intent of the accounting provisions of the FCPA.³⁹ It argued that while "materiality" is geared to disclosure for investors, it is not appropriate for assessing the adequacy of internal accounting.⁴⁰ The GAO pointed out that the FCPA seeks to provide disclosure not for the purpose of investor knowledge but to prevent bribery.⁴¹

A third criticism of the accounting provisions of the FCPA⁴² has been the imposition of criminal penalties for technical or insignificant errors.⁴³ The SEC has stated that it would recommend criminal prosecution "only in the most serious and egregious cases."⁴⁴ However, because of the discretionary and often subjective nature of such a judgment, the business community has argued for decriminalization.⁴⁵

Anti-Bribery Section

In addition to the accounting provisions of the FCPA which mandate disclosure of questionable or illegal payments, Congress has also prohibited the bribery of any foreign official.⁴⁶ Section 78dd-1(a) of the FCPA provides:

It shall be unlawful for any issuer . . . officer, director, employee, or agent of such issuer or any stockholder thereof acting on behalf of such issuer, to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value⁴⁷

In passing the FCPA, Congress sought to obtain the "broadest" possible application of the Act to international business by incorporating the language of the domestic mail fraud statute.⁴⁸ The Supreme Court has interpreted this statute liberally, stating that it must be suf-

36. GAO REPORT, *supra* note 33, at 19, 25-26.

37. *Id.* at 19, 26-27.

38. *Id.* at 28.

39. *Id.* at 30.

40. *Id.* at 28, 30.

41. *Id.*

42. Hudson, *supra* note 19.

43. GAO REPORT, *supra* note 33, at 31-33.

44. *Id.* at 71.

45. See *Joint Senate Hearings, supra* note 1, at 141 (testimony of R. McNeil).

46. Act of Dec. 19, 1977, Pub. L. No. 95-213, § 30A(a), 91 Stat. 1494, 1495 (codified at 15 U.S.C. § 78dd-1 (1982)).

47. 15 U.S.C. § 78dd-1 (1982).

48. 18 U.S.C. § 1341 (1976).

ficiently flexible to reach "new" fraud not yet identified.⁴⁹

Section 30A(a)3 of the FCPA defines the requisite intent necessary for a violation under the Act:

[A]ny person, while knowing or *having reason to know* that *all or a portion* of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office⁵⁰

The intent required to commit a crime is most important from the viewpoint of prosecutorial discretion. In addition, it is important to corporate counsel who wish to advise their clients on the legality of participating in a particular international transaction.

In order to determine whether there has been a violation under the FCPA, it is necessary to know how the term "foreign official" is defined within the Act. The Act defines "foreign official" as "any officer or employee of a foreign government, or any department, agency or instrumentality thereof, or any person acting in an official capacity for or on behalf of any such government or department, agency or instrumentality."⁵¹ The FCPA excludes persons who perform essentially ministerial duties and explicitly allows "facilitating" or "grease" payments.⁵² These payments are not made to obtain or retain business, but merely to expedite a business activity in which the ministerial level employee is already employed. An example is the payment of thirty dollars to a customs official to move paperwork along so that a shipment of non-durable goods can be unloaded quickly. Many foreign governments permit such facilitating payments even though they are illegal in the United States and several foreign countries.⁵³ The anti-bribery section of the FCPA applies to: (1) issuers "of domestic concerns"; (2) officers; (3) directors; (4) employees; (5) agents; and (6) some stockholders of issuers of domestic concerns.⁵⁴ All "domestic concerns" includes both SEC registrants and non-registrants.⁵⁵

Critique of the Anti-Bribery Section

Corporate and government officials, as well as academicians and lawyers, have criticized the bribery sections of the FCPA for vaguely defining what constitutes compliance.⁵⁶ Some commentators have suggested that this vagueness has forced American corporations to forego

49. See *United States v. Maze*, 414 U.S. 395, 405-06 (1974).

50. Act of Dec. 19, 1977, Pub. L. No. 95-213, § 30A(a)3, 91 Stat. 1494, 1495 (codified at 15 U.S.C. § 78dd-1(a)(3) (1982)) (emphasis added).

51. 15 U.S.C. §§ 78dd-1(b), 78dd-2(d)(2) (1982).

52. *Id.*

53. See Comment, *The Foreign Corrupt Practices Act of 1977: A Solution or a Problem?* 11 CAL. W. INT'L L.J. 111, 131 (1981).

54. 15 U.S.C. § 78dd-2(c) (1982).

55. *Id.* § 78dd-2(d)(1) (1982).

56. See generally *Joint Senate Hearings*, *supra* note 1. See also H. WEISBERG AND E. REICHENBERG, *THE PRICE OF AMBIGUITY* 13 (1981).

business opportunities abroad for fear of violating the FCPA and incurring its stiff criminal sanctions.⁵⁷

In its study of the FCPA, the General Accounting Office found that of "the 30% of our respondents who reported that the Act had caused a decrease in their overseas business, approximately 70% rated the clarity of at least one of the anti-bribery provisions as inadequate or very inadequate."⁵⁸ The major ambiguities perceived by the respondents in FCPA antibribery provisions were:

- 1) the degree of responsibility a company has for the actions of the foreign agents;
- 2) the definition of the term "foreign official";
- 3) whether a payment is a bribe (illegal under the FCPA) or a "facilitating payment" (legal under the FCPA); and
- 4) the dual jurisdiction of the SEC and Department of Justice.⁵⁹

"Reason to Know" Provisions

Almost fifty percent of the respondents surveyed by the GAO found this language either "very inadequate" or "marginally inadequate."⁶⁰ Lawyers and legal scholars have continued to argue that a "reason to know" standard increases the potential liability of a company and its officers for the acts of foreign agents or more closely affiliated third parties even if the company is unable to monitor or control their conduct. Several recurring questions have been asked. What does "reason to know" mean? Is reason to know something less than full actual knowledge? If so, how much less, and should it be used in prosecution of criminal conduct?⁶¹ Those favoring the language as it stands under the FCPA point out that "reason to know" language exists in twenty-nine provisions of other federal laws.⁶² An analysis of these provisions, however, shows that thirteen of the twenty-nine provisions are civil or administrative statutes as contrasted with the FCPA, a criminal statute that provides for up to five years imprisonment.⁶³ The remaining provisions fall into areas relating to federal safety standards or other types of regulatory procedures. Furthermore, "reason to know" language is included in eight provisions of the criminal code which may be replaced by the proposed Federal Criminal Code revisions.⁶⁴

57. *Id.*

58. See GAO REPORT, *supra* note 33, at 38, 59. It should be noted that 67.7% of the respondents stated that the FCPA had little or no impact on business. None were of the opinion that the FCPA had a positive impact on their business.

59. GAO REPORT, *supra* note 33, at 38.

60. GAO REPORT, *supra* note 33, at 60.

61. See Hibey, *The Practical Necessity for Amendment of the Foreign Corrupt Practices Act*, 10 HOFSTRA L.R. 1121 (1981-82).

62. See *Joint Senate Hearings*, *supra* note 1, at 416 (testimony of W. Dobrovir).

63. 15 U.S.C. § 78ff(c) (1982).

64. See Memo from Deputy Attorney General Schmults to Staff of House Energy and Commerce Committees (July 26, 1982) [hereinafter cited as Schmults Memo]. Mr. Schmults discussed recent proposals to revise the federal criminal code. In notes six through nine, the memo cites all provisions in which reason to know language is included. See also Fedders,

Perhaps the most significant problem is that no precedent exists interpreting the "reason to know" language of the FCPA. In addition, because both the Department of Justice and the SEC have joint enforcement authority, a question has been raised as to whether the agencies have the same interpretation of the "reason to know" language. Despite President Carter's announcement that the Department of Justice would "provide guidance" to the business community, the Department and the SEC have not responded enthusiastically.⁶⁵ A related concern stems from parallel investigations, wherein the Department of Justice is pursuing a criminal investigation before an impanelled grand jury and the SEC staff is conducting a civil investigation. Should corporate counsel advise their clients to remain silent pursuant to the 5th Amendment⁶⁶ and prevent the SEC from engaging in document discovery because of the possible implications in a criminal proceeding? In doing so, will a client be biased in a civil proceeding? In *Dresser v. United States*,⁶⁷ the court held that parallel investigations by the SEC and Department of Justice may be conducted as long as they are independent and legally authorized.⁶⁸

Definition of a "Foreign Official"

The FCPA focuses on the recipient of a facilitating payment, not on

The "Reason to Know" Standard—A Troublesome Ambiguity in the U.S. Foreign Corrupt Practices Act, 4 MIDDLE EAST EXECUTIVE REPORTS 2, 20 & n.14 (July, 1981) which lists the provisions; R. BECKLER, A. LEVENSON & R. SHINE, *THE NEW REVIEW PROCEDURE UNDER THE FOREIGN CORRUPT PRACTICES ACT II 105-08* (1980) which lists and describes the provisions.

65. On September 26, 1978, President Carter announced that he was directing the Department of Justice to "provide guidance to the business community concerning its enforcement priorities under the recently enacted foreign anti-bribery statute." President's Statement on United States Export Policy, 14 WEEKLY COMP. PRES. DOC. 1631, 1633 (Sept. 26, 1978). The Department of Justice, however, responded negatively, stating "all they (businessmen) want to know is who they can bribe and who they can't. Well, we're not going to tell them—we'll go down kicking and screaming on this one." Berry, *Justice is Reluctant Guide On New Bribe Legislation*, Wash. Post, Oct. 10, 1978, at D7, col. 2. The Department of Justice reiterated this view in hearings on S. 708, the Business Accounting and Foreign Trade Simplification Act, adding, however, that if the law required guidelines, it would issue them. See *Joint Senate Hearings*, supra note 1, at 77-78 (statement of E.C. Schmults, Deputy Attorney General); S. 708, supra note 3, § 8, provides for the issuance of guidelines by an interagency task force. The Department of Justice created the FCPA Review Procedure in March, 1980. The procedure has been criticized because it permits the Justice Department to use the information, submitted by advice-seeking companies, in the Department's subsequent prosecutions for violations of the FCPA. See generally Surrey & Popkin, *An Exercise in Non-Guidance: The Foreign Corrupt Practices Act Review Procedure*, 3 MID. E. EXECUTIVE REP. 3 (May, 1980). See also GAO REPORT, supra note 27.
66. U.S. CONST. amend. V.
67. 628 F.2d 1368 (D.C. Cir. 1980) (en banc) cert. denied, 449 U.S. 993 (1980). See Hibey, supra note 61, for an analysis of these issues.
68. *Dresser*, 628 F.2d at 1377. See Timmeny, *SEC Enforcement of the Foreign Corrupt Practices Act*, 2 LOY. L.A. INT'L & COMP. L. ANN. 25 (1979). Wallace L. Timmeny, former Deputy Director of the SEC Division of Enforcement, promotes the theory that doing business in certain unspecified foreign countries where corruption was known to be commonplace would constitute a "red flag" warning that any payment to a local agent might involve a bribe and, thereby, require that a U.S. entity conduct a far-reaching investigation prior to engaging the agent in order to avoid a charge of negligent, or even reckless, violation of the FCPA.

the purpose for which the payment is made. It defines "foreign official" as any officer or employee of a foreign government or one of its departments, agencies, or instrumentalities.⁶⁹ This definition expressly excludes any employee whose duties are "essentially ministerial or clerical."⁷⁰ This definition implies that employees who are excluded can legally receive "facilitating payments."⁷¹ Corporate officials have frequently complained that this language is unclear. Are employees of a publicly held nationalized corporation considered "foreign officials"? Is an official or member of a family residing in a foreign country who is also involved in the private sector a "foreign official"? How should the law treat individuals who simultaneously hold positions in both government and business? Can an excluded "ministerial or clerical" employee be paid a "facilitating payment" to use his influence to induce a "foreign official" to act as long as the clerical employee does not pay the official from funds received from a United States corporation?

Corrupt Payments

The FCPA proscribes only "corrupt" payments. The legislative history of the FCPA defines a corrupt payment as one made "to induce the recipient to misuse his official position in order to wrongfully direct business to the payor or his client" and requires an "evil motive or purpose."⁷² Because ministerial employees are excluded from the definition of foreign official, it is clear the FCPA was not intended to proscribe grease or facilitating payments.⁷³ Moreover, social gifts or routine expenditures for marketing products are lawful. However, consistent complaints about enforcement officials' interpretation have led to requests for a congressional clarification of the statute.⁷⁴

Facilitating Payments

Despite the apparently clear legislative intent that facilitating payments to ministerial or clerical employees not be proscribed, thirty-eight percent of those responding to the GAO questionnaire rated the

69. 15 U.S.C. § 78-2(d) (1982).

70. *Id.* §§ 78dd-1(b), 78dd-2(d)(2) (1982).

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

72. *Id.*; H.R. REP. NO. 640, 95th Cong., 1st Sess. 8 (1977).

73. S. REP. NO. 114, *supra* note 71, at 10, *reprinted at* 4108. The Senate Banking Committee Report stated:

The statute covers payments made to foreign officials for the purpose of obtaining business or influencing legislation or regulations. The statute does not, therefore, cover so-called 'grease payments' such as payments for expediting shipments through customs or placing a transatlantic telephone call, securing required permits, or obtaining adequate police protection, transactions which may involve even the proper performance of duties.

The importance of the corrupt intent requirement is discussed at length in Elden and Sableman, *Negligence Is Not Corruption: The Scierter Requirement of the Foreign Corrupt Practices Act*, 49 GEO. WASH. L. REV. 819 (1981).

74. *Joint Senate Hearings, supra* note 1, at 154 (testimony of R. McNeil); *id.* at 265 (testimony of M. Feldman).

clarity of the provisions inadequate.⁷⁵ The dilemma raised is that a large corrupt payment to an official with "ministerial" duties may *not* be prohibited while a small payment to expedite customs papers may be prohibited if made to a senior "official."⁷⁶ Furthermore, middle-level employees of American corporations do not fully understand what constitutes a facilitating payment. The decision to make such a payment must often be made quickly because hesitation might cause a delay in transportation or unloading.

A related problem is the lack of uniformity among nations regarding the propriety of facilitating payments.⁷⁷ While a foreign agent may legally receive such a payment under the law of his country, the American corporation making the payment may be violating the FCPA.

PROPOSED AMENDMENTS TO THE FCPA

Introduction

This section will analyze Senate bill 414⁷⁸ and other legislative proposals which would amend the Foreign Corrupt Practices Act. This analysis will focus primarily on S. 414⁷⁹ which contains detailed proposals to amend the FCPA. Two additional bills to amend the FCPA are those introduced by Representative Daniel Mica⁸⁰ (D-Fla.) (Mica bill) and Representative Timothy Wirth⁸¹ (D-Col.) (Wirth bill). The Mica bill adopts much of the S. 414 but offers important modifications. The Wirth bill would slightly modify the FCPA. These proposed bills would amend the FCPA in four substantive areas: (1) title and jurisdiction; (2) accounting and record keeping; (3) bribery proscriptions; and (4) the recommendation suggesting that the executive branch seek an international agreement on bribery.

Proposed Amendments to Title and Jurisdictional Provisions

Senate bill 414 would retitle the Foreign Corrupt Practices Act as the "Business Practices and Records Act."⁸² This change would reflect the fact that the FCPA applies to all entities whether or not they participate in international business.⁸³ Additionally, it "removes the implication of wrongdoing embodied in the former title."⁸⁴ This change brought a sharp response from critics of S. 414. Congressman Timothy

75. GAO REPORT, *supra* note 33, at 60.

76. GAO REPORT, *supra* note 33, at 41.

77. See Comment, *supra* note 53, at 129-31, for a list of countries including France, Switzerland, Jordan, El Salvador, and Saudi Arabia which prohibit facilitating payments.

78. S. 708, 97th Cong., 1st Sess., 127 CONG. REC. S2148 (daily ed. Mar. 12, 1981). This bill was re-introduced in Congress as S. 414. See S. 414, *supra* note 3.

79. S. 414, *supra* note 3.

80. Mica bill, *supra* note 15.

81. Wirth bill, *supra* note 15.

82. S. 414, *supra* note 3, § 3. This bill would change the name of the Foreign Corrupt Practices Act (FCPA) to the Business Practices and Records Act (BPRA).

83. 15 U.S.C. § 78dd-2 (1982).

84. See S. REP. NO. 209, 97th Cong., 1st Sess. 11 (1981).

Wirth (D-Col.) stated: “[b]eginning with the change in the name of the law, S. 708 [S. 414’s predecessor] would in my view send the message that the United States Government was unconcerned about bribery—even to the extent that corruption would be called by another name.”⁸⁵ Because this provision does not go to the substance of the bill, it is an unnecessary change which could send wrong signals to those who would interpret this as a change of congressional intent.

The Mica bill was introduced to amend the Export Administration Act of 1979.⁸⁶ If enacted it would retitle the FCPA the “Foreign Trade Practices Act of 1983.”⁸⁷ This change would emphasize the Act’s role in seeking restrictions on a limited number of activities of businesses involved in international trade.

Senate bill 414 would give the Department of Justice sole jurisdiction to enforce the anti-bribery provisions of the Act and subpoena power to conduct civil investigations.⁸⁸ The FCPA has a dual jurisdiction provision whereby both the Department of Justice⁸⁹ and the SEC⁹⁰ have authority to conduct investigations. Disagreement by these agencies over interpretation of the bribery provisions has led businessmen and lawyers to complain that both the content and the standards used for enforcement are unclear and ambiguous.⁹¹ Under S. 414, the SEC would have sole authority to enforce the accounting provision.⁹² Additionally the Department of Justice would be required to issue guidelines and render advisory opinions which would be final and not subject to disclosure under the Freedom of Information Act.⁹³

The Mica bill would transfer jurisdiction over the Act’s bribery provision to the Secretary of Commerce.⁹⁴ In addition, it would vest authority in the Secretary with the concurrence of the Attorney General, to provide enforcement guidelines and issue limited advisory opinions.⁹⁵ As in S. 414, such opinions would be final and not subject to Freedom of Information Act disclosure.⁹⁶ When first introduced, the Mica bill transferred the accounting provision to the Secretary of Commerce. However, when referred to committee, this section was removed and the SEC retained authority over the accounting provision.

85. Letter from Representative Timothy E. Wirth, D-Colo., to Senator John H. Chafee, R-R.I., (Dec. 14, 1982) [hereinafter cited as Letter of Wirth]. See *Signs of Compromise Seen in Effort to Narrow FCPA*, Legal Times, Jan. 10, 1983, at 2, col. 1.

86. 50 U.S.C. app. §§ 2401-2420 (Supp. V 1981).

87. Mica bill, *supra* note 15.

88. S. 414, *supra* note 3, §§ 5(b), 7 (1983). See also 127 CONG. REC. S2150-51 (daily ed. Mar. 12, 1981) for an explanation of some of these sections when the original bill, S. 708, was introduced.

89. 15 U.S.C. §§ 78(a), 78dd-2(c) (1982).

90. See S. REP. NO. 114, 95th Cong., 1st Sess. 11 (1977), reprinted in 1977 U.S. CODE CONG. & AD. NEWS 4098, 4109.

91. See GAO REPORT, *supra* note 33, app. IV, V.

92. S. 414, *supra* note 3, § 4.

93. S. 414, *supra* note 3, § 8.

94. Mica bill, *supra* note 15, § 8A(c).

95. Mica bill, *supra* note 15, § 8A(d).

96. *Id.*

The Mica bill meets a jurisdictional concern of the export business community which has criticized the dual authority of the Department of Justice and the SEC under the FCPA. Because, as some commentators have suggested, the Department of Commerce was set up to serve the interests of the business community, the Department may be perceived as being more susceptible to drafting less restrictive guidelines for conduct to be referred to the Justice Department for prosecution under the anti-bribery provisions of the Mica bill. If enacted, the Mica bill would be perceived as lacking serious intent to prohibit improper and illegal acts overseas by American corporations. It would require the Secretary of Commerce to recommend the prosecution of American businesses and would thus present a serious conflict of interest for the Secretary.

Impact of Proposed Amendments on FCPA's Accounting Provisions

Senate bill 414 retains the FCPA requirements that business maintain accurate records and internal accounting controls. The bill integrates these requirements by tying each to a concept of "reasonableness." It retains the "reasonable detail," "reasonable assurance," and "accurate and fair" language of the FCPA, and defines each of these terms.⁹⁷ S. 414 would define the "reasonable detail" standard as requiring sufficient detail "to permit preparation of financial statements in conformity with generally accepted accounting fundamentals. . . ."⁹⁸ Moreover, S. 414 defines "reasonable detail" and "reasonable assurance" as "such level of detail and degree of assurance as would satisfy prudent individuals in the conduct of their own affairs, having in mind a comparison between benefits to be obtained and cost incurred in obtaining such benefits."⁹⁹ Such language would allow for a good faith defense. However, a difficulty arises in using cost-benefit analysis as a measurement technique. What is to be included in such an analysis? Will only quantitative factors be included, or will qualitative and equity factors also be involved?¹⁰⁰

Senate bill 414 does not include a "materiality standard" as originally proposed in Senate bill 708.¹⁰¹ S. 414, as passed by the Senate, would impose liability if disclosure lacked sufficient detail to satisfy the "prudent individual" standard.¹⁰² This standard was proposed to allay accountants' fears that liability would be imposed for relatively minor omissions in disclosure requirements under S. 414.¹⁰³

97. S. 414, *supra* note 3, § 6.

98. S. 414, *supra* note 3, § 4(a).

99. S. 414, *supra* note 3, § 6.

100. See B. Shaw and A. Wolfe, *A Legal and Ethical Critique of the Use of Cost-Benefit Analysis in Public Law*, 19 Hous. L. Rev. 899 (1982).

101. S. 708, *supra* note 3.

102. S. 414, *supra* note 3, § 6.

103. See 127 CONG. REC. S13972 (daily ed. Nov. 23, 1981) (statement of Senator John Heinz, R-Pa.).

Senate bill 414 also incorporates an intent standard within the record keeping provision. Issuers will only be liable for "knowingly" failing to prepare and maintain records in "reasonable detail."¹⁰⁴ This bill would raise the standard of proof for prosecution in foreign bribery cases¹⁰⁵ in an attempt to alleviate the fears of issuers of securities that inadvertent or innocent errors might lead to criminal prosecution.¹⁰⁶ It does not, however, allow companies to look the other way and thereby exempt themselves from the requirements of the accounting provisions. This intent standard would place a higher burden of proof on the SEC when bringing charges. In addition, the cost of internal accounting controls would be decreased.

Furthermore, S. 414 would require an SEC reporting company holding more than fifty percent of the voting stock of a domestic or foreign corporation to make a "good faith" effort to influence the firm to comply with the bill's accounting provisions.¹⁰⁷ The FCPA has been criticized for failing to define a parent corporation's liability for violations by a subsidiary. Under S. 414, it would be presumed that a parent corporation had complied by making a good faith effort to use such influence.¹⁰⁸

The Mica bill would impact on the accounting standards of the FCPA in a manner similar to S. 414. The Mica bill would require publicly held companies to maintain accounting controls sufficient to demonstrate compliance with all provisions of the bill and to meet generally accepted accounting standards.¹⁰⁹ Persons failing to comply with these requirements would be protected from criminal prosecution unless they knowingly circumvented such internal controls. Violators would also be protected from civil injunctions as long as they could demonstrate that they had made a good faith attempt to comply.¹¹⁰

The FCPA accounting provision would be so weakened by the Mica bill and S. 414 that it is unlikely that any civil or criminal actions would ever be brought. The burden of proof on the government would

104. S. 414, *supra* note 3, § 4(b).

105. S. 414, *supra* note 3, § 5.

106. *See Joint Senate Hearings, supra* note 1, at 361 (testimony of R. Hills).

107. S. 414, *supra* note 3, § 4(b).

108. The Senate Report for the FCPA notes that a U.S. company which ignores bribes made by its foreign subsidiary in order to raise "ignorance" as a defense to the charge of bribery, *could be* violating the FCPA's strict accounting controls. The argument runs that under the accounting section (15 U.S.C. § 78m(b)(2) (1982)) "no off-the-books accounting fund could be lawfully maintained, either by a U.S. parent or by a foreign subsidiary. . . ." S. REP. NO. 114, *supra* note 71, *reprinted at* 4109. Although this view only touches the narrow case of a U.S. parent and a foreign subsidiary, the committee clearly recognized that the bill would not cover cases "where there is no *nexus with U.S. interstate commerce*." *Id.* (emphasis added). Using this as a test for liability, it then follows that the legislative proscription should include a domestic parent corporation with domestic (or foreign) subsidiaries, only where the proper scienter was involved. Thus, where good faith efforts destroy this culpability, compliance should be presumed.

109. Mica bill, *supra* note 15, § 8A(e).

110. Mica bill, *supra* note 15, § 8A(e)(3)(A).

be insurmountable.¹¹¹ These amendments would again open the door to the non-disclosure violations which precipitated the passage of the Foreign Corrupt Practices Act in 1977.

The Wirth bill would define the terms "reasonable assurance" and "reasonable detail" as used in the FCPA by using the term "reasonable" to mean that which would "satisfy a prudent individual in business in a like position under similar circumstances, and having in mind a comparison between benefits to be obtained and costs to be incurred in obtaining such benefits."¹¹² The approach of the Wirth bill is to add legislative definition to the present FCPA accounting standards. However, the bill fails to delineate the variables which would be included in a cost-benefit analysis. In addition, the Wirth bill would require SEC reporting companies with a controlling interest in a domestic or foreign corporation to use their influence to encourage such firms to comply with the FCPA standards.¹¹³ Any corporation which holds less than twenty percent of the voting securities of another corporation would be rebuttably presumed not to control that corporation and thus a good faith defense would be available to it.¹¹⁴

Impact of Proposed Amendments on Anti-Bribery Provisions of the FCPA

The central focus of S. 414 is to clarify ambiguities in the FCPA which have caused anxiety among businessmen and corporate counsel.¹¹⁵ However, it retains the view that the principal goal of the FCPA—to prevent United States corporations from bribing foreign officials—is a worthwhile goal which should be pursued.¹¹⁶ To this end it proposes five changes in the FCPA. First, S. 414 and the Mica bill would remove the "reason to know" standard for liability under the FCPA and substitute the following language:

It shall be unlawful for any domestic concern, or any officer, director or employee, or shareholder thereof acting on behalf of such domestic concern to make use of the mails or any means or instrumentality of interstate commerce *corruptly to direct or authorize, expressly or by a course of conduct*, a third party in furtherance of a payment, gift, offer, or promise of anything of value to a foreign official.¹¹⁷

Second, S. 414 excludes from liability and explicitly allows extraterritorial payments for the following five purposes:

- (1) any facilitating or expediting payment to a foreign official the

111. See *Joint Senate Hearings*, *supra* note 1, at 460 (statement of J. Burton).

112. Wirth bill, *supra* note 15, § 1(4).

113. Wirth bill, *supra* note 15, § 1(5).

114. *Id.*

115. See *Joint Senate Hearings*, *supra* note 1, at 75 (testimony of E. Schmults).

116. See S. REP. NO. 209, *supra* note 84, at 12.

117. S. 414, *supra* note 3, § 5(b) (emphasis added). See also Mica bill, *supra* note 15, § 8A(a), which would amend the Export Administration Act of 1981, 50 U.S.C. §§ 2401-2420 (1976 & Supp. V 1981).

purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official;

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

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

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

(5) any ordinary expenditures, including travel and lodging expenses, associated with the performance of a contract with a foreign government or agency thereof.¹¹⁸

Third, S. 414 would consolidate enforcement authority for the anti-bribery provisions within the Department of Justice.¹¹⁹ The responsibility for enforcing the accounting provisions of the bill would remain with the SEC.¹²⁰ Fourth, S. 414 and the Mica bill would provide the exclusive federal statute proscribing foreign bribery.¹²¹

Finally, S. 414 would require the Attorney General to issue guidelines to assist the business community in complying with the anti-bribery provisions.¹²² Procedures for requesting interpretations would be included and all such requests would be exempt from disclosure under the Freedom of Information Act.¹²³

Change of "Reason to Know" Standard

Senate bill 414 replaces the "reason to know" standard in the FCPA with the phrase "corruptly to direct or authorize, expressly or by a course of conduct. . . ."¹²⁴ This revised language has led to charges that S. 414 would allow corporate officers to escape liability. It has been argued that such a revision would encourage lower level employees either not to report possible violations of the FCPA or to undertake violations with the tacit understanding that the employee could participate in bribery as long as it is not reported to corporate officers or di-

118. S. 414, *supra* note 3, § 5(b). The words "foreign officials" are eliminated from the Mica bill, thus allowing facilitating payments to anyone for the purpose of securing performance or expediting a routine governmental action. This would further open a "pandora's box." The Wirth bill seeks to clarify the FCPA by defining what duties are "essentially ministerial" or "clerical" thus making such individuals eligible for facilitating payments. It would oppose payments to anyone else for any other purpose.

119. S. 414, *supra* note 3, § 7.

120. S. 414, *supra* note 3, § 5(b). The Mica bill would shift authority to the Secretary of Commerce from the Justice Department for the bribery provisions, and retain SEC civil authority over the accounting provisions. See notes 94-96 and accompanying text.

121. S. 414, *supra* note 3, § 4; Mica bill, *supra* note 15, § 2.

122. S. 414, *supra* note 73, § 8.

123. *Id.*

124. S. 414, *supra* note 3, § 5(b).

rectors.¹²⁵ Critics note that "reason to know" language has been incorporated in the majority of the Restatement compilations, the Uniform Commercial Code, and in other federal criminal statutes.¹²⁶ They argue that based on case law interpretation of other federal statutes containing "reason to know" language, some *scienter*¹²⁷ must be present. Unreasonable requests for information by corporate officers are not required. "One has reason to know a fact only if a reasonable person in his or her position would infer such facts from other facts already known to him or her."¹²⁸

It is not at all clear that the language of S. 414 clarifies the Foreign Corrupt Practices Act as it purports to do. Of particular concern are the words "course of conduct" as defined by the Senate Banking Report.¹²⁹ For example, the report notes that a company's "continuing employment of an agent known to the company to have made corrupt payments in the preceeding two years in violation of applicable U.S. laws or those of the country in question" would violate the FCPA.¹³⁰ Would a company be required to perform a background check on potential employees? Would a corporation be held responsible for failing to withdraw from a transaction after learning that an illegal payment has been made?

In an exchange of letters, Senator Chafee and Representative Wirth proposed modification of the "course of conduct" standard. Representative Wirth has suggested a "knowing" standard for criminal liability and a "reckless" standard for civil liability.¹³¹ Both terms would be defined as in the proposed federal criminal code.¹³² Senator Chafee rejects this dual standard preferring a "trading" standard for both criminal and civil liability.¹³³ He agrees that civil enforcement actions require "less evidence of 'knowledge.'" ¹³⁴ Representative Wirth rejects the "knowing standard" for civil and criminal liability and recommends deleting the "reason to know" standard and substituting

125. See *Joint Senate Hearings, supra* note 1, at 325 (testimony of Senator William Proxmire, D-Wis.). This "corruptly to direct or authorize" standard has been described as an "ostrich or head in the sand approach." *Id.* at 395.

126. See, e.g., Intelligence Identities Protection Act of 1982, Pub. L. No. 97-200, 96 Stat. 122 (to be codified at 50 U.S.C. §§ 421-26 (1982)) which includes a "reason to believe" standard. See also RESTATEMENT (SECOND) OF CONTRACTS § 26 (1981); RESTATEMENT (SECOND) AGENCY § 9 comment d (1957); RESTATEMENT (SECOND) OF CONTRACTS § 21 comment b (Tentative Draft Numbers 1-7, 1973); RESTATEMENT (SECOND) OF TORTS § 12 comment a (1965). See, e.g., U.C.C. § 2-715(2)(a) (1981).

127. *Id.*

128. See *Joint Senate Hearing, supra* note 1, at 417, 418, notes 64-66 (statement of W. Dovrovir citing *United States v. United Marketing Association*, 220 F. Supp. 299, 307 (N.D. Iowa 1963)).

129. See generally S. REP. NO. 209, *supra* note 84.

130. *Id.* at 11.

131. See Letter of Wirth, *supra* note 85.

132. See Schmultz Memo, *supra* note 64, at 2.

133. Letter from Senator John H. Chafee, R-R.I., to Representative Timothy E. Wirth, D-Colo. (Nov. 22, 1982) [hereinafter cited as Letter of Chafee]. See *Signs of Compromise Seen in Effort to Narrow FCPA, supra* note 85.

134. *Id.*

"recklessly disregarding."¹³⁵ Representative Wirth also questioned deleting the word "agent" from the list of principal violators.¹³⁶ Given these difficulties of interpretation, it may be more acceptable to the business community, as well as in the public interest, to retain the "reason to know" language in the bribery provisions. It is well established that the courts interpret such language to mean a "reasonable man's" intent.¹³⁷

Conduct Excluded from Criminal Liability Under S. 414

Facilitating Payments. Under the FCPA, facilitating payments made *without* corrupt intent,¹³⁸ or to an employee of a foreign government at a "ministerial or clerical level,"¹³⁹ or *not* made to retain or obtain business,¹⁴⁰ are not proscribed. Senate bill 414 defines a facilitating payment not in terms of who is to receive the payment but, rather, in terms of the purpose of the payment.¹⁴¹ The question thus raised is whether a payment of an unlimited amount of money can be made to a senior level official, so long as the payment was made in return for a non-discretionary act?¹⁴²

Payments Lawful Under the Laws of a Foreign Country. The second exclusion under S. 414 and the Mica bill would permit payments when

135. See Letter of Wirth, *supra* note 85.

136. *Id.*

137. See, e.g., *Sanders v. United States*, 509 F.2d 162 (5th Cir. 1975), which followed the language of the RESTATEMENT (SECOND) OF AGENCY § 9, comment d (1958), as keeping "in line with the usual legal understanding of the phrase 'reason to know.'" 509 F.2d at 167. Quoting from the RESTATEMENT, the court determined: "A person has reason to know of a fact if he had information from which a person of *ordinary intelligence* . . . would infer that the fact in question exists or that there is such a substantial chance of its existence that, if exercising *reasonable care* with reference to the matter in question, his action would be predicated upon the assumption of its possible existence." *Id.* (emphasis added). For further discussion of the "reason to know" standard (as associated with S. 708) see 127 CONG. REC. S 13969, 13972-73 (daily ed. Nov. 23, 1981) (statement by Senator John Heinz, R-Pa.).

138. As expressed by the Senate Committee on Banking, Housing and Urban Affairs, "[t]he word 'corruptly' is used [in the FCPA] in order to make clear that the offer, payment, or gift, must be *intended* to induce the recipient to misuse his official position in order to wrongfully direct *business* to the payor or his client, or to obtain preferential legislation or a favorable regulation." S. REP. NO. 114, *supra* note 71, *reprinted at* 4108 (emphasis added).

139. The Act explicitly applies to issuers or officers, directors, employees, or agents of such issuers who, acting corruptly, give anything of value to foreign officials, either directly or indirectly (through an intermediary). However, it clearly exempts "any employee of a foreign government or any department, agency, or instrumentality thereof whose duties are essentially *ministerial* or clerical." See 15 U.S.C. § 78dd-1(b) (1982) (emphasis added).

140. See S. REP. NO. 114, *supra* note 138, *reprinted at* 4108.

141. S. 414, *supra* note 3, § 5.

142. See R. Shine, *Congress Focuses on Foreign Corrupt Practices Act*, Legal Times, Feb. 21, 1983, at 34, col. 1, and at 38, col. 1. Mr. Shine argues that the facilitating payment exemption definitely should focus on both the purpose of the payment and the status of the office to whom it is made. He proposed language which would criminalize facilitating payments when they are "made solely to expedite, facilitate or secure non-discretionary governmental action, provided that the recipient is not a foreign official involved, directly or indirectly, in the granting of a contract by his government." *Id.* at 38, col. 2. See also Letter of Wirth, *supra* note 85; Letter of Chafee, *supra* note 133. The Mica bill takes a different approach, see *supra* note 118 and accompanying text.

lawful in a foreign country but illegal in the United States.¹⁴³ This exclusion was proposed in response to complaints that United States companies were losing business because actions forbidden by the FCPA are permitted in foreign countries and were undertaken by foreign competitors.¹⁴⁴ Also, proponents of these bills argue that this provision would allay charges that the FCPA seeks to export morality.¹⁴⁵

Critics argue that the FCPA has caused American corporations to lose business in foreign countries. Three official reports have provided anecdotal examples of lost business.¹⁴⁶ However, no scientific studies of lost business opportunities have yet been published. Moreover, Dr. John L. Graham of the University of Southern California concluded, after reviewing all available studies of lost business opportunities, that:

(a) During the 1978-1980 period, the FCPA had no negative effect on export performance of American industry. No differences in U.S. markets shown were discovered in nations where the FCPA was reported to be a trade disincentive both in terms of total trade with each country as well as for sales in individual product categories.

(b) Since the 1977 statute, U.S. trade with bribe-prone countries has actually outpaced our trade with non-bribe-prone ones.¹⁴⁷

Dr. Graham further concluded that the FCPA has not hurt the competitive position of American industry.¹⁴⁸ In fact, Dr. Graham's study provides support for the proposition that improper foreign payments are at least unnecessary.¹⁴⁹ He suggests, therefore, that management should question payments to foreign firms on economic as well as ethical grounds.¹⁵⁰

With respect to the notion that the FCPA exports American values, David D. Newsome has suggested that the corrupt association of an American company and a foreign official carries political implications for both actors which other foreign multinational corporations need not be concerned with.¹⁵¹ He notes that "American businessmen often ask, 'Why us?' Why should America's multinationals be singled out for restrictions when all around them their competitors operate without such restrictions?"¹⁵² Mr. Newsome concludes that the answer lies in the unique position which American corporations have in world business ventures and their role in foreign domestic affairs. "Our companies

143. S. 414, *supra* note 3, § 5(b); Mica bill, *supra* note 15, § 2.

144. See H. WEISBERG AND E. REICHENBERG, *supra* note 56, at 13.

145. *Id.*

146. See generally DEP'T OF COMMERCE, REPORT TO THE PRESIDENT ON EXPORT PROMOTION FUNCTION AND POTENTIAL EXPORT DISINCENTIVE, (Comm. Print 1980). See also DEP'T OF STATE, THE FOREIGN CORRUPT PRACTICES ACT: REPORTS FROM THE FOREIGN SERVICE, 6 (Comm. Print 1981); GAO REPORT, *supra* note 33, at 15-18.

147. See SCHOOL OF BUSINESS ADMINISTRATION, UNIVERSITY OF SOUTHERN CALIFORNIA LOS ANGELES, 2 BUSINESS RESEARCH REPORT (Oct. 1982).

148. *Id.*

149. *Id.*

150. *Id.*

151. See House Subcommittee Hearings, *supra* note 29, at 391 (testimony of D. Newsome).

152. *Id.* House Subcommittee Hearing, *supra* note 29, at 391, 392.

cannot escape the fact that their activities will never be totally detached from local sensitivities relating to U.S. intervention of any sort in the internal affairs of another country."¹⁵³

Gifts. S. 414 would exclude from liability cases where gifts, offers, or promises of anything of value are made to a foreign official which is lawful in that official's country.¹⁵⁴ This exclusion was included after several corporations complained that some United States government officials perceived routine social gifts and expenses to a foreign official as violating the FCPA.¹⁵⁵ However, this exclusion is unnecessary because Congress never intended to proscribe a routine social gift but, rather, intended to prohibit only "corrupt payments"¹⁵⁶ where an evil motive or purpose or wrongful intent to influence the recipient of a bribe is present. Moreover, this exclusion from S. 414 seems unwise for policy reasons in that a majority of foreign nations' bribery laws prohibit officials from receiving gifts in return for performing official acts.¹⁵⁷

Travel and Lodging Expenditures. The bribery prohibition of S. 414 excludes travel and lodging expenditures associated with the sale, purchase, and demonstration of goods, as well as such expenses associated with the performance of a contract with a foreign government.¹⁵⁸ However, due to the perceived ambiguity of the terms of the exclusion, Senator Chafee, the sponsor of S. 708, dropped these final exclusions from a proposed compromise that he and Congressman Wirth were considering.¹⁵⁹

Exclusivity Provision. Section seven of S. 414 would exempt foreign bribery from prosecution under any other United States criminal or civil statute.¹⁶⁰ This section was included to prevent corporations from becoming simultaneous targets of prosecution under S. 414 and other federal statutes.¹⁶¹ Section seven would also protect corporations in compliance with S. 414 from prosecution under other federal statutes.¹⁶²

153. *Id.*

154. S. 414, *supra* note 3, § 5(b).

155. See *Joint Senate Hearings, supra* note 1, at 154 (testimony of R. McNeil).

156. See S. REP. NO. 114, *supra* note 71, reprinted at 4108.

157. See Letter of Wirth, *supra* note 85, at 11. Congressman Wirth notes a study of bribery laws showing this fact. See Henriksen, Statutory Provision on Bribery of Public Employees—A Comparative Table (1976) (unpublished internal document which is on file at the offices of the *Journal of Legislation*).

This study was submitted to the House Subcommittee on Telecommunications, Consumer Protection and Finance in December, 1981. Begun in 1976 when hearings were held on the FCPA, this study is being updated.

158. S. 414, *supra* note 3, § 5(b).

159. See Letter of Wirth, *supra* note 85 and Letter of Chafee, *supra* note 133.

160. S. 414, *supra* note 3, § 5(b).

161. See *infra* notes 163-67 and accompanying text.

162. S. 414, *supra* note 3, § 5(b).

Both proponents and critics of S. 414 have reservations about this section because pre-FCPA foreign payments actions had been filed under the federal false statement¹⁶³ and contempt statutes,¹⁶⁴ the federal conspiracy statute,¹⁶⁵ and the currency reporting statute.¹⁶⁶ In addition, the Department of Justice has shown an interest in using the Racketeer Influenced and Corrupt Organizations Act (RICO)¹⁶⁷ to prosecute corporations. Proponents of S. 414 argue that section seven fails to provide an exclusive basis for bringing criminal action.¹⁶⁸ Opponents¹⁶⁹ argue that section seven of S. 414 could be used to impede criminal prosecution of a corporation that conceals a bribe from an agency such as the Export Import Bank.¹⁷⁰

Impact of the Proposed Amendments on an International Bribery Agreement

Background. By enacting the FCPA in 1977, the United States unilaterally attacked commercial bribery in an extraterritorial manner. Critics have argued that such an approach places United States companies at a competitive disadvantage when doing business abroad.¹⁷¹ However, Congress also recognized the need to obtain multilateral support to halt questionable payments to foreign officials. Congress sought to "strengthen the United States' position in negotiations concerning bilateral and multilateral bribery agreements."¹⁷² Congressional efforts to obtain multilateral support were aided by the initiatives of President Carter¹⁷³ which resulted in the general endorsement of an international anti-bribery agreement. An interagency team headed by Department of State officials succeeded in negotiating specific terms of the agreement in the Committee on International Agreement on Illicit Payments of the United Nations Economic and Social Council.¹⁷⁴ The Commit-

163. 18 U.S.C. § 1001 (1976). See Roberts & Abbott, *The Law of Questionable Foreign Payments: Implications for American Business*, PRIVATE INVESTORS ABROAD 141-151 (1983), for a discussion of actions filed under federal criminal laws rather than the FCPA.

164. 18 U.S.C. § 401 (1976). See Roberts & Abbott, *supra* note 163.

165. 18 U.S.C. § 371 (1976). See Roberts & Abbott, *supra* note 163.

166. 18 U.S.C. §§ 1058, 1059, 1101 (1976). See Roberts & Abbott, *supra* note 163.

167. 18 U.S.C. § 1961 (1976). See also R. Shine, Remarks at the Practising Law Institute Workshop on the FCPA (Oct. 15-16, 1979).

168. See generally *Joint Senate Hearings*, *supra* note 1.

169. *Id.*

170. The Export-Import Bank of the United States, known as Ex-Imbank, was established in 1934 and is the principle lending agency of the U.S. government with the purpose of financing the export purchase of American goods and services. The Export-Import Bank may make direct loans or guarantee loans made by American banks to American exporters or to foreign governments, banks, corporations, or citizens. These loans are made in U.S. or foreign currencies. The Bank has an authorized limit of \$40 billion in outstanding funds at any one time.

171. North, *The Economics of Extortion*, 10 WASH. MONTHLY 30 (1978).

172. 123 CONG. REC. S19399 (daily ed. Dec. 6, 1977) (remarks of Senator Harrison Williams, D-N.J.).

173. See G. GREANIS & D. WINDSOR, *THE FOREIGN CORRUPT PRACTICES ACT* 69-71 (1982).

174. Draft International Agreement on Illicit Payments, Report of the Committee on an International Agreement on Illicit Payments on Its First and Second Sessions, U.N. ESCOR (2d regular session, agenda item 9), U.N. Doc. E/1979/104 (1979) [hereinafter cited as Draft Agreement]. See also *Joint Senate Hearings*, *supra* note 1, at 270 (testimony of M. Feldman).

tee adopted a report which included the Draft International Agreement on Illicit Payments (Agreement)¹⁷⁵ and forwarded it to the Economic and Social Council and then the Commission on Transnational Corporations. Similar in nature to the FCPA, the Agreement is based on both disclosure and criminalization concepts. The Agreement contains both accounting¹⁷⁶ and anti-bribery¹⁷⁷ sections which are comparable in concept if not in all details to sections of the FCPA.¹⁷⁸ The principal differences lie in the types of business covered by the accounting provisions. In order for coverage of the FCPA to be coextensive with the United Nations Agreement, the FCPA provisions would have to be expanded to cover all "enterprises and other juridical persons established within the territory of a contracting state,"¹⁷⁹ since it now applies only to issuers subject to either section 15(d) or section 12 of the Securities and Exchange Act.¹⁸⁰ However, the United States was unable to obtain a decision by the United Nations Economic and Social Council to convene a conference of plenipotentiaries because developing states insisted on including article seven, which prohibited a contracting state's nationals or enterprises from paying royalties or taxes to South Africa.¹⁸¹ In addition, the treaty was not concluded because developing nations wished to link negotiation of the Agreement with the adoption of a broad United Nations code of conduct for multinational enterprises.¹⁸² This was seen as anti-Western and anti-free market, and led industrial nations to refuse to attend a conference on the Agreement. Nonetheless, President Carter pressed for such an agreement among industrial nations at the annual economic summit in 1980¹⁸³ and received general support but no specific cooperation. The Reagan Administration has continued to pursue an international agreement at lower ministerial levels.¹⁸⁴

S. 414 and Mica Amendments. Both S. 414 and the Mica bill mandate that the President pursue an international agreement on bribery.¹⁸⁵ Such an agreement would include a process by which conflicts associated with illicit payments could be resolved. The President would report to Congress one year from the enactment of both bills. The report would detail progress on negotiations, recommendations

See Note, *A Comparison of the Foreign Corrupt Practices Act and the Draft International Agreement of Illicit Payments*, 13 VAND. J. TRANSNAT'L L. 795 (1980).

175. Draft Agreement, *supra* note 174, at 21.

176. See Draft Agreement, *supra* note 174.

177. *Id.*

178. See generally Note, *supra* note 174.

179. Draft Agreement, *supra* note 174, at 5.

180. 15 U.S.C. § 78m(b)(2) (1982).

181. Draft Agreement, *supra* note 174, at 5.

182. *Joint Senate Hearings*, *supra* note 1, at 270 (testimony of M. Feldman).

183. President's Message to Congress Reporting on the Administration Policies, 16 WEEKLY COMP. PRES. DOC. 1689, 1693 (Sept. 9, 1980).

184. See *Joint Senate Hearings*, *supra* note 1, 270 (testimony of M. Feldman).

185. S. 414, *supra* note 3, § 9; Mica bill, *supra* note 15, § 7.

that Congress and the Executive should take to successfully eliminate the competitive disadvantages of United States business, and steps necessary to promote international cooperation. The report would also analyze the potential effect of corrupt foreign officials and political leaders on our national security.

Both S. 414 and the Mica bill assume the FCPA has placed American corporations at a competitive disadvantage. However, no empirical evidence exists to support this assumption and Professor Graham's study, in fact, concludes that the FCPA has not placed American corporations at a competitive disadvantage in international transactions.¹⁸⁶ Nevertheless, both bills merit praise for their shared concern over the need for an international agreement. This congressional concern impacts on our allies, and gives the executive branch a tool with which to negotiate. Assuming the President worked toward this end, these provisions would demonstrate to our allies the seriousness with which the United States approaches the issue of bribery and its desire for an international agreement.

AMENDING THE FCPA: POLICY IMPLICATIONS FOR THE BUSINESS COMMUNITY AND THE UNITED STATES

The Foreign Corrupt Practices Act was enacted following disclosure to the SEC of improper or questionable payments by approximately 435 corporations.¹⁸⁷ The three bills examined here, S. 414 and the Mica and Wirth bills, would amend the FCPA in varying degrees. S. 414 and the Mica bill have been supported in large part by the Reagan Administration, the United States Senate, lobbying interests representing the business community, and professional associations representing the accounting, legal, and financial communities. The Wirth bill has been supported by a majority of the members of the House of Representatives and by some academicians and lawyers. The Wirth bill seeks to clarify the accounting and bribery sections of the FCPA by defining accounting and bribery standards more specifically.¹⁸⁸ This section of the article discusses the policy issues raised by those individuals who have commented on the three bills and who have become directly or indirectly involved in the amending process. For purposes of analysis, the issues are categorized as ethical, legal, or economic, but because of their complexity, most overlap and involve socio-political questions.

Ethical Policy Issues

Many ethical issues have been raised in the amending process. Should government be involved in legislating morality either domesti-

186. See SCHOOL OF BUSINESS ADMINISTRATION, *supra* notes 147, 148 and accompanying text.

187. See SEC REPORT, *supra* note 9.

188. See generally *Joint Senate Hearings*, *supra* note 1, at 270 (testimony of M. Feldman).

cally or extra-territorially? Does the FCPA export American morality in prohibiting bribery by American multinational corporations? Do foreign multinational corporations export their morality to the United States? Are the values of efficiency, profitability, and "right to export" reconcilable with respect to laws, honesty, and United States national security interests?

Business ethics has been defined as "the study of what constitutes good and bad human conduct, including related actions and values, in a business context."¹⁸⁹ When discussing business ethics, one must include each manager's and employee's personal actions and values, individual corporate values, and industry-wide values.

Several competing schools of philosophical thought have offered theories of values which are useful in analyzing business ethics. These philosophical schools include the utilitarian, natural law, and sociological. Utilitarian theory states that actions are right or ethical to the extent that they promote a net happiness in relation to all of society.¹⁹⁰ Business leaders, particularly those representing the export business community, argue that without bribes to obtain overseas contracts, they would be forced to shut down plants. This, in turn, would lead to unemployment and society's subsidization of business through government guaranteed loans. Furthermore, society would be forced to subsidize labor through extended unemployment compensation payments, as well as increased public assistance expenditures. These business leaders argue that the greater good lies in making bribes. Elected officials often react favorably to such arguments because they fear that an inability to make such payments would result in increased unemployment among their constituents.¹⁹¹

However, such reasoning overlooks the fact that there are two forms of utilitarianism, act-utilitarianism and rule-utilitarianism.¹⁹² Act-utilitarianism uses the net happiness test to evaluate actions on a case by case basis. An action which promotes net happiness in one situation (*e.g.*, making a questionable payment to obtain a contract and successfully gaining the contract) will be ethical, while in another situation it will not be ethical because it does not promote net happiness (*e.g.*, making a payment to a government official for a contract and the official is caught, convicted of bribery, and the company loses future possibilities of bidding on contracts).

Rule-utilitarianism establishes rules based on a generally applied net happiness test. An action deemed unethical by virtue of the rule will always be unethical regardless of the existence of individual cases where net happiness is increased. For example, bribes or questionable

189. BARRY, *MORAL ISSUES IN BUSINESS* 3 (1979).

190. Dunfee, *Business Ethics*, *BUSINESS LAW: KEY ISSUES AND CONCEPTS* 29, 31 (T. Dunfee & J. Reitzel eds. 1978).

191. See *House Subcommittee Hearings*, *supra* note 29, at 220 (testimony of Representative Don Bonker, D-Wash.).

192. See Dunfee, *supra* note 190.

payments, shown to be inefficient and/or illegal, could not be justified in individual cases even if such would produce desirable economic and social consequences.¹⁹³ From a utilitarian viewpoint, those arguing in favor of S. 414 and the Mica bill have adopted an act-utilitarianism approach, while those favoring the present FCPA have adopted a rule-utilitarianism approach.

Natural law philosophers believe that the source of standards for ethical conduct is Divine or human reason. Ethical standards, once adopted, are immutable and have priority over all man-made law.¹⁹⁴ The values of freedom, equality, liberty, and property in the United States Constitution are rooted in natural law philosophy. Those individuals opposed to amending the FCPA may be characterized as arguing that natural law values opposing bribes were incorporated in the FCPA. Those favoring S. 414 and the Mica bill may be characterized as arguing that the FCPA is unjust because it attempts to impose natural law values on other societies. These commentators propose amending the FCPA to bring it in conformity with the laws of foreign nations thereby allaying criticism that the FCPA is exporting American values.¹⁹⁵ If one of the proposed amendments is enacted, the United States should begin to encourage other nations to amend their bribery statutes to prevent importing illegal transactions into this country.¹⁹⁶ In addition, unlawful payments by American companies to foreign officials or other agents overseas could lead to retaliatory conduct by foreign multinationals in this country, thus creating a reverse flow of bribes to American officials or agents.¹⁹⁷

The sociological school maintains that norms of conduct and values are found in contemporary community values. They argue that those values can be demonstrated using empirical evidence. Adherents of this school argue that lawmakers should recognize competing interests and values and make laws which reflect the priority which society has given to certain values.¹⁹⁸ Supporters of S. 414 and the Mica bill perceive the FCPA as adversely affecting efficiency and profitability of corporations and the balance of payments of the United States. The former represent significant contemporary business values, the latter a national interest. When these values and interests are balanced against honesty in international commercial transactions, the proponents of

193. *Id.*

194. M. MACGUIGAN, *JURISPRUDENCE: READINGS AND CASES 9-10* (2d ed. 1976). Adherents to this philosophical school include Thomas Aquinas, Jean-Jacques Rousseau, Charles Louis de Secondat Montesquieu, and Thomas Jefferson.

195. See *Joint Senate Hearings*, *supra* note 1, at 254 (testimony of M. Feldman). See generally WEISBERG AND REICHENBERG, *supra* note 144.

196. For example, a United States court has held that the Japanese should not be allowed to hire only Japanese citizens to manage their American subsidiaries and discriminate against American citizens because it is lawful in Japan. See *Avigliano v. Sumitomo Shojii America, Inc.*, 638 F.2d 552 (2d Cir. 1981), *rev'd on other grounds*, 457 U.S. 176 (1982).

197. Johnson, A Brief Dissection on Bribery in Foreign Markets (Aug. 16, 1982) (unpublished manuscript).

198. See MACGUIGAN, *supra* note 194, at 15, 16, 368, 369.

these bills consider values of efficiency and profitability as more important to society. Opponents of the bills note that almost all foreign countries have enacted anti-bribery laws.¹⁹⁹ Some have prohibited facilitating payments as well. Honesty and national security concerns, thus, prevail as priority values.

The above discussion demonstrates that individual schools of philosophical thought may offer different solutions to the same ethical problems which require immediate action by corporate decision makers. Since its enactment, the FCPA has set the standard of ethical conduct for the American business community. In response to the FCPA, most large corporations have adopted codes of corporate conduct.²⁰⁰ The American Assembly of Collegiate Schools of Business now requires the study of business ethics in every school which it accredits.²⁰¹ That curriculum must include "a background of the economic and legal environment as it pertains to profit and/or nonprofit organizations along with *ethical considerations* and social and political influences as they affect such organizations."²⁰² It is ironic that, at the same time individual corporations are adopting ethical codes, lobbyists for the business community are encouraging Congress to amend the anti-bribery section of the FCPA to permit American corporations to make questionable payments. This raises the question of whether the values set out in individual corporate codes are being represented by such lobbyists.

Legal Policy Issues

Three significant legal policy issues have been raised in the FCPA amending process. First, should the FCPA be a disclosure statute, a criminal statute, or both? Second, should the FCPA have extraterritorial jurisdiction to allow prosecution of corporations and individuals who commit bribery abroad while involved in commercial transactions? Third, should there be an expressed or implied private right of action under the FCPA for shareholders, corporate employees, and/or competitors?

Following disclosure of questionable payments by a large number

199. Hamilton, *The Foreign Corrupt Practices Act of 1977: A Solution or a Problem?*, 11 CAL. W. INT'L L.J. 111, 134 (1981).

200. See GAO REPORT, *supra* note 33, at 6-8.

201. See AMERICAN ASSEMBLY OF COLLEGIATE SCHOOLS OF BUSINESS, POLICIES, PROCEDURES, AND STANDARDS, STANDARD IV CURRICULUM 26-27 (1982-83). See also BUCHHOLZ, BUSINESS ENVIRONMENT OF PUBLIC POLICIES: A STUDY OF TEACHING AND RESEARCH IN SCHOOLS OF BUSINESS AND MANAGEMENT, Working Paper No. 41 (St. Louis 1979); BUCHHOLZ, BUSINESS ENVIRONMENT/PUBLIC POLICY: CORPORATE EXECUTIVE VIEWPOINTS AND EDUCATIONAL IMPLICATIONS, Working Paper No. 55 (St. Louis 1980). These studies, prepared for the accreditation agency of collegiate schools of business, show the role of ethics and social responsibility concepts in curriculum of colleges of business, and the desire of corporate executives to include such views. See also POWERS & VOGEL, ETHICS IN THE EDUCATION OF BUSINESS MANAGERS (1980).

202. AMERICAN ASSEMBLY OF COLLEGIATE SCHOOLS OF BUSINESS, *supra* note 201, at 27 (1982-83) (emphasis added).

of American corporations, it was argued that the extraterritorial application of our antitrust laws,²⁰³ tax laws,²⁰⁴ and security laws,²⁰⁵ and other statutes²⁰⁶ would be sufficient to prevent further instances of foreign bribery. Because these laws emphasize the consequences of bribery rather than the nature of the act, they were rejected.²⁰⁷ Two approaches to prevent foreign bribery were recommended to Congress, the disclosure approach²⁰⁸ and the criminalization approach.²⁰⁹ The Ford Administration recommended that Congress require full disclosure of corporate records with civil and/or criminal penalties for falsification²¹⁰ and many of these recommendations were included in the accounting section of the FCPA.²¹¹ The Carter Administration endorsed a criminalization approach.²¹² In addition to its disclosure requirements, the criminalization approach would define specific instances of bribery and impose criminal penalties for questionable payments made abroad.

The FCPA incorporated both approaches in the accounting and anti-bribery sections. The Mica bill and S. 414 would remove criminal sanctions from the accounting provisions except in cases of knowing misrepresentation²¹³ and would prohibit civil injunctions.²¹⁴ Both bills would retain the anti-bribery section of the FCPA, but would set out a

-
203. See Sherman Act §§ 1, 2, 15 U.S.C. §§ 1, 2 (1982), and Federal Trade Commission Act § 5, 15 U.S.C. § 52 (1982), and Robinson-Patman Act § 2(c), 15 U.S.C. § 13(c) (1982). See also McManis, *Questionable Corporate Payments Abroad: An Antitrust Approach*, 86 YALE L.J. 215 (1976).
204. I.R.C. § 162(c) (1983). This section denies a business expense deduction for payments made to an official or employee of a foreign country if the making of such would be unlawful in the United States.
205. Prior to passage of the FCPA, the SEC proceeded on a theory that such payments violated § 13(a) of the Exchange Act, 15 U.S.C. § 78m(a) (1982). The Exchange Act at this time did not specifically prohibit such payment. However, disclosure was deemed appropriate by the SEC staff because such payments were *material* as defined by the United States Supreme Court in *TSC Industries v. Northway, Inc.*, 426 U.S. 438 (1976).
206. Other statutes such as the Foreign Assistance Act of 1961, 22 U.S.C. § 2399(c) (1976) requires firms operating under the Act to report all commissions to the Agency for International Development (AID). Failure to do so violates 18 U.S.C. § 1001 (1976) which makes it unlawful to conceal information on any matter within the jurisdiction of any United States department or agency. Also, firms financing purchases through the Export-Import Bank must report to the Bank all commissions and fees that are included in a contract. Penalties for failing to disclose or falsifying a report knowingly is a \$10,000 fine and/or up to five years imprisonment, 12 C.F.R. § 401.3(c) (1977). This raises serious questions about the airplane industry's use of Export-Import Bank funds to make questioned payments in the Middle East. (See generally Newhouse, *The Sporty Game*, NEW YORKER MAGAZINE (May 19 and 26, 1982)).
207. See Note, *supra* note 174, at 364.
208. See *Prohibiting Bribes to Foreign Officials; Hearings on S. 3133, S. 3379, S. 3418 Before the Senate Committee on Banking, Housing and Urban Affairs*, 94th Cong., 2d Sess., app. (1976) (Ford Administration Task Force Report).
209. *Id.*
210. See GREANIS & WINDSOR, *supra* note 173, at 65-69, 135.
211. 15 U.S.C. § 78m(b) (1982). See also S. REP. NO. 114, *supra* note 71, at 7-9, reprinted at 4104-4107.
212. See *Foreign Corrupt Practices and Domestic and Foreign Investment Disclosure: Hearings on S. 305 Before the Senate Committee on Banking, Housing and Urban Affairs*, 95th Cong., 1st Sess. 67 (1977) (statement of W. Michael Blumenthal, Secretary of the Treasury).
213. S. 414, *supra* note 3, § 4(b), and Mica bill, *supra* note 15, § 8A(e)(2).
214. See S. 414, *supra* note 3, § 5, and Mica bill, *supra* note 15, § 8A(e)(3), which prohibit injunc-

new standard for criminal liability.²¹⁵

Some commentators have suggested that a pure disclosure approach be adopted since businessmen do not understand the criminal standard set out in the FCPA.²¹⁶ Moreover, the criminal standard "cannot be made clearer since the issue is not a matter of law at all, but of moral judgments. . . ." ²¹⁷ Professors Greanias and Windsor argue that "disclosure would cause the corporation to make its decisions with reference to a standard it professes to understand: the marketplace."²¹⁸ The corporation would have to balance the cost of publicizing its questionable payments against the benefits of contracts obtained. Every corporation would have to weigh the impact of such disclosure on public opinion, as well as take into consideration the fact that such information would be available to prosecutors in foreign countries. This approach would, in effect, allow public opinion and potential investors to determine what constitutes a questionable payment and the penalty for making such payments. It would remove the SEC and the Department of Justice from the decision-making process which determines what acts constitute bribery and what the proper penalties are. Under such a marketplace theory, companies would be "punished" by public opinion and scrutable investors. The marketplace theory advocated by Professors Greanias and Windsor assumes full disclosure by the private sector and a public opinion that will not demand excessive regulation. Disclosure of questionable payments from 1974 to 1976 led to the enactment of the FCPA and criminalization of overseas bribery. The marketplace theory also assumes that all executives and boards of directors would be willing to pay bribes to obtain contracts. In addition, it assumes that businessmen, because they cannot comprehend a "reason to know" standard, should not be held accountable under the FCPA. While recognizing that bribery is an ethical question, marketplace theorists seek answers based solely on an act-utilitarian approach. However, they fail to consider competing philosophical approaches. Also ignored is the impact of a pure disclosure approach on the national security and foreign relations of the United States, and the possibility that foreign corporations will retaliate by making illegal payments to American corporate officials in order to obtain contracts and other favors.

tions against parties making a good faith attempt at compliance with the internal corporate accounting controls established by the bills.

215. In particular, these bills provide explicit liability exemptions for payments to foreign officials which: (1) expedite performance of routine governmental actions; (2) are permitted by any law of that foreign country; (3) constitute courtesies, tokens of regard, or returns for hospitality; (4) are associated with travel and lodging, selling or purchasing, or product demonstrations or explanations; or (5) constitute ordinary expenditures associated with contractual performance. See S. 414, *supra* note 3, § 5(b), and Mica bill, *supra* note 15, § 8A(b).

216. See GREANIAS AND WINDSOR, *supra* note 173.

217. *Id.* at 137-38.

218. *Id.* at 138.

Extraterritorial Application of the FCPA. Businessmen frequently ask why American corporations and individuals associated with them should be punished for bribery committed abroad. They note that the United States is the only nation to criminally punish extraterritorial bribery in commercial transactions and that civil law countries do not recognize criminal sanctions against corporations.²¹⁹ Moreover, they point out that some countries promote bribery or find it acceptable.²²⁰ Finally, they argue that criminal prosecutions have not been successful due to the difficulty of gathering evidence and the need for collaboration with other countries on politically sensitive issues. Critics also note differences between the enforcement philosophy of the SEC (a disclosure-oriented agency) and that of the criminal division of the Department of Justice (where a prosecutor's mentality exists).²²¹

However, while it is true that the United States is the only nation which criminally punishes extra-territorial bribery in a commercial context, it is also true that civil law countries have long had anti-bribery statutes applicable to individuals and agents of corporations. Following a survey of many nations' anti-bribery laws, one researcher stated:

The [study] also indicate[s] that current legislation on bribery may be traced back to the major penal codes of France, Germany and Spain. More recently one may notice some acceptance of the more inclusive concept of "corrupt practices" that has developed within English speaking common law jurisprudence.²²²

Private Right of Action. From an enforcement viewpoint, allowing a form of self-regulation by creating a private civil right to enforce the FCPA may be a far more efficient allocation of resources. One of the few viable alternatives would be to hire many more enforcement employees in many departments and agencies. Under a pure market-disclosure approach, the enforcement mechanism would be enhanced by shareholder suits alleging that illegal payments constitute wasteful use of corporate funds.²²³

A private right of action under the FCPA could be created expressly by Congress or implied by the federal courts. Private actions have been implied under the securities laws when congressional goals were frustrated.²²⁴ The courts have relied heavily on the presence or

219. Hermann, *Criminal Prosecution of United States Multinational Corporations*, 8 LOY. U. CHI. L.J. 465, 468 (1977).

220. Note, *Corruption and the Foreign Corrupt Practices Act of 1977*, 13 U. MICH. J.L. REF. 158. This note points out that local agents in many foreign nations, particularly in the Middle East and Latin America, become involved in "bribery for government contracts, demands for protective money, and bribery for regulatory favors." *Id.* at 160.

221. Note, *The Criminalization of American Extraterritorial Bribery: The Effect of the Foreign Corrupt Practices Act of 1977* INT'L L. & POL. 645, 661-63 (1981).

222. See Henriksen, *supra* note 157, at cover.

223. See WEISS, THE CORPORATE WATERGATE, INVESTOR RESPONSIBILITY RESEARCH CENTER, INC. (1975).

224. See *J.I. Case Co. v. Borak*, 377 U.S. 426, 431-34 (1964), and *Cort v. Ash*, 422 U.S. 66 (1975).

absence of a legislative history indicating an intent either to create or deny a private action.²²⁵ However, it is not clear from the legislative history of the FCPA whether Congress intended to create such a private right of action.²²⁶

Senate bill 414, and both the Mica and Wirth bills do not authorize causes of action. One critic opposes private causes of action for three reasons:²²⁷ (1) the potential for harassment by competitors; (2) foreign relations and national security issues are often involved; and (3) when the SEC or Department of Justice refuse to sue, shareholders already may sue in a civil action under state laws for corporate waste and breach of fiduciary duty.²²⁸ Competitors can also sue under state unfair practices statutes.²²⁹

Economic Policy Issue

A single significant economic policy issue raised during the FCPA amending process is whether the FCPA has resulted in lost business opportunities for American corporations. Ambassador William Brock²³⁰ and other members of the business community have provided anecdotal comments and individual instances wherein they cite loss of opportunities.²³¹ The General Accounting Office report and other studies also show instances of lost business.²³² However, it is difficult to rely on these studies because sensitive information is involved and corporate witnesses are reluctant to testify publicly. Additionally, it is difficult to obtain and quantify data on lost business opportunities.²³³

While American corporations were arguing that the FCPA caused significant lost business opportunities, United States merchandise exports grew at an average annual rate of twenty-two percent between 1977 and 1980.²³⁴ Moreover, other disincentives to exports expansion

225. See *Cort*, 422 U.S. at 82.

226. Only the House Report on the FCPA specifically stated that it intended a private right of action. See H.R. REP. NO. 640, 95th Cong. 1st Sess. 4 (1977). The SEC has argued that a private right of action was created because the Senate-House conference report adopted implicitly the House's position. See 466 SEC. REG. & L. REP. (BNA) A-F (1978) (statement of SEC General Counsel Harvey Pitt).

227. Note, *Effective Enforcement of the Foreign Corrupt Practices Act*, 32 STAN. L. REV. 561, 576-78 (1980).

228. See *Auerbach v. Bennett*, 47 N.Y.2d 619 (1979) (shareholder suit for breach of fiduciary duty against General Telephone & Electronics Corporation for corporate payments to foreign officials).

229. W. PROSSER, LAW OF TORTS, §§ 129, 130 at 944, 952 (4th ed. 1971). Prosser outlines competitor's suits based on theories of interference with a business advantage and contractual relations.

230. Ambassador William E. Brock is a United States Trade Representative and is Chairman of the Trade Policy Committee, which is the interagency trade policymaking body.

231. See *Joint Senate Hearings*, *supra* note 1, at 40 (statement of Ambassador Brock), at 139 (statement of P. McNeil), at 192 (statement of J. Creighton).

232. GAO REPORT, *supra* note 33, at 14-17. Most of all the studies are anecdotal in nature, lacking in scientific principles of survey research, or simply inconclusive because of the inability to quantify.

233. *Id.* at 16.

234. See HOUSE SUBCOMMITTEE HEARINGS, *supra* note 29, at 218 (See statement of Representative Wirth taken from DEPARTMENT OF COMMERCE, REPORT ON EXPORTS, 1982).

must be considered. Such disincentives include export controls, lack of approval of joint ventures under antitrust laws, lack of research and development funds to assist the private sector and lack of foreign language training. A study by Professor Donald Sternitzke concluded that "over the last decade the lagging long run growth of American exports has been due mainly to a loss of competitiveness of American manufactured goods in affluent markets, and has been attributable only incidentally to the commodity structure or mix of American exports."²³⁵ While Professor Sternitzke recommends four national policies to improve export sales, none include "clarifying" or amending the FCPA.²³⁶

A study by Professor John Graham found that the FCPA had no negative impact on the export performance of American corporations in those countries where the business community had reported instances of loss of business.²³⁷ "Market share of U.S. industries in countries where the FCPA is reported to be an important trade disincentive was compared to U.S. market share in other countries. No differences were discovered."²³⁸ This study included reports on fifty-one countries constituting eighty percent of U.S. trade in 1979. The U.S. Department of Commerce solicited responses from U.S. Embassy specialists in those countries as to whether the FCPA was a disincentive to trade. Aircraft industry sales particularly concerned Professor Graham because the aircraft industry argued that they lost significant sales in certain countries. The FCPA competitive disadvantage hypothesis is dealt a blow by Professor Graham's study which showed that U.S. aircraft sales slightly increased in those countries from 1976 to 1980.²³⁹

Based on available data, it is clear that the FCPA is at most a minor disincentive to trade. Such variables as tariff barriers, the failure of U.S. manufacturing companies to modernize plants and production processes, the lack of tax incentives for research and development, the failure to obtain congressional approval for exceptions to antitrust laws for joint ventures, and the overall inflation factor have played major roles in determining American export capabilities.²⁴⁰ As Professor Graham suggests, a more efficient allocation of congressional resources would be to concentrate energies on remedying these major disincentives to exporting rather than on amending the Foreign Corrupt Prac-

235. Sternitzke, *The Great American Competitive Disadvantage: Fact or Fiction*, 10 J. INT'L BUS. STUD. 25, 32-35 (1979).

236. *Id.* Sternitzke recommends that the Administration: (1) negotiate a reduction of tariff barriers on a country by country basis, (2) promote reform at the international monetary system, (3) encourage the private sector to bring on new production techniques, and modernize equipment and factories, and (4) assist firms to open new markets in eastern Europe and the People's Republic of China.

237. Graham, *The Foreign Corrupt Practices Act: A New Perspective* (i), (July 1982) (statement of thesis, unpublished manuscript) (to be published in Fall edition of COLUM. J. OF WORLD BUS. (1983)).

238. *Id.*

239. *Id.* at 9.

240. *Id.* at 10. See also *House Subcommittee Hearings*, *supra* note 29, at 254-55 (statement of Ambassador Brock).

tices Act.²⁴¹

CONCLUSIONS AND LEGISLATIVE RECOMMENDATIONS

Conclusions

Congress has sought to redefine what constitutes acceptable conduct for American corporations doing business in foreign nations through three proposals to amend the Foreign Corrupt Practices Act. In amending the FCPA, Congress must reconcile a conflict between those who believe the present FCPA provides the best guidelines defining appropriate conduct for American business engaged in international transactions and those who espouse an efficiency view that the "right to export" is best for this nation, the business community and the economy as a whole. This reconciliation process must be done in an equitable manner because the failure to do so could be perceived by the public as "gutting" the FCPA.²⁴²

Well-drafted amendments to the FCPA will help create a working partnership between the United States government and American business enabling the business community to compete more successfully with other exporting nations. American business needs predictable and understandable legislation to guide their conduct and the allocation of resources when undertaking international transactions. S. 414 and H.R. 2157 may benefit the American business community in the short run but could lead to more stringent legislation in the long run if American businesses returned to pre-FCPA patterns of conduct. Some scientifically sound studies have indicated that the current FCPA is only a minor disincentive to export expansion with other variables being far more important. However, a number of corporate executives have testified that the "reason to know language" of the FCPA's anti-bribery provision has made their companies unwilling to enter into international contracts, and resulted in lost business.

Recommendations

Congress should take several steps to alleviate American business' unwillingness to enter into international contracts. First, Congress should amend the accounting provisions of the FCPA so that only an intentional failure to meet FCPA standards would expose a corporation or its officers, directors, and employees to criminal prosecution.²⁴³

Second, Congress should further use the definitions of the terms

241. Graham, *supra* note 237, at 11.

242. A recent Harris Poll indicates that business executives themselves have a split opinion as to how the FCPA should be amended. *The Antibribery Act Splits Executives*, BUSINESS WEEK 16 (Sept. 19, 1983).

243. The general enforcement provisions contained in section 32 of the Securities Exchange Act of 1934 require a standard of intent for criminal liability. The amended FCPA should incorporate by reference this section. 15 U.S.C. § 78ff(a) (1982).

“reasonable detail” and “reasonable assurances” as set forth in the Wirth Bill.²⁴⁴ The legislation or legislative history should include specific variables to be weighed in performing a cost-benefit analysis, particularly what qualitative and quantitative factors²⁴⁵ should be included.

Third, Congress should amend the anti-bribery section of the FCPA to include the following standard for criminal liability:

It shall be unlawful for any domestic concern or any officer, director, employee, or shareholder of such when acting on behalf of the concern to use any instrumentality of interstate commerce to corruptly pay (or offer to pay) something of value, directly or indirectly to a foreign official, political party, or official thereof, or any candidate for political office, for the purpose of obtaining or retaining business.

Substitution of the word “corruptly” for the phrase “reason to know” will alleviate corporate executives’ fear that a “mere suspicion” of corrupt payments is enough to invoke criminal prosecution. The statutory definition of “corruptly” must contain a “reasonable man” intent or “evil motive” standard.²⁴⁶ Additionally the statute must define the term “facilitating payments.”²⁴⁷ Facilitating payments should be the sole exclusion from the anti-bribery provisions of the FCPA.²⁴⁸

Fourth, the FCPA should include a congressional directive requiring the Securities and Exchange Commission and Department of Justice to provide Congress jointly prepared and uniformly agreed upon guidelines for enforcing each provision of the FCPA within thirty days following enactment of the amended statute. Specifically, the SEC and Department of Justice must be required to provide a uniform interpretation of the amended standard for enforcement of the bribery provision.

Fifth, the amended FCPA should include a provision authorizing the establishment of a commission to study the impact of the FCPA on the American exporting business. This commission, composed of lead-

244. Wirth bill, *supra* note 15, § 1(4).

245. See Wolf and Shaw, *supra* note 100.

246. See S. REP. NO. 114, *supra* note 71; H.R. REP. NO. 640, *supra* note 72. These reports indicate that the definition of corrupt payments should include this standard. The amended statute should also adopt a “reckless disregard” standard for civil actions. See generally Letter of Wirth, *supra* note 73; Letter of Chafee, *supra* note 113.

247. Richard Shine, former head of the Multinational Branch of the Criminal Fraud Division, proposes language which would not criminalize facilitating payments when they are “made solely to expedite, facilitate or secure non-discretionary governmental action, provided that the recipient is not a foreign official involved, directly or indirectly, in the granting of a contract by his government.” Shine, *supra* note 142, at 38, col. 2.

248. Facilitating payments must be the sole exclusion or exception to the anti-bribery provisions of the FCPA to prevent the misconception that businessmen will be able to pay bribes to foreign officials when it is lawful to do so in that country. Furthermore, limiting exceptions of the anti-bribery provisions to merely one prevents payment of bribes under the guise of travel expenses as set forth in S. 414 and H.R. 2154. See *supra* note 15 and accompanying text. Allowing other well-intentioned exceptions to the anti-bribery provisions could lead to a quagmire of reciprocal conduct that would further hurt the perception the American public holds of Congress and the business community, and could create national security problems.

ers of business and government, as well as academicians and researchers, should be directed to provide Congress with a complete, detailed study within a year from the enactment of the amended FCPA.

Finally, Congress should adopt section 9(a) of S. 414, which covers international agreements.²⁴⁹

249. S. 414, *supra* note 3, § 9(a).