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The Foreign Corrupt Practices Act: Problems of Extraterritorial Application

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THE FOREIGN CORRUPT PRACTICES ACT: PROBLEMS OF EXTRATERRITORIAL APPLICATION

I. INTRODUCTION

The Foreign Corrupt Practices Act of 1977,[1] an amendment to the Securities and Exchange Act of 1934 (Exchange Act),[2] criminalizes bribery of foreign officials and requires audit controls and accurate reporting of transactions by United States companies. By enacting the legislation, Congress condemned foreign bribery as distorting trade and investment, undermining public confidence in United States enterprise, and damaging foreign relations.[3] The Securities and Exchange Commission (SEC) also opposed corporate bribery as a threat to managerial accountability to shareholders.[4] President Carter, while signing the legislation, emphasized its basic policy considerations:

> I share in Congress's belief that bribery is ethically repugnant and competitively unnecessary. Corrupt practices between corporations and public officials overseas undermine the integrity and stability of governments and harm our relations with other countries. Recent revelations of widespread overseas bribery have eroded public confidence in our basic institutions.[5]

The Act responded to increasing revelations concerning the widespread practice of United States corporations making improper payments to foreign nationals.[6] These disclosures stemmed

1. 15 U.S.C. §§ 78m, 78dd-1, 78dd-2, 78ff (Supp. I 1977) (amending scattered sections of Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78kk (1976)).

2. 15 U.S.C. §§ 78a-78kk (1976).

3. CONFERENCE REPORT FROM THE COMMITTEE OF CONFERENCE TO ACCOMPANY S. 305, FOREIGN CORRUPT PRACTICES ACT OF 1977, H.R. REP. No. 831, 95th Cong., 1st Sess. *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 4121 [hereinafter cited as CONF. REP.].

4. *Hearings on H.R. 3815 and H.R. 1602, before the Subcommittee on Consumer Protection and Finance of the House Committee on Interstate and Foreign Commerce,* 95th Cong., 1st Sess. 214 (1977) [hereinafter cited as *House Hearings];* Harold W. Williams, Chairman of the SEC stated in testimony: "[illegal corporate payments] were widespread and threatened to have a corrosive effect on the integrity of our system of capital, and on public confidence in American business."

5. 13 WEEKLY COMP. OF PRES. DOC. 1909 (Dec. 20, 1977).

6. Reports filed by firms with the SEC disclosed that Bell Helicopter, a subsidiary of Textron, Inc. "kicked-back" $297,000 to an official in Ghana to facilitate an aircraft sale in that country. This transaction and a 2.9 million dollar

largely from Watergate investigations which uncovered illegal domestic political contributions.[7] Subsequent investigations by the SEC revealed the existence of off-the-record corporate accounts of questionable domestic and foreign payments.[8] A program was initated by the SEC encouraging businesses to disclose voluntarily the existence of such payments.[9] As a result, nearly five hundred firms have disclosed questionable payments of hundreds of millions of dollars.[10] Corporate payoffs range from bribing high-ranking foreign officials to secure favorable foreign governmental

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payment by Bell, in connection with the sale of helicopters to Iran, delayed Senate confirmation of former Textron Chairman G. William Miller as chairman of the Federal Reserve Board.

Holt & Walcott, *The Missing Memo,* NEWSWEEK, May 22, 1978, at 22. Gulf Oil Corporation reported spending 10.3 million dollars on gifts, entertainment and other items related to political activity in the United States and abroad, including four million dollars given to the political party of the late South Korean President Park Chung Hee. General Tire and Rubber Company disclosed that its affiliates paid $18,600 to a Venezuelan government official to obtain confidential tax returns of competitors. Additionally, General Tire gave $500,000 to Mexican government purchasing agents to escape taxes, and paid six million dollars in "consultants' fees" and 4.4 million in "commissions" in Algeria to win contracts and insure the cooperation of customs officials. Exxon Corporation acknowledged paying 1.2 million dollars in 15 foreign countries "to secure or influence government action." Exxon's Italian subsidiary made unauthorized commercial payments and political contributions totaling 19 million dollars. Also, Westinghouse Electric Corporation made improper payments to a foreign business agent in Manila in order to obtain a major share of Philippine nuclear plant construction contracts. *The Philippines: Tales from Disiniland,* TIME, Jan. 23, 1978, at 56. *See generally* Lang, *Drive to Curb Kickbacks and Bribes by Business,* U.S. NEWS & WORLD REPORT, Sept. 4, 1978, at 41-44.

7. *See* Report of Watergate Special Prosecution Force (1975) at 72-77. Senator W. Proxmire also observed that "[t]he wave of disclosure [of overseas payment] is really the result of some threads that began unravelling when the Watergate Special Prosecutor got into domestic bribery." *Foreign and Corrupt Bribes: Hearings on S. 3133 Before the Senate Committee on Banking, Housing & Urban Affairs,* 94th Cong. 2d Sess. 3 (1976).

8. For a current article on domestic bribery, *see* Sansweet, *Investment Advisors' Fraud and Kickbacks Bring SEC Crackdown,* Wall St. J., April 25, 1978, at 1, col. 6, and *see* Lang, *supra* note 6.

9. *See generally* Herlihy & Leving, *Illicit Corporate Payments,* 8 LAW & POL. INT'L BUS., 547 (1976); Stevenson, *The SEC and Foreign Bribery,* 32 BUS. LAW. 53 (Nov. 1976); Note, *Foreign Bribes and the Securities Acts' Disclosure Requirements,* 74 MICH. L. REV. 1222 (1976); Note, *Disclosure of Payments to Foreign Government Officials under the Securities Act,* 89 HARV. L. REV. 1862-70 (1976).

10. *See* Richman & Berry, *Stopping Payments under the Table,* BUS. WEEK, May 22, 1978, at 18.

action, to facilitating payments allegedly made to ensure that governmental functionaries discharge certain ministerial or clerical duties.[11]

Although intended as a strong antibribery measure, the Act has failed to eliminate overseas payoffs. The Act contains numerous loopholes due to exceptions and vagueness.[12] Moreover, the SEC has indicated that as a matter of policy, it will not render interpretive advice on an ad hoc basis.[13] More importantly, due to its extraterritorial application, the Act is difficult to enforce. Principles of international comity may be offended by prosecuting extraterritorial crimes. The act of state doctrine may preclude judicial inquiry into the facts and motivations underlying foreign state or official acts. Finally, constitutional questions of fairness and due process arise from burdens placed upon a defendant facing criminal penalties for foreign conduct.

This note will examine specific provisions of the Foreign Corrupt Practices Act in light of its legislative history.[14] Difficult questions of enforceability relating to principles of international comity, the act of state doctrine, and constitutional defenses will be investigated.

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11. The foreign recipients of corporate payoffs fall into four general groups: government officials, lower level government employees, political parties, and business enterprises. The motives for making foreign payments can be classified as follows: (1) to obtain new business or maintain existing business; (2) to avert expropriation, nationalization, expulsion, or cancellation of existing rights (preventative maintenance); (3) to influence administrative or legislative actions to establish or preserve a favorable business climate; and (4) to expedite the performance of routine government services. Kugel & Gruenberg, *International Payoffs: Where We Are and How We Got There,* CHALLENGE, Vol. 19 at 13-20 (Sept.-Oct. 1976). *See* remarks of Sen. Williams during the Senate Debate, 123 CONG. REC. S19399 (daily ed. Dec. 6, 1977).

12. *See generally* Best, J., *The Foreign Corrupt Practices Act,* THE REVIEW OF SECURITIES REGULATION, Vol. 11, No. 3 (Feb. 13, 1978); Estey & Marston, *Pitfalls (and Loopholes) in the Foreign Bribery Law,* FORTUNE, Oct. 9, 1978, at 182-84; *The Antibribery Bill Backfires,* BUS. WEEK, April 17, 1978, at 143.

13. The SEC has refused to answer any inquiries or issue any 'no action' letters concerning the adequacy of internal control systems created or presently operative. S.E.C. Rel. No. 14478, 43 Fed. Reg. 7752 (1978).

14. This note will focus on sections 103 and 104 of the Act and will only generally deal with section 102.

II. The Foreign Corrupt Practices Act

A. *General Provisions*

The Foreign Corrupt Practices Act consists primarily of three parts.[15] The first part, section 102,[16] deals with accounting standards for issuers of securities registered under § 12 or required to file under § 15(d) of the Exchange Act.[17] This first part covers issuers, regardless of their involvement with foreign concerns or foreign transactions, and was intended to prevent off-the-book slush funds.[18] Issuers must make and keep books and records that in reasonable detail accurately and fairly reflect transactions and dispositions.[19] Each issuer is also required to maintain a system of

15. *See* Appendix for full text.

16. Section 102 adds a new section 13(b)(2) to the Exchange Act.

17. *See generally* Report From the Comm. on Interstate and Foreign Commerce, Together With Minority Views to Accompany H.R. 3815, *Unlawful Corporate Payments Act of 1977*, H. Rep. No. 640, 95th Cong., 1st Sess. 10 (1977) [hereinafter cited as House Report]. The report stated that the courts would imply a right of action for private parties under § 102 leading to civil liability. Whether the Supreme Court will extend this right to private action is questionable. The SEC has charged issuers with continuing violations of the Act based on inadequate internal controls. The SEC filed a complaint and temporary restraining order against Aminex Resources Corp. *SEC v. Aminex Resources Corp.*, [1977-1978 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 96,352, alleging violation of the internal controls requirement, misappropriation of corporate assets including falsification of books and records, and failure to adopt or maintain a system of accounting controls designed to monitor corporate transactions and assets. The company, without admitting or denying the charges, agreed to pay back $1.24 million of the allegedly misappropriated funds. The SEC also filed suit in *SEC v. Page Airways*, [1977-1978 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 96,393, alleging that Page Airways had paid bribes in connection with the sale of aircraft in various countries and that the company had failed to record certain receipts, disbursements, and expenses, incurred without adequate documentation and controls. For articles concerning Page Airways and Grumman Corporation, *see* Carley, *Grumman Panel Finds Payoff Continued Despite Board's Policy*, Wall St. J., Feb. 28, 1979 at 1, col. 6; Time, Aug. 21, 1978, at 61.

18. Conf. Rep., *supra* note 3, at 10. This Act, according to Norman E. Auerback, chairman of Coopers and Lybrand, is "in many ways the most important act affecting accounting since the Securities Acts of 1933 and 1934." N.Y. Times, Aug. 1, 1978, at D7, col. 3; *see also* Stabler, *Foreign Bribery Act Imposes Tough Rules on the Bookkeeping of all Public Firms*, Wall St. J., July 28, 1978, at 30, col. 1.

19. The Conference Committee adopted the "in reasonable detail" qualification to the Senate bill S. 305 to make it clear that no absolute standard of precision is required or attainable. *See* 123 Cong. Rec. S19401, (daily ed. Dec. 6. 1977) (remarks of Sen. Tower). This provision clearly states that the issuer's records should reflect transactions in conformity with accepted methods of re-

internal accounting controls[20] sufficient to provide reasonable assurances that:

1. transactions are executed in accordance with management's general or specific authorization;
2. transactions are recorded as necessary (a) to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and (b) to maintain accountability for assets;
3. access to assets is permitted only in accordance with management's general or specific authorization; and
4. the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.[21]

Additionally, for reasons of national security an exception relieves issuers from maintaining records in this manner if the issuer is

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cording economic events and effectively prevent off the book slush funds and payment of bribes. CONF. REP., *supra* note 3, at 10. The requirement of accurate record keeping is not qualified by the standard of "materiality," but there is a qualification of reasonableness for detail. This is important in determining whether books must accurately reflect payments that are neither substantial nor material.

20. The Senate Committee recognized that management must exercise judgment in determining the type of accounting control system needed to assure that the expressed objectives will be achieved. The size of the business, diversity of operations, degree of centralization of financial and operating management, and amount of contact by top management with daily operations are among the factors management must consider in establishing and maintaining an internal accounting controls system. The obligation to have and maintain internal controls, however, is absolute. SENATE COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS, REPORT TO ACCOMPANY S. 305, FOREIGN CORRUPT PRACTICES ACT OF 1977 AND DOMESTIC AND FOREIGN INVESTMENTS IMPROVEMENT DISCLOSURE ACT OF 1977, TOGETHER WITH ADDITIONAL VIEWS, S. REP. No. 144, 95th Cong., 1st Sess. at 8 (1977) [hereinafter cited as S. REP.].

21. 15 U.S.C. 78m(b)(2)(B) (Supp. I 1977). The Senate bill contained provisions making it unlawful for any person (1) to knowingly falsify any book, record, or account required to be made for any accounting purpose, and (2) to make a materially false or misleading statement or to omit, or cause another person to omit, any material fact rendered for accounting purposes. These provisions were deleted because the SEC had already published for comment rules designed to accomplish similar objectives under existing authority. The Senate did not intend to resolve the issue of whether or not the inclusion or deletion of the word "knowingly" would affirm, expand, or overrule the decision of the Supreme Court in *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976). The conferees decided that this legislation should not be converted into a debate on the important issues raised by the *Hochfelder* decision. CONF. REP., *supra* note 3, at 10-11.

cooperating with a federal department or agency under written Presidential directive.[22]

The second part of the Act, sections 103 and 104, concerns foreign corrupt practices and improper payments. Section 103 applies to issuers and reporting firms under the jurisdiction of the SEC.[23] Section 104 applies to all other domestic concerns and is implemented by the Justice Department. Both issuers and domestic concerns are prohibited from use of the mails or other instrumentalities of interstate commerce to facilitate improper payments. Generally, these prohibitions apply when the recipient is a foreign official, political party, or person who the firm has reason to know will use the payments for prohibited purposes. The payments may not be made to influence the recipient to assist the firm in obtaining business.

The third part of the Act is entitled Domestic and Foreign Investments Improvement Disclosure Act. This portion expands the disclosure requirements applicable to persons who acquire more than five percent interest in equity securities of publicly owned companies.[24]

B. *Provisions of Sections 103 and 104*

Sections 103 and 104 are the major provisions characterizing certain foreign payments as being illegal under United States law. The final text for these provisions emerged from the Committee of Conference of both Houses of Congress, and two bills previously passed, House bill HR 3185, and Senate bill S 305.[25] Sections 103

22. CONF. REP., *supra* note 3, at 11. This directive expires one year after its issuance, unless renewed, and must be reported annually to the congressional intelligence oversight committees. The only matters excluded from the requirements are those which would result in the disclosure of information that has been classified by the appropriate department or agency for protection in the interests of national security.

23. Section 103 of the Act adds a new section 30A to the Exchange Act.

24. The Act amends 13(d) of the Exchange Act to expand the disclosure requirements applicable to persons who acquire more than 5 percent of an equity security registered with the SEC or who propose to acquire such securities through a tender offer. The following must be disclosed: (a) the residence, citizenship, and nature of the beneficial ownership of the person acquiring the securities, and all other persons by whom or on whose behalf the purchasers have been or are to be effected, and (b) the background and citizenship of each associate of the purchaser who owns or has a right to acquire additional shares of the issuer. S. REP., *supra* note 20, at 18.

25. H.R. 3815, 95th Cong., 2d Sess. (1977); S. 305, 95th Cong., 1st Sess. (1977). Legislation was introduced March 11, 1976 by Sen. William Proxmire's bill S.

and 104 represent a compromise of the two bills.

Section 103 specifically applies to any issuer registered under § 12 or required to file under § 15(d) of the Exchange Act, or any of its officers, directors, employees, agents, or stockholders, acting on behalf of such issuer. The Act prohibits the use of the mails, or other instrumentality of interstate or foreign commerce, in furtherance of any corrupt payment, gift, offer, promise, or authorization of any money or thing of value. It is unlawful to make these payments to any foreign government official, or any foreign political party, official, or candidate. Also included in this class of recipients are persons who the issuer knows or has reason to know will directly or indirectly offer the payment for prohibited purposes. Payments are prohibited if made for the purpose of influencing any official act or decision of the payee, or inducing the payee to influence any act or decision of a foreign government or instrumentality. These payments are prohibited only if made to assist the issuer in obtaining, retaining, or directing any business.

Section 104 contains identical provisions which apply to any domestic concern, including any officers, directors, employees, agents, or stockholders, acting on its behalf. "Domestic concern" includes any individual who is a citizen, national, or resident of the United States. The term also includes any corporation, partnership, association, joint stock company, business trust, unincorporated organization, or sole partnership. Each entity must have its principal place of business in the United States or be organized under the laws of a state, territory, possession, or commonwealth of the United States.

1. Jurisdiction of the Act

The jurisdictional basis of the Act is broad and appears to reach all corrupt foreign payments. Jurisdiction is based on the use of the mails, or other means or instrumentalities of interstate or foreign commerce. These means need only be used in *furtherance* of making the improper payment. Section 103 covers all registered issuers regardless of their nationality or the extent of their contacts with the United States. Even such minimal contact as trading stock on

3133. Despite the activity of the 94th Congress, no legislation was enacted. The 95th Congress passed S. 305 on May 5, 1977, and H.R. 3815 on November 1, 1977. The difference between these two bills is discussed in the CONF. REP., *supra* note 3, at 9. *See generally* Note, *Prohibiting Foreign Bribes: Criminal Sanctions for Corporate Payments Abroad,* 10 CORNELL INT'L L.J. 231 (1977).

a United States exchange is an adequate basis for jurisdiction.[26] Section 104 further extends the Act's reach to include individuals and any business entity without the issuer's knowledge.[27] Enforcement was not needed here because Congress felt that section 102, requiring the United States parent to closely oversee the accounting practices of its foreign subsidiary, would substantially curtail any illegal conduct.[28] More importantly, jurisdiction was not extended to foreign employees and foreign subsidiaries because of inherent jurisdictional, enforcement, and diplomatic difficulties.[29] These difficulties, however, do not exist with respect to issuers and domestic concerns. Any of these domestic individuals or business entities would be liable for engaging in foreign bribery indirectly through a foreign employee or subsidary. Additionally, some foreign subsidiaries and employees, if considered "domestic concerns" for purposes of the Act, would be liable for engaging in prohibited conduct.

Besides its exclusion of foreign employees and subsidiaries, the Act may not apply if a payment is not "on behalf of" a reporting issuer or domestic concern.[30] The term "on behalf of" creates confusion. It is unclear whether a payment by an employee of a foreign subsidiary managed by a United States citizen is made "on behalf of" a domestic concern. It is clear, however, that the Act applies when a foreign employee of a foreign subsidiary is a conduit for a prohibited payment made to benefit the domestic concern or re-

26. The SEC has examined secret payments by foreign companies made in the United States to win or hold airline business. *See* Wall St. J., March 8, 1979, at 6, col. 1.

27. CONF. REP., *supra* note 3, at 14.

28. *See* 123 CONG. REC. S19401 (daily ed. Dec. 6, 1977) (remarks of Sen. Tower).

29. *See* 123 CONG. REC. S19399 (daily ed. Dec. 6, 1977) (remarks of Sen. Proxmire): "Mr. President, this legislation recognizes the inherent jurisdictional, enforcement and diplomatic problems in the passage of legislation which prohibits conduct some part of which takes place overseas. Accordingly, the conferees determined not to cover foreign subsidiaries of American corporations operating overseas."

30. "On behalf of" appears to refer only to acts of stockholders and not to acts of "agents." The legislative history of S. 305, however, suggests that "on behalf of" is intended to modify each of the enumerated categories, since it was added as part of the phrase "or any officer, director, employee or stockholder thereof acting on behalf of such issuer" during the Senate Committee mark-up of S. 305 on April 6, 1977. Comparable language was not contained in H.R. 3815. The revision of this language is not explained in the Conference Report, but appears to evidence no intent other than to add a reference to agents.

porting company.[31]

Finally, if a payment is made without the knowledge of a domestic concern or reporting company, the Act may not apply. This exception has its basis not in the language of the statute, but in the Act's legislative history. Neither section 103 nor section 104 requires that the issuer or domestic concern have knowledge of the criminal acts. An agent acting for the benefit of the issuer in direct violation of its rules may subject the issuer to liability.[32] This result, however, is inconsistent with the Act's legislative history, which indicated that criminal sanctions would not apply to a corporation for the acts of "an agent who had run amuck and was not acting pursuant to corporate order."[33] Whether knowledge of improper conduct will be imputed to an issuer or domestic concern depends on a number of variables, including the position of an employee or agent, the care used by the Board of Directors in supervising management, the care used by management in supervising employees in sensitive positions, and the adherence to strict accounting standards. A United States company, however, which "looks the other way" to establish a defense of ignorance of improper conduct by a foreign susidiary would be in violation of section 102. Under that accounting provision, no off-the-books fund could lawfully be maintained or payment lawfully disguised either by the parent or subsidiary.[34]

2. Exclusions from Sections 103 and 104

The Act covers payments made "corruptly" to influence a "foreign official." By defining these terms the Act removes payments otherwise considered bribes from its scope. First, section 30A(b) of the Exchange Act defines foreign officials as follows:

31. *See* 123 CONG. REC., *supra* note 29, at S19399 (remarks of Sen. Proxmire): "Nevertheless, where the parent corporation participates directly or indirectly [in] the prohibited conduct it would itself be liable." *See also* 123 CONG. REC. H12824 (daily ed. Dec. 7, 1977) (remarks of Rep. Staggers).

32. U.S. v. Hilton Hotels Corp., 467 F.2d 1000, 1004 (9th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973). (Congress may constitutionally impose criminal liability upon a business entity for acts or omissions of its agents within the scope of employment, and such liability may attach without proof that the conduct was within the agent's actual authority, and even though it may have been contrary to express instructions.); *see* U.S. v. American Radiator & Standard Sanitary Corp., 433 F.2d 174, 204-05 (3rd Cir. 1970).

33. *House Hearings, supra* note 4, at 231 (statement of Harvey L. Pitt).

34. S. REP., *supra* note 20, at 11.

> [T]he term "foreign official" means any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or any person acting in an official capacity for, or on behalf of such government or department, agency, or instrumentality. Such term does not include any employee of a foreign government or any department, agency, or instrumentality thereof whose duties are essentially ministerial or clerical.[35]

Payments made to subordinate government employees who do not exercise discretionary functions are exempt from the Act because these employees are not "foreign officials."[36] Additionally, the Act exempts payments to an official whose duties are discretionary, if made for the purpose of expediting the performance of ministerial acts and not for the purpose of influencing an official act or decision.[37] These "grease or facilitating" payments include both bribes to customs officials to obtain lower than normal duties and bribes to license-granting authorities to obtain import and export licenses or industrial property protection not allowed by law. Congress exempted these "grease and facilitating" payments because it recognized that payments made to assure or speed the proper performance of an official's duty may not be viewed as reprehensible by other countries. Further, Congress noted the futility of a unilaterial United States attempt to eradicate all such payments. Practical determination of whether a payment is prohibited in certain situations will hinge upon the importance of the functions performed by the foreign official. Payments are clearly prohibited, however, if made to influence the passage of laws, regulations, placement of government contracts, formulation of policy, or other discretionary governmental functions.[38]

Second, to be illegal under the Act the payment must be made "corruptly." Although the term "corruptly" is not specifically defined in the Act, the House Report discussed corrupt purpose:[39]

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35. 15 U.S.C. 78dd-1(b) (Supp. I 1977).

36. *See* 123 CONG. REC., *supra* note 28, at S19401 (remarks of Sen. Tower): "Under the bill, payments must meet two tests to be actionable. First, they must be made to an official whose duties are not 'essentially ministerial or clerical'."

37. CONF. REP., *supra* note 3, at 12.

38. H.R. REP., *supra* note 17, at 8.

39. *Id.*, at 7-8. An attempt to explain the meaning of "corrupt purpose" was contained in the House discussion of the Conference Report:

> The conference report adopts the House provision prohibiting corporations subject to SEC jurisdiction and other domestic concerns from making payments . . . where there is a corrupt purpose. The Senate-passed provision which defines corrupt purpose was vague and contained several loopholes.

> The word "corruptly" is used in order to make clear that the offer, payment, promise, or gift, must be intended to induce the recipient to misuse his official position; for example, wrongfully to direct business to the payer or his client, to obtain preferential legislation, or regulations, or to induce a foreign official to fail to perform an official function. The word "corruptly" connotes an evil motive or purpose such as that required under 18 U.S.C. 201(b) which prohibits domestic bribery. As in 18 U.S.C. 201(b), the word "corruptly" indicates an intent or desire wrongfully to influence the recipient. It does not require that the act be fully consummated or succeed in producing the desired outcome.[40]

The legislative history further indicates that Congress intended to exclude both facilitating payments and payments procured by extortion from its definition of "corruptly." The Senate Committee reported:

> Sections 103 and 104 cover payments and gifts intended to influence the recipient, regardless of who first suggested the payment or gift. The defense that the payment was demanded on the part of a government official as a price for gaining entry into a market or to obtain a contract would not suffice since at some point the U.S. company would make a conscious decision whether or not to pay a bribe. That the payment may have been first proposed by the recipient rather than the U.S. company does not alter the corrupt purpose on the part of the person paying the bribe. On the other hand true extortion situations would not be covered by this provision since a payment to an official to keep an oil rig from being dynamited should not be held to be made with the requisite corrupt purpose.[41]

The House Report, similarly, excluded both faciliating and extorted payments, recognizing that such payments would be made under duress to protect business investment.[42] The exact scope of excluding extorted payments from the Act is uncertain. First, there is no indication in the legislative history whether the extortion

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> The House version which provided that the corrupt purpose must be to influence any official act or decision of the recipient or to induce the recipient to use his influence to affect a Government act or decision with the modification that the bribe must also be to retain or obtain business.

123 CONG. REC., *supra* note 31, at H12824 (remarks of Rep. Staggers).

40. H.R. REP., *supra* note 17, at 7-8. Presumably domestic case law would be applicable to the definition. *See* U.S. v. Kahn, 472 F.2d 272, 278 (2d Cir. 1973); U.S. v. Barash, 365 F.2d 395, 401-06 (2d Cir. 1966).

41. S. REP., *supra* note 20, at 10-11.

42. 123 CONG. REC. H11932 (daily ed. Nov. 1, 1977) (minority views to H.R. 3815).

exception is limited to threatened violence or property damage, or extends to threatened economic loss. Second, payments which would be considered extorted or corrupt in the United States may, by foreign custom and usage, be recognized as a necessary part of doing business.

In addition to covering only payments corruptly made to foreign officials, the Act applies to bribes made to assist in obtaining or retaining business for or with, or directing business to any person. Although the purpose of this specification was to exclude grease payments from the Act,[43] it has a broader effect.[44]

3. Enforcement by the SEC and Department of Justice

The Act is administered by both the SEC, which investigates activities of issuers, and the Department of Justice, which investigates and has plenery authority for both civil and criminal prosecution of domestic concerns.[45] According to the Act, the SEC may bring civil actions, commence administrative proceedings, including public or private disciplinary proceedings, and refer cases to the Justice Department for criminal prosecution.[46] Further, although not specified in the Act, the House Committee intended that the courts recognize a private cause of action on behalf of persons suffering injury as a result of prohibited corporate bribery.[47]

Section 32(c) of the Exchange Act, a penalty provision applica-

43. S. REP., *supra* note 20, at 10.

44. *See* Carley, *How Exxon Official Agonized Over Making '71 Italian Contribution,* Wall St. J., July 14, 1978, at 1, col. 6. The problem facing Exxon's president was whether to approve a $700,000 "contribution" in Italy—which some investigators considered an outright bribe—in connection with the settlement of a $30 million Italian claim against Esso Italiana. The payment was approved.

45. The Carter Administration objected to the assigned role of the SEC, arguing that "requiring the SEC to take primary responsibility for enforcing a criminalization program would be a dubious diversion of its primary mission of securing adequate disclosure to protect investors of registered securities." Similarly, the Department of Justice took the position that the sharp division of investigative responsibilities between the SEC and the Federal Bureau of Investigation would "hamper" the effort to "mobilize maximum available investigative resources." S. REP., *supra* note 20, at 71; *House Hearings, supra* note 4, at 22-23.

46. The Justice Department has been using information obtained from the SEC under its program of voluntary disclosure. The Justice Department may use a grand jury to gather evidence, and where evidence is not sufficient for criminal prosecutions, it will proceed with civil injunction actions.

47. H.R. REP., *supra* note 17, at 10.

ble to issuers, subjects issuer violators to a maximum one million dollar fine. This provision further subjects any officer, director, or stockholder acting on behalf of the issuer to a maximum fine of ten thousand dollars and/or a five year imprisonment. Predicated upon a judicial finding of an issuer's liability, these same fine and imprisonment terms apply to an issuer's employees or agents who wilfully conduct prohibited activities.[48] More importantly, the issuer may not pay directly or indirectly any fine imposed upon any of its officers, directors, stockholders, employees, or agents. Further, injunctive powers are conferred upon the SEC pursuant to section 21 of the Exchange Act, and upon the Attorney General pursuant to section 104(c) of the Foreign Corrupt Practices Act.[49]

C. *Other Laws Applicable to Bribery*

Even though a payment may fall within one of the several exceptions to the Act, a number of domestic and foreign laws may still impose liability. Justice officials have indicated that they will not be constrained by the "intent of Congress" as manifested by the exemptions under the Act and will prosecute corporations that make payments proscribed by other statutes.[50]

A number of domestic statutes require the disclosure of questionable payments. The Export-Import Bank of the United States requires all companies dealing with buyers financing purchases through the Bank to report all commissions included in the contract price. Deliberate falsification of reports violates 18 U.S.C. § 1001.[51] The International Security Assistance Act and the Arms

48. The Act predicates an employee's or agent's liability upon a judicial finding that the issuer has violated the section. This provision reflects the concern that in some instances a low level employee or agent of the corporation, perhaps the person who is designated to make the payment, might otherwise be made the scapegoat for the corporation.

49. The Department of Justice has stated that it expects "future cases to primarily involve single bribe instances which will not effectively lend themselves to [injunctive action]." *House Hearings, supra* note 4, at 74. In contrast, by the time Chairman Williams testified in April 1977, the SEC had already brought injunctive actions against 31 corporations because of questionable or illegal payments. The Commission can be expected to wield its injunctive power freely and often. *House Hearings, supra* note 4, at 215.

50. North, *The Economics of Extortion,* 10 WASHINGTON MONTHLY at 29, 33 (Nov. 1978).

51. 18 U.S.C. § 1001 (1976) provides that "[w]hoever, in any matter within the jurisdiction of any department . . . of the United States knowingly and willfully . . . makes any false, fictitious or fraudulent statements or representations,

Export Control Act[52] require reports of payments, including political contributions and agent's fees, made or offered to secure the sale of governmental and commercial military items abroad. These reports are made available to congressional committees and federal agencies. The Foreign Military Sales Act requires disclosure to purchasing governments and the Department of Defense of any agent's fees included in contracts. Fees considered questionable by the Defense Department or unacceptable by foreign governments will not be allowed as costs under such contracts.[53] Further, the Foreign Assistance Act[54] requires firms conducting business under its jurisdiction to report all commissions connected with sales to the Agency for International Development. Making questionable payments may also violate criminal statutes proscribing mail and wire fraud[55] and conspiracy to defraud the United States.[56] Furthermore, 18 U.S.C. § 953 prohibits United States citizens from attempting directly or indirectly to influence the conduct of a foreign government in relation to disputes or controversies with the United States.[57]

In addition to the Act, the SEC has jurisdiction to require all registered issuers to disclose material information. Payments that are lawful under the Act, such as "grease payments," may be material to the purchasing decision of a prudent investor and therefore be subject to disclosure.[58] The willful failure to report a

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or [knowingly] makes or uses any false writing or document . . . shall be fined not more than $10,000 or imprisoned not more than five years, or both." In United States v. Olin Mathieson Chemical Corp., 368 F.2d 525 (2d Cir. 1966), it was established that the concealment of improper payments in Agency for International Development reports violated 18 U.S.C. § 1001 (1976). The Criminal Fraud Section of the Export-Import Bank is reportedly investigating several alleged cases of false reporting. Letter from Elliot Richardson, Chairman of the President's Task Force on Questionable Corporate Payments Abroad, June 3, 1976, at 11.

52. 22 U.S.C. § 2312 (1976).

53. *See* 76 DEPT. STATE BULL. 351, 352 (April 11, 1977).

54. 22 U.S.C. § 2399 (1976).

55. 18 U.S.C. §§ 1341 & 1343 (1976).

56. 18 U.S.C. § 286 (1976).

57. *See* Letter from Sen. Lee Metcalf, Rep. Benjamin Rosenthal, Rep. Toby Moffett, Rep. Thomas Downey, Ralph Nader, and Mark Green to Hon. Edward H. Levi (Aug. 22, 1975) *reprinted in* CORNELL INT'L L.J., *supra* note 25, at n. 7.

58. The SEC's position is set out in SEC Rel. No. 14478, *supra* note 13. For guidance in determining whether or not a specific fact is material, see the discussion of materiality contained in SEC, REPORT OF THE SECURITIES AND EXCHANGE COMMISSION ON QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES 16-32 (Senate Comm. on Banking, Housing and Urban Affairs Print 1976).

material payment arguably constitutes criminal fraud under 18 U.S.C. § 1001.[59] Further, the SEC may order disclosure of questionable payments because investors have a right to be fully advised of facts concerning the character and integrity of officials relevant to their management of the corporation.[60] Also, the Internal Revenue Service scrutinizes payoffs reported in income tax statements because unlawful payments are not deductible as corporate business expenses.[61]

Bribery of government officials is prohibited in most foreign countries.[62] It is difficult, however, to determine what constitutes a bribe under the laws of a particular country.[63] In most countries payments made to obtain or maintain government business or to influence the passage or retention of favorable legislation clearly are bribes. Other types of questionable payments, though, are determined to be illegal according to each country's particular laws or customs.[64] Despite foreign proscription of certain types of bribes,

59. *See* text accompanying note 51 *supra.*

60. Investors have a right under the federal securities laws to be fully advised of facts concerning character and integrity of the officials relevant to their management of the corporation. This is particularly true when management executives administer significant assets in foreign states, where investors may not have the same protections as those that exist in the United States. Accordingly, transactions that would not otherwise be material may become so by virtue of the role played by management. Whether disclosure is required on the basis that it relates to the integrity of management is subject to a number of variations. In situations involving a pervasive pattern of encouragement, participation in or knowledge of these practices by senior management, the need for disclosure is clear.

REPORT OF THE SECURITIES AND EXCHANGE COMMISSION ON QUESTIONABLE AND ILLEGAL CORPORATE PAYMENT AND PRACTICES, *supra* note 58, at 30.

61. I.R.C. § 162(c)(1).

62. 2 Ad Hoc Committee on Foreign Payments, Bar of the City of New York, Report on Questionable Foreign Payments by Corporations: The Problem and Approaches to a Solution (March 14, 1977); *see also* CORNELL INT'L L.J., *supra* note 25, at 235.

63. *Prohibiting Bribes to Foreign Officials: Hearings on S. 3133, S. 3379, and S. 3418 Before the Senate Comm. on Banking, Housing and Urban Affairs,* 94th Cong., 2d Sess. 39 (1976) R. Hills, Chairman of the SEC testified:

I do not think [that any government agency in the country has] the capacity to decide what is or is not legal under foreign laws. I hate to say how many file cabinets of my former law firm were filled with opinions expressing no opinion as to whether a given transaction was legal or illegal.

64. *See* North, *supra* note 50, and Kuegel, *supra* note 11. Foreign officials have been convicted by their own countries for taking bribes, *see* Wall St. J., March 2, 1979, at 11, col. 1; Wall St. J., March 15, 1979, at 3, col. 1.

foreign enforcement is rare, particularly with respect to United States nationals.[65]

D. *Impact of the Act*

The most common criticism of the Act is that the United States unilateral prohibition of questionable payments results in a disadvantage to U.S. corporations competing with foreign companies abroad. The estimated ten billiion dollars of lost annual exports[66] resulting from these prohibitions also adversely affect the United States' rate of inflation and trade deficit. It is argued that foreign companies that can meet payment demands will replace the American companies in markets where bribes are part of doing business.[67] As a result many American businesses have already pulled out of export markets, acknowledging that the Act seriously impedes their international business.[68]

Corporations engaged in world trade claim that payoffs are an accepted and necessary part of conducting business. Such payments are deeply rooted in the business and political traditions of foreign countries.[69] A firm desiring to obtain an operating license, unload a shipment of goods, lower an arbitrary tax assessment or avoid red tape must make a "grease payment." Further, some companies are forced to distribute money in countries where payoffs are considered politically benevolent gestures. Political protection is another form of foreign extortion. Gulf Oil Corporation, for example, contributed three million dollars to the ruling political party in South Korea after the party chief told the Gulf chairman that the company's "continued prosperity depended upon a $10 million contribution to the party."[70] In another case, Honduras threatened to double United Brands' taxes which would amount to an additional twenty million dollars. United Brands' head officer offered several hundred thousand dollars to reduce the tax, which the President of Honduras rejected. The Economic Minister,

65. *See The Activities of American Multinational Corporations Abroad: Hearings Before the Subcomm. on International Economic Policy of the House Comm. on International Relations,* 94th Cong., 1st Sess. 25-26 (1975). One of the reasons suggested for the lack of enforcement is that the countries in which the bribes are paid do not have access to the information needed to successfully prosecute.

66. North, *supra* note 50, at 30.

67. Silk, *To Bribe or Bribe Not,* N.Y. Times, Oct. 26, 1976, at 39, col. 5.

68. North, *supra* note 50, at 33.

69. *See* Note, *Securities Regulation,* 49 TEMP. L.Q. 428, 434 (1976).

70. North, *supra* note 50, at 32.

however, counteroffered to reduce the tax for a payment of five million dollars.[71]

According to many observers, no legislation can eliminate these payments. These observers maintain that most questionable payments abroad arise from practices "that are deeply imbedded in the low pay of civil servants in foreign countries and in the absence of settled law which gives a great deal of discretion to public officials."[72] To avoid the sanctions of the Act many United States companies have arranged to serve as subcontractors in order to do most of the actual construction work and disclaim knowledge of payoffs, while foreign companies serve as prime contractors making the questionable payments. Other United States firms are marketing products through independent offshore trading firms that can sell products abroad by employing any necessary questionable means.

Some authorities, nevertheless, discount both the necessity of foreign bribery and the inevitability of trade losses without such payments.[73] First, in many product areas United States corporations compete only among themselves for sales abroad.[74] Therefore, any trade distortion would consist of a sales redistribution among domestic companies, without affecting the United States balance of trade. Second, since bribes frequently do not reach the intended government recipient, their bearing on foreign country purchasing decisions is questionable.[75] Third, a number of reports indicate that trade losses are minimal. A survey of forty corporations that had made questionable payments found that only six companies lost more than .5 percent of total sales after stopping certain payments, and in no case did the loss exceed a few percentage points.[76] An investigation by the President's Task Force on Questionable Corporate Payments Abroad similarly supported the view that bribes play an insignificant role in foreign trade.[77]

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71. *Id.*

72. Schorr, *Questionable-Payments Drive Stimulates Competition, Tougher Internal Controls,* Wall St. J., June 23, 1978, at 34, col. 1.

73. *See Senate Hearings on Foreign and Corrupt Bribes, supra* note 7, at 59-61. Some companies have found that payments may have been unnecessary. *See* Schorr, *supra* note 72.

74. 122 CONG. REC. S15790 (daily ed. Sept. 14, 1976); Richman, *supra* note 10.

75. *See Senate Hearings on Foreign and Corrupt Bribes, supra* note 7, at 39; Richman, *supra* note 10.

76. *See* Richman, *supra* note 10.

77. *See* Letter from Elliot Richardson, Chairman of the President's Task Force on Questionable Payments Abroad, to Sen. William Proxmire, (June 11,

Thus, the impact of the Act has been described as favorable.[78] Competition has been stimulated in some industries formerly dominated by companies making payoffs. Law enforcement officials have used some companies' voluntary disclosures to build otherwise impossible cases against other offenders. Finally, many companies have tightened their internal controls against questionable practices, resulting in improved employee morale.[79] Some observers, however, doubt the effectiveness of these controls.

III. EXTRATERRITORIAL APPLICATIONS OF THE ACT

The extraterritorial application of the Foreign Corrupt Practices Act involves foreign relations considerations. During the Act's legislative development, Secretary of the Treasury Michael Blumenthal testified before the Consumer Protection and Finance Committee:[80]

> I have always felt that a criminal statute such as this one will not be easy to enforce, particularly because it does involve acts that take place in other countries, the whole question of extraterritoriality and gets you into questions of the availability of witnesses, gets you into the questions of acts taken in other jurisdictions into which the laws are different . . . . We must not underestimate the difficulties of enforcement that in any case will result from this kind of legislation.

The Act poses difficult problems concerning legislative jurisdiction under international law, international comity, the act of state doctrine, and enforcement and constitutional questions.

A. *Legislative Jurisdiction Under International Law*

Enforcement requires that the Act have extraterritorial applicability within the reach of the legislative power of the United

1976) at 4 *reprinted in Prohibiting Bribes to Foreign Officials, supra* note 63.

78. Schorr, *supra* note 72.

79. *Id.*

80. Former Secretary of Commerce Elliot Richardson expressed similar fears, which are highlighted in the report of the President's Task Force on Questionable Payments Abroad:

> The Task Force has concluded, however, that the criminalization approach would represent little more than a policy assertion, for the enforcement of such a law would be very difficult if not impossible . . . . The Task Force has concluded that unless reasonably enforceable criminal sanctions were devised, the criminal approach would represent poor public policy.

H.R. REP., *supra* note 17, at 20 (minority views).

States.[81] When applying an act of Congress to international transactions, a court must determine whether Congress intended the regulatory scheme to apply transnationally.[82] Courts in making this determination will interpret the extent of a particular statute's application to be consistent with principles of public international law. While Congress has power to impose jurisdiction beyond the limitations of public international law, courts will not impute such application absent express congressional intent.[83] The Act's express criminalization of extraterritorial bribery is an expansion of legislative jurisdiction to its maximum extent,[84] and may extend beyond the limitations imposed by public international law.[85]

The Act covers conduct of United States nationals and corporations abroad, and also conduct of foreign companies registered under the Exchange Act. The validity of this exercise of jurisdiction depends upon the interpretation of three theories of legislative jurisdiction within public international law.

The first theory of international legislative jurisdiction is the territorial principle. Under this principle a nation may prescribe rules of law attaching legal consequences to conduct occurring within its territory, whether or not the effect of that conduct falls

81. *See* SENATE COMM. ON BANKING, HOUSING AND URBAN AFFAIRS, CORRUPT OVERSEAS PAYMENTS BY U.S. BUSINESS ENTERPRISES, S. REP. No. 1031, 94th Cong., 2d Sess. 9 (1976).

82. Congressional intent determines whether an act applies extraterritorially. Foley Bros. v. Filardo, 336 U.S. 281, 285 (1949); Blackmer v. United States, 284 U.S. 421, 437 (1932).

83. *See* Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326, 1334 (2d Cir. 1972). (Congress has the power to impose liability for the extraterritorial conduct of persons subject to the due process limitation of the fifth amendment.)

84. *See generally* Harvard Research in International Law, *Jurisdiction with Respect to Crime,* 29 AM. J. INT'L L. 435, 443-47 (Supp. 1935).

85. Legislative history indicates congressional concern for the viability of the extraterritorial provisions of the Act under international law. These concerns were addressed in hearings held prior to the passage of the Act. Counsel to the Committee on Banking, Housing and Urban Affairs concluded:

> . . . [t]here is no general limitation under either international law or the Constitution on the authority of Congress to prescribe rules of conduct for citizens or nationals of the United States abroad. There has been, however, little in the way of direct case law authority on the subject, and a determination in cases arising under the language of your bill might turn on the particular facts of that case, such as whether the payment made in a foreign country has an effect on the securities market in the United States or on holders of securities of that issuer who are nationals of the United States.

Supra note 81.

within that territory. This territorial principle is set out in the RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 17 as follows:

> A state has jurisdiction to prescribe a rule of law
> (a) attaching legal consequences to conduct that occurs within its territory, whether or not such consequences are determined by the effects of the conduct outside the territory, and
> (b) relating to a thing located, or a status or other interest localized, in its territory.

The Court in *American Banana Co. v. United Fruit Co.*[86] applied this principle and held that the Sherman Act did not apply where all the acts committed in furtherance of a conspiracy to restrain trade occurred outside the territorial limits of the United States and were not considered violations of the laws of the foreign countries. The Foreign Corrupt Practices Act, by proscribing conduct within the United States which is in furtherance of foreign corrupt payments, is in accordance with the subjective territorial principles of public international law.

The second theory of international legislative jurisdiction, the objective territorial principle, gives a nation jurisdiction to prescribe rules of law relating to conduct occurring beyond its territorial limits if that conduct has its effect within the territory of the prescribing nation. According to the RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 18, jurisdiction is limited to cases where: (1) the conduct and the effect of that conduct are generally recognized as constituent elements of a crime or a tort, (2) the effect within the territory is substantial, and (3) the effect is a direct and foreseeable result of extraterritorial conduct.[87] In addition, the exercise is not inconsistent with generally recognized principles of justice.[88]

This RESTATEMENT rule resulted from liberal interpretations of the objective principle as advanced in two leading cases. In *Case of the S.S. Lotus*,[89] the Permanent Court of International Justice upheld the jurisdiction of Turkey in a criminal case. The officer of

86. 213 U.S. 347 (1909).

87. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 18 (1965).

88. *Id.*

89. (1927) P.C.I.J., ser. A., No. 10, (1927-1928) Ann. Dig. 153 (No. 98). *See also* 2 Ad Hoc Committee on Foreign Payments, Bar of the City of New York, Report on Questionable Foreign Payments by Corporations: The Problem and Approaches to a Solution 5-14 (March 14, 1977).

the Lotus, a French national, was convicted in connection with the collision of the Lotus and a Turkish vessel on the open sea which resulted in the loss of the Turkish vessel and lives of Turkish nationals. An international report noted:

> [I]t is implicit in the [L]otus case that international law does impose limits on the extraterritorial assertion of jurisdiction by states—and, if jurisdiction is to be based on the fact that one of the constituent elements of the offense, and more especially its effects, have taken place within the state asserting jurisdiction . . . such effects must be, in the language of *Lotus* "legally and entirely inseparable from the conduct outside the territory," so much so that their separation renders the offense non-existent.[90]

The objective principle was recognized in the United States in *United States v. Aluminum Co. of America,*[91] in which the Second Circuit recognized that Congress has the power to attach liability to persons for their conduct outside the United States. The court held that the Sherman Act applied extraterritorially where conduct outside the United States was intended to, and did produce, detrimental effects within this country. The court stated that "any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends; and these liabilities other states will ordinarily recognize."[92] The *Aluminum Co.* principle has been more restrictively applied[93] in *Bersch v. Drexel Firestone, Inc.*[94] and *IIT v. Vencap, Ltd.*[95] In both cases, the Second Circuit interpreted the extraterritorial application of the Exchange Act as it related to losses sustained by foreign plaintiffs. The court indicated that conduct which directly contributes to or constitutes a part of a violation must occur in the United States in order to subject the actor to liability.

The applicability of the objective principle is narrowed by the

90. Committee on International Law, Bar of the City of New York, *The 1964 Amendments to the Securities Exchange Act of 1934 and the Proposed Securities and Exchange Commission Rules-International Law Aspects,* 21 THE RECORD 240, 247-48 (1966).

91. 148 F.2d 416 (2d Cir. 1945).

92. *Id.* at 443.

93. *See* Note, *American Adjudication of Transnational Securities Fraud,* 89 HARV. L. REV. 553 (1976); Note, *Extraterritorial Application of § 10(b) of the Securities Exchange Act of 1934—The Implications of Bersch v. Drexel Firestone, Inc. and IIT v. Vencap, Ltd.,* 33 WASH. & LEE L. REV. 397 (1976).

94. 519 F.2d 974 (2d Cir.), *cert. denied,* 423 U.S. 1018 (1975).

95. 519 F.2d 1001 (2d Cir. 1975).

reluctance of nations based on concepts of sovereignty and territorial supremacy to extend the reach of their criminal laws to foreign citizens.[96] It is generally recognized that the penal laws of a country have no extraterritorial force, although each nation may provide for the punishment of its own citizens for acts committed by them outside of its territory. To recognize, however, that the penal laws of a country can bind foreigners and regulate their conduct, either in their own or any other foreign country, is to assert jurisdiction over such countries and to impair their independence. The Act, therefore, accords with international law when proscribing conduct of foreign issuers only when a foreign payment directly affects the United States. Further, the validity of extending criminal laws to foreign officers, directors, or shareholders acting on behalf of a foreign issuer is highly questionable.

The third theory of international legislative jurisdiction dictates that a nation has jurisdiction to prescribe rules of law relating to the conduct of its nationals, wherever such conduct occurs. For the purposes of this jurisdiction, a corporation represents the nationality of its incorporating state.[97] This jurisdictional theory was partially relied upon by the Supreme Court in *Steele v. Bulova Watch Co., Inc.*[98] In that case, a United States corporation claimed its trade reputation had been damaged by a United States citizen who manufactured and sold poorly constructed watches in Mexico under the corporation's trademark. The Court upheld the jurisdiction of the federal district court to apply a federal trademark statute to the conduct of the United States citizen in Mexico. The Supreme Court also relied on this jurisdictional theory in *Blackmer v. United States.*[99] In that case, the Court sustained the validity of a statute compelling a United States citizen residing in a foreign country to comply with a subpoena served by the United States consul.

The Act's jurisdiction over United States citizens and any corporations organized under the laws of the United States is therefore

96. 2 J. MOORE, A DIGEST OF INTERNATIONAL LAW § 201, at 236 (1906).

97. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 27 (1965).

98. 344 U.S. 280 (1952).

99. 284 U.S. 421 (1932); *see also* United States v. Bowman, 260 U.S. 94 (1922) in which the Supreme Court reversed a lower court order quashing an indictment against a United States citizen for conspiracy to defraud a corporate instrumentality of the United States, even though the acts specified in the indictment occurred outside the United States and the statute did not expressly reach extraterritorial violations.

in accord with principles of public international law. This exercise of jurisdiction, however, may be limited when the substantive law under the territorial jurisdiction of the foreign state conflicts with the law of the nation exercising jurisdiction over the national, due to considerations of international comity.

B. *International Comity*

"Comity," according to the United States Supreme Court, is the body of rules which reflect "the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws."[100] The Foreign Corrupt Practices Act may offend these principles of comity between nations since the United States is asserting jurisdiction over conduct which may also be governed by the laws of a foreign country. International law requires a nation to weigh the competitive jurisdictional interests. THE RESTATEMENT OF FOREIGN RELATIONS LAW provides:

> where two states have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct upon the part of a person, each state is required by international law to consider in good faith, moderating the exercise of its enforcement jurisdiction, in the light of such factors as:
>
> (a) vital national interests of each of the states,
> (b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person,
> (c) the extent to which the required conduct is to take place in the territory of the other state,
> (d) the nationality of the person, and
> (e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.[101]

The Act's exercise of jurisdiction over foreign issuers, and in certain situations foreign subsidiaries, may directly encroach upon the interests of several foreign countries: the country of the regis-

100. Hilton v. Guyot, 159 U.S. 113, 164 (1895).

101. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 40 (1965), *quoted in* United States v. First Nat'l City Bank, 396 F.2d 897, 902 (2d Cir. 1968) (use of § 40 in a case in which a subpoena for documents located in Germany was issued by a grand jury investigating antitrust law violations).

tered issuer, the country of the subsidiary, and the country in which a payment is made. Foreign countries may consider themselves entitled to priority of regulation, since the questionable conduct and the foreign issuer's place of incorporation are within its jurisdiction. The Act displaces applicable foreign law and thus deprives the foreign country of the ability to determine whether to prosecute questionable conduct. The Act may also be viewed as an attempt by the United States to protect a foreign nation from its own corrupt officials. Criminalization of the act of bribery necessarily involves the characterization of the act of receiving such a payment as a criminal act under United States laws.[102] The problems raised when two countries have competing jurisdiction are illustrated in *Societe Fruehauf v. Massardy.*[103] The United States sought to enforce the Trading With the Enemy Act[104] against Fruehauf-France, S.A., a French subsidiary of an American corporation, because the subsidiary had contracted to deliver goods to the Peoples' Republic of China. After the subsidiary was ordered to suspend performance of the contract, its Board of Directors instituted litigation in French courts which resulted in the appointment of an administrator to head the subsidiary for three months in order to perform the contract. The United States perceived the activities of the subsidiary as an "American" entity, but the French viewed the activities as subject to their own jurisidiction.

A final consideration bearing on international comity is the effect of the Act on the development of international anti-bribery codes. William Simon, former Secretary of the Treasury, commented in 1976 that "a unilateral effort like that involved in § 3133 would undercut the vital principle that co-operative action by the whole community of nations is needed in order to deal effectively with this problem."[105] An international, rather than a unilateral,

102. Mark B. Feldman, Deputy Legal Advisor for the Department of State, has argued that "[i]t would be not only presumptuous but counterproductive to seek to impose our specific standards in countries with differing histories and cultures." *Activities of American Multinational Corporations Abroad: Hearings Before Subcomm. on International Economic Policy,* 94th Cong., 1st Sess. 24 (1975).

103. Judgment of May 22, 1965, Cour d'appel, Paris, [1965] Recueil Dalloz-Sirey, *Jurisprudence* 147, *translated in* 5 INT'L LEGAL MATERIALS, at 476 (1966). *See* 2 Ad Hoc Committee on Foreign Payments, *supra* note 89.

104. Trading With the Enemy Act of 1917, 50 U.S.C. App. § 1 *et seq.* (1976).

105. *Foreign and Corporate Bribes: Hearings on S. 3133 Before the Senate Comm. on Banking, Housing and Urban Affairs,* 94th Cong., 2nd Sess. 88 (1976).

solution to the problem would respect both the primary interest of the country where the unethical acts occurred and the need for mutual assistance in enforcement.

C. *The Act of State Doctrine*

If the recipient of questionable payment is an official of a foreign nation acting in his official capacity when he receives the payment, the act of state doctrine may provide the most potent defense to an enforcement proceeding brought under the Foreign Corrupt Practices Act. This doctrine, which renders a claim nonjusticiable, has neither a constitutional nor statutory base, but is rooted in concepts of international comity and judicial restraint.[106] The act of state doctrine was enunciated in *Underhill v. Hernandez,*[107] in which the Supreme Court held that the judiciary could not inquire into the legality of an action taken by a Venezuelan guerilla leader whose government was later recognized by the United States. The Court stated: "Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory."[108] Similarly, the act of state doctrine would exclude judicial examination of the legality of a bribery payment to a foreign official.

The act of state doctrine was developed in several major cases involving different legal fields. In *American Banana v. United Fruit,*[109] the Court employed the doctrine to bar the antitrust complaint of a plaintiff who had received defendant's threatening offer to buy his banana plantation in Central America. When plaintiff refused to sell, defendant allegedly caused the Costa Rican government to claim plaintiff's real estate in Colombia, seize the plantation, and transfer it to defendant. The Court determined that the Sherman Antitrust Act did not have extraterritorial reach since the lawfulness of the act could not be measured without reference to the law of the country where the act had transpired. The Court's

106. *See* Banco Nacional de Cuba v. Farr, 243 F. Supp. 957 (S.D.N.Y. 1965), *aff'd* 383 F.2d 166 (2d Cir. 1967), *cert. denied,* 390 U.S. 956, *rehearing denied,* 390 U.S. 1037 (1968); Banco Nacional de Cuba v. Sabbatino, 307 F.2d 845 (2d Cir. 1962). *See generally* Delson, *The Act of State Doctrine—Judicial Deference or Abstention?,* 66 AM. J. INT'L L. 82 (1972); Zander, *The Act of State Doctrine,* 53 AM. J. INT'L L. 826 (1959).

107. 168 U.S. 250 (1897).

108. *Id.* at 252.

109. 213 U.S. 347 (1909).

alternative rationale in applying the act of state doctrine was that a United States court should not determine the legality of acts of a private party aimed at persuading a foreign government "to bring about a result that it declares by its conduct to be desirable and proper."[110]

In *Banco Nacional de Cuba v. Sabbatino,*[111] the Court examined the act of state doctrine in light of foreign expropriation of United States property. The Court held that the United States judiciary could not examine the legality of acts by a foreign sovereign, even if those acts might violate international law. The Court noted that the doctrine was necessary to insure the proper distribution of authority in foreign affairs matters between the judicial and political branches of government. This view was reemphasized in *Occidental Petroleum v. Buttes Gas and Oil Co.*[112] Plaintiff claimed that state action, precluding plaintiff from exploiting petroleum concessions, was fraudulently motivated. The district court, however, held that the act of state doctrine barred the action because "such [judicial] inquiries . . . into the authenticity and motivation of the acts of foreign sovereigns would be the very sources of diplomatic friction and complication that the act of state doctrine aims to avert."[113] Thus, the act of state doctrine will prohibit United States courts from inquiring into the motivations of a foreign official to determine whether a questionable payment constitutes the type of bribery prohibited by the Act.

Two years prior to *Sabbatino,* in *Continental Ore Co. v. Union Carbide & Carbon Corp.,*[114] the Court suggested an area in which the act of state doctrine would be inapplicable. In *Continental Ore,* the defendant, Union Carbide's Canadian subsidiary, was appointed by the Canadian government as a purchasing agent to ration vanadium to Canadian industry during World War II. Continental claimed competitive injury from discrimination by Carbide in carrying out these activities. Before concluding that no foreign act of state had occurred, the Court examined the foreign actor to determine whether its acts could be distinguished from those of a foreign state. The Court held that there was no Canadian policy to compel discriminatory purchasing. Although the defen-

110. *Id.* at 358.
111. 376 U.S. 398 (1964).
112. 331 F. Supp. 92 (C.D. Cal. 1971), *aff'd* 461 F.2d 1261 (9th Cir.), *cert. denied,* 409 U.S. 950 (1972).
113. 331 F. Supp. at 110.
114. 370 U.S. 690 (1962).

dant's conduct had been authorized by an apparently valid delegation of government authority, the government had not compelled defendant's conduct and therefore the act of state doctrine did not apply. By examining the foreign actor's conduct, the Court stepped beyond customary judicial reluctance to probe into the legality of acts of a foreign state. *Continental Ore,* however, was unique because of defendant's position as both a commericial and governmental entity.

In *Alfred Dunhill of London,*[115] the Supreme Court carved out an exception to the act of state doctrine by refusing to apply the doctrine to a foreign sovereign acting in the capacity of an entrepreneur. This action was brought by former owners of Cuban cigar companies against United States importers in order to recover payment for cigar shipments made both before and after Cuban nationalization of the industry. Cuban government appointees intervened and the importers brought cross claims seeking to recover their payments made to the intervenors for pre-nationalization shipments. The intervenors countered that their refusal to return the payments constituted an act of state. The Court distinguished between public or governmental acts of a sovereign state and its private or commercial acts. In *Dunhill,* the quasi-contractual obligation to repay arose from the operation of the cigar business as a commercial business by the intervenors, Cuban agents. The Supreme Court held that the failure to repay did not reach the level of an act of state. The Court further noted: "No statute, decree, order or resolution of the Cuban Government itself was offered in evidence indicating that Cuba had repudiated its obligations in general or any class thereof or that it has as a sovereign matter determined to confiscate the amounts due three foreign importers."[116] This case marked a departure from the act of state doctrine—an exception for purely commercial operations. This commercial act exception requires that a purely commercial act of a foreign official acting in his official capacity may be reviewed in United States courts under applicable national and international rules of commercial law. Therefore, if the payment of a bribe to a foreign official acting in his official capacity arises in the context of a purely commercial transaction, the act of state doctrine will not apply as a defense. Whether a payment transaction will consti-

115. 425 U.S. 682 (1976). *See* Williams, J., *The Act of State Doctrine: Alfred Dunhill of London, Inc. v. Republic of Cuba,* 9 VAND. J. TRANSNAT'L L. 735 (1976).

116. 425 U.S. at 691-94.

tute a purely commercial act, however, is contingent upon the particular facts and circumstances.

Two recent circuit court cases have treated the act of state doctrine in divergent manners. In *Timberlane Lumber Co. v. Bank of America,*[117] the Ninth Circuit investigated the nature of a foreign nation's interest without challenging the motivation or validity of the country's acts. Timberlane brought suit alleging that both officials of the Bank of America and others located in Honduras and the United States had conspired, in violation of the Sherman Act, to prevent Timberlane from milling lumber in Honduras and exporting it to the United States. The defendant argued that Timberlane's injury resulted fom the acts of the Honduran government in connection with the enforcement of a disputed security interest in a lumber mill held by the Bank and could not be reviewed under the act of state doctrine. The court held that the act of state doctrine did not require dismissal of an action when the challenged activity did not reflect official Honduran policy or threaten relations between Honduras and the United States and neither Honduras nor any Honduran official was named as a party-defendant. The court further stated that the act is flexible and the "doctrine does not bestow a blank-check immunity upon all conduct blessed with some imprimatur of a foreign government."[118] Under the *Timberlane* approach, the act of state doctrine would not preclude inquiry into the nature of a foreign nation's involvement with a questionable payments transaction.

The Second Circuit, however, in *Hunt v. Mobil Oil Corp.,*[119] held that the act of state doctrine precluded judicial inquiry into the actions and motivations underlying the act of a foreign state. In this private antitrust action, United States oil companies producing oil in Libya had agreed to bargain jointly with the Libyan government concerning the terms of their oil concessions. This agreement bound Hunt, a smaller independent producer. One of Hunt's several claims alleged that defendant had manipulated the negotiations with the foreign government to cause the Libyan government to nationalize Hunt's Libyan properties. This claim was rejected under the act of state doctrine because the court believed that it would be necessary to inquire into the reasons underlying the actions of the Libyan government.

117. 549 F.2d 597 (9th Cir. 1976).
118. 549 F.2d at 605-06.
119. 550 F.2d 68 (2d Cir. 1977).

The act of state doctrine may effectively prevent successful challenges to payments to foreign officials acting in their official capacities. Under *Hunt,* United States judicial inquiry may be prevented because such inquiry into a foreign official's conduct under foreign laws would require judicial consideration of acts and motivations underlying the conduct of a foreign state. Under *Dunhill* and *Timberlane,* however, if the foreign sovereign officially condemns or simply acquiesces in the payment of bribes to its officials, the act of state doctrine will be ignored. Further, if the action of a foreign official is purely commercial in nature, the court may disregard the act of state doctrine and determine the legality of any questionable transactions.

D. *Enforcement and Constitutional Problems*

One of the most difficult problems with the Act is that of administration and enforcement. Prosecution under the Act's criminal provisions requires evidence sufficient to meet the standard of proof beyond a reasonable doubt. Because successful investigation and prosecution of foreign bribery will depend upon some witnesses and information beyond the reach of United States judicial process, voluntary cooperation of foreign individuals or governments will be needed. Whether this cooperation will be available is questionable.[120]

No principle of public international law compels a foreign country to provide judicial assistance in criminal matters.[121] Further, many local foreign secrecy laws prohibit the disclosure of certain documents and information. Because corporations have raised these laws in defense of orders to disclose information, the Justice Department and SEC have been greatly hampered in their ability to develop evidence in foreign bribery cases.[122] Even if local laws provide for international cooperation in criminal prosecutions, these laws merely empower, but do not compel, foreign authorities to offer assistance.[123] Some nations resist cooperation because of considerations of national preference or sovereignty. Other nations will not cooperate because they are offended by the application of

120. *House Report, supra* note 17 (minority views).

121. 2 M. BASSIOUNI & V. NANDA, A TREATISE ON INTERNATIONAL CRIMINAL LAW 214 (1973).

122. Schorr, *Foreign Bank Secrecy, Laws of Other Nations Hurt SEC Regulation,* Wall St. J., May 3, 1978, at 1, col. 6.

123. M. BASSIOUNI, *supra* note 121, at 234.

United States criminal sanctions to foreign incorporated or foreign managed subsidiaries of United States parent corporations.[124] Current international agreements providing for judicial assistance recognize these foreign interests and permit noncooperation when judicial assistance might seriously harm the political, economic, or military stability of the requested country.[125]

Two fundamental constitutional guarantees further complicate the difficulties of gathering evidence in antibribery cases: the defendant's right to compulsory process to obtain witnesses and his right not to be subjected to double jeopardy.

The sixth amendment provides that a defendant must be offered legal process to compel the appearance of witnesses for his side. The Supreme Court stated in *Washington v. Texas*[126] that the accused's right to have compulsory process for obtaining witnesses in his favor "stands on no lesser footing than the other Sixth Amendment rights . . . previously held applicable to the States . . ." and, as such, "is so fundamental and essential to a fair trial that it is is incorporated into the Due Process clause of the Fourteenth Amendment."[127] Several prior decisions, however, held that the sixth amendment insures the right to compulsory process only when it is within the power of the federal government to supply it.[128] The foreign recipient is an essential witness in a case in which a defendant is indicted in the United States for making a foreign payment. A defendant accused under the Act could not compel the appearance of foreign witnesses on his behalf and would thus be deprived of his sixth amendment rights.

The criminalization of foreign acts of bribery is also inconsistent with the prohibition of double jeopardy as set forth in the fifth amendment as follows: "nor shall any person be subject for the same offense to be twice put in jeopardy of life and limb." This doctrine applies only to successive prosecutions by a single sovereign. It has, however, been recognized that a second prosecution by a different sovereign violates the spirit of the double jeopardy provision.[129] In the area of questionable payments, a foreign nation

124. Letter from Secretary Richardson to Senator Proxmire (June 11, 1976) *cited in* Report on Questionable Foreign Payments, *supra* note 62.

125. M. BASSIOUNI, *supra* note 121, at 237-38.

126. 388 U.S. 14 (1967).

127. *Id.* at 17-18.

128. *See* United States v. Greco, 298 F.2d 247, 251 (2d Cir.), *cert. denied,* 369 U.S. 820 (1962); United States v. Haim, 218 F. Supp. 922, 926-27 (S.D.N.Y. 1963); United States v. Hofmann, 24 F. Supp. 847, 848 (S.D.N.Y. 1938).

129. *See* Bartkus v. Illinois, 359 U.S. 121 (1959); U.S. v. Candelaria, 131 F. Supp. 797 (S.D. Cal. 1955).

where the proscribed acts occurred may have an interest in prosecuting the same conduct that the Act prohibits in this country, thus creating a situation that violates the spirit of the double jeopardy provision.

Finally, there are questions of fairness. In a number of situations, United States government officials knew about payoffs because of covert intelligence links to major corporations. In other situations, government officials tacitly condoned bribery because the payments served United States policy interests abroad.[130] These fairness and due process concerns, coupled with the problems of gathering evidence, will make enforcement and prosecution under the Act difficult. Further, while the Act may deter some United States corporations, it may represent a poor policy decision because it is unlikely to be accepted by foreign officials as a serious justification for discontinuing payments.

IV. Conclusion

The Foreign Corrupt Practices Act, a measure intended to eliminate immorality associated with United States corporate overseas payoffs, has generated confusion concerning its meaning, applicability, and enforcement. Further, in light of the United States trade deficit, and the common and often necessary practice of international payoffs, the wisdom of the Act's unilateral proscriptions is questionable.

The Act has failed to eliminate all overseas payoffs and has created uncertainty by treating similar actions differently. If an overseas United States manager pays a customs official to clear a shipment, even though all the documents are in order, the payment is legal as a facilitating payment. If the same manager, however, is told that the Cabinet Minister expects payment for approving the documents and the customs official is given such payment, the payor has violated the Act. Further, if the manager is told by the Minister to pay ten thousand dollars or face commercial extinction, it is unclear whether the Act would treat this as a bribe or a permissible extortion payment. Because of the vagueness and ambiguities in the Act, corporations face a maze of uncertainties.

Enforcement of criminal sanctions under the Act cannot be easily achieved. Attempts to assert jurisdiction over behavior of individuals and corporations under the jurisdiction of foreign countries

130. Ignatius, *Foreign Bribery Trials May Show U.S. Knew of Some Payments,* Wall St. J., Oct. 5, 1978, at 1, col. 6.

will create numerous foreign relations problems. Public international legal theories of legislative jurisdiction may be violated by applying the Act's criminal provision extraterritorially. Principles of international comity may be disregarded if the competing jurisdictional interests of other nations are not recognized. In addition, defenses such as the act of state doctrine may preclude inquiry into the nature and extent of a foreign official's actions, thus foreclosing determinations of whether a payment is illegal. A criminal defendant may contend that the spirit of his constitutional right to compulsory process and freedom from double jeopardy have been denied.[131]

Finally, despite the Act's proscriptions, companies may continue the payoffs through loopholes and exceptions to the Act. Payments will be made to lower level foreign officials carrying out ministerial duties. Companies will set up offshore trading companies, or seek to be labled as "subcontractors" overseas, thus enabling the questionable payments to be made by their foreign prime contractors. Companies must engage in these practices because of the exigencies of economic international competition. The Foreign Corrupt Practices Act through its unilateral criminal prohibitions cannot eliminate international bribery and will thus be ineffective in the absence of multilateral international antibribery treaties.[132]

Shelley O'Neill

131. All of these problems have been avoided in the recent Lockheed Corporation investigation. Lockheed has agreed to settle its payments controversy with the SEC without disclosing the foreign governmental recipients. Wall St. J., Feb. 20, 1979, at 14, col. 1.

132. For a contrary view see Basche, Those 'Questionable Payments,' Across the Board, Vol. 14, at 23-26 (July 1977).

APPENDIX

The following is the full text of 15 U.S.C. §§ 78m, 78dd-1, 78dd-2, 78ff (Supp. I 1977) (amending scattered sections of Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78kk (1976)).

§ 78m. Periodical and other reports

[See main volume for text of (a)]

(b)(1) The Commission may prescribe, in regard to reports made pursuant to this chapter, the form or forms in which the required information shall be set forth, the items or details to be shown in the balance sheet and the earning statement, and the methods to be followed in the preparation of reports, in the appraisal or valuation of assets and liabilities, in the determination of depreciation and depletion, in the differentiation of recurring and nonrecurring income, in the differentiation of investment and operating income, and in the preparation, where the Commission deems it necessary or desirable, of separate and/or consolidated balance sheets or income accounts of any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer; but in the case of the reports of any person whose methods of accounting are prescribed under the provisions of any law of the United States, or any rule or regulation thereunder, the rules and regulations of the Commission with respect to reports shall not be inconsistent with the requirements imposed by such law or rule or regulation in respect of the same subject matter (except that such rules and regulations of the Commission may be inconsistent with such requirements to the extent that the Commission determines that the public interest or the protection of investors so requires).

(2) Every issuer which has a class of securities registered pursuant to section *78l* of this title and every issuer which is required to file reports pursuant to section *78o*(d) of this title 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

(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.

(3)(A) With respect to matters concerning the national security of the United States, no duty or liability under paragraph (2) of this subsection shall be imposed upon any person acting in cooperation with the head of any Federal department or agency responsible for such matters if such act in cooperation with such head of a department or agency was done upon the specific, written directive of the head of such department or agency pursuant to Presidential authority to issue such directives. Each directive issued under this paragraph shall set forth the specific facts and circumstances with respect to which the provisions of this paragraph are to be invoked. Each such directive shall, unless renewed in writing, expire one year after the date of issuance.

(B) Each head of a Federal department or agency of the United States who issues a directive pursuant to this paragraph shall maintain a complete file of all such directives and shall, on October 1 of each year, transmit a summary of matters covered by such directives in force at any time during the previous year to the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate.

(c) If in the judgment of the Commission any report required under subsection (a) of this section is inapplicable to any specified class or classes of issuers, the Commission shall require in lieu thereof of the submission of such reports of comparable character as it may deem applicable to such class or classes of issuers.

(d)(1) Any person who, after acquiring directly or indirectly the beneficial ownership of any equity security of a class which is registered pursuant to section *78l* of this title, or any equity security of an insurance company which would have been required to be so registered except for the exemption contained in section *78l*(g)(2)(G) of this title, or any equity security issued by a closed-end investment company registered under the Investment Com-

pany Act of 1940, is directly or indirectly the beneficial owner of more than 5 per centum of such class shall, within ten days after such acquisition, send to the issuer of the security at its principal executive office, by registered or certified mail, send to each exchange where the security is traded, and file with the Commission, a statement containing such of the following information, and such additional information, as the Commission may by rules and regulations, prescribe as necessary or appropriate in the public interest or for the protection of investors—

(A) the background, and identity, residence, and citizenship of, and the nature of such beneficial ownership by, such person and all other persons by whom or on whose behalf the purchases have been or are to be effected;

(B) the source and amount of the funds or other consideration used or to be used in making the purchases, and if any part of the purchase price is represented or is to be represented by funds or other consideration borrowed or otherwise obtained for the purpose of acquiring, holding, or trading such security, a description of the transaction and the names of the parties thereto, except that where a source of funds is a loan made in the ordinary course of business by a bank, as defined in section 78c(a)(6) of this title, if the person filing such statement so requests, the name of the bank shall not be made available to the public;

(C) if the purpose of the purchases or prospective purchases is to acquire control of the business of the issuer of the securities, any plans or proposals which such persons may have to liquidate such issuer, to sell its assets to or merge it with any other person, or to make any other major change in its business or corporate structure;

(D) the number of shares of such security which are beneficially owned, and the number of shares concerning which there is a right to acquire, directly or indirectly, by (i) such person, and (ii) by each associate of such person, giving the background, identity, residence, and citizenship of each such associate; and

(E) information as to any contracts, arrangements, or understandings with any person with respect to any securities of the issuer, including but not limited to transfer of any of the securities, joint ventures, loan or option arrangements, puts or calls, guaranties of loans, guaranties against loss or guaranties of profits, division of losses or profits, or the giving or withholding of proxies, naming the persons with whom such

contracts, arrangements, or understandings have been entered into, and giving the details thereof.

[See main volume for text of (2) to (6) and (e)]

(f)(1) Every institutional investment manager which uses the mails, or any means or instrumentality of interstate commerce in the course of its business as an institutional investment manager and which exercises investment discretion with respect to accounts holding equity securities of a class described in subsection (d)(1) of this section having an aggregate fair market value on the last trading day in any of the preceding twelve months of at least $100,000,000 or such lesser amount (but in no case less than $10,000,000) as the Commision, by rule, may determine, shall file reports with the Commission in such form, for such periods, and at such times after the end of such periods as the Commission, by rule, may prescribe, but in no event shall such reports be filed for periods longer than one year or shorter than one quarter. Such reports shall include for each such equity security held on the last day of the reporting period by accounts (in aggregate or by type as the Commission, by rule, may prescribe) with respect to which the institutional investment manager exercises investment discretion (other than securities held in amounts which the Commission, by rule, determines to be insignificant for purposes of this subsection), the name of the issuer and the title, class, CUSIP number, number of shares or principal amount, and aggregate fair market value of each such security. Such reports may also include for accounts (in aggregate or by type) with respect to which the institutional investment manager exercises investment discretion such of the following information as the Commission, by rule, prescribes—

(A) the name of the issuer and the title, class, CUSIP number, number of shares or principal amount, and aggregate fair market value or cost or amortized cost of each other security (other than an exempted security) held on the last day of the reporting period by such accounts;

(B) the aggregate fair market value or cost or amortized cost of exempted securities (in aggregate or by class) held on the last day of the reporting period by such accounts;

(C) the number of shares of each equity security of a class described in subsection (d)(1) of this section held on the last day of the reporting period by such accounts with respect to which the institutional investment manager possesses sole or shared authority to exercise the voting rights evidenced by such securities;

(D) the aggregate purchases and aggregate sales during the reporting period of each security (other than an exempted security) effected by or for such accounts; and

(E) with respect to any transaction or series of transactions having a market value of at least $500,000 or such other amount as the Commission, by rule, may determine, effected during the reporting period by or for such accounts in any equity security of a class described in subsection (d)(1) of this section—

(i) the name of the issuer and the title, class, and CUSIP number of the security;

(ii) the number of shares or principal amount of the security involved in the transaction;

(iii) whether the transaction was a purchase or sale;

(iv) the per share price or prices at which the transaction was effected;

(v) the date or dates of the transaction;

(vi) the date or dates of the settlement of the transaction;

(vii) the broker or dealer through whom the transaction was effected;

(viii) the market or markets in which the transaction was effected; and

(ix) such other related information as the Commission, by rule, may prescribe.

(2) The Commission, by rule or order, may exempt, conditionally or unconditionally, any institutional investment manager or security or any class of institutional investment managers or securities from any or all of the provisions of this subsection or the rules thereunder.

(3) The Commission shall make available to the public for a reasonable fee a list of all equity securities of a class described in subsection (d)(1) of this section, updated no less frequently than reports are required to be filed pursuant to paragraph (1) of this subsection. The Commission shall tabulate the information contained in any report filed pursuant to this subsection in a manner which will, in the view of the Commission, maximize the usefulness of the information to other Federal and State authorities and the public. Promptly after the filing of any such report, the Commission shall make the information contained therein conveniently available to the public for a reasonable fee in such form as the Commission, by rule, may prescribe, except that the Commission, as it determines to be necessary or appropriate in the public inter-

est or for the protection of investors, may delay or prevent public disclosure of any such information in accordance with section 552 of Title 5. Notwithstanding the preceding sentence, any such information identifying the securities held by the account of a natural person or an estate or trust (other than a business trust or investment company) shall not be disclosed to the public.

(4) In exercising its authority under this subsection, the Commission shall determine (and so state) that its action is necessary or appropriate in the public interest and for the protection of investors or to maintain fair and orderly markets or, in granting an exemption, that its action is consistent with the protection of investors and the purposes of this subsection. In exercising such authority the Commission shall take such steps as are within its power, including consulting with the Comptroller General of the United States, the Director of the Office of Management and Budget, the appropriate regulatory agencies, Federal and State authorities which, directly or indirectly, require reports from institutional investment managers of information substantially similar to that called for by this subsection, national securities exchanges, and registered securities associations, (A) to achieve uniform, centralized reporting of information concerning the securities holdings of and transactions by or for accounts with respect to which institutional investment managers exercise investment discretion, and (B) consistently with the objective set forth in the preceding subparagraph, to avoid unnecessarily duplicative reporting by, and minimize the compliance burden on, institutional investment managers. Federal authorities which, directly or indirectly, require reports from institutional investment managers of information substantially similar to that called for by this subsection shall cooperate with the Commission in the performance of its responsibilities under the preceding sentence. An institutional investment manager which is a bank, the deposits of which are insured in accordance with the Federal Deposit Insurance Act, shall file with the appropriate regulatory agency a copy of every report filed with the Commission pursuant to this subsection.

(5)(A) For purposes of this subsection the term "institutional investment manager" includes any person, other than a natural person, investing in or buying and selling securities for its own account, and any person exercising investment discretion with respect to the account of any other person.

(B) The Commission shall adopt such rules as it deems necessary or appropriate to prevent duplicative reporting pursuant to this subsection by two or more institutional investment managers exercising investment discretion with respect to the same amount.

(g)(1) Any person who is directly or indirectly the beneficial owner of more than 5 per centum of any security of a class described in subsection (d)(1) of this section shall send to the issuer of the security and shall file with the Commission a statement setting forth, in such form and at such time as the Commission may, by rule, prescribe—

(A) such person's identity, residence, and citizenship; and

(B) the number and description of the shares in which such person has an interest and the nature of such interest.

(2) If any material change occurs in the facts set forth in the statement sent to the issuer and filed with the Commission an amendment shall be transmitted to the issuer and shall be filed with the Commission, in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(3) When two or more persons act as a partnership, limited partnership, syndicate, or other group for the purpose of acquiring, holding, or disposing of securities of an issuer, such syndicate or group shall be deemed a "person" for the purposes of this subsection.

(4) In determining, for purposes of this subsection, any percentage of a class of any security, such class shall be deemed to consist of the amount of the outstanding securities of such class, exclusive of any securities of such class held by or for account of the issuer or a subsidiary of the issuer.

(5) In exercising its authority under this subsection, the Commission shall take such steps as it deems necessary or appropriate in the public interest or for the protection of investors (A) to achieve centralized reporting of information regarding ownership, (B) to avoid unnecessarily duplicative reporting by and minimize the compliance burden on persons required to report, and (C) to tabulate and promptly make available the information contained in any report filed pursuant to this subsection in a manner which will, in the view of the Commission, maximize the usefulness of the information to other Federal and State agencies and the public.

(6) The Commission may, by rule or order, exempt, in whole or in part, any person or class of persons from any or all of the reporting requirements of this subsection as it deems necessary or appropriate in the public interest or for the protection of investors.

(h) The Commission shall report to the Congress within thirty months of December 19, 1977, with respect to (1) the effectiveness of the ownership reporting requirements contained in this chapter,

and (2) the desirability and the feasibility of reducing or otherwise modifying the 5 per centum threshold used in subsections (d)(1) and (g)(1) of this section, giving appropriate consideration to—

(A) the incidence of avoidance of reporting by beneficial owners using multiple holders of record;

(B) the cost of compliance to persons required to report;

(C) the cost to issuers and others of processing and disseminating the reported information;

(D) the effect of such action on the securities markets, including the system for the clearance and settlement of securities transactions;

(E) the benefits to investors and to the public;

(F) any bona fide interests of individuals in the privacy of their financial affairs;

(G) the extent to which such reported information gives or would give any person an undue advantage in connection with activities subject to subsection (d) of this section and section 78n(d) of this title;

(H) the need for such information in connection with the administration and enforcement of this chapter; and

(I) such other matters as the Commission may deem relevant, including the information obtained pursuant to subsection (f) of this section.

As amended June 4, 1975, Pub.L. 94-29, § 10, 89 Stat. 119; Feb. 5, 1976, Pub.L. 94-210, Title III, § 308(b), 90 Stat. 57; Dec. 19, 1977, Pub.L. 95-213, Title I, § 102, Title II, §§ 202, 203, 91 Stat. 1494, 1498, 1499.

§ 78dd-1. Foreign corrupt practices by issuers—Prohibited practices

(a) It shall be unlawful for any issuer which has a class of securities registered pursuant to section *78l* of this title or which is required to file reports under section *78o*(d) of this title, or for any officer, director, employee, or agent of such issuer or any stockholder thereof acting on behalf of such issuer, to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to—

(1) any foreign official for purposes of—

(A) influencing any act or decision of such foreign offi-

cial in his official capacity, including a decision to fail to perform his official functions; or

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

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

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

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

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

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

(3) any person, while knowing or having reason to know that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office, for purposes of—

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

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

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

Definition

(b) As used in this section, the term "foreign official" means any officer or employee of a foreign government of any department, agency, or instrumentality thereof, or any person acting in an offi-

cial capacity for or on behalf of such government or department, agency, or instrumentality. Such term does not include any employee of a foreign government or any department, agency, or instrumentality thereof whose duties are essentially ministerial or clerical.

June 6, 1934, c. 404, Title I, § 30A, as added Dec. 19, 1977, Pub.L. 95-213, Title I, § 103(a), 91 Stat. 1495.

§ 78dd-2. Foreign corrupt practices by domestic concerns—Prohibited practices

(a) It shall be unlawful for any domestic concern, other than an issuer which is subject to section 78dd-1 of this title, or any officer, director, employee, or agent of such domestic concern or any stockholder thereof acting on behalf of such domestic concern, to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to—

(1) any foreign official for purposes of—

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

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

in order to assist such domestic concern in obtaining or retaining business for or with, or directing business to, any person;

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

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

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

in order to assist such domestic concern in obtaining or retain-

ing business for or with, or directing business to, any person; or

(3) any person, while knowing or having reason to know that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office, for purposes of—

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

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

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

Penalties

(b)(1)(A) Except as provided in subparagraph (B), any domestic concern which violates subsection (a) of this section shall, upon conviction, be fined not more than $1,000,000.

(B) Any individual who is a domestic concern and who willfully violates subsection (a) of this section shall, upon conviction, be fined not more than $10,000, or imprisoned not more than five years, or both.

(2) Any officer or director of a domestic concern, or stockholder acting on behalf of such domestic concern, who willfully violates subsection (a) of this section shall, upon conviction, be fined not more than $10,000, or imprisoned not more than five years, or both.

(3) Whenever a domestic concern is found to have violated subsection (a) of this section, any employee or agent of such domestic concern who is a United States citizen, national, or resident or is otherwise subject to the jurisdiction of the United States (other than an officer, director, or stockholder acting on behalf of such domestic concern), and who willfully carried out the act or practice constituting such violation shall, upon conviction, be fined not more than $10,000, or imprisoned not more than five years, or both.

(4) Whenever a fine is imposed under paragraph (2) or (3) of this subsection upon any officer, director, stockholder, employee, or

agent of a domestic concern, such fine shall not be paid, directly or indirectly, by such domestic concern.

Civil action by Attorney General to prevent violations

(c) Whenever it appears to the Attorney General that any domestic concern, or officer, director, employee, agent, or stockholder thereof, is engaged, or is about to engage, in any act or practice constituting a violation of subsection (a) of this section, the Attorney General may, in his discretion, bring a civil action in an appropriate district court of the United States to enjoin such act or practice, and upon a proper showing a permanent or temporary injunction or a temporary restraining order shall be granted without bond.

Definitions

(d) As used in this section:

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

(2) The term "foreign official" means any officer or employee of a foreign government or any department, agency, or instrumentality therof, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality. Such term does not include any employee of a foreign government or any department, agency, or instrumentality thereof whose duties are essentially ministerial or clerical.

(3) The term "interstate commerce" means trade, commerce, transportation, or communication among the several States, or between any foreign country and any State or between any State and any place or ship outside thereof. Such term includes the intrastate use of (A) a telephone or other interstate means of communication, or (B) any other interstate instrumentality.

Pub.L. 95-213, Title I, § 104, Dec. 19, 1977, 91 Stat. 1496.

78ff. Penalties

(a) Any person who willfully violates any provision of this chapter (other than section 78dd-1 of this title), or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this chapter, or any person who willfully and knowingly makes, or causes to be made, any statement in any application, report, or document required to be filed under this chapter or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section *78o* of this title or by any self-regulatory organization in connection with an application for membership or participation therein or to become associated with a member thereof, which statement was false or misleading with respect to any material fact, shall upon conviction be fined not more than $10,000, or imprisoned not more than five years, or both, except that when such person is an exchange, a fine not exceeding $500,000 may be imposed; but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation.

[See main volume for text of (b)]

(c)(1) Any issuer which violates section 78dd-1(a) of this title shall, upon conviction, be fined not more than $1,000,000.

(2) Any officer or director of an issuer, or any stockholder acting on behalf of such issuer, who willfully violates section 78dd-1(a) of this title shall, upon conviction, be fined not more than $10,000, or imprisoned not more than five years, or both.

(3) Whenever an issuer is found to have violated section 78dd-1(a) of this title, any employee or agent of such issuer who is a United States citizen, national, or resident or is otherwise subject to the jurisdiction of the United States (other than an officer, director, or stockholder of such issuer), and who willfully carried out the act or practice constituting such violation shall, upon conviction, be fined not more than $10,000, or imprisoned not more than five years, or both.

(4) Whenever a fine is imposed under paragraph (2) or (3) of this subsection upon any officer, director, stockholder, employee, or agent of an issuer, such fine shall not be paid, directly or indirectly, by such issuer.

As amended June 4, 1975, Pub.L. 94-29, §§ 23, 27(b), 89 Stat. 162, 163; Dec. 19, 1977, Pub.L. 95-213, Title I, § 103(b), 91 Stat. 1496.