

**United States and International Efforts to Prohibit Bribery of
Foreign Public Officials:**
*From the Foreign Corrupt Practices Act to the OECD Convention
and Beyond*

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*Bribery and corruption contribute to world poverty and that's bad. Bribes bring no economic value to a business transaction; they are like a tax. They ultimately take money out of the pockets of workers and consumers. They also poach on profits and discourage business people from making more investments in an economy.*¹

I. INTRODUCTION

As economic globalization becomes a reality, today's corporations face a growing challenge of adapting effectively to different cultures.² Doing business in a foreign country puts a company in a very different business and cultural environment.³ This is because each country has its own distinct culture with a distinct set of cultural values.⁴ Something that may seem unethical to U.S. businesses might be an acceptable practice in a foreign nation.⁵ Most Western companies' codes of ethics never dreamed of such cross-cultural challenges.⁶

Perhaps the best-known cross-cultural clash is the issue of transnational bribery.⁷ Transnational bribery (bribery of foreign officials) is an acceptable way of doing business in many countries, but U.S. companies who engage in such practices can find themselves subject to severe criminal and civil penalties under the Foreign Corrupt Practices Act of 1977 ("FCPA").⁸

¹ Winston Wallin, former Chairman of Medtronic, Inc. and current Chairman of the Caux Round Table, Caux Round Table Press Release (July 29, 1999) (visited October 14, 1999) <http://www.cauxroundtable.org/AM_1997.htm>.

² Alexander D. Stajkovic, *Business Ethics across Cultures: A Social Cognitive Model*, 32 J. Am. Bus. 17 (March 22, 1997).

³ David J. Levey, *Ethical Standards Can Differ Across Borders*, Crain's Cleveland Business 24 (April 12, 1999).

⁴ Thomas Donaldson & Thomas W. Dunfee, *When Ethics Travel: The Promise and Peril of Global Business Ethics*, 41 Cal. Mgmt. Rev. 45 (June 22, 1999).

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ Pub. L. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. §78dd-1, *et seq.*)

Over the past twenty years, however, there has been a growing international consensus that bribery has no place in ethical business practices.

This growing international consensus, forged primarily by international non-governmental organizations and United States government and business leaders, produced the first major international agreement on foreign bribery, the Organization for Economic Cooperation and Development (“OECD”) Convention on Combating Bribery of Foreign Officials in International Business Transactions (the “OECD Convention”), signed on December 17, 1997.⁹ The Convention has led to several nations enacting their own version of the FCPA.¹⁰

The Convention, although a critical point in the international bribery effort is not the last word on the subject. Further initiatives are in progress, and the United States continues to play a major role in these initiatives.

This paper traces the history of the anti-bribery movement, from initial U.S. efforts with the FCPA through the rise of the international movement, passage of the OECD Convention, and further post-Convention actions. This paper also discusses continuing problems – and possible solutions – in the fight to prohibit bribery of foreign public officials.

II. WHAT IS A “BRIBE”?

Before discussing efforts to curb bribery, a good starting point for this discussion is to define what is meant by a “bribe.” “Bribes” to foreign officials come in five types:

⁹ OECD Anti-Corruption Unit, *Combating Bribery of Foreign Public Officials in International Business Transactions – Text of the Convention* (visited October 26, 1999)

<<http://www.oecd.org/daf/nocorruption/20nov1e.htm>>.

¹⁰ *Id.*

(1) payments from revolving cash funds at a foreign subsidiary to make illegal domestic and foreign political contributions; (2) secret kickbacks on purchase or sales contracts made through foreign-bearer stock corporations; (3) funds passed through foreign consultants for illegal political payments and commercial payments; (4) cash paid directly to foreign officials for favorable business concessions; and (5) cash payments to consultants or commission agents with inadequate documentation of purpose or value.¹¹

The above-listed types of payments are those which U.S. and international efforts are aimed at eradicating.

III. U.S. EFFORTS: THE FOREIGN CORRUPT PRACTICES ACT OF 1977

A. Background and History

The anti-bribery movement began in the United States in the early 1970's, in the wake of the Watergate and Lockheed scandals.¹² This fact is important, for two reasons. First, placing the FCPA in historical context helps explain many of its provisions (i.e., why the statute contains accounting provisions in addition to the anti-bribery provisions). Second, many of the early problems with the FCPA are easily understood when one considers that the statute was enacted quickly in the wake of immense public outcry over the corporate conduct which precipitated the FCPA's enactment.

¹¹ Jyoti N. Prasad, *Impact of the Foreign Corrupt Practices Act of 1977 on U.S. Export*, in FOREIGN ECONOMIC POLICY OF THE UNITED STATES 3, 35-36 (Stuart Bruchey, ed., 1993)

¹² Delia Poon, *Exposure to the Foreign Corrupt Practices Act: A Guide for U.S. Companies With Activities in the People's Republic of China to Minimize Liability*, 19 Hastings Int'l Comp. L. Rev. 327, 330 (1996).

In the mid-1970's, the Securities and Exchange Commission ("SEC") began a corporate bribery program inspired indirectly by a 1972 lawsuit against the Finance Committee of President Nixon's Committee to Re-Elect the President.¹³

Before the Federal Election Campaign Act of 1971¹⁴ went into effect on April 7, 1972, individual contributions to political candidates made to finance primary campaigns did not have to be disclosed.¹⁵ Common Cause, a public interest group, aware that Nixon's finance committee had raised over \$22 million by that date, brought suit in federal district court to require disclosure of the contributors' names, arguing that most of the money would be used to finance Nixon's general election and therefore should be disclosed under the law in effect.¹⁶

Five days before the 1972 election, the committee agreed to disclose the origins of \$6 million in contributions it had received before March 10, 1972.¹⁷ In September 1973, as part of a final settlement of the Common Cause lawsuit, the committee made public information about another \$11.4 million in contributions it had received between March 10 and April 7, 1972¹⁸. Among the latter disclosures was a list of twenty-nine contributors kept by Nixon's personal secretary.¹⁹ Two of the contributors were firms that had made illegal campaign contributions.²⁰

Soon after its formation in late 1973, the Watergate Special Prosecution Force ("Watergate Task Force") began an investigation into illegal corporate campaign

¹³ Joel Seligman, *A Sheep in Wolf's Clothing: The American Law Institute Principles of Corporate Governance Project*, 55 Geo. Wash. L. Rev. 325, 333 (1987).

¹⁴ Pub. L. No. 92-225, 86 Stat. 3 (codified as amended at 2 U.S.C. § 431).

¹⁵ Seligman, *supra* note 13, at 333.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

contributions made during the 1972 presidential election.²¹ In July 1973, Special Prosecutor Archibald Cox announced an “amnesty program”.²² Corporate officers who came forward voluntarily and admitted illegal political contributions would find their voluntary acknowledgement...considered as a mitigating circumstance in deciding what charges to bring.²³ American Airlines, 3M and others all disclosed illegal campaign contributions.²⁴

The SEC became involved when the Watergate Task Force discovered corporate “slush funds,” created by fictitious or unrecorded transactions and used to finance illegal corporate campaign contributions.²⁵ These “slush funds” attracted the interest of the SEC’s Enforcement Division.²⁶

The SEC then initiated its own management fraud program, similar to the Watergate Task Force’s amnesty program.²⁷ This led to a series of enforcement actions.²⁸ Based on the increasing number of enforcement actions, the SEC concluded that it could no longer afford to determine on a case-by-case basis what specific public disclosures each firm would be required to make, and instead initiated a voluntary disclosure program.²⁹

The voluntary disclosure program allowed a firm that made questionable or illegal payments to avoid SEC enforcement action by conducting its own investigation of

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 334.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

payments.³⁰ The investigation was typically supervised by the company's independent directors, assisted by the firm's accounting firm and, if necessary, by independent outside counsel.³¹ At the investigation's conclusion, a complete report had to be submitted to the full board of directors.³² Material information compiled during the investigation had to be publicly disclosed in a filing with the SEC.³³

In September 1975, Cities Service Company became the first firm to file with the FEC a voluntary disclosure of its overseas bribery and record falsification.³⁴ Over the next eighteen months, voluntary disclosures of questionable payments by major American firms were made on a near-daily basis.³⁵ An SEC report revealed that, in total, over 400 corporations based in the United States, including 117 of the Fortune 500, had paid substantial bribes in the past totaling hundreds of millions of dollars to both domestic and foreign public officials.³⁶ In one unfortunate instance, United Brands' chairman and chief executive officer jumped to his death from the forty-fourth floor of his office building following his disclosure that his corporation had paid bribes of \$2.5 million to high Honduran officials to head off a proposed banana export tax on its subsidiary United Fruit Company (Chiquita Brand).³⁷

The most notorious foreign bribery case concerned the Lockheed Aircraft Company, which came under special public scrutiny because the Nixon Administration

³⁰ *Id.* at 335.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ Bruce Zagaris, *Avoiding Criminal Liability in the Conduct of International Business*, 21 Wm. Mitchell L. Rev. 749, 754 (1996). For a complete list of companies and their improper payments, see Prasad, *supra* note 11, Table 2.1.

³⁷ Prasad, *supra* note 11, at 42.

had provided it with a \$250 million emergency loan guarantee in 1971³⁸. The SEC charged that since 1970, at least \$25 million in concealed payments had been made overseas to obtain and retain aircraft sales³⁹. The May 1977 Lockheed special review committee report estimated \$30-38 million in concealed payments⁴⁰. It was also revealed that more than \$200 million in commissions had been paid during 1970-1977⁴¹.

B. Enactment of the 1977 FCPA

It was in the wake of these shocking revelations that the U.S. Congress enacted the FCPA. The FCPA was Congress' response to the growing perception that U.S. multinationals doing business abroad systematically engaged in the bribery of foreign officials.⁴²

The image of American democracy abroad has been tarnished. Confidence in the financial integrity of our corporations has been impaired. The efficient functioning of our capital markets has been hampered.⁴³

The FCPA contains three elements designed to work together in preventing corporate bribery: (1) anti-bribery provisions; (2) accounting provisions, and (3) criminal penalties.⁴⁴

1. Anti-Bribery Provisions

The original FCPA made it unlawful for any "issuer" or "domestic concern" or any "officer, director, employee, or agent of such issuer or any stockholder thereof acting on behalf of such issuer", to

³⁸ *Id.*, at 42-43.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Zagaris, *supra* note 36, at 754.

make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment to...any foreign official,... any foreign political party or official thereof or any candidate for foreign political office, or any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official, political party or official thereof, or to any candidate for foreign political office, for purposes of influencing any act or decision” of such foreign official, political party, party official, or candidate in his or her official capacity, or inducing such foreign official, political party, party official, or candidate to do or omit to do any act in violation of the lawful duty of such foreign official, political party, party official, or candidate, or inducing such foreign official, political party, party official, or candidate to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality, to assist... in obtaining or retaining business for or with, or directing business to any person.⁴⁵

The language of the statute is vague and complex. Fortunately, the U.S. Department of Justice provides written guidance as to the FCPA’s meaning and effect.⁴⁶

Essentially, the FCPA’s anti-bribery provisions prohibit corrupt payments to foreign officials for the purpose of obtaining or keeping business.⁴⁷ Under the original FCPA, four elements must be met for a violation.⁴⁸ First, the violator must be an “issuer” or a “domestic concern.”⁴⁹ Second, the person making or authorizing the payment must have a corrupt intent.⁵⁰ Third, the violator must make or offer a payment of money or anything of value.⁵¹ Fourth, the recipient of such payment must be: (1) a foreign official;⁵² (2) a foreign political party;⁵³ (3) a foreign political party official;⁵⁴ (4) a

⁴³ Pub. L. 95-213, reprinted in 1977 U.S.S.C.A.N. (91 Stat. 1494) 4101.

⁴⁴ *Id.* at 4104.

⁴⁵ 15 U.S.C. §78dd-1.

⁴⁶ Department of Justice, *Foreign Corrupt Practices Act Antibribery Provisions* (visited October 2, 1999), <<http://www.usdoj.gov/criminal/fraud/fcpa/dojdocb.htm>>.

⁴⁷ Department of Justice, *supra* note 46

⁴⁸ *Id.*

⁴⁹ 15 U.S.C. §78dd-1(a); Department of Justice, *supra* note 36.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*, §78dd-1(a)(1).

candidate for foreign political office;⁵⁵ or (5) any other person, if the issuer or domestic concern knows that the money or thing of value will ultimately go to one of the former types of persons.⁵⁶ Fifth and finally, the payment must be made in order to assist the firm in obtaining or retaining business for or with, or directing business to, any person.⁵⁷

a. Issuers and Domestic Concerns

An “issuer” is a corporation that has issued securities that have been registered in the United States or who is required to file periodic reports with the SEC. A “domestic concern” is any individual who is a citizen, national or resident of the United States, or 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.⁵⁸

b. Corrupt Intent

The person making or authorizing the payment must have a corrupt intent, and the payment must be intended to induce the recipient to misuse his official position to direct business wrongfully to the payer or to any person. The word “corruptly” connotes an evil motive or purpose, an intent to wrongfully influence the recipient.⁵⁹ The FCPA does not,

⁵³ *Id.*, §78dd-1(a)(2).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*, §78dd-1(a)(3).

⁵⁷ *Id.*, §78dd-1; Department of Justice, *supra* note 36.

⁵⁸ Department of Justice, *supra* note 36.

⁵⁹ Pub. L. 95-213 at 4108.

however, require that a corrupt act succeed in its purpose.⁶⁰ The offer or promise of a corrupt payment can constitute a violation of the statute.⁶¹ The FCPA prohibits any corrupt payment intended to influence any act or decision of a foreign official in his or her official capacity, to induce the official to do or omit to do any act in violation of his or her lawful duty, to obtain any improper advantage, or to induce a foreign official to use his or her influence improperly to affect or influence any act or decision.⁶²

c. Payment

The FCPA prohibits paying, offering, promising to pay (or authorizing to pay or offer) money or anything of value.⁶³

d. Recipient

The FCPA prohibits payments to a foreign official, a foreign political party or party official, or any candidate for foreign political office.⁶⁴ A “foreign official” means any officer or employee of a foreign government, a public international organization, or any department or agency thereof, or any person acting in an official capacity.⁶⁵ The FCPA applies to payments to any public official, regardless of rank or position.⁶⁶ The FCPA focuses on the *purpose* of the payment instead of the particular duties of the official receiving the payment, offer, or promise of payment.⁶⁷

⁶⁰ Department of Justice, *supra* note 46.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

e. *Business Purpose Test*

The FCPA prohibits payments made in order to assist the firm in obtaining or retaining business for or with, or directing business to, any person.⁶⁸ The Department of Justice interprets “obtaining or retaining business” broadly, such that the term encompasses more than the mere award or renewal of a contract.⁶⁹ In addition, the business to be obtained or retained does not need to be with a foreign government or foreign government instrumentality.⁷⁰

2. *Accounting Provisions*

In addition to the FCPA’s anti-bribery provisions, the statute contained accounting provisions designed to aid in the detection of improper payments:

In the past, corporate bribery has been concealed by the falsification of corporate books and records. [The FCPA] removes this avenue of cover-up, reinforcing the criminal sanctions which are intended to serve as the significant deterrent to corporate bribery. Taken together, the accounting requirements and criminal prohibitions of [The FCPA] should effectively deter corporate bribery of foreign government officials.⁷¹

The FCPA’s accounting provisions, therefore were in response to the SEC’s discovery of corporate “slush funds” used to hide improper payments to foreign officials.⁷² The FCPA required companies subject to the jurisdiction of the SEC to maintain strict accounting standards and management control over their assets, and

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ Pub. L. 95-213 at 4100.

⁷² See Seligman, *supra* note 13, at 333.

prohibited the falsification of accounting records and the deceit of accountants auditing the books and records of such companies.⁷³

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 78(o)(d) of this title shall...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 devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that...transactions are executed in accordance with management's general or specific authorization; transactions are recorded as necessary...to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and...to maintain accountability for assets;...access to assets is permitted only in accordance with management's general or specific authorization; and...the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.⁷⁴

3. *Criminal Penalties*

The third component of the FCPA, along with the anti-bribery and accounting provisions, was the imposition of severe criminal penalties.⁷⁵ Under the original statute, a company which violated either the anti-bribery provisions or accounting provisions faced a maximum fine of \$500,000.⁷⁶ In addition, individuals acting on behalf of companies faced a maximum fine of \$10,000 and five years in jail.⁷⁷ Companies were also prohibited from paying fines assessed to individuals.⁷⁸

⁷³ 15 U.S.C. §78m(b)(2)(A), (B); Pub. L. 95-213 at 4106-4107.

⁷⁴ *Id.*

⁷⁵ *see note 71, infra.*

⁷⁶ Pub. L. 95-213 at 4107.

⁷⁷ 15 U.S.C. §78dd-2(g) (1977).

⁷⁸ *Id.*

