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Modifying the Foreign Corrupt Practices Act: The Search for a Practical Standard

INTRODUCTION

In December 1977, Congress passed and President Carter signed the Foreign Corrupt Practices Act (FCPA)¹ in response to discoveries made during the Watergate investigations of payments by United States companies to foreign officials and political parties.² Section 102 of the FCPA³ set record keeping and internal control requirements, while sections 103⁴ and 104⁵ established standards of payments to foreign governmental officials. Critics sharply attacked the FCPA for its dual enforcement by the Securities Exchange Commission (SEC) and the Justice Department,⁶ the costs of meeting the Act's accounting standards,⁷ the problems of controlling agents,⁸ the many ambiguities in the Act's provisions, and the need for a multilateral solution to the multinational problem of corrupt payments to foreign officials.⁹ In response to these criticisms, Senator John Chafee of Rhode Island introduced Senate Bill No. 708 to "amend and clarify the Foreign Corrupt Practices Act of 1977."¹⁰ On November 23, 1981, the Senate approved the

¹ 15 U.S.C. §§ 78a, 78m, 78dd-1, 78dd-2, 78ff (1976 & Supp. IV 1980).

² Over 400 corporations, including 117 of Fortune's 500, admitted making questionable or illegal payments, with the total exceeding 300 million dollars. Disclosure of these payments has allegedly precipitated "the removal of a Central American president, embarrassed a Philippine regime, led to a constitutional crisis in the Netherlands, caused legislative paralysis in Japan, and shaken an Italian government." McLaughlin, *The Criminalization of Questionable Foreign Payments by Corporations: A Comparative Legal Systems Analysis*, 46 FORDHAM L. REV. 1071, 1072 (1978). See also H. WEISBERG & E. REICHENBERG, *THE PRICE OF AMBIGUITY: MORE THAN THREE YEARS UNDER THE FOREIGN CORRUPT PRACTICES ACT* 4 (1981); Lowenfeld, *Questionable Corporation Payments and the Federal Securities Laws*, 51 N.Y.U.L. REV. 1, 2 (1976); Stevenson, *The SEC and Foreign Bribery*, 32 BUS. LAW. 53, 57 (1976).

³ 15 U.S.C. § 78m(b)(2) (Supp. IV 1980) (amending § 13(b) of the Securities Exchange Act of 1934).

⁴ 15 U.S.C. § 78dd-1 (Supp. IV 1980).

⁵ 15 U.S.C. § 78dd-2 (Supp. IV 1980).

⁶ See *infra* notes 65-68 and accompanying text.

⁷ See *infra* notes 16-25 and accompanying text.

⁸ See *infra* notes 45-55 and accompanying text.

⁹ See *infra* notes 120-25 and accompanying text.

¹⁰ *Business Accounting and Foreign Trade Simplification Act: Joint Hearings before the Sub-*

Business Practices and Records Act, a bill only slightly different from the Chafee proposal.¹¹

This comment will examine the Senate's proposed amendment to the FCPA, taking into consideration the resulting economic, political, and moral burdens. The first section reviews criticism of the FCPA's accounting and anti-bribery provisions. The following section analyzes whether and how the Business Practices and Records Act (BPRA) addresses the FCPA's shortcomings. In addition, this comment discusses possible effects of the Senate's proposal on the possibility of a multilateral agreement on corrupt payments to foreign officials, and on purely private transactions.

THE FOREIGN CORRUPT PRACTICES ACT OF 1977

Accounting Provisions

The FCPA's accounting provisions amended section 13(b) of the Securities Exchange Act of 1934.¹² While the original section 13(b) required reports from issuers of securities, the accounting provisions of the FCPA require companies reporting under section 13(b) to establish records which reflect transactions "in reasonable detail," and to maintain internal accounting control systems to assure compliance with the FCPA.¹³ These provisions were designed to eliminate bookkeeping methods that concealed questionable or illegal payments.¹⁴ The maximum penalties for violating these provisions include fines up to \$10,000 and five years imprisonment.¹⁵

The FCPA accounting provisions have several shortcomings.

comm. on Securities and the Subcomm. on International Finance and Monetary Policy of the Comm. on Banking, Housing, and Urban Affairs, 97th Cong., 1st Sess. 11 (1981) [hereinafter cited as *Joint Hearings*].

¹¹ 127 CONG. REC. S13,971-85 (daily ed. Nov. 23, 1981). A bill to amend the FCPA has also been introduced in the House (H.R. 2530). However, as of October, 1982, hearings had not yet begun on H.R. 2530, and will not begin until the Energy and Commerce Subcommittee on Telecommunications, Consumer Protection and Finance have concluded their FCPA oversight hearings. See *House Subcommittee Asks USTR for Corporate Details Regarding FCPA Problems*, [Oct.-Mar.] INT'L TRADE REP. U.S. EXPORT WEEKLY (BNA) No. 380, at 82 (Oct. 27, 1981).

¹² See 15 U.S.C. § 78m(b) (Supp. IV 1980).

¹³ Section 102 of the FCPA, 15 U.S.C. § 78m(b)(2) (Supp. IV 1980), provides:

- (2) Every issuer . . . shall—
(A) make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer; and
(B) devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances. . . .

¹⁴ S. REP. NO. 114, 95th Cong., 1st Sess. 7 (1977).

¹⁵ 15 U.S.C. § 78ff(a) (Supp. IV 1980) provides that "[a]ny person who willfully violates any provision of this chapter (other than section 78dd-1 of this title) . . . shall upon conviction be fined not more than \$10,000, or imprisoned not more than five years, or both."

Since the FCPA was enacted, many United States companies affected by the Act have adopted tighter internal controls, finding it necessary constantly to document and test internal control systems and to increase the use of audit committees.¹⁶ Yet many persons contend that many of these measures were unnecessary, and have only occurred due to the uncertainty in the FCPA's accounting provisions.¹⁷ Commentators argue that the requirements of "reasonable detail"¹⁸ and "reasonable assurances"¹⁹ do not provide concrete guidelines for establishing an internal control system. In addition, there is no scienter requirement under the accounting provisions and United States businesses may be exposed to potential criminal and civil liability for unintentional errors in company books.²⁰ A violation is determined by a "reasonably prudent man" test,²¹ which does little to define the necessary standards and is totally unsuited for determining criminal liability.²²

Together, these factors result in increased costs for accounting and internal audit controls. An investigation by the General Accounting Office revealed that about seventy-two percent of the corporations responding to its survey had increased accounting and auditing costs by at least eleven percent because of the FCPA, and nearly a third of these companies reported increases exceeding thirty-five percent.²³ These costs stem from the severe criminal penalties of the FCPA for account-

¹⁶ GENERAL ACCOUNTING OFFICE, IMPACT OF FOREIGN CORRUPT PRACTICES ACT ON U.S. BUSINESS 9 (1981) [hereinafter cited as GAO REPORT]; *Joint Hearings*, *supra* note 10, at 358 (testimony of A.A. Sommer, Jr.).

¹⁷ See *Joint Hearings*, *supra* note 10, at 118, 290, 344; H. WEISBERG & E. REICHENBERG, *supra* note 2, at 7; Note, *The Foreign Corrupt Practices Act of 1977: A Transactional Analysis*, 13 J. INT'L L. & ECON. 367, 373 (1979).

¹⁸ 15 U.S.C. § 78m(b)(2)(A) (Supp. IV 1980).

¹⁹ 15 U.S.C. § 78m(b)(2)(B) (Supp. IV 1980). One set of commentators has noted that the requirement of "adequate" internal controls was so broad that it might "be compared to revising the criminal code to 'citizens must behave themselves.'" H. WEISBERG & E. REICHENBERG, *supra* note 2, at 9.

²⁰ See *Joint Hearings*, *supra* note 10, at 161, discussing the FCPA's lack of a scienter requirement in its accounting provisions.

²¹ The SEC has asserted that the test is whether a defendant "failed to act as a reasonable and prudent person would have acted under the same or similar circumstances." This and other SEC comments are reprinted in the appendix to GAO REPORT, *supra* note 16, at 84.

²² The SEC has stated that it would recommend criminal prosecution "only in the most serious and egregious cases." *Id.* at 71. Yet this statement itself leaves much doubt as to when the SEC will seek prosecution, and "[i]t is of small comfort to an executive when his lawyer tells him he may be liable under the law—personally and corporately—but not to worry because the Government may not prosecute." 127 CONG. REC. S13,972 (daily ed. Nov. 23, 1981) (remarks of Senator John Heinz).

²³ GAO REPORT, *supra* note 16, at 13. See also *Joint Hearings*, *supra* note 10, at 172 (testimony of Mr. John Subak, Group Vice President and General Counsel, Rohm & Haas Co.).

ing errors and control weaknesses.²⁴ Such severe penalties have understandably caused many companies to spend large sums to protect themselves from the uncertainties of the FCPA's accounting provisions. In addition, these provisions affect public companies regardless of whether they engage in international business.²⁵ All companies, whether or not they conduct business overseas, must protect themselves against the uncertainties of the FCPA's accounting provisions.

Anti-Bribery Provisions

Other provisions of the FCPA prohibit bribery of foreign officials.²⁶ These sections are directed towards all domestic concerns and towards any issuer that has a class of securities registered or that is required to file reports with the SEC. The sections prohibit using "any means or instrumentality of interstate commerce corruptly"²⁷ in furtherance of an offer or payment of anything of value in order to influence a foreign official, political party or candidate. The Act also prohibits such payments to "any person, while knowing or having reason to know that all or a portion of such money or thing of value"²⁸ will be used to pay foreign officials or political parties, to help the issuer or domestic concern to obtain or retain business, or to direct business to another person. The FCPA defines "domestic concern" as all United States citizens and residents, as well as all businesses which have their principal place of business in the United States, or are organized under the laws of a state, territory, possession, or commonwealth of the United States.²⁹ A "foreign official" is "any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality."³⁰ Those whose duties are "essentially ministerial or clerical" are explicitly excluded, thereby allowing "facilitating" or "grease" payments.³¹ A "grease" payment does not obtain or retain business. Instead, it facilitates or expedites a business-related activity that a government employee is already required to perform. The classic example

²⁴ See *supra* note 15 and accompanying text.

²⁵ See 15 U.S.C. § 78m(b)(2) (Supp. IV 1980) (requiring compliance by "[e]very issuer which has a class of securities registered . . . and every issuer which is required to file reports." (emphasis added)).

²⁶ 15 U.S.C. §§ 78dd-1, 78dd-2 (Supp. IV 1980).

²⁷ 15 U.S.C. §§ 78dd-1(a), 78dd-2(a) (Supp. IV 1980).

²⁸ 15 U.S.C. §§ 78dd-1(a)(3), 78dd-2(a)(3) (Supp. IV 1980).

²⁹ 15 U.S.C. § 78dd-2(d)(1) (Supp. IV 1980).

³⁰ 15 U.S.C. §§ 78dd-1(b), 78dd-2(d)(2) (Supp. IV 1980).

³¹ *Id.*

is paying \$20 to a customs official to move the necessary papers before the banana shipment rots on the dock.³² Such payments are allowed under the FCPA, even though this practice is illegal in the United States and in many other foreign countries.³³ Criminal penalties under the anti-bribery provisions of the FCPA are severe, with "any domestic concern" potentially liable for fines up to \$1,000,000. Individuals who willfully violate the Act may be fined up to \$10,000, or imprisoned up to five years, or both.³⁴ Jurisdiction over the FCPA's bribery provisions is divided. The SEC retains civil authority over the companies reporting to it, and the Justice Department maintains civil jurisdiction over nonreporting companies. The Justice Department also has all criminal enforcement authority.³⁵

The anti-bribery provisions are a source of confusion and uncertainty. In the General Accounting Office's review of the FCPA, seventy percent of the respondents who reported that the FCPA caused a decrease in their overseas business rated the clarity of at least one of the anti-bribery provisions as "inadequate" or "very inadequate."³⁶ Although it is hard to measure the amount of lost business opportunities caused by ambiguities in the anti-bribery provisions, "[t]he fact that this Act is consistently cited in surveys as one of the strongest disincentives to exporting is the best evidence that it is a source of confusion and uncertainty for exporters."³⁷ One area of confusion surrounds facilitating payments. Instead of expressly allowing customary facilitating payments, the FCPA excluded from its prohibitions payments to those "whose duties are essentially ministerial or clerical."³⁸ This indirect approach has created uncertainty as to the law's meaning, with many payments that Congress never intended to forbid being withheld as a consequence.³⁹ The ambiguities have also resulted in greater costs

³² See, e.g., H. WEISBERG & E. REICHENBERG, *supra* note 2, at 17.

³³ The list of countries that prohibit facilitating payments includes both developed states, such as France, Switzerland, and the United States, and developing states, such as Jordan, El Salvador, and Saudi Arabia. Indeed, a large majority of the developing states prohibit facilitating payments. See Comment, *The Foreign Corrupt Practices Act of 1977: A Solution or a Problem?*, 11 CAL. W. INT'L L.J. 111, 132 (1981).

³⁴ 15 U.S.C. § 78dd-2(b)(1) (Supp. IV 1980).

³⁵ See S. REP. NO. 114, 95th Cong., 1st Sess. 12 (1977).

³⁶ GAO REPORT, *supra* note 16, at 38.

³⁷ *Joint Hearings*, *supra* note 10, at 391 (statement of Robert Graham, Governor of Florida, on behalf of the National Governor's Association).

³⁸ See 15 U.S.C. §§ 78dd-1(b), 78dd-2(d)(2) (Supp. IV 1980). The reports from both the Senate and the House explicitly state that the FCPA did not cover facilitating payments. See S. REP. NO. 114, 95th Cong., 1st Sess. 10 (1977); H.R. REP. NO. 640, 95th Cong., 1st Sess. 8 (1977).

³⁹ The United States Chamber of Commerce found that due to the ambiguities of the FCPA, some companies have discontinued granting small payments to customs officials to expedite ap-

to those who have made facilitating payments. In one instance, a company spent \$30,000 investigating a \$20 payment to a customs official.⁴⁰ The FCPA's focus on the recipient of facilitating payments, instead of on their purposes, is the main cause of the ambiguity.⁴¹ If the goal is to prohibit payments for certain purposes only, then a clear and effective guideline must squarely address these purposes. In its facilitating payment provisions, the FCPA fails to achieve this goal.

The FCPA also contains ambiguities concerning the differences between bribes and gifts or legitimate business expenses. Even the Senate Banking Committee indicated that the term "corruptly"⁴² was used to make clear that the payment "must be intended to induce the recipient to misuse his official position in order to wrongfully direct business to the payor or his client," and defined "corruptly" to require an "evil motive or purpose, an intent to wrongfully influence the recipient."⁴³ Despite these explanations, some United States government officials have applied the statute to routine social gifts and to business expenses.⁴⁴ As long as the actual language of the FCPA does not define allowable gifts and business expenses, conflicting interpretations are inevitable.

Other ambiguities are contained in the "reason to know" provisions.⁴⁵ Under these provisions, domestic concerns are liable for any corrupt political payments made overseas, if the domestic concern knows or has reason to know of the transaction. Although Congress may impose criminal sanctions on a principal for acts of its agent, performed within the scope of the agent's employment,⁴⁶ there is no similar "reason to know" standard in United States domestic bribery laws.⁴⁷ The real problem with the provisions, however, lies in the lack

proval of export and import papers, gasoline to policemen in order to permit patrol of company facilities more frequently, and other types of payments which Congress did not intend to prohibit. H. WEISBERG & E. REICHENBERG, *supra* note 2, at 18.

⁴⁰ *Joint Hearings*, *supra* note 10, at 8 (opening statement of Senator Chafee).

⁴¹ See *id.* at 150 (statement of Robert McNeill for the Emergency Committee for American Trade).

⁴² See 15 U.S.C. §§ 78dd-1(a), 78dd-2(a) (Supp. IV 1980).

⁴³ S. REP. NO. 114, 95th Cong., 1st Sess. 10 (1977). See also H.R. REP. NO. 640, 95th Cong., 1st Sess. 8 (1977).

⁴⁴ *Joint Hearings*, *supra* note 10, at 154 (statement of Robert McNeill).

⁴⁵ See 15 U.S.C. §§ 78dd-1(a)(3), 78dd-2(a)(3) (Supp. IV 1980).

⁴⁶ See, e.g., *United States v. A & P Trucking Co.*, 358 U.S. 121, 125 (1958) (partnership held criminally liable for the acts of its agents, even though the partners did not participate in the infraction); *United States v. Hilton Hotels Corp.*, 467 F.2d 1000, 1004 (9th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973) (under the Sherman Act, a corporation is liable for the acts of its agents within the scope of their authority, even when the agents act against company orders).

⁴⁷ See *Joint Hearings*, *supra* note 10, at 63 (testimony of William E. Brock, United States

of guidelines defining "reason to know."⁴⁸ By definition, such guidelines are based on hindsight: whether the company should have known of a particular result had it exercised "reasonable" control procedures, even if the company could not reasonably control the agent's actions.⁴⁹ Under the FCPA, a company and its directors and officers may be liable for an agent's actions that are more clearly visible in hindsight than in foresight. Such ambiguity leads to greater costs in finding and using acceptable agents.⁵⁰ For example, if an agent who gathers more business than others has bribed to obtain business, while receiving a slightly larger commission, should the company have realized he was using his extra commission to bribe government officials? In such cases, companies might not employ an agent, even if a thorough examination of his background revealed no history of bribery, simply for the uncertainty of the "reason to know" standard.⁵¹ This standard especially burdens smaller businesses, since they often rely exclusively on foreign agents to obtain foreign business.⁵² The sheer intrusiveness of the investigation which companies feel compelled by the Act to conduct may cause companies to lose experienced agents or encounter difficulty recruiting new ones.⁵³

As a matter of public policy, it seems appropriate that a statute prohibiting bribery should prohibit bribes through third persons. However, it seems unreasonable to impose stricter requirements abroad than at home. Though some have argued that by dropping the "reason to know" standard, the United States would allow companies to pay

Trade Representative). *See also id.* at 169 (statement of John Subak: "Liability can attach even though traditional standards of criminal liability for the actions of others would not give rise to liability.").

⁴⁸ *Joint Hearings, supra* note 10, at 63 (testimony of William Brock: "Well, frankly, nobody knows what ['reason to know'] . . . means, and therefore in some cases and [sic] quite a few companies have withdrawn from doing business where there is any question about it. . . .").

⁴⁹ *See id.* at 164 (testimony of John Subak).

⁵⁰ *See, e.g., id.* at 432 (statement of Harvey Pitt: "[M]ore often than not [the reason to know standard] . . . results in corporations attempting, in good faith, to satisfy a standard they cannot comprehend at undue expense. The end product is often uncertainty and an impressive 'paper trail,' but not necessarily the result Congress originally desired.").

⁵¹ *See id.* at 247 (testimony of Norman Pacun).

⁵² For example, Shaw Mudge & Co. recently ceased conducting business in Africa, Pakistan, and the Moslem countries because of agency problems arising under the FCPA. *Id.* at 273 (testimony of Shaw Mudge).

⁵³ *See id.* at 266 (statement of Mark Feldman:

The predictable response of many agents to such proposals by U.S. companies is to refuse to do business with them. Foreign businessmen have no desire to become enmeshed in procedures required by U.S. law or to risk embarrassing inquiries into their business practices. They can find other customers for their services.).

See also id. at 169 (statement of John Subak); H. WEISBERG & E. REICHENBERG, *supra* note 2, at 25; GAO REPORT, *supra* note 16, at 39.

giant sales commissions and avoid liability simply by not asking how the commissions were spent,⁵⁴ such blatant acts would not go unpunished since such "negligence" would violate the internal controls requirements of the FCPA's accounting provisions.⁵⁵ The "reason to know" provisions of the FCPA have done little toward solving the problem intended, and have cost United States businesses greatly in lost business opportunities and agent investigations.

Another shortcoming of the FCPA's anti-bribery provisions is that the Act prohibits conduct that is legal in many countries, and allows acts that are prohibited by the internal laws of some nations.⁵⁶ For example, many countries authorize companies to make political contributions,⁵⁷ while such contributions are clearly illegal under the FCPA.⁵⁸ Other nations forbid facilitating payments⁵⁹ that the FCPA permits United States companies to make abroad.⁶⁰ Forbidding certain practices by United States concerns that are legal in some countries puts United States companies at an automatic disadvantage. By prohibiting practices and payments that have become standard and well-accepted methods of doing business in a country, foreign companies operating without such restrictions gain an advantage in that country. For example, in many countries, social gestures such as gifts or entertainment are not only permitted under local laws, but are necessary before business can be transacted.⁶¹ The problem is compounded by the fact that a foreign agent of a United States company may fully comply with his nation's laws, yet the company may be liable for his actions under the FCPA.⁶² Another effect of such FCPA prohibitions is the unwillingness of foreign officials to do business with United States companies because of the concern that United States courts and media will label them "corrupt," even though they comply fully with

⁵⁴ See, e.g., *Joint Hearings*, *supra* note 10, at 411 (testimony of William Dobrovir:

To eliminate the reason to know, it would allow a company to hire a local agent who was the minister's brother-in-law, who was recommended by the minister, pay him double the usual commission, make sure he did not tell them what he did with it, and enjoy with impunity the fruits of his bribery.).

⁵⁵ See *supra* notes 12-22 and accompanying text.

⁵⁶ For a thorough examination of foreign internal bribery laws, see Comment, *supra* note 33, at 131-34.

⁵⁷ The list of such countries includes Canada and the United Kingdom, which do not even require disclosure. In addition, West Germany provides tax deductions for such contributions. See *id.* at 133.

⁵⁸ See 15 U.S.C. §§ 78dd-1(a)(2), 78dd-2(a)(2) (Supp. IV 1980).

⁵⁹ See *supra* note 33 and accompanying text.

⁶⁰ See 15 U.S.C. §§ 78dd-1(b), 78dd-2(d)(2) (Supp. IV 1980).

⁶¹ H. WEISBERG & E. REICHENBERG, *supra* note 2, at 21.

⁶² *Joint Hearings*, *supra* note 10, at 195 (statement of Joseph Creighton).

their national law.⁶³ Not prohibiting acts illegal in other countries poses minor problems as well. For example, a company relying on the FCPA to set standards of behavior may find itself in violation of foreign law if it gives a facilitating payment in a country where facilitating payments are illegal.⁶⁴

Problems also arise because the anti-bribery provisions of the FCPA are enforced by two federal bodies. The SEC has civil jurisdiction over companies reporting to it, while the Justice Department has civil jurisdiction over everyone else and all criminal actions.⁶⁵ Indicative of the problems of dual jurisdiction was a Practicing Law Institute seminar where representatives of the SEC and Justice Department disagreed on interpretations of FCPA provisions.⁶⁶ How substantial a deterrent dual enforcement may be to foreign business was manifested when the Justice Department instituted its review procedures. Under the Department's review procedure, a United States company or domestic concern that wishes to know whether certain actions fall within the FCPA agrees to give the Justice Department access to all relevant records. The Justice Department then attempts to determine within thirty days whether the proposed actions violate the FCPA. If the Review Board determines that the actions would not violate the FCPA, it issues a binding opinion letter stating that the Justice Department will not bring action. However, the letter is not binding if the Justice Department determines that information was withheld, and evidence of other illegal acts discovered during the review can be used against the company or concern.⁶⁷ Because of dual enforcement of the FCPA's anti-bribery provisions, companies are not willing to rely solely on the Justice Department's binding opinion letter.⁶⁸

Overall, the FCPA has succeeded in preventing bribery by United States concerns in foreign countries, but it has cost those concerns in lost business and increased operating costs. The ambiguities of the ac-

⁶³ H. WEISBERG & E. REICHENBERG, *supra* note 2, at 13.

⁶⁴ For a discussion of the countries that prohibit facilitating payments, see *supra* note 33 and accompanying text; Comment, *supra* note 33, at 132.

⁶⁵ S. REP. NO. 114, 95th Cong., 1st Sess. 12 (1977).

⁶⁶ Practicing Law Institute Seminar, Chicago, Illinois, March 22-23, 1979, reprinted in FOREIGN CORRUPT PRACTICES ACT REPORTER 109-30 (Bus. Laws, Inc. 1980).

⁶⁷ Justice Department comments, reprinted in appendix to GAO REPORT, *supra* note 16, at 117.

⁶⁸ Five months after the Justice Department instituted its review procedure, the SEC announced that it would not prosecute corporations for transactions which the Justice Department cleared. However, the SEC reserved the right to determine the need for enforcement action independently irrespective of the Justice Department's actions. The SEC also reserved the right to take issue with the results of the Justice Department procedure. See GAO REPORT, *supra* note 16, at 44.

counting provisions have forced many companies to increase greatly their internal controls to ensure compliance. Dual enforcement and the "reason to know" standard may convince a United States company to avoid foreign markets. The many ambiguities of the FCPA, coupled with stiff penalties, prevent United States concerns from doing business competitively with those unencumbered by the FCPA. The FCPA needs revision. Bribery by United States concerns can be prohibited without needlessly injuring those United States concerns: "As is often the case with the Government's effort to codify and regulate a moral standard, the fault is not with the objective but with the implementation."⁶⁹

PROPOSED MODIFICATIONS TO THE FCPA

The BPRA's Effect on Accounting Standards

The Business Practices and Records Act (BPRA) would remove much uncertainty from the FCPA's accounting requirements for issuers regulated by the SEC. The Senate's bill retains the "reasonable detail," "reasonable assurance," and "accurately and fairly" language of the FCPA.⁷⁰ However, the BPRA clarifies and defines these phrases within the context of the Act. The BPRA would supplement the "reasonable detail" standard with explicit requirements of reasonable detail in records in order to "permit preparation of financial statements in conformity with generally accepted accounting principles . . . and to maintain accountability for assets."⁷¹ The BPRA would also define "reasonable detail" and "reasonable assurance" as "such level of detail and degree of assurance as would satisfy prudent individuals in the conduct of their own affairs, having in mind a comparison between benefits to be obtained and costs to be incurred in obtaining such benefits."⁷² Due to the cost-benefit form of the definition, companies would no longer need to employ control systems larger than costs justify merely to prevent FCPA liability.

Moreover, although the Senate's bill does not add a "financial statement" materiality standard to the accounting provisions as Senator

⁶⁹ *Joint Hearings*, *supra* note 10, at 6 (opening statement of Senator John Heinz, Chairman, Senate Subcommittee on International Finance and Monetary Policy).

⁷⁰ Section 4(a) of the proposed BPRA (to amend § 13(b)(2) of the Securities Exchange Act of 1934). Full text of the proposed BPRA is in appendix. *See also supra* notes 18-19 and accompanying text.

⁷¹ Section 4(a) of the proposed BPRA (to amend § 13(b)(2)(B) of the Securities Exchange Act of 1934) (see appendix).

⁷² Section 6 of the proposed BPRA (proposed addition to the Securities Exchange Act of 1934 as § 13(b)(6)) (see appendix).

Chafee originally proposed,⁷³ the BPRA would impose liability only for failing to reach such level of detail and degree of assurance "as would satisfy prudent individuals in the conduct of their own affairs."⁷⁴ Since relatively minor omissions would no longer give rise to liability, companies would no longer need to bear unreasonable accounting costs merely to protect themselves from the FCPA.

The Senate bill also provides guidelines for the Act's "accurately and fairly" provisions. The BPRA requires scienter for liability under the accounting provisions, with liability arising only if an issuer of securities has acted in bad faith, or if an officer of the issuer knowingly caused the issuer to violate the Act.⁷⁵ This provision protects issuers from liability for innocent errors in bookkeeping. An issuer would still be liable for "knowingly" failing to maintain adequate internal controls⁷⁶ or for "knowingly circumventing a system of internal accounting controls,"⁷⁷ and for failing to adhere to the section 13(b)(2)(A) requirements to prepare records of the issuer's transactions "in reasonable detail."⁷⁸ Therefore, the addition of a scienter requirement would not permit issuers to evade all liability by merely "turning their corporate heads" or maintaining an accounting system inadequate for the issuers' needs. The BPRA also removes all criminal liability for violations of the FCPA's accounting provisions.⁷⁹ In passing the FCPA, Congress intended the accounting standards "to operate in tandem with the criminalization provisions of the bill to deter corporate bribery,"⁸⁰ yet the FCPA's provisions impose criminal liability whether or not there is evidence of bribery. Under the BPRA, however, if the SEC discovers an accounting practice "to cover up" an illicit payment, the company and its officers would be criminally liable under the anti-bribery provisions.⁸¹ Without the threat of criminal liability, corporate executives who did not knowingly authorize bribes would no longer feel pressured

⁷³ *Joint Hearings*, *supra* note 10, at 14-16.

⁷⁴ Section 6 of the proposed BPRA (proposed addition to the Securities Exchange Act of 1934 as § 13(b)(6)) (see appendix).

⁷⁵ Section 4(b) of the proposed BPRA (proposed addition to the Securities Exchange Act of 1934 as § 13(b)(5)) (see appendix).

⁷⁶ *See id.*

⁷⁷ *See* section 4(b) of the proposed BPRA (proposed addition to the Securities Exchange Act of 1934 as § 13(b)(6)) (see appendix).

⁷⁸ *See supra* notes 71-72 and accompanying text.

⁷⁹ Section 4(b) of the proposed BPRA (proposed addition to the Securities Exchange Act of 1934 as § 13(b)(4)) (see appendix).

⁸⁰ 123 CONG. REC. 13,819 (1977).

⁸¹ *See* section 5(b) of the proposed BPRA (proposed addition to the FCPA as § 104(d)(3)) (see appendix).

to spend excessive amounts on internal control just to protect themselves from possible prison sentences.

Another BPRA addition to section 13 of the Securities Exchange Act would require an issuer holding fifty percent or less of a domestic or foreign firm to use "good faith" in influencing the firm to follow the BPRA's accounting guidelines.⁸² This resolves the FCPA's uncertainty as to whether an issuer would be liable for accounting violations of another firm wholly or partially owned by the issuer.⁸³ This section would provide that if the issuer does not have direct control of the firm (i.e., owning fifty percent or less), the issuer would have a duty to influence the firm to comply with the BPRA's accounting standards. Possible confusion may arise, however, over how the issuer fulfills its "good faith" obligation. The only guideline supplied is that the issuer should exert influence "to the extent reasonable under the issuer's circumstances," including the relative degree of ownership and the laws and practices of the country in which the firm is located.⁸⁴ Despite this uncertainty, in light of the other shortcomings of the FCPA concerning ownership of domestic and foreign firms, this section of the BPRA would be a welcome step forward, providing guidelines regarding an issuer's liability for the records of a firm it owns either wholly or in part.

The BPRA would likely not result in an immediate dismantling of issuers' accounting departments. Even before the FCPA was enacted in 1977, United States corporations had already begun implementing stronger accounting policies and procedures to prevent a recurrence of the type of misconduct discovered during the Watergate investigations.⁸⁵ In addition, the BPRA would retain the FCPA's stiff penalties in civil actions.⁸⁶ The BPRA's clarifications of accounting requirements for issuers would, however, remove much unnecessary bookwork currently performed merely to ensure compliance with the FCPA. These changes would require a sufficiently high level of quality in an issuer's accounting practices and internal controls, yet would not re-

⁸² Section 4(b) of the proposed BPRA (proposed addition to the Securities Exchange Act of 1934 as § 13(b)(5)) (see appendix).

⁸³ Implicit in this section is the requirement that any firm which the issuer controls (i.e., owns more than fifty percent), whether foreign or domestic, must meet the requirements of the BPRA's accounting provisions.

⁸⁴ Section 4(b) of the proposed BPRA (proposed addition to the Securities Exchange Act of 1934 as § 13(b)(6)) (see appendix).

⁸⁵ See *Joint Hearings*, *supra* note 10, at 160 (statement of Robert McNeill).

⁸⁶ Except for the removal of criminal liability (*supra* note 80 and accompanying text), the BPRA includes no amendments to section 32(a) of the Securities Exchange Act of 1934, which governs the penalties for the entire Act except for section 30A (section 103 of the FCPA).

quire the expenditure of an unnecessarily high amount of resources to meet with certainty the Act's standards.

The BPRA's Effect on Anti-Bribery Standards

The most obvious change to anti-bribery standards proposed by the BPRA is the total repeal of section 103 of the FCPA (section 30A of the Securities Exchange Act).⁸⁷ This is not, however, nearly as significant as it appears, for sections 103 and 104 of the FCPA are nearly identical. The major difference is that section 103 covers acts of concerns regulated by the SEC, while section 104 covers acts of all other domestic concerns. Since section 5 of the BPRA would apply to all domestic concerns, including those currently covered by section 103 of the FCPA,⁸⁸ total repeal of section 103 would not create a new class of concerns exempt from liability under United States foreign anti-bribery laws. The real significance of this repeal would be the termination of the dual enforcement of the anti-bribery provisions, giving the Justice Department sole jurisdiction over violations of the Act's anti-bribery provisions.⁸⁹ This would eliminate the current confusion inherent in dual enforcement under the SEC's and Justice Department's differing interpretations of the FCPA.⁹⁰ By following the Justice Department's guidelines, a United States concern could be reasonably certain that it was complying with the BPRA's anti-bribery provisions.

In addition, the BPRA would codify the Justice Department's review procedure and would authorize the Department to issue guidelines concerning compliance with the BPRA.⁹¹ Absent the threat of SEC prosecution for acts approved by the Justice Department, use of the review procedure would increase with the passage of the BPRA. Similarly, Justice Department guidelines under the BPRA would authoritatively outline what constitutes a violation of the anti-bribery provisions. The increased certainty would result in economic benefits to United States concerns. No longer would an issuer need to protect itself from the vague guidelines of the SEC⁹² by avoiding business op-

⁸⁷ Section 5(a) of the proposed BPRA (see appendix).

⁸⁸ Section 5(b) of the proposed BPRA (amends § 104(a) and adds § 104(f) to the FCPA) (see appendix).

⁸⁹ *Id.* (adding § 104(e) to the FCPA) (see appendix).

⁹⁰ See *supra* notes 65-68 and accompanying text.

⁹¹ Section 8 of the proposed BPRA (see appendix). The Justice Department's review procedure is discussed *supra* at note 68 and accompanying text.

⁹² The SEC has stated that "greater clarity [in the FCPA cannot] be reconciled with the policy of Congress to eradicate corporate bribery of foreign officials," suggesting that acceptable corporate behavior is possible only under guidelines so vague as to force overly cautious behavior. These comments are reprinted in the appendix to GAO REPORT, *supra* note 16, at 105.

portunities that the Justice Department would approve. The BPRA would provide certainty, discouraging practices which Congress intended to prohibit, and encouraging practices which Congress intended to permit. The resulting end of overcautious behavior would yield significant economic benefits to United States firms, without permitting any "questionable" practices.

Another BPRA change to section 104(a) of the FCPA would remove the word "agent." While this would not exempt United States concerns from liability for their foreign agents' acts,⁹³ the United States would no longer prosecute the agent himself under its anti-bribery laws for actions performed on foreign soil. Since agents of United States entities would no longer be concerned about potential liability under two sets of laws, this would provide more incentive for agents to work for United States companies.

The BPRA also explicitly authorizes facilitating payments.⁹⁴ Instead of allowing payments to certain officials, as under the FCPA,⁹⁵ the BPRA would permit payments for particular purposes, "to facilitate or expedite performance by such foreign official of his official duties."⁹⁶ This would eliminate confusion over what are ministerial or clerical duties,⁹⁷ and would advance the original intent of Congress to authorize facilitating payments.⁹⁸ Since enforcement officials have raised doubts as to whether the FCPA permits facilitating payments,⁹⁹ the BPRA would directly address this uncertainty by explicitly authorizing these payments. Questions may arise as to what "official duties" include. For example, would the BPRA permit a payment to an official whose "official duty" was to determine which aircraft his government would buy? Though it may be argued that such a payment may "expedite" the purchasing process, the payment would undoubtedly violate the Act. First, the payment might be considered as corruptly influencing the official's decision. This is forbidden by the strongest and most

⁹³ For a discussion of liability for an agent's actions under the BPRA, see *infra* notes 111-114 and accompanying text.

⁹⁴ Section 5(b) of the proposed BPRA (to amend § 104(c) of the FCPA) (see appendix).

⁹⁵ See *supra* notes 38-41 and accompanying text.

⁹⁶ Section 5(b) of the proposed BPRA (to amend § 104(c) of the FCPA) (see appendix).

⁹⁷ See 15 U.S.C. §§ 78dd-1(b), 78dd-2(d)(2) (Supp. IV 1980).

⁹⁸ See S. REP. NO. 114, 95th Cong., 1st Sess. 10 (1977) ("The statute does not, therefore, cover so-called 'grease payments,' such as payments for expediting shipments through customs. . . ."); H.R. REP. NO. 640, 95th Cong., 1st Sess. 8 (1977) ("The language of this bill is deliberately cast in terms which differentiate between [corrupt] payments and facilitating payments. . . ."). See also S. REP. NO. 1031, 94th Cong., 2d Sess. 6 (1976).

⁹⁹ *Joint Hearings*, *supra* note 10, at 255, 265 (testimony of Mark Feldman).

likely provision to govern such a payment.¹⁰⁰ Second, the example may violate the requirement that such payments be customary in the foreign country.¹⁰¹ This assumes, of course, that business in that country does not normally require such payments. Finally, in the unlikely event that the above two provisions are determined not to prevent this type of payment, the Justice Department may exercise authority under section 8 of the proposed BPRA to issue guidelines stating that the Act prohibits such payments. Thus, while the proposed Act raises legitimate questions regarding what may be considered facilitating payments, other provisions of the BPRA address most of these questions. The provisions of the BPRA that allow facilitating payments would be much more workable than those of the FCPA. The BPRA would, in effect, make explicit the original wishes of Congress in passing the FCPA.¹⁰² This clarification should result in less delay for visas, import papers, and repair parts, less spoilage of perishable goods, more certainty among United States concerns, and, consequently, significant economic benefits and savings.

The BPRA would also explicitly allow gifts intended as "a courtesy, a token of regard and esteem, or in return for hospitality."¹⁰³ In some countries, courtesy gifts are not only permitted under local law, but are necessary before business may be transacted.¹⁰⁴ By legalizing these payments, the BPRA would allow United States businesses that abandoned particular markets due to uncertainties in the FCPA to re-enter these markets. As in the facilitating standards, the BPRA's gift provisions present questions of potential abuse. However, an unusually large gift would most likely be found corruptly to influence the official's decisions,¹⁰⁵ or to be more than just a courtesy, token of regard, or return for hospitality.¹⁰⁶ As in the case of facilitating payments, if questions arise as to what is permitted, the Justice Department may issue guidelines.¹⁰⁷ The BPRA would likewise explicitly permit expenses related to the demonstration and explanation of products, including travel and lodging, if such marketing activities, demonstrations, explanations, or related expenses pertain to a business presentation "associated with the selling or purchasing of goods or

¹⁰⁰ See § 5(b) of the proposed BPRA (to amend § 104(a) of the FCPA) (see appendix).

¹⁰¹ See § 5(b) of the proposed BPRA (to amend § 104(c) of the FCPA) (see appendix).

¹⁰² See *supra* note 98 and accompanying text.

¹⁰³ Section 5(b) of the proposed BPRA (to amend § 104(c)(3) of the FCPA) (see appendix).

¹⁰⁴ H. WEISBERG & E. REICHENBERG, *supra* note 2, at 21.

¹⁰⁵ Section 5(b) of the proposed BPRA (to amend § 104(a) of the FCPA) (see appendix).

¹⁰⁶ Section 5(b) of the proposed BPRA (to amend § 104(c)(3) of the FCPA) (see appendix).

¹⁰⁷ Section 8 of the proposed BPRA (see appendix).

services.”¹⁰⁸ As with the gift provisions, there remains the possibility of abuse. A United States firm that brings its foreign clients to Hawaii for a week to demonstrate a refrigeration system would have to show that the expenses were related to or necessary for the demonstration¹⁰⁹ and that the action was not taken to influence an official’s decisions.¹¹⁰ Overall, this clarification should prevent lost business opportunities caused by businesses’ reluctance to pay legitimate expenses to show products to potential foreign clients, and should not allow much abuse in the classification of demonstration expenses.

The BPRA would remove the “reason to know” standard of accountability for agents’ actions under section 104(a)(3) of the FCPA.¹¹¹ Eliminating this standard would greatly reduce the costs of maintaining foreign agents. United States concerns would no longer need to conduct overly extensive and intrusive investigations into a prospective agent’s background, which, in addition to the cost, might discourage totally acceptable and highly qualified people from applying to work for United States companies. A United States concern would also no longer need to conduct overly extensive and intrusive checks on business done by its agents to assure that it has no “reason to know” of any possibly illegal activity. Although many have argued that removing the “reason to know” standard would result in corporations ignoring its agents’ actions to escape all liability,¹¹² such arguments overlook the requirements of the accounting provisions to keep books in reasonable detail.¹¹³ Any significant lack of control over agents could result in prosecution under the Act’s accounting provisions, with a possible fine of \$10,000 for individuals, or up to \$500,000 “when such person is an exchange.”¹¹⁴ With such strict penalties, it would not profit a firm to violate the accounting provisions in order to escape the anti-bribery requirements.

Yet it may be preferable to leave a well-defined remnant of “reason to know” to make more explicit Congress’ intent to prevent United States concerns from purposely ignoring their agents’ actions. Such a

¹⁰⁸ Section 5(b) of the proposed BPRA (to amend § 104(c)(4) of the FCPA) (see appendix).

¹⁰⁹ *Id.*

¹¹⁰ Section 5(b) of the proposed BPRA (to amend § 104(a) of the FCPA) (see appendix).

¹¹¹ See *supra* notes 45-55 and accompanying text.

¹¹² See *Joint Hearings, supra* note 10, at 396 (statement of Senator William Proxmire: “The obvious problem with the ‘director authorizes’ standard is that it encourages an ostrich or a head-in-the-sand approach.”). See also *id.* at 411 (testimony of William Dobrovir); *id.* at 487 (testimony of Harold Williams, former SEC chairman).

¹¹³ Section 4(a) of the proposed BPRA (to amend § 13(b)(2) of the Securities Exchange Act of 1934) (see appendix).

¹¹⁴ 15 U.S.C. § 78ff(a) (Supp. IV 1980).

provision should specify signposts to alert a company that its agents are using corrupt methods to obtain business. An example of such a signpost may be an agent who consistently wins business in spite of lower bids by competitors. Ignoring such signposts would constitute a violation if an agent employed corrupt practices to obtain or retain business. A "reason to know" standard would also protect United States concerns from liability if they follow certain guidelines in monitoring their agents. If reasonable, well-defined guidelines are supplied, a "reason to know" standard would encourage businesses to deter their agents from engaging in illegal conduct while avoiding the uncertainty costs of the current FCPA standards. Still, passage of the BPRA even without a "reason to know" standard would improve the FCPA. The BPRA would remove the costs of uncertainty caused by the FCPA's total lack of definition for the "reason to know" standard. Removing the standard would not introduce the possibility of future abuses of the system because of the accompanying provisions.

The BPRA includes one general exception to its anti-bribery provisions, allowing any payment or gift "which is lawful under the laws and regulations of the country" of the recipient foreign official.¹¹⁵ This would override any other anti-bribery provision in the BPRA whenever the laws of the recipient's country authorize the payment. Currently, United States concerns must forego considerable business opportunities because actions permitted in a foreign market and allowed by foreign competitors are illegal under the FCPA. This section would also avoid the criticism that the FCPA attempts to export United States morality.¹¹⁶ Allowing United States concerns to follow business practices authorized by foreign law adds an element of respect for the laws of other nations absent from the FCPA. United States concerns could rely on the laws of foreign countries in planning their conduct abroad, without the concern of liability under the FCPA for otherwise legal activities. In addition, the BPRA would afford little room for abuse of these provisions. United States concerns could not circumvent the BPRA by making a payment in Country X, which would permit the payment, to an official of Country Y, whose laws prohibit the payment. The BPRA expressly states that for the purposes of this section, the determining factor is the law of the country where the recipient principally operates.¹¹⁷ The BPRA would expressly forbid actions illegal both under its

¹¹⁵ Section 5(b) of the proposed BPRA (to amend § 104(c)(2) of the FCPA) (see appendix).

¹¹⁶ See H. WEISBERG & E. REICHENBERG, *supra* note 2, at 13; Lashbrooke, *The Foreign Corrupt Practices Act of 1977: A Unilateral Solution to an International Problem*, 12 CORNELL INT'L L.J. 227, 241 (1979).

¹¹⁷ Section 5(b) of the proposed BPRA (to amend § 104(c)(2) of the FCPA) (see appendix).

provisions and the laws of a foreign country, even if the laws are ignored in the foreign country. The BPRA would allow an act only if a foreign country's laws, not its customary practices, permit the act. Although this would leave United States firms at a disadvantage to foreign concerns not operating under the BPRA, this would be a wise prohibition. First, a system authorizing customary practices would be uncertain. Until someone develops a workable definition for when a practice is "customary," United States firms who wish to take advantage of such a provision would expose themselves to risks that their actions do not constitute "customary practices." Second, non-enforcement of the country's law may not be permanent. A change of favor with a particular official may result in prosecution in that country for acts thought customary, and prosecution in that country would be "proof" that the enforcing country intended its law to be obeyed, causing liability under United States anti-bribery laws. Finally, in light of the possibility that "customary practices" may not always be ignored by a country, allowing such an exception might expose United States concerns to extortion by foreign enforcement officials. These officials may realize that if they prosecute a United States concern for a "customary" but illegal practice, the concern might be fined up to \$1,000,000 in United States courts. Even though disallowing customary but illegal practices that are prohibited under the BPRA would result in disadvantages to United States concerns, the protections provided these concerns would justify the disadvantages.

The opposite aspect of this section is that the BPRA, like the FCPA, would not make all acts illegal in a foreign country illegal under United States anti-bribery laws.¹¹⁸ Yet this would not be a major shortcoming under the BPRA (nor is it under the FCPA¹¹⁹). The United States would stand on the same ground as all the other countries of the world without internal prohibitions against foreign bribery. The foreign nation would be free to prosecute any United States concern for violations of that country's laws. This should deter any practices of which a nation seriously disapproves.

Overall, it appears that the proposed BPRA would prevent bribery without unnecessarily restricting business abroad. The prohibitions seem fair, and the definitions supplied seem complete. Due to the stiff penalties retained from the FCPA, United States businesses would still take steps to ensure compliance with the BPRA. Yet, due to the greater

¹¹⁸ For example, a United States concern would not be liable under the BPRA if it broke a foreign law against facilitating payments. See Comment, *supra* note 33, at 132.

¹¹⁹ See *supra* note 65 and accompanying text.

certainty of the BPRA, companies would not lose business by unnecessarily passing up profitable opportunities. The BPRA would provide an effective deterrent against bribery as well as a workable standard for business to follow.

THE BPRA AND INTERNATIONAL SOLUTIONS TO CORRUPT BUSINESS PRACTICES

During the five years since the FCPA was passed, the literature has been filled with calls for an international agreement to the problem of foreign corrupt practices.¹²⁰ Nonetheless, there is still no international agreement,¹²¹ and it appears that none will soon be reached.¹²² It seems that an international agreement concerning corrupt business practices would more likely result under the BPRA than under the FCPA.

There are certain problems inherent in any attempted unilateral action against a multilateral problem. The most serious dilemma is the danger of alienating countries whose internal laws vary significantly from that of the acting country.¹²³ Such is the situation under the FCPA. The FCPA currently allows activities clearly illegal in many countries, and restricts activities that are permissible in many countries.¹²⁴ In contrast, the BPRA would provide more consistency with the laws of other nations.¹²⁵ For that reason, the BPRA would remove

¹²⁰ See, e.g., Atkeson, *The Foreign Corrupt Practices Act of 1977: An International Application of SEC's Corporate Governance Reforms*, 12 INT'L LAW. 703, 720 (1978); Solomon & Linville, *Transnational Conduct of American Multinational Corporations: Questionable Payments Abroad*, 17 B.C. INDUS. & COM. L. REV. 303, 344 (1976); Comment, *Bribes, Kickbacks, and Political Contributions in Foreign Countries: The Nature and Scope of the Securities and Exchange Commission's Power to Regulate and Control American Corporate Behavior*, 1976 WIS. L. REV. 1231, 1266.

¹²¹ See, e.g., Comment, *Foreign Corrupt Payments: Enforcing a Multilateral Agreement*, 22 HARV. INT'L L.J. 117, 121 (1981) [hereinafter cited as Comment, *Multilateral Enforcement*]; H. WEISBERG & E. REICHENBERG, *supra* note 2, at 29; Lashbrooke, *supra* note 116, at 240. See also *Joint Hearings*, *supra* note 10, at 44 (testimony of William Brock); *id.* at 76 (testimony of Edward Schmults).

¹²² For a thorough discussion of various attempts at international agreement, see *supra* the articles and comments in notes 120-21 *supra*. See also Coonrod, *The United Nations Code of Conduct for Transnational Corporations*, 18 HARV. INT'L L.J. 273 (1977); Note, *Legislating Business Morality: A Look at Efforts by Two International Organizations to Deal with Questionable Behavior by Transnational Corporations*, 10 VAND. J. TRANSNAT'L L. 459 (1977).

¹²³ See, e.g., Lashbrooke, *supra* note 116, at 235.

¹²⁴ See Comment, *supra* note 33. See also *supra* notes 56-65 and accompanying text.

¹²⁵ See § 5(b) of the proposed BPRA (to amend § 104(c)(2) of the FCPA) (see appendix). This section would make payments to officials that are permissible under the host country's laws allowable under the BPRA. The BPRA would still authorize payments in some circumstances that are illegal in some countries. However, this should not be a problem, since the possibility of prosecution under the host country's laws should deter such practices if the host country seriously wishes

part of the barrier to an international solution to the problem of corrupt payments to government officials.

Still, it has been suggested that amending the FCPA would end the search for an international solution, under the assumption that the United States would no longer have an interest in pursuing such a solution if it no longer bore the huge costs of the FCPA.¹²⁶ This argument ignores the realities of the BPRA. First, United States concerns would still bear a cost that those from other nations would not incur (although the costs would be less than under the FCPA). Even though the BPRA would permit all payments allowed by the laws of the host country, United States companies would lose business when the host country and the BPRA both forbade the same activity (such as payments to political parties), if the host country did not enforce its own provisions, allowing concerns from other countries to make such payments. Second, even if there were no unilateral costs associated with the BPRA, the United States would still seek an international solution to the problem of corrupt payments to government officials. Whether one attributes the United States efforts to morality or to a desire for a greater share of the world market, the United States has taken and remains committed to take the initiative in the search for international agreement.¹²⁷ Third, the Senate proposal contains provisions authorizing Congress to urge the President to achieve international agreement on the corrupt payments problem.¹²⁸ The FCPA contains no such provisions. Fourth, the BPRA, by amending section 104(c)(2) of the FCPA,¹²⁹ would be more consistent than the FCPA with the internal laws of other nations. This greater respect for the laws of other nations should result in greater willingness on the part of other countries to

to enforce its provisions. See *supra* notes 115-19 and accompanying text. Still, there is the problem of foreign reaction to the United States exporting its morality.

¹²⁶ See Comment, *Multilateral Enforcement*, *supra* note 121, at 150.

¹²⁷ Atkeson, *supra* note 120, at 705 n.8 (1978) (discussing United States proposals before the United Nations and the Organization of Economic Cooperation and Development). Regarding current United States initiatives, see *Joint Hearings*, *supra* note 10, at 58 (statement of William Brock:

Our statement as a nation is clear on the issue of illicit payments, and our leadership toward an international effort in this area will be strengthened because we will have demonstrated to our trading partners that it is possible to create a reasonable and fair, yet comprehensive and stringent prohibition against the bribing of foreign officials.)

See also *id.* at 76 (statement of Ernest Johnson, Deputy Assistant Secretary for Economic and Business Affairs, Department of State: "We cannot now predict the final form of any international agreement, but we are striving for positive, enforceable, objective criteria that can be clearly applied by governments and adhered to by business.").

¹²⁸ See § 9 of the proposed BPRA (see appendix).

¹²⁹ Section 5(b) of the proposed BPRA (see appendix). This provision allows any type of payment that is legal in the foreign official's country.

negotiate an international settlement, since the BPRA should alleviate anxieties of having United States morals forced upon them.¹³⁰ Fifth, as United States firms become increasingly competitive in foreign markets under the BPRA,¹³¹ foreign companies will profit less than they currently do from the lack of a unified standard. As the profitability of certain acts decreases, the desirability of a uniform code of conduct should increase.

The BPRA does not ensure a unified agreement on corporate conduct. Yet the Act would solidify the United States commitment to an international consensus, and would remove incentives for other nations to avoid agreement. Overall, the BPRA is a positive step in the search for an international solution to the problem of corrupt corporate practices.

EFFECTS OF THE BPRA ON PRIVATE TRANSACTIONS

The BPRA would substantially affect the amount of private business performed by United States firms overseas. Neither the FCPA nor the proposed BPRA prohibits bribery of private foreign concerns for the purpose of obtaining or retaining private transactions. Enforcement against private payments is governed by the host nation. The FCPA excluded many United States businesses from certain foreign governmental markets, and many companies abandoned these countries altogether,¹³² presumably because it was not profitable to remain in the market for only private transactions within the country. However, by once again opening those foreign governmental markets, the BPRA would make it more cost-effective for United States companies to do business with private concerns in those countries. Whereas in some markets the possibility of private transactions may not alone justify the expense of doing business in a country, the addition of the government as a potential buyer may make many such operations profitable again.

Due to the failure of United States law to address the issue of bribes to private concerns in foreign lands, such bribery is regulated solely by the host country's laws. Yet many developing states do not

¹³⁰ See *Joint Hearings*, *supra* note 10, at 44 (statement of William Brock). See also *id.* at 58: "Once the U.S. business community and the U.S. government stand together in support of a practicable law of this type that respects the laws and customs of other nations, our credibility and influence as a world leader against bribery will be greatly enhanced."

¹³¹ See *supra* notes 87-119 and accompanying text.

¹³² See GAO REPORT, *supra* note 16, at 15 ("About 45 percent of the respondents that reported lost business stated that the act has limited the number of countries in which they do business."). See also *id.* at 39.

prohibit bribes to those who are not public officials.¹³³ As in the area of corrupt governmental payoffs, this appears to be an area that would benefit greatly from an international consensus as to what should be allowed.

CONCLUSION

The FCPA's purpose of stopping corrupt payments is commendable; in practice, however, the Act has failed to solve the problem without causing major problems of its own. The FCPA's accounting provisions provide inadequate guidance as to what is required, and companies, therefore, often employ much greater controls than would otherwise be used. Likewise, uncertainties in the anti-bribery provisions have also caused excessively cautious behavior.

The BPRA, if enacted, would also prohibit bribery. Yet the BPRA's definitions of key terms would create certainty as to whether companies were complying with the Act. Under the BPRA, companies would no longer find it necessary to employ wasteful accounting control systems, due to the Act's specificity and removal of criminal sanctions. United States companies could compete more effectively in foreign markets since the BPRA would eliminate many of the FCPA's disadvantages. United States companies could once again pay for legitimate expenses and make reasonable facilitating payments without concern about liability under the FCPA. Eliminating the "reason to know" standard would enable United States concerns to compete once again for the best foreign agents. The increased governmental business opportunities under the BPRA would also result in increased business with private foreign concerns, since it is more practical to enter a market if both governmental and private markets are open. Most importantly, the BPRA would more effectively induce an international agreement concerning corrupt foreign payments. The removal of the FCPA's windfalls to foreign businesses coupled with the BPRA's requirements for United States action should encourage an international solution to the problem of corrupt payments to foreign officials.

Laws dictating ethics will always cost someone money. When only one nation seeks to reform worldwide corrupt practices, as the United States attempted to do in enacting the FCPA, discontent arises since the people of that one country suffer all the resulting economic loss. Until the world achieves a unified agreement, however, the United

¹³³ One author noted that a consistent difference between developed and developing states is that developed states usually prohibit illicit payments to individuals who are not public officials, whereas developing states usually allow these payments. Comment, *supra* note 33, at 131.

States must enforce some restraints to prevent corrupt payments by its companies to foreign officials. The BPRA is an appropriate measure to take at this time because it would effectively prohibit corrupt payments without unduly restricting business opportunities.

John W. Duncan

APPENDIX

S. 708, BUSINESS ACCOUNTING AND FOREIGN TRADE SIMPLIFICATION ACT*

AMENDMENT OF SHORT TITLE

Sec. 3. Section 101 of the Foreign Corrupt Practices Act of 1977 is amended to read as follows:

SHORT TITLE

Sec. 101. This title may be cited as the 'Business Practices and Records Act'.

ACCOUNTING STANDARDS

Sec. 4. (a) Section 13(b)(2) of the Securities Exchange Act of 1934 is amended to read as follows:

(2) Every issuer which has a class of securities registered pursuant to section 12 of this title and every issuer which is required to file reports pursuant to section 15(d) of this title shall devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that—

(A) transactions are executed in accordance with management's general or specific authorization;

(B) 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;

(C) access to assets is permitted only in accordance with management's general or specific authorization;

(D) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences; and

* This proposed Act, amending the Foreign Corrupt Practices Act, passed the United States Senate and was sent to the House of Representatives on Nov. 23, 1981. 127 CONG. REC. S13,983-85 (daily ed. Nov. 23, 1981).

(E) for the purposes of subparagraphs (A) through (D) of this paragraph, the issuer makes and keeps books, accounting records, and accounts which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer.

(b) Section 13(b) of the Securities Exchange Act of 1934 is amended by adding at the end thereof the following:

(4) No criminal liability shall be imposed for failing to comply with the requirements of paragraph (2) of this subsection.

(5) No civil injunctive relief shall be imposed with respect to—

(A) any issuer for failing to comply with the requirements of paragraph (2) of this subsection if such issuer shall show that it acted in good faith in attempting to comply with such requirements; or

(B) any person other than an issuer, in connection with an issuer's failure to comply with paragraph (2), unless such person knowingly caused the issuer to fail to devise or maintain a system of internal accounting controls that complies with paragraph (2).

(6) No person shall knowingly circumvent a system of internal accounting controls established pursuant to paragraph (2) for a purpose inconsistent with paragraph (2).

(7) Where an issuer which has a class of securities registered pursuant to section 12 of this title or an issuer which is required to file reports pursuant to section 15(d) of this title holds 50 per centum or less of the voting power with respect to a domestic or foreign firm, the provisions of paragraph (2) require only that the issuer proceed in good faith to use its influence to the extent reasonable under the issuer's circumstances, including the relative degree of its ownership over the domestic or foreign firm and under the laws and practices governing the business operations of the country in which such firm is located, to cause such domestic or foreign firm to devise and maintain a system of internal accounting controls consistent with paragraph (2). Such an issuer shall be conclusively presumed to have complied with the provisions of paragraph (2) by demonstrating good faith efforts to use such influence.

REPEALER; NEW BRIBERY PROVISION

Sec. 5. (a)(1) Section 30A of the Securities Exchange Act of 1934 is repealed.

(2) Section 32 of such Act is amended—

(A) by striking out “(other than section 30A)” in subsection (a); and

(B) by striking out subsection (c).

(b) Section 104 of the Business Practices and Records Act is amended to read as follows:

FOREIGN PAYMENTS

Sec. 104. (a) It shall be unlawful for any domestic concern, or any officer, director, employee, or shareholder thereof acting on behalf of such domestic concern, to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of a payment, gift, offer, or promise, directly or indirectly, of anything of value to any foreign official for the purpose of—

(1) influencing any act or decision of such foreign official in his official capacity, or inducing such foreign official to do or omit to do any act in violation of his legal duty as a foreign official; or

(2) 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.

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

(c) Subsections (a) and (b) shall not apply to —

(1) any facilitating or expediting payment to a foreign official the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official;

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

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

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

(5) any ordinary expenditures, including travel and lodging ex-

penses, associated with the performance of a contract with a foreign government or agency thereof.

(d)(1)(A) Except as provided in subparagraph (B), any domestic concern which violates subsection (a) or (b) 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) or (b) 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) or (b) 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) or (b) of this section, any employee 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, employee, or stockholder of a domestic concern, such fine shall not be paid, directly or indirectly, by such domestic concern.

(e)(1) When it appears to the Attorney General that any domestic concern, or officer, director, employee, or stockholder thereof, is engaged, or is about to engage, in any act or practice constituting a violation of subsection (a) or (b) 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.

(2) For the purpose of all civil investigations which, in the opinion of the Attorney General, are necessary and proper for the enforcement of this Act, the Attorney General or any attorney or attorneys of the Department of Justice designated by him are empowered to administer oaths and affirmations, subpoena witnesses, take evidence, and require the production of any books, papers, or other documents which the Attorney General deems relevant or material to the inquiry. Such attendance of witnesses and the production of such documentary evidence may be required from any place in the United States, or any territory,

possession, or commonwealth of the United States, at any designated place of hearing.

(3) In case of contumacy by, or refusal to obey a subpoena issued to, any person, the Attorney General may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, or other documents. Any such court may issue an order requiring such person to appear before the Attorney General or attorney designated by the Attorney General, there to produce records, if so ordered, or to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. All process in any such case may be served in the judicial district whereof such person is an inhabitant or wherever he may be found. The Attorney General shall have the power to make such rules relating to civil investigations as may be necessary or appropriate to implement the provisions of this subsection.

(f) 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, which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States, which has a class of securities registered pursuant to section 12 of the Securities Exchange Act of 1934, or which is required to file reports under section 15(d) of the Securities Exchange Act of 1934.

(2) The term 'foreign official' means (A) any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality; or (B) any foreign political party or official thereof or any candidate for foreign political office.

DEFINITIONS

Sec. 6. Section 13(b) of the Securities Exchange Act of 1934 is amended by adding at the end thereof the following:

(6) For the purpose of this section, the terms 'reasonable assurances' and 'reasonable detail' mean such level of detail and degree of

assurance as would satisfy prudent individuals in the conduct of their own affairs, having in mind a comparison between benefits to be obtained and costs to be incurred in obtaining such benefits.

EXCLUSIVITY PROVISION FOR OVERSEAS BRIBERY

Sec. 7. No criminal action pursuant to section 1341 or 1343 of title 18, United States Code, may be brought against a domestic concern, its officers, directors, employees, or any shareholders thereof acting on behalf of such domestic concern for a payment, gift, offer, or promise to a foreign official based upon the theory that the foreign official or the domestic concern violated a duty to or defrauded the foreign government or the citizens of a foreign country.

AUTHORITY TO ISSUE GUIDELINES

Sec. 8. Title I of the Business Practices and Records Act is amended by adding at the end thereof the following:

GUIDELINES AND GENERAL PROCEDURES FOR COMPLIANCE

Sec. 105. (a) Not later than six months after the date of enactment of this section, the Attorney General, after consultation with the United States Trade Representative, the Secretary of State, the Secretary of Commerce, and the Secretary of the Treasury, and after consultation with representatives of the business community and the interested public through public notice and comment and in public hearings, shall determine to what extent the business community would be assisted by further clarification of section 104 of this Act and shall, based on such determination and to the extent necessary and appropriate, have the authority to issue—

(1) guidelines describing specific types of conduct associated with common types of export sales arrangements and business contracts which the Attorney General determines constitute compliance with the provisions of section 104 of this Act; and

(2) general precautionary procedures which issuers or domestic concerns may use on a voluntary basis to ensure compliance with this Act, and to create a rebuttable presumption of compliance with this Act.

The guidelines and procedures referred to in the preceding sentence shall be issued in accordance with sections 551 through 557 of title 5, United States Code.

(b) The Attorney General, after consultation with other Federal

agencies and representatives from the business community, shall establish a Business Practices and Records Act Review Procedure for the purpose of providing responses to specific inquiries concerning enforcement intentions under this Act. The Attorney General shall issue opinions, within thirty days, in response to requests from domestic concerns, regarding compliance with the requirements of the provisions of section 104 of this Act. An opinion that certain prospective conduct does not involve a violation shall be final and binding on all parties, subject to the discovery of new evidence. When appropriate, and at reasonable intervals, the responses derived from the review procedure will be reviewed by the Attorney General to determine whether such compilation of responses should be included in a new guideline pursuant to subsection (a).

(c) Any document or other material provided to, received by, or prepared in the Department of Justice, or any other department or agency of the United States Government, in connection with a request by a domestic concern for a statement of present enforcement intentions under the Business Practices and Records Act Review Procedure pursuant to subsection (b) of this section, or in connection with any investigations conducted to enforce this Act, shall be exempt from disclosure under section 552 of title 5, United States Code, regardless of whether the Department responds to such a request or the applicant withdraws such request prior to receiving a response. The Attorney General shall protect the privacy of each applicant, and shall adopt rules assuring that materials, documents, and information submitted in connection with a review procedure request will be kept confidential and will not be used for any purpose that would unnecessarily discourage use of the review procedure. The review procedure shall be developed and instituted in accordance with sections 551 through 557 and 701 through 706 of title 5 United States Code.

(d) The Attorney General shall make a special effort to provide timely compliance guidance to potential exporters, and smaller businesses, who as a practical matter are unable to obtain specialized counsel on issues pertaining to this Act. Such assistance shall be limited to requests for enforcement intention disclosures provided for under this Act, and general explanation of compliance responsibilities and of potential liabilities under the Act.

(e)(1) On September 1 of each year the Attorney General shall transmit to the Congress and make public a detailed report on all actions which the Department of Justice has taken pursuant to this Act, along with its views on problems associated with implementation, its

plan for the next fiscal year to further implement the Act, and recommendations for amendments.

(2) On September 1 of each year the Chairman of the Securities and Exchange Commission shall file with the Congress a detailed report on all actions which the Commission has taken pursuant to section 13(b) of the Securities Exchange Act, its views on problems associated with implementation, its plans for the next fiscal year to further implement such section, and its recommendations for amendment.

INTERNATIONAL AGREEMENTS

Sec. 9. (a) It is the sense of the Congress that the President should pursue the negotiation of an international agreement among the largest possible number of nations on illicit payments, including, a process by which problems and conflicts associated with such practices could be resolved.

(b) Within one year after the date of enactment of this Act, the President shall report to Congress on—

- (1) the progress of the negotiations referred to in subsection (a);
- (2) those steps which the administration and Congress should consider taking in the event that these negotiations do not successfully eliminate the competitive disadvantage of United States business; and
- (3) possible actions that could be taken to promote cooperation by other nations in international efforts to prevent bribery of foreign officials, candidates, or parties in third countries.

This report shall also include recommendations for any new legislation required to give the President authority to take appropriate action to achieve such objectives. The report shall contain an analysis of the potential effect on the interests of the United States including United States national security of the corruption of foreign officials and political leaders in connection with international business transactions involving persons and business enterprises of other nations. In addition, the report shall assess the current and future role in curtailing such corruption of private initiatives such as the Recommendation to Governments and Rules of Conduct to Combat Extortion and Bribery developed by the International Chamber of Commerce.