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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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]

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[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:

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[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.

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[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 1971[14] 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, 1972[18]. 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

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[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

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[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

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[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 1971[38]. The SEC charged that since 1970, at least $25 million in concealed payments had been made overseas to obtain and retain aircraft sales[39]. The May 1977 Lockheed special review committee report estimated $30-38 million in concealed payments[40]. It was also revealed that more than $200 million in commissions had been paid during 1970-1977[41].

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

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[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

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[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,

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[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]

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[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

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[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]

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[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.*

C. *Effect of the FCPA on U.S. Businesses*

The FCPA provoked strong criticism from the business community, primarily for two reasons.[79] First, due to the scandalous context in which the government discovered improper corporate payments to foreign officials, Congress perceived an immediate need for the new law, hastily wrote the legislation, and passed the FCPA with minimal debate.[80] This led to a vaguely-worded statute.[81]

The resulting vague language of the anti-bribery provisions thus created uncertainty in foreign business transactions.[82] Essential words such as "corruptly" and "knowingly" were left undefined in the statute (although the legislative history provides some guidance as to their meanings).[83] In addition, companies were unclear as to which types of payments were permissible and which were not.[84] Even companies that carried on business without thought of illicit payments tended to be overcautious and turned down legitimate business opportunities for fear that a proposed transaction might violate the FCPA.[85]

A second and even larger concern with the new law was the fact that U.S. companies' foreign competitors were not similarly restrained.[86] The U.S. was, at the time, the only country to adopt a law such as the FCPA.[87] American companies were thus operating at a disadvantage when compared to foreign companies who routinely paid

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[79] Stephen J. DeCosse & Susan S. Katcher, *Newly Amended Foreign Corrupt Practices Act*, 63-JUL Wis. Law. 23, 24 (July, 1990).
[80] Prasad, *supra* note 11, at 51.
[81] *Id.*
[82] DeCosse & Katcher, *supra* note 79, at 24.
[83] *Id.*
[84] Prasad, *supra* note 11, at 51.
[85] DeCosse & Katcher, *supra* note 79, at 24; Prasad, *supra* note 11, at 52.
[86] Editorial, *A Level World Playing Field*, Engineering News-Record (December 1, 1997), 74.
[87] Prasad, *supra* note 11, at 52.

bribes and, in some countries, were permitted to deduct the cost of such bribes as business expenses on their taxes.[88]

In response to the criticisms, President Jimmy Carter ordered the Department of Justice to provide guidance to the business community concerning its enforcement priorities under the FCPA.[89] Additionally, Congress proposed various amendments between 1977 and 1988 to provide more explicit definitions, certain safe harbors and affirmative defenses, and Department of Justice review procedures to indicate the potential illegality of an anticipated foreign business transaction.[90] These various concerns were finally addressed in 1988.[91]

D. The 1988 Amendments to the FCPA

Congress enacted six significant changes to the FCPA in the Omnibus Trade and Competitiveness Act of 1988.[92] First, Congress redefined the knowledge standard for purposes of assessing penalties.[93] Second, Congress created an exception for payments made to facilitate "routine governmental action."[94] Third, Congress established two affirmative defenses for certain types of payments.[95] Fourth, Congress increased the penalties for a violation.[96] Fifth, Congress instructed the Department of Justice to

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[88] Department of Justice, *supra* note 46. One commentator has likened the FCPA to "uniltateral disarmament for U.S. businesses competing in not-always-ethical world trade." *See* Terry Carter, *Wide World of Payola: United States pushes action on bribery convention*, 85 A.B.A.J. 18 (March, 1999).
[89] Prasad, *supra* note 11, at 52, *citing* President's Statement on Export Policy, *14 Weekly Compilation of Presidential Documents* 1633, Oct. 2, 1978. Instead of issuing guidelines, however, the Department established a review procedure. *See* Beverly Earle, *Foreign Corrupt Practices Act Amendments; The Omnibus Trade and Competitiveness Act's Focus on Improving Investment Opportunities*, 37 Clev. St. L. Rev. 549, 551 (1989).
[90] DeCosse & Katcher, supra note 66, at 24.
[91] *Id.*
[92] House Conf. Rep. No. 100-576, reprinted in 1988 U.S.C.C.A.N. 1949.
[93] *Id.*
[94] *Id.*
[95] *Id.*
[96] *Id.*

establish a review opinion procedure.[97] Sixth and finally, Congress called on the Executive Branch to negotiate an international agreement similar to the FCPA.[98]

1. Knowledge Standard

The most important change to the FCPA in 1988 was the change in the knowledge standard for the purposes of assessing liability.[99] The original "reason to know" standard was changed to a standard that would be met by "conscious disregard," "willful blindness," or "a conscious purpose to avoid learning the truth," but not by mere recklessness.[100] This amendment meant that a company could no longer be penalized for "insignificant or technical infractions" or "inadvertent conduct."[101] Thus, a company would no longer refrain from entering into a transaction solely out of fear that a mere technical error would result in an FCPA violation.

2. Routine Governmental Action Exception

Under the 1988 Amendments, Congress created an exception for "routine governmental action," which was defined as an action "ordinarily and commonly performed" by a foreign official and explicitly including (1) obtaining permits, licenses, or other official documents to qualify as a person to do business in a foreign country; (2) processing governmental papers, such as visas and work orders; (3) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country; (4) providing phone

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[97] *Id.*
[98] *Id.*
[99] Zagaris, *supra* note 36, at 755.
[100] *Id.*

service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or (5) actions of a similar nature.[102] "Routine governmental action" does not include any decision by a foreign official whether, or on what terms, to award new business to or to continue business with a particular party, or any action taken by a foreign official involved in the decision-making process to encourage a decision to award new business to or continue business with a particular party, i.e., decisions involving the exercise of discretion.[103]

3. Affirmative Defenses

The 1988 Amendments created two affirmative defenses to an FCPA action, the "lawful payments" defense and the "reasonable and bona fide expenditure" defense.[104]

a. Lawful Payments

The amended FCPA created an affirmative defense for payments "expressly permitted under any law or regulation" of the foreign official's country.[105]

b. Reasonable and Bona Fide Expenditures

A second affirmative defense was created for "reasonable and bona fide expenditures" incurred by or on behalf of foreign official.[106] Such expenditures include those related to (1) the promotion, demonstration, or explanation of products or services;

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[101] *Id.*
[102] 15 U.S.C. §78dd-2(d)(4)(A); House Conf. Rep. No. 100-576, *supra* note 92, at 1954.
[103] *Id.*, §78dd-2(h)(4)(B); House Conf. Rep. No. 100-576, *supra* note 92, at 1954.
[104] *Id.*, §78dd-2(c)(1), (2); House Conf. Rep. No. 100-576, *supra* note 92, at 1954-1955.
[105] *Id.*, §78dd-2(c)(1); House Conf. Rep. No. 100-576, *supra* note 92, at 1954.
[106] *Id.*, §78dd-2(c)(2); House Conf. Rep. No. 100-576, *supra* note 92, at 1955.

or (2) the execution or performance of a contract with a foreign government or agency thereof.[107]

4. Increase in Penalties

Congress also increased the penalties for violations of the FCPA in 1988.[108] While the legislative history of the 1988 Amendments does not speak to the rationale behind the increases, the increases were probably made in light of the new safe harbors as well as the clarifications of previously misunderstood terms. The 1988 Amendments increased the maximum criminal fine for a firm or domestic concern from $1million to $2 million.[109] Congress also increased the maximum criminal fine for individuals from $10,000 to $100,000. In addition, Congress created a new civil penalty of $10,000.[110] The maximum potential imprisonment for an individual, however, remained at five years.[111]

5. Review Procedure

In an effort to provide assistance to companies in interpreting the FCPA, Congress established a procedure under which the Attorney General may issue general guidelines describing examples of activities that would or would not conform with the Justice Department's enforcement policy regarding FCPA violations.[112] In addition, Congress required the Department to establish procedures to provide opinions in response

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[107] 15 U.S.C. §78dd-2(c)(2); House Conf. Rep. No. 100-576, *supra* note 92, at 1955.
[108] House Conf. Rep. No. 100-576, *supra* note 92, at 1957.
[109] *Id.*
[110] *Id.*
[111] *Id.*
[112] *Id.* at 1956. The Department publishes a brochure, designed to provide general FCPA guidance in fulfillment of Congress' mandate. *See* Department of Justice, *supra* note 46,

to specific inquiries from firms concerning performance of their conduct with the Department's enforcement policy.[113] Congress also required the Department, to the extent possible, to provide timely guidance to exporters and small businesses who are unable to obtain specialized counsel with respect to compliance with the FCPA.[114]

6. *International Agreement*

While each of the aforementioned amendments addressed problems in the statutory language of the FCPA, the 1988 final amendment seemed to address U.S. businesses' remaining concern: the competitive disadvantage experienced by U.S. businesses caused by the FCPA. The 1988 Amendments included a sense of the Congress that the President should pursue the negotiation of an international agreement, among the largest possible number of countries, to govern acts prohibited under the FCPA.[115] The international agreement was to be negotiated with the member countries of the Organization of Economic Cooperation and Development (OECD).[116] The United States thus began work on establishing an international consensus against bribery, which would thereby reduce the competitive disadvantage the FCPA caused to U.S. businesses.

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[113] *Id.* The DOJ Opinion Procedure is located at 28 C.F.R. §80.1, et seq. In addition, the Department of Justice posts published opinions on its website. (visited October 2, 1999) <http://www.usdoj.gov/criminal/fraud/fcpa/dojdocb.htm>.
[114] House Conf. Rep. No. 100-576, *supra* note 92, at 1957.
[115] *Id.*
[116] *Id.* For a discussion of the OECD Convention, see Section V., *infra*.

IV. INTERNATIONAL EFFORTS

While the U.S. passed and revised the FCPA, several international organizations have attempted to deal with the issue of transnational bribery, with varying degrees of success.

A. United Nations

The United Nations began actions to combat transnational bribery, but such actions were never completed.[117]

In 1976, at roughly the same time that the United States was contemplating passage of the FCPA, the General Assembly of the United Nations passed a resolution condemning transnational bribery and requesting unilateral and multilateral action to stop such behavior.[118] The General Assembly, having condemned the practice, took no further action itself, but instead delegated the matter to its Economic and Social Council.[119]

The Economic and Social Council produced a draft agreement to be signed by concerned member states.[120] This draft prohibited all illicit payments to foreign officials.[121] The draft included among illicit payments "facilitation" payments that are not illegal under the FCPA.[122] This very strict draft, however, remained a draft. It was never formalized nor presented to nations for signature.

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[117] Philip M. Nichols, *Outlawing Transnational Bribery Through the World Trade Organization*, 28 Law Pol'y Int'l Bus. 305 (January 1, 1997).
[118] *Id.*
[119] *Id.*
[120] *Id.*
[121] *Id.*
[122] *Id.*

The U.N. Code of Conduct for Transnational Corporations, which also was prepared by the Economic and Social Council, makes reference to transnational bribery. It suggests that corporations refrain from using techniques such as bribery and that companies maintain accurate records of all payments made.[123] The Code of Conduct, however, is simply a code and is not legally binding in any jurisdiction.[124] Moreover, like the draft agreement, the U.N. never finalized the Code of Conduct, and thus the Code has never been adopted in any formal manner.[125]

B. World Bank

The World Bank has been somewhat more successful than the U.N. in its efforts to prevent bribery and corruption.[126]

Until recently, the World Bank paid little heed to corruption, apparently considering it a political matter outside its purview.[127] At the bank, this attitude began to change with the appointment of James Wolfensohn as president in 1995.[128] Wolfensohn's speech at that year's annual meeting included the first reference to corruption in a presidential address.[129] At the 1996 meeting, Wolfensohn made combating bribery a top priority.[130]

In 1997, the bank adopted a comprehensive program, including strong controls to prevent bribery on World Bank-financed projects and assistance to governments to

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[123] *Id.*
[124] *Id.*
[125] *Id.*
[126] [126] John Brademas & Fritz Heimann, *Tackling International Corruption; No Longer Taboo*, Foreign Affairs 17 (1998); *see also* Leslie Kramer, *The World's Second-Oldest Profession*, Institutional Investor 49 (September, 1998).
[127] Brademas & Heimann, *supra* note 126, at 17.
[128] *Id.*
[129] *Id.*
[130] *Id.*

promote reforms.[131] Under the program, World Bank inspectors perform random spot checks of the bidding process and awarding of contracts for projects for which the bank provides loans.[132] The inspectors then track the purchase and delivery of goods associated with that loan.[133] If foul play is detected, sanctions include suspension from bidding on future World Bank projects for a period of time.[134]

In one instance, the bank in 1998 pressured the Tanzanian government to renegotiate an overpriced power-plant contract obtained by a Malaysian company through what many believed was the bribing of Tanzanian officials.[135] For the worst cases the Bank maintains a "blacklist" of companies that have failed to meet the institution's procurement guidelines, and informs other multilateral development banks of its findings.[136]

The World Bank, however, is not without its own corruption problems. The bank is currently investigating the payment of possible kickbacks in connection with international projects to its own employees.[137]

C. International Monetary Fund

In addition to the World Bank's efforts, the International Monetary Fund ("IMF"), going beyond its traditional focus on monetary and fiscal policy, is also emphasizing the need for transparency and other steps to curb corruption.[138]

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[131] *Id.*
[132] Kramer, *supra* note 126, at 49.
[133] *Id.*
[134] *Id.*
[135] *Id.*
[136] *Id.*
[137] *Id.*
[138] Brademas & Heimann, *supra* note 126.

D. International Chamber of Commerce

The International Chamber of Commerce ("ICC"), a non-governmental association of internationally-oriented enterprises and their national organizations that works to promote international commerce worldwide, has also formally condemned transnational bribery.[139] In 1977, the Chamber adopted a report on transnational bribery extortion and bribery.[140] The first two rules in the guidelines included in the report state simply that "[n]o one may demand or accept a bribe" and "[n]o enterprise may directly or indirectly, offer or give a bribe in order to obtain or retain business, and any demand for such a bribe must be rejected,"[141]

In 1996, the ICC adopted a more stringent code. The Rules of Conduct to Combat Extortion and Bribery in International Business Transactions prohibit the offer or acceptance of any bribe or kickback, require companies to control payments by their agents, and require recordkeeping sufficient to prevent the hiding of illicit payments or secret funds.[142] Although the ICC urged its members to adopt these rules, they are intended as a voluntary code of corporate conduct, and are not intended to be adopted in any formal way by any government.[143]

E. Non-Governmental Organizations

While various international organizations have attempted to address transnational bribery, the primary impetus for an international agreement came from private entities

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[139] Nichols, *supra* note 117.
[140] *Id.*
[141] *Id.*
[142] *Id.*
[143] *Id.*

known as Non-Governmental Organizations, or NGO's.[144] Several NGO's exist in the world today.[145] NGO's use various approaches to achieve their goals. The effect of the NGO's can be seen through the activities of three important initiatives – the Caux Round Table, Transparency International, and the Principles for Global Corporate Responsibility. Each one of these organizations takes a different approach in achieving a common goal; namely, combating transnational bribery.

1. Caux Round Table

The Caux Round Table (the "CRT") was launched in 1986 by twenty-eight senior business leaders from Europe, Japan and North America.[146] The role of the CRT is to bring together business leaders for impartial, informed and off-the-record consideration, analysis, and debate of key global issues within the framework of its core beliefs.[147]

In undertaking this role, the CRT aims to; (1) bring a point of view to all issues that is based on factual accuracy, non-ideological perspective and objectivity; (2) achieve consensus on particular issues where possible, and establish priorities; (3) act as an advocate on those issues with other businesses, governments and other institutions; (4) affect policies and events, and act as a catalyst for pragmatic and constructive actions and change; and (5) provide access to decision-makers and construct working partnerships.[148]

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[144] Business Ethics Class Lecture, Lisa Dercks, former Ethics Officer, Honeywell, Inc. (October 4, 1999).
[145] Some examples of NGO's include: The Conference Board (visited October 14, 1999) <http://www.conference-board.org>; Institute for Global Ethics (visited October 14, 1999) <http://www.globalethics.org>; Ethics Resource Center (visited October 14, 1999) <http://www.ethics.org>; The Institute of Business Ethics (visited October 14, 1999) <http://www.ibe.org.uk>; and the European Business Ethics Network (visited October 14, 1999) <http://www.bi.no/users/fag88008/welcebe.htm>.
[146] Caux Round Table, *History and Meetings* (visited October 14, 1999) <http://www.cauxroundtable.org/HISTORY.HTM>.
[147] Caux Round Table, *Role* (visited October 14, 1999) <http://www.cauxroundtable.org/ROLE.HTM>.
[148] *Id.*

The CRT convened initially to address trade imbalances between Japan and the West.[149] Since its inception, however, the CRT has broadened its mission to promote the critical leadership role of business in improving social, economic and environmental conditions throughout the world.[150] The CRT's most significant accomplishment in this regard is its Principles for Business, published in 1994 (the "Principles").[151]

The Principles are the first worldwide standard for ethical and responsible business practice developed by global business leaders.[152] The Principles have been published in eleven different languages, and have been distributed to over 150,000 business leaders throughout the world.[153]

Through its Principles, the CRT advocates a strong anti-bribery position:

> ***Principle 7: Avoidance of Illicit Operations*** – A business should not participate in or condone bribery, money laundering, or other corrupt practices; indeed, it should seek cooperation with others to eliminate them....[154]

As part of its effort to seek cooperation to eliminate bribery, the CRT has consistently advocated for the immediate ratification of the OECD Convention Against Bribery by all countries, whether or not they are members of the OECD.[155] With the recent passage of the OECD Convention, the CRT plans to cooperate with governments , international agencies and other NGO's and provide workshops and seminars for international

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[149] Caux Round Table, *History and Meetings*, *supra* note 146.
[150] *Id.*
[151] *Id.*
[152] *Id.*
[153] Caux Round Table, *History and Meetings*, *supra* note 146.
[154] Caux Round Table, *Principles for Business* (visited October 14, 1999) <http://www.cauxroundtable.org/ENGLISH.HTM>.
[155] Caux Round Table, *Press Release* (July 29, 1999) (visited October 14, 1999) <http://www.cauxroundtable.org/AM_1997.htm>.

companies to increase rapid compliance with the OECD Convention.[156] The CRT's approach to combating transnational bribery thus represents a three-step process: (1) build a coalition of business leaders from around the world; (2) establish a consensus that international bribery is wrong and should be prohibited; and (3) work with national and international governments to implement solutions.

2. *Transparency International*

An effective grass-roots force is Transparency International, a Berlin-based NGO formed to curb corruption in international transactions.[157] Unlike the CRT, however, TI has a much broader focus. Rather than focusing solely on the business community, TI builds national, regional and global coalitions, embracing the state, civil society and the private sector, in order to fight domestic as well as international corruption.[158] TI builds these coalitions through the coordination and support of National Chapters to implement its mission.[159] TI also assists in the design and implementation of effective integrity systems.[160] Finally, TI collects analyses and disseminates information and raises public awareness on the damaging impact of corruption (especially in low-income countries) on human and economic development.[161] TI is the only international movement exclusively devoted to curbing corruption.[162] TI's most significant contribution to the international anti-corruption movement is its Corruption Perceptions Index.[163]

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[156] *Id.*
[157] Skip Kaltenhauser, *Bribery in International Commerce*, Across the Board (November 1, 1999).
[158] Transparency International, *Mission Statement* (visited October 23, 1999) <http://www.transparency.de/mission,html>.
[159] *Id.*
[160] *Id.*
[161] *Id.*
[162] *Id.*
[163] Keltenhauser, *supra* note 157; *see also* Bob Tippee, *Growing Attention to Corruption Forces Companies to Deal With Sensitive Issue*, The Oil and Gas Journal 57 (November 9, 1998).