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).

First published in 1995, TI's Corruption Perceptions Index ("CPI") is a "poll of polls" drawing upon numerous distinct surveys of expert and general public views of the extent of corruption in many countries around the world.[164] Essentially, the CPI surveys the results of several established surveys in order to measure perceptions of corruption in various countries; the CPI does not measure *actual* levels of corruption.[165] TI hopes that the publication of the CPI will stimulate public debate about corruption, and thus serve as an incentive to governments to confront corruption in their countries.[166] In some countries, the CPI has led to substantive reform.[167] In the 1998 CPI, 85 countries were scored, based on the degree of corruption in those countries as seen by business people, risk analysts and the general public.[168] The scores range from 10 (highly clean) and 0 (highly corrupt).[169] In 1998, the United States ranked 17 out of 85 with a score of 7.5.[170]

3. Principles for Global Corporate Responsibility

The Principles for Global Corporate Responsibility: Benchmarks for Measuring Business Performance (the "Benchmarks") represent a faith-based effort to advocate

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[164] Transparency International, *Transparency International Ranks 85 Countries in Largest Ever Corruption Perceptions Index*, Press Release (September 22, 1998) (visited October 23, 1999) <http://www.transparency.de>. The 1998 CPI drew upon data from: (1) Economist Intelligence Unit (Country Risk Service and Country Forecasts); (2) Gallup International (50th International Survey); (3) Institute for Management Development (World Competitiveness Yearbook); (4) Political & Economic Risk Consultancy (Asian Intelligence Issue); (5) Political Risk Services (International Country Risk Guide); (6) World Bank (World Development Report & Private Sector Survey); and (7) World Economic Forum & Harvard Institute for International Development (Global Competitiveness Survey). *Id.*

[165] *Id.*

[166] *Id.*

[167] *Id.*

[168] *Id.*

[169] *Id.*

[170] *Id.*

ethical business conduct.[171] Proposed by three religious groups – the U.S-based Interfaith Center on Corporate Responsibility (ICCR), the British/Irish –based Ecumenical Council for Corporate Responsibility (ECCR), and the Canadian-based Taskforce on the Churches on the Churches and Corporate Responsibility (TCCR)—the Benchmarks serve as an accountability tool to evaluate companies, their codes of conduct and their implementation. The groups do not, however, ask companies to endorse the document.[172]

The Benchmarks are divided into "Principles, "Criteria," and "Bench Marks." "Principles" refer to a statement of business philosophy fundamental to a responsible company's actions. "Criteria" refer to particular company policies and practices that can be compared for consistency with the Principles. "Bench Marks" are suggested specific reference points of measurement to be used in assessing the company's performance in relation to the Criteria.

The Benchmarks' "Financial Integrity" section addressees the bribery issue. Essentially, the Benchmarks ask companies to: (1) refuse to offer, pay, solicit or accept bribes in any form; (2) appropriately describe all transactions in accordance with proper accounting procedures; (3) keep track of commissions and consultants' fees; (4) have the CEO annually sign a letter stating that the company has not been a party to any bribe, that no payments have been made in violation of any country's laws, and that no records have been falsified.[173] Thus, the Benchmarks appear to advocate adherence to the U.S. FCPA for all companies, regardless of their location.

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[171] The Interfaith Center on Corporate Responsibility (ICCR), the Ecumenical Council for Corporate Responsibility (ECCR) & the Taskforce on the Churches and Corporate Responsibility (TCCR), *Principles for Global Corporate Responsibility: Bench Marks for Measuring Business Performance*, 1 (1998).
[172] *Id.*
[173] *Id.* at 15.

Each of these non-governmental organizations utilizes a different approach in attempting to achieve the same goal – eliminate transnational bribery. The CRT's approach consists of building an ever-increasing voluntary coalition of international business leaders. Transparency International takes the issue right to the public, through the CPI and its national chapters. Finally, the Benchmarks serve as a guidepost for companies against which to measure their ethics and compliance programs.

These approaches, as well as others, have been effective in establishing abroad what the government established in the United States: a consensus that bribery of foreign public officials is unethical.

V. THE OECD CONVENTION ON COMBATING BRIBERY AND CORRUPTION IN INTERNATIONAL BUSINESS TRANSACTIONS

The governmental efforts of the United States and the private efforts of the non-governmental efforts converged with the signing of the Organization for Economic Cooperation and Development (OECD) Convention on Combating Bribery and Corruption in International Business Transactions in 1997.[174]

A. The OECD: Background

The OECD is a group of 29 member countries that provides governments a setting in which to discuss, develop and perfect economic social policy.[175] Governments compare experiences, seek answers to common problems and work to coordinate

[174] Text of the Convention, *supra* note 9.
[175] Organization for Economic Cooperation and Development, *What is OECD* (visited October 26, 1999) <http://www.oecd.org/about/general/index.htm>.

domestic and international policies that increasingly in today's globalized world must form a web of even practice across nations.[176]

The OECD has assumed a leading role in preventing international bribery in corruption through its Recommendations in 1994, 1996 and 1997.[177] These Recommendations embody progressively more specific commitments to fight international corruption by criminalizing bribery of foreign public officials, ending the tax deductibility of such bribes, stopping corruption in contracts funded by development assistance and implementing stronger rules on accounting, audit and company controls.[178] In December 1997, OECD countries and five non-member countries signed a binding Convention known as the Convention on Combating Bribery and Corruption in International Business Transactions (the "Convention").[179]

B. The OECD Anti-Corruption Convention

The Convention obliges signatories to adopt national legislation that makes it a crime to bribe foreign public officials.[180] "Bribery" under the Convention refers to the person who offers, promises, or gives a bribe ("active" bribery, not the recipient of the bribe ("passive" bribery).[181] The Convention provides a broad definition of what is a public official which would cover all persons exercising a public function.[182] The Convention requires that bribery of foreign public officials be punishable, by effective,

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[176] *Id.*
[177] OECD Anti-Corruption Unit, *Update on the Implementation of the OECD Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials* (visited October 26, 1999) <http://www.oecd.org/daf/nocorruption/tax98.htm>.
[178] *Id.*
[179] *Id.*
[180] Text of the Convention, *supra* note 9
[181] *Id.*

proportionate and dissuasive criminal penalties comparable to those applicable to their own public officials.[183] Signatories must interpret territorial jurisdiction in as broad a manner as possible and must establish nationality jurisdiction if this is in accord with their legal system.[184] Where there is no criminal liability of companies, countries are obliged to impose dissuasive non-criminal sanctions, including monetary fines.[185] Additionally, similar to the United States' FCPA, the Convention contains exceptions for facilitation payments (i.e. "routine governmental action" payments) and those payments which are lawful under a foreign country's laws.[186]

With the Convention signed and in process of being implemented by signatories, the OECD now provides the institutional framework for carrying out monitoring of the Convention.[187] The Working Group on Bribery, made up of all signatories, performs monitoring and surveillance procedures.[188] The Working Group examines each country's legislation to assess how well it meets the Convention's standard.[189] The Working Group evaluates each country's performance and makes recommendations that will be forwarded to the Ministers of all participating countries.[190]

U.S. business leaders were the strongest advocates for the Convention's passage.[191]

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[182] Text of the Convention, *supra* note 157; OECD Anti-Corruption Unit, *Frequently Asked Questions* (visited October 26, 1999) <http://www.oecd.org/daf/nocorruption/faq.HTM>.
[183] *Id.*
[184] *Id.*
[185] *Id.*
[186] *Id.*
[187] *Id.*
[188] *Id.*
[189] *Id.*
[190] *Id.*
[191] Kaltenhauser, *supra* note 157.

C. Current status of the Convention

Currently, 17 signatories have deposited instruments of ratification/acceptance of the Convention.[192] At the same time, these countries have adopted legislation necessary to implement the Convention in national law.[193]

While the Convention is just one aspect of a multi-faceted corruption problem, U.S. officials such as Attorney General Janet Reno and Secretary of State Madeleine Albright hope that the Convention represents the first step in attacking the problem.[194] Most importantly, the Convention represents a consensus among the major nations that business bribery is wrong and should stop. This consensus alone will go far in leveling the playing field for all companies. No longer will business go to the company that can pay the biggest bribe; rather, business will go the company based on its merits.

D. 1998 FCPA Amendments

On November 10, 1998, following the passage of the OECD Convention, President Clinton signed the International Anti-Bribery and Fair Competition Act of 1998 (the "1998 Amendments").[195] The 1998 Amendments incorporated amendments

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[192] Frequently Asked Questions, *supra* note 182. The countries are as follows: Iceland (August 17, 1998); Japan (October 13, 1998); Germany (November 10, 1998); Hungary (December 4, 1998); United States (December 8, 1998); Finland (December 10, 1998); United Kingdom (December 14, 1998); Canada (December 17, 1998); Norway (December 18, 1998); Korea (January 4, 1999); Greece (February 5, 1999); Austria (May 20, 1999); Mexico (May 27, 1999); Sweden (June 8, 1999); Belgium (July 27, 1999); Slovak Republic (September 24, 1999); and Australia (October 18, 1999).

[193] *Id.*

[194] Speech to Global Forum on Fighting Corruption by Janet Reno, U.S. Attorney General (February 24, 1999) (visited December 10, 1999) <http://www.usia.gov/topical/econ/integrity/document/reno.htm>; Remarks by Madeleine K. Albright (February 1999) (visited December 10, 1999) <http://www.usia.gov/topical/econ/integrity/document/albright.htm>.

[195] Statement by the President (November 10, 1998) (visited December 10, 1999) <http://www.usdoj.gov/criminal/fraud/fcpa/signing.htm>.

necessary to bring the FCPA into full compliance with the U.S.'s obligations and to implement the OECD Convention.[196]

Five changes resulted from the 1998 Amendments.[197] First, whereas the FCPA previously criminalized payments made to influence any decision of a foreign official or to induce him to do or omit to do any act, the 1998 Amendments expand the FCPA's scope to include payments made to secure "any improper advantage," the language used in the OECD Convention.[198]

Second, the 1998 Amendments expand the FCPA's coverage to include all foreign persons who commit an act in furtherance of a foreign bribe while in the United States, whereas the FCPA had previously covered only issuers with securities registered under the 1934 Securities and Exchange Act and "domestic concerns."[199]

Third, the 1998 Amendments expand the FCPA's definition of public officials to include officials of public international organizations.[200]

Fourth, the 1998 Amendments provide for jurisdiction over the acts of U.S. businesses and nationals in furtherance of unlawful payments that take place wholly outside the United States.[201]

Fifth and finally, the 1998 Amendments eliminate the current disparities in penalties applicable to U.S. nationals and foreign nationals employed by or acting as agents of U.S. companies, thus subjecting all employees or agents of U.S. businesses to both civil and criminal penalties.[202]

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[196] Pub. L. 105-366, 112 Stat. 3302 (codified as amended at 15 U.S.C. §78dd-1, *et seq.*).
[197] *Id.*
[198] *Id.*
[199] *Id.*
[200] *Id.*
[201] *Id.*
[202] *Id.*

In signing the 1998 Amendments to the FCPA, President Clinton summed up the history since the 1977 FCPA, stating:

> The United States has led the effort to curb international bribery. We have long believed bribery is inconsistent with democratic values, such as good governance and the rule of law. It is also contrary to basic principles of fair competition and harmful to efforts to promote economic development.... Under the [OECD] Convention, our major competitors will be obligated to criminalize the bribery of foreign public officials in international business transactions.... The United States intends to work diligently, through the monitoring-process to be established under the OECD, to ensure that the Convention is widely ratified and fully implemented. We will continue our leadership in the international fight against corruption.[203]

VI. WILL THE OECD CONVENTION WORK?

While the passage of the Convention represents a significant step in moving towards the eradication of transnational bribery, several problems are readily apparent. Primarily, these problems are: (1) the inability of the Convention to address the "demand side" of bribery; (2) the Convention's "loophole" for payments to political parties and candidates; and (3) whether the Convention will be enforced.

A. The "Demand Side" of Transnational Bribery

The Convention closely mirrors the U.S. FCPA, and the FCPA has been effective in curbing corruption in U.S. businesses. The FCPA, however, has been in effect for over twenty years. In addition, as discussed above, the FCPA has caused problems for U.S. businesses that required amendments to the statute. The OECD Convention may not be much different in taking time to "work out the bugs" of the legislation.

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[203] Statement by the President, *supra* note 195.

One problem with the OECD Convention is its inability to establish any penalties for government officials who continue to solicit bribes. The Convention only addresses the bribe-givers; in other words, the "supply side" of the bribe. The Convention is silent on the "demand side."

One might argue that such a difference is trivial, but that is simply not the case. How will the Convention be enforced among various governments, if the very government officials charged with enforcement are themselves corrupt? Such a proposition may seem unlikely, but when one considers that most countries that are viewed as the most corrupt have had laws prohibiting bribery for a number of years,[204] a strong possibility exists that the OECD Convention may simply go unenforced, just like those countries' existing anti-bribery legislation. Time will tell if the Convention's monitoring mechanisms are effective in rooting out corruption in government. If not, the Convention's signatories should consider reconvening and addressing the bribe-takers.

Such an agreement might start by focusing on reducing the size of governmental bureaucracies. A reduction in the number of hurdles a business must pass through before being awarded a contract or permit will reduce the number of opportunities for officials to solicit bribes.[205] The feasibility of an international agreement on the size of government, however, seems highly implausible. Thus, the problem of corrupt governments will linger and, quite possibly, keep transnational bribery alive.

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[204] Nichols, *supra* note 117.
[205] Nancy Bord, *International Corruption: So What?*, 14 World and I 86 (April 1, 1999).

B. Payments to Political Parties and Candidates

A second problem with the Convention is its failure to prohibit payments to foreign political parties or foreign political candidates.[206] Such an omission in effect creates a loophole through which payments which normally would have gone directly to the government official will now be channeled through that official's political party. This will also effectively nullify the effects of the Convention.

C. Enforceability

Perhaps the Convention's biggest problem lies in whether the Convention will be enforced. Assuming that all signatories live up to the Convention, the mechanics of enforcing violations seem unworkable. How will violations be dealt with? At least one commentator has suggested that the OECD is the wrong entity through which to implement the Convention, and that the World Trade Organization, with its enforcement authority, would be a more appropriate international body.[207] Regardless, enforcing an international agreement by relying on various countries' good faith seems highly suspect.

These criticisms may seem premature, given the fact that the Convention has only recently gone into effect. These issues, however, will remain a concern until the Convention proves to be a workable framework for preventing transnational bribery.

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[206] Remarks of Andrew J. Pincus, General Counsel, U.S. Department of Commerce at Vice President's Conference on Corruption (February 25, 1999) (visited December 1, 1999) <http://www.ita.doc.gov/legal/pincus.html>.
[207] Nichols, *supra* note 110.

VII. BEYOND THE OECD CONVENTION: NEXT STEPS

Just as President Clinton promised when he signed the 1998 FCPA Amendments into law, the U.S. has continued its leadership in the anti-bribery movement. In addition to the 1998 FCPA Amendments, the U.S. has led two significant actions since the OECD Convention's passage. First, Vice President Gore held the First Annual Global Forum on Fighting Corruption. Second, the U.S. Senate is currently debating another international anti-bribery agreement – the Inter-American Convention Against Corruption.

A. The Global Forum on Fighting Corruption

For three days in February, 1999, participants from 90 governments gathered in Washington, D.C. at the invitation of U.S. Vice President Al Gore.[208] The participants worked intensely to examine the causes of corruption and practices that are effective to prevent or fight it.[209] Elected officials, ministers responsible for security and justice, experts in public ethics and anti-corruption from every region of the world were joined by distinguished academics and lay and clerical figures from many of the world's great religions.[210]

The participants considered and shared with one another many practices that help control or punish corruption in public office.[211] All participants called on their governments to cooperate in appropriate regional and global bodies to rededicate

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[208] Conference Papers, *Declaration* (visited December 1, 1999) <http://www.usia.gov/topical/econ/integrity/document/declare.htm>.
[209] *Id.*
[210] *Id.*
[211] *Id.*

themselves to adopt effective anti-corruption principles and practices, and to create ways to assist each other through mutual evaluation.[212]

Feeling common urgency to act, the participants agreed to continue the dialogue begun at the forum.[213] They will gather again in a second Global Forum on Fighting Corruption, to be held next year in the Netherlands, and propose thereafter an annual Global Ministerial forum on fighting corruption.[214] This effort may alleviate concerns about the OECD Convention's failure to address corruption in government.

B. The Inter-American Convention Against Corruption

Along with Vice President Gore's efforts, the U.S. Senate is currently reviewing a second international anti-bribery/anti-corruption agreement, the Inter-American Convention Against Corruption (the "Inter-American Convention").[215]

The Inter-American Convention was negotiated under the auspices of the Organization of American States (OAS) following a mandate agreed to by the 34 heads of state that participated in the Summit of the Americas in 1994.[216] The Inter-American Convention was adopted and opened for signature on March 29, 1996 in Caracas, Venezuela and promptly signed by 21 countries.[217] The United States signed the convention on June2, 1996 at the OAS General Assembly in Panama City.[218] On April 1,

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[212] *Id.*
[213] *Id.*
[214] *Id.*
[215] *Summary of the Inter-American Convention Against Corruption* (visited December 1, 1999) <http://www.ita.doc.gov/legal/oas2.html>.
[216] *Id.*
[217] *Id.* The 21 OAS States that signed on March 29, 1996 were Argentina, Brazil, Bolivia, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Surinam, Uruguay and Venezuela. *Id.*
[218] *Id.*

1998, the President transmitted the Inter-American Convention to the U.S. Senate for advice and consent to ratification.[219]

The Inter-American Convention identifies acts of corruption to which the convention will apply and contains articles that create binding obligations under international law as well as hortatory principles to fight corruption.[220] The convention also provides for institutional development and enforcement of anti-corruption measures, requirements for the criminalization of specified acts of corruption and articles on extradition, seizure of assets, mutual legal assistance and technical assistance where acts of corruption occur or have effect in one of the States' parties.[221] In addition, subject to each party's constitution and the fundamental principles of its legal system, the convention requires parties to criminalize bribery of foreign government officials and illicit enrichment.[222] The convention also contains a series of "preventive measures" that the parties agree to consider establishing to prevent corruption including systems of government procurement that assure the openness, equity, and efficiency of such systems.[223]

VIII. CONCLUSION

Efforts to curb transnational bribery have come a long way since 1977, when the United States took the first courageous steps and passed the FCPA. The OECD Convention is a significant development in the anti-bribery/anti-corruption movement, and those responsible for its passage – the U.S. government and international NGO's

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[219] *Id.*
[220] *Id.*
[221] *Id.*
[222] *Id.*

such as the Caux Round Table and Transparency International – should be commended for their efforts. Problems, however, still abound. Foremost among these problems are the Convention's failure to address corruption in government (the "demand side" of transnational bribery), as well as its failure to prohibit payments to foreign political parties and candidates. In addition, potential enforceability problems linger despite the Convention's passage.

There is much to be done in rooting out transnational bribery. Fortunately, a consensus has been established that bribery is bad business. Perhaps the most significant result of this consensus will be that businesses will *voluntarily* forego making bribes to foreign officials, thereby eliminating the problem outright. Until that time, governments, business leaders, academics, clergy and citizens from *all* nations must work to eradicate this corrosive force.

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[223] *Id.*