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# The Evolving Domestic and International Law Against Foreign Corruption: Some New and Old Dilemmas Facing the International Lawyer

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# THE EVOLVING DOMESTIC AND INTERNATIONAL LAW AGAINST FOREIGN CORRUPTION: SOME NEW AND OLD DILEMMAS FACING THE INTERNATIONAL LAWYER

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*For over two decades, the Foreign Corrupt Practices Act ("FCPA") and, more recently, the Organization for Economic Cooperation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("OECD Convention") have delineated to U.S. lawyers and their clients which international transactions are proscribed and punished as corrupt. However, like any other statute, the FCPA and the OECD Convention are unable to cover all the permutations of activity that would seemingly constitute transnational corruption. This Article explores what is prohibited and permissible under the FCPA and the OECD Convention, highlighting the tension between operating outside the coverage of these legal precepts while still complying with the rules of professional conduct. It concludes by demonstrating, by means of various scenarios, that there is no substitute for a lawyer's reliance on her professional and ethical judgment.*

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## INTRODUCTION[†]

Lawyers are constantly aware of the ethical dilemmas that may arise during the representation of a client, particularly when the client's activities cross national borders, where applicability of the norms governing routine domestic practice may be in doubt.[1] These ethical issues are heightened by the dilemma an attorney faces when notified of a transaction that, though lucrative to the client, may expose the client to liability under the domestic laws that have extraterritorial reach.[2] In these situations, U.S. lawyers are often put in the position of attempting to reconcile their responsibility to the client with their overarching duty to uphold the word and spirit of the law.[3]

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1. In 2002, Transparency International reported that one in five respondents to a Gallup International poll across fifteen emerging market economies was aware of the Organization for Economic Cooperation and Development ("OECD") Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("OECD Convention" or "Convention"), notably the same result to that obtained in the same survey conducted in 1999. Transparency International, *Transparency International Releases New Bribe Payers Index (BPI) 2002*, http://www.transparency.org/cpi/2002/bpi2002 (last visited Nov. 9, 2005). Transparency International's own Bribe Payers Index ("BPI") survey revealed that forty-two percent of the 835 respondents surveyed had not heard about the OECD Convention, with only seven percent being familiar with the Convention. *Id*. The survey also indicated that a very small portion of overseas business executives, including executives of western multinational corporations, were informed about or planned to enforce the OECD Convention. *Id*.

2. Though not reviewed here, there is an abundance of U.S. laws and regulations that discipline international business transactions, often reaching conduct taking place abroad. Among these are the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 ("Helms-Burton") (22 U.S.C. § 6001 *et seq.* (2000)), the International Emergency Economic Powers Act (50 U.S.C. § 1701 *et seq.* (2000)), the Trading with the Enemy Act (12 U.S.C. §§ 95a, 95b) (trade sanctions and embargoes against several countries), the Arms Export Control Act (22 U.S.C. § 2778(a)(1) (2000)), the State Department's International Traffic in Arms Regulations (22 C.F.R. §§ 121, 123 (2005)), U.S. export controls under the Export Administration Act (50 U.S.C. app. § 2404(a) lapsed but in force under 50 U.S.C. § 1701) and Export Administration Regulations ("EAR") (15 C.F.R. §§ 730 *et seq.* (2005)), the Iran Sanctions Act (50 U.S.C. § 1701 note, renewed by Pub. L. No. 107-24 (Aug. 3, 2001)), the Economic Espionage Act (18 U.S.C. §§ 1831 *et seq.*), the Department of Commerce "Antiboycott Law" (15 C.F.R. § 760), and the Treasury Department "Antiboycott Law" (I.R.C. § 999 (1999)).

3. The obligation to heed to the spirit and letter of the law certainly extends well beyond international business practice and encompasses the entire legal profession. As a commentator has pointed out, the official commentary to the American Bar Association Model Rules of Professional Conduct (1994) ("Model Rules") is "replete with admonitions to obey the spirit of the law." Rob Atkinson, *A Dissenter's Commentary on the Professionalism Crusade*, 74 TEX. L. REV. 259, 283 n.104 (1995).

For over two decades, the Foreign Corrupt Practices Act ("FCPA")[4] has delineated to U.S. lawyers and their clients which international transactions are proscribed and punished as corrupt.[5] While the FCPA specifically defines what constitutes corrupting a foreign official, it also raises difficult and complex legal, ethical, judgmental, and representational issues for lawyers and their clients.[6] Like any other legislative enactment, the FCPA is unable to cover all the permutations of activity that would seemingly fall within the definition of transnational corruption.[7] As such, the FCPA leaves counsel in the precarious position of attempting to preserve the client's commercial interests and maneuver within the bounds of the law while struggling with the possibility that the client's actions, although technically legal, may be contrary to the goals of the law.[8]

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4. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (1977) (codified as amended at 15 U.S.C. §§ 78m (issuers' duty to report), 78dd-1(issuers), dd-2 (domestic concerns), dd-3 (any person), 78ff (other penalties)); *see also* S. REP. NO. 95-114, at 3 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4098, 4101.

5. *See id.* The statute:

> make[s] it a crime for a "domestic concern," "issuer," or "any person" not already covered as a domestic concern or issuer (and their officers, directors, employees, agents and shareholders acting on their behalf) to commit, with any required territorial nexus to the United States, an act [in the United States or abroad] in furtherance of a payment of an offer, promise, or authorization of a payment, of money or anything of value to a foreign official corruptly to secure that official's action, inaction or influence, in a decision related to a business opportunity.

Lucinda A. Low & William M. McGlone, *Avoiding Problems Under the Foreign Corrupt Practices Act, U.S. Antiboycott Laws, OFAC Sanctions, Export Controls, and the Economic Espionage Act*, *in* INTERNATIONAL TRADE UPDATE 2004: TRENDS, TIPS AND PRACTICAL ADVICE, GEORGETOWN UNIVERSITY LAW CENTER, at 136 (Jan. 29–30, 2004) (on file with author).

6. *See* 15 U.S.C. §§ 78dd-1(a), -1(g), -2(a), -3(a) (2000). Notably, lawyers and their clients have to be alert to the broad interpretation that federal law enforcement officials give to this statute. One example: the Department of Justice ("DOJ") broadly defines FCPA prohibitions as "prohibit[ing] corrupt payments to foreign officials for the purpose of obtaining or keeping business." DEPARTMENT OF JUSTICE, FOREIGN CORRUPT PRACTICES ACT ANTIBRIBERY PROVISIONS, *available at* http://www.usdoj.gov/criminal/fraud/fcpa/dojdocb.htm (last visited Nov. 9, 2005). For an interesting and quick example of the complex world surrounding FCPA compliance, see also Northrop Grumman Electronic Systems, http://www.es.northropgrumman.com/Our_Values/new-employees/FCPA.htm (providing a "test yourself" FCPA-related set of questions) (last visited Nov. 9, 2005).

7. *See* discussion *infra* Part IV.

8. *See id.* Arguably, a lawyer's concern with his client's interests also extends to the protection of his client's public image, which can be significantly damaged if the public perceives certain conduct as bribery. One commentator has described this situation:

> Bribery is a breach of people's trust. People find corruption shameful and repugnant, and when confronted with corrupt public officials and their illicit gains, they invariably reject it. The difference today is that, in the modern electronic world, it is more obvious when it happens and more difficult to deny it.

A. Timothy Martin, *The Development of International Bribery Law*, 14 NAT. RESOURCES & ENV'T 95, 102 (1999).

Before developing some of the basic legal and ethical themes associated with “corruption” in international business transactions—themes later analyzed in Part IV—this Article first summarizes the content of the FCPA in Part I. Because the FCPA is not the only law to prescribe criminal liability to U.S. companies who engage in corrupt practices, Part II will also briefly refer to other applicable statutes.

Part III will then discuss the 1997 Organization for Economic Cooperation and Development (“OECD”) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (“OECD Convention” or “Convention”), and show how it has given new impetus to the task of combating foreign corruption arising out of international business transactions.[9] The Convention represents a sea of change in the international community’s attitude toward bribery and corruption, an area where the United States previously stood alone with legislation combating this form of corruption.[10] Beyond leveling the playing field in the international business arena, the Convention greatly streamlines prosecutions under the FCPA because, among other things, it applies the nationality principle of jurisdiction.[11] This principle significantly expands the jurisdictional basis for the prosecution of U.S. companies and U.S. nationals engaging in corruption practices that “take place wholly outside of the United States, regardless of whether ‘an instrumentality of interstate commerce’ is used in furtherance of the prohibited conduct.”[12] In Part III, this Article also explores some

9. For about two decades since 1977, the United States was the only country that had anti-foreign-corruption legislation like the FCPA. After the FCPA’s enactment, the most significant effort aiming to deter corrupt practices in the conduct of international business occurred under the auspices of the OECD, with the signing of a convention against bribery of foreign officials, the OECD Convention. *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, 37 I.L.M. 1 (1998) (“*OECD Convention*”), *available at* http://www.oecd.org/document/21/0,2340,en_2649_201185_2017813_1_1_1_1,00.html (last visited Nov. 9, 2005). Though less ambitious, the Organization of American States adopted the Inter-American Convention Against Corruption, OEA/Ser.K.XXXIV.1, CICOR/doc. 14/96 rev. 2 (Mar. 29, 1996), *reprinted in* 35 I.L.M. 724 (1996), and the Council of Europe followed suit by promulgating the Council of Europe Criminal Law Convention on Corruption on January 27, 1999. 38 I.L.M. 505 (1999), *available at* http://conventions.coe.int/Treaty/EN/Treaties/Html/173.htm (last visited Nov. 9, 2005).

10. *See* John W. Brooks, *Fighting International Corruption*, 20 GPSolo 42 (LEXIS) (2003) (“The most significant development recently in international corruption law is the . . . OECD Convention . . . that entered into force in 1999.”).

11. *OECD Convention*, *supra* note 9, art. 4, para. 2.

12. *See id*. *But see* Stuart H. Deming, *Foreign Corrupt Practices*, 33 INT’L LAW. 507, 514 (1999) (arguing that due to precedents of extraterritorial application of other federal statutes, the FCPA’s territorial nexus is minimal, and that, therefore, the OECD Convention’s reliance on nationality as a basis for jurisdiction does not represent a significant change).

distinctions between the approaches to foreign corruption contemplated in the FCPA and OECD Convention.

Part IV will then develop three hypothetical examples that may (or may not) involve corruption under the present anti-bribery legal framework. The goal is to explore what is prohibited and permissible under the FCPA and the OECD Convention and to highlight the tension between operating outside the coverage of these legal precepts and complying with the rules of professional conduct. The legal analysis of these possible "corruption scenarios" will serve not only to draw attention to some complex legal and ethical problems that occur in foreign business transactions, but also to show how there are problems still not covered by the present anti-foreign-bribery regime. The Article then concludes by revealing the need for lawyers to rely on the professional rules of conduct to guide their actions through the inherent legal gaps in this area.

## I. THE FOREIGN CORRUPT PRACTICES ACT

### *A. Background of the FCPA*

In 1974, the United States was still reeling from the general loss of public trust resulting from the Watergate debacle when a new scandal emerged.[13] Due to illegal payments some U.S. corporations had made to domestic political campaigns, the Securities and Exchange Commission ("SEC") created a voluntary disclosure program.[14] In the resulting disclosures, over 300 companies admitted to making questionable payments, both domestically and abroad.[15] The public responded overwhelming with disgust, with Congress sharing in the public's sentiment.[16] The scandal reached far beyond the borders of the United States[17] and contributed to a legislative response that resulted in the passage of the Foreign Corrupt Practices Act of 1977.[18]

13. *See* Martin, *supra* note 8, at 97.

14. Karl A. Groskaufmanis, *Minimizing Corporate Civil and Criminal Liability: A Second Look at Corporate Codes of Conduct*, 78 GEO. L.J. 1559, 1582 (1990); *see also* DOJ Website, *supra* note 6 ("As a result of SEC investigations in the mid-1970's, over 400 U.S. companies admitted making questionable or illegal payments in excess of $300 million to foreign government officials, politicians, and political parties.").

15. *Id.*; S. REP. NO. 95-114, at 1–2 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4098, 4101. *But see* Agnieszka Klich, *Bribery in Economics in Transition: The Foreign Corrupt Practices Act*, 32 STAN. J. INT'L L. 121, 123 (1996) ("[A]s many as 600 American firms made payments to foreign officials . . . .").

16. S. REP. NO. 95-114, at 1–2 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4098, 4099.

17. "Foreign governments friendly to the United States in Japan, Italy, and the Netherlands have come under intense pressure from their own people." S. REP. NO. 95-114, at 3, *reprinted in* 1977

As originally drafted, the FCPA proscribed the payment of bribes to foreign officials in exchange for foreign government contracts or other types of business.[19] The FCPA was almost immediately met with criticism. The primary argument was that the FCPA prevents American companies from effectively competing in international settings where "gifts" and "tributes" are the norm.[20]

One can respond to much of this criticism with two separate, though related, arguments: (a) corporate bribery of foreign officials, if left unchecked, would "also affect our domestic competitive climate";[21] and (b) the investing public has the right to know whether they are investing in corporations that have engaged in unethical conduct. That access to the relatively cheap money, readily available in U.S. capital markets (i.e., via the issuance of stocks, private bonds, or other debt instruments, etc.), should be limited to companies that do not engage in less than competitive behavior seems to strike a fair capitalistic bargain.

Since its enactment, the FCPA has undergone several amendments. Most notably, in 1988, Congress added several affirmative defenses (e.g., "lawful payment," "reasonable and bona fide expenditure," etc.),[22] made the mens rea requirement stricter (i.e., requiring knowledge rather than recklessness),[23] and expanded the legislative record to further broaden the meaning of some original statutory provisions (e.g., clarifying the meaning of "retaining business," etc.).[24] At the same time, Congress reviewed and increased the formal penalties for violating the anti-bribery provisions.[25] A

U.S.C.C.A.N. 4098, 4101.

18. 13 WKLY. COMPILATION OF PRES. DOC. 1909 (Dec. 20, 1977); *see also* Mark Romaneski, *The Foreign Corrupt Practices Act of 1977: An Analysis of Its Impact and Future*, 5 B.C. INT'L & COMP. L. REV. 405, 405 n.2; Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended in scattered sections of title 15 of the United States Code).

19. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. §§ 78m (issuers' duty to report), 78dd-1(issuers), -2 (domestic concerns), -3 (any person), 78ff (other penalties) (2000)).

20. *See* Jennifer Dawn Taylor, *Ambiguities in the Foreign Corrupt Practices Act: Unnecessary Costs of Fighting Corruption?*, 61 LA. L. REV. 861, 869 n.57 (2001) (citing Robert S. Levy, Note, *The Antibribery Provisions of the Foreign Corrupt Practices Act of 1977: Are They Really As Valuable As We Think They Are?*, 10 DEL. J. CORP. L. 71, 82 (1985).

21. S. REP. NO. 95-114, at 4 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4098, 4101 ("Foreign corporate bribes also affect our domestic competitive climate when domestic firms engage in such practices as a substitute for healthy competition for foreign business.").

22. H.R. REP. NO. 100-418, at 921–23 (1988) (Conf. Rep.), *reprinted in* 1988 U.S.C.C.A.N. 1949, 1954–56. The conference agreement defined "lawful payment" as "a payment to a foreign official [that] is 'lawful under the *written* laws and regulations of the foreign official's country.'" *Id.* at 1955 (emphasis added).

23. *Id.* at 919, *reprinted in* 1988 U.S.C.C.A.N. 1949, 1952.

24. *Id.* at 918, *reprinted in* 1988 U.S.C.C.A.N. 1949, 1951.

25. Pub. L. No. 100-418, tit. V, subtitle A, pt. I, § 5003(b), 102 Stat. 1415, 1419 (1988).

civil fine of up to $10,000 was introduced as a possible sanction,[26] and the maximum criminal fine for a U.S. corporation was increased from $1 million to $2 million.[27] Finally, in late 1998, the FCPA was updated to conform to the new OECD Convention.[28]

### *B. FCPA's Framework*

The FCPA places several duties on American corporations, businessmen and their agents. The statute prohibits both companies and natural persons from offering, promising to offer, or authorizing the payment of money, a "gift," or anything of value to a foreign official for the purpose of securing influence, inaction, or a contract to obtain or maintain business.[29] Furthermore, since 1998 the FCPA has applied to any foreign entity or foreign national who commits an act in furtherance of a foreign bribe while in U.S. territory.[30] In addition, U.S.-registered security-issuing corporations[31] (i.e., "issuers") subject to SEC regulation have the additional duty to comply with SEC accounting and record-keeping requirements for disclosing their payments.[32]

The antibribery provisions of the FCPA can be broken down into three separate segments: (a) one applying to issuers (i.e., thus subject to civil enforcement through the SEC);[33] (b) one applying to domestic concerns (i.e., subject to civil and criminal enforcement by the Department of Justice ("DOJ"));[34] and (c) a catchall provision applying to anyone who

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26. 15 U.S.C. §§ 78dd-2(g)(1)(B), 78ff(c)(2)(A) (2000).

27. *Id*. §§ 78dd-2(g)(1)(A), 78ff(c)(1)(A).

28. *See* discussion *infra* Part III.B.

29. 15 U.S.C. §§ 78dd-1(a), -2(a), -3(a) (2000).

30. *See id*. § 77dd-3 ("Prohibited foreign trade practices by persons other than issuers or domestic concerns"). Congress extended statutory coverage to this category of individuals pursuant to the U.S. efforts to bring FCPA in compliance with the OECD Convention. *See* discussion *infra* Part III.B.

31. An "issuer" is a business entity that either (a) has a class of securities registered under Section 12 of the Securities Exchange Act of 1934, or (b) is required to file reports pursuant to Section 15(d) of the same Act. 48 Stat. 881 (June 6, 1934), codified as amended in 15 U.S.C. § 77b, et seq.

32. *See generally* 15 U.S.C. § 78m(b) (2004). These record-keeping/disclosure requirements create only corporate, not criminal liability. *See* Low & McGlone, *supra* note 5, at 136. These provisions are beyond the scope of this article.

33. 15 U.S.C. § 78dd-1 (2000). *See also* S. REP. NO. 95-114, at 11 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4098, 4109 ("When the SEC believes it has compiled enough evidence for a criminal action, it refers the case to the Justice Department for criminal prosecution.").

34. 15 U.S.C. § 78dd-2 (2000). The statute explains:

> For purposes of this section:
>
> (1) the term "domestic concern" means—
>
> (A) any individual who is a citizen, national, or resident of the United States; and

does not fall under either of the other two categories.[35] Much of the language between the three segments is identical, and none of the differences are significant for the purposes of this Article.

*1. Jurisdiction of the FCPA*

The FCPA sets forth two separate bases for jurisdiction: (a) the standard territorial jurisdiction (i.e., jurisdiction resulting from some act that establishes a nexus between the bribery and the United States territory, thus triggering the U.S. territorial power to adjudicate);[36] and (2) the more recently added (1998) nationality principle (i.e., jurisdiction based on the U.S. nationality of an individual or legal person).[37]

Traditionally, any act requiring the use of the mails or any other instrumentality of interstate commerce in the course of bribing a foreign official would trigger liability under the FCPA.[38] This included engaging in efforts to corrupt a foreign official while on international travel, making an international telephone call, sending a fax, or even an e-mail.[39] Thus, it was nearly impossible to engage in any foreign official bribery without violating the statute. Because this element is so easily met, counsel should advise clients about the need to approach with great care any conduct that could potentially evolve to or be interpreted as bribery.[40]

Yet, despite its breadth, the usual cautionary warning is no longer comprehensive enough. Congress, in 1998, expanded the jurisdiction of the FCPA by prohibiting *any* U.S. corporation, business, or persons that are nationals of the United States from bribing any foreign official *anywhere*,[41] regardless of whether any part of the conduct involved an

> (B) any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States.

*Id.* § 78dd-2(h). *See also* S. REP. NO. 95-114, at 4 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4098, 4109-10 ("Under the bill, the Justice Department retains sole investigative and prosecutorial jurisdiction over domestic concerns covered but which are not otherwise within the jurisdiction of the SEC.").

35. 15 U.S.C. § 78dd-3 (2000) ("Prohibited foreign trade practices by persons other than issuers or domestic concerns").

36. *Id.* §§ 78dd-1(a), -2(a), -3(a).

37. *See id.* §§ 78dd-1(g), 78dd-2(i) ("Alternative jurisdiction").

38. *Id.* §§ 78dd-1(a), dd-2(a), dd-3(a). *See also id.* §§ 78dd-2(h)(5), 78dd-3(f)(5) (definition of "interstate commerce.").

39. *See id.* §§ 78dd-2(h)(5), -3(f)(5).

40. *See* Dep't of Comm., Foreign Corrupt Practices Act Antibribery Provisions, http://www.bisnis.doc.gov/bisnis/fcp1.htm (last visited Jan. 7, 2006).

41. *See* 15 U.S.C. §§ 78dd-1(g), -2(i) (2000).

instrumentality of interstate commerce.[42] Indeed, U.S. citizens, nationals, and even residents are now all bound by the FCPA, just as corporations incorporated within the United States[43] and corporations subject to SEC regulation. Thus, the FCPA reach now goes well beyond the already broad jurisdictional requirement that a legal or natural person use an instrumentality of interstate commerce to procure the bribery of a foreign official.

*2. Mens Rea*

At the core of the FCPA is the prohibition of making a "corrupt" payment to a foreign official. The three prongs of the statute address (a) U.S. issuers anywhere, (b) domestic concerns anywhere, and (c) all others (i.e., other U.S. persons anywhere, and foreign entities' or individuals' acts while in U.S. territory). Each prong prohibits a person from "corruptly" making a bribe,[44] but none provides a definition of "corruptly" or "corrupt."[45] The legislative history does, however, provide some guidance. It explains that the use of the word "corruptly" embodies the quid pro quo nature of the transaction: the briber gives something of value with the expectation of influencing the foreign official "to wrongfully direct business to the payor or his client."[46]

This also explains why the FCPA only criminalizes those corrupt exchanges that are done knowingly.[47] With respect to what constitutes "knowing," the legislative history is very clear: merely pretending to look away (i.e., willful blindness) does not work.[48] However, despite providing a definition of what constitutes a "knowing" state of mind, the terms

42. For a discussion of why a U.S. resident would be covered by the statute, see Low & McGlone, *supra* note 5, at 176 n.12.

43. Congress extended statutory coverage to this category of individuals pursuant to the U.S. efforts to bring FCPA in compliance with the OECD Convention. *See* discussion *infra* Part III.B.

44. 15 U.S.C. §§ 78dd-1(a), -2(a), -3(a) (2000).

45. *See id.*

46. S. REP. NO. 95-114, at 10 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4098, 4108. *See also* Klich, *supra* note 15; *accord* Stanley S. Arkin, et al., *Business Crime: Criminal Liability of the Business Community*, 18.04, 18-17 to 18-18 (Matthew Bender 1990).

47. 15 U.S.C. §§ 78dd-1(f)(2), -2(h)(3), -3(f)(3) (2000).

48. H.R. REP. NO. 576, 100th Cong., 2d Sess. 920 (1988), *reprinted* in 1988 U.S.C.C.A.N. 1949, 1953 ("If . . . a defendant act[s] with reckless disregard [with respect to the occurrence of bribery] and with a conscious purpose to avoid learning the truth, the requirement of knowledge would be satisfied unless the defendant actually believed [that such conduct is not bribery].") (quoting United States v. Jacobs, 475 F.2d 270, 287 n.37 (2d Cir. 1973), *cert denied sub nom.* Lavelle v. United States, 414 U.S. 821 (1973)). *See also* discussion *infra* Part IV.A (describing a situation where reasonable diligence would be required, and, thus, willful blindness would be ineffective) and note 151 (containing additional quotation from the legislative record).

employed by the statute (e.g., "substantially likely to occur," "firm belief," etc.) leave attorneys and courts with ample room for interpretation.[49] Here, a more cautious approach is in order because corporations are especially vulnerable due to the application of vicarious liability. For example, a corporation can be prosecuted and held liable, even without having any direct knowledge of the offense, if it is closely affiliated with a subsidiary that has knowledge. In such instances, the law will impute the knowledge to the parent corporation.[50]

### 3. *Restricted Conduct*

The FCPA restricts any quid pro quo trade of something of value in exchange for influence over the decision-making process of a foreign official,[51] foreign political party, foreign political party official, or a candidate for a foreign political office in the pursuit of obtaining or retaining business.[52] Specifically, the term "foreign official" means any employee of a foreign government or of a public international organization, or any individual acting on behalf of any such entity.[53] In addition, the FCPA prohibits knowingly giving anything of value to a third party who will pass all or part of the value to a foreign official, foreign political party, foreign political party official, or a candidate for a foreign political office.[54]

In terms of what transactions are prohibited, the FCPA is written broadly to include any payment, promise to pay, or authorization of the payment of any money, gift, or anything of value.[55] Notably, the statute

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49. *Id.*

50. Taylor, *supra* note 20, at 874 (citing Stephen F. Black & Roger M. Witten, *Complying with the Foreign Corrupt Practices Act*, § 1.01, *in* 1 BUSINESS LAW MONOGRAPHS, INTERNATIONAL SERIES 3–6 (2000)). Note, however, that the FCPA's mens rea requirement still leaves open the possibility of a defense of innocent intentions, *i.e.*, that the defendant was acting under an erroneous belief that the activities were not bribery. In such circumstances, however, reliance upon the advice of counsel would be highly probative of a defendant's intent. *See* 15 U.S.C. §§ 78dd-1(c), -2(c), -3(c) (2000). *See also* discussion *infra* Part IV.A.

51. 15 U.S.C. §§ 78dd-1(a)(1), -2(a)(1) (2000).

52. *Id.* §§ 78dd-1(a)(2), -2(a)(2).

53. *Id.* §§ 78dd-1(f)(1)(A), -2(h)(2)(A), -3(f)(2)(A). With the adoption of the OECD Convention, officials of public international organizations have also been included in FCPA. *See* International Anti-Bribery Act of 1998, H.R. REP. NO. 105-802, pt. 3, at 9 (1998). For purposes of U.S. law, public international organizations are only those entities that have been so designated by Executive Order pursuant to Section 1 of the International Organizations Immunities Act of 1945, Pub. L. No. 79-291 (Dec. 29, 1945) (22 U.S.C. § 288, et seq.).

54. 15 U.S.C. §§ 78dd-1(a)(3), -2(a)(3) (2000).

55. *Id.* §§ 78dd-1(a), -2(a).

does not require a completed transaction. Simply making a corrupt offer, or even authorizing someone to make a corrupt offer, violates the FCPA.[56]

The element that makes the actions in the FCPA illegal is the purpose of the transaction. The transaction must be made for the purpose of influencing an act or decision of a foreign official in his official capacity, including the decision not to act, or to have the foreign official influence the decisions of another foreign official or government entity.[57] It is equally prohibited to engage in a transaction to "secure an improper advantage."[58] Notably, the purpose of the transaction must be to secure influence "in order to assist the [briber] in obtaining or retaining business."[59]

It should be clear by now that the FCPA defines foreign corruption very broadly, but it is not without its limits. In particular, the 1988 amendments to the FCPA were designed to create some limits to the FCPA so that businesses were not unduly hindered by the restrictions. The next Part will address the boundaries of the FCPA.

### *4. Limitations of the FCPA*

There are three major exceptions to the general prohibitions in the FCPA: (a) grease payments;[60] (b) legitimate business marketing;[61] and (c) payments permitted by the written laws of the foreign country.[62]

The grease-payment exception permits payments to governmental officials intended to hasten the completion of a non-discretionary "routine governmental action."[63] Routine governmental actions are those functions for which the official has no decision-making authority.[64] Paying money to accelerate processing of paperwork is thought of as the classic example.[65] The statute defines a few tasks as "routine," but also contains a catchall

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56. *Id.*
57. *Id.* §§ 78dd-1(a)(1), -2(a)(1).
58. *Id.*
59. *Id. See also* discussion *infra* Part I.B.4 (discussing FCPA's limitations).
60. 15 U.S.C. §§ 78dd-1(b), -2(b), -3(b) (2000).
61. *Id.* §§ 78dd-1(c)(2), -2(c)(2), -3(c)(2).
62. *Id.* §§ 78dd-1(c)(1), -2(c)(1), -3(c)(1).
63. *Id.* § 78dd-2(h)(4)(B).
64.

> The term "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.

15 U.S.C. § 78dd-2(h)(4)(B); *see also id.* §§ 78dd-1(f)(3)(B), -3(f)(4)(B).

65. *Id.* §§ 78dd-1(f)(3)(A)(i)-(ii), -2(h)(3)(A)(i)-(ii), -3(f)(3)(A)(i)-(ii).

provision.[66] The distinction between decision-making and mandatory authority is anything but clear. Some commentators argue that moving an application to the top of the pile is in itself exercising decision-making authority.[67] An even more difficult question arises when a payment is made to expedite a matter that involves some future determination; e.g., the application must be reviewed for completeness before processing.[68] Although the payment may only have been intended to expedite the process, it is impossible to prove the purpose of such a payment after the fact. Or, more troubling, although the intent of the payment may have been only to expedite a process, the foreign official may have interpreted the payment as having a dual meaning.

The legitimate business exception is an affirmative defense available under the FCPA.[69] It permits businesses to expend money to educate government officials about their company, product, etc.[70] A company can reimburse foreign officials for expenses incurred to promote, demonstrate, or explain a product, or to execute or perform on a contract. The classic example of this exception is a company paying for a government official to visit a production factory or worksite. The outer boundaries of this exception are not without confusion. For instance, how long can a trip last before it turns into a vacation, and can the company pay for the family to travel with the official?

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66. The FCPA defines the performance of the following tasks as "routine governmental action":

> (i) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country;
>
> (ii) processing governmental papers, such as visas and work orders;
>
> (iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country;
>
> (iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or
>
> (iv) actions of a similar nature.

*Id.* §§ 78dd-1(f)(3)(A), -2(h)(4)(A), -3(f)(4)(A).

67. JEFFREY P. BIALOS & GREGORY HUSISIAN, THE FOREIGN CORRUPT PRACTICES ACT: COPING WITH CORRUPTION IN TRANSITIONAL ECONOMIES 44 n.67 (1997); *see* Taylor, *supra* note 20, at 875.

68. Taylor, *supra* note 20, at 876.

69. 15 U.S.C. §§ 78dd-1(c)(2), -2(c)(2), -3(c)(2) (2000).

70. The statute reads in pertinent part:

> It shall be an affirmative defense to actions under subsection (a) of this section that—
>
> (1) the payment, gift, offer, or promise of anything of value that was made, was a reasonable and bona fide expenditure, such as travel and lodging expenses, incurred by or on behalf of a foreign official, party, party official, or candidate and was directly related to—
>
> (A) the promotion, demonstration, or explanation of products or services; or
>
> (B) the execution or performance of a contract with a foreign government or agency thereof.

*Id.* §§ 78dd-1(c), -2(c), -3(c).

The last exception came as a concession to those who argued that the FCPA unfairly disadvantaged American businesses in foreign countries. Pursuant to this affirmative defense, the FCPA is inapplicable when a country permits bribes in its legal code.[71] Notably, the exception requires that the law be *written*,[72] which is rarely the case. Typically, countries that accept bribery do so by not outlawing bribes. Some countries may not codify permission because they view longstanding customs as law.[73] However, these practices fall short of the FCPA requirement that the law be written. Corporations and individuals subject to FCPA coverage are well advised not to neglect narrowness of this exception.

In addition to these obvious exceptions, there is another limitation in the language of the statute that is often overlooked. For the bribe to be actionable under the statute, the bribe must be made for the purpose of obtaining or retaining business.[74] While a reading of the legislative history regarding the 1988 amendments reflects a congressional intent that the statute be read broadly to proscribe payments for the purpose of gaining influence with a foreign official,[75] the operative test under the statute is whether such "payments [are] intended to assist the payor, either directly or indirectly, in obtaining or retaining business for some person."[76]

Specifically, a prosecutor will satisfy the "business nexus"[77] test only by demonstrating that the payment at issue was intended "to assist in obtaining or retaining business."[78] Under *United States v. Kay*, where the prosecution did benefit from the court's adoption of a broad reading of the

71. *Id.* §§ 78dd-1(c)(1), -2(c)(1), -3(c)(1).

72. *Id.*

73. One commentary suggested that the FCPA needs to be expanded to recognize conduct consistent with "customary law" as a permissible exception to the anti-bribery provisions. Taylor, *supra* note 20, at 877.

74. "It shall be unlawful [to give gifts, etc. to a foreign official] in order to assist such domestic concern in obtaining or retaining business for or with, or directing business to, any person." 15 U.S.C. § 78dd-2(a)(1) (2004). Identical language is found in sections 78dd-1 and 78dd-3.

75. H.R. REP. NO. 100-418, at 918 (1988) (Conf. Rep.), *reprinted in* 1988 U.S.C.C.A.N. 1547, 1951.

76. United States v. Kay, 359 F.3d 738, 755 (5th Cir. 2004) ("[B]ribes paid to foreign tax officials to secure illegally reduced customs and tax liability constitute a type of payment that can fall within [the] broad coverage [of FCPA].").

77. *Id.* at 743.

78. *Id.* at 755. In rejecting a narrow defense interpretation of "business," however, the Fifth Circuit noted that "business" need not be restricted to business opportunities with the government, but extends to business activities within a foreign country that may be aided by obtaining a competitive advantage by bribing a foreign official. *See id.* at 756 ("[B]y narrowly defining exceptions and affirmative defenses against a backdrop of broad applicability, Congress reaffirmed its intention for the statute to apply to payments that even indirectly assist in obtaining business or maintaining existing business operations *in a foreign country*.") (emphasis added).

statute,[79] merely showing that a defendant obtained beneficial treatment by bribing a foreign official will not suffice. Simply put, the business nexus test acts as another limitation on the application of FCPA to foreign official bribes. This limitation, however, is tempered by a broad interpretation of the term "business" that looks to whether the payment of a bribe was intended as a means of securing a competitive advantage that would result in obtaining or retaining business with *any person* within a foreign country, not only with governmental parties.[80]

As a final note, although not a formal part of the law, the DOJ has been noted to rely upon advice of local counsel in its decision to initiate proceedings for violations of the FCPA.[81] Obviously, this element would factor into the mens rea requirement, particularly in the context of the requirement that the act be "corrupt." If a person were acting under the advice of counsel, it would strongly suggest that he was not attempting to engage in a corrupt activity. However, advice of counsel never should be considered relevant for the defense of legality under local law, because that affirmative defense is only available when the law is written. Whether or not a person had advice of counsel would have no bearing on the actual state of the law in the country in question.

### *C. Enforcement*

The FCPA is enforced through civil and criminal mechanisms. Violators can be subject to fines and imprisonment. An individual can be subject to fines as high as $100,000 and a prison term of up to five years.[82] For corporations, fines can be as high as two million dollars.[83] In the civil realm, the government can seek prospective injunctions to prohibit a person from making an illegal bribe[84] and a civil penalty of up to $10,000.[85] Fines imposed against officers, directors, employees, agents, or stockholders of corporations may not be paid directly or indirectly by the corporation.[86]

79. *Id*. at 748 ("We conclude that the legislative intent was so broad.").
80. *See supra* note 78.
81. Taylor, *supra* note 20, at 882–83.
82. 15 U.S.C. §§ 78dd-2(g)(2)(A), -3(e)(2)(A) (2000).
83. *Id.* §§ 78dd-2(g)(1)(A), -3(e)(1)(A).
84. *Id.* §§ 78dd-2(d), -3(d).
85. *Id.* §§ 78dd-2(g)(1)(B), -2(g)(2)(B), -3(e)(1)(B), -3(e)(2)(B).
86. *Id.* §§ 78dd-2(g)(3), 78ff(c)(3).

The DOJ and the SEC jointly enforce the FCPA.[87] The SEC primarily enforces the FCPA through the accounting requirements placed upon regulated corporations,[88] while the Attorney General ("AG") enforces the anti-bribery provisions.[89] The SEC is generally responsible for enforcing civil actions against issuers,[90] although the AG is also authorized to do so.[91] The DOJ is the only agency capable of obtaining prospective injunctions.[92] It should be noted that corporations are rarely prosecuted for FCPA violations. The few times that FCPA charges have been brought, they were an add-on to a lengthier indictment related to more serious offenses.[93]

In addition to the traditional prosecutorial role of the DOJ, it also serves an advisory function by providing FCPA opinions to companies regarding the propriety of a prospective transaction.[94] The AG will issue opinions only on prospective, as opposed to hypothetical or completed conduct.[95] The opinion has binding force, with some limits. For example, an AG opinion creates a rebuttable presumption that conduct consistent with the opinion did not violate the FCPA.[96] However, the AG can defeat that presumption by a preponderance of the evidence.[97] The opinion binds only the parties that joined in the request[98] and the DOJ.[99] This last exception is notable because the SEC is expressly excluded from being bound to the opinion.[100] This raises the question of how useful the FCPA opinion is in practice.[101]

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87. S. REP. NO. 114, 95th Cong., 1st Sess. 3-4 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4098, 4109-10.

88. *See, e.g.*, 15 U.S.C. § 78m(a) ("Every issuer of a security . . . shall file with the Commission . . . .")

89. *Id*. §§ 78dd-2(g), -3(e), 78ff(c).

90. Stephen J. DeCosse & Susan S. Katcher, *Newly Amended Foreign Corrupt Practices Act*, 63 WIS. LAW. 23, 61 (1990).

91. 15 U.S.C. §§ 78dd-2(g)(1)(B), -2(g)(2)(B), -3(e)(1)(B), -3(e)(2)(B) (2000).

92. *Id*. §§ 78dd-2(d), -3(d).

93. Bruce Zagaris, *Avoiding Criminal Liability in the Conduct of International Business*, 21 WM. MITCHELL L. REV. 749, 760 (1996).

94. 15 U.S.C. § 77dd-1(e) (2000); *see also* 28 C.F.R. § 80.1 (2005).

95. 28 C.F.R. § 80.3 (2005).

96. *Id.* § 80.10 (2005).

97. *Id.*

98. *Id.* § 80.5.

99. *Id.* §§ 80.10, 80.11.

100. *Id.* § 80.12.

101. Since the creation of the review opinion process, only twenty-three requests have been made to the DOJ. *See* Decosse & Katcher, *supra* note 90, at 61 (noting only twenty opinions as of 1990); FCPA Op. No. 01-03, 2001 WL 34059037 (DOJ FCPA); FCPA Op. No. 98-02, 1998 WL 34068169 (DOJ FCPA); FCPA Op. No. 92-01, 1992 WL 12005339 (DOJ FCPA). More telling, in the past fifteen years, there have only been three requests made. *See* FCPA Op. No. 01-03, 2001 WL 34059037 (DOJ

## II. BRIBING FOREIGN OFFICIALS MAY TRIGGER MONEY MOVEMENT OFFENSES AND OTHER FEDERAL STATUTES BEYOND THE FCPA

U.S. corporations engaging in business abroad must take into account various federal statutes that have both civil and criminal provisions. When U.S. persons or corporations make financial transactions that are for or connected to illegal transactions, such as bribing a foreign official, a related number of criminal laws also may be violated. These and other laws should be considered as a checklist when counsel is requested to advise on payments to officials to obtain contracts, as well as in preparing financial statements to obtain loans, tax planning, and responding to potentially irregular or suspicious transactions.[102] The list below offers a brief, nonexhaustive summary of federal statutes that may be applicable in instances of bribery.

### *A. "Money Laundering" and Engaging in Monetary Transactions in Property Derived from Specified Unlawful Activity*

Sections 1956 and 1957 of Title 18 of the United States Code comprise the federal money laundering statutes. These sections criminalize four distinct transactions: (a) money laundering;[103] (b) international monetary transfers with a criminal intent;[104] (c) "sting" offenses;[105] and (d) monetary

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FCPA); FCPA Op. No. 98-02, 1998 WL 34068169 (DOJ FCPA); FCPA Op. No. 92-01, 1992 WL 12005339 (DOJ FCPA). The low request number suggests that companies may not find the opinion process helpful. *See generally* BUSINESS LAWS INC., FOREIGN CORRUPT PRACTICES ACT REPORTER (Supp. 112, July 2005).

102. *See* discussion *infra* Part III.B and note 53.

103. The statute provides in pertinent part:

> Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct a financial transaction which in fact involves the proceeds of specified unlawful activity—
>
> (A)(i) with the intent to promote the carrying of specified unlawful activity; or
>
> (ii) with the intent to engage in conduct constituting a violation of section 7201 or 7206 of the Internal Revenue Code of 1986; or
>
> (B) knowing that the transaction is designed in whole or in part—
>
> (i)to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or
>
> (ii) to avoid a transaction reporting requirement under State or Federal law,
>
> shall be sentenced to [fine or imprisonment].

18 U.S.C. § 1956(a)(1) (2000).

104. The statute reads in pertinent part:

> Whoever transports, transmits, or transfers or attempts to transport, transmit, or transfer a monetary instrument or funds from a place outside the United States or to a place in the United States from or through a place outside the United States—

transactions involving criminal proceeds exceeding $10,000.[106] Of particular concern for our purposes are the prohibitions on monetary transactions designed to avoid a reporting requirement. Because the FCPA contains reporting requirements for SEC regulated entities,[107] transfers related to a violation of the FCPA would likely also be designed to circumvent the reporting requirements. Also notable is the prohibition contained in subsection 1956(a)(2)(B)(ii), which relates to international monetary transfers, the typical vehicle for paying a foreign bribe.[108]

### *B. Bribing and Other Federal Statutes*

While bribing or attempting to bribe a foreign official, a U.S. individual or corporation may trigger several federal statutes, whose applicability will depend on the specific circumstances of the particular bribing incident. The following is a nonexhaustive list: mail fraud;[109] wire fraud;[110] the "Currency and Foreign Transactions Reporting Act";[111] the

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> (A) with the intent to promote the carrying on of specified unlawful activity; or
>
> (B) knowing that the monetary instrument or funds involved in the transportation, transmission, or transfer represent the proceeds of some form of unlawful activity and knowing that such transportation, transmission, or transfer is designed in whole or in part—
>
> (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or
>
> (ii) to avoid a transaction reporting requirement under State or Federal law,
>
> shall be sentenced to [fine or imprisonment].

18 U.S.C. § 1956(a)(2) (2000). Similar to § 1956(a)(1), this section is most relevant for its prohibition on international money transfers designed to circumvent federal reporting requirements.

105. The statute provides in pertinent part:

> Whoever, with the intent—
>
> (A) to promote the carrying on of specified unlawful activity;
>
> (B) to conceal or disguise the nature, the location, source, ownership, or control of property believed to be the proceeds of specified unlawful activity; or
>
> (C) to avoid a transaction reporting requirement under State or Federal law, conducts or attempts to conduct a financial transaction involving property represented to be the proceeds of specified unlawful activity, or property used to conduct or facilitate specified unlawful activity, shall be [subject to fine and imprisonment].

18 U.S.C. § 1956(a)(3) (2000).

106. "Whoever [as a United States citizen or while within the territories of the United States], knowingly engages or attempts to engage in a monetary transaction in criminally derived property of a value greater than $10,000 and is derived from specified unlawful activity, shall be punished as provided in subsection (b)." 18 U.S.C. § 1957(a) (2000).

107. *See* 15 U.S.C. § 78m (2000).

108. 18 U.S.C. § 1956(a)(2)(B)(ii).

109. *Id.* § 1341 (criminalizing the use of U.S. Postal Service or private interstate carrier in connection with a fraudulent scheme).

110. *Id.* § 1343 (criminalizing the use of wire communications in connection with a fraudulent scheme).

111. 31 U.S.C. § 5316 (2000) (requiring all transportation of currency in excess of $10,000 to be

"Internal Revenue Code";[112] and the "False Statements Act";[113] and the Sarbanes-Oxley Act.[114]

### C. A Note of Caution

Parts I and II not only summarize the full breadth of the FCPA, but also showed how bribing foreign officials can trigger a number of other predicate federal criminal offenses. In view of the undisputed moral argument against bribery, any U.S. corporation that conducts even a small amount of business overseas will benefit from having a formal, written anti-bribery policy. This company policy should lay out procedures that aid its directors, officers, employees, agents, and even stockholders to differentiate between legitimate and illegitimate proposals, and payments and gifts to the different foreign officials covered by the statute.

U.S. companies' need for cautious conduct in their foreign transactions is particularly heightened now that other developed (and some less developed) countries have ratified the OECD Convention Against Bribery of Foreign Public Officials ("OECD Convention"). By expanding the applicability of anti-foreign bribery laws to major international competitors of U.S. companies, the OECD Convention has further reinforced this call for caution.

## III. THE OECD CONVENTION AND ITS REPERCUSSIONS IN U.S. LAW

### A. The Convention

Pursuant to article 15, paragraph 1, the OECD Convention entered into force on February 15, 1999, sixty days after Canada (the fifth among

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reported to the United States Treasury). *See* Zagaris, *supra* note 93, at 779.

112. U.S. corporate taxpayers may not deduct bribes that are illegal under the FCPA. *See* I.R.C. § 162(c)(1), which states:

> No deduction shall be allowed . . . for any payment made, directly or indirectly, to an official or employee of any government, or of any agency or instrumentality of any government, if the payment constitutes an illegal bribe or kickback or, if the payment is to an official or employee of a foreign government, the payment is unlawful under the Foreign Corrupt Practices Act of 1977.

*Id.* Notably, where any officer, director, employee, agent, or stockbroker of a U.S. company is fined for violating the FCPA, the U.S. company may not pay the fine or reimburse the individual who has been fined. *See* 15 U.S.C. § 78dd-2(g)(3) (2000).

113. This statute prescribes criminal penalties for persons or corporations that "knowingly make false, fictitious or fraudulent statements, or submit fraudulent documents to any department or agency of the United States government." *Id.* (referring to 18 U.S.C. § 1001).

114. *See generally* 15 U.S.C. §§ 7201, 7211 (2000) (establishing and authorizing Public Company Accounting Oversight Board to enforce accounting standards).

member-countries with the largest ten export shares) deposited its instrument of ratification.[115] The Convention requires, among other things, that signatories:

(1) adopt anti-bribery legislation barring the bribery of public officials to obtain or retain any improper advantage in the conduct of international business;[116]

(2) criminalize or create civil liability for bribing public officials;[117] and

(3) require companies to keep accurate books and records to stymie efforts to conceal corrupt payments.[118]

The OECD Convention addressed two problems that previously had affected FCPA enforcement: the question of jurisdiction[119] and the issue of cooperation in extraditing and prosecuting offenders.[120]

Regarding jurisdiction, the OECD Convention prescribed that signatories shall assert jurisdiction both over acts committed within their boundaries and over its citizens accused of engaging in proscribed conduct *anywhere*.[121] This represents a significant departure from the FCPA's territorially based approach to jurisdiction.[122] That approach had required the use of the mail or an instrumentality of interstate commerce in furtherance of a foreign bribe as a nexus for asserting jurisdiction of U.S. courts. This significant change raises the stakes for U.S. companies operating abroad. They now have to monitor compliance not only with an eye to territorially-based acts, but also with respect to conduct by any U.S. party anywhere in the world.

By requiring multilateral cooperation in the extradition and prosecution of offenders, the OECD Convention also has simplified significantly the investigatory hurdles the DOJ previously faced when dealing with

115. The other four countries were Germany, Japan, the United Kingdom, and the United States. The status of ratification and implementation is provided at the OECD's website, http://www.oecd.org/dataoecd/59/13/1898632.pdf (last visited on Nov. 9, 2005). As of November 9, 2005, thirty-six countries had deposited their instruments of ratification, among which, only Slovenia was still expected to enact legislation implementing the Convention.

116. *OECD Convention*, *supra* note 9, art. 1, para. 1.

117. *Id.*; *see also* arts. 2, 3, para. 1.

118. *Id.* art. 8, para. 1.

119. *Id.* art. 4, paras. 1, 2.

120. *Id*. art. 10.

121. *Id*. art. 1, para. 4(a).

122. *See* discussion *supra* Part I.C.1.

uncooperative countries.[123] More importantly, at least with respect to signatory countries, this approach eliminates two basic defenses to extradition: (a) that there is no extradition treaty; and (b) that the offense charged is not extraditable under a preexisting treaty.[124]

### *B. Domestic Repercussions*

In July 1998, the Senate approved both the OECD Convention and the implementing legislation.[125] Congress completed action on implementing legislation in October 1998.[126] The President signed the implementing legislation on November 10, 1998 and the ratification instrument on November 20, 1998.[127] The United States deposited its instrument of ratification with the OECD Secretary-General on December 8, 1998.[128]

Adoption of the International Anti-Bribery and Fair Competition Act of 1998[129] brought the United States in conformity with the Convention.[130] The 1998 Amendments expanded the FCPA in several areas: (1) the class of prohibited conduct; (2) extraterritorial jurisdiction over domestic companies and nationals;[131] (3) jurisdiction over foreign companies and nationals; and (4) the application of criminal sanctions against natural persons regardless of nationality. These amendments sought to close loopholes that had handicapped FCPA enforcement in the past.[132]

First, before the 1998 amendments, a corrupt act was defined as a payment to a foreign official, foreign political parties, party officials, and candidates for the purpose of (i) influencing *any act or decision of such person or party* in their official capacity, or (ii) inducing such person or party to do or omit to do *any act in violation of the lawful duty of such*

123. *OECD Convention*, *supra* note 9, art. 9.

124. Article 10, paragraph 2 establishes that "a Party which makes extradition conditional on the existence of an extradition treaty . . . may consider this Convention to be the legal basis for extradition in respect of the offence of bribery of a foreign public official." *Id.* art. 10, para. 2.

125. *See* Steps Taken and Planned Future Actions by Participating Countries to Ratify and Implement the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, OECD BRIBERY CONVENTION: STATUS OF RATIFICATION 1, 77 (2001), http://www.oecd.org/dataoecd/50/33/1827022.pdf (last visited on Nov. 9, 2005) ("Steps Taken and Planned Future Actions—Submissions as of 12 November 2004").

126. *Id.*

127. *Id.*

128. *Id.*

129. International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, § 2375, 112 Stat. 3302 (1998).

130. *See* Deming, *supra* note 12, at 512.

131. *See* discussion *supra* Part I.B.1.

132. For a more detailed discussion of each of these changes, see Deming, *supra* note 12.

*official or party*.[133] That definition has been amended and broadened to contemplate a payment to a foreign official to secure *any improper advantage*.[134]

Second, besides expanding the jurisdictional basis for liability of U.S. companies and nationals, the 1998 Amendments also created a new basis for civil and criminal penalties by imposing liability on any person, defined as "any foreign national or company that is not an issuer and does not have a principal place of business in the U.S., who commits any act in the U.S. utilizing the U.S. mails or other instrument of interstate commerce in furtherance of an unlawful, foreign bribe."[135] This means that a single act committed in the United States by a foreign non-resident national could now subject a foreign company with no U.S. operations to FCPA liability. On the other hand, a wholly owned foreign subsidiary that acts completely outside the United States in furthering a foreign bribe is still not subject to FCPA liability if the U.S. parent does not take any part in the proscribed conduct.[136]

Finally, the 1998 Amendments eliminated a previous disparity in sanctions against U.S. and foreign nationals who are employees or agents of a domestic company.[137] Previously, only U.S. nationals and permanent residents were subject to both civil and criminal sanctions, while foreign non-resident nationals were subject only to civil penalties.[138] Since 1998, all individuals are subject to both types of sanctions.[139] As I discussed earlier,[140] criminal sanctions include imprisonment for up to five years and fines of up $100,000 for individuals, or two million dollars for corporations.[141]

## IV. SOME BRIBERY SCENARIOS AND SOME PUZZLING QUESTIONS

As the foregoing parts indicate, the legitimate concern with combating bribery, first by the United States, and later by OECD members, has culminated with the proscription by more than thirty countries of the bribing of foreign officials. But these statutes can be very broad, and the

133. 15 U.S.C. § 78dd-1(a) (1997).
134. *Id.* § 78dd-1(a) (2000).
135. *Id.* § 78dd-2(a).
136. The U.S. company, however, could be held liable if an agency relationship or other form of vicarious liability (*e.g., respondeat superior*) is established.
137. *See* Deming, *supra* note 12, at 514.
138. 15 U.S.C. § 78dd-2(g) (1997).
139. *Id*. § 78dd-2(g) (2000).
140. *See* discussion *supra* Part I.B.1 and accompanying notes.
141. *See id.*

incentives for going forward with a highly profitable transaction frequently lead to "rationalizations" that may stretch concepts as fluid as, say, "grease payments" beyond reasonable bounds. It is no surprise, then, that attorneys are frequently under enormous pressure[142] from their clients to provide an unqualified legal opinion that a particular course of action will not lead to violations, despite the ethical caveat that "[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent . . . ."[143]

In areas where an attorney cannot render a clean opinion, corporate officers may face a difficult choice between losing a major sale and running the risk, even if limited, of a criminal violation. This tension between personal risk and corporate gain could create potential conflicts of interest between the corporation and its officers, and for the attorneys who represent them.[144] Certainly, issues under the FCPA and the OECD Convention raise questions of liability both for the company and its responsible officers—a situation which does not necessarily, but may raise conflict problems.[145]

As we consider the following hypothetical situations ((A)-(C)), it is worth keeping in mind the scope of the lawyer's role as advisor:

> In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, *a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors*, that may be relevant to the client's situation.[146]

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142. This pressure may be exponentially heightened in situations where counsel is licensed to practice law in a foreign jurisdiction, since the DOJ has noted that a factor in its decision to prosecute is whether the domestic concern was acting under advice of local counsel when it engaged in the questionable conduct. Jennifer Dawn Taylor, *Ambiguities in the Foreign Corrupt Practices Act: Unnecessary Costs of Fighting Corruption?*, 61 LA. L. REV. 861, 877 (2001).

143. MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (2002).

144. Panel discussion on Solving Your Clients' Sanctions and Export Control Problems, William L. Clements, Lucinda A. Low, J. Scott Maberry, O'Neil Woelke, panelists, *in* GEORGETOWN UNIV. LAW CTR., INTERNATIONAL TRADE UPDATE 2004: TRENDS, TIPS AND PRACTICAL ADVICE 136 (Jan. 29–30, 2004) (on file with author).

145. *See* MODEL RULES OF PROF'L CONDUCT R. 1.13(g) (2002). This rule generally permits a lawyer to represent both an organization and any of its directors, officers, members, etc., subject to Rule 1.7. Rule 1.7 generally prohibits a lawyer from representing a client "if the representation of that client will be directly adverse to another client." *Id.* R. 1.7(a)(1) (2002).

146. *Id.* R. 2.1 (2002) (emphasis added). *See also* MODEL CODE OF PROF'L RESPONSIBILITY EC 7-8 (1983) ("Advice of a lawyer to his client need not be confined to purely legal considerations.").

*A. Hypothetical Situation: What is a Commission, What is a Bribe?*

A U.S. manufacturer of irrigation valves is asked to supply a Ruritanian[147] corporation with $500,000 worth of valves, an order that would represent thirty percent of the U.S. company's yearly sales. The U.S. manufacturer's Ruritanian "agent," a private party, requests that a commercial invoice of $600,000 be presented with the goods to the ultimate customer (the Ruritanian agricultural development agency), and that the U.S. company, once it receives payment, deposit $100,000 of the proceeds—a "commission"—in a *numbered* Swiss bank account.[148] The sales manager for the U.S. company is aware that the normal commission for such transaction is between two and five percent of the invoiced value, and is aware that an abnormally high commission can trigger a "red flag" under the company's FCPA compliance procedures.

It is not clear whether the recipient of these funds is a private or a foreign official. Thus, the client would not know whether this is a commission or a bribe. Being aware of how this sale so clearly affects his client, how should counsel to the U.S. manufacturer advise his client?

At first, this example appears to present a straightforward decision because the facts and legal issues are easily ascertainable, and they point against going ahead with the transaction for a number of reasons. First, as discussed above,[149] the term "knowing" includes "conscious disregard and deliberate ignorance" and will not insulate a corporation from prosecution under the FCPA.[150] A reasonable level of diligence thus is required and, should this transaction be investigated, it would be very hard to demonstrate that the client "actually believed" no bribery was involved.[151]

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147. Although I am assuming that Ruritania is a less developed country, I do not hold the naïve view that government official corruption only occurs in these countries.

148. The use of a Swiss bank account to further an alleged bribery operation is one of the elements of recent SEC civil injunctive action before the Southern District of New York. *See* SEC v. Joshua C. Cantor, Civil Action No. 03 CV 2499 (LMM) (S.D.N.Y. Apr. 10, 2003). Among other charges, the SEC alleges that the defendant "violated the anti-bribery provisions of the federal securities laws by causing [his former employer] to pay $239,000 to a Swiss bank account for the purpose of influencing or affecting the acts or decisions of one or more Saudi Arabian officials . . . to assist [his former employer] in obtaining or retaining business with that government." U.S. Securities and Exchange Commission, Litigation Release No. 18081 (Apr. 10, 2003), *available at* htpp://www.sec.gov/litigation/litreleases/lr18081.htm. The factors in this hypothetical are in no way related to this case.

149. *See supra* Part I.B.2.

150. *See* Dep't of Comm., Foreign Corrupt Practices Act Antibribery Provisions, *supra* note 40.

151. *See* H.R. REP. NO. 576, *supra* note 48, at 920. *See also id.* at 1954.

> [K]nowledge of a fact may be inferred where the defendant has notice of the high probability of the existence of the fact and has failed to establish an honest, contrary disbelief. The inference cannot be overcome by the defendant's "deliberate avoidance of knowledge," his or

Second, though no foreign official is directly involved or even mentioned, a twenty percent commission is highly suspicious, especially because the client has paid much lower commissions, and counsel knows that willful ignorance will not suffice as a defense to foreign bribery, particularly where such discrepancies are involved.[152] Third, the use of an unnamed, numbered Swiss bank account, while decreasing the risk of detection in Ruritania and possibly in the United States, will implicate the client if this transaction triggers an investigation. It creates an aura of secretiveness and suspicion.[153]

From a practical standpoint, however, this decision is more complicated due to the potential gains from this transaction (i.e., thirty percent of the company's sales in a year). The client may be strongly dissuaded from heeding counsel's sound legal advice, and, worse, the circumstances may cause the client to think counsel is too risk-averse or merely trying to protect himself from liability. These perceptions can strain significantly the relationship between the client and his attorney, thus creating perverse incentives for the latter to issue an opinion advising the client to obtain assurances from the Ruritanian agent that the commission money will not be siphoned off to local authorities and that it is reasonably related to his activities as an agent. The business efficacy of this opinion, however, is questionable, for it is doubtful that the agent will agree to such stipulations.

### B. *Hypothetical Situation: What Is Missing When Paying a Bribe Is Defined Only as Making a Payment or Conferring an Advantage to a Foreign Public Official?*

A U.S. citizen managing a wholly-owned Ruritanian subsidiary of a U.S. information technology company is approached by the head of the local union and proposed the following: the union official will guarantee a year of "labor peace" if the Ruritanian subsidiary pays the union leader $1,000 per month into a designated account in a bank in Miami. Payment of this "guarantee" would be worth far more to the company in

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> her "willful blindness," or his or her "conscious disregard," of the existence of the required circumstance or result.

*Id*. (quoting United States v. Manrique Aribizo, 833 F.2d 244, 249 (10th Cir. 1987), United States v. Kaplan, 832 F.2d 676, 682 (1st Cir. 1987), *cert denied*, 485 U.S. 907 (1988), and United States v. McAllister, 747 F.2d 1273, 1275 (9th Cir. 1984), *cert denied*, 474 U.S. 829 (1985)).

152. *Id*.

153. These evading procedures are precisely what the original FCPA legislators intended to deter. *See id.*

maintaining continuity of its operations than the relatively minor cost of the payment. The manager consults U.S. counsel and asks for an opinion.

Because the union official does not meet the definition of a "foreign public official" under either the FCPA or the Convention, counsel can feel secure to inform his client that the transaction is *not* illegal. This scenario, however, shows a major gap in the current OECD/FCPA anti-foreign bribery scheme: bribery which may seriously undermine a significant foreign public interest, namely, that of having fairly uncorrupt labor unions, may go unpunished.[154]

Although U.S. counsel may be aware that Ruritanian law obviously proscribes such conduct, she knows that this may not figure as prominently among her client's concerns as a full-blown DOJ or SEC investigation. Counsel is nonetheless required to caution her client about the possibility of foreign criminal and civil liability, and she is well-advised to abstain from suggesting to her client that this operation is perfectly okay merely because it is beyond the scope of the FCPA and the OECD Convention.[155] It should be clear to counsel that such a payment, though occurring abroad, would be considered squarely corrupt and illegal should it occur within the United States.[156]

Moreover, this situation would further corruption in Ruritania as well as corrupt the business practices of a U.S. company, which is at odds with the policy aims of the FCPA.[157] This scenario is also at odds with other current developments of international law in the areas of corruption and bribery. Since 1998, the United Nations has been in the process of drafting and promoting ratification of a convention[158] that encourages signatories to adopt legislation that would deter both public and private acts of corruption.[159] The United States is a signatory of this convention and,

154. As discussed below, the author is aware that article 21 of the new United Nations Convention Against Corruption, U.N. Doc A/58/422 (adopted Oct. 31, 2003) ("U.N. Convention"), extends bribery prohibitions to actions between private individuals.

155. As discussed *supra*, the FCPA and OECD Convention only targets bribery of foreign officials, not of private individuals. *See* 15 U.S.C. § 78dd-1(a), -2(a), -3(a); *OECD Convention*, *supra* note 9, art. 1, para. 1.

156. *See* 29 U.S.C. § 186(a) and (b) (Taft-Hartley Act).

157. *See* DOJ Website, *supra* note 6 ("Congress enacted the FCPA to bring a halt to the bribery of foreign officials and to restore public confidence in the integrity of the American business system.").

158. The U.N. Convention entered into force on December 14, 2005. Press Release L/T/4389, U.N. Department of Public Information, Convention against Corruption ratified by 30th state, Will Enter into Force 14 December 2005, http://www.un.org/News/Press/docs/2005/lt4389.doc.htm.

159. The U.N. Convention provides:

> Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally in the course of economic, financial or commercial activities:

presumably, with its ratification would implement laws to prohibit transactions such as the one described in this hypothetical, or at least to establish its jurisdiction over the acts of a U.S. national committed in Ruritania that would be in violation of either U.S. or Ruritanian bribery laws. Until that time, U.S. lawyers are placed in the awkward position of having to balance ethical and professional dilemmas with their clients' commercial interests.

Rule 2.1 of the Model Rules of Professional Conduct suits this situation very well: "a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."[160] In this situation, counsel is directed by both domestic law as it currently stands as well as developments in international law that signal that the proposed transaction should be discouraged.[161]

### C. *Hypothetical Situation: What if a Charitable Donation Comes Close to the Functional Equivalent of a Bribe?*

A U.S.-based telecommunications company, and other U.S. and foreign competitors are seeking a concession with a state government in Ruritania, a densely populated nation, to lay and operate a multi-billion fiber optic data transmission network. Ruritania's Minister of Telecommunications suggests to the U.S. company's Chief Operations Officer ("COO") that some sort of substantial demonstration of the firm's "commitment" to its Ruritanian expansion would greatly increase the company's chances of

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> (a) The promise, offering or giving, directly or indirectly, of an undue advantage to any person who directs or works, in any capacity, for a private sector entity, for the person himself or herself or for another person, in order that he or she, in breach of his or her duties, act or refrain from acting;
>
> (b) The solicitation or acceptance, directly or indirectly, of an undue advantage by any person who directs or works, in any capacity, for a private sector entity, for the person himself or herself or for another person, in order that he or she, in breach of his or her duties, act or refrain from acting.

U.N. Convention, *supra* note 154, art. 21.

In addition, the U.N. Convention gives a State Party jurisdiction over an act of correction if the offense is committed by a national of that State Party or a stateless person who has his or her habitual residence in its territory. *Id*. art. 42(b).

160. MODEL RULES OF PROF'L CONDUCT R. 2.1 (2002).

161. From a strictly a moral standpoint, counsel should consider that advising the client to go through with such a transaction would violate various human rights of the workers involved, effectively imposing silence against potential labor abuses, and also would impede the workers' realization of their human right to a corruption-free society. *See* Ndiva Kofele-Kale, *The Right to a Corruption-Free Society as an Individual and Collective Human Right: Elevating Official Corruption to a Crime Under International Law*, 34 INT'L LAW. 149 (Spring 2000).

winning the concession award. As the COO explains the provisions of the FCPA to the Minister, she perceives his distancing and skeptical facial expressions with respect to the likelihood of her company's chances of being selected. The COO now is convinced that failure to respond positively to the Minister's opening will result in loss of the contract, but she has no intention of exposing either her company or herself to criminal liability. She contacts the corporation's U.S. headquarters and hears from a company official that perhaps the Minister is more interested in political gain and power than "actual bribery." Headquarters then suggests that she propose that the U.S. company will build and fully furnish a new two million dollar public library and museum in the official's electoral district, if awarded the telecom contract. The company official suggests that the U.S. company would donate the money to a U.S. foundation that would disburse the funds to a local charity, which then would hire local contractors selected under a closed-bid scheme, but that at no moment would the Minister have access to the funds. The Minister would obviously be invited to, and would also appear prominently in, the opening festivities. Counsel is requested to provide his own certification that this deal complies with the FCPA and the OECD Convention.

Because the foreign official will have no access to the donated money and receive no ascertainable value—only a fairly remote opportunity for political gain—this transaction may fall beyond the scope of the FCPA's definition of "corrupt payment."[162] Yet, this situation is beyond the innocuous charitable donations that the DOJ has previously determined not to investigate under the FCPA.[163] The transaction presented here involves a narrow political quid pro quo in which the involvement of the foreign official is central to the charitable offer. As this situation has the

162. *See* 15 U.S.C. §§ 77dd-1(a), dd-2(a), dd-3(a).

163. In two separate Opinion Procedure Releases, the DOJ indicates that charitable donations by a company either already engaged in the construction of a plant or planning to acquire and operate a plant in a foreign country will not be investigated. *See* Foreign Corrupt Practices Act Review, Opinion Procedure Release, No. 97-02, Nov. 5, 1997, *available at* http://www.usdoj.gov/criminal/fraud/fcpa/o9702.htm (donating $100,000 for a proposed school construction project is acceptable because the donation was made directly to the government entity responsible for the construction, not to any foreign official) (last visited Nov. 9, 2005); Foreign Corrupt Practices Act Review, Opinion Procedure Release, No. 95-01, Jan. 11, 1995, *available at* http://www.usdoj.gov/criminal/fraud/fcpa/o9501.htm (approving a donation of $10 million in a public ceremony for the construction of a medical facility in the region where a U.S. company plans to acquire and operate a plant, where the donation was made through a charitable organization incorporated in the United States and through a limited liability company in the foreign nation, both of which signed certifications that none of the funds will be offered in violation of the FCPA, none of the persons involved were affiliated with the foreign government, and the company required audited financial reports detailing the disposition of the donated funds) (last visited Nov. 9, 2005).

basic characteristics of a bribe (although lacking in tangible value), if it were made apparent to the DOJ, the latter would *likely* initiate an investigation. Thus, counsel again is faced with a hard decision: while this transaction would appear to be a purely charitable donation, the addition of certain internal facts changes its character to one that is suspicious and far from innocent.

Furthermore, it is at least arguable that this transaction would come under the purview of the "undue pecuniary or other advantage" language of the OECD Convention.[164] Opponents of such a broad reading could plausibly claim that any further stretching of the definitions of "paying, offering or giving *something of value*,"[165] or "intentionally offering, promising or giving any undue pecuniary or other *advantage*"[166] to cover situations like these would render illegal virtually all contact between private interests and government officials, no matter how tenuous the connection, merely because such conduct results in political gain for the latter. Yet, the laws implementing the Convention in various signatory countries certainly leave open the possibility that offering or giving such a donation would be an "undue advantage" or "bribe."[167] This leaves

164. *See OECD Convention*, *supra* note 9, art. 1, para. 1.

165. *See* 15 U.S.C. §§ 77dd-1(a), -2(a) (2000) (emphasis added).

166. *See OECD Convention*, *supra* note 9, art. 1, para. 1 (emphasis added).

167. OECD country reports on the signatory states' implementation of the Convention reveal that some states envision a very broad interpretation of bribe or undue advantage. *See* OECD, Country Reports on the Implementation of the Convention, *available at* http://www.oecd.org/document/24/0,2340,en_2649_34859_1933144_1_1_1_1,00.html (last visited Nov. 9, 2005). For example, the Luxembourg Criminal Code includes in its definition of a bribe "any advantages whatsoever," reflecting their desire to cover "any other advantage whatsoever, whether material, intellectual or social, for the offender or for any other person . . . [and] approaches of all kinds, recommendations, favorable interventions, votes, sexual relations, etc." OECD, *Luxembourg: Review of Implementation of the Convention and 1997 Recommendation*, at 5, *available at* http://www.oecd.org/dataoecd/39/40/2019732.pdf (last visited Nov. 9, 2005). The Slovak Criminal Code and Slovak Authorities define bribery as an undue advantage in the form of a pecuniary or natural performance, or any other advantage (e.g., mutual service or assistance) and that it comprises anything that can be defined as a benefit, including "dealing with a case in a shorter time as usual, the offering of a better carrier perspective or promotion, or the granting of additional holidays." OECD, *Slovak Republic Review of Implementation of the Convention and 1997 Recommendation*, at 4, *available at* http://www.oecd.org/dataoecd/16/15/2389408.pdf (last visited Nov. 9, 2005). Usually, a bribe is any advantage, with only small exceptions for gifts or advantages of minor value or that are "socially acceptable," or in some cases if it is permitted by law or case law. *See id. See also* OECD, *France: Review of Implementation of the Convention and 1997 Recommendation*, at 6, *available at* http://www.oecd.org/dataoecd/24/50/2076560.pdf ("corruption involves the act of proposing 'without right' . . . . [T]he term without right means that the advantage is neither permitted by law nor required by any statute or case law currently in force.") (last visited Nov. 9, 2005); OECD, *Korea: Review of Implementation of the Convention and 1997 Recommendation*, at 2, *available at* http://www.oecd.org/dataoecd/15/6/2388296.pdf ("case law confirms that the advantage, which is the substance of the bribe, includes money, goods and other pecuniary advantages, as well as intangible benefits (such as the opportunity of having a sexual relationship) that satisfy the demand or desire of a person.") (last visited Nov. 9,

counsel in a particularly perplexing position, as it is far from clear whether this transaction would be prohibited, given that it would depend on how Ruritania adopted the Convention and interpreted its meaning.

In addition, even if one assumed that this transaction does not implicate either the FCPA or the OECD Convention, this does not mean that this transaction is fair. Indeed, to focus only on a given client's civil or criminal liability deflects attention from the inherently unfair nature of such transaction, for one of its direct consequences is that both U.S. and non-U.S. competitors of the successful corporation here might never get a fair chance. This scenario then shows another major gap in the current anti-foreign bribery scheme: charitable contributions that come fairly close to the functional equivalent of a bribe will continue to undermine the inherent fairness of foreign transactions if they are not required to be disclosed fully well in advance of a final foreign contract award.

One may posit, however, that requiring full disclosure of donations linked to international business transactions would not ultimately improve fairness in international business transactions because competitors might then try to hide such contributions, or merely engage in outright corruption efforts. But this "race to the bottom" argument will not carry the day so long as the current anti-bribery regime is kept in place. Moreover, requiring more disclosure while keeping or increasing the current level of enforcement may have quite a different result: it may provide strong incentives for a "race to the top" in terms of foreign competition. We need not look much farther than at the present example. If disclosure is required, the U.S. telecom might be forced to "up the ante" after one of its competitors makes a higher "charitable donation." Whoever makes a more significant "bid" will win the contract.

## CONCLUSION

As required by the FCPA and other federal statutes, companies engaged in international business transactions must exercise great care in ensuring their compliance with the rules governing such transactions. While the OECD Convention closely resembles the FCPA, it is clear that

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Moreover, one can argue that the U.N. Convention may also require states to bar this type of transaction regardless whether it involves a public or *private* figure. The U.N. Convention prohibits, with respect to both public and private figures, making a promise, gift, offer, solicitation, or acceptance of an "undue advantage." U.N. Convention, *supra* note 154, arts. 16, 21. Again, this depends upon a broad reading of the term "bribe" or "undue advantage," which as discussed above, many countries have already adopted in their implementing statutes.

it effectuated a tremendous change. Due to the OECD Convention's adoption by more than thirty-five nations, the United States is no longer the sole country with clear policies and laws geared towards fighting corruption in foreign transactions.[168] Furthermore, the Convention's importance lies in the fact that it provides for essential mutual legal assistance among signatory countries.[169] This development has led a commentator to indicate that the Convention "will enable U.S. authorities to acquire evidence that typically was not obtainable in the past."[170]

The net result of these developments is that international legal practitioners not only are going to be at the forefront of the developing anti-bribery mechanisms, but will also be more often challenged by them. So long as clients tread the fine line that separates legality from bribery, lawyers will have to rely on the ethical principles contained in the professional rules of conduct. Neither the FCPA nor the OECD Convention are equipped to deter all forms of foreign corruption that may occur. In the end, as is the case in other legal areas, there is no substitute for professional and ethical judgment.

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168. *See* Steps Taken and Planned Future Actions by Participating Countries to Ratify and Implement the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Information as of 17 December 2003, http://www.oecd.org/dataoecd/50/33/1827022.pdf (last visited Nov. 9, 2005).

169. *OECD Convention*, *supra* note 9, art. 9.

170. Deming, *supra* note 12, at 515.