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A Global Economy and the Foreign Corrupt Practices Act: Some Facts Worth Knowing

I. INTRODUCTION

As U.S. companies do business in an ever increasing global economy, they risk being caught in a legal dilemma. A World Bank survey of 3,600 firms in sixty-nine nations revealed that forty percent of businesses are paying bribes.¹ Fifteen percent of businesses in industrial countries pay bribes while the percentage in the former Soviet Union is a staggering sixty percent.² From these statistics, it is clear that bribery is a way of doing business in much of the world. U.S. companies eager to do business in foreign countries may be tempted to pay the necessary bribes to various foreign officials in an effort to secure contracts. Unfortunately for these companies, the Foreign Corrupt Practices Act may prove to be an impenetrable barrier standing between the American company and the contract.

The Foreign Corrupt Practices Act forbids the bribery of foreign officials with few exceptions. In addition, the Act imposes accounting requirements on many U.S. companies. This legislation is to be taken seriously, as Lockheed found in 1995 when it was forced to pay \$24.8 million in penalties for bribing an Egyptian official.³

This Comment will first address the history leading up to the adoption of the Foreign Corrupt Practices Act. A discussion of the provisions of the Foreign Corrupt Practices Act will follow. Next is an analysis of cases interpreting the Foreign Corrupt Practices Act. This is followed by a discussion of the difficulties particular to transitional economies, such as Russia, and developing countries such as China. Finally, this Comment will discuss ways a U.S. business can avoid running afoul of the Foreign Corrupt Practices Act.

1. Thomas Omestad, *Bye-Bye to Bribes: The Industrial World Takes Aim at Official Corruption*, U.S. NEWS & WORLD REP., Dec. 22, 1997, at 42.

2. *Id.*

3. Martha Groves, *Careers / Ethics at Work: Honor System Even in an Increasingly Competitive Business Climate, Some Firms are Finding that It Pays to Focus on Doing the Right Thing*, L.A. TIMES, Nov. 3, 1997, at D23. Lockheed paid the bribes in an effort to secure the contract for certain planes. *Id.* As will be seen below, Lockheed's earlier practices substantially contributed to the passing of the Foreign Corrupt Practices Act.

II. HISTORY LEADING UP TO THE FOREIGN CORRUPT PRACTICES ACT

The American disaster known as Watergate eventually led to the Foreign Corrupt Practices Act.⁴ Besides the affairs that led to the downfall of the Nixon administration, investigators began examining political corruption generally. Corporate slush funds⁵ were a major focus of these investigations. The Securities and Exchange Commission (SEC) became involved in the matter and soon discovered something it had not expected—the money in the slush funds was being used to bribe foreign officials in order to gain business.⁶ Over four hundred companies admitted to making payments to foreign officials for this purpose.⁷ In all, more than three hundred million dollars exchanged hands in the 1960s and 1970s.⁸ The Lockheed Aircraft Corporation was among the more prominent examples, giving more than thirty million dollars to various foreign officials between 1961 and 1975.⁹ Bribes to foreign officials have also been credited for the serious problems faced by the governments of Japan, The Netherlands, and Italy.¹⁰

The SEC's first response to this crisis was to implement a procedure of voluntary disclosure. By voluntarily disclosing questionable payments, a corporation could gain some immunity if it would agree not to make such payments in the future and to maintain an accounting system that would make any bribes identifiable.¹¹ Though this procedure appeared to be a step in the right direction, it was not perfect. The independent investigators sometimes

4. See Lisa Harriman Randall, Note, *Multilateralization of the Foreign Corrupt Practices Act*, 6 MINN. J. GLOBAL TRADE 657, 658 (1997).

5. A slush fund was an account that was off the books and enabled the company to make payments to gain influence in the United States. See Mark J. Murphy, *International Bribery: An Example of an Unfair Trade Practice?*, 21 BROOKLYN J. INT'L L. 385, 392 (1995).

6. Randall, *supra* note 4, at 658.

7. Brett Witter, Note, *Lamb v Phillip Morris, Inc.*, 915 F.2d 1024 (6th Cir. 1990): *The Sixth Circuit Gets Sheepish on Foreign Corrupt Practices Act Enforcement*, 5 TRANSNAT'L LAW. 533, 535 (1992).

8. *Id.*

9. *Id.* Lockheed was by no means the only fortune 500 company to be involved in these activities. Exxon paid more than \$56 million and Northrup more than \$30 million. JEFFREY P. BIALOS & GREGORY HUSISIAN, *THE FOREIGN CORRUPT PRACTICES ACT: COPING WITH CORRUPTION IN TRANSITIONAL ECONOMIES* 24 n.77 (1997) (citing SECURITIES & EXCHANGE COMM'N, 94TH CONG., 2D SESS., REPORT ON QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES, 1 (Comm'n Print 1976)).

10. Randall, *supra* note 4, at 658.

11. Randall, *supra* note 4, at 661-62. In addition, the corporation was required to assign an independent investigator to look into the matter. Randall, *supra* note 4, at 662. After making a report to the corporation's board, the independent investigator released his or her findings to the public. Randall, *supra* note 4, at 662.

received little cooperation from the corporations.¹² In addition, the Freedom of Information Act required the SEC to make investigatory records public, resulting in the leak of confidential corporate information.¹³ Finally, these requirements of disclosure obviously only reached those entities governed by the SEC.

The Foreign Corrupt Practices Act was unanimously passed by Congress in 1977.¹⁴ This put the United States ahead of the rest of the world governments in stamping out corruption.¹⁵ Not only do other countries not prohibit bribery of foreign officials, many, such as Germany, actually allow the bribe to be deducted as a business expense.¹⁶

To date, the U.S. is the only country to criminalize the paying of bribes to foreign officials;¹⁷ however, that may soon change. The Organization of American States adopted the Inter-American Convention Against Corruption of the Organization of American States (OAS) in 1996.¹⁸ The OAS agreement obligates the member states to prohibit payments to foreign officials.¹⁹

More recently, the Organization of Economic Cooperation and Development (OECD) agreed in November of 1997 to a pact that takes real steps toward eliminating the bribery of foreign officials.²⁰ In addition to the twenty-nine members of OECD, the agreement involves Argentina, Brazil, Bulgaria, Chile, and the Slovak Republic.²¹ The treaty requires members to adopt a definition of bribery that is similar to the definition under the Foreign Corrupt Practices Act.²² Additionally, members must impose criminal penalties on people or businesses who bribe foreign officials.²³ Finally, the treaty provides that the proceeds and profits of bribes (including any transactions resulting from a bribe) can be confiscated.²⁴ Though some have criticized the OECD treaty as not going far enough,²⁵ it is at least a step in the right direction.

12. Randall, *supra* note 4, at 664.

13. Randall, *supra* note 4, at 664.

14. BIALOS & HUSISIAN, *supra* note 9, at 24.

15. BIALOS & HUSISIAN, *supra* note 9, at 26-27.

16. Beverley Earle, *The United States' Foreign Corrupt Practices Act and the OECD Anti-bribery Recommendation: When Moral Suasion Won't Work, Try the Money Argument*, 14 DICK. J. INT'L L. 207, 234 (1996).

17. BIALOS & HUSISIAN, *supra* note 9, at 26.

18. Joongi Kim & Jong Bum Kim, *Cultural Differences in the Crusade Against International Bribery: Rice-Cake Expenses in Korea and the Foreign Corrupt Practices Act*, 6 PAC. RIM L. & POL'Y J. 549, 553 (1997).

19. *Id.* at 553-54.

20. Jack Nelson, *Nations to Fight Commercial Bribery*, SEATTLE TIMES, Nov. 21, 1997, at A3.

21. *EU/OECD: OECD Brokers Agreement on Bribery*, EUROPEAN REP., Nov. 26, 1997, available in 1997 WL 13048009.

22. Nelson, *supra* note 20, at A3.

23. Nelson, *supra* note 20, at A3.

24. Nelson, *supra* note 20, at A3.

25. For example, the treaty does not prohibit bribes to political party officials.

There may be hope for change even in Africa, where bribery and corruption is considered by many to be at its highest level. Six African countries have expressed their intent to end bribery.²⁶

Finally, the World Bank and the International Monetary Fund have also taken steps to discourage bribery.²⁷ The day seems to be rapidly approaching when the United States will not be alone in its stand against bribery.²⁸

III. THE PROVISIONS OF THE FOREIGN CORRUPT PRACTICES ACT

The Foreign Corrupt Practices Act (FCPA) has provisions applicable to two different categories—issuers and domestic concerns. The term “issuer” includes those companies “which ha[ve] a class of securities registered pursuant to section 781 of this title [Section 15 of the Securities Exchange] or which is required to file reports under section (780(d)) of this title.”²⁹ A “domestic concern” is defined in the act as “any individual who is a citizen, national, or resident of the United States, and 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.”³⁰ One can clearly see that the FCPA has an extremely broad reach.

Anne Swardson, *34 Nations Promise to Curb Bribery: Treaty to Cover Some Foreign Officials*, WASH. POST, Nov. 22, 1997, at A16. In addition, the treaty allows nations to grant tax deductions for bribes. *Id.* Finally, the treaty does not require the official taking the bribe to be punished. *Id.*

26. *Ungreasing the Palm*, CHRISTIAN SCI. MONITOR 20, Nov. 14, 1997, available in 1997 WL 2805240.

27. *Id.* The World Bank does not finance projects that are not clearly free from bribery. *Id.* The IMF stops its funding once it discovers some of its money has been diverted to private parties. *Id.*

28. Several reasons have been put forth as explaining why a multi-lateral prohibition against the bribery of foreign officials has been largely unforthcoming. One of the chief reasons is the fact the definition of “bribery” varies from country to country. Kim & Kim, *supra* note 18, at 557. This makes it very hard to develop a universal consensus as to what constitutes “bribery.” In addition, many countries find the pressure to prohibit bribery of foreign officials offensive, seeing it as an impingement on their sovereignty. Kim & Kim, *supra* note 18, at 558. These countries believe that the foreign country where the officials are accepting the bribes should be the country to deal with the situation. Kim & Kim, *supra* note 18, at 558. In addition they are resentful of what they see as an attempt by the United States to impose its values on their country. Kim & Kim, *supra* note 18, at 558.

29. See 15 U.S.C. § 78dd-1(a) (1994).

30. 15 U.S.C. § 78dd-2(h)(1) (1994).

In addition to denoting two categories of potential defendants, the FCPA attacks bribery in two different ways—through accounting and anti-bribery provisions.

A. Accounting Provisions

The FCPA imposes certain accounting requirements on issuers by amending the Securities Exchange Act. The accounting provisions are only applicable to issuers, so domestic concerns need not worry about them.³¹ The FCPA requires issuers to “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.”³² In addition, issuers are required to establish a system whereby there are “reasonable assurances” that company action is properly authorized.³³ The terms “reasonable assurances” and “reasonable detail” mean the “level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs.”³⁴

To be criminally liable under these provisions, an issuer must “knowingly circumvent or knowingly fail to implement a system of internal accounting controls or knowingly falsify any book record or account.”³⁵ This assures that companies need not fear liability for inadvertent errors.

In addition to the protection from inadvertent errors, the FCPA provides protection for the issuer who owns less than fifty percent of another business.³⁶ A United States corporation will not be liable under the accounting provisions for the actions of other businesses (foreign or domestic) so long as the issuer makes a good faith attempt to secure FCPA compliance.³⁷

The purpose of the accounting provisions is to prevent the buildup of “slush funds” that were used in the past to make questionable payments.³⁸ An

31. 15 U.S.C. § 78m(a) (1994).

32. 15 U.S.C. § 78m(b)(2)(A) (1994).

33. 15 U.S.C. § 78m(b)(2)(B) (1994). Whether a company’s control structure is sufficient is determined by the SEC using a variety of factors, including the following: “(1) role of the board of directors, (2) communication of corporate procedures and policies, (3) assignment of authority and responsibility, (4) competence and integrity of personnel, (5) accountability for performance and for compliance with policies and procedures, and (6) objectivity and effectiveness of the internal audit function.” Michael D. Nilsson, *Foreign Corrupt Practices Act*, 33 AM. CRIM. L. REV. 803, 806 (1996) (citing SEC Notice of Withdrawal of Proposed Rules Regarding Statement of Management on Internal Accounting Controls, 45 Fed Reg. 40,135, 40,139 to 40,143 (1980)).

34. 15 U.S.C. § 78m(b)(7) (1994).

35. 15 U.S.C. § 78m(b)(5) (1994).

36. 15 U.S.C. § 78m(b)(6) (1994).

37. 15 U.S.C. § 78m(b)(6) (1994).

38. Lisa Harriman Randall, Note, *Multilaterlization of the Foreign Corrupt Practices Act*, 6 MINN. J. GLOBAL TRADE 657, 666 (1997).

important aspect of the accounting requirements under the FCPA is that all issuers must comply with them, whether or not they do any foreign business.³⁹

B. Anti-Bribery Provisions

The anti-bribery provisions of the FCPA apply to both issuers and domestic concerns. Though these provisions are codified separately (15 U.S.C. § 78dd-1 for issuers and 15 U.S.C. § 78dd-2 for domestic concerns), they are virtually identical. The FCPA prohibits:

1. Certain issuers of U.S. securities, domestic concerns, the officers, directors, employees, and agents thereof, stockholders acting on behalf of such firms, and U.S. individuals;
2. from making use of the mails or some other means of interstate commerce;
3. corruptly;⁴⁰
4. in furtherance of an offer, payment, promise to give, or an authorization of an offer, payment, or gift;⁴¹
5. to any foreign official, foreign political party, or candidate for political office;⁴²
6. for the purpose of either (i) influencing any act or decision of that foreign official or (ii) inducing that official to use influence to affect or influence any act of a foreign government or its instrumentality in order to assist such issuer or domestic concern in directing business to any person or in obtaining or retaining business with any person.⁴³

39. Nilsson, *supra* note 33, at 805.

40. The term "corrupt" is not defined in the statute. However, legislative history defines the term to mean "a purpose to induce the recipient to misuse his official position in order to wrongfully direct business to the payor or his client, or to obtain preferential legislation or a favorable regulation," and "connotes an evil motive or purpose, and intent to wrongfully influence the recipient." BIALOS & HUSISIAN, *supra* note 9, at 36.

41. It is important to note that the plan to bribe does not have to actually grow to fruition. Liability is triggered when action "in furtherance" of the plan is taken. BIALOS & HUSISIAN, *supra* note 9, at 32-33.

42. Bribes paid to private individuals are not covered by the FCPA.

43. BIALOS & HUSISIAN, *supra* note 9, 29 (citing 15 U.S.C. § 78dd-1 (1994) (issuers); 15 U.S.C. § 78dd-2 (1994) (domestic concerns)). With respect to the sixth part, it has been said that situations where action is taken "with the expectation of a profit" meet this requirement. BIALOS & HUSISIAN, *supra* note 9, at 34. It is not necessary to make the payments in hopes of gaining business with a foreign government. The important element of this requirement is that the payment was made to a foreign official, party, or office. BIALOS & HUSISIAN, *supra* note 9, 34-35.

In addition, the FCPA prohibits payments made to third parties “while knowing” that the money will be used to make payments prohibited by the act.⁴⁴ “Knowing” is said to mean that a person “is aware that such [third party] is engaging in such conduct, that such circumstances exists, or that such result is substantially certain to occur; or such person has a firm belief that such circumstances exists or that such result is substantially certain to occur.”⁴⁵ Actual knowledge of illegality is not required.⁴⁶ Thus, a “conscious disregard” of the situation will trigger liability.⁴⁷ In other words, one cannot avoid liability by sticking one’s head in the sand.

The FCPA prohibitions do not apply to payments used to facilitate “the performance of a routine governmental action.”⁴⁸ “Routine governmental action” is defined by the statute as follows:

[A]n action which is ordinarily and commonly performed by a foreign official in—

- (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
- (v) actions of a similar nature.⁴⁹

In other words, this exception applies to non-discretionary actions by the foreign official—duties the official is supposed to perform anyway. Congress realized that prohibiting U.S. companies from making such payments would put them at a serious disadvantage because officials in many countries use such payments to supplement their income.⁵⁰ The exception does not apply to discretionary

44. 15 U.S.C. § 78dd-1(a)(3) (1994) (issuers); 15 U.S.C. § 78dd-2(a)(3) (1994) (domestic concerns).

45. 15 U.S.C. § 78dd-1(f)(2)(A) (1994) (issuers); 15 U.S.C. § 78dd-2(h)(3)(A) (1994) (domestic concerns).

46. BIALOS & HUSISIAN, *supra* note 9, at 40.

47. BIALOS & HUSISIAN, *supra* note 9, at 40-41 (citing H.R. CONF. REP. NO. 576, at 919-21 (1988)).

48. 15 U.S.C. § 78dd-1(b) (1994) (issuers); 15 U.S.C. § 78dd-2(b) (1994) (domestic concerns).

49. 15 U.S.C. § 78dd-1(f)(3)(A) (1994) (issuers); 15 U.S.C. § 78dd-2(h)(4)(A) (1994) (domestic concerns).

50. BIALOS & HUSISIAN, *supra* note 9, at 42-43.

actions, such as the decision by a foreign official "to award new business to or to continue business with a particular party."⁵¹

In addition to the "routine governmental action" exception, the FCPA provides two affirmative defenses. One allows the payments to be made if they are "lawful under the written laws" of the foreign country.⁵² The other allows "reasonable and bona fide expenditure[s] . . . directly related to the promotion . . . of products or services; or the execution or performance of a contract."⁵³ As examples of this second affirmative defense, the statute lists travel and lodging expenses.⁵⁴

Issuers and domestic concerns are allowed under the FCPA to ask the Attorney General specific questions about proposed conduct.⁵⁵ The Attorney General is then required to respond within thirty days.⁵⁶ If the Attorney General finds that certain actions are allowable under the FCPA, a rebuttable presumption arises that such conduct is indeed in conformity with the FCPA unless, in an enforcement hearing, it is shown otherwise by a preponderance of the evidence.⁵⁷ This procedure is restricted to questions concerning the anti-bribery provisions, and is not available for questions regarding the accounting provisions.⁵⁸

C. Penalties for Violation of the Antibribery Provisions

Criminal penalties may reach as high as two million dollars for both issuers⁵⁹ and domestic concerns.⁶⁰ A willful violation by the officers, directors, employees, agents, or stockholders of an issuer or domestic concern could result

51. 15 U.S.C. § 78dd-1(f)(3)(B) (1994) (issuers); 15 U.S.C. § 78dd-2(h)(4)(B) (1994) (domestic concerns).

52. 15 U.S.C. § 78dd-1(c)(1) (1994) (issuers); 15 U.S.C. § 78dd-2(c)(1) (1994) (domestic concerns).

53. 15 U.S.C. § 78dd-1(c)(2) (1994) (issuers); 15 U.S.C. § 78dd-2(c)(2) (1994) (domestic concerns).

54. 15 U.S.C. § 78dd-1(c)(2) (1994) (issuers); 15 U.S.C. § 78dd-2(c)(2) (1994) (domestic concerns). In addition to travel and lodging expenses, food, entertainment, and product samples have been allowed so long as the cost was reasonable and there was adequate documentation and disclosure. BIALOS & HUSISIAN, *supra* note 9, at 47. It is important to note that all payments must be closely related to the promotion of the product in order to qualify for this defense. BIALOS & HUSISIAN, *supra* note 9, at 47.

55. 15 U.S.C. § 78dd-1(e)(1) (1994) (issuers); 15 U.S.C. § 78dd-2(f)(1) (1994) (domestic concerns).

56. 15 U.S.C. § 78dd-1(e)(1) (1994) (issuers); 15 U.S.C. § 78dd-2(f)(1) (1994) (domestic concerns).

57. 15 U.S.C. § 78dd-1(e)(1) (1994) (issuers); 15 U.S.C. § 78dd-2(f)(1) (1994) (domestic concerns).

58. 28 C.F.R. § 80.12 (1997).

59. 15 U.S.C. § 78ff(c)(1)(A) (1994).

60. 15 U.S.C. § 78dd-2(g)(1)(A) (1994).

in a fine of up to \$100,000 and up to five years imprisonment.⁶¹ These same individuals, as well as the company, may be assessed civil fines of no more than ten thousand dollars.⁶² The FCPA insures that any officer, director, employee, agent, or stockholder assessed a penalty will be personally responsible for the fine by prohibiting reimbursement by the company.⁶³ Injunctions are also available to prevent future violations.⁶⁴

D. Penalties for Violation of the Accounting Provisions

Violations of the accounting provisions can result in civil fines of no more than one million dollars generally, although the fines may be as high as \$2.5 million if there is a "willful violation."⁶⁵ Criminal penalties may only be imposed if there is a "knowing" violation of the accounting provisions.⁶⁶ If criminal penalties are imposed, imprisonment may not exceed ten years.⁶⁷

E. Enforcement

The SEC and the Justice Department share enforcement duties under the FCPA. The SEC prosecutes civil violations of the accounting and antibribery provisions as applied to issuers.⁶⁸ The Department of Justice prosecutes civil violations by domestic concerns.⁶⁹ However, the Department of Justice has exclusive jurisdiction in regard to criminal prosecutions, whether by a domestic concern or an issuer.⁷⁰

IV. CASES INTERPRETING THE FCPA

The practitioner will quickly learn there is a dearth of cases interpreting the FCPA. This is not due to the unimportance of the act, but can be attributed to the fact that most defendants settle prior to trial. Fortunately, a few cases do make it to trial.

61. 15 U.S.C. § 78dd-2(g)(2)(A), (B) (1994) (domestic concerns); 15 U.S.C. § 78ff(c)(2)(A), (B) (1994) (issuers).

62. 15 U.S.C. § 78dd-2(g)(1)(B), (2)(C) (1994) (domestic concerns); 15 U.S.C. § 78ff(c)(1)(B), (2)(C) (1994) (issuers).

63. 15 U.S.C. § 78dd-2(g)(3) (1994).

64. 15 U.S.C. § 78dd-2(d)(1) (1994).

65. 15 U.S.C. § 78ff(a) (1994).

66. 15 U.S.C. §§ 78m(b)(4), (5) (1994).

67. BIALOS & HUSISIAN, *supra* note 9, at 68.

68. Nilsson, *supra* note 33, at 811.

69. Nilsson, *supra* note 33, at 811.

70. Nilsson, *supra* note 33, at 811.

*A. Gift or Bribe? United States v. Liebo*⁷¹

Richard Liebo, the defendant, was a vice-president with NAPCO International, Inc., a seller of military supplies and equipment.⁷² The government of Niger had contracted with a West German company to service cargo planes.⁷³ The Niger government had some financial difficulties, so the West German company sought out an American part supplier in hopes that the Niger project would qualify for assistance under the Foreign Military Sales Program.⁷⁴ The West German company selected NAPCO.

In order to get the President of Niger's approval, a representative from the West German company and Liebo flew to Niger and met with the chief of maintenance for the Niger Air Force.⁷⁵ Liebo promised to make "some gestures" to the chief if he supported the contract.⁷⁶ The chief agreed and the President signed the contract upon the chief's recommendation.⁷⁷

Liebo later contacted the chief's cousin, an embassy official in Washington, D.C., and told him that he wanted to make a "gesture" to the chief.⁷⁸ The cousin set up a bank account into which NAPCO deposited thirty thousand dollars.⁷⁹ The cousin used this money for his personal use and gave some of it to the chief.⁸⁰ Liebo, using a NAPCO credit card, also paid for part of the cousin's honeymoon by purchasing airline tickets worth over two thousand dollars.⁸¹

NAPCO received two other contracts from the Niger government totaling nearly three million dollars.⁸² Among other charges,⁸³ Liebo was charged with violating the FCPA.⁸⁴ He was eventually acquitted of all the charges except the FCPA charge relating to the honeymoon airline tickets.⁸⁵

71. 923 F.2d 1308 (8th Cir. 1991).

72. *Id.* at 1309.

73. *Id.*

74. *Id.* The program provides loans to countries who buy from American contractors. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Liebo*, 923 F.2d at 1309-10.

80. *Id.* at 1310.

81. *Id.*

82. *Id.*

83. Liebo was charged with fraud, falsifying tax returns, and making false statements to the Defense Security Assistance Agency. *Id.* at 1310 n.1.

84. *Id.*

85. *Id.* at 1310. The charge of making false statements was tied to the FCPA charge. *Id.* In order to get the assistance loan, Liebo had to certify to the agency that no gifts contrary to United States law had been given to a foreign official in connection with the contract. *Id.*

On appeal, Liebo argued there was not enough evidence to show that he had given the tickets “to obtain or retain business.”⁸⁶ The Eighth Circuit Court of Appeals disagreed.⁸⁷ The President of Niger would not sign contracts without the chief’s approval.⁸⁸ There was also evidence that the chief and his cousin were best friends.⁸⁹ It was therefore reasonable for the jury to believe the tickets were bought to gain the chief’s recommendation to the President.⁹⁰

Liebo also argued there was insufficient evidence to show he acted “corruptly.”⁹¹ Liebo asserted the tickets were bought as a gift, not intended to cause the cousin to abuse his position.⁹² The court once again found the jury’s determination reasonable.⁹³ The court noted that the tickets were bought just prior to the third contract being awarded.⁹⁴ Once again, the relationship between the cousin and the chief, as well as that between the chief and the President, was an important factor.⁹⁵ Finally, Liebo’s classification of the tickets as a “commission payment” helped the court find that the jury’s verdict was based on sufficient evidence.⁹⁶

Liebo also contested the jury instruction as not distinguishing between a gift and a bribe.⁹⁷ Once again, the court disagreed, finding the instruction sufficient.⁹⁸

However, Liebo did actually win on one point. The court granted a new trial because of new evidence discovered after his conviction.⁹⁹ A memo surfaced tending to prove Liebo’s actions were approved by NAPCO’s president.¹⁰⁰ Liebo argued this evidence was important because he had been acquitted on all counts where it was shown that NAPCO’s president or another superior approved the action taken.¹⁰¹ Indeed, the jury specifically asked if there

86. *Id.* at 1311.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Liebo*, 923 F.2d at 1312.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* The judge instructed the jury “corruptly” meant “the offer, promise to pay, payment or authorization of payment, must be intended to induce the recipient to misuse his official position or to influence someone else to do so” and that “an act is ‘corruptly’ done if done voluntarily [a]nd intentionally, and with a bad purpose of accomplishing either an unlawful end or result, or a lawful end or result by some unlawful method or means.” *Id.*

99. *Id.* at 1314.

100. *Id.* at 1312-13.

101. *Id.* at 1313.

was any evidence of approval of the tickets.¹⁰² The Eighth Circuit concluded that the jury considered such evidence to be crucial and consequently ordered a new trial.¹⁰³

B. Act of State Doctrine

The United States Supreme Court addressed the issue of whether the act of state doctrine barred actions brought by a competitor against a company that pled guilty to making payments in violation of the FCPA in order to gain a contract.¹⁰⁴ The case, *W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corporation, International*,¹⁰⁵ involved a contract for a medical center at an air force base in Nigeria.¹⁰⁶ Kirkpatrick made a deal with a Nigerian national whereby Nigerian officials would receive a "commission" if the contract was awarded to the company.¹⁰⁷ The contract was in fact awarded to Kirkpatrick.¹⁰⁸ Environmental Tectonics, a competitor for the same contract, notified the U.S. government upon learning of Kirkpatrick's scheme.¹⁰⁹ Kirkpatrick was charged with violation of the FCPA and plead guilty.¹¹⁰

The facts qualifying Kirkpatrick for a FCPA violation also qualified him for a violation under the Racketeer Influenced and Corrupt Organizations Act, an act which allows for private causes of action.¹¹¹ Environmental Tectonics brought such an action against Kirkpatrick.¹¹² Kirkpatrick countered by asserting that the act of state doctrine prevented a finding in favor of Environmental Tectonics.¹¹³ Kirkpatrick reasoned that Environmental Tectonics could win only if it showed the contract was entered into as a result of the bribery of Nigerian officials.¹¹⁴ These facts would require a court to find the contract invalid under

102. *Id.*

103. *Id.* at 1314.

104. The act of state doctrine was created by the Supreme Court in *Underhill v. Hernandez*, 168 U.S. 250 (1897), where the Court stated "[e]very sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory." *Id.* at 252. For example, in order for the plaintiff to win in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), the Court would have been required to find Cuba's expropriation of plaintiff's goods located in Havana invalid. *Id.* at 427-37. This the Court refused to do. *Id.* at 437.

105. 493 U.S. 400 (1990).

106. *Id.* at 401.

107. *Id.* at 402.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.* at 406.

Nigerian law.¹¹⁵ In other words, Kirkpatrick argued that a court would be forced to find a foreign government's action invalid and that this finding would be a clear violation of the act of state doctrine.

Justice Scalia, writing for the majority of the Court, disagreed with Kirkpatrick's assessment.¹¹⁶ Scalia found it unnecessary for a court to decide whether or not the contract was valid under Nigerian law.¹¹⁷ A court need only look at the defendant's acts leading up to the contract and decide whether they violate U.S. law. Whether or not the resulting contract is valid under Nigerian law is not an issue. Because an act of the Nigerian government was not at issue, the act of state doctrine did not apply.¹¹⁸

C. Private Right of Action

The implication doctrine was first enunciated by the United States Supreme Court in *Texas & Pacific Railway v. Rigsby*.¹¹⁹ The Court found that when a defendant violates a statute thereby harming one of the members of the class of people intended to benefit by the statute, a private right of action was implied even though not specified in the statute.¹²⁰ In *Cort v. Ash*,¹²¹ the Court established a four part test to determine whether or not the implication doctrine applied.¹²² This test considered the following factors:

(1) whether the plaintiffs are among "the class for whose special benefit" the statute was enacted; (2) whether the legislative history suggests congressional intent to prescribe or proscribe a private cause of action; (3) whether "implying such a remedy for the plaintiff would be 'consistent with the underlying purposes of the legislative scheme'"; and (4) whether the cause of action is "one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action."¹²³

In subsequent cases, the Supreme Court modified the test, finding congressional intent to be the paramount factor.¹²⁴

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* at 409-10.

119. 241 U.S. 33 (1916).

120. *Id.* at 39-40.

121. 422 U.S. 66 (1975).

122. *Id.* at 78.

123. *Lamb v. Phillip Morris, Inc.*, 915 F.2d 1024, 1028 (6th Cir. 1990) (citing *Chairez v. United States Immigration & Naturalization Serv.*, 790 F.2d 544, 546 (6th Cir. 1986)).

124. *See Touche Ross & Co. v. Redington*, 442 U.S. 560, 578 (1979); *Canon v.*

The notion that the FCPA creates a private right of action has been rejected by every court to consider the issue. The Sixth Circuit found in *Lamb v. Phillip Morris, Inc.*¹²⁵ that competitors of the defendants were not the intended beneficiaries of the FCPA.¹²⁶ Instead, the court found “the FCPA was primarily intended to protect the integrity of American foreign policy.”¹²⁷ The court discovered only one reference to private causes of actions in the legislative history of the FCPA.¹²⁸ This was not enough to mandate recognition of a private cause of action in the opinion of the court.¹²⁹ The court also felt that implying a private right would be inconsistent with the FCPA because the act showed a preference for compliance as opposed to prosecution.¹³⁰ Though the court conceded a private cause of action would not impinge on the providence of the states, the court noted the availability of other statutory rights of redress such as the Sherman Act.¹³¹ The court’s evaluation of the *Cort* factors led it to hold that no private cause of action exists under the FCPA.¹³²

Although other courts have disagreed as to the intended beneficiaries of the FCPA,¹³³ the analysis of the *Cort* factors has always resulted in a finding of no private cause of action.¹³⁴ Consequently, it appears unlikely that a private party will ever be able to establish a private cause of action.

D. Foreign Officials

Only one case has addressed the issue of whether foreign officials may be prosecuted under the FCPA.¹³⁵ In that case, the Fifth Circuit held foreign

University of Chicago, 441 U.S. 677, 688-709 (1979).

125. 915 F.2d 1024 (6th Cir. 1990).

126. *Id.* at 1029.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* at 1029-30.

131. *Id.* at 1030.

132. *Id.* For an opposing view, see Witter, *supra* note 7.

133. See *J.S. Serv. Ctr. Corp. v. General Elec. Technical Servs. Co.*, 937 F. Supp. 216, 226 (S.D.N.Y. 1996); *Citicorp Int’l Trading Co. v. Western Oil & Ref. Co.*, 771 F. Supp. 600, 606-07 (S.D.N.Y. 1991). The court in both of these cases felt a violating company’s competitors were the intended beneficiaries of the FCPA. *J.S. Serv. Ctr.*, 937 F. Supp. at 226; *Citicorp* 771 F. Supp. at 606.

134. *J. S. Serv. Ctr.*, 937 F. Supp. at 227; *Citicorp*, 771 F. Supp. at 607. In *J.S. Service Center*, the defendant’s distributor was bringing the suit. 937 F. Supp. at 226. Because the distributor was not technically a competitor of the defendant, the court found the plaintiff was not part of class intended to be protected by the FCPA. *Id.* In *Citicorp*, the court found the plaintiff did not fall within the class intended to be protected by the FCPA. 771 F. Supp. at 606-07.

135. See *United States v. Castle*, 925 F.2d 831 (5th Cir. 1991).

officials to be beyond the reach of the FCPA.¹³⁶ The court found in the FCPA “an affirmative legislative policy to leave unpunished a well-defined group of persons who were necessary parties to the acts constituting a violation of the substantive law.”¹³⁷ Though this is the only case to address the issue, the fact that foreign officials are left out of the extensive list of people identified in the FCPA as potential defendants makes it likely other courts will reach a similar conclusion.

V. THE FCPA IN COUNTRIES LIKE RUSSIA AND CHINA

U.S. companies face the challenge of doing business in transitional economies, such as Russia, or in developing economies, such as China, while avoiding liability under the FCPA. The issues faced by a company in these types of economies are similar and will, therefore, be addressed together.

FCPA liability in these economies is often a risk because the American company generally has either hired a foreign agent or the company is part of joint-venture in the foreign country.¹³⁸ Foreign agents are often unaware of the FCPA. Because bribery is common in many countries, the agent may very well make payments prohibited by the act.¹³⁹ In regard to joint-ventures, the U.S. company may be a minority shareholder without the ability to control the foreign company’s business operations.¹⁴⁰ In such a situation, the U.S. company would probably not be prosecuted under the FCPA “if it did not direct, control, or ‘know’ of any bribery schemes.”¹⁴¹ Even if the U.S. company owns a majority of the equity shares, it may not have much actual control over the company.¹⁴² Because foreign subsidiaries are not directly governed by the FCPA,¹⁴³ it is possible a scheme violative of the FCPA conceived and executed by the subsidiary behind the U.S. parent’s back would not expose the parent to

136. *Id.* at 831.

137. *Id.* at 836.

138. See Delia Poon, Note, *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, 337-38 (1996); see also Christopher F. Dugan & Vladimir L. Lechtman, *In Russia, Bribe Ban is Causing Difficulties*, NAT’L L. J., October 7, 1996, at C1.

139. Poon, *supra* note 138, at 337.

140. Poon, *supra* note 138, at 337.

141. Christopher F. Dugan & Vladimir Lechtman, *The FCPA in Russia and Other Former Communist Countries*, 91 AM. J. INT’L L. 378, 381 (1997).

142. Poon, *supra* note 138, at 337.

143. Dugan & Lechtman, *supra* note 141, at 381 (citing H.R. CONF. REP. NO. 95-831, at 14 (1977)).

liability.¹⁴⁴ However, there will be close scrutiny as to whether the U.S. parent went along with the scheme.¹⁴⁵

One major problem in both China and Russia is distinguishing between a foreign official and private individual.¹⁴⁶ This problem is created by state ownership of enterprises.¹⁴⁷ Though Russia is in the process of privatization, many enterprises have not reached the final stage of privatization.¹⁴⁸ Therefore, U.S. companies do not know whether the manager of an enterprise is a foreign official or someone not contemplated by the FCPA.

The FCPA defines "foreign official" to mean "any officer or employee of a foreign government or any department, *agency, or instrumentality* thereof, or any person acting in an official capacity for or on behalf of any such government or department, *agency, or instrumentality*."¹⁴⁹ Unfortunately, neither the FCPA nor case law define "agency or instrumentality." This has led commentators to turn to the Foreign Sovereign Immunities Act of 1976 (FSIA), which provides a statutory definition of "agency or instrumentality."¹⁵⁰ Under the FSIA, a business is a government "instrumentality" or "agency" if the majority of its shares are owned by the government.¹⁵¹ For example, if the Russian or Chinese government owned fifty-one percent of an enterprise, that enterprise would be part of the government. Therefore, it is believed that a manager of such a facility would be considered a "foreign official," triggering the possibility of FCPA liability.¹⁵²

U.S. companies often want to hire a well-connected government official who knows his or her way through the bureaucratic red tape and has the ability to drum up business. In this scenario, the official's own office is not used to benefit the U.S. company. Instead, the official uses his connections with friends in the government to help the U.S. company or, the official uses his or her office to obtain non-governmental business. In these situations, the question is whether the payments to the official are made "corruptly," thereby resulting in a violation of the FCPA.¹⁵³ The Department of Justice has intimated that factors relevant to

144. Dugan & Lechtman, *supra* note 141, at 381-82.

145. Dugan & Lechtman, *supra* note 141, at 382.

146. *See* Poon, *supra* note 138, at 343; *see also* Dugan & Lechtman, *supra* note 141, at 382.

147. Dugan & Lechtman, *supra* note 141, at 382.

148. Dugan & Lechtman, *supra* note 141, at 382.

149. 15 U.S.C. § 78dd-1(f)(1) (1994) (issuers) (emphasis added); 15 U.S.C. § 78dd-2(h)(2) (1994) (domestic concerns) (emphasis added).

150. Dugan & Lechtman, *supra* note 141, at 383. *See also* BIALOS & HUSISIAN, *supra* note 9, at 110; Poon, *supra* note 138, at 343-44.

151. 28 U.S.C. § 1603(a), (b) (1994).

152. BIALOS & HUSISIAN, *supra* note 9, at 110-12; Dugan & Lechtman, *supra* note 141, at 384; Poon, *supra* note 138, at 344.

153. Dugan & Lechtman, *supra* note 141, at 386. For a definition of "corrupt," *see supra* note 38.

this determination are “the official’s position, the extent to which he relies on it to obtain the business, and the amount of money he receives for his services.”¹⁵⁴ Consequently, it may not be wise for a company to hire an official with an extremely high position in the government.¹⁵⁵ The Department of Justice may well be inclined to find any efforts by such an official to aid the U.S. company as a misuse of his or her position.

VI. AVOIDING FCPA PROBLEMS

Developing a compliance program is probably the most effective way for a company to avoid liability under the FCPA.¹⁵⁶ Such programs not only cultivate “due diligence” on the part of the company, but can actually lead to a reduced fine in the case of a violation.¹⁵⁷ It stands to reason that senior management in companies must make compliance a priority if a compliance program is to be effective. If individuals are promoted based exclusively on the money they earn for the company without regard to possible FCPA violations, there will be no incentive for employees to concern themselves with the FCPA.

The United States Sentencing Commission has determined an effective compliance program consists of the following seven elements:

- (i) written compliance standards and procedures;
- (ii) senior level personnel assigned overall responsibility for compliance;
- (iii) use due care not to delegate authority to individuals whose company knew or should have known had propensity for illegal activities;
- (iv) communicate standards through training programs or disseminating written materials;
- (v) the company should implement procedures to achieve compliance, such as a monitoring and auditing system to deter violations, and a process for employers to report violations by others without fear of retribution;
- (vi) appropriate disciplinary procedures for a violation; and
- (vii) after a violation has been detected, taking appropriate steps to respond, and to prevent similar violations in the future, including modifications to its Compliance program.¹⁵⁸

154. Dugan & Lechtman, *supra* note 141, at 386-87.

155. Dugan & Lechtman, *supra* note 141, at 387.

156. Don Zarin, *Doing Business Under The Foreign Corrupt Practices Act: Compliance Programs*, 943 PLI/CORP 525, 529 (1996).

157. *Id.* at 529-30.

158. *Id.* at 532 n.6 (quoting UNITED STATES SENTENCING COMM’N, GUIDELINES MANUAL § 8A1.2 cmt. 3(k) (1997)).

One author suggests the promulgation of a policy statement by the president of the company, as well as the development of a compliance committee in charge of training employees and preparing a manual on ethics.¹⁵⁹ Though not required by the FCPA, domestic concerns should maintain sufficiently detailed records and may want to consider creating an audit committee in charge of enforcing company policy.¹⁶⁰

When dealing in countries such as Russia and China, the U.S. company should be very careful in choosing a partner or agent.¹⁶¹ The process of choosing a partner or agent in a foreign country should be well documented and based on merit rather than "connections."¹⁶² Upon hiring a foreign agent, the foreign government should be notified of the appointment and anything that may suggest bribery (such as relationship to government officials) should be disclosed.¹⁶³

U.S. companies should draft their contracts with foreign agents and partners in such a way that the contracts are contingent upon compliance with the FCPA and that a violation of the FCPA will excuse the U.S. company from the contract.¹⁶⁴ The U.S. company should try to include a clause providing for indemnification in case the foreign agent or partner's actions result in liability for the U.S. company.¹⁶⁵

Finally, it can only help a company to submit any questions to the Attorney General under the opinion procedure of the FCPA in those instances where an action may or may not be prohibited. A company with the approval of the Attorney General may take action with the knowledge it has some protection from liability.¹⁶⁶

VII. CONCLUSION

The Foreign Corrupt Practices Act is a possible pitfall of which companies doing business abroad should be aware. The act is very broad, covering virtually every business in the United States (in fact it is hard to imagine what business could escape its scope). Violations can result in large fines and imprisonment. However, there are some steps businesses can take to minimize exposure. Of these, education of employees may very well be the most important.

The Foreign Corrupt Practices Act can make doing business in transitional or developing economies where bribery is rampant especially difficult. And, until other countries adopt laws similar to the FCPA, U.S. businesses are at a

159. *Id.* at 532-35.

160. *Id.* at 536

161. Poon, *supra* note 138, at 348.

162. Poon, *supra* note 138, at 348-49.

163. Poon, *supra* note 138, at 349-50.

164. Poon, *supra* note 138, at 350-51.

165. Poon, *supra* note 138, at 351.

166. For a discussion of the opinion procedure, see *supra* notes 53-56.

seeming disadvantage to foreign competitors. There are some indications, however, that the day may be coming when the United States is no longer the lone soldier in the fight against bribery of foreign officials.

J. LEE JOHNSON

