

COMING CLEAN ON DIRTY DEALING: TIME FOR A FACT-  
BASED EVALUATION OF THE FOREIGN CORRUPT  
PRACTICES ACT

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## I. INTRODUCTION

Since its enactment in 1977, the Foreign Corrupt Practices Act has received little serious scrutiny as to its effectiveness.<sup>1</sup> The significant portion of commentators on this law are practitioners who sell compliance services in an active and growing market,<sup>2</sup> in whose professional interest it could be to portray the law as one that is effectively enforced. Academics have for the most part declined, using statistics combined with actual case study, to examine how well the law actually works.<sup>3</sup> The debate over the appropriateness of the FCPA as well as its effectiveness has often taken place, as a result, in a fact-free vacuum.<sup>4</sup>

This Article contends that from the standpoint of anyone who would wish to deter bribery abroad, the FCPA has been greatly under-enforced since it was enacted. It looks in a theoretical way at how much U.S. bribery might be expected to occur overseas, versus how much there is in this country. The author has reviewed every bribery-related FCPA

1. See 15 U.S.C. §§ 78m, 78dd-1 to 78dd-3 (1998).

2. See *Org. Econ. Cooperation and Dev., U.S.: Phase 2; Rep. on Application of the Convention on Combating Bribery of Foreign Pub. Officials in Int'l Bus. Transactions and the 1997 Recommendation on Combating Bribery in Int'l Bus. Transactions* 18 (Oct. 2002) [hereinafter OECD], available at <http://www.oecd.org/dataoecd/52/19/1962084.pdf>.

3. See, e.g., Daniel K. Tarullo, *The Limits of Institutional Design: Implementing the OECD Anti-Bribery Convention*, 44 VA. J. INT'L 665 (2004); James R. Hines, *Forbidden Payment foreign Bribery and American Business After 1977* (Nat'l Bureau of Econ. Research, Working Paper 5266, 1995); Masako N. Darrough, *The FCPA and the OECD Convention, Some Lessons From the U.S. Experience* (2004), <http://ssrn.com/abstract=555643>. Steven R. Salbu, *Bribery in the Global Market: A Critical Analysis of the Foreign Corrupt Practices Act*, 54 WASH. & LEE L. REV. 229, 231 n.8, 237 (1997) (posing the question as to why so many reputable businesses are still getting into FCPA trouble, even after noting that in 20 years, not a single chief executive was convicted of overseas bribery under the FCPA).

4. Thomas W. Dunphy & David Hess, *Getting from Salbu to the 'Tipping Point': The Role of Corporate Action Within a Portfolio of Anti-Corruption Strategies*, 21 NW. J. INT'L L. & BUS. 471, 472 (2001). At the outset of their argument that the FCPA should be among a portfolio of approaches to combat bribery, the authors dismiss a fact-based approach to the FCPA by asserting its deterrence effect is "undocumented, if not undocumentable."

conviction or enforcement action since the law was enacted,<sup>5</sup> and provides some detail on those convictions achieved comparatively cheaply, often by companies turning themselves in or by acquirers doing due diligence<sup>6</sup>—as opposed to those which resulted from lengthy or expensive investigation. This is the sort of analysis a working party from the OECD concluded was necessary to evaluate the FCPA, but which until now has not been done.<sup>7</sup>

The conclusion: because the actual or intended flow of money or “anything of value” from briber to the bribee is a necessary element to prove a crime of bribery,<sup>8</sup> increasing the difficulty of tracing money is a critically important part of any corrupt enterprise’s operation if it wishes to avoid detection. A review of the cases shows that more than half of those caught bribing could either have avoided detection easily, or made it much more difficult to prosecute them had only simple steps been taken to disguise money flows. As a result, without greatly increased funding for

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5. A complete catalogue of the “easy” or “cheap” cases has been edited for length. *Infra* Part III. Only a sampling presented in the text. A full list with abbreviated comments appears in the Appendix.

6. See, e.g., SEC v. Monsanto Co., [2005] 5 FCPA Rep. (Bus. Laws) 699.9167, 1:05CV00014 (D.D.C. Jan. 6, 2005).

7. In its evaluation of the FCPA’s progress the OECD, see OECD, *supra* note 2, at 27. The organization stated:

[T]here are no clear, documented, formal processes between agencies to underpin the vital exchange of information and reporting of suspected violations, and a corresponding absence of statistics. This results in a lack of transparency and of data, which, if captured, could serve useful analytical purposes in reviewing the workings of the FCPA.

In its latest report on U.S. compliance released in July 2005, the OECD stated that its recommendation for a formal statistical analysis of the FCPA’s enforcement has not been implemented, and that “It is difficult to assess how effective the existing mechanisms have been in uncovering foreign bribery.” *U.S. Phase 2, Follow-Up Report on the Implementation of Phase 2 Recommendations on the Application of the Convention and the 1997 Recommendation on Combating Bribery of Foreign Public Officials in International Business Transactions*, at 17 (June 1, 2005).

8. 18 U.S.C. § 201.

investigation, the FCPA is a flawed model on which to base all expectations of foreign bribery deterrence.<sup>9</sup>

Implied in this Article but unexamined for purposes of length limitation are the following assumptions:

1. That bribery of public officials abroad is, for the most part, harmful to the citizens of the particular country.<sup>10</sup> The literature on corruption appears to have defeated the notion that bribery is efficient or desirable, and regime change in certain corrupt countries has helped debunk that myth as well.<sup>11</sup> Rather than staying with the bribery-as-efficiency approach, after the United States stood nearly alone among developed countries for two decades in its insistence on outlawing foreign bribery,

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9. See Darrough, *supra* note 3 (drawing a similar though more tentative conclusion as to the FCPA's effectiveness, but concluding that the OECD's convention against bribery will have a greater chance of success than the FCPA because there will be collective incentives among developed countries to enforce the convention. This paper, on the other hand, argues that the FCPA model is flawed, and it is unclear that multilateral application will do anything to improve its effectiveness because of the high cost of public enforcement).

10. See, e.g., Andrei Schleifer & Robert W. Vishny, *Corruption*, 108 Q.J. ECON. 599, 616 (1993) (Bribery payments that convince public officials to invest in marginal projects or to award contracts on the basis of kickbacks waste assets in developing countries); Cheryl W. Gray & Daniel Kaufmann, *Corruption and Development*, in NEW PERSPECTIVES ON COMBATING CORRUPTION, 21-32 (Transparency International & The World Bank, 1998) [hereinafter NEW PERSPECTIVES] (finding that where corruption is perceived to be high, managers spend comparatively more time with government bureaucrats); Daniel Kaufmann et al., *Governance Matters IV: Governance Indicators for 1996-2004* (May 2005), <http://ssrn.com/abstract=718081>. See also Larry Rohter & Juan Forero, *Unending Graft is Threatening Latin America*, N.Y. TIMES, July 30, 2005, at A1.

11. Indonesia, before the fall of the Suharto regime in 1998, was often cited as an example of a corrupt country with nonetheless comparatively positive attributes for business and efficiency. See Kenneth U. Surjadinata, *Revisiting Corrupt Practices From a Market Perspective*, 12 EMORY INT'L L. REV. 1021, 1049 (1998) (arguing for the repeal of the FCPA and substitution of a market-based approach to allow business to choose between bribing and not bribing). Post-Suharto Indonesia has suffered from capital flight because of higher perceived risk that follows from a dearth of reliable non-military institutions. Just this year, after the initial wave of generosity over aiding victims of the Tsunami, the world focused anew on the endemic corruption in Indonesia, and fears that authorities would steal large portions of aid money earmarked for reconstruction. See Raymond Bonner, *Asia's Deadly Wars: The Money; Corruption in Indonesia is Worrying Aid Groups*, N.Y. TIMES, Jan. 13, 2005, at A8. We should care about corruption from an efficiency standpoint, and also because corruption is a two-way street: it takes two to bribe. Exhortations by Western governments against government corruption in Africa or Asia ring hollow if Western companies are easily able to bribe and are perceived to be doing so. See Gray & Kaufmann, *Corruption and Development*, in NEW PERSPECTIVES, *supra* note 10 (asserting that corruption correlates negatively with civil liberties and with women's economic and social human rights). These are not efficiency arguments, but help to bolster the idea that corruption is undesirable.

the rest of the developed world has come around (in theory) to the U.S. view.<sup>12</sup>

2. That bribery is seldom “culturally appropriate.”<sup>13</sup> Bribery of officials tends to be illegal the world over, although such rules are often selectively enforced for political reasons, or enforced hardly at all. There is an affirmative defense to bribing an official overseas under the FCPA if that bribe is legal in the country concerned,<sup>14</sup> but this defense has hardly ever been relied upon in the few published foreign bribery cases.
3. The “routine governmental action” (or “grease payments”)<sup>15</sup> exception offered by the FCPA cannot explain the dearth of convictions, since the standard as to what is “routine governmental action,” and what is therefore allowed to be paid for has not been the subject of even a nominal amount of litigation to try to escape the clutches of the FCPA—a result we would expect if it proved to be a loophole to foil robust enforcement.<sup>16</sup> Instead, several recent defendants approached their defense from the other side,<sup>17</sup> arguing that all payments to foreign

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12. See Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, December 17, 1997, 37 I.L.M. 1.

13. For a review of the debate over the “moral imperialism” of the FCPA, see Bill Shaw, *The Foreign Corrupt Practices Act and Progeny: Morally Unassailable*, 33 CORNELL INT’L L.J. 689 (2000).

14. 15 U.S.C. §§ 78dd-1(c), 78dd-2(c), 78dd-3(c) (1998).

15. 15 U.S.C. §§ 78dd-1(b), 78dd-2(b), 78dd-3(b) (1998).

16. Much ink is spilled in the literature over the difficulties businesses face in distinguishing between permitted and prohibited payments, because of cross-cultural difficulties U.S. companies face in transacting business in alien cultures. See Salbu, *supra* note 3, at 265-67; Dunphy & Hess, *supra* note 4, at 476. In fact, few if any cases turn on distinguishing facilitation payments from prohibited bribes, because “routine governmental action” is well defined in the statute. See 15 U.S.C. §§ 78dd-1(f)(3)(B), 78dd-2(h)(4)(B), 78dd-3(f)(4)(B) (1998). In addition, research has tended to show a correlation between facilitation payments and the proliferation of corruption on a grand scale, which should lead to more convictions, not fewer. See Antonio Argandona, *Corruption and Companies: The Case of Facilitating Payments* (Univ. Of Navarra (Spain), Working Paper No. 539, 2004), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=685861](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=685861).

17. See *United States v. Kay*, 359 F.3d 738 (5th Cir. 2004); *SEC v. Mattson*, Civ. A. No. H-01-3106 (S.D. Tex. Sept. 9, 2002). The issue of law in both these cases was whether a bribe to induce officials to lower a tax bill was prohibited by the FCPA, or whether such a bribe was outside the scope of prohibitions on payments to “assist . . . in obtaining or retaining business.” Kay’s case was dismissed, but the government won on appeal, the case was remanded and Kay plus co-defendant Douglas Murphy were convicted at trial. Murphy testified at trial that he had no knowledge of any payments made to Haitian government officials, but during the trial changed his defense once the government proved the existence of the payments, and argued unsuccessfully that they were facilitation payments only. Sentencing Memorandum, *United States v. Kay*, No. 4:01cr00914, at 18 (S.D. Tex. Dec. 12, 2001). Mattson and Harris, the defendants in the SEC civil

officials are permitted if they are not for the express purpose of obtaining or retaining business.

4. That the level of optimal enforcement of the FCPA is greater than what exists at present. The realistic goal cannot be to eradicate foreign bribe-giving, any more than legislatures that prohibit murder believe they will completely do away with homicide.<sup>18</sup>
5. That bribery is a two-sided transaction. Without a supply-side of funding in the form of corporations willing to bribe, the pipeline of bribe money flowing from developed company to developing government official bank account and—quite often—back to a developed country bank, would empty in no time. Western governments and shareholders have more leverage over bribe-givers in Africa or Asia than on bribe-takers,<sup>19</sup> it, therefore, makes sense to attack the supply side vigorously.

Section II of this Article first estimates how many FCPA convictions might be given the same enforcement rate as we observe in U.S. domestic bribery cases.<sup>20</sup> Section II then constructs an admittedly rough index of convictions per dollar of investment, both in the United States and abroad. The section then estimates enforcement quality in a different way, by approaching the history of convictions by the country in which the bribe is received. If countries that receive a great share of U.S. foreign investment see few or even no convictions under the FCPA over twenty-five years, even while registering heavy perceived corruption both at home and among foreign investors, it is at least reasonable to assume that the law is under-enforced. Both the convictions per dollar calculation and the

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action, had their case dismissed on similar grounds to Kay's, but the Fifth Circuit dismissed the government's appeal. *See* SEC Litigation Release No. 18863 (Sept. 1, 2004).

18. The assumption is that to deter bribe-giving is a worthwhile goal on its face, but since 2001 has taken on greater importance: the vast literature on "failed states" inevitably contains descriptions of disillusioned populations, fed up with corrupt authorities which have been robbing the treasury for decades. Such is the atmosphere that can turn people to revolution, to religious fanaticism, or to both. *See, e.g.*, Elizabeth Becker, *Report Says Aid to Weak States is Inadequate*, N.Y. TIMES, Jun. 9, 2004, at A3; Joseph R. Biden, *A Democratic Foreign Policy*, WALL ST. J., Sept. 9, 2004, at A16.

19. Domestically-based bribe-givers may be regulated by legislation or punished criminally. Foreign parties may not.

20. The offenses for bribing U.S. and foreign government officials are now treated identically for purposes of sentencing. U.S. SENTENCING GUIDELINES MANUAL, App. C, Amend. 639 (2004) (raising the guideline sentence for an FCPA violation from Base Level 8 to Base Level 14). Previously the FCPA guidelines were akin to those for domestic commercial bribery of private officials, they are now parallel to offenses under 18 U.S.C. § 201 (1994), which covers the bribery of public officials in the United States.

convictions by country or recipient estimates indicate underenforcement of the FCPA.<sup>21</sup>

Section III attempts to explain the apparent under-enforcement of the FCPA by looking at the cost of enforcement. Investigation leading to enforcement is expensive, while the convictions under the FCPA have so far been disproportionately cheap. Convictions have tended either to fall into the laps of authorities, having been initiated by the companies themselves or, less often, by overseas law enforcement officials. Convictions have resulted from investigations by government agencies who happen upon the corruption while investigating something else. Finally and probably most importantly, a significant number of an already-low number of convictions have been as a result of careless banking and recordkeeping practices. A safe-cracker who forgets to wear gloves and then leaves fingerprints can still be caught, but we would credit the arrest more to the bungling of the thief than skilled detective work. This Article reasons that even a modest amount of care on the part of the bribe-givers would have made it much more difficult to secure convictions in these cases. To the extent that most bribe-givers are less than clumsy in the recordkeeping, bribes are probably going undetected. This Article is not estimating based on a representative sampling of FCPA bribery cases, but of all of these cases the author has been able to detect using the Foreign Corrupt Practices ACT Reporter,<sup>22</sup> the Department of Justice and SEC web sites, as well as PACER.

Section IV argues that the FCPA, as it is currently enforced, should not be adopted as a model for anti-bribery laws in other countries, in the sense that the United States relies too heavily on the FCPA's effectiveness. A more pragmatic if imperfect approach is to realize that the law is more expensive to enforce than we have wished to admit. Establishing a private right of action would solve little, since the government must often establish beneficial ownership of offshore accounts and trusts, in order to trace funds that are the lifeblood of corrupt transactions.<sup>23</sup>

As effective as criminal sanctions against bribery would be, even given adequate funding to enforce them, a public shaming regime comparable to the one used by interest and shareholder groups which monitor company use of overseas child or prison labor might prove as useful. The same may

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21. See Discussion accompanying notes 48-52; *infra* Part II.B.

22. Business Laws, Inc., FCPA Rep. (Jan. 2005) [hereinafter FCPA Rep.].

23. See Stacey K. Lee, *Piercing Offshore Asset Protection Trusts in the Cayman Islands: The Creditor's View*, 11 TRANSNAT'L LAW 463, 494 (1998).

be said for inexpensive compliance codes which investors could monitor.<sup>24</sup> In addition, the trend abroad to privatize industry calls for a new approach, because the FCPA covers only payments to officials of government-controlled entities.<sup>25</sup> To the extent that there is good will among some foreign governments to investigate bribe-taking by their own officials, those good intentions may not be easily converted into effective anti-corruption work as privatization proceeds. On top of this problem, investigating the private sector can entail an entirely new level of complexity compared to an internal governmental investigation.

Whatever the way forward, the most dangerous approach is the one which currently prevails: to pretend that the FCPA is effective. Indeed, this approach stifles debate about how to improve and supplement the law to increase deterrence of bribe-giving.

## II. ESTIMATING ENFORCEMENT EFFICIENCY

How many FCPA convictions should we expect to see? The standard argument that the FCPA is effective tends to cite a number of recent convictions, without putting these into any statistical context.<sup>26</sup> Some such as Nichols, rely on assertions of American business executives who claim

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24. These are not solutions unto themselves, but should work in combination with enhanced regulatory oversight. For a thoughtful look at the limits of corporate social responsibility, see Thomas F. McInerney, *6 Issues in the Development of an Anti-Corruption Management System Standard*, <http://www.idli.org/DLRC/documents/Anticorruption.pdf>.

25. See 15 U.S.C. §§ 78dd-1 to 78dd-3 (1998).

26. Former Judge Stanley Sporkin, credited with originating the FCPA when he was Director of the Enforcement Division at the SEC, is a typical taker of this approach, as were other speakers at a conference in 1998 at Northwestern University, held to assess the effects of the FCPA 20 years after its enactment. *The Worldwide Banning of Shmiergold: A Look at the Foreign Corrupt Practices Act on its Twentieth Birthday*, 18 NW. J. INT'L L. & BUS. 269 (1998). Buchheit and Reisner told the same conference: "The FCPA has been remarkably effective in altering corporate behavior. Many large multinational corporations have instituted 'compliance programs' designed to deter and uncover activities that could, at the least, embarrass the company and, at the worst, subject it to civil or criminal penalties." See *id.*; Lee C. Buchheit & Ralph Reisner, *Why has the FCPA Prospered?*, 18 NW. J. INT'L L. & BUS. 263 (1998). See also a lengthy article by two attorneys surveying the history of the FCPA's enforcement, which concluded: "The severe penalties of the FCPA have served as ample motivation for U.S. companies to take measures to ensure that they adhere to the law. Increased enforcement and escalation of penalties in the 1990s—best exemplified by the \$59 million paid by General Electric pursuant to a plea bargain—greatly increase the importance of compliance with anti-bribery law." Christopher F. Corr & Judd Lawler, *Damned If You Do, Damned If You Don't? The OECD Convention and the Globalization of Anti-Bribery Measures*, 32 VAND. J. TRANSNAT'L L. 1249, 1324 (1999).

they do not bribe to support the view that the FCPA has had an adequate deterrent effect.<sup>27</sup>

Pointing to two or three indictments in a recent year is like using three speeding tickets issued on an interstate highway to make a case that speeding is under control. Without an overall traffic rate, one cannot know whether three speeding tickets are too few or too many. The great dependence of U.S. authorities on whistleblowers and companies turning themselves in—for instance, after bribery has been discovered during due diligence prior to an acquisition<sup>28</sup>—is also cause for worry. Indeed, Highway Patrol counts on catching offenders who wish not to be caught, by investing in adequate numbers of police cruisers, radios, and other necessary equipment.<sup>29</sup> Without these expenditures, enforcement would suffer. Some would-be speeders would slow down because that was the law, but most would not, as they would think they would likely not get caught.

A low number of arrests and convictions of Americans who bribe foreign government officials can mean either that the FCPA is effective in deterring undesirable behavior, or that corrupt U.S. companies, and individuals, are successfully avoiding prosecution. Even though the United States, for more than two decades, has been one of the few countries to ban bribery of foreign officials,<sup>30</sup> the international business community, as measured by Berlin-based Transparency International,<sup>31</sup> perceives that U.S. companies doing foreign business are no less likely to offer bribes than many of their European counterparts, who until recently were not restricted from offering bribes.<sup>32</sup>

Transparency made its name with an index which measures perceived likelihood by countries to accept bribes, but in 1999 began to issue a Bribe

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27. Philip M. Nichols, *Regulating Transnational Bribery in Times of Globalization and Fragmentation* 24 *YALE J. INT'L L.* 257, 286 (1999).

28. See *infra* text accompanying note 61; *infra* text accompanying note 56; see also *United States v. ABB Vetco Gray, Inc.*, [2005] 5 FCPA Rep. (Bus. Laws) 699.9054, Criminal No. H-04-CR-279 (S.D. Tex. June 22, 2004); *United States v. Syncor Taiwan, Inc.*, [2003] 5 FCPA Rep. (Bus. Laws) 699.8626, (C.D. Cal. Nov. 2002). All stemming from discoveries during due diligence, these account for a third of the foreign bribery-related cases resulting in conviction or settlement from 2002 to early 2005.

29. See, e.g., California's Proposed Budget for 2006-2007 adding 10 positions and \$491 million for more sophisticated radios, <http://www.ebudget.ca.gov/BudgetSummary/BTH/8860454.html>.

30. Salbu, *supra* note 3, at 231.

31. See *infra* Appendix 1; Transparency International Web Site, <http://www.transparency.org> [hereinafter Transparency Int'l].

32. See, e.g., *infra* note 36.

Payers Index (BPI).<sup>33</sup> The traditional index was criticized by many as an incomplete picture of corruption.<sup>34</sup> Just as the U.S. law against bribery of domestic public officials prohibits both giving and taking bribes,<sup>35</sup> Transparency International began with its new index to chart admittedly unscientific perceptions of the propensity to pay bribes—and not simply to receive them. As has been the case in the studies since, not only did U.S. businesses rank as more likely to pay bribes than several western countries including Sweden, Australia, and Canada, but they even achieved a similar ranking to Germany, where until 1999, bribes of overseas officials were not only legal, but tax-deductible.<sup>36</sup>

There have been attempts to demonstrate the FCPA's effectiveness by showing a fall in foreign investment by U.S. companies in countries thought to be comparatively corrupt. The principle study, by Hines, claimed to have refuted earlier findings that the FCPA has had little deterrent effect on company conduct.<sup>37</sup>

#### A. Comparison to Domestic Bribery

Usually, the only statistical method used to attempt to measure international corruption is perception.<sup>38</sup> Transparency International itself routinely cautions that this is highly imprecise, given the unscientific method of polling and the measurement of perceptions.<sup>39</sup> However, there are other ways we should be able to approximate the relative propensity

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33. See *infra* Table 1; Transparency Int'l, *supra* note 31.

34. See, e.g., Transparency International Annual Report, at 12, (1999), at [http://transparency.org/publications/annual\\_report](http://transparency.org/publications/annual_report).

35. See 18 U.S.C. § 201 (1994).

36. "On the basis of [Germany's] new 1999/2000/2002 Tax Act (Steuergesetz) bribes may no longer be tax deducted in future." Organization for Economic Co-Operation and Development, *Germany - Phase 1: Report on Implementation of the OECD Anti-Bribery Convention*, at 14 (Jun. 27, 2000). The BPI for 2002 contained rankings similar to that for 1999. *Supra* note 31.

37. James R. Hines, Jr., *Forbidden Payments: Foreign Bribery and American Business After 1977* (Nat'l Bureau of Econ. Research Working Paper No. 5266, 1995). The paper is by now out of date, and at the time of publication contained insufficient data. In aggregating target countries with high economic growth into two groups, according to whether they are "corrupt" or "less corrupt," Hines used just nine countries for each grouping, without proof that they are representative. There is no explanation as to why, on a scale of 1 to 10, ratings of 0-7 should be "corrupt" and 8-10 "less corrupt." The paper also excludes data after 1982, after which the boom in Southern China, rife with corruption, elicited torrents of new investment.

38. Transparency International, the leading benchmarker of corruption calls its index the "Corruption Perceptions Index." See TI Corruption Perceptions Index Methodology (2005), [http://transparency.org/policy\\_research/surveys\\_indices/cpi/2005/methodology](http://transparency.org/policy_research/surveys_indices/cpi/2005/methodology).

39. See 2005 Frequently Asked Questions TI Corruption Perceptions Index (CPI 2005), at [http://transparency.org/policy\\_research/surveys\\_indices/cpi/2005/faq\\_cpi2005](http://transparency.org/policy_research/surveys_indices/cpi/2005/faq_cpi2005).

of U.S. companies to bribe and the likelihood that bribe-payers will get caught. Since the prohibition against bribing public officials in the United States is substantially the same as the FCPA's prohibition against bribing public officials outside the United States,<sup>40</sup> it should be instructive to compare conviction volumes.

This comparison is imperfect in two major ways: First, it is biased in favor of comparatively high FCPA enforcement rates in that 18 U.S.C. § 201 is not the only public statute against bribing public officials in the U.S. Bribery of public officials is illegal in all 50 states, and prohibitions on bribery of state officials can be found in both state constitutions and statutes.<sup>41</sup> For the sake of length, this Article does not count state-level bribery convictions in the United States.

Another bias that makes FCPA enforcement look more robust against domestic bribery than it actually is, is the fact that this Article includes among "convictions" consent decrees in which companies neither admit nor deny allegations of foreign bribery. In some cases, companies paid fines which were relatively small compared to the benefits flowing therefrom.<sup>42</sup> It also includes as a "conviction" any civil liability under the FCPA. The federal statistics for bribery convictions do not include decrees lacking an admission or guilt or civil liability.<sup>43</sup>

A bias which cuts in the opposite way is that the FCPA covers only the giving of bribes, whereas the domestic bribery statute covers both the giving and taking of bribes.<sup>44</sup> While there remains plenty of work to be done to quantify these differences and reconcile the similarity between the language of the two statutes, the statistical disparity between federal domestic and FCPA convictions is still stark and merits examination.

Another difference is worth noting: The domestic bribery statute targets the bribery of both public officials and witnesses,<sup>45</sup> which casts a broader net than the FCPA. Its language on the bribe offered to a public official encompasses "intent to influence any official act,"<sup>46</sup> while the FCPA is aimed only at payments made with an intention of "obtaining or retaining

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40. See 18 U.S.C. § 201 (1994); 15 U.S.C. § 78m, 78dd-1 to 78dd-3 (1998).

41. Thomas F. McInerney, *The Regulation of Bribery in the United States*, 73 INT'L REV. PENAL L. 100 (2002).

42. See Darrough, *supra* note 3, at 16. Working with incomplete figures which are "at best, suggestive," a limited universe of FCPA convictions yielded a median fine of \$75,000 on a median value of \$10 million of business at stake.

43. See *infra* note 49.

44. 18 U.S.C. § 201(b) (1994).

45. 18 U.S.C. § 201(b)(3) (1994).

46. 18 U.S.C. § 201(b)(1)(A) (1994).

business.”<sup>47</sup> In practice, U.S. courts have held that payoffs to reduce a tax bill can count as bribes which assist in the retention of business,<sup>48</sup> and while there may be inefficient companies which bribe because it makes them feel good, it is safe to say that most who pay off public officials do so because it is good for business.

The average number of offenders convicted of bribery in the U.S. District Courts (where bribery is the most serious offense charged) from fiscal years 1995-2000 was 199.3 per year.<sup>49</sup> Taking an average number for 1995 to 2000 of \$1.4 trillion per year in gross private domestic investment,<sup>50</sup> the result is 0.14 convictions per billion dollars of investment. Put another way, there was one federal bribery conviction for every \$7 billion of private investment.

Consider a similar approach to convictions or consent decrees for violating the foreign bribery provisions of the FCPA. There were 63 convictions or consent decrees between and including 1977 and July of 2005, or about two per year.<sup>51</sup> Foreign direct investment by U.S. companies between 1995 and 2000 totaled \$755 billion, or an average of \$125.9 billion per year.<sup>52</sup> The numbers work out to fewer than 0.02 foreign bribery convictions per billion dollars of foreign direct investment. That is, a conviction for every \$63 billion in investment. For every dollar of investment, there are nine times more bribery convictions for bribes to U.S. officials than for bribes to foreign officials. After cutting in half the number of domestic bribery convictions (to cover bribe giving but not bribe taking), the disparity is still more than four times the rate seen in the United States. These statistics alone ought to create at least a suspicion that the FCPA is under-enforced. And this suspicion should have increased as

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47. 15 U.S.C. §§ 78dd-1(b), 78dd-2(b), 78dd-3(b) (1998).

48. 15 U.S.C. §§ 78dd-1(a)(3)(B) & 78dd-2(a)(3)(B) (1998), *cited in* United States v. Kay.

49. *See generally* U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS (2003).

50. *See generally* In Constant-Year 2000 Trillions of Dollars: U.S. Dep't of Commerce, Gross Domestic Product Statistics.

51. When there were both civil and criminal proceedings related to the same set of facts, I have counted the incident as a single case. The vast majority of some 800 convictions, consent decrees or enforcement actions under the FCPA since its inception have nothing to do with overseas bribery. The FCPA is technically an amendment to the Securities Exchange Act of 1934, 15 U.S.C. § 78a (1998). It contains provisions that mandate adequate maintenance of books and records. Prior to the FCPA, the government prosecuted extraterritorial graft relying as it does today on the prohibition against conspiracy 18 U.S.C. § 371 (1994), on laws against fraud 18 U.S.C. § 1001 (1996), and wire fraud 18 U.S.C. § 1343 (2002).

52. *See* U.S. DIRECT INVESTMENT ABROAD: COUNTRY AND INDUSTRY DETAIL FOR CAPITAL OUTFLOWS (2000), *available at* [www.bea.doc.gov/bea/di/usdiacap.htm#2000](http://www.bea.doc.gov/bea/di/usdiacap.htm#2000).

of 1998, when Congress amended the FCPA to abolish any U.S. territorial nexus under the Act's alternative jurisdiction provisions for U.S. individuals.<sup>53</sup> Previously, conviction required the use of some instrumentality of interstate commerce in furtherance of the corrupt practice.<sup>54</sup>

The OECD highlighted one factor which could help account for the disparity between domestic and foreign bribery convictions: the fact that corporate compliance policies at U.S. corporations

are more extensively and intensively taught, understood and implemented within the U.S. than internationally, where the problem of bribery is most likely to arise . . . A survey by Transparency International of leading practices in corporate governance revealed that companies generally performed less, not more, monitoring activity in their overseas operations than at home. It also found that only 52 per cent of respondents who had codes of conduct had multilingual versions available, and that only 19 per cent rated their code of conduct as extremely effective.<sup>55</sup>

Consider *Monsanto*, which settled with the SEC and the Justice Department earlier this year, paid civil and criminal penalties of \$1.5 million and entered into a deferred prosecution agreement with the DOJ.<sup>56</sup> Despite having an FCPA compliance program, the company conducted no internal audits of its Indonesian affiliates from 1996 to 2001,<sup>57</sup> even though Indonesia is the site of more bribery violating the FCPA than any other country but one.<sup>58</sup> In the end, Monsanto uncovered its own bribery and informed the government of the wrongdoing.<sup>59</sup> But how much comfort should we take, given lax auditing by a sophisticated company which turns itself in, as to the conduct of another similarly-sized company which has not come forward to confess bribery?<sup>60</sup>

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53. 15 U.S.C. § 78dd-2(i) (1998).

54. Pub. L. 105-366, § 3(d)(1) (adding the alternative jurisdiction provisions to the FCPA).

55. See OECD, *supra* note 2, at 18.

56. SEC v. Monsanto Co., [2005] 5 FCPA Rep. (Bus. Laws) 699.9167, 1:05CV00014 (D.D.C. Jan. 6, 2005); SEC Litigation Release No. 19023 (Jan. 6, 2005).

57. In the Matter of Monsanto Co., SEC Administrative Proceeding File No. 3-11789, Jan. 6, 2005.

58. *Infra* Table 1.

59. See *supra* text accompanying note 56.

60. The Monsanto enforcement, rather than being an aberration, is closer to the norm in FCPA enforcement history. See *infra* Part III.

While it is possible that businesses operating outside the United States bribe less than businesses and individuals do inside the country, examination of the kinds of convictions obtained under the FCPA leads to a starkly different conclusion: that most of the convictions and consent decrees obtained by the government were either handed to the authorities by the company concerned, or the criminal conduct of those found guilty was so clumsy that even the most rudimentary precautions would have helped greatly to avoid detection. Many of these cases are dealt with in detail in Section III.

### *B. Geographic Breakdown of Convictions*

A rash of bribery convictions in countries that take relatively small shares of U.S. direct investment might indicate under-enforcement, especially if independent indices suggest that countries with low conviction rates have independently high rates of bribe taking or bribe solicitation.

Table 1 lists the countries to which foreign bribes have been directed (or alleged to have been directed) in the sixty-three convictions or consent decrees recorded by the Foreign Corrupt Practices Act Reporter, the DOJ, the SEC, and the Judiciary's PACER service covering the federal courts. Column three represents that country's share of total convictions or consent decrees under the anti-bribery provisions of the FCPA since enactment, and column four that country's share of total U.S. foreign direct investment for the year 2000.

**Table 1**

<b>Country</b>	<b># of Cases (One Per Country Unless Noted), Comments</b>	<b>% of FCPA Convictions/Decrees</b>	<b>% of Total U.S. FDI, 2000 (\$142.6 Billion)</b>
Algeria	Partial case	<1.6	
Angola	Partial case	<1.6	
Argentina	3	4.8	0.47
Azerbaijan		1.6	n/a
Benin	Partial case with Nepal, Bangladesh, Sri Lanka, France, and Japan	<1.6	
Brazil	2	3.2	2.3
Canada	2	3.2	11.8
Chile	Partial case	<1.6	n/a
China	Partial case with Philippines, Thailand	<1.6	Combined
Colombia		1.6	0.2
Cook Is.		1.6	<0.04
Costa Rica		1.6	0.3
Dominican Republic	3	4.8	0.1
Egypt	4	6.3	0.4 (in 2001)
Gabon		1.6	<0.2
Germany (West)		1.6	2.7
Greece		1.6	0.07
Haiti	2	3.2	<0.7
Indonesia	7	11.1	0.5
Iran	Partial case	<1.6	n/a
Iraq		1.6	<0.3
Israel		1.6	0.3

Ivory Coast	Partial case	<1.6	
Jamaica		1.6	<0.7
Kazakhstan		1.6	n/a
Kenya	By way of Sweden	1.6	<0.23
Mexico	8 cases (7 of which related to one series of bribes to Pemex officials)	12.7	2.9
Nicaragua	2	3.2	0.08
Niger	3	4.8	<0.23
Nigeria	2	3.2	0.1
Oman		1.6	0.3
Panama	2	3.2	0.9
Poland		1.6	0.4
Qatar		1.6	<0.3
Russia		1.6	0.2 (in 1999)
Saudi Arabia	3	4.8	0.3
Taiwan	1	1.6	0.7
Trinidad & Tobago	2	3.2	<0.7
U.K.		1.6	
Venezuela		1.6	
Country unspecified	1	1.6	

Several countries represent a negligible share of U.S. business interest abroad. Yet, those countries account for a disproportionate share in the number of bribes detected since 1977. That could be as a result of two factors: they could be more corrupt than countries in which we observe fewer or zero convictions, and/or local law enforcement cooperation could be better than it is in China, for example, which is a major destination of U.S. capital but which has this year yielded only its first conviction or

consent decree under the FCPA<sup>61</sup>—discovered by an acquiring company during “due diligence” and not by the U.S. authorities.<sup>62</sup>

In some cases, the amount of business done in a country may not correlate well with investment. For instance, Egypt is a major recipient of defense assistance from the United States, while private U.S. businesses invest relatively little in that country. Still, there are major recipients of U.S. investment which are not on the radar screen when attempting to detect bribery. Taken together, China, Hong Kong, Japan, South Korea, India, Italy, and Venezuela had a collective 16.6% of FDI in 2000, but up to that point none of those countries had ever been the location of a single bribe that resulted in either an FCPA conviction or a consent decree.<sup>63</sup> Because of the high number of prosecutions from a single case (seven from the bribery of Mexican state oil company Pemex), Mexico appears to have yielded more than its expected share of bribery violations. Yet, since most of those violations were from a single bribery scheme, the possibility that many other incidents of bribery go undetected or unprosecuted remains highly plausible.

The idea that only two U.S. companies have ever paid bribes in China, Korea, or Venezuela since the FCPA’s enactment seems farfetched. All of these countries score as having plenty of officials happy to accept bribes, according to Transparency International.<sup>64</sup> While the Transparency International index may be imprecise, the most serious criticism which tends to be directed against it is that it omits to rate certain countries. Ratings of individual countries are taken from a variety of sources which tend to poll experienced business executives.<sup>65</sup>

To assume that not having any bribery convictions in the preceding list of major trading partners is reasonable, an analyst would have to presume that the FCPA is acting as a deterrent to bribery. To be an effective deterrent, the FCPA would have to overcome what is probably a greater temptation for companies to offer bribes abroad than at home: more

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61. SEC v. GE InVision, Inc., C-05-0660MEJ (N.D. Cal. Feb. 14, 2005).

62. [2005] 1 FCPA Rep. (Bus. Laws) 106.006.

63. From survey of every code reported in FCPA Report since FCPA’s inception.

64. In 2000, in a ranking of 90 countries, with more corrupt countries ranking lower, Venezuela, China, South Korea ranked 71st, 63rd, and 48th, respectively. Some jurisdictions involved with multiple FCPA convictions ranked as less prone to corruption, including Taiwan (28th). Egypt ranked on par with China in corruption, and has registered three FCPA convictions to China’s one despite China’s much greater importance as a destination for U.S. investment. Transparency International, Corruption Perception Index (2000), available at [www.transparency.org/policy\\_research/surveys\\_indices/cpi/previous\\_cpi\\_\\_1/2000](http://www.transparency.org/policy_research/surveys_indices/cpi/previous_cpi__1/2000).

65. *Supra* note 38.

solicitation of bribes than the companies might be used to in the United States, as well as highly inadequate enforcement of domestic corruption laws in some very large or profitable markets.

If the FCPA is not used as often as its drafters might have intended, there are explanations other than the principle one embraced later in this Article, (that the law is too costly to enforce with current funding levels and international banking practices, especially without cooperation of foreign legal authorities). Harvey Pitt, who later became Chairman of the Securities and Exchange Commission (SEC) but who helped to draft the FCPA when he was a lawyer at the commission in the 1970s, asserts that at various times there has been a reluctance to enforce the FCPA, since U.S. companies were perceived to be at a disadvantage relative to companies from countries with no prohibition on foreign bribery.<sup>66</sup> If that is so, and if U.S. businesses could pick up on that reluctance, the U.S. Commerce Department was not misleading when it used to offer an annual tally of the billions of dollars in business U.S. companies had allegedly lost overseas because they were restricted from offering bribes, while European and Asian competitors were not.<sup>67</sup> No methodology or list of unsuccessful bids has ever been offered by Commerce to support its assertions of lost business.

### III. THE EASY (CHEAP)/HARD (EXPENSIVE) DIVIDE

#### *A. The Methodology*

This Article takes the position that the FCPA makes it relatively inexpensive for companies to bribe abroad. Disguising bribery is cheap. The chances of being detected are low. The author has examined the sixty-three companies or individuals involved in successful FCPA prosecutions or decrees since the law's enactment.<sup>68</sup> From failing to take inexpensive steps to disguise the beneficial owners of bank accounts, to the clumsy

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66. Interview with Harvey Pitt, Former Securities and Exchange Commission Chairman (Apr. 14, 2004).

67. Eleanor Roberts Lewis, Chief Counsel for International Commerce, U.S. Department of Commerce, Speech to American Bar Association Forum on the Foreign Corrupt Practices Act and the OECD Convention (Mar. 21, 2002), (transcript available at <http://www.osec.doc.gov/ogc/occic/abasppeech.htm>).

68. In classifying the easy and hard cases, I have identified as "hard" any case lacking details as to how the bribe was detected. In addition, I have credited as a conviction any consent decree with no admission of guilt.

involvement of U.S. diplomats in the proposed bribery of overseas officials, U.S. companies have often displayed a surprising ineptitude in their ability to fly beneath the under-funded radar at the Department of Justice and the SEC. For the sixty-three convictions under the anti-bribery provisions of the FCPA or consent decrees since 1977, I have classified 36 as “easy” or “cheap” for the U.S. authorities to handle. This may be due to poor planning on the part of U.S. companies, or because the investigations were undertaken by other agencies and yielded evidence of bribery by accident. Most commonly, companies turned themselves into the authorities.

If the FCPA seems under-enforced with just a bit more than two cases a year in a quarter century, not to mention the statistical and country-specific analysis in Section II, it looks much weaker considering the number of cases that should have been uncommonly easy to prove. With so many mistakes being made by companies, and with an inexpensive alternative course of action that would make detection much harder, the government bears the burden to prove that the FCPA properly deters.

In the easy cases, the prosecution overcomes three major sorts of barriers.

### 1. Costly Financial Detection

The most difficult element in proving a case is the tracing of funds through offshore corporations and bank accounts, the beneficial ownership of which can be extremely costly to determine. Suppose that in order to prove a case against a bribe-giver who is determined not to get caught, the United States must prove that payments to a particular Caribbean corporation secretly benefited the procurement minister in the foreign country concerned. Proving the link between the minister and the company can be extremely expensive.<sup>69</sup> Buying a pre-established British Virgin

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69. One of the attractions of foreign-based trusts is that not only are these hostile to the interests of nonresident creditors, but

the creditor may encounter difficulty in discovering vital documents which would trace how the [trust] was funded, who the key players are, and where the trust assets are located. Cayman Islands confidentiality laws, which apply to all persons associated with the establishment and administration of [a trust] were drafted specifically to protect, and thereby attract, foreign settlors and investors.

Stacey K. Lee, *Piercing Offshore Asset Protection Trusts in the Cayman Islands: The Creditors' View*, 11 *TRANSNAT'L L.* 463, 494 (1998).

Islands company off the shelf can be done in the space of a few days.<sup>70</sup> Still, in many cases, the companies caught violating the FCPA did not bother to avail themselves of this cheap method of cloaking assets. The threat that companies can cheaply hide assets and, in so doing, raise the cost of enforcement for those tracing the assets has only increased in recent years.<sup>71</sup>

## 2. Foreign Noncooperation

The cooperation of the authorities in foreign countries can also be critical. Suppose the police forces in South Korea, China, or Venezuela fail to cooperate in investigating the bribery of officials in their countries, the United States must then prove the case at home, without power of subpoena or search in the country where the bribe might have taken place.<sup>72</sup>

While following the general current of official opinion in declaring the FCPA a successful piece of legislation in its high deterrent value, former Justice Department antifraud prosecutor William F. Pendergast made the following assertion in a 1995 conference address, about the needs of the U.S. authorities in tracking down bribery of foreign officials: "In every prosecution, it is clear the government had obtained adequate evidence of the foreign bribery activity. The foreign bank records and witness testimony to key meetings are the linchpin evidence. Without the ability to trace monies to the foreign official, these prosecutions probably would not have gone forward."<sup>73</sup>

## 3. Lack of a Quid Pro Quo

Several of the successful convictions for violations of the FCPA featured neat written statements of intended bribes, records of a series of bribes, or other documents making the government's case easier than it would have been had simple rules been followed not to record such illegal arrangements. A quid pro quo for a payment helps establish an accused's culpability according to the statute's definition of knowledge of a corrupt

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70. See, e.g., Offshore Corporation Web Site, [www.offshorecorporation.com](http://www.offshorecorporation.com); Offshore Companies House, British Virgin Islands, IBC's Have the Following Features and Advantages, [www.bvi-corporations-ibc-incorporate-in-bvi.offshore-companies.co.uk](http://www.bvi-corporations-ibc-incorporate-in-bvi.offshore-companies.co.uk).

71. See OECD, *supra* note 2, at 6 (noting that "the pattern has changed from the classic suitcase filled with cash to more subtle scenarios involving intermediaries, complex transactions with government entities, and misstatements of business or promotional expenses.").

72. *Id.* at 28.

73. See [1996] 1 FCPA Rep. (Bus. Laws) 102.014.

payment.<sup>74</sup> Even the most rudimentary measures to conceal bribes would counsel against a written agreement to bribe.

### B. *The Comparatively Easy Cases*

Following is a sampling of some of the thirty-six cases I have classified as “easy” or “cheap” for authorities to have made. They make up roughly half of all successful prosecutions of foreign bribery since the FCPA was enacted: they are not only highly representative but also troubling, in that the bribers were greatly inefficient.

Comparatively complex routing of financial transactions will not always be undetectable. But by making transactions more difficult to trace, enforcement costs for the U.S. government rise and the rate of enforcement should slow, assuming a constant budget and staffing for anti-bribery investigations. Rational companies seeking to bribe can pay little and, in exchange, acquire anonymity in their offshore transactions.

#### 1. *United States v. Roy Carver*<sup>75</sup>

An oil company sought business in Qatar. Co-defendant Holley arranged to involve state department officials, including the U.S. ambassador to Qatar, in his business negotiations. At a meeting in Qatar in March, 1978, defendant Carver told the U.S. ambassador that he had already paid \$1.5 million to a Qatari official to obtain his original oil concession, and “expressed frustration that his entire investment would soon be lost. Defendant Carver then stated to Ambassador Killgore ‘Who do I go see now, how do I get it done’.”<sup>76</sup> In the context of Carver's revelations concerning [official] Al Jaidah, the clear import of Carver's question was, and [the Ambassador] reasonably construed it to be, an inquiry as to which officials of the Government of Qatar would be willing to sell their influence to renew Holcar's concession.”<sup>77</sup>

#### 2. *SEC v. Sam P. Wallace*<sup>78</sup>

Consent decree following the allegation of a bribe of \$1.3 million paid to the chairman of the Trinidad & Tobago Racing Authority to obtain a

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74. 15 U.S.C. §§ 78dd-1(f)(2)(A), 78dd-2(h)(3)(A), 78dd-3(f)(3)(A) (1998).

75. [1982] 2 FCPA Rep. (Bus. Laws) 645 (S.D. Fla. Apr. 9, 1979).

76. *Id.* at 645.

77. *Id.* at 646.

78. [1982] 2 FCPA Rep. (Bus. Laws) 682 (D.D.C. Aug. 13, 1981). *See also* United States v. Alfonso A. Rodriguez, [1984] 2 FCPA Rep. (Bus. Laws) 690.06 (D.P.R. Mar. 11, 1983).

contract to build a grandstand. To the credit of the authorities in the United States, this case involved penetrating the records of a Cayman Islands trust. Still, I have classified it as an “easy” case because the defendants made detection simple for prosecutors in a number of ways. Checks drawn on the company in favor of an intermediary, and from the intermediary to the bribe-receiving official, tended to match, making the paper trail for establishing a bribe very simple. The other avoidable measure was to use an offshore company controlled by the president of the Wallace subsidiary in Puerto Rico as an intermediary. Three of the checks to the official in Trinidad were personally endorsed by the president of that subsidiary.

3. *United States v. Napco International, Inc. & Venturian Corp.*<sup>79</sup>

Agency agreement through which bribes were funneled to officials of the government of Niger. The agreement used a code name for the agent, which was part of the given name of a Niger official’s live-in girlfriend. A bank account was opened in the United States, rather than in Niger, in the name of the agent.<sup>80</sup> In addition, the agency agreement stipulated that the agent would receive “10% of gross.”<sup>81</sup> Finally, the corrupt payments were structured and made within the United States, making enforcement costs a lot lower than they might have been had more difficult-to-track aliases been used offshore.

4. *United States v. Morton*<sup>82</sup>

This was a conspiracy to bribe a provincial government controlled corporation in Canada to induce it to buy passenger buses.<sup>83</sup> Tracing the transaction was easy because the payments were made through the Canadian agent’s personal corporation in Canada. Canada does not offer the anonymity available in other offshore locations.<sup>84</sup> The agent also made large withdrawals from—and deposits of cash to—his own Canadian bank accounts.<sup>85</sup> There is no record of how the bribery scheme was uncovered,

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79. [1989] 3 FCPA Rep. (Bus. Laws) 697.74, Cr. No. 48965 (D. Minn. Mar. 10, 1989).

80. An account opened outside the country of business is very often the sign of secretive money flows. See *infra* Part IV (discussing of shaming and private-sector monitoring approaches to deterring corruption).

81. *Supra* text accompanying note 79.

82. [1990] 3 FCPA Rep. (Bus. Laws) 698.62, Criminal No. 3-90-061-H (N.D. Tex. Mar. 14, 1990).

83. *Id.*

84. *Id.*

85. *Id.*

but varied and voluminous cash transactions are an excellent way to attract the attention of bank auditors during routine checks.<sup>86</sup>

5. *United States v. F.G. Mason Engineering, Inc.*<sup>87</sup>

The zealous government official in what was then West Germany wrote to the U.S. company (over a discrepancy of 0.03% of the contract price): “I would like to point out that it was agreed upon between your father and me that my ‘commission’ for everything that is associated with the MICRO-G project will be 13 1/3 percent (not 13.3 percent) . . .”<sup>88</sup> This communication was then mailed to the United States, violating two cardinal rules of bribery: putting in writing anything that would make a commission arrangement sound like anything other than a commission arrangement; and should this rule be disregarded, the writing should never be sent over U.S. mails or wires.<sup>89</sup>

6. *United States v. Vitusa Corp.*<sup>90</sup>

Vitusa sold milk powder to the Dominican Republic, but because it was not fully paid, it bribed an official to expedite payment.<sup>91</sup> It sent, by facsimile, a letter to a bank in Santo Domingo, instructing that part of its payment be withheld and given to its agent.<sup>92</sup>

Vitusa made enforcement easy by asking the advice of an Agricultural Service Counselor at the U.S. embassy in Santo Domingo, in which Vitusa related that a bribe had been solicited.<sup>93</sup> The U.S. official advised Vitusa not to pay, and then sent a written summary of the conversation to Vitusa.<sup>94</sup> When bribers alert the authorities that they have been asked for a bribe, they may not always get caught, but enforcement costs likely decline immediately as authorities know where to focus their attention.

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86. See, e.g., Financial Action Task Force on Money Laundering, Paris Report on Money Laundering Typologies, 2003-2004, at 12; Financial Action Task Force Web Site, [www.fatf-gafi.org](http://www.fatf-gafi.org).

87. [1991] 3 FCPA Rep. (Bus. Laws) 698.70, Case No. B-90-29-JAC (D. Conn. June 25, 1990).

88. *Id.*

89. 15 U.S.C. §§ 78dd-1, dd-3 (outlawing use of the mail in overseas bribery. More prosaically, paper trails make detection easier.).

90. [1994] 3 FCPA Rep. (Bus. Laws) 699.155, Criminal No. 93-253 (D.N.J. Apr. 13, 1994).

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

### 7. *United States v. David H. Mead*<sup>95</sup>

Mead was an executive at Saybolt, Inc., a company based in Massachusetts. He was convicted after a jury found he had paid \$50,000 to bribe a Panamanian official.<sup>96</sup> Saybolt agreed to pay a fine of \$4.9 million.<sup>97</sup> The criminal investigation of Saybolt was initiated by the Environmental Protection Agency in Massachusetts, following allegations concerning data falsification in one of Saybolt's labs.<sup>98</sup> In the course of this investigation, agents of the EPA's Criminal Investigations Division uncovered information concerning the payoff made in Panama.<sup>99</sup> A substantial amount of incriminating evidence against Saybolt and its officials consisted of e-mails discussing the illegal payment.<sup>100</sup>

### 8. *United States v. Control Systems Specialist, Inc.*<sup>101</sup>

Also charged was Darrol R. Crites, the president of the company, which dealt in surplus military equipment.<sup>102</sup> Both Crites and the company entered guilty pleas, after they were charged with bribing a Brazilian military procurement officer who was stationed at a U.S. base in Ohio.<sup>103</sup> While laudable that the bribery scheme was uncovered, this was unusual in that the foreign official was resident in the United States, making this case little different in complexity from any domestic bribery charge. In fact, one count of each indictment included a domestic bribery charge involving a civilian employee of the U.S. Air Force.<sup>104</sup> Payments to the Brazilian officer were easy to trace as they were by company check.<sup>105</sup> None of the extra costs involved in an overseas investigation were encountered here.<sup>106</sup>

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95. [1998] 4 FCPA Rep. 699.534, Cr. Complaint No. 98-3025 (D.N.J. Jan. 29, 1998).

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. [2002] 1 FCPA Rep. (Bus. Laws) 113.023.

101. [1999] 4 FCPA Rep. (Bus. Laws) 699.587, Case No. CR-3-98-073 (S.D. Ohio Aug. 19, 1998).

102. *Id.*

103. *Id.*

104. *Id.*

105. *See contra* Lee, *supra* note 23 (showing complexities involved when sophisticated concealment mechanisms are used).

106. *Id.*

### 9. *SEC v. International Business Machines Corp.*<sup>107</sup>

IBM consented to a cease and desist order without admitting or denying the findings of the SEC, and agreed to pay a \$300,000 civil penalty following illegal payments by its wholly-owned subsidiary in Argentina in 1994.<sup>108</sup> “Argentine tax authorities conducted a routine audit of a local company and discovered that millions of dollars reported as paid to the company were, in fact, either deposited in a Swiss bank account or were missing. The U.S. criminal investigation proceeded on the theory that IBM used the local shell company to pay bribes to government officials.”<sup>109</sup>

In this and in one case in which Argentine officials aided the United States in a sting operation to simulate a solicitation of a bribe,<sup>110</sup> officials from Argentina appear to have been unusually cooperative with U.S. anti-bribery investigations. Representing less than a half of one percent of total U.S. foreign direct investment, Argentina has nonetheless helped in nearly 5% of all FCPA convictions or consent decrees—punching far above its relative weight. That leads to a plausible suspicion that reluctance to cooperate, or inferior policing skills, on the part of other countries might explain their under-representation in successful FCPA actions, as the corrupt activity goes on unabated.

### 10. *United States v. Robert Richard King*<sup>111</sup>

This case involved payoffs to officials in Costa Rica for a major coastal construction project. It represents one of the richest lodes imaginable for a corruption prosecution: long detailed discussions in writing about the subjects and methodologies of the payoffs. In one written solicitation to an Indiana investor for a loan of \$20 million, \$1 million was allocated for “reserve for kiss,” one of the several euphemisms for a bribe. King’s conviction was upheld on appeal to the Court of Appeals for the Eighth Circuit.<sup>112</sup>

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107. [2001] 4 FCPA Rep. (Bus. Laws) 699.8136, 1:00CV03040 (JR) (D.D.C.), reported in SEC litigation release No. 16839, Dec. 21, 2000.

108. *Id.*

109. See Corr & Lawler, *supra* note 26, at 1290.

110. *United States v. Herbert Tannenbaum*, [1999] 4 FCPA Rep. (Bus. Laws) 699.583, Criminal Complaint No. 97-4441 (S.D.N.Y. Aug. 4, 1998).

111. [2003] 5 FCPA Rep. (Bus. Laws) 699.819601, No. 01-00190-01/02-CR-W-1 (W.D. Mo. June 27, 2001).

112. 351 F.3d 859, 868 (8th Cir. 2003), *cert. denied*, 2004 U.S. LEXIS 4213 (U.S., June 14, 2004).

11. *SEC v. Chiquita Brands International, Inc.*<sup>113</sup>

Discovered by internal auditors at Chiquita, the company eventually consented to pay a \$100,000 penalty, but neither admitted nor denied the making of illegal payments to Colombian officials totaling the equivalent of \$30,000.

According to the SEC, internal documents at Chiquita indicated that the bribes were to ensure that the company did not lose a coveted customs license, which would have incurred a cost of \$1 million. In the end, payment of a \$100,000 fine should have been worth the effort, as the only individuals who suffered were the local Chiquita employees who were fired. The disturbing message for other companies: as long as head office is insulated on paper from bribes paid by a local subsidiary, the fallout could prove to be worthwhile.<sup>114</sup>

Sengupta was a manager at the World Bank whose job was to select and retain consultants for feasibility and other technical studies.<sup>115</sup> Sengupta was paid off by a Swedish consultant he hired, and then agreed to a request by a foreign official in Kenya to have the consultant pay that Kenyan official. He pled guilty to one count of wire fraud; one count of conspiracy to commit wire fraud; and one count of violating the FCPA.

As if tying up a nice neat package with a bow for investigators, Sengupta, according to the government, did the following: “In or about December 1998, the defendant sent an electronic mail message from the World Bank, in the District of Columbia, to the Swedish Consultant in Stockholm, Sweden. The message was in the form of a spreadsheet detailing the kickbacks paid and amounts still due and owing.”<sup>116</sup>

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113. [2002] 5 FCPA Rep. (Bus. Laws) 699.8296. 1:01CV02079 (D.D.C. Oct. 3, 2001).

114. Worth noting is the FCPA’s relative leniency as to books and record-keeping regarding subsidiaries which are less than 50%-owned by the U.S. parent, which requires that the U.S. issuer

proceed[s] in good faith to use its influence, to the extent reasonable under the issuer’s circumstances, to cause such domestic or foreign firm to devise and maintain a system of internal accounting controls . . . . An issuer which demonstrates good faith efforts to use such influence shall be conclusively presumed to have complied with the requirements of paragraph (2).

15 U.S.C. § 78m(b)(6) (1994).

115. *United States v. Gautam Sengupta*, [2002] 5 FCPA Rep. (Bus. Laws) 699.8341, Case No.1:02CR00040 (D.D.C. Jan. 30, 2002).

116. *Id.*

### C. *The Remaining Hard Cases or Clusters*

These cases are presumed to have been costly and difficult to prosecute, but that is often because there is no evidence that they were anything other than difficult cases, or else little specific at all about how they were prosecuted.<sup>117</sup> Even if it was complicated to catch some of those convicted or fined, the tiny number of such cases over twenty-five-plus years of the FCPA make it difficult to believe that they are typical, and not merely drops of water in fast-flowing river of corruption.

What might give believers in the FCPA's effectiveness some grounds for optimism, is that the United States initiated two cases in 2003—both dealing with the oil industry in Central Asia—which have the potential to breathe new life into the Act because of the complexity of unraveling the money trails needed to bring charges.<sup>118</sup> If the government can win these expensive and complex cases, it could lead to more deterrence of bribery than winning many more convictions which were inexpensive to investigate and prosecute.

## IV. FOUR PATHS FORWARD FOR THE FCPA

### A. *The Most Obvious Solutions to Improving FCPA Enforcement*

There can always be calls for more money and personnel to combat any problem, and to the extent the United States is willing to do this, an increase of the recent sort of difficult prosecutions undertaken could result.<sup>119</sup> Still, the numbers remain too small for this to be embraced as the only—or even the main—solution to the problem of FCPA under-enforcement.

The situation at present is the reverse of the one which applies to the domestic U.S. tax net, where a low enforcement rate for domestic tax audits fails to discourage the payment of tax because there is still a

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117. See, e.g., SEC v. Ashland Oil, [1986] 3 FCPA Rep. (Bus. Laws) 696.95, Civil Action 86-1904 (D.D.C. July 8, 1986); see also United States v. Lockheed Corp., [1995] 3 FCPA Rep. (Bus. Laws) 699.185, Criminal Action No. 1:94-CR-226-01 (N.D. Ga. Jan. 27, 1998).

118. United States v. James H. Giffen, 326 F. Supp. 2d 497 (S.D.N.Y. 2004), trial scheduled for Jan. 9, 2006; and United States v. Hans Bodmer, 342 F. Supp. 2d 176 (S.D.N.Y. 2004); guilty plea to the charge of conspiring to launder money, sentencing pending. The Bodmer case is significant as it relates to catching corruption via the prosecution of money laundering. See *infra* text accompanying note 134.

119. See *supra* text accompanying note 118.

perception that compliance is widespread.<sup>120</sup> In the international bribery sphere, U.S. companies have perceived that competitors overseas are not withholding the payment of bribes. With low enforcement rates at home, the economic (as distinct from the moral) incentive is not to act honorably, but to offer a bribe with a reasonable certainty of non-apprehension. As with the tax net, a small number of difficult convictions could suffice to increase compliance.<sup>121</sup>

Tarullo argues that while the Justice Department has adequate resources to investigate and prosecute allegations of bribery, it appears not to have a system for analyzing available information sources for evidence of possible overseas bribery.<sup>122</sup> This argument is problematic in that it assumes such a system of analysis is either costless or low-cost when, in fact, it is time-intensive and thus costly. A DOJ with sufficient resources and the will to go after bribery should be able to mount more than two prosecutions a year. Tarullo concedes a resource problem at the SEC for pursuit of possible civil violations of the FCPA.<sup>123</sup>

### B. *Private Right of Action*

Courts have held that there is no private right of action under the FCPA,<sup>124</sup> while Pines has suggested such a right be allowed in order to encourage more FCPA suits, taking as one source of inspiration the antitrust laws of the United States.<sup>125</sup> The critical difference is that the investigative tools needed to prove criminal or civil liability in international bribery involve the cooperation of foreign governments and the investigation of international flows of money, two tasks ill-suited to the private sector, at least without government cooperation.<sup>126</sup>

If secretive off-shore financial centers simply opened their corporate records to any private lawyer who asked, they would quickly erode the main competitive advantage to setting up there as opposed to low-cost

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120. See *supra* text accompanying note 26.

121. See generally Dan M. Kahan, *Signaling or Reciprocating? A Response to Eric Posner's Law and Social Norms*, 36 U. RICH. L. REV. 367 (2002).

122. See Tarullo, *supra* note 3, at 707.

123. *Id.*

124. *Lamb & Willis v. Phillip Morris, Inc.*, 915 F.2d 1024 (6th Cir. 1990), *cert. denied*, 111 S. Ct. 961 (1991).

125. Daniel Pines, *Amending the Foreign Corrupt Practices Act to Include a Private Right of Action*, 82 CAL. L. REV. 185 (1994).

126. See discussion *supra* text accompanying notes 69-73.

jurisdictions on-shore.<sup>127</sup> This Article argues that increasing civil penalties and decreasing criminal sanctions would make little difference with regard to the FCPA: The problem is not so much one of evidentiary standards, as it is in an offense of accounting fraud, but one of gathering evidence that is expensive to acquire. Restatements of annual reports or sudden filings for bankruptcy are obvious on their face, and throw up the red flags for audits of accounting practices. Bribe money flowing through offshore, anonymous companies is more costly to discover before even civil action can be contemplated.<sup>128</sup>

Because the investigative costs of overseas bribery can be so high, the FCPA is better compared with campaigns to minimize the use of child labor. As in bribery cases where information on company activities is more difficult to obtain, even though in black letter terms, bribery is a crime, whereas subcontracting to a company in China which fails to provide adequate education for its minor employees is not.

### C. Bribery as Predicate Offense

Two private rights of action are in fact possible in relation to FCPA violations: conduct that violates the FCPA is also a violation of the Travel Act,<sup>129</sup> which is a Racketeer Influenced and Corrupt Organizations (RICO) predicate act. Private parties can sue under civil RICO for treble damages based on allegations of FCPA violations.<sup>130</sup> In addition, a violation of the FCPA is a predicate offense under the money laundering laws.<sup>131</sup> The near-total absence of successful private suits under these laws helps make this Article's point:<sup>132</sup> information gathering for such crimes is expensive. It is cheaper to match competitors bribe for bribe than to slog through years of paper trails to bring them to court.

Still, from a pure efficiency standpoint, the United States may find that rather than spending money on detecting "original" crimes like drug trafficking or bribery, it would be more efficient to combat laundering of monetary proceeds from these crimes.<sup>133</sup> The OECD suggests reducing the

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127. Transparency International, FAQs for Journalists - Facts and Figures on Corruption, Question 8, at [http://www1.transparency.org/faqs/media\\_faq.html](http://www1.transparency.org/faqs/media_faq.html).

128. Philip Segal, *Offshore Banks, Trusts Crimp U.S. Terror Fund Investigation*, ASIAN WALL ST. J., Sept. 25, 2001, at 3.

129. 18 U.S.C. § 1952 (b)(3) (2002).

130. 18 U.S.C. § 1964 (c) (1995).

131. 18 U.S.C. § 1956 (c)(7)(D) (2002).

132. A rare example is *United States v. Herbert Steindler*, [1994] 3 FCPA Rep. (Bus. Laws) 699.131, Cr. No. 194-29 (S.D. Ohio, 1994).

133. See *supra* text accompanying note 118. *Bodmer* proved problematic only because it straddled older and newer versions of the FCPA. One count of conspiring to violate the FCPA was

level of culpability, perhaps even to criminal negligence, required to prosecute the failure of financial institutions to report suspicious transactions.<sup>134</sup> One benefit to attacking bribery through anti-money laundering laws is that the latter are not evaluated as crudely as is the FCPA. Rather than a simple list of convictions, reports on the effectiveness of money laundering at least provide a rough estimate of the scale of the problem.<sup>135</sup> Against that, success is easier to measure. In the event of failure, new approaches can be proposed, whereas with a probably-failed FCPA, new approaches can be batted down with factless assertions that the FCPA works.

A more radical approach, though one which ought not to offend the principles of legality because it would be a bright line rule introduced well in advance, would be for the United States to limit the use by U.S. persons and corporations, of offshore financial centers and anonymous corporate entities. That would seem to demand a degree of political determination lacking at present.<sup>136</sup>

The United States has the power to forbid Americans from dealing with foreign trustees, but that is not, apparently, currently being contemplated. Had it been shown that Al-Qaeda had financed its pre- Sept. 11 terrorist activities through the British Virgin Islands or Delaware, the political landscape on the question of trusts might have changed. Instead, the honor-based *Hawala* finance system, settled by diamond smuggling between the Middle East and India, was found to be a principal international financial tool used by these terrorist networks.<sup>137</sup>

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dismissed based on the rule of lenity. Still, the case stands for the proposition that failure to prove FCPA violations is not a bar to proving money laundering in furtherance of FCPA violations, given that bribers often employ agents to do their laundering for them.

134. See OECD, *supra* note 2, at 22.

135. Somewhere between 2% and 5% of global Gross Domestic Product. Estimates available at <http://www1.oecd.org/fatf>, web site for the Financial Action Task Force, the anti-money laundering arm of the OECD.

136. Such a move would depart from past practices, and is fraught with political difficulty not only in the United States but overseas as well: "Federal legislation on the substantive law of trusts would not reach many offshore trusts, simply because the United States as an entity lacks power to compel the foreign trustee to act in accordance with American law." Stewart Sterk, *Asset Protection Trusts: Trust Law's Race to the Bottom?* 85 CORNELL L. REV. 1035, 1115 (2000).

137. See, e.g., Adam Cohen, *How Bin Laden Funds His Network*, TIME, Oct. 1, 2001; CNN interview with William Wechsler, Director for Transnational Threats on the U.S. National Security Council during the Clinton administration (Sept. 27, 2001).

#### D. *Shaming and Other Noncriminal Monitoring Approaches*

Perhaps in recognition of the limits of prosecution-heavy anti-corruption strategies, Kaufmann, Kraay, and Mastruzzi, conclude that the “next stage” of corporate governance reform include an increasing focus on prevention and deterrence, working more closely with the “heretofore neglected private sector.”<sup>138</sup>

Kahan and Posner have argued for the value of shaming corporate wrongdoers,<sup>139</sup> and part of that argument is found in this Article: the harm to the reputations of manufacturers found to be using child labor is at least as harmful to a company as a fine paid following the “discovery by management” that locally-hired company officers engaged in bribery thousands of miles away from corporate headquarters. Elevation of bribery to the same level as unconscionable pollution, or the use of child or prison labor, represents a low-cost way to enhance deterrence of the FCPA.<sup>140</sup> It is important to emphasize that the shaming would come before, or perhaps in place of, any conviction.

Also relevant is Moohr’s argument that private actors, such as investors, can encourage law-abiding business conduct.<sup>141</sup>

Effective gatekeepers provide a counterweight to the norms that may develop in corporate subcultures and to the judgment biases that lead to inaccurate assessments of the risks of criminal sanctions . . . Market monitors may also sound a timely warning that can signal corporate actors that they are treading treacherously close to the line, leading them to make the rational calculation in time to avoid or abandon potentially harmful acts. At a minimum, early warnings by outside gatekeepers signal that the company is the subject of a scrutiny that has market implications.”

When Nike expends great effort to improve the lot of its workers in Indonesia or Vietnam, it does so not because of a pending indictment, but because of pressure applied by nongovernment groups, be they labor

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138. See *supra* text accompanying note 10.

139. Dan M. Kahan & Eric A. Posner, *Shaming White-Collar Criminals: A Proposal for Reform of the Federal Sentencing Guidelines*, 42 J.L. & ECON. 365 (1999).

140. That is from a government spending perspective, since monitoring is done by nongovernmental organizations.

141. Geraldine Szott Moohr, *An Enron Lesson: The Modest Role of Criminal Law in Preventing Corporate Crime*, 55 FLA. L. REV. 937, 969 (2003).

unions, ethical investors, church-affiliated groups, or other interested parties.<sup>142</sup>

The attractiveness of the shaming approach is that it needs not be mutually exclusive with the criminalization of foreign bribery. Neither approach has been attempted as robustly it might have been, so there is no concrete reason not to try both as long as under-enforcement continues.

Prior to shaming, bribers need to be identified. Some of the successful prosecutions under the FCPA threw up a sufficient number of “red flags” to have signaled behavior consistent with bribe-giving. The main problem is that few were watching. If there is the same pressure to bear on companies that bribe as there is on companies that employ children or convicts, then one of many standard codes of conduct and red flag lists would be easy to use in analyzing a publicly-listed company.<sup>143</sup>

A regime of disclosure to independent monitors is not similar to an internal compliance program shielded from independent scrutiny. This is an approach some businesses may favor only for optics reasons (as do some law firms, which profit from compliance code advisory services).

*Monsanto* underlines the need for codes of conduct to be monitored by parties other than the government.<sup>144</sup> If a company as large as Monsanto can go five years illegally omitting to audits its Indonesian affiliates, there must be a way to hold it to accountable instead of waiting for the company to turn itself in. Could the laxness of the FCPA be the reason businesses say they like it, and claim to fear its severe but seldom-imposed sanctions? Khanna’s work<sup>145</sup> supports the idea that simple disclosure of how overseas agency and money flows operate is to be feared by companies more than the FCPA’s difficult-to-obtain proof of wrongdoing. His thesis suggests that businesses *prefer* criminal to civil sanctions precisely because these are difficult to enforce, while at the same time providing the appearance

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142. *Infra* note 154.

143. *See, e.g.*, Michael N. Davies, Application of Corporate Compliance Programs to Sales Representatives, made at the 9th International Anti-Corruption conference in 1999, at [http://www.transparency.org/iacc/9th\\_iacc/papers/day3/ws5/d3ws5\\_mndavies.html](http://www.transparency.org/iacc/9th_iacc/papers/day3/ws5/d3ws5_mndavies.html). Simple steps like refusing to pay agents in cash; refusing to pay agents out of country and refusing to pay into numbered bank accounts—or to third parties—would go a long way toward encouraging more transparent dealing with intermediaries. These steps are easier to monitor than promises not to bribe. *See also* McInerney, *supra* note 24.

144. *See supra* text accompanying notes 56-60.

145. Vikramaditya S. Khanna, Corporate Crime Legislation: A Political Economy Analysis (Sept. 2003).

that businesses are subject to the strict monitoring of the Justice Department.<sup>146</sup>

Pieth too has questioned the utility of relying on strict criminal sanctions as opposed to using civil monetary penalties, especially where the administration of the home state of the bribee is not in favor of an investigation into dealings that might show the government (or the leading party) in a negative light.<sup>147</sup>

Another example, from among the FCPA cases, in which disclosure might have alerted corporate monitors: in *SEC v. Katy Industries*<sup>148</sup> the company neither admitted nor denied that it entered into a contractual agreement with the consultant of a corporation which had not yet been organized. The consultant, a friend of an official in Indonesia, was the recipient of a percentage commission after Katy obtained an oil and gas contract.<sup>149</sup> Absent a hard and fast rule against paying a company that has yet to exist, many of the model codes of conduct make a related, sensible point: payments that are legal in the country where business is to be done should be paid in that country, and never in cash. Legal transactions should have nothing to hide. Had there been a verifiable corporate norm against paying agents offshore, Katy might still have bribed, but doing so would have been more risky.

Another transaction that might have caught the eyes of nongovernment monitors, had it been required to be disclosed, was BellSouth's decision to retain as a Venezuelan agent the wife of a key legislator with oversight of telecommunications.<sup>150</sup> The company neither admitted nor denied SEC allegations, and paid a \$150,000 civil penalty. Would this level of fine be high enough to deter similar subsequent behavior more effectively than a shareholder campaign which might have cast the company in a morally negative light? Perhaps not, in that lobbying is a common occurrence at home in the United States, where with certain restrictions it is legal. But one major difference is that in the U.S. contributions are disclosed, and

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146. Khanna suggests that businesses which ought to be good at lobbying against harsh criminal sanctions, but in fact are little harmed by them when they arrive amid a populist wave of revulsion over corporate wrongdoing, as was the case with the FCPA in the 1970s and Sarbanes-Oxley more recently. *Id.* at 115-17.

147. "Making the OECD Convention Work," 1999. Paper available via Transparency International Website, [www.transparency-usa.org](http://www.transparency-usa.org).

148. [1982] 2 FCPA Rep. (Bus. Laws) 619 (1978).

149. *Id.*

150. [2002] 5 FCPA Rep. (Bus. Laws) 699.8332, *SEC v. BellSouth Corporation*, 1:02-CV-0113 (N.D. Ga. Jan. 15, 2002), Litigation Release No. 17310, and SEC Administrative Proceeding File No. 3-10678, Jan. 15, 2002.

abroad they are not. Any debate about their propriety should start with an inquiry into who gets how much money in exchange for lobbying activity.

Shareholders or other monitors ought to be able to demand that agents disclose their names, receive money in their home country by check or wire transfer, and have a track record to avoid hiring novice relatives or friends of officials.<sup>151</sup>

The problem is not that there are no decent guidelines for monitoring; it is that the perception among ethical investors and lawyers who speak and write publicly about the FCPA is that the Act is already an effective tool to discourage bribery.<sup>152</sup> There is a danger that the various laudable movements toward openness on the bribe-giving side will be ineffective as long as the presumption is that the authorities in the United States and other OECD countries are effectively prosecuting it.<sup>153</sup>

Think of it this way: if there were a similarly unenforced law against using low-wage labor without providing educational opportunities, and if shareholders or ethical investment groups were not as concerned with this issue as they are now, would Nike have taken measures to educate some of its workers in South-East Asia?<sup>154</sup>

This is not to argue that the FCPA should be repealed, which would send a message that the United States is not serious about combating bribery. Salbu's argument that there are better ways than the status quo to combat harmful overseas bribery does not logically imply repeal of the FCPA in favor of "work in the global marketplace to persuade other nations to adopt and vigorously enforce laws that criminalize bribery within their own borders."<sup>155</sup> Instead, because some of the largest bribe-takers are the officials the United States would be lobbying under this approach, the way forward should include the FCPA as now written, in addition to other approaches. Salbu's arguments that the FCPA amounts

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151. See Davies, *supra* note 143. See also, e.g., Publish What You Pay web site, [www.publishwhatyoupay.org](http://www.publishwhatyoupay.org); The Extractive Industries Transparency Initiative, <http://www.eitransparency.org>. On the demand side, Chad will submit to a citizen's committee evidence of all outlays in its \$3.7 billion pipeline with Cameroon. Somini Sengupta, *The Making of an African Petrostate*, N.Y. TIMES, Feb. 18, 2004, at A3.

152. *Supra* note 26.

153. Granted, a reliance on shareholder monitoring excludes privately-held companies from a shareholder monitoring system, another reason to apply a multidimensional approach and to reject repeal of the FCPA. However, the FCPA itself could be tightened by including non-issuers of securities in the accounting and auditing requirements of the Act. See OECD, *supra* note 2, at 15.

154. Philip Segal, *Nike Hones Its Image on Rights in Asia*, INT'L HERALD TRIB., June 26, 1998, at 1.

155. See Salbu, *supra* note 3, at 286.

to cultural imperialism ring hollow if he argues,<sup>156</sup> at the same time, for vigorous lobbying of foreign governments to change their laws or enforce them more effectively. Which is more open to charges of moral imperialism and abuse of [super] power? Aid and debt relief for poor countries, which punishes an entire citizenry, or the attempt to jail a single citizen of an African country caught helping to bribe his government, in contravention of his own government's law?<sup>157</sup>

## V. CONCLUSION

More likely than not, the FCPA is under-enforced—to a bad effect if we believe our stated public policy that overseas bribery is a bad thing. The pretense that the Act is an effective deterrent prevents the United States from thinking about supplementary ways to discourage bribery of foreign officials and others overseas. This flawed approach has now been adopted in cookie-cutter fashion for the rest of the developed world, via the OECD's convention on foreign bribery. Unlike the largely uncritical reception the FCPA has received (apart from businesses claiming it put them at an unfair disadvantage to European competitors allowed to bribe), the OECD convention has been held to be of only minimal success.<sup>158</sup>

While more money and personnel would help tackle the more sophisticated forms of bribery and concealment that until now have almost completely escaped notice, other forms of moral disapproval and shareholder advocacy could prove to be as good at deterring overseas bribery, and at much lower cost. Radical attempts to increase the cost of concealing money laundering would also help. Because of the current high discovery costs in proving overseas bribery, a private right of action or greater emphasis on civil judicial action would produce fewer marginal benefits than other forms of wholly domestic corporate wrongdoing.

More intelligent monitoring carries the inherent risk that rather than discourage companies to bribe, which would be the desired result, it could drive more companies to conceal their bribery more skillfully, raising the investigative costs further. There is, at present, no way to determine how many companies are using sophisticated methods to conceal their bribes,

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156. *Id.* at 283.

157. 15 U.S.C. §§ 78dd-1 (c), 78dd-2 (c), 78dd-3 (c) (1998).

158. See Tarullo, *supra* note 3. See also Peter Eigen, *Fighting Corruption: Multinationals' Bribery Goes Unpunished*, INT'L HERALD TRIB., Nov. 12, 2002 (describing the OECD convention as being "in crisis," with budget shortfalls and "lackluster enforcement" across the countries signed up).

and how many are operating marginally more skillfully than the often unsophisticated level of conduct that has handed government prosecutors a significant portion of their (small batch of) wins.

As sunlight is the best disinfectant for bribery, it also works well in evaluating laws to combat bribery. If improved monitoring of corporate bribery makes companies more careful to conceal wrongdoing, it would likely reveal a more pressing need to increase efforts against money laundering. That would not be a bad outcome at all, and would come at the short-term cost of no more than the one or two bribery-related FCPA convictions we now observe each year.

## Appendix 1

1999 Transparency International Bribe Payers Index (BPI) ranking 19 leading exporters.

Gallup International asked: respondents whether companies in the country concerned were very likely, quite likely, or unlikely to pay bribes to win or retain business.<sup>159</sup> Top possible score is 10, indicating least likely to pay bribes.

Rank	Country	Score
1	Sweden	8.3
2	Australia	8.1
2	Canada	8.1
4	Austria	7.8
5	Switzerland	7.7
6	Netherlands	7.4
7	United Kingdom	7.2
8	Belgium	6.8
9	Germany	6.2
9	United States	6.2
11	Singapore	5.7
12	Spain	5.3
13	France	5.2
14	Japan	5.1
15	Malaysia	3.9
16	Italy	3.7
17	Taiwan	3.5
18	South Korea	3.4
19	China	3.1

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159. Transparency International, TI Bribe Payers Index, *available at* [www.transparency.org/policy\\_research/surveys\\_indices/bpi](http://www.transparency.org/policy_research/surveys_indices/bpi) (reprinted parts of appendix with permission).

## Appendix 2

The “easy” or “cheap” FCPA cases:<sup>160</sup>

SEC v. Page Airways	Cr. No. 7900273 (D.D.C. 1978).	Money sent to company without anonymous bene-ficiaries (easy to trace).
SEC v. Tesoro Petroleum Corp.	No. 80-2961, (D.D.C. Nov. 20, 1980).	Paid into consultant’s personal U.S. bank account.
U.S. v. Carver	[1982] 2 FCPA Rep. (Bus. Laws) 645, (S.D. Fla. Apr. 9, 1979).	Request for bribery assistance from U.S. State Dept. officials.
United States v. Kenny International Corp.	[1982] 2 FCPA Rep. (Bus. Laws) 649, (D.D.C. Aug. 2, 1979).	Bribery scheme to influence an election discovered by court in the Cook Islands.
SEC v. Sam P. Wallace; U.S. v. Alfonso A. Rodriguez.	[1982] 2 FCPA Rep. (Bus. Laws) 682, (D.D.C. Aug. 13, 1981); [1984] 2 FCPA Rep. (Bus. Laws) 690.06 (D.P.R. Mar. 11, 1983).	Simple paper trail, lack of anonymous intermediaries.
U.S. v. Napco Int’l. Inc.; U.S. v. Liebo	[1989] 3 FCPA Rep. (Bus. Laws) 697.74, Cr. No. 48965 (D. Minn. Mar. 10, 1989); 923 F.2d 1308 (8th Cir. 1991).	Code name for agent was agent’s girlfriend; U.S. bank accounts used for bribe deposits.
U.S. v. Goodyear Int’l. Corp.	[1992] 3 FCPA Rep. (Bus. Laws) 698.19, (D.D.C. May 11, 1989).	Discovered internally.

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160. In counting the cases, I have aggregated civil and criminal actions against the same individual as a single case, and for the purposes of this table, not all cases associated with a single bribe are listed.

U.S. v. Young & Rubicam, Inc.	[1990] 3 FCPA Rep. (Bus. Laws) Criminal No. N-89-68(PCD) (D. Conn. Feb. 9, 1990).	Checks for bribes mistakenly sent onshore in U.S. to unindicted employee of target firm.
U.S. v. Morton; U.S. v. Eagle Bus Mfg. Inc.	[1990] 3 FCPA Rep. (Bus. Laws) 698.62, Criminal No. 3-90-061-H. (N.D. Tex. Mar. 14, 1990); Civil Action No. B-91-171 (S.D. Tex. Oct. 28, 1991).	Payments through Canadian agent's personal corp. Agent made large withdrawals and deposits in cash to his personal on-shore accounts.
U.S. v. F.G. Mason Engineering, Inc.	[1991] 3 FCPA Rep. (Bus. Laws) 698.70, Case No. B-90-29-JAC (D. Conn. June 25, 1990).	Precise amount of bribe demanded in writing, sent via U.S. mail.
U.S. v. Herbert B. Steindler	[1994] 3 FCPA Rep. (Bus. Laws) 699.131, Cr. No. 194-29 (S.D. Ohio, 1994).	Whistleblower revealed the bribery. Earlier related settlement by General Electric counted as same case.
U.S. v. Vitusa Corp.; U.S. v. Herzberg	[1994] 3 FCPA Rep. (Bus. Laws) 699.155, Criminal No. 93-253 (D.N.J. Apr. 13, 1994); Criminal No. 93-254 (D.N.J. 1994).	Disregarded U.S. State Dept. advice not to pay bribe.
SEC v. Triton Energy Corp.	[1997] 4 FCPA Rep. (Bus. Laws) 699.462, 1:97CV00401 (D.D.C. Feb. 27, 1997).	Matter discovered by company auditors, reported to the authorities by company.

U.S. v. David H. Mead	[1998] 4 FCPA Rep. (Bus. Laws) 699.534, Cr. Complaint No. 98-3025 (D.N.J. Jan. 29, 1998).	Discovered by EPA investigating a separate matter.
U.S. v. Control Systems Specialist, Inc.	[1999] 4 FCPA Rep. (Bus. Laws) 699.587, Case No. CR-3-98-073 (S.D. Ohio Aug. 19, 1998).	Payments to Brazilian military officer stationed in made on-shore. No different from a domestic bribery case.
U.S. v Metcalf & Eddy, Inc.	[2000] 4 FCPA Rep. (Bus. Laws) 699.749, Civil Action No. 99CV-12566-NG (D. Mass. Dec. 14, 1999).	Timing of trips followed closely the award of contracts. Quid pro quo need not be so easy to prove regarding travel.
SEC v. International Business Machines Corp.	[2001] 4 FCPA Rep. (Bus. Laws) 699.8136, 1:00CV03040 (JR) (D.D.C. Dec. 21, 2000).	Bribes at Argentina subsidiary discovered during local tax audit.
U.S. v. Robert Richard King	[2003] 4 FCPA Rep. (Bus. Laws) 699.819601, No. 01-00190-01/02-CR-W-1 (W.D. Mo. June 27, 2001).	Long written record detailing proportion of money raised destined to pay bribes in Costa Rica.
U.S. v. Joshua Cantor	[2002] 4 FCPA Rep. (Bus. Laws) 699.821601, Case No. 01 CR. 687 (S.D. N.Y. July 18, 2001).	Discovered by company auditors.

U.S. and SEC v. KPMG-Siddharta Siddhardta & Harsono and Sonny Harsono	[2002] 5 FCPA Rep. (Bus. Laws) 699.8273, H-01-3105 (S.D. Tex. Sept. 12, 2001).	Disclosed by company management upon internal discovery.
SEC v. Chiquita Brands Int'l. Inc.	[2002] 5 FCPA Rep. (Bus. Laws) 699.8296, 1:01CV02079 (D.D.C. Oct. 3, 2001).	Discovered by internal auditors.
U.S. v. Gautam Sengupta	[2002] 5 FCPA Rep. (Bus. Laws) 699.8341, Case No.1:02CR00040 (D.D.C. Jan. 30, 2002).	Sent e-mail spreadsheet of bribes paid and owing.
U.S. v. Syncor Taiwan, Inc.	[2003] 5 FCPA Rep. (Bus. Laws) 699.8626, (C.D. Cal. Nov. 2002).	Discovered during pre-acquisition due diligence. Fines paid to DOJ and SEC worth less than 1% of deal value.
In the matter of BJ Services. Co.	[2004] 5 FCPA Rep. (Bus. Laws) 699.8956, SEC Administrative Proceeding File No. 3011427, Mar. 10, 2004.	Discovered by the company, no indication of headquarter involvement. Cease and desist order only, no monetary penalty.

<p>United States v. ABB Vetco Gray, Inc. and ABB Vetco Gray UK Ltd.</p>	<p>[2005] 5 FCPA Rep. (Bus. Laws) 699.9054, Crim. No. H-04-CR-279 (S.D. Tex. June 22, 2004).</p>	<p>Discovered during due diligence for a merger. Spreadsheet of bribes e-mailed, employee corporate credit card used for bribery, and bribe-paying employee reimbursed through a Texas bank account.</p>
<p>SEC v. Monsanto Co.</p>	<p>[2005] 5 FCPA Rep. (Bus. Laws) 699.9167, 1:05CV00014 (D.D.C. Jan. 6, 2005); SEC Litigation Release No. 19023.</p>	<p>Uncovered by company after years of failure to audit Indonesian affiliates.</p>
<p>SEC v. GE Invision</p>	<p>[2005] 5 FCPA Rep. (Bus. Laws) 699.9197, C-05-0660 MEJ (N.D. Cal. Feb. 14, 2005).</p>	<p>Discovered during due diligence prior to a takeover.</p>