
Mark Romaneski

I. INTRODUCTION

When Congress amended the Securities and Exchange Act of 1934 by enacting the Foreign Corrupt Practices Act of 1977 (FCPA), American business was uncertain about predicting the effects of the new legislation. The FCPA contains two major provisions: an internal accounting requirement and anti-bribery provisions. The former provision requires every issuer of securities to keep accurate records which fairly reflect disposition of assets and to devise a system of internal accounting control to regulate the disposition and recording of assets. The latter provisions prohibit issuers from offering or paying anything of value to a foreign official to influence him to make any act or to use his influence to affect any government act in order to obtain or retain business. Critics speculated about

1. 15 U.S.C. §§ 78a-78kk (1976). The securities laws include the Securities Act of 1933, the Securities Act of 1934, the Public Holding Act of 1935, the Trust Indenture Act of 1939, and the Investment Advisors Act of 1940. The 1933 Act's main objective was the disclosure of information, whereas, the 1934 Act's main thrust was to prevent fraud. Generally, the 1934 Act regulated the securities market and the dealer-brokers. For a general overview of the 1934 Act see W. CAREY & M. EISENBERG, CORPORATIONS 26&-76 (5th ed. 1980).


4. FCPA, § 102. Section 102 amends § 13(b) of the 1934 Act.

5. Id. §§ 103-104. Section 103 amends § 30 of the 1934 Act by adding § 30A entitled "Foreign Corrupt Practices By Issuers." Section 104 of the FCPA is entitled "Foreign Corrupt Practices By Domestic Concerns"; it applies to domestic concerns other than an issuer subject to § 30A of the 1934 Act. Sections 103 and 104 are nearly identical in their prohibitory language.

6. Id. § 102.

7. Id. § 103.

8. See note 3 supra.
provisions of the Act which failed to adequately define crucial terms such as "corruptly,"9 "obtaining or retaining business,"10 "foreign official,"11 and "facilitating"12 payments.13 Furthermore, opponents of the law felt that these antibribery provisions might have debilitating effects on the ability of American businesses to compete in world markets.14 In response to these concerns, the Securities and Exchange Commission (SEC) solicited comments from any interested party on the impact of the FCPA15 and "any impediments which it presents to legitimate foreign commerce."16 The SEC received an insufficient response from this request to draw any meaningful conclusions about the potential impact of the new law.17

While the lack of raw data hampers efforts to make an accurate assessment of the FCPA,18 one may draw preliminary conclusions about the Act's impact by examining recent litigation, and the rules promulgated by the SEC.19 In addition, the Chamber of Commerce of the United States and the General Accounting Office of the United States (GAO) have conducted empirical studies of the

9. FCPA, §§ 103-104.

10. Id.

11. Id.

12. Id.


16. Id.

17. Commission Policy Statement on Section 30A, 45 Fed. Reg. 59,001 (1980). Despite provisions for the confidential submission of information, only fourteen letters were received during the request period. Id. at 59,004. Commenting on the limited response it received, the Commission stated, "[o]f these fourteen letters, one transmitted a duplicate copy of a trade associate's comments and another took issue with a decision of a different independent regulatory agency, which was unrelated to Section 30A." Id. The Commission noted that while the data was insufficient to formulate any definite conclusions about the impact of the FCPA, the limited response seemed incongruent with concerns expressed in publications. Id. See note 3 supra.


19. The SEC has stated:

[T]here is presently no . . . body of empirical data that would support such analysis of the impact and operation of the bribery prohibitions of Section 30A. . . . the available data is insufficient to support a reasoned evaluation of whether problems exist that were not contemplated at the time the FCPA was enacted, what alternatives may be appropriate for dealing with these problems, and the degree to which alternative responses may be consistent with the multiple objectives that the Congress sought to achieve by enacting the FCPA. Id. at 59,004.

This Comment will analyze the current interpretation of the Act by tracing the development of the FCPA. Since corporations continue to bear the burden of understanding and complying with the FCPA, management must be careful and responsible in order to avoid the FCPA's severe sanctions while continuing to compete vigorously in world markets.

II. Origins of the Act

The Watergate scandal heightened the public's sense of political morality and raised concerns about high level corruption in both the public and private sectors. The FCPA was born in this morality oriented post-Watergate atmosphere. The SEC investigated illegal domestic political payments and learned that many corporations used secret funds to conceal questionable payments to foreign government officials. In addition, the publicity generated by these disclosures made clear that the United States should unilaterally regulate its international business practices is certainly open to debate and is at the root of the philosophical disagreement over the FCPA. See Carter, Foreign Policy Based on America's Essential Character, 76 Dep't State Bull. 621-25 (1977).

20. See H. Weisberg & E. Reichenberg, The Price of Ambiguity More Than Three Years Under the Foreign Corrupt Practices Act (1981) [hereinafter cited as Weisberg & Reichenberg], for a research report on the U.S. Chamber of Commerce's study. This report details the accounts of U.S. firms who have had difficulty complying with the FCPA and is based on 180 responses from both domestic and foreign-based firms. Id. at 1 & n.1. See also Impact on U.S. Business, supra note 19, for the results of the GAO study.

21. Warner, SEC Head Tries to Allay Corporate Fears About Anti- Bribery Record-Keeping Rules, Wall St. J., Jan. 14, 1981, at 14, col. 3 [hereinafter cited as Warner]. Harold Williams, a former chairman of the SEC, has stated that the SEC holds management responsible for engendering corporate integrity. He has suggested that placing "the regulatory burden on companies and on the auditing profession — through independent directors and audit committees — is in keeping with . . . [President] Reagan's philosophy that emphasizes self-regulation rather than extensive government intervention in companies' internal affairs." Id.

22. Violations of the FCPA can result in a maximum fine of $1 million for a corporation, provided the corporation is a domestic concern or registered under the Securities Exchange Act of 1934. FCPA, §§ 103-104. In addition, any officer, director, shareholder or agent acting on the corporation's behalf is personally subject to a maximum $10,000 fine and five year prison sentence. Id.

23. Surrey, The Foreign Corrupt Practices Act: Let the Punishment Fit the Crime, 20 Harv. Int'l L. J. 293 (1979) [hereinafter cited as Surrey]. Walter Surrey suggests that Congress has attempted, using the FCPA as a vehicle, to apply domestic standards of morality in an inappropriate context. Id. This thesis that the United States should unilaterally regulate its international business practices is certainly open to debate and is at the root of the philosophical disagreement over the FCPA. See Carter, Foreign Policy Based on America's Essential Character, 76 Dep't State Bull. 621-25 (1977).


Because of these disclosures several executive officers of large corporations resigned, including Gulf Oil Corporation executives, N.Y. Times, Jan. 14, 1976, at 1, col. 2, and Lockheed Corporation executives, N.Y. Times, Feb. 14, 1976, at 1, col. 5.
payments hampered the ability of the United States to conduct an effective foreign policy. The SEC and the Department of Justice, therefore, attempted to convince U.S. corporations to regulate themselves voluntarily.

In 1976, the Senate Committee on Banking, Housing and Urban Affairs held hearings on questionable payments to foreign governmental officials. The SEC presented the Committee with a summary of its findings on the subject in a report entitled, "Report of the Securities and Exchange Commission on Questionable and Illegal Corporate Payments and Practices." The report detailed the questionable payments made by eighty-nine U.S. firms. The motive behind many of these payments, according to the report, was to generate goodwill and prevent governmental interference from foreign nations in which the corporations held assets.

Although Congress recognized the existence of a problem with corrupt foreign practices of U.S. corporations, Congress could not uniformly suggest a remedy. Congress debated whether it should criminalize questionable corporate payments, or merely establish a system of reporting and disclosure. The Department of State supported the latter approach because it did not involve the

25. Congressman John M. Murphy commented:

Recently, through corporate public disclosure, we have become acutely aware of the dimensions of the foreign bribery problem and its deleterious effect on U.S. foreign policy, on the business climate abroad for U.S. corporations, and on our own moral expectations. Payments by Lockheed alone, have had some very significant, and in some cases, perhaps irreversible, adverse political effects in Italy, Japan and the Netherlands.

The Foreign Bribery Bill would require corporations to adhere to certain accounting standards and would make it a crime to falsify company books and records or to deceive an accountant in connection with his audit. Moreover, it would apply criminal penalties to companies which bribe foreign officials. Significantly, most corporations favor the bill since it would make it easier to resist pressure from foreign officials, and since many of the bribes disclosed to date have involved one U.S. concern competing with another U.S. concern for the same business.


27. WEISBERG & REICHENBERG, supra note 20, at 4.


29. Id.


imposition of U.S. standards on other countries. 32 This position reflects the common notion in international law that the host country should be responsible for regulating conduct within its borders and the home country, i.e., the United States, should only be concerned with insuring that its nationals receive fair and equal treatment. 33

Congress finally chose the criminalization approach over mere disclosure. Since the disclosure requirement would have implied that bribery was permissible as long as the corporation properly reported it, 34 the criminalization of corporate payments provided a greater deterrent to bribery. 35 The choice of criminalization does not entail a more burdensome prosecution, since the elements of proof in bribery prosecution are similar to those in a disclosure prosecution. 36 This approach is unique to the United States; other nations with civil law systems do not impose criminal sanctions upon corporations. 37

In enacting the FCPA, Congress had to choose between a system which criminalized questionable corporate payments and a system which merely required disclosure of the payments. The Carter Administration eventually supported legislation requiring disclosure, criminal sanctions and codes of conduct for U.S. corporate activities overseas. 38 However, the FCPA has been criticized as the type of legislative product which occurs when "the White House reverses signals at the last minute and when members of Congress, the administration, and the business community are unwilling to challenge a draft law for fear of being accused of being in favor of that which the law seeks to prohibit." 39

III. THE FOREIGN CORRUPT PRACTICES ACT: DESCRIPTION OF SUBSTANTIVE PROVISIONS

The FCPA has two substantive requirements. 40 Section 102 embodies the first provision which is designed to increase corporate accountability in disposition of

32. Mark B. Feldman, the Deputy Legal Advisor to the Department of State, stated that "it would be not only presumptuous but counterproductive to seek to impose our specific standards in countries with differing histories and cultures." The Activities of American Multinational Corporations Abroad: Hearings Before the Subcomm. on International Economic Policy of the House Comm. on International Relations, 94th Cong., 1st Sess. 24 (1975).
33. A State may treat its citizens "according to discretion." 1 L. Oppenheim, INTERNATIONAL LAW 682 (H. Lauterpacht ed. 8th ed. 1955). Whether there is an international minimum standard of justice in international law is debatable.
35. Id.
36. Id.
37. Id. at 650.
39. Id. at 296. Surrey described the FCPA as "not polished legislation" in a bit of scholarly understatement. Id.
40. The accounting provisions are in § 102 and the antibribery provisions are in §§ 103 and 104. FCPA, §§ 102-104.
corporate assets and to aid the SEC in enforcing the FCPA.\footnote{S. Rep. No. 114, 95th Cong., 1st Sess. 7, reprinted in [1977] U.S. CODE CONG. & AD. NEWS 4098, 4104-05.} Section 102 requires corporations to keep records, books and accounts which accurately reflect the disposition of corporate assets.\footnote{FCPA, § 102.} These records must be kept "in reasonable detail."\footnote{\textit{Id.}} In addition, Section 102 requires corporations to maintain a system of internal accounting control to insure that all transactions have management’s authorization, all transactions are recorded as necessary to maintain accurate records, access to assets is limited to those with authorization, and that at regular intervals recorded assets are compared to existing assets.\footnote{\textit{Id.}} A corporation which complies with Section 102 would find it difficult to avoid detection of misused corporate assets, especially funds used in questionable foreign payments.\footnote{Comment, \textit{The Foreign Corrupt Practices Act of 1977}, 27 KAN. L. REV. 635, 641 (1979) [hereinafter cited as Comment].}

The second substantive provision is contained in Sections 103 and 104 which make bribery of foreign officials a criminal offense.\footnote{FCPA, §§ 103-104.} Section 103 applies to issuers under SEC jurisdiction\footnote{\textit{Id.} § 103.} and Section 104 applies to all other domestic concerns.\footnote{\textit{Id.} § 104.} The two sections, which are almost identical, define the scope of prohibited payments and the sanctions for violations.\footnote{\textit{Id.} §§ 103-104.}

A. \textit{Section 102: Accounting Standards}

The accounting provisions embodied in Section 102 require those subject to coverage of the Act to:

\begin{itemize}
  \item (A) make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer; and
  \item (B) devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that
    \begin{itemize}
      \item (i) transactions are executed in accordance with management’s general or specific authorization;
      \item (ii) transactions are recorded as necessary (I) to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and (II) to maintain accountability for assets;
    \end{itemize}
\end{itemize}
(iii) access to assets is permitted only in accordance with management’s general or specific authorization; and
(iv) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences. 50

The legislative history 51 of the FCPA suggests that Congress considered questionable foreign payments as being closely related to inadequate corporate accountability and a lack of accurate record keeping. 52

Prior to enactment of the FCPA, the SEC expressed interest in strengthening corporate accountability under the SEC’s rule-making authority. 53 In a report 54 to Congress in 1976, the SEC stated that the “most devastating disclosure that we have uncovered . . . has been the fact that, and extent to which, some companies have falsified entries in their own books and records.” 55 Congress intended that Section 102 address that deficiency. 56

The accounting requirements seem reasonable on their face. As one commentator has noted, Section 102 “appears only to require management to do that which would be dictated by ordinary business prudence; namely, keep books, records and accounts that are accurate and fair.” 57 The requirement for accurate bookkeeping makes it difficult for corporations to maintain unaccounted funds from which to dispense questionable payments.

50. Id. § 102.
51. For a synopsis of the history and origins of the Act, see Goelzer, The Accounting Provisions of the Foreign Corrupt Practices Act — The Federalization of Corporate Recordkeeping and Internal Control, 5 J. Corp. L. 1, 6-19 (1979) [hereinafter cited as Goelzer].
52. Id. at 19.
55. Id. at 13.
57. Baruch, The Foreign Corrupt Practices Act, 57 Harv. Bus. Rev. 32, 33 (1979) [hereinafter cited as Baruch]. Mr. Baruch was special counsel to the SEC from 1969 to 1972. He stated that accuracy and fairness would be in the eye of the beholder, and in this case that would be the SEC. As a result the legislation was criticized by corporate lawyers and accounts. Id. This is consistent with the criticism which Doug Carmichael, vice president of the American Institute of Certified Public Accounts: “Any institution depending on the benevolence of those in charge will always have cause to worry.” Warner, supra note 21.
1. The Requirement of Accurate Records

The legislative history of Section 102 indicates that congressional debate focused on the inclusion of the word "accurately" in subsection A. The accounting profession felt that the standard would be impossible to satisfy due to the inexact nature of accounting. The original House bill contained no provision for fair and accurate record keeping as did the comparable section of the Senate bill. The Conference Committee adopted the Senate bill's requirement of "accurately and fairly" keeping records, but qualified the provision with the words "in reasonable detail." The Conference Report stated:

The conference committee adopted the "in reasonable detail" qualification to the accurate and fair requirement in light of concern that such a standard, if unqualified, might connote a degree of exactitude and precision which is unrealistic. The amendment makes clear that the issuer's records should reflect transactions in conformity with accepted methods of recording economic events and effectively prevent off-the-books slush funds and payments of bribes.

The Conference Report indicates that congressional intent was not to condone minor mistakes but merely to insure that corporations were not required to meet a level of precision beyond the capabilities of modern accounting methods.

There was an attempt, during the congressional deliberations, to add a "materiality" requirement to the "accuracy" requirement. Under such a standard, much of the effect of the accuracy requirement would have been lost. For example, the standard of materiality would have added an additional element of proof in an enforcement proceeding which may have been difficult to prove. The suggestion for a materiality test did not prevail, and the only congressional qualification is that the records be kept "in reasonable detail."

a. Records

Under the FCPA, records are not limited to financial statements required by the Securities Exchange Act. The definition of records contained in the securi-

58. FCPA, § 102. See Baruch, supra note 57, at 33.
59. Baruch, supra note 57, at 33.
61. Id.
62. Id.
63. Goelzer, supra note 57, at 23.
64. Id. at 22.
65. Id.
ties laws includes: "accounts, correspondence, memorandums, tapes, discs, papers, books, and other documents or transcribed information of any type, whether expressed in ordinary or machine language." The implication of this definition is that the scope of the accuracy requirement extends beyond those records which are used to prepare financial statements, or those records which are part of the accounting system. As one authority has noted: "Congress's use of the term 'records' suggests that virtually any tangible embodiment of information made or kept by an issuer is within the scope of section 102 . . . at least if it pertains to the recording of 'economic events.'"

b. Scienter

The original Senate bill prohibited any person from "knowingly" falsifying accounting records. The House bill had no similar provision. In conference, the Senate deferred to the House which was concerned that the legislation would be a vehicle for congressional debate on the Supreme Court decision in *Ernst & Ernst v. Hochfelder*. Application of the "knowingly" standard might have the effect of expanding or overruling the decision. In *Hochfelder*, the Court held that negligence by an auditing firm was not sufficient to make the firm liable to a shareholder under SEC Rule 10b-5. Although the decision was based upon an SEC rule distinct from the sections of the 1934 Act which were amended by the FCPA, and the Committee Report on S.305 (the Senate version of the FCPA) made it clear that the "knowingly" provisions were severable from other securities law, the Conference Committee, nevertheless, concluded that the safest method to avoid raising the issue was to delete the provision entirely. This deletion was not intended to hinder the SEC's ability to adopt a similar provision through its rule-making powers.

An accounting provision violation does not depend on any criminal motive by

69. Goelzer, supra note 51, at 23.
70. Id. at 23-24.
72. Id.
73. Id.
77. Id.
79. Id. at 10.
80. Id. at 11. Indeed the SEC had already published similar rules for comment under existing authority. Id. at 10. See note 48 and accompanying text supra.
the issuer. Thus, enforcement agencies are not required to prove the issuer possessed any criminal intent to establish a violation of the FCPA; proving criminal intent would, in most cases, be extremely difficult. The SEC has taken this position by stating that "the language of new section 13(b)(2)(A) . . . contains no words indicating Congress intended to impose a 'scienter' requirement." 

2. Internal Controls

Also included under the accounting provisions is the requirement that every SEC-reporting company establish a system of internal accounting controls. The system must provide reasonable assurances that:

(i) transactions are executed in accordance with management's general or specific authorization;
(ii) transactions are recorded as necessary . . . to permit preparation of financial statements . . . and to maintain accountability for assets;
(iii) access to assets is permitted only in accordance with management's general or specific authorization; and
(iv) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.

This record keeping provision applies regardless of the specific dollar amount or materiality of the transaction. According to legislative history, Congress expected corporations to use cost-benefit analysis to determine an appropriate accounting system. The appropriate internal accounting system depends on "the size of the business, diversity of operations, degree of centralization of financial and operating management, and the amount of contact by top management with day-to-day operations." A company which has absolutely no system for regulating certain types of transactions might be held to have violated the internal control provision. These transactions would include "the transfer of funds outside the country or the making of political contributions."

82. Goelzer, supra note 51, at 24.
84. FCPA, § 102.
85. Id.
86. Baruch, supra note 57, at 38.
87. Id.
88. Id.
89. Id.
90. Id.
a. Proposed Rules

In the spring of 1979, the SEC proposed several rules which would have required corporations subject to the FCPA to "provide information about the effectiveness of systems of internal accounting control." The proposed rules would have required a statement by the management of these corporations on the adopted method of their internal accounting controls. Management would have included this statement as part of its annual report filed with the SEC as well as in the annual report given to its security holders. The proposed rules would require an independent accountant to examine the management's statement; management would be required to include the accountant's findings in the annual reports. In addition, the management's statement would include the following:

1. Management's opinion as to whether, as of the date of such audited balance sheet, the systems of internal accounting control of the registrant and its subsidiaries provided reasonable assurances that specified objectives of internal accounting control were achieved; and
2. A description of any material weakness in internal accounting control communicated by the independent accountants of the registrant or its subsidiaries which have not been corrected, and a statement of the reasons why they have not been corrected.

The SEC did not suggest any specific control procedures since it believed that "those provisions must be determined in the context of the circumstances of each issuer." According to the SEC, the corporation would continue to assume responsibility for making those determinations. The purpose behind the examination of the statement by the independent accountant was to increase the reliability of the management's statement. The SEC recognized that the "independent accountant's responsibility will be more limited than that of management." Therefore, management would be primarily responsible for the statement.

In discussing the additional costs that the proposed rules would cause corporations to incur, the SEC suggested that:

92. Id.
93. Id.
94. Id.
95. Id. This requirement only applied to periods after December 15, 1980.
96. Id.
97. Id. at 26,703.
98. Id. See note 20 supra.
100. Id.
costs likely would be in large part of an initial rather than a continuing nature. . . . [I]n many instances the additional work of the independent accountant with respect to internal accounting control would result in reductions in costs of the financial statements, as independent accountants would be able to place more reliance on internal accounting control. . . . [T]he additional costs of the proposed requirement that the statement of management on internal accounting control be examined by an independent public accountant would be outweighed by the increased reliability of the statement of management which would result from such examination.101

b. Withdrawal of Proposed Rules

The SEC’s optimism concerning the cost analysis was apparently not widely shared, as the proposed rules met with strong opposition.102 The objections to the proposed rules centered on the cost of complying with the rules, the possibility of SEC preemption of significant voluntary initiatives already undertaken by private industry and the view that the required management statement was more of a tool to gauge compliance with the law than a source of useful information to investors.103 The SEC, without disputing all the opposing claims, withdrew the proposed rules in order “to allow existing voluntary and private-sector initiatives for public reporting on internal accounting control — by both registrants and accountants — to continue to develop.”104 The SEC has since adopted the policy of monitoring the voluntary initiatives of corporations such as “[m]anagement statements on internal accounting controls; [c]omprehensive management reports in general; and [p]ublic reporting by independent accountants on internal accounting control.”105


The accounting requirements of the FCPA are expansive in the scope of their coverage. Section 102106 covers “every issuer which has a class of securities registered pursuant to section 12 of this title and every issuer which is required to file reports pursuant to section 15(d).”107 An issuer is “any person who issues or proposes to issue any security.”108 Section 102 applies to registered foreign issuers; however, enforcement against such corporations may be problematic

101. Id. at 26,708.
103. Id.
104. Id.
105. Id.
106. FCPA, § 102. This is amended Section 13(b)(2) of the 1934 Act.
107. Id.
because of "differences in accounting methods and auditing techniques, foreign financial privacy laws, delicate questions of foreign sovereignty and diplomacy, and the practical and legal limits of the Commission's investigatory and enforcement authority."¹⁰⁹

a. Foreign Subsidiaries

Some commentators note that the FCPA does not apply directly to foreign subsidiaries of U.S. corporations.¹¹⁰ One may read Section 102 to mean that unless the subsidiary were a registrant of the SEC, it would not be an issuer as defined by the FCPA.¹¹¹ However, the FCPA's legislative history demonstrates that Congress did not intend such a literal and narrow interpretation.¹¹² The antibribery provisions apply only to "domestic concerns,"¹¹³ and issuers which have securities registered with or are required to file reports with the SEC.¹¹⁴

The FCPA defines a domestic concern as any individual who is a citizen, national, or resident of the United States; or . . . any corporations, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship, which has its principal place of business in the United States, or which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States.¹¹⁵

This definition excludes foreign subsidiaries because Congress recognized "the inherent jurisdictional, enforcement, and diplomatic difficulties raised by the inclusion of foreign subsidiaries of U.S. companies in the direct prohibitions of the bill."¹¹⁶ The Conference Report emphasizes, however, that any issuer or domestic concern which bribes foreign officials indirectly, through foreign subsidiaries or any other entity, would itself be liable under the FCPA.¹¹⁷

The parent corporation based in the United States is responsible for the accounting system of its foreign subsidiaries.¹¹⁸ The accounting provisions would be rendered ineffective if a corporation could avoid the requirement for accurate records and accounting by tolerating a subsidiary's accounting abuses.¹¹⁹ One authority has suggested that management can safely act only by

¹¹⁰. Comment, supra note 45, at 640-41.
¹¹¹. FCPA, § 102.
¹¹³. FCPA, § 104.
¹¹⁴. Id. § 103.
¹¹⁵. Id. § 104.
¹¹⁷. Id.
¹¹⁹. Id.
assuming that the accounting provisions of the FCPA fully apply to all foreign subsidiaries. He defends this premise by stating:

First, where the books and records of a subsidiary are materially deficient in a financial sense, the books and records of the parent company may well be inaccurate insofar as they reflect consolidating entries (or pick up an equity interest in a nonconsolidated subsidiary). In such cases, the SEC could choose to bring an enforcement action against the parent company under the act's record-keeping provision.

Second, where management of the parent company is engaged in corrupt or improper practices through a subsidiary whose books and records are deficient, the obvious remedy would be to bring an action against the parent company under the disclosure provisions of the federal securities laws.

Third, where the management of the parent company knew, or had reason to know, that the subsidiary was engaged in foreign corrupt practices, which the act would prohibit if done by the parent, the SEC might charge the parent with failing to disclose the practices.

b. Reasonable Assurance

The system of internal accounting controls is to be judged by a "reasonable assurance" standard; it must be "sufficient to provide reasonable assurance" that certain safeguards are met. The incorporation of the "reasonable assurance" standard in the statute indicates that Congress was aware of the costs associated with many of these controls. One writer has suggested that "the development of the initial accounting system required by the Act can cost as much as fifty thousand dollars, [and] many corporate officials and attorneys complain that the accounting standards . . . impose an onerous burden, particularly on small corporations." Another writer has suggested that there would be widespread noncompliance with the internal accounting provisions among smaller businesses because of the costs involved. If the marginal costs of implementing further internal controls outweigh the marginal utility derived from the controls, one may expect a corporation to eschew the economically unjustified controls.

120. Baruch, supra note 57, at 38.
121. Id.
122. FCPA, § 102.
123. Id.
124. Comment, supra note 45, at 642.
125. Id.
126. Baruch, supra note 57, at 38.
Under the cost-benefit analysis suggested in the "reasonable assurances" standard, fears of overly burdensome compliance costs are ungrounded. As the Senate Report on S. 3664 (a predecessor of S. 305) stated that the internal accounting provision is not "intended to be enforced to the point at which the costs associated with a particular corporate system of internal accounting controls exceeds the benefits that flow from that system. The accounting profession will be expected to use their professional judgment in evaluating the systems maintained by issuers." 127

One caveat to this general rule is that strict economic cost-benefit analysis might not apply for certain types of abuses such as bribery. The history of the FCPA was "unusually sensitive" 128 to the issue of foreign bribery. Thus, a corporation's failure to implement safeguards to protect assets worth less than the costs of the controls may violate the FCPA if the transaction involves "foreign bribery or other facets of the integrity of management." 129 The accounting requirement mandates that the transaction be properly and accurately recorded, and that all other information be listed which would lead a reviewer to possible illegal activity. 130 This requirement can be problematic for the management of a corporation engaged in foreign bribery. To comply with the record keeping provision, a corporation would have to submit incriminating reports to the SEC; "if a company is buying its business by commercial bribery, the SEC may take the position that its records are not accurate and fair unless it has labeled such disbursements as 'bribes to secure business.' " 131 Therefore, the cost-benefit analysis may not be appropriate in the areas where the accounting system is designed to prevent bribery.

B. Sections 103 and 104: Antibribery Provisions

The second set of substantive provisions of the FCPA is that which criminalizes bribery. Section 103 132 prohibits the "payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to . . . any foreign official for the purposes of . . . influencing any act or decision of such official in his official capacity." 133 A foreign official is defined by this Section as any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or any person acting in an official capacity.

129. Goeler, supra note 51, at 29.
130. Baruch, supra note 57, at 34.
131. Id.
132. FCPA, § 102.
133. Id.
capacity for or on behalf of such government or department, agency, or instrumentality. . . . [The definition] does not include any employer of a foreign government . . . whose duties are essentially ministerial or clerical. 134

1. Scope of the FCPA Antibribery Provisions

Congress limited the reach of the FCPA antibribery provisions by excluding from the Act’s coverage payments to clerical government workers of foreign nations. In so doing, Congress intended to permit so-called “grease” payments. 135 These facilitating payments are common and culturally accepted in some nations, 136 and help governmental clerks supplement their small government salaries. 137 Typically, corporations will make facilitating payments in order to receive the permits and licenses necessary to conduct business in the country. By permitting facilitating payments, Congress has encouraged the anomalous result that a small payment to a government official to influence the decision-making process would be illegal, while a much larger payment to a clerical official would not be illegal. 138 The FCPA anticipates that possibility by requiring corporations to report large facilitating payments under the accounting provisions of the FCPA. 139

2. The “Corruptly” and the “To Obtain Business” Requirements

Under the FCPA antibribery provisions, payments are not illegal unless the corporation makes them “corruptly” 140 and “to assist the issuer or domestic concern in obtaining or retaining business.” 141 The term “corruptly” means, according to the legislative history of the FCPA, “an evil motive or purpose, an intent to wrongfully influence the recipient.” 142 Congress’ use of the word

134. Id.
137. Comment, supra note 45, at 643.
138. Id.; Baruch, supra note 57, at 46.
140. FCPA, §§ 103, 104.
141. Id.
"corruptly" indicates that the purpose of the payment must be to "induce the recipient to misuse his official position."\textsuperscript{143}

Because of the requirement that payments be made "corruptly" before the transaction can be considered a violation of the FCPA, a corporation could conceivably make facilitating payments to officials as well as to clerical workers without violating the antibribery provisions of the Act.\textsuperscript{144} One writer notes:

A facilitating payment to a foreign official is intended merely to move a matter toward an eventual act or decision, it does not have the forbidden purpose of "inducing such foreign official to use his influence with a foreign government . . . to affect or influence any act or decision of such government."\textsuperscript{145}

In an enforcement action, the enforcement agency must, therefore prove there was a corrupt purpose. However, even if no corrupt intent exists, the corporation still must properly account for its payment under the accounting provision.\textsuperscript{146} The antibribery and accounting provisions are thus able to act in tandem in an enforcement action.\textsuperscript{147}

The "obtaining or retaining business" standard is almost inconsequential in light of the SEC's broad interpretation of the phrase.\textsuperscript{148} Payments for special tax treatment, product promotion, and even for generation of goodwill are illegal under the SEC's expansive standard.\textsuperscript{149} Payments completely unrelated to obtaining or retaining business would be permissible; however, it is difficult to envision a situation where a corporation would be motivated to make such a non-business related payment.

III. DEFENSES TO THE FOREIGN CORRUPT PRACTICES ACT

A. Extortion

In enacting the FCPA, Congress intended to give U.S. businessmen a cogent excuse for strongly resisting extortion attempts.\textsuperscript{150} Whether businessmen, succumbing to extortion, would have a valid defense to an action brought under the FCPA is questionable. The Senate report on the legislation stated:

The defense that the payment was demanded on the part of a government official as a price for gaining entry into a market or to

\textsuperscript{143} Id.
\textsuperscript{144} Baruch, supra note 57, at 46.
\textsuperscript{145} Id.
\textsuperscript{146} Id.
\textsuperscript{147} Id.
\textsuperscript{149} Comment, supra note 45, at 644.
\textsuperscript{150} See Goelzer, supra note 51, at 6-19.
obtain a contract would not suffice since at some point the U.S. company would make a conscious decision whether or not to pay a bribe. That the payment may have been first proposed by the recipient rather than the U.S. company does not alter the corrupt purpose on the part of the person paying the bribe. On the other hand true extortion situations would not be covered by this provision since a payment to an official to keep an oil rig from being dynamited should not be held to be made with the requisite corrupt purposes. 151

This explanation provides little guidance in determining whether the defense of extortion is available in a prosecution under the FCPA, however. The report indicates that a terrorist attack might provide the ground for the extortion defense, but does not address the more probable situation of a businessman faced with a reasonable threat, such as unfair favoritism of another corporation. 152

One commentator has suggested that a business could resolve the extortion problem through consultations with the U.S. Embassy. 153 This approach "might result in a diplomatic protest, which would remove the threat . . . [or] if a payment was deemed necessary in light of irremediable corruption in the foreign government, it would help the company to document the bona fide nature of the threat, and thus avoid later prosecution." 154 Corporations in facing extortion should follow this advice.

B. The "Knowing or Having Reason To Know" Requirement

The FCPA prohibits corporations from making bribery payments indirectly. 155 The antibribery provisions make it illegal "to use an instrumentality of interstate commerce corruptly in furtherance of an offer, payment, and so forth to any person while 'knowing or having reason to know' that all or any portion of such money will be offered or given to any prohibited recipient." 156 The phrase "knowing or having reason to know" and its possible effects is controversial as the legislative history of the FCPA has no hint as to Congressional intent as to the meaning of the phrase. 157 The effect of that phrase and interpretation of its meaning is significant. For example, corporations could not evade the FCPA by passing money payments to an "agent" if circumstances suggested that the

152. Baruch, supra note 57, at 48.
153. Id.
154. Id.
155. FCPA, §§ 103-104.
156. Baruch, supra note 57, at 48.
157. Id.
payments were being forwarded to foreign officials; suspicious circumstances would arise when the agent received disproportionate payment or rendered no services at all.\textsuperscript{158} Therefore, corporations cannot avoid liability by passing the payment to an agent and later denying knowledge of the agent’s activities.\textsuperscript{159}

The language, “having reason to know,”\textsuperscript{160} prevents corporations from using third parties to effect bribes and places a burden upon the corporation to supervise its agents. Some corporations have expressed concern over their ability to control an agent, who could, while acting ultra vires, cause a corporate violation of the FCPA.\textsuperscript{161} A corporation must rely on agency law in formulating a defense to its agents’ ultra vires violations of the FCPA,\textsuperscript{162} and must be prepared to show it used reasonable care in supervising the activities of its agents.\textsuperscript{163}

IV. ENFORCEMENT

The Securities and Exchange Commission and the Department of Justice both have enforcement and investigative responsibilities under the FCPA.\textsuperscript{164} The Department of Justice prosecutes criminal violations of the FCPA,\textsuperscript{165} and has exclusive authority to enforce, in either criminal or civil proceedings, Section 104 of the FCPA.\textsuperscript{166} The SEC, on the other hand, implements and civilly enforces Section 103\textsuperscript{167} as it does other sections of the Securities Exchange Act.\textsuperscript{168}

A. The FCPA Review Procedure of the Department of Justice

On March 20, 1980, the Department of Justice formed a Review Procedure through which companies can seek guidance on the legality of particular transactions under the antibribery provisions of the FCPA.\textsuperscript{169} Under the Review Procedure, after companies detail the particular transaction to the Department,\textsuperscript{170} the Department indicates whether it will take enforcement action.\textsuperscript{171} Once the De-
partment receives all relevant information and the transaction is completed as described, it assures the companies that no enforcement action will commence until the Department gives prior clearance. The Department makes every reasonable effort to respond to inquiries within 30 days. Under the Review procedure, the Department will release no information to the public as long as the information is exempt from mandatory disclosure under the provisions of the Freedom of Information Act. However, the Department will make public releases of transactions described in general terms, giving companies a framework of guidance and predictability in the Department's enforcement actions.

B. The SEC's Response to the Review Procedure

The SEC does not participate in the Department of Justice's FCPA Review Procedure. Therefore, even after obtaining clearance from the Department of Justice, a company may face an SEC enforcement action. The SEC's rationale for non-participation in the Justice Department Review Procedure is that determinations with respect to the applicability of Section 30A to particular fact patterns often would turn on judgments concerning motivation and intent. Any questions of this nature do not easily lend themselves to guidance on the basis of a written description of a proposed transaction and that such questions could, in the first instance, be better resolved by corporate officials and their professional advisors, who have access to all of the relevant facts bearing upon intention.

Although non-participation by the SEC reduces some of the effectiveness of the Department's FCPA Review Procedure, the SEC has stated that it would work closely with the Department of Justice in the administration of the antibribery provisions. At the present time, the SEC and the Department of Justice do not interpret substantive provisions of the Act differently. The SEC has also stated that, as a general rule, it does not expect to bring any Section 30A (FCPA, 172. Id.
173. Id.
174. Id.
175. Id.
176. Id.
177. Id. at 59,005.
178. Id. at 59,004.
179. The Department of Justice is not the sole enforcement agency of the FCPA; the SEC is also charged with enforcement. Comment, supra note 45, at 646. Thus, if a corporation gets clearance from the Department of Justice, the corporation may still be subject to an enforcement action by the SEC.
181. Id.
Section 103) enforcement action where the Department of Justice has approved the transaction in a review request. This expectation is important for corporations seeking guidelines, given that the Department of Justice may have considerations in bringing a criminal action different from those that the SEC would make when deciding whether to bring a civil action. In order to encourage use of the Department’s Review Procedure, the SEC announced it would not, under its prosecutorial discretion, bring enforcement actions against those who properly cleared the transaction with the Department. This policy applied to clearances obtained prior to May 31, 1981, and should allow a sufficient length of time to evaluate the efficacy of the review procedures.

On November 12, 1981, the SEC announced that it intended to reinstate its policy with respect to the Justice Department’s FCPA Review Procedure. The SEC’s policy automatically lapsed on May 31, 1981. Therefore, the SEC’s policy is today, and remains until further notice, that the SEC will not as a matter of prosecutorial discretion take action under Section 30A (FCPA Section 103) where the issuer sought and received a letter from the Department of Justice stating that the Department would not commence criminal enforcement with respect to the transaction. The SEC did not specify any evaluation it had made with respect to the Review Procedure other than a general reaffirmation of the intent to continue the “close working relationship with the Justice Department” which the SEC had maintained since the enactment of the FCPA. As of the date of the new policy statement, November 12, 1981, the Department of Justice had only issued four review letters pursuant to the FCPA Review Procedure. All of them were issued prior to May 31, 1981. Corporations which have doubts about the applicability of the FCPA, and are in need of guidance, would be wise to fully utilize these Review Procedures.

To date there have been few enforcement actions and convictions under the FCPA. The first FCPA suit under the accounting provisions to go to trial was in November 1981 in the U.S. District Court for Northern Georgia. The suit
was the result of a complaint filed by the SEC alleging numerous violations of federal securities laws including the accounting provisions of the FCPA.\(^{194}\) The SEC described the bookkeeping as "sheer chaos."\(^{195}\) It also alleged that the principal shareholder of the corporation had reduced the assets of the company from $2 million to $500,000.\(^{196}\) The SEC investigation began when the corporation’s accountant refused to issue an opinion concerning the corporation’s financial soundness and expressed concern over possible FCPA violations.\(^{197}\)

One of the SEC’s earliest enforcement actions under the accounting provision of the FCPA was *Securities and Exchange Commission v. Page*,\(^{198}\) in which the defendant allegedly dispensed $2.5 million to foreign officials in connection with the sale of aircraft.\(^{199}\) The SEC claimed that the payments were made without adequate controls.\(^{200}\) These controls would have insured that the payments were made for the recorded purpose; that the services, for which the payments were made, were actually rendered; and that the payments represented reasonable compensation for the services provided.\(^{201}\) *Page* demonstrates the relationship between the accounting provisions and the bribery prohibitions.\(^{202}\)

In another enforcement action, the SEC charged that the defendant failed to maintain the accounting controls necessary to safeguard corporate assets.\(^{203}\) The corporate officers allegedly billed the company for services never rendered, paid unauthorized salaries and misappropriated funds from the sale of the company’s yacht.\(^{204}\) All of those transactions resulted in inaccuracies in the defendant company’s books. The SEC agreed to settle the case with Page Airways, Inc. before the case could go to trial.\(^{205}\) Page did not admit or deny the charges but agreed to a permanent injunction prohibiting further violations of the FCPA’s accounting provisions.\(^{206}\)

V. THE GENERAL ACCOUNTING OFFICE STUDY: EFFECTS AND RECOMMENDATIONS

The General Accounting Office has completed its first empirical study of the FCPA,\(^{207}\) and found dissatisfaction with the FCPA and its implementation.\(^{208}\) A

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194. Id.
195. Id.
196. Id.
197. Id.
201. Id.
202. Id. at 42-43.
206. Id.
substantial number of firms indicated that they felt the accounting costs outweighed the benefits of internal accounting controls, and that the antibribery provisions had resulted in the loss of business overseas. The GAO study acknowledged that implementation of the FCPA had resulted in changes in corporate activities, but stated that the antibribery provisions have also been criticized as being vague and ambiguous. These ambiguities have been cited as a possible cause of U.S. business foregoing legitimate export opportunities. Further, companies believe they are suffering a competitive disadvantage without an international antibribery agreement. The GAO concluded that some of the

study in March, 1981. The GAO mailed questionnaires to 250 companies randomly selected from Fortune's top 1,000 companies, and used audit techniques to test the validity and accuracy of the survey results. Id. Commission Policy Statement on Section 30A, 45 Fed. Reg. 59,001, 59,004-05 (1980).


209. Id. Fifty-five percent of the companies completing the questionnaire believed the costs outweighed the benefits and 50% claimed the FCPA was responsible for the loss of business by U.S. companies overseas. According to half of the survey respondents, corporate compliance with the accounting provisions of the FCPA increased accounting and auditing costs by 11% to 35%. Id.

210. Id. Seventy-five percent of the respondents made changes in their internal accounting control and 60% have made changes in their code of conduct because of the FCPA. Excessive compliance costs may be the result of fear caused by the criminal penalties. The GAO, therefore, recommended eliminating these penalties. Id. at D-2.

211. Id. The problem of U.S. businesses being competitively disadvantaged by the FCPA in the world marketplace raises the question of whether the U.S. should set the example for international ethics or merely comply with standards arrived at through international agreement. For a description of the activity regulating multinational corporations by the international community, see generally Primoff, supra note 25. There are three areas of development in the international regulation of business activities. The United Nations Conference on Trade and Development (UNCTAD) is developing model laws restricting business activities which injure international trade. Id. at 287-88. The UNCTAD is also devising a Code of Conduct on the Transfer of Technology. Id. at 288. The Economic and Social Council (ECOSOC) is involved with "the development and computerization of information on TNCs [transnational corporations], preparation of a Code of Conduct on TNCs, and assistance to developing countries in decision-making on foreign investment within their borders and negotiation with TNCs." Id. Corrupt practices are within the purview of the U.N. Commission on Transnational Corporations.

Id.

There is an understandable difference in business practice goals of developed nations and lesser developed countries (LDCs). Developed nations tend to view the desired goal as the maintenance of free market economics, whereas, LDCs believe that LDCs should be exempted from the restrictions on prohibited business practices. Id. at 289. The opposing domestic goals of developed nations and LDCs significantly decrease the possibility of any international accord on restrictive business practices. Id.

The ECOSOC established the Commission on Transnational Corporations and the Centre on Transnational Corporations in 1974 to provide a forum for transnational corporate issues. Id. at 301. A Group of Eminent Persons was convened and they developed a Code of Conduct for transnational corporations. Their specific recommendations do not address bribery. The Group's failure to address bribery probably was due to the fact that the widespread publicity concerning bribery did not occur until after the Group had completed its work. Id. at 314.

In December 1975, the U.N. General Assembly passed a resolution condemning bribery by multinational corporations. Id. at 315.

The U.S. Senate passed a resolution in September, 1975, asking the President to pursue, in the then current GATT negotiations, an international accord covering bribery. S. J. RES. 265, 94th Cong. 1st Sess., 1975, at 516,735 (daily ed. Sept. 25, 1975).

SEC guidance will clarify some of the ambiguities of the FCPA. \textsuperscript{212} In addition, the GAO report was critical of the Justice Department's FCPA Review Procedure, \textsuperscript{213} and recommended developing alternative methods of resolving ambiguities in the antibribery provisions. \textsuperscript{214}

\section*{VI. Future Congressional Action}

There have been recent attempts in Congress to clarify the FCPA. In September 1981, the Senate Banking Committee approved a version of a bill proposed by Senator John Chafee. \textsuperscript{215} The Committee did not approve all of Sen. Chafee's proposals. \textsuperscript{216} Instead of a financial statement "materiality" standard, as recommended by Senator Chafee, the Committee approved a standard for the accuracy of the accounting provisions to be that which a "prudent man would require in the management of his own affairs." \textsuperscript{217} With regard to the antibribery provisions, Senator Chafee recommended eliminating the "reason to know" language. \textsuperscript{218} The Committee adopted, instead, an amendment offered by Senator John Heinz that "defines the 'course of conduct' for which an executive will be accountable." \textsuperscript{219} Under this proposal an executive would be liable only if he intended a bribe to be made. \textsuperscript{220} The language of the amendment makes clear, however, that intent could be implied from the circumstances surrounding the payment. \textsuperscript{221} Finally, the proposed bill would give the Department of Justice exclusive jurisdiction over the antibribery provisions. \textsuperscript{222} The SEC would retain civil enforcement responsibilities for the accounting provisions. \textsuperscript{223}

\textsuperscript{212} [1981] SEC. REG. & L. REP. (BNA) No. 594, at D-1 (Mar. 11, 1981). Former SEC Chairman Harold Williams has stated that, "inadvertent recordkeeping mistakes will not give rise to Commission enforcement proceedings; nor could a company be enjoined for falsifications of which its management, broadly defined, was not aware and reasonably should not have known." [1981] SEC. REG. & L. REP. (BNA) No. 586, at I-1 (Jan. 14, 1981). He also stated that the Commission was changing its policy of not detailing what constitutes a violation of the FCPA and would, in the future, give corporations a clear idea of what would be considered a violation. \textit{Id.} at D-1. Chairman Williams's statements have been incorporated into SEC policy and all commissioners concur with those views. [1981] SEC. REG. & L. REP. (BNA) No. 591, at D-7 (Feb. 18, 1981).

\textsuperscript{213} [1981] SEC. REG. & L. REP. (BNA) No. 594, at D-2 (Mar. 11, 1981). The report states that the procedure "has yet to effectively address the ambiguities in the antibribery provisions and it is doubtful that it will." \textit{Id.} Part of the criticism stems from the lack of SEC involvement with the procedure, despite the SEC's willingness to defer to the Justice Department's judgment until May 31, 1981. \textit{Id.}

\textsuperscript{214} \textit{Id.}


\textsuperscript{216} \textit{Id.}

\textsuperscript{217} \textit{Id.}

\textsuperscript{218} \textit{Id.} at D-2.

\textsuperscript{219} \textit{Id.}

\textsuperscript{220} \textit{Id.}

\textsuperscript{221} \textit{Id.}

\textsuperscript{222} \textit{Id.}

\textsuperscript{223} \textit{Id.}
During the hearing on the proposed amendments, former Congressman Bob Eckhardt defended the current FCPA. He stated that the FCPA should not be weakened and he cited figures demonstrating that U.S. exports rose after the FCPA was enacted. In contrast, Mr. Roderick Hills, a lawyer and former Chairman of the SEC, stated that the FCPA went too far by "criminalization of the issue." He also stated that the accountability of corporations had improved in the past five years and there was no longer "need for further stimulus from the government."

Despite passage of the bill in the Senate on November 23, 1981, the prospects for any Congressional approval in 1982 are slim. There has been little lobbying to get the bill through the House due to the bill falling short of U.S. business's expectations. Corporate officials feel that the proposed amendments do not go far enough in resolving the FCPA's ambiguities. In addition, U.S. business was disappointed because the bill did not tie the accounting and antibribery provisions together. U.S. business wanted the accounting provisions to be applicable only if illegal payments were involved. The Chairman of the Telecommunications, Consumer Protection and Finance Subcommittee, Congressman Timothy Wirth, is not willing to push the proposed bill in his subcommittee. Congressman Wirth does not believe the FCPA should be amended unless there is solid evidence that the FCPA is hurting U.S. export business. Even if the bill is reported out of the subcommittee, it will have similar opposition in the House Energy & Commerce Committee. Therefore, U.S. corporations should not anticipate even moderate legislative relief in the near future.

VII. Conclusion

The effect of the FCPA has not been as detrimental to U.S. business interests as originally feared. In requesting information on the impact of the FCPA, the SEC received only a modicum of response. This low level of response indicates that corporate boardrooms are not suffering from any inability to compete due to the FCPA. In this regard, the predictions of the original sponsors of the FCPA

225. Id.
226. Id.
227. Id.
230. Id.
231. Id.
232. Id.
233. Id.
234. Id.
235. Id.
may be correct. Those sponsors contended that a strong antibribery bill would enhance U.S. business interests by creating an image of integrity and forthrightness, putting the world on notice that American goods and technology were of such quality that companies could market those goods without resorting to bribes and questionable payments. The FCPA also gave U.S. business the incentive and opportunity to begin refusing to pay, what had in some cases become, outrageous bribe demands.

A lingering weakness of the FCPA is its unpredictability. However, the establishment of the Department of Justice's FCPA Review Procedure, coupled with the deference which the SEC has displayed toward the procedure, should remedy that shortcoming. Application of the FCPA will become more certain as the Department of Justice's public releases establish guidelines defining legal and illegal transactions.

In applying the accounting provisions, the private sector has displayed remarkable initiative. As a result, the SEC has withdrawn proposed rules implementing the accounting provisions of the Act. Private industry should continue these efforts in order to avoid SEC regulation. Management should adopt at least the issuance of an annual report on internal accounting control and an examination, evaluation and report by an independent auditor of management's report.

Finally, the United Nations is expected to re-examine the area of questionable payments to foreign officials when the international standards of business practices are finalized at the United Nations. If the major trading partners and industrial nations endorse the business practice proposals, the United States will find itself on equal competitive footing once again. U.S. business can be justifiably proud that it is on the vanguard of establishing honest and acceptable business practices.

Mark Romaneski