The FCPA and the OECD Convention
Some Lessons from the U.S. Experience

Masako N. Darrough

Stan Ross Department of Accountancy
Baruch College, CUNY
One Bernard Baruch Way,
New York, NY 10010

Masako_Darrough@baruch.cuny.edu

February 2004

I am grateful to Donal Byard, Martin Benis, Aloke Ghosh, David Green, Michael Maher, Marilyn Neimark, Rita Ormsby, Fred Thompson, and the participants at the seminar at Rutgers University for their insightful comments.

The FCPA and the OECD Convention:
Some Lessons from the U.S. Experience

Abstract

Although corruption is ubiquitous, attitudes toward it differ among countries. The U.S. had been the only country, until 1997 OECD Convention, with an explicit extraterritorial anti-bribery law. The Foreign Corrupt Practices Act of 1977 employs a two-pronged approach to control the supply side of corruption: (1) anti-bribery provisions and (2) accounting (internal control) provisions. I offer indirect evidence that shows that the FCPA had limited success. The OECD Convention adopts the same two-pronged approach, but is likely to be more successful since it is a multilateral treaty: the signatory nations can effectively form a cartel to reduce the cost of doing business. As with any cartel, however, each multinational corporation has an incentive to deviate. I argue that the main lesson to be drawn from the U.S. experience is that we need, in addition to internal controls, stronger and more effective corporate governance within an appropriate regulatory framework.

Key words: Bribery, corruption, corporate governance, FCPA, internal control, OECD Convention

1 Introduction

The last half-century has seen an unprecedented growth in world trade and the value of traded goods and services in the world has grown much faster than their production. According to the statistics compiled by the World Trade Organization, from 1950 to 2002, the world export of merchandise in real terms has increased 17.6 times, while the world GDP increased by a factor of only 6.8. More recently, the merchandise export has grown since 1980 at an average annual growth rate of 5.4%, about twice the growth rate of the world GDP. Since trade in the form of services has increased even faster, the combined growth rate has been slightly higher at 5.6% per annum. Developed or industrialized countries carry out the majority of trade, accounting for about 70% of the world's total trade. Being the largest economy in the world, the United States is also the largest trading nation and saw its share of world trade increased from 11.3% in 1980 to 14.7% in 2002.

With this rapid globalization and integration of the world economy, competition among those who engage in trade and investment has become fiercer and temptation to resort to questionable methods of doing business has also increased. Multinational corporations, for example, are often accused of bribing foreign public officials, who in turn, ask for kickbacks when awarding public contracts. These companies "supply" and the public officials "demand" corruption. Although it is difficult to make a precise estimate of the magnitude of bribery payments because of their illicit nature, the World Bank estimates that five percent of exports to developing countries - $50 to $80 billion per year – goes to corrupt officials (Moss, 1997). Other experts estimate that various forms of corruption siphon away "five to thirty percent of all public funds" (Hamra, 2000). Bribe payers and receivers presumably engage in the act to obtain private economic gains, but the cost is born by others. Bribery, like a tariff, significantly increases the costs of a contract. However, unlike tariff revenues, which in principle go into the government coffers, bribe payments go directly into the pockets of officials and are not available for social projects.

Until the passage of the *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (henceforth the OECD Convention) in 1997, the United States was the only country in the world that explicitly prohibited extraterritorial bribery. SEC investigations in the mid-

1970s found that a large number of U.S. corporations were involved in corrupt practices both within the Unites States and abroad. The *Foreign Corrupt Practices Act* (henceforth FCPA) was enacted in 1977 to "bring a halt to the bribery of foreign officials" and "to restore public confidence in the integrity of the American business system." Twenty years later, thirty-five countries (including the 30 OECD members and 5 non-members) signed the OECD Convention and most of the countries have since implemented legislation to put anti-bribery laws into effect. By making extraterritorial bribery explicitly illegal for companies, both the FCPA and the OECD Convention are designed to limit the supply side of corruption.

In addition to anti-bribery provisions, both the FCPA and the OECD Convention include accounting provisions that require companies to keep good books and records as well as to establish and maintain appropriate internal controls. These requirements first came about when the SEC investigations discovered that many American companies masked corrupt practices by unrecorded slush funds and false records. As an amendment to the Securities Exchange Act of 1934, the accounting requirement of the FCPA is applicable to all companies that report to the SEC regardless of their involvement with foreign business. Good record keeping and internal controls would make it more difficult to conceal illegal or unauthorized payments. Internal control is a tool for top management to solve agency problems within organizations and no doubt has been an important tool in the United States in combating corruption of various types – not just ones involving foreign public officials.

The word "corruption" is used in many contexts. However defined in a technical sense, it is generally agreed that corruption undermines the economic and social development of societies. In fact, the World Bank has recently identified corruption "as the single greatest obstacle to economic and social development," since it "undermines development by distorting the rule of law and weakening the institutional foundation on which economic growth depends."[1] Corruption is ubiquitous, but the extent and the form differ across countries. According to Transparency International, the Corruption Perception Index (CPI) in year 2003 varied from 1.3 to 9.7 (10 being perfectly corruption free) for the 130 countries surveyed. The United States is ranked 18th,

---

[1] See the website of the World Bank: http://www1.worldbank.org/publicsector/anticorrupt

trailing many of the Northern European countries, Singapore, Hong Kong, Canada, U.K., Australia, and New Zealand.

However, if we focus more narrowly on the capital market, the U.S. has, until recently, unambiguously considered itself to have the most important and the best-functioning capital market. The Opacity Index compiled by PricewaterhouseCoopers in 2000 ranked United States second (to Singapore) in the level of transparency of its capital markets. Transparency is viewed as a desirable quality for capital markets as it increases investor confidence and thus, lowers the cost of capital for firms. The series of corporate malfeasances that are currently being revealed, however, shows that the present U.S. market system does not work as well as we once thought. Emerging is a consensus that these debacles represent a "systemic" failure of the systems at all levels -- political, regulatory, the corporate board, the management, and the external auditor -- and these egregious failures represent a clear breach of the basic contract that underlines corporate capitalism. These scandals show that internal controls alone are not sufficient to ensure proper corporate conduct. Internal controls may be effective in controlling misconduct within the corporation, but are ineffective if management and the external auditor are intent on defrauding the system.

With the 25-year experience of criminalizing bribery of foreign officials and requiring internal controls, one would expect that U.S. corporations are relatively free of bribery. On the contrary, the U.S. standing in the world in this respect is surprisingly poor. Transparency International conducted in 2002 the second opinion polls as to the propensity of the "multinational corporations to bribe" foreign pubic officials. The resulting Bribe Payers Index ranked the U.S. below average, as 13th among the 21 leading "exporting" nations. Moreover, the U.S. ranking slipped from 9th since the first survey of 1999. Another survey by Transparency International asked the respondents to name three governments that are thought to be willing to use various practices (other than bribery) to obtain "unfair" advantage in international trade and investment. The U.S. was selected most frequently: 58% of the respondent chose the U.S., followed by 26% for France. In view of the U.S.'s long history of attempting to reduce bribery through the FCPA and its effort of promoting "fair competition" that culminated in the OECD Convention, these perceptions held by the respondents are disappointing and disturbing.

The OECD Convention is modeled after the FCPA with parallel requirements. Thus, one might expect that the OECD Convention would affect multinationals from the signatory nations in a similar manner. The purpose of this paper is to ask what lessons we can learn from the U.S. experience in combating corruption in general and bribery in specific. What lessons can we draw from the U.S. experience, which are useful to ensure the success of the OECD Convention?

Since the U.S. appears to have limited success with the FCPA, one might wonder if the OECD Convention would also have a limited impact. There is a distinct difference between the two, however. The FCPA is a unilateral law applicable to mainly U.S. corporations, whereas the OECD Convention is a multilateral treaty with 35 signatory nations. Prior to the OECD Convention, U.S. corporations were subject to different rules of the game and were "at a disadvantage" relative to their competitors from other countries. Therefore, the anti-bribery provision provided conflicting incentives to these U.S. companies. With the OECD Convention, it is in the interest of all signatory nations to enforce the agreement because it reduces the cost of doing business for every multinational company, although each company can make itself better off by unilaterally reneging the agreement. This begs the question of whether the U.S. experience has anything useful to offer to ensure the success of the OECD Convention. On the contrary, an analysis of the U.S. experience provides a valuable insight into the forces at work in shaping the bribe behavior of the players involved. I offer an argument in this paper that although both the FCPA and the OECD Convention provide internal controls as the tool to control illicit and unauthorized acts within the corporation, they do not provide any effective mechanism to control corporate misconduct that involves top management. Proper corporate conduct is promoted only through social mechanisms that align the incentives of corporate members at all levels with those of the society.

The remainder of the paper is organized as follows. In the following two sections, I provide briefly the background of the FCPA and the OECD Convention. I then analyze the FCPA as a policy tool, in particular the efficacy of the FCPA in controlling bribery. Although it is impossible to provide a direct and conclusive assessment, I provide indirect evidence that suggests that the FCPA had a limited impact on the U.S.

corporations. Internal control alone is not sufficient. In Section 5, I examine the concepts of internal control, which leads to a discussion of corporate governance in Section 6. Following this is a brief concluding section.

2 Foreign Corrupt Practices Act: Anti-bribery Provisions

As the title of the Act suggests, the FCPA makes it "unlawful for a U.S. person, and certain foreign issuers of securities," to make "a corrupt payment" to a foreign official "for the purpose of obtaining or retaining business."[2] The Act was strengthened in 1998 to include foreign firms and persons who take any act "in furtherance of such a corrupt payment while in the United States."

2.1 Background

Within the United States, bribery and kickbacks involving American public officials have always been illegal. A myriad of state and federal laws, including the RICO Act, the Travel Act, and mail and wire fraud acts have been applied to such conduct involving both government officials and private persons.[3] No explicit law existed, however, to deal with foreign officials before the FCPA of 1977.[4] The enactment of the FCPA was prompted by a series of notorious scandals such as Watergate and one involving Lockheed Martin Aircraft Corporation.[5] The SEC-sponsored voluntary disclosure program in the 1970s revealed that more than 450 U.S. companies made "questionable or illegal payments" in excess of $300 million to foreign government officials, politicians, and political parties (GAO Report, 1981). Lockheed was found to have paid approximately $202 million in bribes in the U.S. and abroad. In addition to contributing to the Nixon campaign, Lockheed paid bribes to public officials in various foreign countries including the Netherlands, Japan, Italy, Germany, Mexico, Spain, and Greece. This is a corporation that had a $250 million loan guarantee by Congress in 1971 to prevent bankruptcy. A special Watergate prosecutor discovered the

---

[2] From the website of the Department of Justice: http://www.usdoj.gov/criminal/fraud/fcpa/dojdocb.htm

[3] Prior to the enactment of the FCPA, the U.S. Government has used these various statues to prosecute improper payments to foreign officials. Appendix C lists some of these pre-FCPA cases.

[4] Noonan (1984) points out that bribery abroad was in violation of several existing American laws even before the FCPA. Moreover, since 1958, bribe payments were not deductible for federal tax purposes. The FCPA, however, made this explicit.

[5] The Special Prosecutor's office that investigated the Watergate scandal discovered that many American corporations were engaged in questionable and illegal activities including illegal corporate campaign contributions to both domestic and foreign political parties as well as bribe payments to domestic and foreign officials. Such revelation led the SEC to investigate if the activities involved any violations of the federal securities laws.

widespread practice by American multinationals of funneling money through foreign agents to establish unrecorded slush funds for domestic political contributions (in violation of campaign finance law), and to bribe foreign officials to obtain favorable contracts. Such disclosures of widespread corporate wrongdoing increased the public anger against big companies, resulting in the passage of the FCPA in 1977. Section 103 of the FCPA amends the 1934 Securities and Exchange Act by inserting Section 30A that makes it unlawful for any issuer to use the mails or any means of interstate commerce, corruptly, in furtherance of an offer, payment, or promise to give anything of value to any foreign political party or officials in order to obtain or retain business, while Section 104 of the FCPA enacted parallel prohibitions to any "domestic" concern that is not covered by Section 30A.

2.2 Accounting Provisions: Record Keeping and Internal Control

During the Watergate investigation, a large number of corporations voluntarily disclosed that they made questionable and illegal payments (to both domestic, foreign officials and political parties) through slush funds involving the falsification of records.[6] The SEC viewed this finding as "a breakdown in the system of corporate accountability" which was a "matter of concern irrespective of any bribery or questionable payments" and in a 1976 Report to Congress, recommended adopting of specific accounting provisions of internal control, which were included a year later in the FCPA (GAO Report). Congress clearly realized the importance of legislating a systematic approach to corporate accountability.

The FCPA amended Section 13(b) of the Securities Exchange Act of 1934 and codified the accounting provisions along the lines of Statement of Auditing Procedure (SAP) No. 54. Since the accounting provisions were passed as amendments to the 1934 Act (unlike the anti-bribery requirement), they apply to all corporations subject to the SEC regulation, regardless of whether they are engaged in foreign business.[7] In effect, the FCPA granted the SEC authority over the entire financial management and reporting requirements of SEC registrants (Lacey and George, 1998). The FCPA divides enforcement authority between the

---

[6] In 1975, the SEC instituted a voluntary program to induce corporations to disclose the information on questionable payments. Participation in the program did not grant immunity from civil or criminal liability, however. See Herlihy and Levine (1976).
[7] Note, however, that the requirement covers only the SEC registrants and not private businesses.

Department of Justice for criminal (for "willful" violations) and civil prosecution of anti-bribery provisions and the SEC for the investigation of civil violations of both the accounting control and anti-bribery provisions.

The accounting provisions require: (1) good bookkeeping and disclosure, and (2) maintenance of the internal control system, which ensures that: (a) transactions are executed in accordance with management's general or specific authorization; (b) 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; (c) access to assets is permitted only in accordance with management's general or specific authorization; and (d) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.

These provisions were made with an emphasis on transactions and dispositions of assets to prevent valuable assets of a company from being illicitly given away.[8] The immateriality criterion does not apply to bribe payments, since any bribe, however small, would be illegal, although "facilitating payments" are allowed.

Good record keeping and internal control are a must for any business. What is significant about the FCPA is that the Act made it a legal requirement. Shortly after the passage of the FCPA, Beresford and Bond (1978) wrote:

> Management's responsibility for maintaining internal control is not new. However subjecting companies and their officers and employees to possible civil liability and criminal prosecution under federal securities laws for not having a sufficient system of internal control is a significant development.

Subsequent to the enactment of the FCPA, several documents were issued dealing with internal control. In 1987, the Treadway Report (of the National Commission on Fraudulent Financial Reporting) also emphasized internal control as a mechanism to prevent fraudulent reporting. The Commission made a number

---

[8] Rose-Ackerman (1999) explains the reason why internal control was required as opposed to holding corporations responsible for the criminal behavior of their employees. Since most bribes are paid by employees and agents, not by top management, top management might be reluctant to come forward with information on the criminal conduct of their employees if the corporations are "held criminally liable."

of recommendations and made it clear that the responsibility for reliable financial reporting "resides first and foremost at the corporate level, in particular at the top management level" because top management "sets the tone and establishes the financial reporting environment." Internal controls assisted by internal audit are crucial for the purpose. In addition, the Commission called for the sponsoring accounting organizations to work together to integrate various internal control approaches into an integrated framework. Subsequently, the Committee of Sponsoring organizations (COSO) issued a comprehensive four-volume report on internal control in 1992, with a framework that integrates five interrelated components (control environment, risk assessment, control activities, information and communication, and monitoring), through which business entities could assess and ensure the effectiveness of their internal controls.[9] The central principles of the COSO Report were later codified by the AICPA's Auditing Standards Board in Statement on Auditing Standards (SAS) No.78 (1995). Finally, COSO and SAC are incorporated in the report on Control Objectives for Information and related Technology (COBIT) by the Information Systems Audit and Control Foundations. COBIT is considered astate-of-the-art and is widely adopted by various organizations around the world.

3 OECD Convention

Many American companies complained that the FCPA placed them at a competitive disadvantage relative to foreign corporations that were not subject to such a law in their own country. Moreover, many countries allowed tax deductibility of bribe payments.[10] A study by the Commerce Department claimed that U.S. companies, in 1994 alone, lost $45 billion of international business to international competitors that paid bribes (Borrus, 1995). Similarly, from 1994 through 2001, they lost contracts valued at $200 billion to over 400 foreign competitors that allegedly paid bribes.[11] Thus, an amendment to the FCPA (1988) mandated the U.S. President to "pursue an international agreement criminalizing foreign bribery through the OECD" as well as other international venues (Tronnes, 2000). Other nations were also becoming concerned with the adverse effect

[9] The committee consisted of five accounting organizations that had sponsored the Treadway Report.
[10] For example, fourteen out of 30 OECD member countries recognized foreign bribery payments as legitimate business expenses for tax purpose.
[11] http://www.state.gov/g/inl/rls/rpt/fgcrpt/2001/3144.htm

of corruption. For example, in addition to the OECD Convention, two multinational treaties were signed in the late nineties: in 1996 the Organization of American States (OAS) adopted the *Inter-American Convention Against Corruption*; in 1997 the Council of Europe (CE) adopted *the Convention on the Fight Against Corruption*. Both the OAS and CE Conventions have a wider scope than the OECD Convention, covering corruption involving both domestic and foreign officials. However, since neither specifies any provision on internal control, my analysis will focus only on the OECD Convention.

The OECD Conventio*n* was adopted in 1997 and entered "into force" in 1999. Thirty OECD members (including the United States) and five additional countries have signed the convention allowing participants to move in a "co-coordinated manner" to adopt national legislation making it a crime to bribe foreign public officials.[12] Most of the signatory countries have since ratified the convention and incorporated anti-bribery provisions into their law. The OECD considers bribery to be "widespread" and to raise "serious moral and political concerns and distorting international competitive conditions." Similar to the FCPA, the Convention criminalizes bribery of foreign officials and provides for accounting provisions. Not only does the convention ban payments made to foreign officials for the purpose of obtaining or retaining business as the FCPA specifies, but it also bans payments made to secure any "improper advantage." While the Convention itself includes no provisions on the issue of tax-deductibility of bribes paid abroad, the signatory countries all adopted provisions to deny tax-deductibility of bribe payments.

With the passage of the convention, the U.S. was finally able to level the "playing filed" for its corporations. The 1998 amendment to the FCPA was introduced under the title "International Anti-bribery and Fair Competition Act of 1998" to "improve the competitiveness of American business and promote foreign commerce."[13] In a message to a publication on fighting global corruption, Secretary of State Colin Powell (2001) states:

---

[12] The OECD member countries include: Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Spain, Sweden, Switzerland, Turkey, United Kingdom, and the United States. Additional five signatory countries are Bulgaria, Brazil, Argentina, Chile, and Slovenia.

[13] The 1998 Amendments conform the FCPA to the requirements of and implement the OECD Convention. The amendments make "corrupt" payments abroad illegal irrespective of whether the U.S. mails or means of interstate

> Since the enactment of the Foreign Corrupt Practices Act of 1977, the United States has provided indispensable leadership so that business enterprise can compete fairly in the global economy. Today, rule of law and anticorruption initiatives are key foreign policy elements that promote integrity and confidence in both government institutions and in the global marketplace."[14]

The two underlying motives for the FCPA are clear in the statement: one is based on business ethics ("integrity and confidence") and the other is based on the ideal of leveling the playing field ("compete fairly" in the "global marketplace").

Article 8 of the OECD Convention also requires signatories to adopt accounting provisions. Penalties are proposed for "omissions or falsification in respect of company books and accounts for the purpose of bribing foreign public officials or of hiding briberies." Prohibited are off-the-book accounts, the making of inadequately identified transactions, the recording of non-existent expenditures, the entry of liabilities with incorrect identification of their purpose, and the use of false documents. In addition, it requires the disclosure of "facilitation payments."

4 The Efficacy of the FCPA as a Policy Tool

With the 25-year history of the FCPA and its enforcement, one would expect U.S. corporations to have shied away from engaging in bribe payments. Did the U.S. companies lose $45 billion of business in 1994 because they did not offer bribes? Did the FCPA "bring a halt to the bribery of foreign officials"? The meta question is: how effective has the FCPA been as a policy tool to curb bribery of foreign officials? This is an interesting and key question, yet it is impossible to produce direct answers for two reasons: (1) it is not possible to establish how U.S. corporations would have behaved without the FCPA; and (2) it is difficult to estimate the magnitude of actual bribe payments under the FCPA. A bribe payer is unlikely to report bribe payments truthfully once the FCPA is in effect, unlike the voluntary disclosures made during the Watergate investigation period. The available evidence is indirect at best. I examine the question from five perspectives: (1) the FCPA

---

commerce are used. In addition, the differential treatment of U.S. nationals (and firms) and foreign nationals (and firms) has been removed.

[14] A Message from Secretary of State Colin L. Powell on Corruption from "Fighting Global Corruption: Business Risk Management," published by Bureau for International Narcotics and Law Enforcement Affairs, May 2001

as an incentive mechanism; (2) the empirical literature that examined the trading patterns of U.S. corporations pre- and post-FCPA periods; (3) the Bribe Payers Index (BPI), which reflects the perception as to the propensity of U.S. corporations to bribe foreign officials; (4) a brief study of several enforcement cases; (5) a statistical analysis of FCPA enforcement firms.

4.1 Incentives to comply with the FCPA

The two-pronged approach of the FCPA relies on punitive measures and an internal-control tool. For those who are considering making bribe payments in order to obtain or retain business, an anti-bribery law raises the expected cost of such acts. Proper records and internal controls give a better tool for top management to oversee the conduct of their subordinates. Violations of the FCPA can result in severe and adverse consequences. Both criminal charges and civil enforcement can impose fines and penalties up to $2 million per bribe as well as prison terms.[15] In addition, a person or firm found in violation of the FCPA may be barred from doing business with the Federal government and receiving export licenses. The SEC may suspend or bar individuals from the securities business, while the Commodity Futures Trading Commission and the Overseas Private Investment Corporation can suspend or bar individuals from agency programs. A number of companies and persons have been investigated and prosecuted for violations of the FCPA.

Yet, U.S. multinationals have faced conflicting incentives to comply with the FCPA. The difficulty for U.S. multinationals was threefold: (1) the moral ambiguity of the conduct; (2) increasing competitive pressures; and (3) the difficulty of control over geographically decentralized operations. First, why is it illegal for U.S. companies to offer payments to foreign officials when it seems to be the norm? Although bribing (American) public officials has always been illegal in the U.S., if paying bribes to foreign officials is not illegal for foreign companies, why should Americans have to play by a different set of rules? Bribe payments are made precisely because they increase the probability of obtaining or retaining business, which is a value-increasing activity for the firm. Moreover, bribery is not embezzlement and those who lose are other

[15] In addition to the cost of monetary penalty and imprisonment, firms and individuals can lose "reputational capital." For senior managers and directors, such a cost appears to be minima, however. Griffin (1976) found only minimal and temporary decline in the stock prices of the companies that disclosed "questionable and illegal payments" under the voluntary disclosure program. Agrawal et al. (1999) found no systematic evidence that turnover of senior managers increases after the revelation of fraud.

competitors. It might be justified as a means to win the game, which is played on behalf of the company's shareholders. Finally, an agent might yield to the pressure from those who demand bribe payments.[16] There is little one can do to deal with extortionary demand by foreign officials.

Second, the stakes have been increasing. An agent who views bribery as an economic (as opposed to a moral) decision is more likely to make such payments when the expected payoffs are high. If an agent can increase the probability of obtaining or retaining business via bribe payments, then the expected benefits can be substantial. The value of U.S. trade of goods and services has grown from $.55 trillion to $2.51 trillion from 1980 to 2000. Although competition from other nations increased as the world market became more integrated, the U.S. has been enjoying the highest shares of world trade of goods and services. The U.S. share of the trade has increased at an annual rate of 1.22%, while that by other developed nations remained constant. (See Appendix A). Some of the enforcement cases (to be discussed later) by DOJ or the SEC illustrate that multimillion-dollar contracts were at stake.[17]

Third, bribery is a manifestation of a two-sided agency problem. One side is a private enterprise and the other side is a (foreign) government. Actual business activity, however, is carried out by their respective agents. For example, a public official as a representative of a government selects an enterprise to award a contract (for example, to build a power plant or to supply fighter planes) or licenses (for example, to import goods), providing an opportunity for the public official to extract private gains. Since bribes are usually paid to public officials abroad, top management in a decentralized organization could have difficulty in exercising direct control. It is more likely that the principal (enterprise) has given a considerable amount of discretion to the local agent so that he can make use of his superior knowledge of the local conditions (such as how business is done in the country). In fact, the FCPA exempts "facilitating" and "routine" government payments from the definition

---

[16] For example, United Brands claimed to have made bribe payments of $1.25 million to avoid a "confiscatory export duty on bananas" in Honduras in the 1970s. See Mathews (1984). More recently, Mewcomb (2002) reports that the CFO and the controller of Baker Hughes are challenging the SEC by claiming that a "bribe" payment was in response to extortion by a government official who would have imposed an excessive tax bill. In addition, they claim that there was no business to obtain or retain, nor was any illegal advantage gained.

[17] See Appendix B.

of "corrupt" payments.[18] They are considered necessary grease payments as in "honest graft" of George Washington Plunkitt. Since business activities are carried out by local agents (sometime foreign nationals or foreign subsidiaries), the problem of asymmetric information is more severe, resulting in more acute agency problems.

4.2 Empirical Literature

Several academic articles provide evidence that is consistent with the hypothesis that the U.S. corporations were discouraged from doing business in more "corrupt" countries because of the FCPA. If the FCPA makes the costs of bribery higher, the relative costs would be higher in those countries where corruption is high. For example, documenting that U.S. business activity in corrupt countries showed unusual declines after 1977, Hines (1995) attributed the declines to the FCPA. Beck et al. (1991) examined the export-market share of U.S. firms pre- and post-FCPA periods to conclude that U.S. market share declined (1) in bribery-prone countries in general, and more specifically (2) in bribery-prone countries where U.S. firms do not have regional advantages (that is, bribery-prone non-Latin American countries). Alesina and Weder (1999) also found that U.S. business is discouraged from doing business in more corrupt countries. In contrast, they found that neither the U.S. nor other countries reduce official aid to more corrupt governments. Of course, there is no explicit law that prohibits giving aid to corrupt governments. Wei (1997), on the other hand, found that although foreign direct investment (FDI) in general is sensitive to corruption, American FDI is no more sensitive than investors from other countries despite the FCPA. These studies provide evidence that U.S. multinationals have responded to the FCPA by reducing their business in more corrupt countries. However, given that total U.S. imports and exports of goods have increased in nominal terms at the annual rate of 8% and 6.5%, respectively, in the last 25 years, it does not appear that overall American foreign trades have been discouraged significantly.[19] In fact, the U.S. share of world trade has increased steadily at about 1.22% per annum.

---

[18] When firms are not sure if a specific business arrangement is in violation of the Act, they can ask the Department of Justice (DOJ) for an opinion. Although the DOJ's opinion is not binding in subsequent litigation, it is still informative for firms in formulating their business strategies. Some companies have set up formal and rigorous procedures into their "codes of ethics" to "forbid receiving gifts, entertainment, and gratuities from suppliers when a conflict interest would be created thereby..." (Salbu, 1997).

[19] Calculated based on the data available from the Bureau of Economic Analysis, the U.S. Department of Labor.

4.3 Bribe Payer Index and Corruption Perception Index

Yet, U.S. multinationals are viewed as bribery-prone. The aforementioned BPI ranking for the U.S. slipped from just above average (9th out of 19 nations) in 1999 to below average (13th out of 21) in 2002. The BPI score of the U.S. also went down from 6.2 (the average being 5.9) to 5.3 (6.0), respectively. The BPI scores are based on the surveys conducted in 15 emerging-market countries and represent perceived measures of the propensity of corporations from leading nations to "pay bribes to senior public officials."[20] Notwithstanding lack of anti-bribery history, many nations ranked and scored higher than the U.S. in this aspect.[21] Since bribery is a specific form of corruption, the BPI and the Corruption Perception Index (CPI) are highly correlated with a correlation coefficient of 0.8 (based on the BPI and the CPI for the 21 nations in 2002). However, one would expect that the U.S. would score better with respect to bribery of foreign officials. On the contrary, the U.S. BPI in 2002 was below all the countries that had ranked better in the CPI, except Hong Kong. Furthermore, the U.S. ranked below Belgium, Germany, Spain, and France, all of which ranked below the U.S. in the CPI. Thus, it does not appear that the criminalization of bribery of foreign officials contributed much to reducing bribery of foreign officials by American companies relative to other forms of corruption. Nevertheless, it is possible that the perception about the U.S. companies has improved dramatically since the passage of the FCPA. Unfortunately, since the BPI is available only for 1999 and 2002, it is not possible to produce a definitive answer. However, I speculate that the answer is negative based on the CPI, which is available for a longer time series. (See Appendix B.) Prior to 1995, the CPI was compiled for two periods covering five years each (1980-85 and 1988-92) and from then on compiled annually. In the first 5-year period, the U.S scored 8.41 and ranked number one along with the Netherlands, New Zealand, Norway, and Sweden among the 54 countries surveyed. Over the next 20 years, every one of the four U.S. peers improved their scores. The U.S. score, however,

---

[20] The 15 nations surveyed are: Argentina, Brazil, Colombia, Hungary, India, Indonesia, Mexico, Morocco, Nigeria, the Philippines, Poland, Russia, South Africa, South Korea and Thailand. A total of 835 interviews were carried out, principally with senior executives of domestic and foreign companies and with executives at chartered accountancies, binational chambers of commerce, national and foreign commercial banks and commercial law firms.

[21] All but Sovenia has ratified the Convention and twenty-nine countries have implemented legislation according to the Convention, which went into effect, by the end of 2002.

dropped significantly in the second 5-year period (from 8.41 to 7.76) and stayed about the same throughout the 1990s. The U.S. is one of the eight countries among the 30 OECD nations with significant deterioration in the last 22-year period, while the majority of the OECD countries made a substantial stride. Thus, both the absolute and relative standing of the U.S. appear to have dropped significantly over the last 22-year period. It is unlikely that the BPI would have improved with such a background.

Clearly, the intention of the FCPA is to make it explicit that bribery is a criminal activity, thereby removing any ambiguity in interpreting what might have been viewed as a business strategy, and to require a better tool for top management. Given the size of the stakes involved, however, it is not surprising that the U.S. record is less than stellar during the time when U.S. corporations had to play the game with different set of rules. This is not to say that the U.S. has not been vigilant in enforcing the FCPA. Furthermore, the fact that only a small number of enforcement cases exist does not necessarily imply negligence on the part of law enforcement. It might have provided effective deterrence in equilibrium. I now turn to a brief discussion of how the FCPA has been enforced by the regulatory bodies, followed by several case studies and statistical analysis of the companies that have been the subject of government enforcement actions. These cases show that the large bribery cases that become targets of the investigations by the SEC and/or the DOJ often involve top management. In addition, they tend to be large firms operating in either very concentrated industry or very competitive industries with large number of firms. On average, these firms were not as profitable as their competitors and some were facing falling sales growth.

4.4 Enforcement of the FCPA

Enforcement responsibilities for the FCPA are divided between the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC). The DOJ is responsible for all criminal enforcement of the FCPA provisions and for civil enforcement of the anti-bribery violations (Section 30A of the Securities Act of 1934) with respect to domestic concerns and foreign companies and nationals. The SEC is responsible for civil enforcement of both the anti-bribery and accounting provisions with respect to the issuers of securities. Generally speaking, the SEC enforces the record-keeping ("books and records") violations (Section 13(b)(2)(A)

of the Securities and Exchange Act) and internal control violations (Section 13(b)(2)(B)), and has authority to obtain civil injunctions against future violations of the FCPA by issuers.

A brief perusal of the history of enforcement reveals that the number of cases that have been brought by the DOJ and/or the SEC is small. Appendix C provides a brief description of the cases ("violation" of the FCPA or "conspiracy to violate" the FCPA) prosecuted or investigated by the DOJ (Tables 1 and 2) and the SEC (Table 3) over the last 25 years.[22] Tables 4 and 5 provide a sample of DOJ and SEC cases prior to the 1977 Act.[23] "Payments" indicate the amount of alleged "bribes," while "$ value of business" indicates the value of business (for example, contracts) the company tried to obtain or retain. Charges are against the enterprise ("legal person") and/or the people involved ("natural persons"). "Sanction" briefly categorizes the outcome of each enforcement action. There are 27 criminal cases by DOJ, 4 civil actions by DOJ, and 14 enforcement actions by the SEC, although a few cases overlap. In addition, Table 4 lists the DOJ criminal cases and the SEC enforcement actions against companies that violated before the 1977 Act. Companies of various types and their high-level officers were charged for violations. The alleged illegal payments have ranged from $16,000 (U.S. v. Herbert Tannebaum, 1998) to 272 million (SEC v. Montedison, S.P.A, 1996), ranging from less than one % (U.S. v. Lockheed) to 40% (U.S. v. Cantor; SEC v. ABNH) of the business obtained. Some the foreign officials involved in these cases are politicians. The following table summarizes the value of bribe payments, the value of business obtained (or retained), the payments as a percentage of the values, the fines imposed, and the fines as a percentage of the business. Since the data are incomplete (and the values are in nominal dollars over the period of 25 years), these figures are, at best, suggestive.[24] Nevertheless, they indicate that the value of business at stake is often quite large (for example, the median value is $10 million). With the mean (median) payment of 8.07% (4.99%) of the business, modest fines (the median of $75,000), and the probability of prosecution of (perhaps significantly) less than one, the net expected benefit of bribery could be quite high.

---

[22] Compiled from Newcomb (2002), OECD (2002), and various SEC publications.

[23] These cases often involve "questionable payments" both to domestic and foreign concerns (including political parties, officials and private persons).

[24] Since the data are incomplete in that I don't have the three values for all of the cases, the descriptive statistics are for the data available. Note the number of observations.

	Payments	Value of Business	Payment %	Fine	Fine/Value
Mean	$9,484,482	$321,604,804	8.07%	$1,032,102	3.47%
Median	$600,000	$10,000,000	4.99%	$75,000	0.03%
Max	$272,000,000	$5,500,000,000	40.00%	$21,800,000	27.59%
Min	$16,000	$163,000	0.76%	$0	0.00%
Std Dev	$36,643,122	$1,092,961,606	8.98%	$3,913,323	7.67%
Number of Cases	59	25	24	31	25

Major companies including General Electric (1984), Goodyear (1989), IBM (2000) and Lockheed Corporation (1994) and their high-level officers have been the subjects of criminal and civil FCPA cases. The alleged activities took place in predominantly, but not restricted to, developing countries. Most of the cases involve the sale (exporting) rather than the purchase (importing) of goods and services. All DOJ's criminal cases except two involved either obtaining or retaining contracts.[25] For example, Crawford Enterprises International, Ruston Gas Turbines, and International Harvester in 1982 received altogether several hundred million dollar contracts from Pemex, a Mexican national-owned oil company, by making bribe payments that amounted to 4.5% or 5% of the contracts. A number of individuals including the CEOs pleaded guilty and were fined. In 1989, Goodyear International was fined $250,000 after being charged for making almost $1 million of bribe payments to win a contract valuing $10 million to sell tires to the Iraqi Trading Company. No individual was charged in this case. In 1998, Herbert Tannenbaum, president of the Tannenbaum Management Corporation pleaded guilty for having offered to pay a bribe to an undercover agent of the FBI, who was posing as a procurement officer of the Government of Argentina, to induce the agent to purchase a garbage incinerator manufactured by his company. He was fined $15,000 and sentenced to a one-year prison term.

Most of these cases have resulted in rather moderate fines for both corporations and individuals, and probation or confinement instead of imprisonment. Between 1977 and 2001, over 60 companies and individuals were convicted for criminal violations of the FCPA. Corporate fines have ranged from $1,000 to $21.8 million,

[25] One exception is a case of a Florida company that was engaged in the business of recovering seized aircrafts. They tried to secure the release of confiscated airplanes used in drug trafficking by bribing Dominican Republic officials. Another exception is David Kay 120
vice president of American Rice) who was charged for falsifying shipping documents.

although the median fine was only $75,000.[26] Fines imposed on individuals have ranged from $50 to $ 309,000 (the latter figure applies to Crawford, the president of Crawford Enterprise International) with a median fine of about $10,000. Until 1994, no director, officer or employee of a company had gone to jail for an FCPA violation. However, in 1994, a Lockheed executive and a General Electric international sales manager were sentenced to, respectively, 18 and 84 months of imprisonment. In 1998, two presidents of companies were sentenced to jail for four months (U.S. v. David H. Mead and U.S. v, Frerik Pluimers*)* and for one year (U.S. v. Herbert Tannenbaum*)*.

There are 14 SEC enforcement cases in the 25-year period, with the first five cases in the first five years after the passage of the FCPA and the last seven in the last 5 years. Some of the cases brought by the SEC deal only with the accounting provisions of the FCPA, while others also deal with the anti-bribery provisions. The SEC also investigated companies for accounting violations using the FCPA even though there were no payments to foreign officials (for example, SEC v. Aminex Resources Corp., 1978; SEC v. World-Wide Coin Investments, 1983). A majority of the cases involve contracts to sell products such as aircraft (for example, SEC v. Page Airways) or to explore and develop oil and gas (for example, SEC v. Katy, Industries; SEC v. Tesoro Petroleum Corp.; SEC v. Ashland Oil). Since there are not enough cases to carry out a systematic statistical analysis, I provide below a brief description of the more recent SEC enforcement cases to highlight some salient features of bribery and the difficulty multinationals face in controlling geographically decentralized operations.

4.4.1 Case Studies: The control over Subsidiaries

Triton Energy (1997): The SEC alleged that during the years 1989 and 1990, two senior officers of Triton Indonesia, a subsidiary of Triton Energy, authorized numerous improper payments of approximately $450,000 to the subsidiary's business agent, who in turn made payments to government employees "for the purpose of influencing their decisions affecting the business of Triton Indonesia" (to obtain lower tax assessments on Triton Indonesia's oil and gas operations). Although Triton Energy did not authorize or direct

[26] Allegedly, Lockheed paid $1 million to win a contract valued $79 million. Lockheed paid a $21.8 million fine, which was based on the calculation imposed by the Sentencing Guidelines of twice the gain to Lockheed, and a $3 million civil settlement. A vice president was fined $125,000 and was sentenced to an 18-months prison term.

these improper payments, when Triton Energy's internal auditor notified its management of the violations in a memorandum, Triton Energy's president ordered the destruction of all copies of the memorandum. Triton was found to have violated both the anti-bribery (Section 30A) and the accounting provisions (Sections 13(b)) and ultimately agreed to pay a $300,000 penalty. The two senior officers were fined $35,000 and $50,000 each and consented to the entry of an injunction that permanently enjoins them from future violations.

IBM (2000): IBM had a $250 million contract to integrate and modernize the computer system of a commercial bank owned by the Argentine government. IBM-Argentina allegedly entered into a subcontract with an Argentine corporation for $22 million, which funneled approximately $4.5 million of these funds to several directors of the government owned commercial bank, Banco de La Naction Argentina. IBM recorded the expenses as third-party subcontractor expenses. IBM-Argentina's former senior management overrode IBM's procurement and contracting procedures and hid the details from financial personnel by providing the procurement department with fabricated documentation and stating inaccurate and incomplete reasons for hiring the Argentine corporation. The SEC alleged that even though IBM did not falsify or destroy its record, IBM violated Section 13(b)(2)(A) of the Securities Act of 1934 in consolidating the subsidiary's financial results. In the end, IBM consented to pay a civil fine of $300,000.

Chiquita Brands International (2001): Chiquita Brands International, Inc. (Chiquita) has a wholly owned subsidiary in Colombia that trades bananas and operates a port facility. A senior officer of the subsidiary authorized payments to Colombian customs officials to renew port facility license. The payments were incorrectly identified in the books and records of the subsidiary. Chiquita's internal audit staff discovered the payments during an audit review, and after conducting an internal review, Chiquita took corrective action, including terminating the responsible employees and reinforcing internal controls in its Colombian operations. The SEC brought cease and desist order against Chiquita for violating the FCPA books and records (13(b)(2)(A)) and internal accounting controls provisions (13(b)(2)(B)). Chiquita agreed to pay a $100,000 civil penalty.

BellSouth (2002): The SEC found BellSouth to be in violation of the FCPA for authorizing payments to local officials through their subsidiaries in Venezuela and Nicaragua. Senior management at the Venezuelan

subsidiary authorized payments totaling approximately $10.8 million to six offshore companies, which were recorded with fictitious invoices for services that were in fact not rendered. BellSouth was not able to reconstruct the circumstances or the purpose of the payments, or the identity of their ultimate recipients. In another incidence, a Nicaraguan subsidiary of BellSouth retained a lobbyist. She was the wife of a Nicaraguan legislator, who presided over a hearing that allowed BellSoudh to increase its ownership interest in its Nicaraguan subsidiary. The payments to the lobbyist were recorded as "consulting services." The SEC found that BellSouth "failed to devise and maintain a system of internal accounting controls" that is "sufficient to detect and prevent FCPA violations." The SEC ordered that BellSouth cease and desist from committing or causing any violation, and any future violation, of Section 13(b)(2) of the Exchange Act.

4.4.2 Case Study: A Foreign Company with ADR in the U.S.

Montedison (2001): The SEC complained that Montedison, an Italian company, disguised approximately $270 million in payments to bribe politicians in Italy to secure political backing. Montedison allegedly misstated its financial condition and results of operations on its books and records and in its reports 20-F filed with the SEC and disseminated to the investing public from at least 1988 through the first half of 1993. The alleged conduct was disclosed after new management was appointed. The company agreed to pay a civil penalty of $300,000 for violating the antifraud, financial reporting, and books and records provisions. Until late 2000, Montedison had their American Depositary Receipts listed on the New York Stock Exchange.

4.4.3 Case Studies: Bribes to Reduce Taxes

Baker Hughes (2001): The CFO and the controller of Baker Hughes authorized several illegal payments to government officials in Indonesia, India, and Brazil and as a result, the SEC filed an injunctive action against both the CFO and the controller. In addition, the SEC and DOJ filed a joint civil action against KPMG-Siddharta Siddharta & Harsono, Indonesia, and one of its partners who acted as an intermediary for the payment of $75,000 to a tax official in Indonesia. The tax official, in turn, reduced a tax assessment from $3.2 million to $270,000 for an Indonesian company owned by Baker Hughes. The action was the first joint civil injunctive action by the DOJ and the SEC.

American Rice (2003): A new board of directors took charge of American Rice after bankruptcy filing and voluntarily disclosed to the SEC the details of improper conduct committed by the former management. The board also took disciplinary action against a vice president and the others involved in the scheme. In addition, American Rice substantially enhanced its FCPA compliance program, improved internal auditing practices, and procedures for corrective action and discipline. Separately, the DOJ brought a criminal charge (U.S. v. David Kay) against the vice president in 2001, which instructed employees, among other things, to destroy e-mails discussing the illegal transactions.

American rice had a large market share in Haiti in the mid-90s. By shipping bulk rice, instead of bagged rice, the company paid a lower import tax rate and operated more efficiently than its competitors. However, competition from rice smugglers, who paid no import taxes, corruption among customs officials, who allegedly cut illicit deals with other competitors, and escalating import taxes steadily eroded American Rice's competitive advantage. Numerous bribery payments were made to Haitian customs officials to reduce import taxes. The bribery payments amounted over $500,000, which resulted in the reduction of import tax of over one million dollars.

American Rice was found to be in violation of Sections 13(b)(2)(A) and (B) of the Exchange Act for (1) inaccurately recording bribery payments as routine business expenditures in its consolidated books and failing to devise and maintain an adequate system of internal accounting controls to detect and prevent improper payments. The SEC ordered the company to cease and desist from committing future violations.

4.4.4 Case Studies: The Involvement at the Top

What emerges from these cases, albeit small in sample size, is that bribery payments of large scale are usually sanctioned by top management. Lower-level employees do not have large amounts of funds at their discretion. Furthermore, if the amount involved is “material,” it is difficult to escape internal or external audit processes without the involvement of top-level management. The following two cases illustrate such direct involvement of top management.

Syncor (2002): In December 2002, the SEC filed two settled enforcement proceedings against Syncor International Corporation, a radiopharmaceutical company. Without admitting or denying the Commission’s

charges, Syncor agreed to pay a $500,000 civil penalty. From the mid-1980s through September 2002, Syncor's foreign subsidiaries in Taiwan, Mexico, Belgium, Luxembourg, and France made a total of at least $600,000 in illicit payments (mostly in Taiwan) to doctors employed by hospitals controlled by foreign authorities. These payments were used to influence the doctors' decisions about whether Syncor could obtain or retain business with them and the hospitals that employed them. Moreover, the payments were made with the knowledge and approval of senior officers of the Syncor subsidiaries, and in some cases with the knowledge and approval of Syncor's founder and chairman of the board. Syncor violated the anti-bribery provisions of the FCPA (Section 30A) and the accounting provisions (Section 13(b)(2)). In a related proceeding, the DOJ filed criminal charges against Syncor Taiwan, Inc., which pleaded guilty and agreed to pay a $2 million fine (the maximum criminal fine for a corporation under the FCPA).

American Bank Note Holographics (2001): The SEC filed a lawsuit against Joshua C. Cantor, who was the president and director of American Bank Note Holographics, Inc (ABNH) for participating in a fraudulent scheme involving an IPO as well as violating Section 30A of the Exchange Act. Among other things, he inflated the revenues and net income of ABNH and its publicly-held parent, American Banknote Corporation (ABN), in order to meet earnings forecasts and to condition the market for an initial public offering of stock by ABNH, which took place in August 1998. The conduct took place over three years, beginning with fiscal year 1996, and continuing through fiscal year 1998. To avoid detection of the scheme, Cantor participated in actively deceiving ABN's and ABNH's independent auditors. In addition Cantor caused ABNH to make a $239,000 payment (which amounted to be 40% of the contract value) to a Swiss bank account of Saudi Arabian officials in order to assist ABNH in obtaining a contract to produce holograms for the Saudi Arabian government.

The cases above illustrate (1) the difficulty a parent company faces in exercising control over its subsidiaries abroad; (2) how the accounting provisions of the FCPA make the parent responsible for the actions of its subsidiaries; (3) the value of business at stake (for example, possibly obtainable via bribes) is substantial; (4) foreign government officials have significant bargaining power, specifically monopsony power; and (5) large-scale bribery cases involve top management. They also

illustrate that the expected cost of engaging in bribery appears to be relatively low while the expected benefits are large. The actual penalties imposed on the firms and/or individuals had been modest both in terms of monetary value and imprisonment. Although it is difficult to estimate the probability of detection, investigation, or prosecution, the actual incidence has been low. The FCPA certainly deters bribery at the margin, but the overall effect appears to be modest.

4.5 Characteristics of FCPA Firms

Since the number of FCPA enforcement actions is relatively small, it is difficult to conduct a conclusive statistical analysis to characterize the type of firms that commit bribery. In addition, the firms that have been charged by government agencies may not be representative of violators, but rather the type of firms the government agencies like to prosecute. Nevertheless, a statistical analysis provides some insight into the types of firms that are prone to bribery. Although there are over 60 firms that have been the subjects of enforcement actions ("enforcement firms") by the SEC or DOJ in the last 25 years, in this analysis, I only include firms that have financial data available in COMPUSTAT.[27] Table 6 presents the description of the FCPA enforcement firms: the year of enforcement, the name, the SIC code of the 4-digit industry each firm belongs to, and the description of the industries of the firms in my sample. All firms are from industries in agricultural, mining, extractive, manufacturing, and services. So far, no firm from retail trade or FIRE (finance, insurance, and real estate) has been charged. Columns 5 to 15 present various statistics that attempt to characterize the standing of the firm in the industry and the degree of market concentration of the industry.

Columns 5 and 6 present the ranking of the firm in its industry in the year of enforcement with respect to its total assets (TA) and sales. Column 7 indicates the total number of firms in the industry. Since there is a large number of industries at the 4-digit SIC code level, some of the industries have only a few firms in the COMPUSTAT database (for example, SIC 3011, 3760 in year 1994, 4412, and 4822). The average number of firms in the industries of the enforcement firms is 37. This is much larger than the average for all the industries in the entire time period, which is 20.

---

[27] Four of the firms do not have data available for the year of enforcement.

Most of the enforcement firms are some of the largest firms in their respective industry. Comparison of TA ranking and sales ranking shows that the majority of the firms (23) have the same ranking, while 4 firms have higher ranks in sales than in TA. However, 11 firms higher ranks in TA than in sales, indicating that these firms are likely to be performing poorly and struggling to maintain or increase sales. The last eight columns of Table 6 present various measures of competitiveness or market concentration of the industry in the enforcement year. Again, these measures are calculated at the 4-digit SIC level. The Herfindahl-Hirschman Index (HHI) for the industry in question and the median of the HHI for all 4-digit industries in the year of enforcement are calculated using either TA or sales. The HHI varies from 667 (670) to 9,267 (9,347) for TA (sales). Although some of the enforcement firms belong to extremely concentrated industries (for example, Lockheed and Sea Land), many firms belong to the industries with much lower HHI. To understand the nature of the distribution of my sample, I first summarize the economy-wide distribution by examining all the 4-digit level industries from 1975 to 2002 to calculate the mean, median, maximum, minimum, and standard deviation of the HHIs. These measures are presented at the bottom of Appendix D in the column with the heading "Med. HHI." The following observations lead me to conclude that the enforcement firms come from industries that are less concentrated and more competitive than average.

- The mean (median) HHI is lower for the industries of the enforcement firms than economy-wide. For example, the mean (median) of HHI for TA for my sample is 3,210 (2,510), while that for economy wide is 3,950 (3,249).
- Of the 43 industries, 30 (70%) have lower HHI than the median HHI (for all the industries in the enforcement year).
- Total of 26 (60%) firms come from industries with HHI larger than 1,800, which is often used as the cutoff point by the DOJ to determine whether an industry is "concentrated." However, this percentage is significantly lower than the economy-wide percentage, which is 80%.
- The cumulative distribution of HHI for the enforcement firms is well above that for the entire economy for years 1975 to 2002.

The last four columns of the table provide the percentage of industry total assets (TA) (or sales, IEI (income before extraordinary items), and net income) that are attributed to the largest four firms (concentration ratio of top four firms or "CR4") in the year of enforcement. Consistent with HHI, some of these industries have extremely high CR4s. These are highly concentrated industries with a few players where stakes are high. Others

have lower CR4s. These are industries with large numbers of firms competing against each other, although the dominant 4 firms appear to command large market shares.

With a few exceptions, the enforcement firms come from industries with a large number of players. The enforcement firms tend to be among the largest; and the level of competition is expected to be highest among these largest firms. The average CR4 of TA (sales) is 75.9% (77.63%). Since we are aggregating across industries and over time, it is difficult to find a benchmark of comparison, but my calculation of the same statistic for all industries in 1995 (arbitrarily chosen) is 82.7%. Thus, being among the largest does not command as much market power as on average. For example, computer programming (SIC, 7370) has a large number of firms with CR4 of TA of 61% (75% for sales). But, the largest four firms appear to be among the worst performers in the industry.

Next, in order to provide a benchmark to examine the performance level of the enforcement firms, I select a control firm, for each of the FCPA firms, from the same 4-digit industry (matched by the size of total assets). There are 32 matching pairs.[28] The mean of total assets for the two groups appears to be quite different, although the difference is not statistically significant (t-statistic of 1.59). The large difference is due to the fact that several enforcement firms are the largest in their industries. In such a case the second largest firm is chosen as a control firm, but it can be much smaller than the largest. I then compare the performance of matched pairs in terms of profitability during the 10 years prior to the year of enforcement.[29]

Matched Sample

	FCPA Firms (N=32)		Control Firms (N=32)		(in $million)
	Mean	Median	Mean	Median	t-stat
Total Assets	7,136.22	1,739.41	3,218.58	1,204.25	1.59
Sales	6,801.19	2,822.95	3,001.52	907.33	1.81
Income bef Extraord Items	319.95	86.40	173.19	35.42	1.61
Net Income	306.70	85.00	175.15	48.09	1.45
ROA – IEI	3.57%	4.86%	5.53%	5.61%	2.49**
ROA – NI	3.59%	4.71%	5.72%	5.72%	2.75**
Sales/ TA	12.76%	11.84%	13.32%	13.32%	0.57

** Significant at 1%

[28] Eleven firms did not have sufficient data in COMPUSTAT.
[29] I also calculated profitability using the data from prior 5 years. The results are qualitatively the same.

Comparison shows that the FCPA firms have been, on average, less profitable compared with the control firms.[30] The difference in mean ROA–IEI and ROA-NI are statistically significant at 1%. In a pair-wise comparison, twenty out of 32 enforcement firms have lower levels of ROI-IEI and ROI-NI, compared with their control firms. The level of sales-intensity (Sales/TA) does not appear to be (statistically) different. However, some of the firms were clearly losing sales. The sales intensity had been steadily falling (untabulated) in the case of Beatrice, Baker-Hughes, Environmental Tectonics, McDonnell, Lockheed, General Electric, and Allied Products in the several years prior to the enforcement year.

Overall, the enforcement firms appear to have been under tremendous competitive pressure, due to the competitive structure of their industries as well as their own faltering performance. In addition, by nature of business, they were competing with non-American firms in a non-level playing field. The foreign firms were not subject to anti-bribery laws (until recently) and moreover, many of them enjoyed tax deductibility of bribery payments. It is easy to surmise that the competitive pressure was too strong for some American firms to comply with the FCPA regulation.

What is the likelihood, then, of the OECD Convention of achieving its purpose? The Convention also uses the same two-pronged approach, but a critical difference is the multilateral nature of the treaty. If enforced, the Convention creates a uniform approach to bribery among the signatory nations and furthermore creates a "level playing field" between U.S. and non-U.S. corporations. The OECD is often referred to as the "club of rich nations," comprised of industrialized countries that account for the majority of world trade. Once the Convention is signed and ratified by each country, it is in the interest of the club to enforce anti-bribery, since the reduction or elimination of bribery reduces the costs of doing business for everybody in the club. It is a form of cartel agreement to reduce the monopsony power (vested in the hands of its officials) of foreign governments. Of course, cartels are inherently unstable. Each member has an incentive to deviate unilaterally from the agreement to gain "unfair" advantages. Collective enforcement, however, is mutually advantageous and since the incentives are aligned better among these nations, there will be a strong interest on the part of the

[30] Similar results obtain when I examine 5-year period prior to the enforcement year.

governments in the club to promote mutual monitoring. This would in turn induce a higher likelihood of multinationals to comply with the Convention than U.S. multinationals with the FCPA. In fact, mutual monitoring is part of the Convention: Article 12 requires that the parties to carry out a program of "systematic follow-up to monitor and promote the full implementation" of the Convention. Therefore, there are reasons to be more optimistic about the future of the OECD Convention compared to that of the FCPA when the U.S. was alone in its endeavor. The incentives are better aligned, and an effective accounting tool of record keeping and internal control has been put into place. Yet, as many enforcement cases demonstrate, large bribery cases often involve top management. When top management is involved, internal control alone is not sufficient, since the top management can circumvent the internal control system. I now turn to an examination of internal control.

5 Internal Control

It is clear that the internal control requirement is a powerful policy tool for the SEC to regulate the conduct of securities issuers.[31] The company is held legally responsible for internal control. And internal control, in turn, is used as a tool to resolve its agency problems.

5.1 Who is Responsible for Internal Control?

SAS No.55 (AU 319.06), later amended by SAS No.78 and SAS No.94, defines internal control as "a structure that consists of the policies and procedures" established to provide "reasonable assurance that specific entity objectives will be achieved." Since such a structure could be costly to implement, ultimately "management makes both quantitative and qualitative estimates and judgments in evaluating the cost-benefit relationship" (AU 319.14). Both SAS No.55 and No.82 make it clear that internal control is the management responsibility, although SAS No.82 further requires external auditors to make an assessment of the internal control.[32] More specifically, external auditors assess the risk of fraud on every audit by considering both the

[31] Non-issuing firms, however, are not subject to such a requirement. That suggests that private or smaller companies might not have adequate control against bribery payments. However, any entity above some minimum size needs good record keeping and internal control.
[32] SAS No.82 (1997): Consideration of Fraud in a Financial Statement Audit.

internal control system and management's attitude toward controls.[33] The COSO Report, in contrast, defines the responsibility in a broader manner by defining internal control as "a process, effected by an entity's board of directors, management and other personnel" and states that "everyone in an organization has responsibility for internal control," including the management; the board of directors (especially the audit committee), the internal auditors, and other personnel (that is, "virtually all employees"). At the same time, the report implies that internal controls are put in place as a management tool so that management can "better control the enterprises they run" and to provide reasonable assurance (to the management and the board of directors) "regarding the achievement of objectives in the following categories: effectiveness and efficiency of operations; reliability of financial reporting; compliance with applicable laws and regulation."

Even though the COSO Report holds "everyone" responsible for internal control, the general view in the accounting profession is that it is ultimately the responsibility of top management. A standard textbook on managerial accounting (Maher, Stickney & Weil, 1997, p. 487) defines internal controls as "policies and procedures designed to provide top management with reasonable assurances that actions undertaken by employees will meet the organizational goals." Carmichael et al. (1996, p.182), a textbook in auditing, states, "management's attitude toward control sets the stage for the attitudes and actions of the entire company." However, they point out that internal control is not designed to detect all "errors or irregularities, since "absolute prevention or complete detection" would be" too costly and is probably a practical impossibility." Recently, Section 404 of the Sarbanes-Oxley Act charges the SEC to "prescribe" rules requiring each annual report to contain an internal control report, which shall

> (1) state the responsibility of management for establishing and maintaining an adequate internal control structure and procedures for financial reporting; and
> (2) contain an assessment, as of the end of the issuer's fiscal year, of the effectiveness of the internal control structure and procedures of the issuer for financial reporting.

[33] In 1979, the SEC proposed to require in annual reports a statement by management that the internal controls provided reasonable assurance. The proposal was later recanted in "Statement on Management and Internal Accounting Control: Withdrawal of Proposed Rules" in 1989. Briloff (1999) interprets this as the reluctance of the SEC and Congress to take aggressive measures on what they see as the domain of the private sector.

Internal control is expected to provide reasonable, rather than absolute, assurance. If it is practically impossible for management to uncover all errors and irregularities, one would expect that it is impossible for external auditors to discover them *especially if* management is involved. Management is in a position, if they wish, to ensure that internal controls fail. For example, in examining a theoretical model of an auditor's decision to investigate fraud, Caplan (1999) assumes that management is able to choose the quality of internal control when it has incentives to misreport. He states (p. 101), "[c]onsistent with the practitioner literature, I assume that managers can commit fraud by overriding internal controls." Audits conducted in accordance with generally accepted auditing standards (GAAS) cannot "always distinguish between errors and fraud."

We do not routinely hear about the cases where auditors successfully discover frauds or errors, except when the discrepancies are large enough to cause the firm to issue restatements. It is more likely for us to hear about large audit failures, most of which are caused by auditors' inability to detect management fraud. If management is intent on defrauding the other stakeholders, they have the best means to do so.

5.2 Management Frauds

Although better internal controls would prevent or discourage fraudulent conduct on the part of employees, it is more difficult to prevent such conduct by the top level of management. Eisenberg (1997) provides several examples of infamous fraud cases by management: Archer Daniels Midland, Sumitomo, Prudential, Citibank, and Bankers Trust. In the cases of both Prudential and Bankers Trust, complaints from the internal auditors were ignored by top management. A study commissioned by the COSO (based on a sample of approximately 200 alleged financial statement fraud cases during 11-year period from January 1987 to December 1997) found that in 83 percent of cases, either the chief executive officer or the chief financial officer or both were associated with the fraud (Morrissey, 2000). More recently, the SEC (2003b) conducted a study, required by Section 704 of the Sarbanes-Oxley Act, to review their enforcement actions over the 5-year period, August 1997 through July 2002, to identify areas of financial-reporting fraud committed by issuers. During this 5-year period, the SEC filed 515 enforcement actions, resulting in 227 "enforcement matters" that involved 164 entities and 705 individuals. The SEC charged 511 individuals and 82 entities with fraud in connection with reporting violations.

Of the 227 enforcement matters studied, 126 involved improper revenue recognition and 101 involved improper recognition of expenses.[34] More than half of the enforcement matters involved books and record and/or internal control violations.[35] The practice of "improper accounting for foreign payments," on the other hand, was found in only six enforcement matters. Although relatively infrequent, it would be fair to say that the practice to conceal bribe payments is yet another tool of financial-fraud schemes used by management. Unlike the cases of defrauding their own shareholders through fraudulent accounting schemes, however, top management might justify improper foreign payments as necessary expenses ostensively made on behalf of shareholders.

The SEC Study (2003b) revealed that the majority of the individuals held responsible for the violations were from the ranks of senior management, including 75 chairmen of the board, 111 CEOs, and 105 CFOs. In addition, charges were brought against 18 auditing firms and 89 individual auditors of different sizes, which suggests that these officers had the ability to circumvent internal and, in some cases, external control systems. It is difficult to say if these numbers should be viewed as small or large. One can only conclude that the larger fraud cases tend to require involvement at the top. As Eisenberg points out, internal controls are not the right means to limit managerial opportunism, especially if ultimate responsibility for internal control is "vested" in the management. Thus, the ultimate responsibility for internal control would have to be vested in a higher level of the corporate hierarchy. This brings us to the topic of corporate governance.

6 Corporate Governance and Accountability

The securities acts were passed in the Unites States almost 70 years ago. After the stock market crash and growing antagonistic sentiments towards big businesses, it was necessary to restore public confidence in the efficacy of competitive capital markets. Underlying these actions is an ideology, according to Merino and Neimark (1982), that a "corporate governance model" should be based on "the image of the stockholder" as

---

[34] Since many enforcement matters involve more than one improper accounting practice, the total of various practices is 380 for the 227 enforcement matters.

[35] The Study concluded that 135 issuers in the 227 enforcement matters filed restatements that were related to conduct investigated in the enforcement matters. Of these restatements, the majority involved either revenue or expense recognition. Of the 126 enforcement matters involving improper
revenue recognition, 94 issuers restated their financial statements.

"owner." The SEC was entrusted with "the task of ensuring public confidence" in the securities markets. Through financial disclosure and the proxy provision, the SEC sought to develop a more effective corporate governance model of "shareholder democracy," consisting of (1) shareholders as owners, and (2) the board of directors as the representatives of shareholders. This model has established the fundamental approach to the equity market in the United States. When there are many shareholders, however, a number of problems arise due to the "separation of ownership from control," an issue that has generated a vast amount of academic literature.

In examining the rise and fall of modern corporations, Jensen (1993) points out that often firms are not able to evolve in an optimal way with the changing economic environment and attributes this inability to a failure of the corporate "internal control" system. He argues that "[s]ubstantial data support the proposition that the internal control system of publicly held corporations have generally failed to cause managers to maximize efficiency and value" and "ineffective governance is a major part of the problem with internal control mechanisms."[36] By "internal control," Jensen implies something very different from the one defined by the accounting profession as well as the FCPA and the OECD Convention. He is addressing the issues that have been recently referred to as "corporate governance." In fact, he defines governance as "the top-level control structure, consisting of the decision rights possessed by the board of directors and the CEO, the procedures for changing them, the size and membership of the board, and the compensation and equity holding of managers and the board" (Jensen, 1993).

In terms of corporate hierarchy in the agency relationship, shareholders represent the first-level, who are then represented by the board of directors. It is then the board that is responsible for achieving the corporate objectives by providing guidance for corporate strategy and monitoring management. Monitoring management, in turn, involves setting their compensation as well as making promotion and termination decisions. The board is effective only if it is sufficiently independent from management and this independence usually requires a

[36] An example of the failure of internal control system, according to Jensen, is IBM, which failed to adjust to the substitution away from its mainframe business following the PC revolution.

sufficient number of outsiders, a sufficient time devoted by the members, and access to accurate, relevant and timely information.[37]

In a survey of corporate governance, Shleifer and Vishny (1997) define the term, corporate governance, as "the ways in which suppliers of finance to corporations assure themselves of getting a return on their investment," including "economic and legal institutions that can be altered through political process – sometimes for better." Furthermore, since these corporations exist in the context of larger social, economic, political, and legal environments, the discussion of good governance cannot be restricted only to what goes on within an organization. Transparency (or the lack of opacity) in the capital markets is a necessary ingredient of good corporate governance.

6.1 OECD Principles of Corporate Governance, OECD, April 1999

It would be misleading to give an impression that the OECD has ended its efforts to combat bribery with the OECD Convention. The OECD has recently developed the "Principles of Corporate Governance" to assist member and non-member governments in their efforts to "evaluate and improve the legal, institutional and regulatory framework for corporate governance" and to "provide guidance and suggestions" for various stakeholders in corporate governance.

Since the principles are non-binding, their purpose is to serve only as "a reference point." They can be used by policy makers to develop their own frameworks for corporate governance in the context of their "own economic, social, legal and cultural circumstances," and "by market participants as they develop their own practices." The principles discuss the rights and fair treatment of various groups of shareholders, the role of various stakeholders, the importance of disclosure and transparency of information, and the responsibility of the board among others. The framework developed should ensure the strategic guidance of the company, the effective monitoring of management by the board, and the board's accountability to the company and the shareholders. In sum, the principles clarify the notion that the board of directors has the ultimate responsibility for governing (not operating on a day-to-day basis) a company.

---

[37] The other important variables are the board culture, legal liability, information requirement, equity holding of directors, size, and the board member composition.

6.2 Auditors

Even though the board is ultimately responsible for corporate governance, what it can do is often limited. Since the board is usually not engaged in its work on a full-time basis, it needs to rely on experts such as the internal auditor and the external auditor for necessary information. Since internal auditors are employees of the company, there could be a built-in conflict in regard to their allegiance because although internal auditors might report to the board (especially the audit committee of the board) directly, one cannot be sure of their independence from the management. This leads to the role of external auditors. If they are to attest to the "fair representation" of the financial condition of the firm, they must be able to form their opinion independent of the board and management.

Although external auditors cannot be perfect detectives, they provide an important service of attestation as an independent party.[38] Whether audit firms are "independent" both in appearance and in fact has been a focus of major debate.[39] It is difficult to argue that interests are perfectly aligned between the external auditor and the owners of the firm when auditors are paid by the management and often provide lucrative consulting services to some firms (again to the management).[40] For the opinions of external auditors to be taken seriously by the financial community, perceived independence does matter.[41] After all, "credibility" is in the minds of beholder (even though it should be based on reality).

The recent corporate scandals involving accounting reveal that some firms with the blessing of their auditors have engaged in creative accounting, stretching the interpretations of GAAP as well as taking advantage of the "rules-based" approach to accounting standards.[42] This promotes "check-the-box" mentality – whatever is not in violation of GAAP must therefore be good accounting. However, a rapidly changing business

---

[38] Briloff (2002) claims that "covenance" exists between the accounting profession and society. He states: "It is to assure the effective functioning of capitalism powered by the corporate complex which demands an effective system of corporate governance and accountability – and it is to help drive such a process that the covenance was entered into by society with my profession." In a prepared statement for U.S. Senate Committee on Banking, Housing, and Urban Affairs. – March , 2002.
[39] Briloff would lament that accountants are acting as management's "lapdogs" rather than "watchdogs."
[40] Knutson (1994) notes that until the early part of the twentieth century, the U.S. industrialization was chiefly financed by the imported capital from Britain. The British sent capital as well as their own accountants. Thus, the duty of these accountants was to their principals, who bore directly the costs of accounting services. "The return on their investment was net of those costs."
[41] Arthur Andersen gave an opinion stating that Enron's internal accounting system "was adequate to provide reasonable assurance as to the reliability of financial statements." The public's opinion as to their independence is highly influenced by the fact that the audit firm received large consulting fees from Enron.
[42] For an excellent analysis of accounting issues involved with Enron, see Benston and Hargraves (2002).

environment makes it difficult for standard setters to develop appropriate rules in a timely fashion. Alles (2002) observes that "the FASB simply cannot operate as quickly and flexibly as profit driven managers and financial engineering consultants."

The Sarbanes-Oxley Act of 2002 establishes the Public Company Accounting Oversight Board (PCAOB) that is charged with, among other things, the establishment of rules for "auditing, quality control, ethics, independence, and other standards relating to the preparation of audit reports for issuers." A violation of rules of the PCAOB will be treated as a violation of the 1934 Act. The PCAOB is also charged with adopting an audit standard requiring the external auditor to evaluate the internal control structure and procedures, and furthermore attest to the internal control report by management. Furthermore, the Act provides for various requirements that enhance auditor independence such as: (1) the prohibition of the provision of non-audit services simultaneously with the audit service; (2) mandatory rotation of the lead auditor; and (3) the empowerment of audit committees. The audit committee of the board of directors is directly responsible for the appointment, compensation, and oversight of the work of external auditors.

6.3 Regulatory and Political Environments: Other Stakeholders

The Financial Accounting Standards Board (FASB) is an independent body entrusted by the SEC with the task of setting accounting standards. To ensure independence, all board members are appointed on a full-time basis and are expected to sever all ties from other organizations. Yet, it is impossible for the Board to operate in a political vacuum. Zeff (2002) provides examples of "numerous attempts by industry and other affected parties" both in the U.S. and abroad to pressure standard setters not to impose "an objectionable requirement." The pressure came from different sources, sometimes directly through business interests, other times indirectly through political legislative bodies.

To illustrate, consider the treatment of stock options. After lengthy deliberations, the FASB decided not to require expensing of stock options (under political pressures). The Board did so despite it's belief that financial statements would be "more relevant and representationally faithful" if stock options are expensed. FAS123 states that the debate was so divisive that both the Board's future working relationship with "some of its constituents" and "the future of accounting standards setting in the private sector" were "threatened."

In an article published in the New York Times (1/23/02), Granof and Zeff note that some members of Congress pressured the FASB and the SEC to back off from setting tougher standards for financial reporting for the oil industry. In another case, Congress opposed the proposed change in the period of amortization of goodwill. The authors claim that by interfering with the standard setting process, a process which attempts to develop accounting standards that are to reflect the changing reality of business practices, "Congress paved the way for the current crisis." "Congressional involvement in financial standard setting has been pure politics, fueled by a system of campaign financing that distorts the pursuit of the nation's legislative agenda." Obviously, firms operate in a complex environment and their behavior is influenced by a complex interplay of various forces, but internal control, corporate governance, and regulatory framework need to reinforce each other to promote less corruption.

7 Concluding Remarks

Although the main focus of this paper has been on the legislative attempts to curb the supply side of corruption, the discussion has led to broader and related issues of corporate governance and regulatory environment. Such a broadening of scope is necessary since bribery behavior is influenced by economic incentives that are shaped by social, economic and political institutions. As a New York Times report on Enron (Stevenson and Gerth, 1/20/02) observes:

> The system of safeguards that was put in place over the years to protect investors and employees from a catastrophic corporate implosion largely failed to detect or address the problems that felled the Enron Corporation, say regulators, investors, business executives and scholars. The breakdown in checks and balances encompassed the company's auditors, lawyers and directors, they say. But it extended to groups monitoring Enron from the outside, like regulators, financial analysts, credit-rating agencies, the media and Congress… In Enron's case, the questions extend to the political influence wielded by the company. But increasingly the focus has turned to the entire framework of legislation, regulation and self-governance in which it operated.

It appears that the crisis had reached such a point that the ideology of corporate capitalism was questioned. Sweeping changes are demanded by the public to restore confidence. Several companies have decided voluntarily to expense stock options. Moreover, a number of systematic attempts are under way to reform the U.S. corporate governance system. At the federal government level, the Sarbanes-Oxley Act of July 2002

includes various new measures that strengthen the oversight of the board of directors and the fiduciary responsibility of CEOs and CFOs. For example, the CEO and the CFO are now required to certify the financial statements filed with the SEC, stating that the statements and disclosures fully comply with provisions of the Securities Exchange Act and fairly present the operational and financial condition of the issuer. The potential penalties for "willful and knowing" violations could be as high as a $5 million and an imprisonment of up to 20 years.

Yet, one can argue that the Act did not go as far as the Cadbury Report (1992) in the U.K., which was also a by-product of financial scandals. The sponsors of the Cadbury Report were concerned with "the perceived low level of confidence both in financial reporting and in the ability of auditors to provide safeguards" to shareholders and "the lack of effective board accountability." The committee's recommendations were summarized as a "Code of Best Practices," which was based on the key notion that the boards of directors are responsible for the governance of their companies. The committee recommended that the directors install and maintain a system of internal controls and that the directors make a statement in the financial reports "on the effectiveness of their system of internal control."

The NYSE and Nasdaq also have new proposals, in the form of listing requirements, designed to promote more transparency and accountability among listed public companies. The former SEC chairman Levitt (2002) says:

> Sometimes it takes a crisis to convince the world that the status quo has to change. If there is a silver lining in the past year's accounting disasters, it's that an issue as mundane as auditor independence which nearly consumed us at the SEC, has finally caught the public imagination.

The FCPA and the OECD Convention will be effective policy tools for combating corruption – specifically bribery of foreign public officials by corporations from the signatory countries of the OECD Convention. Essential to their effectiveness is the fact it is in the interest of all club members collectively to enforce the new rules. Other multilateral treaties sponsored by the OAS and the European Union should help level the playing field for a larger number of countries and promote healthy competition sans bribery. Yet, it is clear that their effectiveness will be diminished if other efforts are neglected. There is still a powerful incentive

for an individual player to deviate from and renege the agreement to gain an unfair advantage. Various institutional arrangements need to complement the Convention: that is, stronger corporate governance and regulatory support. This is the main lesson we should draw from the U.S. experience.

At least three questions remain unresolved with respect to the FCPA and the OECD Convention. First, do these two legislative acts help resolve the corruption problem in the "bribe-supplying" countries? That is, "domestic" corruption in the signatories of the OECD Convention? My analysis in this paper suggests that a more systematic approach at all levels is necessary. Internal control is necessary, but not sufficient.

Second, do these legislative attempts help reduce the problem of corruption in the "bribe-demanding" countries? The aforementioned Bribery Payer Index points out that the propensity to bribe by the domestic companies (in emerging markets) is much higher than that of any of the 21 "exporting" countries. The average domestic BPI is 1.9, significantly below the worst of the exporting country (Russia with 3.2). This suggests that companies from exporting nations are facing difficulty competing with local companies (if there are any) and dealing with the public official that are accustomed to different standards of conduct. Are these countries interested in reducing domestic corruption? The World Bank points out that the cost of corruption is essentially borne by "the poor," who are hardest hit by economic decline and are most reliant on the provision of public services. If the burden of corruption falls more heavily on the poor, one effective way of reducing corruption is to make the rich (those who benefit directly from corruption) feel the pain as well. Since it is more difficult to do honest business in countries where (domestic) corruption is rampant, it is again in the interest of exporting nations to put more direct pressure on the demand-side through coordinated actions by governments and international organizations. Together, the OECD signatory countries account for the majority of world trade and world wealth and therefore can command strong bargaining power.[43] For the bribe-demanding countries, the possibility of a reduction in foreign direct investment poses a serious threat to their economic welfare.

The last question is a natural extension to the first two: do the FCPA and the OECD Convention, in fact, reduce the overall level of corruption in the world? Or are they just the means to level the playing field for

---

[43] These 35 countries account for 69% and 74% of world exports and imports of goods for 2001 (based on the statistics from the World Trade Organization).

the signatory countries of the OECD Convention? The OECD Convention created a cartel or club of wealthy nations for their mutual benefit. Companies from this club of nations will be able to reduce the cost of doing business in effect by transferring wealth from the bribe-demanders to bribe-suppliers. However, there are many countries that are not part of the OECD Convention, including most countries in Asia, the Middle East, South America, and Africa. It would be in the interest of the OECD nations to broaden its membership so that the level-playing field is made even larger. Most of the non-club nations (except for Hong Kong and Singapore) score poorly with respect to the Corruption Perception Index. These countries are at risk of losing their market shares if the member nations substitute their trading activities away from them to less corrupt countries. It would be in the interest of these nations to join the club also. The overall level of corruption would fall significantly if competition without bribery becomes a standard practice in more nations.

References

Agrawal, Anup, Jeffrey Jaffe, and Jonathan Karpoff. 1999, "Management Turnover and Governance Changes Following the Revelation of Fraud," *Journal of Law and Economics*, Vol. XVII, April.

Alesina, Alberto and Beatrice Weder. 1999. "Do Corrupt Governments Receive Less Foreign Aid?" NBER Working Paper 7108, May.

Alles, Michael G. 2002. "A Management Control Perspective on Financial Accounting Standards," Rutgers University, Working paper.

Beck, Paul J., Michael W. Maher, and Adrian E. Tchoegl. 1991. "The Impact of the Foreign Corrupt Practices Act on US Exports," *Managerial and Decision Economics*, v12: 295-303.

Benston, George J. and Al L. Hartgraves. 2002. "Enron: What Happened and What We Can Learn from It," *Journal of Accounting and Public Policy*, 21: 105-127.

Beresford, Dennis R. and James D. Bond. 1978. "The Foreign Corrupt Practices Act - Its Implication to Financial Management," *Financial Executive*, August: 28-32.

Borrus, Amy. 1995. "A World of Greased Palms," *Business Week*, November 6.

Briloff, Abraham J. 1999. "The Private Securities Litigation Reform from a Critical Accountant's Perspective," *Critical Perspectives on Accounting*, v10: 267-282.

Briloff, Abraham J. 2002. "Accountancy and Society: A Covenant Desecrated," Prepared Statement for U.S. Senate Committee on Banking, Housing, and Urban Affairs: March 2.

Cadbury Committee, 1992, " Report on the Committee on the Financial Aspects of Corporate Governance," December, London.

Caplan, Dennis. 1999. "Internal Controls and the Detection of Management Fraud," *Journal of Accounting Research*, v37(1), Spring: 101-117.

Carmichael, Douglas R., John J. Willingham, and Carol A. Schaller. 1996. *Auditing Concepts and Method*, 6th ed. McGraw Hill.

Committee of Sponsoring Organizations of the Treadway Commission. (COSO). 1992. "Internal Control – Integrated Framework," May.

Eisenberg, Melvin A. 1997. "Corporate governance: the Board of Directors and Internal Control," *Cardozo Law Review*, September/November: 237-264.

Griffin, Paul A. 1976. “Disclosure Policy an the Securities Market: The Impact of the 1975-76 Sensitive Payment Disclosures,” Summary of a Research Report Prepared at the Request of the SEC Advisory Committee on Corporate Disclosure, Washington, D.C., November.

Hamra, Wayne. 2000. “Bribery in International Business Transactions and the OECD Conventions: Benefits and Limitations,” *Business Economics*, October: 33-46.

Hines, James R. Jr. 1995. “Forbidden Payment foreign Bribery and American Business After 1977,” NBER Working Paper 5266, September.

Herlihy, Edward D. and Theodore A. Levine. 1976. “Corporate Crisis: The Overseas Payment Problem,” *Law & Policy in International Business*, Vol. 8 (54): 547-629.

Information Systems Audit and Control Foundation. 2000. *Control Objectives for Information and related Technology*, 3rd edition (1st edition in 1996).

Jensen, Michael C. 1993. “The Modern Industrial Revolution, Exit, and the Failure of Internal Control Systems,” *Journal of Finance*, July: 831-880.

Knutson, Peter H. 1994. “`In the Public Interest -Is it Enough?,” *The CPA Journal*, January: 32-34.

Lacey, Kathleen A. and Barbara Crutchfield George. 1998. “Expansion of SEC Authority into Internal Corporate Governance: The Accounting Provisions of the Foreign Corrupt Practices Act,” *Journal of Transnational Law & Policy*, Spring: 119-155.

Levitt, Arthur Jr. 2002. *Take on the Street: What Wall Street and Corporate America Don’t Want You to Know. What You Can Do to Fight Back*, Random House.

Maher, W. Michael, Clyde P. Stickney, and Roman L. Weil. 1997. *Managerial Accounting*, The Dryden Press.

Mathews, Arthur F. 1984. “Current Issues in Corporate Governance: Internal Corporate Investigations.” *Ohio State Law Journal*, summer.

Merino, Barbara Dubis and Marilyn Dale Neimark. 1982. “Disclosure Regulation and Public Policy: A Sociohistorical Reappraisal,” *Journal of Accounting and Public Policy*, v1: 33-57.

Morrissey, John. 2000. “Corporate Responsibility and the Audit Committee,” Speech by SEC Staff, the General Audit Management Conference, New Orleans, March 21.

Moss, Nicholas. 1997. “Who Bribes Wins,” *The European*, December 11: 26-27.

National Commission on Fraudulent Financial Reporting. 1987. *Report of the National Commission on Fraudulent Financial Reporting.*

Newcomb, Danforth, 2002, “Digests of Cases and Review Releases Relating to Bribes to Foreign Officials under the Foreign Corrupt Practices Act of 1977,” New York.

Noonan, John T. 1984. *Bribes*, Macmillan Publishing: New York.

Organization for Economic Co-operation and Development. 1999. *OECD Principles of Corporate Governance*, SG/CG(99)5.

OECD. 2002, "Report on Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions," October .

PricewaterhouseCoopers. 2001. *The Opacity Index*

Rose-Ackerman, Susan. 1999. *Corruption and Government: Causes, Consequences, and Reform*, Cambridge University Press.

Salbu, Steven R. 1997. "Bribery in the Global Market: A Critical Analysis of the Foreign Corrupt Practices Act," *Washington & Lee Law Review*, v54: 229-287.

SEC. 1976. *Report to the Senate Commission on Banking, Housing, and Urban Affairs*, 95th Congress, Second Session, Questionable and Illegal Corporate Payments and Practices.

SEC. 1997, Accounting and Auditing Enforcement Release No. 889, February 27: Administrative Proceedings File No. 3-9262 (Triton Energy), Litigation Release No. 15266: SEC v Triton Energy Corporation, et al., Civil Action No. 1: 97CV00401 (D.D.C).

SEC. 2000 Accounting and Auditing Enforcement Release No. 1444, December 21: Administrative Proceedings File No. 3-10397572 (IBM)

SEC. 2001, Accounting and Auditing Enforcement Release No. 1422, July 18: Administrative Proceedings File No. 3-10532 (American Bank Note Holographics).

SEC. 2001, Accounting and Auditing Enforcement Release No. 1444, September 12: Administrative Proceedings File No. 3-10572 (Baker Hughes).

SEC. 2001, Accounting and Auditing Enforcement Release No. 1463, October 3: Administrative Proceedings File No. 3-10613 (Chiquita Brands International)

SEC. 2002, Accounting and Auditing Enforcement Release No. 149, September 12: Administrative Proceedings File No. 3-10678 (BellSouth).

SEC. 2002, Accounting and Auditing Enforcement Release No. 1463, December 10: Administrative Proceedings File No. 3-10969 (Syncor International)

SEC. 2003a, Accounting and Auditing Enforcement Release No. 1710, January 30: Administrative Proceedings File No. 3-11024 (American Rice).

SEC. 2003b, "Report Pursuant to Section 704 of the Sarbanes-Oxley Act of 2002," January 24.

Shleifer, Andrei and Robert W. Vishny. 1997. "A Survey of Corporate Governance," *Journal of Finance*, June: 737-783.

Stevenson, Richard and Jeff Gerth. 2002. "Enron's Collapse: The System," *New York Times*, January 20: Section 1, page 1.

Tronnes, Robert D. 2000. "Ensuring Uniformity in the Implementation of the 1997 OECE Convention on Combating Bribery of Foreign Public Officials in International Business Transactions," *The Washington International Law Review*, v33: 97-130

United States Department of State "Fighting Global Corruption: Business Risk Management," 2001-2003.

U.S. General Accounting Office. 1981. *Report to the Congress: Impact of Foreign Corrupt Practices Act on U.S. Business.*, v33: 57-76.

Wei, Shang-Jin. 1997. "How Taxing is Corruption on International Investors," NBER Working Paper 6030.

The World Bank. 2000. *Helping Countries Combat Corruption: Progress at the World Bank since 1997*, June.

Zeff, Stephen. 2002. "Commentary: Political Lobbying on Proposed Standards: A Challenge to the IASB*," Accounting Horizons*, V16(1), March: 43-54.

Zeff, Stephen and Michael Granof. 2002. "Unaccountable in Washington," *New York Times*, January 23: Section A, Page 19

Appendix A

World Trade: Summary Statistics

(Million dollars)

			1980	1985	1990	1995	2000	2002	Growth rate* 1980-2002	Growth rate* 1990-2002
Service	Export	World	$364,300	$381,800	$783,200	$1,190,600	$1,475,400	$1,538,400	6.77%	5.79%
		United States	$38,110	$63,493	$132,880	$198,610	$271,010	$267,808	9.27%	6.01%
		US share	10.46%	16.63%	16.97%	16.68%	18.37%	17.41%	2.34%	0.21%
		Developed economies	$280,900	$293,600	$620,400	$874,600	$1,086,000	$1,134,000	6.55%	5.15%
		Dev Econ Share	77.11%	76.90%	79.21%	73.46%	73.61%	73.71%	-0.20%	-0.60%
Service	Import	World	$398,000	$397,600	$814,800	$1,194,300	$1,462,200	$1,522,300	6.29%	5.35%
		United States	$28,890	$57,180	$97,950	$129,310	$202,580	$218,442	9.63%	6.91%
		US share	7.26%	14.38%	12.02%	10.83%	13.85%	14.35%	3.15%	1.49%
		Developed economies	$268,200	$275,800	$618,300	$836,800	$1,027,900	$1,082,300	6.55%	4.78%
		Dev Econ Share	67.39%	69.37%	75.88%	70.07%	70.30%	71.10%	0.24%	-0.54%
Merchandise	Export	World	$2,034,000	$1,954,000	$3,448,000	$5,160,000	$6,431,000	$6,424,000	5.37%	5.32%
		United States	$225,566	$218,815	$393,592	$584,743	$781,125	$693,517	5.24%	4.83%
		US share	11.09%	11.20%	11.42%	11.33%	12.15%	10.80%	-0.12%	-0.46%
		Developed economies	$1,266,717	$1,291,628	$2,495,205	$3,534,593	$4,120,567	$4,089,531	5.47%	4.20%
		Dev Econ Share	62.28%	66.10%	72.37%	68.50%	64.07%	63.66%	0.10%	-1.06%
Merchandise	Import	World	$2,075,000	$2,015,000	$3,551,000	$5,280,000	$6,711,000	$6,685,000	5.46%	5.41%
		United States	$256,984	$352,463	$516,987	$770,852	$1,259,300	$1,202,499	7.27%	7.29%
		US share	12.38%	17.49%	14.56%	14.60%	18.76%	17.99%	1.71%	1.78%
		Developed economies	$1,414,713	$1,391,371	$2,628,207	$3,576,789	$4,579,759	$4,499,092	5.40%	4.58%
		Dev Econ Share	68.18%	69.05%	74.01%	67.74%	68.24%	67.30%	-0.06%	-0.79%
Total**		World	$4,871,300	$4,748,400	$8,597,000	$12,824,900	$16,079,600	$16,169,700	5.60%	5.41%
Total**		US overll ($)	$549,550	$691,951	$1,141,409	$1,683,515	$2,514,015	$2,382,266	6.89%	6.32%
		US overall share	11.28%	14.57%	13.28%	13.13%	15.63%	14.73%	1.22%	0.87%
Total**		Developed economies	$3,230,530	$3,252,399	$6,362,112	$8,822,782	$10,814,226	$10,804,923	5.64%	4.51%
		Dev Econ Share	66.32%	68.49%	74.00%	68.79%	67.25%	66.82%	0.03%	-0.85%

Source: World Trade Organization

* Simple geometric growth rate

** Totals are simple sums of four categories. Since exports are imported, these figures are double counting the goods and services traded.

Appendix B

CPI, BPI, and Opacity Indices of the Signatory Nations of the OECD Convention

	CPI																BPI				Opacity Index
	2002		2001		2000		1997		1996		1995		1988-92		1980-85		2002		1999		
	Score	Rank	Score	Rank	Score	Rank	Score	Rank	Score	Rank	Score	Rank	Score	Rank	Score	Rank	Score	Rank	Score	Rank	
OECD																					
Australia	8.6	11	8.5	11	8.3	13	8.9	8	8.6	10	8.8	7	8.2	11	8.4	1	8.5	1	8.1	2	
Austria	7.8	15	7.8	15	7.7	15	7.6	17	7.6	16	7.1	16	7.1	19	7.4	18	8.2	4	7.8	4	
Belgium	7.1	20	6.6	24	6.1	25	5.3	26	6.8	20	6.9	19	7.4	17	8.3	10	7.8	6	6.8	8	
Canada	9	7	8.9	7	9.2	5	9.1	5	9.0	5	8.9	5	9.0	5	8.4	1	8.1	5	8.1	2	
Czech Republic	3.7	52	3.9	47	4.3	42	5.2	27	5.4	25			5.2	27	5.1	27					70.81
Denmark	9.5	2	9.5	2	9.8	2	9.9	1	9.3	2	9.3	2	8.9	6	8.0	14					
Finland	9.7	1	9.9	1	10.0	1	9.5	2	9.1	4	9.1	4	8.9	6	8.1	12					
France	6.3	25	6.7	23	6.7	21	6.7	20	7.0	19	7.0	18	7.5	15	8.4	1	5.5	12	5.2	13	
Germany	7.3	18	7.4	20	7.6	17	8.2	13	8.3	13	8.1	13	8.1	12	8.1	12	6.3	9	6.2	9	
Greece	4.2	44	4.2	42	4.9	35	5.4	25	5.0	28	4.0	30	5.1	32	4.2	36					57.38
Hungary	4.9	33	5.3	31	5.2	32	5.2	28	4.9	31	4.1	28	5.2	26	1.6	46					50.07
Iceland	9.4	4	9.2	4	9.1	6															
Ireland	6.9	23	7.5	18	7.2	19	8.3	12	8.5	11	8.6	11	7.7	14	8.3	10					
Italy	5.2	31	5.5	29	4.6	39	5.0	30	3.4	34	3.0	33	4.3	34	4.9	31	4.1	17	3.7	16	47.79
Japan	7.1	20	7.1	21	6.4	23	6.6	21	7.1	17	6.7	20	7.3	18	7.8	17	5.3	13	5.1	14	60.19
Korea	4.5	40	4.2	42	4.0	48	4.3	37	5.0	27	4.3	27	3.5	37	3.9	38	3.9	18	3.4	18	
Luxembourg	9	7	8.7	9	8.6	11	8.6	10													
Mexcico	3.6	57	3.7	51	3.3	59	2.7	47	3.3	38	3.2	32	2.2	45	1.9	45					47.64
Netherlands	9	7	8.8	8	8.9	9	9.0	6	8.7	9	8.7	9	9.0	3	8.4	1	7.8	6	7.4	6	
New Zealand	9.5	2	9.4	3	9.4	3	9.2	4	9.4	1	9.6	1	9.3	1	8.4	1					
Norway	8.5	12	8.6	10	9.1	6	8.9	7	8.9	6	8.6	10	8.7	9	8.4	1					
Poland	4	45	4.1	44	4.1	43	5.1	29	5.6	24			5.2	27	3.6	40					63.93
Portugal	6.3	25	6.3	25	6.4	23	7.0	19	6.5	22	5.6	22	5.5	25	4.5	35					
Slovak	3.7	52	3.7	51	3.5	52															
Spain	7.1	20	7	22	7.0	20	5.9	24	4.3	32	4.4	26	5.1	31	6.8	22	5.8	11	5.3	12	
Sweden	9.3	5	9	6	9.4	3	9.4	3	9.1	3	8.9	5	8.7	8	8.0	14	8.4	2	8.3	1	
Switzerland	8.5	12	8.4	12	8.6	11	8.6	11	8.8	8	8.8	8	9.0	4	8.4	1	8.4	2	7.7	5	
Turkey	3.2	64	3.6	54	3.8	50	3.2	38	3.5	33	4.1	29	4.1	35	4.1	37					74.07
United Kingdom	8.7	10	8.3	13	8.7	10	8.2	14	8.4	12	8.6	11	8.3	10	8.0	14	6.9	8	7.2	7	38.03
United States	7.7	16	7.6	16	7.8	14	7.6	16	7.7	15	7.8	15	7.8	13	8.4	1	5.3	13	6.2	9	35.53
AVERAGE	7.0		7.0		7.0		7.1		7.0		7.0		6.9		6.7		6.7		6.4		
non-OECD																					
Argentina	2.8	70	3.5	57	3.5	52	2.8	42	3.4	35	5.2	24	5.9	22	4.9	30					60.60
Brazil	4	45	4	46	3.9	49	3.6	36	3.0	40	2.7	37	3.5	36	4.7	32					60.85
Bulgaria	4	45	3.9	47	3.5	52															
Chile	7.5	17	7.5	18	7.4	18	6.1	23	6.8	21	7.9	14	5.5	23	6.5	23					
Sovenia	6	27	5.2	34	5.5	28															
AVERAGE	4.9		4.8		4.8		4.1		4.4				5.0		5.4						
Total in Index		102		91		90		51		54		41		54		54					

"Total in Index" = Total Number of Countries Surveyed

Source: Transparency International; PricewaterCoopers

Appendix C

Investigation of (Foreign Official) Bribery-related Cases

Table 1: Criminal Prosecutuion under the FCPA by DOJ

							Charges against Legal Person			Charges against Natural Persons		
	Year	CASE	Influence to obtain	Foreign Country	Payment	$ Value of Business	Fines	Other Charges	Sanction	Position	Fines	Sanction
1	1979	U.S. v. Kenny International	Renewal of a stamp distribution agreement	The Cooks Islands	$ NZ 337,000	$1,500,000	$50,000	Restitution NZ $337000	PI, FCPA	Chairman*		
2	1982	US. V. Crawford	Sale of gas compression systems to Pemex	Mexico	$9,900,000	$225,000,000	$3,450,000		Conspiracy, AA	President* Exec VP others	$309,000 $150,000 $85,000	Conspiracy
3	1982 1983	U.S. v. C.E.Miller U.S. v. Marquis King	Sale of turbine compression systems to Pemex	Mexico	5%	$79,000,000	$20,000		AA	President* Director	community service $5,000	
4	1982	U.S. v. Ruston Gas Turbines	Sale of turbine compression systems to Pemex	Mexico	5% + $200,000	$225,000,000	$750,000		Conspiracy, FCPA	President VP	$5,000 $5,000	
5	1982 1985 1987	U.S. v. Int'l Harvester U.S. v. McLean McLean v. Int'l Harvester	Sale of turbine compression systems to Pemex	Mexico	5%	$112,000,000	$10,000	$40,000	Conspiracy, FCPA	VP		Conspiracy AA
6	1982	U.S. v. Appl. Process Products U.S. v. Gary Baterman	Sale of equipment to Pemex	Mexico	$342,000	$5,000,000	$5,000			President*		PI, FCPA $229,512
7	1983	U.S. v. Sam P. Wallace U.S. v. Alfonson A. Rodriquez	A contract for Racetrack	Trinidad Tobago	$1,391,000 30%	Not stated	$30,000	$500,000	PI, FCPA	President*	$10,000	
8	1985 1990	U.S.v. Harry G. Carpenter et al. Environmental Tectonics	A contract to furinish equipment for Air Force	Nigeria	$1,700,000 20%	$10,800,000	$75,000			Chairman CEO	$10,000	
9	1985	U.S. v. Silicon Contractors	A contract to outfit a nuclear power plant	Mexico	$132,000	Not stated	$150,000		PI, FCPA	3 officers		PI, FCPA
10	1989 1991	U.S. v. Napco Int'l and Venturian U.S. v. Liebo	Contracts for Ministr of Defense	Niger	$130,814	$3,200,000	$785,000	$140,000 $75,000	Conspiracy DUSA	VP	community service	
11	1989	U.S. v. Goodyear Int'l	Sale of car and truck tires	Iraq	$981,124	$10,000,000	$250,000			none		
12	1989	U.S. v. Joaquin Pou et al.	Release of confiscated airplanes	Dominical Republic	$20,000 to $ 30,000		not charged			President Intermediary	none	Conspiracy, FCPA
13	1990 1994	U.S. v. Young & Rubicam Abrahams v. Young & Rubicam	An advertising account with the Tourist Board	Jamaica	15%	$3,750,000	$500,000		RICO			
14	1990 1991	U.S. v. Morton; U.S. v. Blondek et al. U.S. v. Eagle Bus; U.S. v. Castle et al.	Sale of buses to a Canadian Crown Corporation	Canada	2%	$2,770,000			PI, FCPA	Canadian agents Company officers		Conspiracy, FCPA
15	1990	U.S. v. F.G. Mason Eng'g and F. Mason	Contract to sell new device to Government	Germany	$225,688 13.3%	Not stated	$75,000	$160,000	Conspiracy, FCPA	President*	$75,000	Conspiracy, FCPA
16	1990	U.S. v. Harris Corp	Telecommunicatons contract	Colombia	$22,845	Not stated	Acquittted		Conspiracy BR AA	VP Director	Acquittted Acquittted	

Table 1 continued

	Year	CASE	Influence to obtain	Foreign Country	Payment	$ Value of Business	Charges against Legal Person: Fines	Other Charges	Sanction	Charges against Natural Persons: Position	Fines	Sanction
17	1994	U.S. v, Steindler et al.	Contracts to service aircraft equipment	Israel	$7,875,000	$300,000,000	$69,000 $3,000,000	(GE) (National Airmotive)		Int'l sales mgr Foreign official		7 yr prison wire fraud
18	1993 1994	U.S. v. Vitusa Corp U.S. v. Heizberg	To obtain an outstanding balance on an earlier contract	Dominical Republic	$20,000	$163,000	$20,000			Pres, CEO*	$5,000	
19	1994	U.S. v. Lockheed U.S. v. Love U.S. v. Nassar	Sale of aircraft	Egypt	$600,000	$79,000,000	$21,800,000	$3,000,000	Conspiracy, FCPA	VP Sales director Regional VP	$20,000	1.5yr prison
20	1998	U.S. v. Saybolt North America U.S. v. Saybolt U.S. v. David H. Mead U.S. v. Frerik Pluimers	To obtain contracts and other favors	Panama	$50,000	Not stated	$1,500,000	$800	False data	President, CEO Chairman	$20,000	Conspiracy, FCPA 1/3 yr prison
21	1998	U.S. v. Herbert Tannebaum	Contract to sell a garbage incinerator	Argentina	$16,000	Not stated				President	$15,000	1 yr prison
22	1998	U.S. v. Control Systems Specialist U.S. v. Darrold Richard Crites	Contract to sell surplus military equipment	Brazil	$257,139		$1,500			President	$50	Conspiracy, FCPA
23	1999	U.S. v. Int'l Material Solutions U.S. v. Donald K. Qualey	Approval of a bid to sell trucks	Brazil	$67,563	$392,250	$1,000		Conspiracy, FCPA	President	$5,000	Conspiracy, FCPA
24	2001	U.S. v. Cantor U.S v. Weissman	Contract to produce holograms	Saudi Arabia	$239,000	$597,500	not charged			Exec VP	pending	
25	2001	U.S. v. Daniel Ray Rothrock	Contract to sell oil rigs	Russia	$300,000	$5,500,000	not charged			VP	$100	
26	2001	U.S. v. R.K.Halford U.S. v. A.F. Reitx U.S. v. R. R. King U.S. v. P.B. Hermandez	Concession to construct, etc	Costa Rica	$1,500,000 plus more	Not stated	not charged			CFO* VP* Officer* Employee		Conspiracy, FCPA
27	2001	U.S. v. David Kay (American Rice)	False shipping documents	Haiti			not charged			VP	dismissed	

* These officers are stockholders as well.

Table 2: Civil Actions by the Department of Justice under the FCPA

1	1979	U.S. v. Carver et al.	Oil rig drilling concession	Emirate of Qatar	$1,500,000	Not stated	not charged			Officers*		PI, FCPA
2	1990	U.S. v. Domier GmbH	Contract to maintain military aircraft	Niger	$175,000 5%	$3,518,315			PI, FCPA	none		
3	1993	U.S. v. American Totalisator	Contract with racetrack	Greece	Not stated	Not stated			PI, FCPA			
4	1999	U.S. v. Metcalf & Eddy	Influence over technical review	Egypt	Unspecified	$36,000,000	$400,000		Various injunctitons			

Source: Newcomb (2002)
OECD (2002)

Table 3: SEC Actions relating to Foreign Bribery

							Charges against Legal Person			Charges against Natural Persons		
	Year	CASE	Influence to obtain	Foreign Country	Payment	$ Value of Business	Fines	Other Charges	Sanction	Position	Fines	Sanction
1	1978	SEC v. Page Airways	Sale of Gulfstream aircraft, etc	Cabon, Malaysia, etc	$2,500,000	$60,000,000			PI, FCPA	6 officiers	dismissed	
2	1978	SEC v. Katy Industries	Contract to produce oil	Indonesia	$250,000 13.33%	$10,000,000			PI, FCPA, Filing amendment, Outside directors	2 officers		PI, FCPA
3	1979	SEC v. Int'l Systems & Controls	To secure contracts	Saudi Arabia, Iran, Algeria, etc	$23,000,000	$750,000,000			PI, FCPA, Filing amendment, audit committee	none		
4	1980	SEC v. Tesoro Petroleum	Oil and gas concessions	Worldwide	$200,000	Multimillion $ contracts			PI, FCPA New director BR	none		
5	1981	SEC v. Sam P. Wallace	Contract to build racetrack	Trinidad, Tobago	$1,391,000	Not stated			PI, FCPA Special committee of BOD	none		
6	1986 1987 1988	SEC v. Ashland Oil Howes v. Atkins Williams v. Hall	To obtain crude oil contracts	Oman	$29,000,000	Not stated			PI, use of corp funds for unlawful purposes	Chairman, CEO		PI, use of corp funds for unlawful purposes
7	1996	SEC v. Montedison, S.P.A.	To secure political backing	Italy	$272,000,000	Not stated			Fin fraud	none		
8	1997	SEC v. Triton	To gain favors from government auditors, etc	Indonesia	$287,500	Not stated	$300,000		PI, FCPA	senior officers		PI, FCPA
9	2000	SEC v. IBM		Argentina	$4,500,000	$250,000,000	$300,000		CD, BR			
10	2001	SEC v. Weissman et al. SEC v. ABNH	Contract to produce holograms	Saudi Arabia	$239,000 $0	$597,500	$75,000		CD,	Senior officers 2 exec officers	$20,000	each
11	2001	SEC v. KPMG-SSH SEC v. Eric L. Mattson and James Harris (Baker Hughes)	Reduction of tax payment	Indonesia	$75,000	$2,930,000			PI, FCPA CD, IC and BR	none		
12	2001	SEC v. Chiquita Brands Int'l	Renewal of cusomes license	Colombia	$30,000		$100,000		CD, FCPA	none		
13	2002	SEC v. BellSouth							CD, FCPA	none		
14	2002	SEC v. Syncor SEC v. Syncor Taiwain			$600,000		$500,000 $2,000,000					

Payment:	the alleged amount payments made by the defendants
Value of Business:	The value of business (e.g., contract) to be obtained or retained
PI, FCPA	Permanent injunction against future violations of the FCPA
CD	Oder to cease and desist future violations
BR	Books and records violations, Section 13 (b) (2) (A) of the Securities Act of 1934
RICO	The Racketeer Invluenced and Corrupt Organizatons Act
AA	Aiding and abetting
Conspiracy, DUSA	Conspiracy to defraud the USA (tax)
Conspiracy, FCPA	Conspiracy to violate the FCPA

Source: Newcomb (2002)
OECD (2002)
SEC Accounting and Auditing Enforcement Releases

Table 4: Criminal Prosecutions by the DOJ prior to the FCPA

	Year	CASE	Influence to obtain	Foreign Country	Questionable Payment	$ Value of Business	Fines	Charges	
1	1978	U.S. v. J. Ray McDermott & Co.			$804,800		$1,027,000 criminal and forfeiture	RICO	
2	1978	U.S. v. Williams Companies					$187,000 civl and criminal	CFTR	
3	1978	U.S. v, Control Data Corporation					$1,381,000 civil and criminal	Mail fraud, CFTR	
4	1978	U.S. v. Westinghouse Electric Co.		Egypt			$300,000	False statement - Export-Import Bank	
5	1978	U.S. v. United Brands Company	To reduce a local tax on banaanas	Honduras	$2,500,000		$15,000 criminal	Mail fraud	
6		U.S. v United States Lines, Inc					$5,000 criminal	Conspiracy to defraud the Fed Maritime Admin	
7	1978	U.S. v, Sea-Land Services					$5,000 criminal	same as above	
8		U.S. v . Seatrain Lines, Inc					$260,000 crimial each against Seatrain and the sub	same as above and CFTR	
9	1979	U.S. v. Lockheed Corporation					$647,000	CFTR, wire fraud, false statemnt	
10	1979	U.S. v. Gulfstream American Corp.					$120,000 criminal	False statement to Export-Import Bank	
11	1978	U.S. v. Page Airways, Inc		Cabon, Malaysia			$52,647	CFTR	
12	1979	U.S. v. Textron, Inc.		Ghana	$297,000		$131,670	CFTR	
13	1980	U.S. v. Bethlehem Steel							
14	1980	U.S. v. General Electric Com							
15	1981	U.S. v. McDonnell Douglas Corp., et al.		Pakistan			$55,000 fine and $1.2 mil damage	Mail fraud, wire fraud, conspiracy, false statement	

CFTR Currency and Foreign Transactions Reporting Violation

Source: Mathews (1979)
Newcomb (2002)

Table 5: SEC Enforcement Cases invloving Payments to Foreign Officials, Prior to the FCPA (excluding the disclosures made voluntarily)

	Year	Company	Investigation Dates Influence to obtain	Foreign Country	Payment	Value of Business	Fines	Sanction	Remark
1	1975	SEC v. United Brands Co.		Honduras	$2,500,000			10(b), 13(a)	Civil Action No. 75-0509, also DOJ
2	1975	SEC v. General Refractories Co.			$400,000			10(b), 13(a), 14(a)	Civil Action No. 75-0809
3	1975	SEC v. Ashland Oil			?			13(a), 14(a)	Civil Action No. 75-0794
4	1975	SEC v. Gulf Oil	To secure investment in the country in 1970	South Korea	$3,000,000			13(a), 14(a)	Civil Action No. 75-0324
5	1976	SEC v. Firestone Tire & Rubber						10(b), 13(a), 14(a)	Civil Action No. 76-1064
6	1976	SEC v. Butler National Corp	To obtain a sales contract		$102,500			10(b), 13(a)	Civil Action No. 76-0996
7	1976	SEC v. General Tire & Rubber			$4,050,000			10(b), 13(a), 14(a)	Civil Action No. 76-0799
8	1976	SEC v. Lockheed			$25,000,000			13(a), 14(a)	Civil Action No. 76-0611
9	1976	SEC v. Waste Management	Contribution to foreign politcal party		$35,000			13(a), 14(a)	Civil Action No. 76-0496
10	1978	SEC v. Boeing	Aircraft sale	Egypt	$70,000,000	$5,500,000,000		10(b), 13(a), 14(a)	SEC action because the company refused to provide information, Civil Action No. 78-1383
11	1976	SEC v. General Tire & Rubber		Chili, Morocco, Mexico	$1,130,000			10(b), 13(a), 14(a)	Civil Action No. 76-0799
12	1978	SEC v. ITT	1971 - 1975	Chili, others	$3,800,000			10(b), 13(a), 14(a)	SEC action because the company refused to provide information; Civil Action No. 78-0807
13	1976	SEC v. J. Ray McDermott Co., et al.			$804,800			10(b), 13(a), 14(a)	Civil Action No. 76-
14	1977	SEC v. Occidental Petroleum			$400,000		$80,000	13(a), 14(a)	SEC action because the company refused to provide information; Civial Action NO. 77-0751
15	1977	SEC v. Exxon	Contribution to political party, government officials; 1963 - 1975	Italy and 15 others	$56,862,000			13(a), 14(a)	Civil Action No. 77-1681
16	1978	SEC v. Ralph M. Parsons			$6,000,000	$400,000,000		13(a), 14(a)	Civil Action No. 78-1460
17	1978	SEC v. McDonnell-Douglas	1967 - 1975	Pakistan	$2,500,000			10(b), 13(a), 14(a)	'ivil Action No. 78-2353
18	1978	SEC v. Beatrice Foods	1971-1976		?			13(a), 14(a)	vil Action No. 78-C-3293
19	1978	SEC v. Dresser Industries						?	Civil Action No. 78-1702; Also DOJ (criminal)
20	1980	SEC v. Textron		1971-1978	$5,400,000			10(b), 13(a), 14(a)	'ivil Action No. 80-0326
21	1981	SEC v. Clark Oil and Refining Corp	1975-1976	Abu Dhabi United Arba Emirates	?			10(b), 13(a)	Civil Action No. 79-1881

10(b) Antifraud violation of 1934 Act
13(a) Reporting violation 1934 Act
14(a) Proxy violation 1934 Act

Source: Adams and Zan (1976)
Herlihy and Levine (1976)
SEC documents

Appendix D
Description of the FCPA Enforcement Firms

These are the firms that have been subject of the SEC and DOJ enforcement actions. The "enforcement year" referes to the year of enforcement. "Rank" is the ranking of the firm in the industry (4-digit) in terms of the value of total assets or sales. The "number in industry" indicates the number of fimrs in COMPUSTAT with data for the 4-digit industry in the enforcement year. "HHI" is the Herfindahl-Hirschman index in terms of TA or Sales of the 4-digit industry to which the firm belongs. "Med. HHI" refers to the median HHI of all 4-digit industries in the year of enforcement.

Enforcement				Rank	Rank	Number	HHI	Med. HHI	HHI	Med. HHI	CR4			
Year	Name	SIC Code		TA	Sales	in Industry	TA	TA	Sales	Sales	TA	Sales	IEI	NI
1975	GENERAL REFRACTORIES CO	3290	ABRASIVE,ASBESTOS,MISC MINRL	6	6	21	1,766	3,174	1,640	3,158	74.36%	71.87%	70.72%	70.61%
1976	FIRESTONE TIRE & RUBBER CO	3011	TIRES AND INNER TUBES	2	2	11	2,573	3,190	2,538	3,158	93.75%	93.01%	89.18%	89.18%
1976	BUTLER NATIONAL CORP	3721	AIRCRAFT	14	14	15	2,567	3,190	2,587	3,158	84.32%	86.56%	80.23%	80.23%
1976	WASTE MANAGEMENT INC	4953	REFUSE SYSTEMS	2	2	5	3,495	3,190	3,473	3,158	99.95%	100.00%	100.14%	100.15%
1977	OCCIDENTAL PETROLEUM CORP	1311	CRUDE PETROLEUM & NATURAL GS	3	3	208	753	3,151	1,303	3,109	47.94%	66.77%	47.45%	47.42%
1977	EXXON MOBIL CORP	2911	PETROLEUM REFINING	1	1	46	676	3,151	755	3,109	38.28%	42.24%	39.19%	39.67%
1978	DRESSER INDUSTRIES INC	1382	OIL AND GAS FIELD EXPL SVCS	1	1	7	8,195	3,207	8,110	3,183	90.52%	90.13%	91.32%	91.03%
1978	BEATRICE COS INC	2000	FOOD AND KINDRED PRODUCTS	3	3	16	1,253	3,207	1,224	3,183	61.16%	60.60%	58.08%	57.82%
1978	KATY INDUSTRIES INC	2842	SPECIAL CLEAN,POLISH PREPS	4	4	9	2,387	4,074	3,494	3,183	93.00%	93.51%	98.96%	104.26%
1978	BOEING CO	3721	AIRCRAFT	1	1	13	2,949	3,207	2,659	3,183	87.02%	85.60%	84.52%	84.47%
1978	SEATRAIN LINES	4400	WATER TRANSPORTATION	1	1	8	2,002	3,207	2,331	3,183	85.06%	83.04%	85.48%	87.30%
1978	SEA LAND CORP	4412	DEEP SEA FRN TRANS-FREIGHT			2	9,267	3,207	8,909	3,183	100.00%	100.00%	100.00%	100.00%
1978	ITT WORLD COMMUNICATIONS I	4822	TELEGRAPH & OTH MESSAGE COMM	2	2	3	7,663	3,207	6,659	3,183	100.00%	100.00%	100.00%	100.00%
1978	PAGE AIRWAYS INC	5080	MACHINERY AND EQUIPMENT-WHSL	5	7	16	1,182	3,207	1,356	3,183	58.63%	52.68%	60.24%	59.13%
1978	CONTROL DATA SYS INC	7373	CMP INTEGRATED SYS DESIGN			29	5,337	3,207	3,477	3,183	83.89%	75.11%	86.41%	85.95%
1979	GULFSTREAM AEROSPACE	3721	AIRCRAFT			13	3,050	3,252	2,994	3,255	87.70%	87.33%	84.44%	84.44%
1979	LOCKHEED MARTIN CORP	3760	GUIDED MISSILES & SPACE VEHC	1	1	4	4,885	3,252	5,367	3,255	100.00%	100.00%	100.00%	100.00%
1980	TESORO PETROLEUM CORP	2911	PETROLEUM REFINING	30	21	48	667	3,441	735	3,391	40.23%	40.58%	38.76%	38.47%
1980	BETHLEHEM STEEL CORP	3312	STEEL WORKS & BLAST FURNACES	3	4	36	1,122	3,441	939	3,391	55.65%	47.96%	49.11%	50.29%
1980	GENERAL ELECTRIC CO	9997	CONGLOMERATES	1	1	7	5,723	3,441	6,900	3,391	97.90%	97.30%	97.04%	96.88%
1980	TEXTRON INC	9997	CONGLOMERATES	3	2	7	5,723	3,441	6,900	3,391	97.90%	97.30%	97.04%	96.88%
1981	CLARK OIL & REFINING CORP	2911	PETROLEUM REFINING	34	28	43	682	3,441	745	3,398	40.29%	39.93%	36.58%	36.40%
1981	MCDONNELL DOUGLAS CORP	3721	AIRCRAFT	2	2	10	3,388	3,441	3,159	3,398	91.10%	90.52%	88.62%	88.61%
1982	CRAWFORD ENERGY INC	1381	DRILLING OIL AND GAS WELLS	21	23	36	993	3,258	937	3,373	54.61%	51.59%	80.60%	81.31%
1985	MCLEAN INDUSTRIES INC	1531	OPERATIVE BUILDERS	3	4	53	1,322	3,331	812	3,271	59.71%	40.99%	43.37%	43.58%
1986	ASHLAND INC	5160	CHEMICALS & ALLIED PDS-WHSL	1	1	7	8,074	3,107	8,003	3,160	99.46%	99.60%	99.50%	99.50%
1989	GOODYEAR TIRE & RUBBER CO	3011	TIRES AND INNER TUBES	1	1	4	6,051	3,328	5,889	3,231	100.00%	100.00%	100.00%	100.00%
1989	VENTURIAN CORP	5080	MACHINERY AND EQUIPMENT-WHSL	13	13	22	1,632	3,328	1,615	3,231	66.15%	69.23%	73.78%	74.22%
1990	ENVIRONMENTAL TECTONICS CO	3690	MISC ELEC MACHY,EQ,SUPPLIES	16	15	32	2,329	3,408	1,654	3,422	73.29%	70.29%	70.21%	76.04%
1990	HARRIS CORP	3812	SRCH,DET,NAV,GUID,AERO SYS	4	4	28	2,510	3,408	1,872	3,368	80.63%	79.35%	119.98%	119.93%
1990	YOUNG & RUBICAM INC	7311	ADVERTISING AGENCIES			9	2,048	3,408	2,139	3,422	87.18%	87.99%	86.31%	69.69%
1994	LOCKHEED MARTIN CORP	3760	GUIDED MISSILES & SPACE VEHC	1	1	3	8,948	3,255	9,347	3,041	100.00%	100.00%	100.00%	100.00%
1996	MONTEDISON SPA -ADR	2000	FOOD AND KINDRED PRODUCTS	3	8	10	1,494	3,078	1,551	2,871	67.65%	66.75%	68.92%	68.91%
1997	TRITON ENERGY LTD	1311	CRUDE PETROLEUM & NATURAL GS	35	62	241	695	3,050	1,221	2,787	42.81%	55.83%	72.95%	73.32%
1999	METCALF & EDDY COS INC	4953	MACHINERY AND EQUIPMENT-WHSL			16	3,929	3,032	4,902	2,863	95.65%	95.43%	89.88%	89.96%
2000	INTL BUSINESS MACHINES COR	7370	CMP PROGRAMMING,DATA PROCESS	1	1	339	1,573	3,016	2,653	3,006	60.66%	75.36%	-37.74%	-33.13%
2001	CHIQUITA BRANDS INTL	100	AGRICULTURE PRODUCTION-CROPS	3	3	19	1,401	3,407	2,593	3,162	74.54%	85.46%	80.48%	46.09%
2001	AMERICAN BK NT HOLOGRAPHIC	2670	CONVRT PAPR,PAPRBRD,EX BOXES	16	17	20	2,632	3,407	2,737	3,162	81.69%	80.96%	93.58%	94.42%
2001	BAKER-HUGHES INC	3533	OIL & GAS FIELD MACHY, EQUIP	1	1	19	1,710	3,407	1,574	3,162	76.74%	74.59%	77.61%	80.10%
2001	ALLIED PRODUCTS	3540	METALWORKING MACHINERY & EQ	8	9	10	3,004	3,407	2,906	3,162	82.20%	80.06%	95.91%	95.90%
2001	AMERICAN RICE INC	5140	GROCERIES & RELATED PDS-WHSL	3	5	19	7,000	3,407	7,408	3,162	84.21%	87.23%	93.47%	93.33%
2002	BELLSOUTH CORP	4813	PHONE COMM EX RADIOTELEPHONE	8	10	113	682	3,783	670	3,699	45.04%	42.62%	171.78%	89.12%
2002	SYNCOR INTL CORP/DE	5122	DRUGS AND PROPRIETARY-WHSL	8	9	21	2,689	3,783	3,012	3,699	87.93%	92.83%	120.43%	121.02%
			Mean	6.97	7.71	37.16	3,210	4,007	3,296	3,965	77.41%	77.63%	81.03%	78.43%
			Median	3.00	3.50	16.00	2,510	3,314	2,593	3,220	83.89%	83.04%	86.31%	85.95%
			Max	35.00	62.00	339.00	9,267	10,000	9,347	10,000	100.00%	100.00%	171.78%	121.02%
			Min	1.00	1.00	2.00	667	136	670	137	38.28%	39.93%	-37.74%	-33.13%
			Standard Deviation	9.20	11.36	67.09	2,497	2,617	2,502	2,624	19.58%	19.60%	30.95%	27.67%