CHAPTER 1

Bribery, Corruption, and the Foreign Corrupt Practices Act

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In the movie *Syriana*—a politically charged story of greed, self-interest, betrayal, and corruption in the oil and gas industry—one of the characters angrily learns he is under investigation by the U.S. Department of Justice (DOJ) for bribery to obtain drilling rights in Kazakhstan. "Corruption charges! Corruption? Corruption is government intrusion into market efficiencies in the form of regulations. . . . We have laws against it precisely so we can get away with it. Corruption is our protection. Corruption keeps us safe and warm. Corruption is why you and I are prancing around in here instead of fighting over scraps of meat out in the streets. Corruption is why we win." These contemptuous comments are what one would expect from people who have been caught up in bribery probes and prosecutions under the Foreign Corrupt Practices Act (FCPA).

The FCPA has long been an available weapon in the arsenal of federal prosecutors in the United States. Yet, the specter of the FCPA was one infrequently seen, so much so that companies and their employees came to believe they had nothing to fear. But how the times have changed. Now,

the mere utterance of the acronym FCPA is enough to instill deep concern, and even fear, in corporate suites throughout the world. The FCPA is the U.S. law that makes bribery of foreign officials to obtain or retain business and the failure to maintain accurate books and records, as well as related internal controls, a very serious crime. The Act's provisions significantly impact business organizations through criminal and civil prosecutions and the collateral damage that comes with government enforcement of anti-corruption laws.

If there is a recent case that exemplifies the strong stance that government authorities are taking in pursuing FCPA violations, it is the prosecution of Control Components, Inc. (CCI). CCI is a California corporation that designs and manufactures control valves for the nuclear, oil and gas, and power generation industries throughout the world. Between 1998 and 2007, CCI, through its officers, employees, and agents, made more than 200 corrupt payments to employees of state-owned enterprises and private companies in 36 countries. These countries included China, Korea, Malaysia, and the United Arab Emirates. The bribes totaled $6.85 million and earned CCI $46.5 million in net profits.

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Prosecutors used a variety of tactics to unravel the pervasive conspiracy, a move that is indicative of the new approach to fighting FCPA violations. Both the corporation and individuals were prosecuted. In fact, the eight CCI defendants is the single largest number of individual defendants in an FCPA case. There was cross-border law enforcement cooperation resulting in the prosecution of a UK official implicated in the bribery probe. Both government corruption and private company bribery were charged in this case. The Travel Act was used to charge commercial bribery. The Travel Act prohibits using interstate or foreign commerce to promote unlawful activity including bribery and corruption in violation of state law.

These tactics are part of the government's focused attack on FCPA violations. This strategy has had a visible impact on corporations. The $25 million fine against Lockheed Martin in 1994 held the record for many years until Titan Corporation paid $28.5 million in 2005. The $44 million fine levied against Baker Hughes in April 2007 was the largest ever at the time. That was eclipsed by the Siemens penalty. In December 2008, Siemens paid the largest fine ever handed down to settle the biggest FCPA case in the history of the statute. Siemens voluntarily paid $1.7 billion in fines, penalties, and disgorgement of profits to U.S. and German authorities. Of the $800 million to U.S. government authorities, $450 million was a fine and $350 million was in disgorgement of profits. In early 2009, Halliburton settled a bribery probe with a $559 million fine.

It seems inevitable that another case will come along soon with yet another record-high fine. The penalties for FCPA violations have skyrocketed of late, a trend expected to continue. Investigating and prosecuting corruption and bribery cases have become "a significant priority in recent years," according to Mark E. Mendelsohn, the DOJ's chief prosecutor for international bribery.[1]

GLOBAL CRACKDOWN

Like at no other time before, there is a growing global crackdown on corruption. The United States has been joined by other countries in this fight. There have been more investigations and prosecutions of both businesses and their employees than at any time in the past 30 years. "Crimes of official corruption threaten the integrity of the global marketplace and undermine the rule of law in the host countries," said Lori Weinstein, the Justice Department prosecutor who oversaw the Siemens case.[2]

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Corruption and bribery are insidious elements of the dark side of business. Illegal payments by public and private corporations to foreign government officials to induce business dealings have long been an unscrupulous practice. These bribes, in the form of cash and a host of other means including gifts and gratuities, trips and entertainment, charitable contributions, forgiveness of debt, and more, are illegal and have been outlawed by the United States for many years. A rash of business corruption cases in the 1970s and a Congressional focus resulted in the enactment of the FCPA in 1977.

The FCPA prohibits individuals and companies from "corruptly making use of the mails or any means or instrumentality of interstate commerce in furtherance of an offer, promise, authorization, or payment of money or anything of value to a foreign official for the purpose of obtaining or retaining business for, or directing business to any person, or securing any improper advantage."[3] The FCPA also requires "issuers not only to refrain from making corrupt payments to foreign government officials, but also to implement policies and practices that reduce the risk that employees and agents will engage in bribery."[4] The books and records provision of the FCPA requires certain corporations to create and maintain books, records, and accounts that fairly and accurately reflect company transactions. The knowing falsification of company records is also prohibited.[5] Penalties include both civil and criminal sanctions against the company and culpable employees.

The Sarbanes-Oxley Act (SOX) was not the first federal law to require strict internal controls within publicly traded U.S. companies to prevent fraud. The FCPA mandated that corporate records contain accurate statements concerning the true purpose of all payments made by the company long before SOX was ever envisioned. Since the passage of SOX, there has been a renewed focus on investigations and prosecutions involving FCPA violations. Thus, compliance with the provisions of the FCPA is more important than ever.

Since the enactment of the FCPA, Nigeria has had the most prosecutions by country. Nigeria is followed by Iraq, China, Indonesia, India, Azerbaijan, Canada, Costa Rica, Rwanda, Egypt, Kazakhstan, and South Korea in number of cases. Countries in every region of the world have seen FCPA enforcement. By far, Asia has seen more cases than any other region with Africa a distant second.

What is not commonly known is that the FCPA was initially referred to as the "Lockheed Law," since the law was enacted as a result of the involvement of numerous corporations, including Lockheed, in making financial payments to foreign government officials in return for government contracts. As detailed later in this chapter, the Lockheed of the 1970s regularly paid bribes to foreign officials. The surprising disclosures of the size and scope of their payments in countries throughout the world did as much as anything to ensure that legislation such as the FCPA would become law.

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DEVASTATING COST OF CORRUPTION

The sad fact is that corruption is pervasive and entrenched on a global scale. A culture of corruption is still embraced as a way of doing business in many parts of the world. "Each year one trillion U.S. dollars is lost in bribes and other forms of corruption around the world," said Alan Boeckmann, Chairman of the Board and Chief Executive Officer of Fluor Corporation. "Consider this: the trillion dollars lost each year to bribes could feed up to 400 million starving people for the next 27 years."[6] These impactful words reinforce the devastating cost of corruption and bribery on a global scale.

Corruption often occurs in the worst possible locales. They include developing and emerging countries and regions that suffer the most from corruption's evil consequences. Corruption fuels poverty, hunger, disease, illiteracy, contempt, and disillusion. It drains the funds necessary for the very programs that people in developing countries most need. Corrupt government officials in countries with rich natural resources such as

oil, timber, and minerals "accumulate enormous personal wealth, taking millions in bribes from corporations looking to secure lucrative contracts" while the very poor live in abject poverty.[7] The resulting bribes and graft destroy honest government and business. The corruption ultimately turns the populace to distrust, ambivalence, acceptance, and ultimately, participation.

Corruption can only exist and flourish if it is tolerated. Businesses and governments need to step forward and fight corruption and bribery. This can only be done if people refuse to participate in corrupt activities. People have to take responsibility. The corruption chain can be broken if even one participant says no. Law enforcement does not have the ability to investigate every corrupt act or wrongdoer. "The answer to corruption is not necessarily at the end of handcuffs," says career federal prosecutor Patrick Fitzgerald. "People can't do this stuff without someone else knowing about it. The metric of whether or not you're doing a good job is not whether or not you get indicted."[8] Fitzgerald should know. His high-profile cases have included the World Trade Center bombings, the conviction of former vice-presidential advisor I. Lewis "Scooter" Libby, and the indictment of Illinois Governor Rod Blagojevich on numerous corruption charges.

President Obama tackled the issue of corruption in a speech he gave in Kenya in August 2008, aptly describing it as a worldwide problem.

> *Corruption is not a new problem. It's not just a Kenyan problem, or an African problem. It's a human problem, and it has existed in some form in almost every society. My own city of Chicago has been the home of some of the most corrupt local politics in American history, from patronage machines to questionable elections. In just the last year, our own U.S. Congress has seen a representative resign after taking bribes, and several others fall under investigation for using their public office for private gain.*
>
> *It is painfully obvious that corruption stifles development—it siphons off scarce resources that could improve infrastructure, bolster education systems, and strengthen public health. It stacks the deck so high against entrepreneurs that they cannot get their job-creating ideas off the ground.*
>
> *And corruption also erodes the state from the inside out, sickening the justice system until there is no justice to be found, poisoning the police forces until their presence becomes a source of insecurity rather than comfort.*
>
> *Corruption has a way of magnifying the very worst twists of fate. It makes it impossible to respond effectively to crises—whether it's the HIV/AIDS pandemic or malaria or crippling drought.*

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> *Of course, in the end, one of the strongest weapons your country has against corruption is the ability of you, the people, to stand up and speak out about the injustices you see. The Kenyan people are the ultimate guardians against abuses.*[9]

President Obama summed up his speech quite well by reinforcing the need for good people to stand up against corruption. Prosecutions can do only so much in preventing corrupt behavior. Law enforcement cannot arrest every bribe giver or recipient. Individuals and business organizations need to step up in stopping corruption. "The accomplice to the crime of corruption is frequently our own indifference," as former New York City Commissioner of Consumer Affairs Bess Myerson[10] once said. Yet, until this dream becomes a reality, the threat of business disruption, incarceration, and massive fines for violations of the FCPA and related criminal statutes will have to do.

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GOVERNMENT'S COMMITMENT TO FCPA ENFORCEMENT

The DOJ and the Securities and Exchange Commission (SEC) are committed to holding individuals and organizations accountable for FCPA violations. One area of focus is whether internal control processes are designed but not implemented. Siemens had detailed anti-corruption policies and procedures but they were ineffective as they were ignored. The SEC considers this a core area for compliance and investigative attention. It is often said that the only thing worse than not having a compliance program, is having one that is simply a "paper program" and not followed. The DOJ has often commented on the risk of having a paper program and how that will play a significant role in determining whether the organization will be prosecuted for criminal violations.

The U.S. government has expanded their investigative approach to FCPA cases. While they still use self-disclosures of FCPA violations as a starting point, they have now embraced self-sourcing of cases. Self-sourcing is the proactive initiation of a new investigation using leads from an ongoing or recently concluded investigation. For example, when a corruption issue is discovered in a particular industry, the DOJ and SEC will start looking at other companies in that industry for similar violations. If a corporation has an FCPA issue, the investigators will look at their competitors as well. If one telecom company has corruption and bribery violations in China, it is reasonable to assume that the other telecom companies operating there may face similar issues.

This scrutiny of like companies will bear results for the government. An organization that self-discloses a violation will most likely tell the government about similar activities of their competitors. In fact, sources have advised that 60 percent of the FBI's current caseload is from self-sourcing. The SEC is also receiving information on violators from companies all too willing to tattle to potentially gain a competitive advantage. In addition, companies in trouble are readily sharing with the government any knowledge they may have of similar activity by their competitors.

FBI's Laser Focus on Anti-Corruption

In February 2008, the FBI created its International Corruption Unit based in the Washington, DC Field Office. Corruption is the number one target for the FBI's criminal program and there is zero tolerance for it. The unit's purpose is program oversight of corruption, bribery, and fraud investigations. There is a focus on FCPA, fraud, and corruption associated with the wars in Iraq and Afghanistan, defense contracting and procurement investigations, and antitrust cases. The unit has oversight of all FCPA investigations that the Bureau conducts.

The FBI has seen a significant growth in corruption cases in recent years. One estimate is at least a 300 percent increase since 2007. There are a number of factors contributing to this increase. Some of the reasons for increased cases include self-reporting of violations, cooperating defendants, whistleblowers, and competitors providing information. Disclosures have come from FBI investigations, disgruntled employees, foreign-based employees who have witnessed bribery, and corporate filings. There are other reasons. The FBI is providing better training to its agents on FCPA red flags. The many investigations of the past few years provided subject matter expertise to these investigators and they are sharing that thought leadership with others.

The close interaction of the International Corruption Unit with FBI legal attachés worldwide is also paying off. The FBI has over 200 special agents and support professionals in more than 60 overseas offices and embassies. While much of their work is related to terrorism, intelligence, and criminal threats, the global aspect and liaison has provided another dimension in investigating corruption and bribery. Legal attachés are briefed on the FCPA prior to deployment and as such increase the breadth and depth of FBI reach. The FBI is already teaming with investigators from the UK's Serious Fraud Office and the City of London Police to share intelligence and educate businesses on anti-corruption issues.

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As for the future, there is a strong possibility that the Internal Revenue Service's Criminal Investigation Division may add troops to the war on bribery by assigning IRS agents to the FBI's International Corruption Unit. The IRS is already working on bribery cases, including the CCI case. The added resources of the IRS Criminal Investigation Division along with its expertise in tax evasion, undeclared income, money laundering, and other tax code violations would add further strength to FCPA enforcement efforts.

As one member of the FBI's International Corruption Unit said at a training conference on the FCPA, "we're here, we're there, we're everywhere, so beware." Based on the Bureau's results in recent years, this is not an idle threat. Business organizations, both in the United States and elsewhere, need to take notice.

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WATERGATE AND THE BIRTH OF THE FCPA

It is a given that corruption and bribery have been a part of business dealings since time immemorial. In the years prior to 1977, bribery was the norm in all countries as a deal expeditor and closer. Not only was bribery of foreign government officials considered a legitimate business practice, in almost every country it was legal. Indeed, in many countries, particularly in the developing world, bribery was an accepted and encouraged business practice. That all changed in 1977 with the enactment of the FCPA.

The United States became the first country to outlaw bribery of foreign officials. The Act and its associated aspects would have far-reaching implications for U.S.-based companies and those throughout the world. In the years since its passage, the FCPA has had a significant impact on how the world deals with bribery. Just how the FCPA came to be is both fortuitous and prophetic for the change it would have in promoting anticorruption programs in the corporate world.

The Watergate Special Prosecutor's 1973 investigations of illegal campaign contributions by public companies and their executives to Richard Nixon's 1972 reelection campaign opened a Pandora's box of other significant and pervasive criminality. What emerged was corporate America's dirty little secret: the existence of multimillion-dollar slush funds used to bribe foreign government officials and others to obtain lucrative business contracts. Slush funds are secret and often illegally obtained stashes of money used for corrupt activity such as bribes.

This corruption and bribery was extensive and long-standing and the wrongdoers made up a Who's Who of the movers and shakers in the corporate world. Their names included Northrop, Exxon, Mobil, Gulf Oil, United Brands, Ashland Oil, and Phillips Petroleum. The nation's largest defense contractor, Lockheed Aircraft Corporation, as it was then known, was identified as one of the worst offenders.

SECURITIES AND EXCHANGE COMMISSION ENTERS THE FIGHT

It wasn't long before the SEC got involved. Judge Stanley Sporkin, then Director of Enforcement for the SEC, started inquiries into how these corporate slush funds were created and whether they violated securities laws. Sporkin's staff dived into the investigation. "And before we knew it we had developed a horrendous situation where we found that out of those slush funds that were being used to give money to political parties, we went into them and we found that those monies were also being used for other and various activities, such as bribing officials in foreign countries to get business," said Sporkin years later.[11]

The expanding investigation determined that hundreds of American companies had been paying bribes to government officials in almost every region of the world. No foreign official was too big or too small to receive a bribe if it meant a business deal would close. "The public corporation is currently under severe attack because of the many revelations of improper corporate activity. It is not simple to assess the cause of this misconduct. Since it has taken so many different forms, the one dimensional explanation that . . . such conduct is a way of life, is simply not acceptable," said Sporkin in 1974 describing the many disclosures of bribes paid to foreign government officials.[12]

Not only were the bribes legal in foreign countries, they were an entrenched business practice. It was commonplace for companies to hide bribe payments on their corporate books. In European countries such as Germany and the United Kingdom, bribes could be deducted from corporate tax returns as a legitimate business expense. It was painfully obvious that no legal requirement existed for public companies to keep accurate books and records of their transactions.

Overwhelmed by the volume of bribery cases that sprung up, the SEC instituted a voluntary disclosure program in 1975 for companies to reveal both their slush funds and their foreign bribery schemes. Sporkin proposed the program to deal with the ever-growing number of subject companies

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involved in bribery. Otherwise, it would be impossible to investigate and independently discover all the offenders. In a sense, the SEC granted unofficial deferred prosecutions to companies that stepped forward and fully cooperated with the government.

> *Under the program, any corporation which came forward and self-reported an illicit payment problem and fully cooperated with the Commission was informally assured that Commission enforcement action was unlikely to be taken against it. Full cooperation included conducting an independent internal investigation to determine the full extent of the company's worldwide bribery; sharing the results with the Commission, with the understanding they would be made public; and taking appropriate remedial steps to ensure that the problems were addressed and would not reoccur.*[13]

Before it was over, more than 500 companies, including many of the Fortune 500, had disclosed more than $300 million in bribes to foreign officials to obtain or retain business.[14]

In response to the disclosures of widespread corporate bribery and to facilitate detection and investigation, on December 31, 1974, the IRS issued "Political Contributions" guidelines that covered political contributions made abroad. On August 29, 1975, they issued "Corporate Slush Funds" guidelines that included payments made through foreign subsidiaries. The IRS also began to more closely audit corporate tax returns for compliance.

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SENATE INVESTIGATIONS

In May 1975, the Senate Committee on Foreign Relations opened its previously closed hearings on foreign bribery to the public. The committee was headed by Senator Frank Church, a strong advocate for fighting international corruption. Church had a thorough understanding of the problem from his many years of experience investigating clandestine CIA and FBI operations outside the country that had connections to bribery. In his opening remarks on the issue of bribery, Church said it was not a "question of private or public morality" but rather a "major issue of foreign policy for the United States."[15]

By June 1975, there was the expected backlash from other quarters in Washington. In a secret cable from June 2, 1975 that was declassified in 2006, a State Department Deputy Secretary warned that the Church Committee's public hearings would do more harm than good. "We hear that Senator Church is planning a week-long Saudi spectacular. . . . If

members of the royal family are implicated, we will be in for a painful time. . . . We, the U.S. must recognize that we will take the brunt of whatever reaction there is. . . ."[16] It is ironic that similar logic was employed by British Prime Minister Tony Blair in his ordering his government to end a bribery investigation of BAE Systems and questionable connections to the Saudi government. A further discussion of the BAE case can be found in Chapter 8.

KISSINGER'S RESISTANCE

Secretary of State Henry Kissinger also weighed in, expressing his strong concern. In a declassified secret cable from June 4, 1975, Kissinger called the investigation into the systematic bribery of foreign officials "The Watergate of Private Industry" and recognized the "possible foreign policy repercussions."[17] The investigation intensified in the following months, leading Kissinger to attempt to stop public disclosure of Lockheed activities in foreign bribery. Fearing the fallout of public disclosure, Lockheed's outside counsel asked Kissinger to intercede and help quash the subpoena issued by the SEC for documents and testimony from Lockheed related to corporate bribery.[18] Kissinger responded in another declassified secret cable from December 19, 1975 where he stated:

> *On November 19, 1975, Rogers and Wells, Counsel for Lockheed, wrote to me formally and requested the Department of State to file a suggestion of interest in the case. Accordingly, officers of the Department have examined some of the documents under subpoena which contain the names of officials of friendly foreign governments alleged to have received covert payments from Lockheed. As the Department has stated on many occasions, the making of any such payments and their disclosures can have grave consequences for significant foreign relations interests of the United States abroad. We reiterate our strong condemnation of any such payments, but we must note that premature disclosure to third parties of certain of the names and nationalities of foreign officials at this preliminary stage of the proceedings in the present case would cause damage to the United States foreign relations.*[19]

Ironically, it was Kissinger's own actions that compelled Church to further his investigation. Church planned on seeking the Democratic nomination for president in 1976. Worried that a potential public backlash against a "post-Watergate frenzy of public disclosure and exposure" could hurt his chances, he ended the hearings early and did not push the inquiry

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as far as it could have gone.[20] Kissinger's behind the scenes maneuvers helped convince Church to hold more hearings and pursue culpable parties.[21]

Though Kissinger's attempts to stop the subpoenaed evidence and the ongoing investigation were fruitless, Lockheed continued to be defiant. In trying to stop the SEC from moving forward, Lockheed argued that the practice of bribery was good for its business and stopping it "could hurt its $1.6 billion backlog of unfilled foreign orders, presumably by causing embarrassed foreign governments to cancel contracts, and also damage prospects for future sales."[22] Lockheed further stated that bribes are "a normal and necessary feature of doing business in certain parts of the world, are essential to sales, and are consistent with practices engaged in by numerous other companies abroad."[23]

LOCKHEED'S DEFIANCE

There was a bigger question surrounding the whole issue of foreign bribery and how far the U.S. government was going to push the envelope. Was the government prepared for a full-fledged battle with corporate America over payments to foreign officials considering that at the time it was not a violation of any U.S. law? True, concealing the payments on a company's books and records was a violation but Lockheed and other companies didn't think much of that at the time. The question was moot as the SEC and Congress were steadfast and resilient in moving forward.

Lockheed was forced to admit in Congressional hearings in February 1976 that it had paid up to $24 million in bribes to government officials in at least 15 countries, including some very prominent leaders. Payoffs were funneled to the husband of then Queen Juliana of The Netherlands, the head of the then ruling political party in Japan, the Minister of the Interior in Italy, air force generals in Colombia, and to many others throughout the world.[24] Many of the bribes were made through agents and other third parties. Compounding the problems, the bribes were often large and made to the highest levels of government leaders.

Lockheed became the focal point for criticism not only from U.S. government regulators and legislators but also from other corporations. An unnamed corporate executive "condemned Lockheed for going beyond accepted practice in its payoffs" but admitted there was a "gray area in which American companies must accept the moral standards of the countries where they operate, like it or not."[25] The size of some of the Lockheed bribes stunned many and strangely, outraged other bribe givers.

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The accepted practice for bribes was generally in the five percent range and Lockheed had clearly gone beyond those accepted standards.

Just as disconcerting was the fact that although concealment of foreign bribes violated SEC reporting requirements, the penalties for disclosure were minor. The complaint from American companies was that if they didn't pay bribes, they would be at a competitive disadvantage as payoffs were pervasive worldwide. That defense held little water and soon there would be calls for passage of legislation to make bribery of foreign officials a crime. Yet, enacting antibribery laws will not be effective unless the moral fiber of any organization embraces corporate compliance. As a senior executive said at the time, "The top guy has to set the ethical standards" and without that support, no number of codes of conduct or laws will work.[26]

In February 1976, Kissinger again weighed in on the expanding issue of corporate bribes and cautioned that "The implications for the stability of other countries could be extremely serious."[27] But it was too late. Reform was coming.

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QUESTIONABLE CORPORATE PAYMENTS TASK FORCE

In response to the chorus of people demanding reform, President Gerald Ford established the Task Force on Questionable Corporate Payments Abroad on March 31, 1976 and appointed then Secretary of Commerce Elliot Richardson as its chair. The task force would conduct a review of these payment practices and recommend additional policy steps as warranted. The President made it clear that the "purpose of the task force is not to punish American corporations but to ensure that the United States has a clear policy and that we have an effective, active program to implement that policy."[28]

On May 12, 1976, the SEC submitted the "Report on Questionable and Illegal Corporate Payments and Practices" to the Senate Committee on Banking, Housing and Urban Affairs. In the report, the SEC outlined the specific practices and necessary legislation to combat the rampant corporate bribery that had been discovered. The proposed legislation points would:

- Require issuers subject to the periodic reporting requirements of the Securities and Exchange Act to make and keep accurate books and records
- Require such issuers to devise and maintain a system of internal accounting controls meeting the objectives articulated by the American Institute of Certified Public Accountants

- Prohibit the falsification of corporate accounting records
- Prohibit the making of false, misleading, or incomplete statements to an accountant in connection with any examination or audit[29]

By June 1976, Richardson and his Task Force on Questionable Corporate Payments Abroad completed their review. On June 8, 1976, he submitted a memo to President Ford outlining the pros and cons of proposing legislation to address the issue of questionable payments abroad. The task force found clear and convincing evidence that a "significant number of America's major corporations, in their dealings with foreign governments, have engaged in practices which violated ethical and in some cases legal standards of both the United States and foreign countries."[30] Richardson identified problematic business practices and bribery consequences including:

- Falsified business records
- Lying to auditors
- Off-the-book slush funds
- Improper foreign payments unlawfully deducted as business expenses for income tax purposes
- Facilitation or grease payments
- Bribes as a "competitive necessity" to meet foreign competition
- Issue of extortion by corrupt foreign officials
- Adverse effect on foreign relations
- Adverse impact on multinational corporations
- Eroding public confidence in democratic institutions as a result of Watergate and subsequent investigations

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Richardson discussed the pending legislation that was being proposed to address corporate bribery and whether it was needed. He also provided the President with a number of issues and options. Overall, Richardson commented that the SEC believed that "little if any business would be lost if U.S. firms were to stop these practices."[31]

FCPA ENACTMENT

The frenzied activity around corporate bribery had garnered the attention of Senator William Proxmire, who chaired the Senate Banking, Housing, and Urban Affairs Committee. The discoveries troubled Proxmire and he

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asked Sporkin whether legislation was the answer. Sporkin advised the Senator "that all that was really necessary was a law that required all corporations to maintain accurate books and records, basically because not one of these companies booked these bribes and these other illegal payments correctly."[32] Sporkin added, "There is no provision that requires a company to keep accurate books and records."[33]

Senators Proxmire, Church, and others pushed through comprehensive legislation that included both antibribery provisions and a requirement to maintain accurate books and records of all transactions as well as the need for adequate internal controls. On December 19, 1977, President Jimmy Carter signed the FCPA into law. At the time, "the FCPA was decreed by some as the end of U.S. competitiveness in foreign markets."[34] In the beginning, there were few prosecutions and enforcement was inconsistent. Yet, Sporkin had no doubt that the FCPA would be a force to be reckoned with in the years to come. "It is clear that it has assumed a prominent place among our federal criminal laws," said Sporkin many years later.[35]

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COMPLIANCE INSIGHT 1.1: FIRST FCPA PROSECUTION

Kenny International Corporation has the dubious distinction of being the first company prosecuted for violations of the FCPA shortly after its enactment. Finbar Kenny was chairman of the board, president, and the majority shareholder of Kenny International, a New York corporation. Kenny was a renowned philatelist and designed postage stamps for countries all over the world. He was also a very rich and powerful man.

Postage stamps and money got Kenny and his company entangled in the first FCPA prosecution. Kenny International became involved in the sale and distribution of Cook Islands postage stamps. Although the Cook Islands are a self-governing parliamentary democracy in the South Pacific, they are closely associated with New Zealand, which has responsibility for external affairs, defense, and other oversight. The population of the Cook Islands is relatively small but the sales of their postage stamps to tourists and stamp collectors are significant. The sale of postage stamps distributed by Kenny International provided over a million dollars a year in revenue shared equally with the government of the Cook Islands.

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A representative of Sir Albert Henry, then Premier of the Cook Islands, solicited Kenny International for a bribe on behalf of the Premier "to ensure renewal of Kenny International's stamp distribution agreement with the government."[36] The payment would provide Kenny International with exclusive rights for the promotion, distribution, and sale of Cook Islands postage stamps worldwide. Kenny agreed to the corrupt act. The bribe turned out to be financial assistance worth 337,000 in New Zealand dollars to charter an aircraft to fly supporters of the reelection campaign of Sir Albert from New Zealand to the Cook Islands to vote in the general election. There were no provisions for absentee voting so voters needed to be physically present in the Cook Islands in order to vote for Sir Albert. A shell company was created to facilitate the transfer of funds for the purchase of the charter flight, and thus the bribe.

The disclosure of the FCPA violations in this case came from a tip to the U.S. government. The Cook Islands Superintendent of Police learned of the large payment made by Kenny to Sir Albert. He also learned of the recently enacted FCPA and immediately made the connection to possible violations of law. In May 1978, he visited the U.S. Consul's Office in Auckland, New Zealand to both obtain more information on the FCPA and alert them to the offense. The information was relayed to federal prosecutors in the United States and an investigation began.[37]

The investigation targeted Kenny and his company. Kenny hired prominent Washington, DC attorney Seymour Glanzer, one of the original Watergate prosecutors. Subsequently, Kenny International pleaded guilty to one count of violating the new FCPA and consented to a permanent injunction against further FCPA violations. The company paid a $50,000 fine as well as restitution to the government of the Cook Islands. Kenny was not charged criminally in the United States and consented to a civil injunction against further FCPA violations.[38] He also pleaded guilty before the High Court of the Cook Islands to a criminal charge of conspiracy to defraud the Cook Islands Government. He was fined and released with no jail sentence. His co-conspirator Sir Albert also pleaded guilty. Although Sir Albert won the rigged election as a result of Kenny International's help, once the conspiracy was discovered, the High Court disallowed

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the election results. The High Court ruled that Sir Albert be removed from office as a result of "unlawful votes tainted by bribery."[39]

Although this was the first prosecution under the newly enacted FCPA, it would definitely not be the last. The elements of the offense, including conspiracy, bribery of government officials, shell companies, and financial maneuvers to hide the payments and quid pro quo, would be repeated time after time in the years that followed. What comes to mind is the comment of the Harvard philosophy professor George Santayana who liked to say that those who do not remember the past are condemned to repeat it.

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CRITICISM OF THE FCPA

In the few years after the enactment of the FCPA, there was still resistance and resentment in the corporate suites and in government. The Act was contemptuously called the "Accountants' Full Employment Act of 1977" for its onerous compliance requirements. Companies now had to increase their internal auditing departments, focus on internal controls, better police third-party agents, and carefully review all payments, especially those around commonplace grease payments that had now been outlawed. By 1981, there was already discussion to amend the FCPA. The Reagan administration signaled that it was not pleased with the legislation and that it would "cast a chill over the willingness of U.S. businessmen to push into foreign markets and thereby help boost U.S. exports."[40]

In March 1981, the General Accounting Office (GAO) released its report entitled "The Impact of the Foreign Corrupt Practices Act on U.S. Businesses." The report reaffirmed the Act's importance but also highlighted its "controversy and confusion over what constitutes compliance."[41] Much of the testimony mirrors what was heard after the enactment of the SOX legislation in 2002. Critics described the accounting provisions as "vague and causing business to incur unnecessary costs" and the antibribery provisions as "ambiguous and causing U.S. firms to forego legitimate export opportunities."[42]

The GAO report highlighted some positive changes but there was also a widespread call for changes in the legislation. Companies revised codes of conduct to reflect adherence to the FCPA and communicated this

to employees. In addition they reviewed the adequacy of their internal controls and improved documentation of internal control systems. The majority of firms that were polled by the GAO believed the Act was responsible for reducing corporate bribery but that the American companies would suffer financially as a result. Of note, "almost all the respondents who reported a decrease in business stated that the [A]ct had discouraged foreign buyers and agents from doing business with their firms."[43] The GAO report also reinforced that "without an effective international ban against bribery, unfair competitive advantage could be given to non-U.S. firms."[44] The report and subsequent related testimony before the Senate outlined a number of recommended changes around both the legislation and its implementation.

In August 1981, Attorney General William French Smith commented that the Reagan administration intended "to eliminate the more offensive provisions of our law that both harm our countries' ability to compete abroad and offend the business sensibilities of other countries."[45] There were few FCPA prosecutions in the Reagan years but there was a significant amendment in 1988. The most significant change was that the FCPA's jurisdiction now extended to foreign companies that committed related offenses within the United States. The 1988 amendment also directed the Executive Branch to "level the playing field by encouraging our trading partners to enact legislation similar to the FCPA."[46] The outcome was the creation of the Organisation for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. There is a more detailed discussion of the OECD and its Anti-Bribery Convention in Chapter 4.

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A CULTURE OF COMPLIANCE

Watergate and the shocking disclosures that came out of that time in American history spawned the FCPA. The reaction to widespread corporate corruption and bribery has far-ranging implications for how organizations do business with integrity and honesty. With the FCPA, the law reaches around the world and covers the actions of U.S. corporations and their employees no matter where they are. Illegal actions relating to the FCPA can have major implications. There are harsh penalties for those who violate the Act. Financial and reputational risks abound.

Compliance goes beyond the borders of the United States with the globalization of business. International compliance is a necessity because of a confluence of several important factors. The global nature of

companies with subsidiaries, affiliates, and vendors all over the world provide great opportunity but also great risk. Third-party liability is another major concern as companies are liable for the actions of people it hires, be they direct employees or agents, as is successor liability in mergers and acquisitions. More than ever before, all organizations need a robust compliance program to ensure an enduring culture of compliance.

NOTES

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