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ARTICLES

FOREIGN CORRUPT PRACTICES ACT: AMENDMENTS OF 1988

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I. INTRODUCTION

After eleven years and several failed attempts at modifying the Foreign Corrupt Practices Act of 1977 ("the Act"),[1] both the Senate and the House of Representatives have reached an agreement on a direction for the antibribery law,[2] a direction on which the Reagan Administration concurred.[3] Because of opposition to the changes, supporters buried the amendments to the Act deep within the omnibus trade bill,[4] which promises to boost American exports and alleviate a staggering trade deficit.[5] The changes made to the Foreign Corrupt Practices Act were, to some observers, unnecessary and unjustified.[6] This article describes the provisions of the original Act, the 1988 amendments, and addresses the supporting and opposing arguments surrounding the modifications. In view of the expressed purpose of these changes, this article analyzes three of the more controversial provisions in the Act and determines whether these modifications are necessary to effect the expressed purpose.

II. FOREIGN CORRUPT PRACTICES ACT OF 1977

In response to discoveries of foreign corruption involving major U.S. corporations, Congress passed the Foreign Corrupt Practices Act of 1977 which imposed strict accounting standards and antibribery prohibitions on American businesses.[7] While these scandals caused embarrassment to the nation and jeopardized American foreign interests

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1. Foreign Corrupt Practices Act, Pub. L. No. 95-213, 91 Stat. 1464 (1977) (codified at 15 U.S.C. §§ 78a; 78m; 78dd-1; 78dd-2; 78ff (1982) [hereinafter Foreign Corrupt Practices Act].

2. H.R. CONF. REP. NO. 576, 100th Cong., 2d Sess. 916-925 (1988).

3. Waldman, *Back to Corporate Payoffs Abroad?*, N.Y. Times, Mar. 22, 1988, sec. A, at 31, col. 1.

4. Rushford, *Business Lobby Hit for "Bring-Back-Bribery" Bill*, Legal Times, No. 16, 1987, at 1, col. 1.

5. 134 CONG. REC. S4,216 (daily ed. Apr. 19, 1988) (statement of Senator Byrd).

6. *Business Accounting and Foreign Trade Simplification Act: Joint Hearing on S. 430 Before Subcomm. on International Finance and Monetary Policy and the Subcomm. on Securities of the Senate Comm. on Banking, Housing, and Urban Affairs*, 99th Cong., 2d Sess. 3 (1986) (Statement of Senator Proxmire) [hereinafter *Senate Hearing*].

7. Rushford, *supra* note 4, at 1, col. 1.

abroad,[8] the Act itself has provoked as much controversy as these initial improprieties. The current law is an amendment to the Securities Exchange Act of 1934, and requires issuers of stock, that is, publicly-held corporations, to "make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions . . . of the issuer" and to "devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances" of management control over the firm's assets.[9] These accounting requirements provide a "paper trail" that leads to corporate accountability.[10] The accounting requirements also serve as a mechanism for detecting illicit payments to foreign government officials which is the other major focus of the Act. Under the antibribery provisions, the Act prohibits payment by an issuer or a domestic concern to any foreign official, except foreign employees "whose duties are essentially ministerial or clerical," for the purpose of obtaining or retaining business.[11] Similarly, the Act proscribes such payments to a third party while "knowing or having reason to know" that the money will be used for the above purpose.[12] Under the original Act, both civil and criminal sanctions attach to violations of the accounting and antibribery provisions.[13]

III. History of the Act and Amendments

Since the Act's passage in 1977, numerous attempts to modify it have proved fruitless.[14] In 1981 and again in 1983, changes almost identical to the present amendments surfaced, but died, in the legislature.[15] Supporters attempted different means by which to institute the changes, for instance, by seeking to amend the Export Administration Act rather than directly amend the Foreign Corrupt Practices Act.[16] Until now, however, such efforts were unsuccessful.

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8. *Omnibus Trade Legislation, vol. IV: Hearing on H.R. 4389 Before the Subcomm. on International Economic Policy and Trade of the House Comm. on Foreign Affairs*, 99th Cong., 2d Sess. 3 (1986) (Statement of Representative Wolpe) [hereinafter *House Hearing*].

9. Foreign Corrupt Practices Act, 15 U.S.C. § 78m (1982).

10. 134 Cong. Rec. S3,067 (daily ed. Mar. 25, 1988) (statement of Senator Proxmire).

11. Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-1, 78dd-2 (1982).

12. *Id.*

13. Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-2, 78ff (1982).

14. Graham, *Viewpoints: Don't Dilute Law Curbing Bribery Overseas by American Companies*, L.A. Times, June 15, 1986, sec. 4, at 3, col. 1.

15. *Senate Hearing*, *supra* note 6, at 1 (statement of Senator Heinz).

16. Gerth, *Easing of Curbs in Law on Foreign Bribes Sought*, N.Y. Times, April 16, 1986, sec. D, at 24, col. 1.

A. Support for the Changes

The amendment's supporters point to the unnecessary ambiguities as justifying the changes. In their view, uncertainty under the law has increased the cost of international business, made firms exceedingly cautious, and prompted businesses to forego legitimate foreign opportunities for fear of violating the law.[17] American firms alone have borne the costs of the Act, and supporters contend some costs could be eliminated with clarification.[18] These costs include the allocation of resources to comply with the accounting standards, lost business, and changes in business practices to meet the imposed standards.[19] Statutory vagueness has caused firms to err on the side of excess to protect themselves against violations of the Act.[20]

The strongest criticism of the Act is that it puts American exporters, particularly small and medium-sized exporters, at a competitive disadvantage in world markets.[21] Others, however, contend that there is no evidence of an adverse effect on American exports.[22] In a comparative study of markets, John Graham found the Foreign Corrupt Practices Act had no negative effect on export performance in markets where the Act is considered a trade disincentive and those where it is not.[23] Graham does admit, however, that the results of his study may be the product of factors outside of the Act. According to Graham, the lack of a competitive disadvantage to American exporters may result from the loss of business by some American firms to other American firms; from the fact that some intermediaries never actually remit bribery money to foreign officials; or from the fact that American firms could have attained the business without the payoffs.[24] In each of these cases, the Foreign Corrupt Practices Act would not have an impact on the foreign transactions. Still, other studies, such as a 1981 General Accounting Office report on the Foreign Corrupt Practices Act, docu-

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17. *Senate Hearing*, *supra* note 6, at 44 (statement of Malcolm Baldridge, Secretary of Commerce).

18. H. Weisberg & E. Reichenberg, Research Report, *The Price of Ambiguity: More Than Three Years Under the Foreign Corrupt Practices Act*, Chamber of Commerce of the U.S. 2, 30 (1981).

19. *Id.* at 13.

20. *Id.* at 1-2.

21. Graham, *supra* note 14 sec. 4, at 3, col. 1.

22. 134 CONG. REC. S3,068 (daily ed. Mar. 25, 1988) (statement of Senator Proxmire).

23. Graham, *The Foreign Corrupt Practices Act: A New Perspective*, 15 J. INT'L BUS. STUDIES 107 (Win. 1984).

24. Graham, *supra* note 14, sec. 4 at 3, col. 1.

ment the deterrent effect of the Act.[25] Given the complexity of issues that might influence trade, both sides tend to agree that the impact of the Act on exports is difficult to measure with accuracy, but each side claims empirical support for its position.[26]

B. Opposition to the Changes

Opponents of the modifications focus on the effectiveness of the current Act. Stating that the law has stopped the use of slush funds and deterred corruption of foreign officials, Senator Proxmire points to the policing aspects of the Act, that is, the fear of prosecution for violating the Act.[27] Supporters of the amendments argued that the same fear that deters corruption also deters the entrance into foreign trade by American firms.

Other opponents of the amendments claim the Foreign Corrupt Practices Act represents the moral judgment of the nation that bribery is wrong and that in the long run, it is in our interest to prevent it.[28] The loss of business by American firms is to be expected and accepted as a cost of that position. In this sense, our success in the free market depends on others' perception of our ability to produce quality goods and services without corruption.[29] Under the current Foreign Corrupt Practices Act, that perception is reinforced. In fact, amendment opponents claim the law has strengthened the integrity of American trade since American goods presently are bought on the basis of quality and price, not illegal payments.[30]

Supporters of the 1977 Act say that the amendments return to a "soft line" on bribery, and that this will undermine confidence in American integrity and American goods.[31] Corruption in foreign governments tends to destabilize these governments, increase the threat to American interests there, and undercut our ability to do business in those nations.[32] Those who support the Act in its original form believe that strong antibribery standards will minimize foreign corruption and

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25. *The Antibribery Act Splits Executives*, BUS. WK., Sept. 19, 1983, at 16.

26. Brownstein, *Financial Institutions Focus: Bribery Lessons*, NAT'S J., Oct. 1, 1983, at 2019.

27. *Senate Hearing*, *supra* note 6, at 21 (statement of Senator Proxmire).

28. Burton, *Business Forum: A Guarantee for Long-Term Trouble*, N.Y. Times, Mar. 20, 1983, sec. 3, at 2, col. 3.

29. *Id.*

30. 134 CONG. REC. S3,067-68 (dailey ed. Mar, 23, 1988) (statement of Senator Proxmire).

31. *Senate Hearing*, *supra* note 6, at 20-21 (statement of Senator Proxmire).

32. Burton, *supra* note 4.

result in long run benefits for the United States as a trade nation. Those who advocate change, like Representative Mica, say we need "sensible legislation," but they pledge that they are not advocating bribery or corruption.[33] Opponents answer, "If it ain't broke . . . don't fix it."[34]

C. *Purpose of the Amendments*

Even those who oppose changes to the Act agree that clarification of its provisions is appropriate.[35] Differences arise, however, regarding the scope and extent of the changes. The stated purpose of the amendments is to clarify certain provisions of the Act; to clarify standards of conduct for business persons; and to provide more certainty in enforcement.[36]

The executive branch has not enforced the law vigorously, which, in itself, may be sufficient reason to amend the Act. Primary enforcement of the accounting standards lies with the Securities and Exchange Commission. The Commission may bring action under the antibribery provisions as well.[37] The Justice Department, however, retains primary jurisdiction over the enforcement of the antibribery provisions.[38] According to the Justice Department, there are fewer than 20 complaints of violations involving bribery each year. Bribery cases are defended vigorously and since the evidence is overseas, these cases present unique investigative problems.[39] Still the policy of the Justice Department remains to investigate all serious allegations of criminal behavior, and if the evidence develops, to bring suit.[40]

In addition to more efficient administration of the Act, legislators hope that clarification will lessen "unnecessary paperwork" and alleviate "needless concerns" about criminal liability.[41] For businesses, if the ambiguities in the Act surrounding the accounting and antibribery

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33. *House Hearing*, *supra* note 8, at 16 (statement of Representative Mica).

34. Rushford, *supra* note 4.

35. *Senate Hearing*, *supra* note 6, at 40 (statement of Senator Dixon); *The Antibribrery Act Splits Executives*, *supra* note 25, at 16.

36. *Senate Hearing*, *supra* note 6, at 2 (statement of Senator Heinz).

37. *Id.* at 57-63 (statement of Edward Fleischman, Commissioner, Securities and Exchange Commission).

38. *Id.* at 64-74 (statement of John C. Keenex, Deputy Assistant Attorney General, Criminal Division, Department of Justice).

39. Gerth, *Easing of Bribery Law Under Fire*, N.Y. Times Apr. 30, 1984, sec. D, at 1, col. 3.

40. *Id.*

41. 134 CONG. REC. S4,225 (daily ed. April, 19, 1988).

standards are resolved, these modifications may bring new opportunities for foreign investment. At the same time, legislators recognize that the amendments must proscribe bribery while improving the competitive position of U.S. firms in global markets.[42]

IV. Proposed Changes to the Act

Under a scheme of clarification, the amendments make a number of subtle, but significant, modifications to the Act. Changes in the accounting provisions limit criminal liability to knowing falsifications of accounting records, define reasonable detail and assurances by a prudent person standard, and require an issuer who owns 50% or less of the voting stock to exercise good faith influence on a subsidiary to assure the subsidiary's compliance with the accounting provisions.[43]

Amendments to the antibribery provisions replace the controversial "knowing or having reason to know" standard with the requirement that U.S. firms have actual knowledge that a third person may bribe a foreign official. Further, these amendments (1) define prohibited payments as those used to induce a foreign official to violate legal duties, (2) clarify the types of "facilitating payments" that are allowed, and (3) provide an affirmative defense for payments that are lawful in the foreign country and payments that constitute reasonable and bona fide expenditures directly related to business conducted in that country.[44]

Similarly, the modifications repeal the Eckhardt amendment. Under the new Act, conviction of the company is no longer necessary for prosecution of employees or agents who violate its provisions.[45] Other changes include increased criminal and civil sanctions, new civil subpoena authority in the Justice Department, and a procedure by which the Attorney General can issue guidelines regarding conduct that may violate the Act.[46] Lastly, the amendments require the President to pursue an international agreement to ban bribery abroad.[47]

Having examined the major provisions of the new Act, this article will focus on three problems that principally account for the impetus to amend the Act: the "reasonable detail" and "reasonable assurances"

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42. *Senate Hearing*, *supra* note 6, at 42 (statement of Senator D'Amato).

43. Foreign Corrupt Practices Act (amendments), Pub. L. 100-418, 102 Stat. 1415 (1988).

44. *Id.*

45. H.R. Conf. Rep. No. 576, *supra* note 2, at 923.

46. Foreign Corrupt Practices Act, *supra* note 43, at 1417-1423.

47. *Id.* at 1424-1425.

standards; the "reason to know" standard of culpability; and the problem of "facilitating payments."

V. CLARIFICATION OF THE ACCOUNTING PROVISIONS OF THE ACT

A. Criticisms of the Prior Standards

Criticism of the accounting provisions of the Foreign Corrupt Practices Act of 1977 focuses on the lack of clarity and certainty caused by the standards. Prior to the amendments, it was possible to incur liability for just one inaccurate record.[48] Uncertainty as to the interpretation of the provisions resulted in a proliferation of documentation and increased accounting costs.[49] In fact, concern over enforcement of technical and insignificant errors in records led to overcompliance without necessarily advancing the purposes of the statute.[50] A 1981 General Accounting Office study found that, as a result of compliance, accounting costs increased as much as 35 percent for many companies and significantly more than that for some.[51] This increase in accounting costs, however, did bring about certain positive results. These firms received benefits from the mandated internal control, such as, better management capability, more reliable data, and better information for decision-making.[52]

B. Actual Changes: Adoption of the Prudent Person Standard

The 1988 amendments to the accounting standards of the Act are minor, yet significant in responding to these increasing costs. While the original Act required "reasonable detail" in recordkeeping and "reasonable assurances" from internal accounting controls,[53] legislators failed to delineate the level of precision required under these provisions. Business people were unable to determine what would be considered reasonable in the eyes of the Securities and Exchange Commission ("SEC").[54] As a result, the new provisions define "reasonable detail"

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48. *Senate Hearing*, *supra* note 6, at 60 (statement of Edward Fleischman, Commissioner, Securities and Exchange Commission).

49. *House Hearing*, *supra* note 8, at 34-35 (statement of the Honorable Alexander H. Good, Director General, U.S. and Foreign Commerce Service).

50. *Senate Hearing*, *supra* note 6, at 74 (statement of John C. Kenny, Deputy Assistant Attorney General, Criminal Division, Department of Justice).

51. *House Hearing*, *supra* note 8, at 34 (statement of the Honorable Alexander H. Good, Director General, U.S. and Foreign Commerce Service).

52. Burton, *supra* note 28.

53. Foreign Corrupt Practices Act, 15 U.S.C. § 78m (1982).

54. *House Hearing*, *supra* note 8, at 2 (statement of Representative Roth).

and "reasonable assurances" at such "level of detail and degree of assurances as would satisfy prudent officials in the conduct of their own affairs."[55] Similarly, the 1988 amendments limit criminal liability to those who "knowingly" circumvent or fail to implement a system of internal accounting controls or "knowingly" falsify books or records.[56]

The SEC reports that enforcement of the original Act targeted knowing and reckless conduct. The Commission, however, tolerated certain deviations from the Act based on a rational cost-benefit analysis.[57] The new amendments' definition of "reasonable", and the limit on criminal liability, more accurately codifies this policy. The SEC now operates under congressional mandate rather than administrative discretion.

C. Effect of the Changes

The effect of these changes will be less ambiguity in compliance. By the imposition of the "prudent person" standard, a standard with which businesses and courts alike are familiar, legislators expect that the uncertainty that has been experienced heretofore will be replaced with more efficient systems. With these relatively minor changes in the 1977 Act, the costs associated with maintaining and controlling accounting records will decrease without offending the integrity of the Act itself. If these modifications result in greater certainty for businesses in the conduct of their affairs, we will lose very little, if anything, in terms of carrying out the intent of the original Act.

VI. CHANGE IN THE STANDARD OF CULPABILITY FOR THIRD PARTY PAYMENTS

A. Criticisms of the Prior Standard

1. Ambiguity

Like the accounting standards of the Act, the "reason to know" provision that imposed liability for third party payments, caused considerable anxiety among business executives. The difficulty lies in assuring that U.S. employees or agents are not making illegal payments abroad.[58] Under the 1977 Act, critics claim that American firms are

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55. H.R. CONF. REP. NO. 576, *supra* note 2, at 916.

56. *Id.*

57. *Senate Hearing*, *supra* note 6, at 58-59 (statement of Edward Fleischman, Commissioner , Securities and Exchange Commission).

58. Brownstein, *supra* note 26, at 2019.

asked to determine with certainty that a third person will not engage in illicit conduct, risking criminal prosecution if their judgment about that person is wrong.[59] Congress was strongly influenced by testimony that U.S. citizens should not be held strictly liable for the actions of foreign agents.[60] To many, however, this standard is unnecessarily ambiguous, and some commentators assert that the purpose of the Act could be met by a more objective and predictable standard.[61] Under Justice Department policy, the "reason to know" standard was never used as a basis for prosecution,[62] but prior to the amendments, the possibility existed that it could be so used.

Despite such provisions, due process requires that the legislature give reasonable notice of what conduct is prohibited.[63] Those who supported the 1988 amendments argued that the original Act did not give such notice, and, therefore, conceivably offended the constitutional guarantee of due process. Douglas Riggs, General Counsel for the U.S. Department of Commerce, related that under the 1977 Act, an executive could be liable for an unauthorized payment simply because he knew that payments are common in many parts of the world.[64] While liability probably would not lie in such a scenario, the illustration shows the breadth of the provision and substantiates the fear that executives experience under the Act.

2. Improper Standard

Perhaps the strongest criticism of the "reason to know" standard is that it is not a proper basis for imposing criminal liability carrying serious felony penalties.[65] This standard has no analogue in domestic bribery law. Thus, liability could exist for payments to foreign officials where no liability would exist if the payments were made to U.S. officials.[66] Steven Brogan testified that liability under domestic law de-

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59. *House Hearing*, *supra* note 8, at 76 (statement of Calman Cohan, Vice President, Emergency Committee for American Trade).

60. *Senate Hearing*, *supra* note 6, at 54 (statement of Malcolm Baldridge, Secretary of Commerce).

61. *Id.* at 45.

62. *Id.* at 65 (statement of John C. Kenney, Deputy Assistant Attorney General, Criminal Division, Department of Justice).

63. *House Hearing*, *supra* note 8, at 21 (statement of Representative Berman).

64. Fanning, *On the Docket: Am I My Brother's Keeper?*, FORBES, May 4, 1987, at 66.

65. *House Hearing*, *supra* note 8, at 97-98 (statement of Steven J. Brogan, Partner, Jones, Day, Reavis, and Pogue).

66. *Id.* at 96.

pends on the person's status as an accomplice to the intermediary. To be liable as an accomplice, the person must have acted with the intent that the crime be committed.[67] The "reason to know" standard does not require an intent that the crime be committed. Thus, U.S. firms confront serious criminal penalties for conduct that is merely negligent; such an outcome is inconsistent with modern criminal law.[68] Some commentators have suggested, however, that the "reason to know" standard, as interpreted by the courts, is tantamount to knowledge or intent. They further contended that recklessness is also equated with intent.[69]

Lastly, some authorities have argued that the criminal liability imposed for negligent conduct is modified by the word "corruptly" which actually limits liability to circumstances where there is intent.[70] This interpretation, however, intensified the confusion over the provisions of the original Act. If the word "corruptly" requires evil intent, then the "reason to know" standard becomes unnecessary, if not contradictory.[71]

B. Changes to the Act

1. Senate and House Versions of the Amendments

In view of these criticisms, the Senate version of the amendment made it unlawful to direct or authorize expressly or by "course of conduct" a third party to make an improper payment.[72] While the proposed amendment did not define "course of conduct,"[73] the Senate expressed grave concern over the problem of an executive who sticks his head "in the sand" and consciously ignores facts that indicate a bribe will be paid.[74] In fact, Senator Proxmire, who opposed any change in the Act, contended that no corporate official would expressly authorize a bribe or even engage in a course of conduct that would connect that official with a bribe.[75] In the wake of concerns that executives might avoid liability by disregarding particular circumstances, as well as the

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67. *Id.* at 95.

68. *Id.* at 97.

69. Elden & Sableman, *Negligence Is Not Corruption: The Scienter Requirement of the Foreign Corrupt Practices Act*, 49 GEO. WASH. L. REV. 819, 828-837 (1981).

70. *Id.* at 823.

71. *House Hearing*, *supra* note 8, at 100-101 (statement of Steven J. Brogan, Partner, Jones, Day, Reavis, and Pogue).

72. H.R. CONF. REP. No. S10,0004 (daily ed. July 15, 1987).

73. *Id.*

74. 133 CONG. REC. S10,0004 (daily ed. July 15, 1987).

75. 134 CONG. REC. S3,067 (daily ed. Mar. 25, 1988) (statement by Senator Proxmire).

overriding purpose of clarification, the Senate was prompted to make clear that such a "course of conduct" would not relieve one of liability.[76]

The House bill, on the other hand, imposed criminal liability on persons who make payments to third parties knowing that the payment will be used as a bribe.[77] The knowledge standard employed by the House version encompassed awareness, substantial certainty, or conscious disregard for a high probability that a bribe would be paid.[78] Also under the House bill, civil liability would attach where the payment is made while "recklessly disregarding" the fact that it would be used as a bribe. The term "reckless disregard" was defined as awareness and disregard of a substantial risk.[79]

2. Final Version of the Amendments

After committee consideration, the Senate conceded to the House. The final version employs a knowledge standard which includes a conscious purpose to avoid learning the truth about the payment, but deletes the "reckless disregard" element.[80] Since the knowledge standard typically encompasses conscious disregard of facts which would alert a reasonable person to probable violations,[81] congressional concern over this problem is largely alleviated by the standard adopted. The knowledge standard encompasses actual knowledge, as distinguished from the "reason to know" standard which the committee likened to a negligence standard.[82] For further clarity, the committee expressly stated that mere negligence or inadvertance is not a basis for liability.[83]

C. Effect of the Changes

Primarily aimed at alleviating the uncertainty that clouds the antibribery provisions of the 1977 Act, these changes in the required degree of culpability should stimulate foreign trade by small exporters who refrained from all activity in foreign lands for fear of violating the

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76. H.R. CONF. REP. NO. 576, *supra* note 2, at 919.
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. *Senate Hearing*, *supra* note 6, at 100 (statement of Allen B. Green, Chairman, Foreign Corrupt Practices Act Working Group, International Procurement Committee, Section of Public Contract Law, American Bar Association).
82. *Id.*
83. H.R. CONF. REP. NO. 576, *supra* note 2, at 920.

Act. In addition, larger American businesses will benefit from greater predictability in the enforcement of these provisions.

VII. CLARIFICATION OF "FACILITATING PAYMENTS" EXCEPTION

A. Criticisms of the Prior Provision

Under the original Act, payments to foreign employees whose duties were "ministerial or clerical" were not prohibited.[84] U.S. corporate executives view these payments, often called "facilitating" or "grease" payments, as necessary to conduct business in a foreign country. Since American executives cannot be sure whether a foreign official's duties are purely clerical, this exception alleviates very little uncertainty in the enforcement of the Act.[85] While the nature of U.S. officials' duties is sometimes difficult to ascertain, the problem is magnified in the case of foreign government officials whose duties are rarely clearly defined or articulated.[86] The 1977 Act nevertheless required an executive to determine whether the foreign official's duties were in fact "essentially clerical or ministerial", risking criminal liability if the determination was erroneous.[87]

B. Change: Exception for "Routine Governmental Action"

The amendments to the Act shift the focus from the person to whom payment was made to the purpose for which the payment was made. Specifically, the inquiry is whether the purpose of the payment falls within those permitted and whether such a payment is customary in that foreign country to facilitate or expedite performance.[88] To accomplish this clarification, the amendments create an exception for "routine governmental action,"[89] such that payments for this type of expediting activity are not prohibited. Under the new provisions, "routine governmental action" includes obtaining permits, processing government papers, providing police protection and mail pickup, providing utility service, loading and unloading cargo, and "actions of a similar

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84. Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-1, 78dd-2 (1982).

85. *House Hearing*, *supra* note 8, at 31 (statement of the Honorable Alexander H. Good, Director General, U.S. and Foreign Commerce Service).

86. *House Hearing*, *supra* note 8, at 79 (statement of Calman Cohan, Vice President, Emergency Committee for American Trade).

87. *Senate Hearing*, *supra* note 6, at 45 (statement of Malcolm Baldridge, Secretary of Commerce).

88. *House Hearing*, *supra* note 8, at 80 (statement of Calman Cohan, Vice President, Emergency Committee for American Trade).

89. H.R. CONF. REP. NO. 576, *supra* note 2, at 921.

nature."[90] The amendments clearly state that such routine action does not include any decision by a foreign official involving the awarding of new business or the continuation of business.[91]

C. *Effect of the Change*

Clarification of the exception, will alleviate much foreign trade disincentive for American firms. Many executives believe that such "grease payments" are necessary to accomplish even the smallest of tasks in some countries. If they are sure that such "facilitating payments" will not result in criminal prosecution, foreign trade may become a more attractive alternative.

VIII. CONCLUSION: A NEW FOREIGN CORRUPT PRACTICES ACT

The amendments to the Foreign Corrupt Practices Act promise to alleviate some of the uncertainty surrounding the Act since its inception. While opponents of the changes contend that the Act in its present form has been effective in stamping out foreign corruption, supporters claim the Act is costing America much in terms of lost trade and wasted resources. Since American firms would prefer to do business on a purely competitive basis, they support reasonable efforts to eliminate bribery,[92] but, to many firms, the existing Foreign Corrupt Practices Act is anything but reasonable.

Addressing these concerns, Congress effected subtle, but significant, changes to the prior law. With clarification of the accounting standards, accounting costs for U.S. businesses are expected to become more manageable, or at least less burdensome. Similarly, the changes to the antibribery provisions of the original Act promise to alleviate some of the uncertainty with regard to compliance. Specifically, Congress replaced the "reason to know" provisions with a knowledge standard of culpability. This standard encompasses a conscious disregard or deliberate ignorance of known facts. Finally, the amendments to the Act clarify the exception for "routine governmental action" by clearly defining what activities fall within this category, thereby promoting even greater certainty and incentive for American businesses abroad.

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90. *Id.* at 331, 336.
91. *Id.*
92. H. Weisberg & E. Reichengerg, *supra* note 18, at 30.