THE FOREIGN CORRUPT PRACTICES ACT: NOBLE MORALITY OR ARROGANT FUTILITY?

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Briefly: the notably controversial Foreign Corrupt Practices Act of 1977 prohibits the giving, or condoning, of "anything of value" to any foreign official to obtain assistance in directing business to the giver. Payments to foreign government employees with "essentially ministerial or clerical" duties are excluded, presumably to permit facilitating payments (i.e. "grease") to expedite, for example, favorable action by customs officials. This paper deals only with the anti-bribery sections of the Act. New record-keeping requirements have also been controversial.

The first comprehensive review of the impact of the Act appeared in a Report of the President to the Congress in September, 1980. It said that "the business community regards the F.C.P.A. as one of the most significant disincentives to exports....Most troublesome to U.S. exporters is the uncertainty associated with....key provisions." So troublesome are these ambiguities, says the Report, that "consultations with the private sector revealed instances in which U.S. companies....withdrew from joint ventures....; withdrew from existing markets; and declined to enter new markets."

Worth noting: (a) "It is virtually impossible to quantify the effect of these distincentives;" (b) "Corruption in international business transactions is forbidden even though the prohibition against bribery may in the short run result in some loss of U.S. exports....However, uncertainties should not be allowed to hamper exports;" (c) "The comprehensive solution to the problem of illicit payments in international business must ultimately be international agreement and collective action." Despite efforts, to date the U.S. had not succeeded in obtaining any such agreement.

Six months later, the General Accounting Office, after a major study, reported that over 30% of those engaged in foreign business said that "they had lost overseas business as a result of the Act." Over 50% of the respondents in the aircraft and construction survey so reported. However, "(these beliefs are) neither supported nor rejected by hard verifiable data." Such losses were undoubtedly in part the anticipated result of the anti-bribery provisions but were also in significant part the result of exporters' reactions to the ambiguities in the law.

Both Justice and the S.E.C. reacted sharply. They attacked the representativeness of the G.A.O. sample (Fortune's 1,000 excluded smaller businesses and financial institutions), G.A.O.'s interpretation of the results and the emphasis accorded that part of its findings which called for clarification of the Act. Both argued that the G.A.O. survey failed totally to distinguish between losses from the prohibition of bribery that were envisaged by the Act and those from alleged ambiguities which deterred exporter promotion. The S.E.C. believed the former (i.e. anticipated losses) were the bulk of the cases.

The G.A.O. replied: "We are unaware of any....study....that would lead the S.E.C. to reach such a conclusion....companies that reported a decrease in business were much more critical of the clarity of the anti-bribery provisions than companies who didn't experience a decrease."

These differences led this author to conduct an independent investigation. Extensive, confidential discussions were held with U.S. exporters and officers of several of the District Export Councils of the U.S. Department of Commerce. In addition, there was a comprehensive mail survey of 250 of the Fortune 500.

The findings: First, there is no hard evidence as to the amount of export business lost, either as a result of the prohibitions on bribery or the chilling effect of the ambiguities. Second, there is substantial concern about the perceived ambiguities but these concerns were by no means universal. Several major exporters stated that their own codes prohibited any payments that could conceivably be considered bribes and that bribery is simply unnecessary.

There were, however, strong statements that compliance with the Act was a deterrent to many exporters. For example: in response to the question "Payments apparently prohibited by the Act are frequently necessary to do business in....?, the following pattern clearly emerged: Canada, China, Scandinavia, the United Kingdom and West Germany were each cited by no respondent; Japan and France were rarely cited; Iran, Iraq, Italy, Mexico, Nigeria and Saudi Arabia were all commonly cited. As to whether an international code prohibiting such bribery would be genuinely helpful, few were sanguine and many were dubious.

Present status: No court actions have been brought by Justice. S.E.C. enforcement has been limited to obtaining injunctions in six cases and there is reason to believe that rigorous investigation cannot be anticipated.

Congressional hearings have been held during the past year. Charges similar to those referred to above were repeated and revisions continued to be demanded. No one apparently has asked for revocation of the Act.

The Senate has now passed a bill (S.708) that clarifies the Act in several respects but the House has as yet brought no bill out of committee. Odds are apparently against getting House action this session.

Major questions will persist for some. To what extent have U.S. exporters been impeded by the inability to offer bribes--losses clearly anticipated by the Act? What potential export volume has been lost because exporters were not prepared to face the possibility of heavy fines and/or imprisonment for unintentional violation of an ambiguous Act? These one may expect will go unanswered.

And one final question--not being raised publicly--will continue to nag. Having been unsuccessful in obtaining an international code, does the U.S. have a responsibility to remain the only country in the world to prohibit bribery to foreign officials? Reasonable men may find this moot.