Note

Sweetening the Deal: Strengthening Transnational Bribery Laws Through Standard International Corporate Auditing Guidelines

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Throughout the past several decades, the German conglomerate Siemens AG regularly bribed government officials in order to secure contracts and obtain favorable terms.[1] Internal investigations revealed that the company made more than $1.9 billion in bribes and other questionable payments to third parties.[2] After an investigation lasting more than three years, a German court fined the company $284 million, while fifteen other countries also conducted investigations into the payments.[3] Siemens is one of many large corporations that bribed foreign government officials to gain a competitive advantage.[4] But despite recent high-profile crackdowns, some developed na-

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1. Jack Ewing, *Siemens Braces for a Slap from Uncle Sam*, BUS. WK., Nov. 26, 2007, at 78, 78.

2. *Id.*

3. Peter H. Stone, *White-Collar Crime—Crackdown on Foreign Bribery*, NAT'L J., Jan. 12, 2008, at 34, 38; *see* Michael D. Goldhaber, *How the Massive Siemens Bribery Scandal Made U.S.-Style Internal Investigations the New Model for Europe*, AM. LAW., May 2008, at 92, 92 (stating that investigations of Siemens AG have occurred in "Austria, China, Greece, Hungary, Indonesia, Israel, Italy, France, Germany, Japan, Liechtenstein, Nigeria, Norway, Russia, Switzerland, and the U.S.").

4. *Cf.* Stone, *supra* note 3, at 35 (quoting a former chief of the U.S. Department of Justice's fraud section as stating that other major companies are being investigated for making large bribes).

tions are slow in pursuing the domestic corporations they suspect of this behavior.[5]

A bribe is the payment by a briber of something of value to the bribee in exchange for the bribee acting both in the briber's interest and contrary to the bribee's own duties.[6] With the rise of government in the civilized world, the rich sought to use their ample resources to influence those in power.[7] Such transactions made sense on a basic level; on the surface, they merely represented the giving of something of value in exchange for a service rendered. But society soon began to reject bribery. An Egyptian pharaoh announced a penalty of death for officials who took bribes,[8] and ancient Athens had a complex auditing procedure to ensure that public officials did not use their position for personal gain.[9]

When a person bribes a state official, the state suffers in a variety of ways. The poor of the society suffer since they cannot compete with the rich in the market for government services, be it road maintenance or criminal justice.[10] The country as a whole breaks down when it works only for pay, not out of the interest of fairness.[11] Government becomes inefficient and cannot provide social services at the same levels as less-corrupt governments.[12] Finally, bribery burdens businesses and the economy of a nation in general and stands as a market entry

5. *See* Nelson D. Schwartz & Lowell Bergman, *Payload: Taking Aim at Corporate Bribery*, N.Y. TIMES, Nov. 25, 2007, at BU1 (noting that Britain and Japan have declined to take part in global efforts to enforce existing antibribery laws).

6. *See* Stuart P. Green, *What's Wrong with Bribery*, *in* DEFINING CRIMES: ESSAYS ON THE SPECIAL PART OF THE CRIMINAL LAW 143, 145 (R.A. Duff & Stuart P. Green eds., 2005).

7. *Cf.* JOHN T. NOONAN, JR., BRIBES: THE INTELLECTUAL HISTORY OF A MORAL IDEA 10–11, 15 (1984) (describing examples of early legislation against bribery in the writings of the Babylonians, Egyptians, and Israelites).

8. *Id.* at 11.

9. *See* ARISTOTLE, THE ATHENIAN CONSTITUTION pt. 48 (P.J. Rhodes trans., Penguin Classics 1984).

10. *See, e.g.*, Press Release, Transparency International, Poor Families Hit Hardest by Bribery, Even in Rich Countries, Finds New TI Poll (Dec. 6, 2007), http://www.transparency.org/news_room/latest_news/press_releases/2007/2007_12_06_gcb_2007_en.

11. *See, e.g.*, Sanjeev Gupta et al., *Corruption and the Provision of Health Care and Education Services*, *in* THE POLITICAL ECONOMY OF CORRUPTION 111, 132 (Arvind K. Jain ed., 2001) ("[A] high level of corruption has adverse consequences for a country's child and infant mortality rates, percent of low-birthweight babies in total births, and dropout rates in primary schools.").

12. *See id.*

barrier for corporations.[13] Bribery thus results in real costs to societies and businesses, necessitating laws to reallocate the cost of the bribes to the corrupt individuals who make them.[14]

This Note explores a number of options to promote the punishment of corrupt businesses that bribe foreign officials, even when the prosecution of these businesses might not be in the public interest of the company's home country. Part I examines several past efforts to root out transnational bribery in the United States and Europe, most notably the U.S. Foreign Corrupt Practices Act. Part II critiques several new developments in the war against transnational bribery, including the passage of the Sarbanes-Oxley Act and the ratification of an antibribery treaty by members of the Organisation for Economic Cooperation and Development. Part III proposes a more robust treaty that not only outlaws transnational bribery, but also gives developed nations the tools and the motivation to detect it. Specifically, an international treaty against transnational bribery should prohibit the bribing of foreign government officials, punish companies that keep inaccurate and incomplete records, and provide incentives for private shareholders to support ratification and enforcement of treaty obligations. Such a treaty would level the playing field for businesses by cutting corruption and making corporations and governments more transparent to taxpayers and shareholders.

13. *See* Vito Tanzi & Hamid Davoodi, *Corruption, Growth, and Public Finances*, *in* THE POLITICAL ECONOMY OF CORRUPTION, *supra* note 11, at 89, 106 (finding a positive correlation between corruption and "the allocation of talent to unproductive activities" as well as a negative correlation between corruption and growth). *But see* Michael Johnston, *Measuring Corruption: Numbers Versus Knowledge Versus Understanding*, *in* THE POLITICAL ECONOMY OF CORRUPTION, *supra* note 11, at 157, 157 (noting the difficulty in measuring the true cost of corruption).

14. *But see* Llewellyn H. Rockwell, *The Right to Bribe*, FREE MARKET (Ludwig von Mises Inst., Auburn, Ala.) Aug. 1997, *available at* http://mises.org/freemarket_detail.aspx?control=126 (arguing that bribes are a part of doing business in foreign countries and the real cost to businesses are laws against bribery); Pierre Lemieux, *In Defense of Bribery*, DAILY ARTICLE, Aug. 8, 2005, http://www.mises.org/story/1884 (stating that some countries could not survive without bribes and a state which turns a blind eye to bribery is still better than a complete autocracy).

I. PAST ATTEMPTS TO OUTLAW TRANSNATIONAL BRIBERY

A. UNITED STATES: THE FOREIGN CORRUPT PRACTICES ACT

When Congress passed the Foreign Corrupt Practices Act (FCPA) in 1977,[15] it was the first attempt by a major Western power to crack down on its own citizens and companies for bribery of foreign government officials.[16] Congress passed the law in the wake of public revelations that several large, multinational corporations were using their considerable wealth to bribe foreign governments.[17] The Watergate scandal showed Congress that large American corporations used slush funds not only to contribute illegally to political campaigns, but also to bribe overseas foreign officials.[18] These revelations contributed to the sense among the public and some lawmakers that the nation needed new legislation to combat the problem of transnational bribery.[19]

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15. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended in scattered sections of 15 U.S.C. (2006)), *amended by* Foreign Corrupt Practices Act Amendment of 1988, 15 U.S.C. §§ 78dd-1 to -3, 78ff (2006), and International Anti-Bribery and Fair Competition Act of 1998, 15 U.S.C. §§ 78dd-1 to -3, 78ff (2006).

16. Arvind K. Jain, *Power, Politics, and Corruption*, *in* THE POLITICAL ECONOMY OF CORRUPTION, *supra* note 11, at 3, 9 (referring to the FCPA as "the oldest anti-bribery legislation in modern history"). But the FCPA was not the first U.S. legislation intended to combat corporate bribery, only the first to combat bribery of officials abroad. *See* GEORGE C. GREANIAS & DUANE WINDSOR, THE FOREIGN CORRUPT PRACTICES ACT 12 (1982) (discussing antibribery provisions in several other laws, such as the Meat Inspection Act, Grain Standards Act, Internal Revue Code, Federal Trade Commission Act, and Anti-Kickback Act).

17. *See* Wesley Cragg & William Woof, *Legislating Against Corruption in International Markets: The Story of the US Foreign Corrupt Practices Act*, *in* THE POLITICAL ECONOMY OF CORRUPTION, *supra* note 11, at 180, 181–82 (describing the public disclosure of the International Telephone and Telegraph Corporation's request to hire the CIA to prevent Salavadore Allende's election in Chile, and the revelations of kickbacks by Lockheed totaling more than $200,000, and bribes by Gulf Oil to Korea).

18. *See id.* at 183.

19. A number of other theories have been put forward to explain why the United States would unilaterally enact a law in which the penalties would hurt American citizens and companies but whose benefits would mostly be felt in other nations. Wesley Cragg and William Woof posit that the FCPA was a way for the U.S. to regain some of the moral high ground which it lost after Watergate and the Vietnam War. *Id.* at 187. John T. Noonan Jr. hypothesizes that the wave of anticorruption which spawned the FCPA had its roots both in a government trying to show that its citizens were less corrupt than the Soviet Union's, and in a society substituting government and corporate purity for the

The FCPA consists of two parts: accounting provisions and antibribery provisions. The provisions go hand-in-hand to ensure that a company accounts for these bribes—by their nature secret transactions—in the company's books.

The antibribery provisions make it a criminal offense to corruptly use interstate commerce to offer or give anything of value to an officer or employee of a foreign government, public international organization, political party, or candidate for office, for the purpose of influencing any act or omission that violates a lawful duty, or securing an improper advantage, in order to assist in obtaining or retaining business with, or directing business to, any person.[20] The bribery provisions also prohibit giving anything of value to an agent of one of the above-listed people, or to any third party, with the knowledge that all or some of the items of value will be offered or given to a prohibited recipient.[21] The provisions apply to any American citizen, national, resident, or person within the United States; or a business either organized in the United States or that issues securities under U.S. law; or any employee, officer or any other agent of the above.[22] It may be enforced against anyone inside the United States or against any U.S. person or entity outside the United States.[23]

The accounting provisions of the FCPA require that all publicly traded companies keep accurate and detailed records while also putting into place internal controls to ensure that all company transactions are authorized and accounted for.[24] The degree of detail necessary in record keeping is defined using a "reasonable detail" standard that would "satisfy prudent offi-

sexual purity lost in the 1960s and '70s. NOONAN, *supra* note 7, at 598–600. Others point to a desire to keep companies from interfering with U.S. foreign interests. Mark Pieth, *Introduction*, *in* THE OECD CONVENTION ON BRIBERY 3, 8 (Mark Pieth et al. eds., 2007).

20. *See* Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78dd-1 to -3 (2006) (applying to issuers, domestic concerns, or any person, respectively); *see also* Andrea Dahms & Nicolas Mitchell, *Foreign Corrupt Practices Act*, 44 AM. CRIM. L. REV. 605, 612–13 (2007) (describing the elements of a violation of the FCPA antibribery provisions). Although not defined in the statute, legislative history suggests that "'corruptly' connotes an evil motive or purpose, an intent to wrongfully influence the recipient." *See, e.g.*, S. REP. NO. 95-114, at 10 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 4098, 4108.

21. *See* 15 U.S.C. §§ 78dd-1(a), -3(a).

22. *See id.* §§ 78dd-1(a), -2(h).

23. *See id.* §§ 78dd-1(a), -2(a), -3(a).

24. *Id.* §§ 78m(a), (b)(2)–(7).

cials in the conduct of their own affairs."[25] The internal controls put in place must provide "reasonable assurances"[26] that all transactions have been properly authorized by management;[27] all transactions have been recorded and accounted for according to the "generally accepted accounting principles";[28] that the company's assets can only be accessed with management's approval;[29] and that the company's records are audited regularly, with steps taken to correct any inaccuracies found.[30]

The FCPA provides for both criminal and civil penalties. Fines can range as high as twenty-five million dollars for companies and five million dollars for individuals, while prison sentences for individuals may reach twenty years.[31]

The Securities and Exchange Commission (SEC) handles all civil investigations of publicly traded companies and may forward a case warranting criminal prosecution to the Department of Justice (DOJ).[32] The DOJ performs all criminal investigations of both public and private companies and civil investigations of private companies.[33] The SEC also handles civil injunctions against publicly traded companies and their officers and employees, while the DOJ files suits for monetary damages.[34]

B. INTERNATIONAL TREATIES

Although many nations in Europe have long had robust *domestic* antibribery laws, Europe was slow to follow the U.S.'s lead in passing foreign antibribery laws.[35] In fact, up until the

25. *Id.* § 78m(b)(7).

26. *Id.* § 78m(b)(2)(B). The FCPA later states that "reasonable assurances . . . mean such level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs." *Id.* § 78m(b)(7).

27. *Id.* § 78m(b)(2)(B)(i).

28. *Id.* § 78m(b)(2)(B)(ii).

29. *Id.* § 78m(b)(2)(B)(iii).

30. *Id.* § 78m(b)(2)(B)(iv).

31. *Id.* §§ 78dd-2(d), (g), -3(d)–(e), 78ff. In reality, fines can go much higher since the Alternative Fine Act allows for a fine of up to twice the gain to the corporation or individual. 18 U.S.C. § 3571(d) (2000).

32. *See* S. REP. NO. 95-114, at 11–12 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 4098, 4108.

33. *See id.*

34. *See id.*

35. The United Kingdom, for example, has a history for prosecuting domestic bribery since at least 1769, LAW COMM'N, REPORT NO. 248, LEGISLATING THE CRIMINAL CODE: CORRUPTION ¶ 2.2 n.4 (1997), but did not outlaw foreign corruption until 2001, Ingeborg Zerbes, *Article 1—The Offence of Bribery*

late 1990s, many European nations even allowed companies to deduct bribes to foreign officials from their taxes.[36] The reasons for European reluctance to enact such laws are varied, but one thing is clear: European companies benefited competitively from the ability to operate in emerging markets with fewer restrictions than their American counterparts.[37]

The end of communism and the rise in economic globalization brought the nations of Europe together to start addressing transnational bribery.[38] Although each European nation implemented laws banning transnational bribery differently,[39] several treaties established guidelines for their signatories to follow.

In December 1997, members of the Organisation for Economic Co-operation and Development (OECD) signed the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the OECD Convention).[40] Thirty-seven nations ratified the OECD Convention, including all of Western Europe.[41] The convention generally requires that each signatory prohibit the bribing of foreign officials, set criminal and civil penalties for violations, and either extradite or prosecute its nationals who are accused of bribery by another

of Foreign Public Officials, *in* THE OECD CONVENTION ON BRIBERY, *supra* note 19, at 45, 87.

36. Org. for Econ. Cooperation & Dev., *Testing the Convention*, OECD OBSERVER, March 2007, at 7, 7, *available at* http://www.oecdobserver.org/news/fullstory.php/aid/2161/Testing_the_convention.html ("Not long ago, writing off bribes against tax was even allowed in several OECD countries; no longer.").

37. *See* Pieth, *supra* note 19, at 5.

38. *See id.* at 5–6; *see also* Dahms & Mitchell, *supra* note 20, at 624; John T. Noonan Jr., *Struggling Against Corruption*, *in* PRIVATE AND PUBLIC CORRUPTION 227, 229–30 (William C. Heffernan & John Kleinig eds., 2004).

39. *See generally* ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION (2007).

40. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, 112 Stat. 3302, 37 I.L.M. 1 (1998).

41. The European nations to ratify the OECD are Austria, Belgium, Bulgaria, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, the Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, and the United Kingdom. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, OECD CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS, RATIFICATION STATUS AS OF 12 MARCH 2008, http://www.oecd.org/dataoecd/59/13/40272933.pdf. Several non-European nations have ratified the agreement as well, including Argentina, Australia, Brazil, Canada, Chile, Japan, Korea, Mexico, New Zealand, South Africa, and the United States. *Id.*

signatory.[42] It also contains provisions for continued monitoring of the implementation of the convention by signatories.[43] The OECD publishes its findings on how well each signatory has implemented the text and spirit of the convention through legislation and enforcement.[44] Although the OECD convention largely succeeded in ensuring implementation of laws in each signatory nation, observers have criticized its lack of enforcement mechanism and its failure to ban all aspects of bribery.[45]

The Council of Europe (CoE) adopted conventions addressing criminal and civil penalties for corruption in January and November 1999, respectively.[46] The CoE Criminal Law Convention on Corruption directs its signatories to adopt laws that ban the giving and receiving of bribes, both domestically and transnationally.[47] In 2003, the Council of Europe expanded the criminal ban on transnational bribery to include bribes to arbitrators and jurors.[48] Although the CoE adopted a mechanism for monitoring each nation's progress in implementation and enforcement, the results of the monitoring remain confidential, unlike the OECD Convention.[49] The Convention has been signed by forty-four of the Council's forty-seven member nations.[50]

42. *See* Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, *supra* note 40, art. 1.

43. *Id.* art. 12.

44. *See, e.g.*, Organisation for Economic Co-Operation and Development, *Report on France*, *in* IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION, *supra* note 39, at 79.

45. *See, e.g.*, Dahms & Mitchell, *supra* note 20, at 624 & n.127 (citing concerns that the OECD enforcement varies by nation, and noting that the convention does not eliminate the bribery of foreign political parties or candidates for office, or the tax deductibility of bribes).

46. Criminal Law Convention on Corruption, Jan. 27, 1999, Europ. T.S. No. 173, 38 I.L.M. 505 [hereinafter CoE Criminal Law Convention on Corruption]; Civil Law Convention on Corruption, Nov. 4, 1999, Europ. T.S. No. 174 [hereinafter CoE Civil Law Convention on Corruption].

47. *See* CoE Criminal Law Convention on Corruption, *supra* note 46, ch. II, arts. 2–3, 17.

48. Additional Protocol to the Criminal Law Convention on Corruption, May 15, 2003, Europ. T.S. No. 191, *available at* http://conventions.coe.int/Treaty/EN/Treaties/Html/191.htm.

49. *See* CoE Criminal Law Convention on Corruption, *supra* note 46, ch. III, art. 24. A unit known as the Group of States Against Corruption, or GRECO, is responsible for the monitoring. *Id.*; *see also* STUART H. DEMING, THE FOREIGN CORRUPT PRACTICES ACT AND THE NEW INTERNATIONAL NORMS, 108 (2005) (comparing the confidential nature of GRECO's reports with the public nature of the OECD's country reports).

50. *See* Council of Europe, Chart Showing Signatures and Ratifications of

The companion convention the Council adopted, the CoE Civil Law Convention on Corruption, mandates that each signatory create a private right of action for recovery of damages due to corruption.[51] The private right of action is unlike anything found in either the OECD Convention or the FCPA.[52] Forty-one Council members signed, and thirty-two ratified, the CoE Civil Law Convention on Corruption.[53]

In 2003, the United Nations also adopted a convention against bribery.[54] The U.N. Convention Against Corruption calls on signatories to ban, among other things, bribery, money laundering, trading in influence, and embezzlement.[55] Like the CoE Civil Convention on Corruption, the U.N. Convention Against Corruption allows for a private right of recovery,[56] while, like the FCPA, it also includes accounting provisions.[57] The U.N. convention has been signed by 141 of the 153 U.N. members and ratified or accepted by 111.[58]

Conventions and Agreements Concluded within the Council of Europe [hereinafter Chart Showing Signatures], http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=173&CM=1&CL=ENG.

51. CoE Civil Law Convention on Corruption, *supra* note 46, ch. I, art. 1.

52. Under the FCPA, a private citizen cannot generally bring a lawsuit against a company that bribes foreign officials. *See* Lamb v. Phillip Morris, Inc., 915 F.2d 1024, 1027–30 (6th Cir. 1990); J.S. Serv. Ctr. Corp. v. Gen. Elec. Technical Servs. Co., 937 F.Supp. 216, 225 (S.D.N.Y. 1996) ("The FCPA . . . provides no explicit private right of action."). *Compare* CoE Civil Law Convention on Corruption, *supra* note 46 (providing a private right of action), *with* Foreign Corrupt Practices Act of 1977, Pub. L. 95-213, 91 Stat. 1494 (codified as amended in scattered sections of 15 U.S.C. (2006)), *amended by* Foreign Corrupt Practices Act Amendment of 1988, 15 U.S.C. §§ 78dd-1 to -3, 78ff (2006), *and* International Anti-Bribery and Fair Competition Act of 1998, 15 U.S.C. §§ 78dd-1 to -3, 78ff (2006) (criminalizing bribery and providing a civil action to be brought only by the Attorney General), *and* Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, *supra* note 40, 112 Stat. at 3302–03, 37 I.L.M. at 4, (criminalizing bribery).

53. *See* Chart Showing Signatures, *supra* note 50.

54. United Nations Convention Against Corruption, G.A. Res. 58/4, U.N. Doc. A/RES/58/422 (Dec. 11, 2003).

55. *Id.* arts. 15–24.

56. *Id.* art. 35.

57. Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78q(b) (2006); *id.* art. 12.

58. *See* Signatories to the United Nations Convention Against Corruption, http://www.unodc.org/unodc/en/treaties/CAC/signatories.html (last visited Jan. 19, 2009). Several other international conventions also address transnational bribery. The European Union passed a convention in 1997 outlawing bribery of EU officials or members of EU governments, but it did not apply to officials outside of Europe. *See* Convention on the Fight Against Corruption Involving Officials of the European Communities or Officials of Member States of the

C. EUROPEAN LEGISLATION

European nations, which before their ratification of international conventions had few if any laws outlawing transnational bribery, have since implemented the requirements of the OECD and CoE treaties in a variety of ways.[59] By way of example, this section will examine two approaches to legislating against transnational bribery.

The United Kingdom, which had existing common law[60] and statutory bribery offenses,[61] simply modified these existing

European Union, May 26, 1997, 1997 O.J. (C 195) 1 [hereinafter EU Corruption Convention]. Also in 1997, the Organization of American States ratified a convention that binds most nations of the Western Hemisphere to pass and enforce strict laws against transnational bribery. *See* Organization of American States, Inter-American Convention Against Corruption arts. II–III, Mar. 29, 1996, 35 I.L.M. 724, 728–29 [hereinafter OAS Corruption Convention]. The Pacific Basin Economic Council adopted a statement the same year that "encourages" its twenty members to adopt laws banning transnational bribery and forcing businesses to abide by FCPA-like accounting standards. Pacific Basin Economic Council [PBEC], *Statement on Standards for Transactions Between Business and Governments* (Nov. 21, 1997), http://www.pbec.org/index2.php?option=com_docman&task=doc_view&gid=61&itemid=24.htm. The African Union adopted a convention in 2003 that prohibited public and private corruption while endorsing whistleblower provisions, but it has only been adopted by twenty-seven of the fifty-three nations of Africa. *See* African Union, Convention on Preventing and Combating Corruption, arts. 5, 12, July 11, 2003, 43 I.L.M. 5 [hereinafter AU Corruption Convention]; African Union, List of Countries Which Have Signed, Ratified/Acceded to the African Convention on Preventing and Combating Corruption, http://www.africa-union.org/root/au/Documents/Treaties/List/African Convention on Combating Corruption.pdf (last visited Dec. 4, 2008).

59. For a complete report on the laws regarding transnational bribery in Europe, see THE OECD CONVENTION ON BRIBERY, *supra* note 19, at 289, 553–62 (stating that enforcement of the OECD Convention is "subject to the applicable rules and principles of each party," and listing the applicable sanctions for each party to the Convention); ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION (2004 & 2005) (providing a report for each signatory that describes the legal provisions in place to combat bribery and a review of their effectiveness); Organisation for Economic Co-operation and Development, OECD Anti-Bribery Convention: National Implementing Legislation [hereinafter OECD Anti-Bribery Convention], http://www.oecd.org/document/30/0,3343,en_2649_34859_2027102_1_1_1_1,00.htm (last visited Jan. 19, 2009) (listing members' national implementing legislation by country).

60. *See* LAW COMM'N, *supra* note 35, at ¶¶ 2.2–.5 (1997) (citing a treatise and several cases, most notably *R. v. Whitaker*, [1914] 3 K.B. 1283, in which a colonel accepted a bribe from a catering company in return for allowing the caterers to serve the colonel's regiment).

61. Prevention of Corruption Act 1916, 6 & 7 Geo. 5, c. 64 (Eng.); Prevention of Corruption Act 1906, 6 Edw. 7, c. 34 (Eng.); Public Bodies Corrupt Practices Act, 1889, 52 & 53 Vict., c. 69 (Eng.); *see also* LAW COMM'N, *supra* note 35, at ¶¶ 2.6–.16 (citing the Prevention of Corruption Acts 1889 to 1916);

laws by applying them to foreign agents and governments[62] while also extending U.K. jurisdiction to apply to any British national operating outside of the country.[63] British law currently provides for a criminal penalty of seven years imprisonment with no limit on fines for persons or corporations.[64]

France complied with its convention obligations by passing an act that amended its Criminal Code and Criminal Procedure to outlaw transnational bribery,[65] in addition to the existing provisions that prohibited domestic bribery.[66] French law currently provides for a maximum incarceration penalty of ten years and a €150,000 fine for persons who violate the law and a fine of €750,000 for companies that violate the law, among other provisions.[67]

II. CRITIQUE OF CURRENT EFFORTS TO CURB TRANSNATIONAL BRIBERY

Although the United States and most European nations passed strict laws to prohibit transnational bribery,[68] less accord exists in the enforcement of these laws. The United States

WORKING GROUP ON BRIBERY IN INTERNATIONAL BUSINESS, ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, UNITED KINGDOM: REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 RECOMMENDATION, PHASE I BIS REPORT 2–3 (2002), *available at* http://www.oecd.org/dataoecd/12/50/2498215.pdf (describing antibribery laws of the United Kingdom prior to the Anti-Terrorism, Crime and Securities Act of 2009).

62. *See* Anti-Terrorism, Crime and Security Act 2001, 49 Eliz. 2, c. 24, § 108(1) (Eng.). The laws were changed by simply redefining their terms to include bribery of foreign government officials within the scope of the old laws. *See id.* § 108(2)–(4).

63. *See id.* § 109.

64. *See* THE OECD CONVENTION ON BRIBERY, *supra* note 19, at 559.

65. Law No. 2000-595 of June 30, 2000, Journal Officiel de la République Française [J.O.] [Official Gazette of France], July 1, 2000, p. 9944, *translated in* Organisation for Economic Co-operation and Development, *Report on France*, *in* IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION 82–85 (2005).

66. *See* Organisation for Economic Co-operation and Development, *Report on France*, *in* IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION 7 (2005) (referring to existing domestic bribery laws in Articles 433-1 and 432-11 of France's Criminal Code that "prosecuted only active and passive bribery involving French persons entrusted with public authority, charged with a public service mission, or holding an elected office").

67. *See* THE OECD CONVENTION ON BRIBERY, *supra* note 19, at 554–55.

68. *See generally* Ingeborg Zerbes, *Article 1—The Offence of Bribery of Foreign Public Officials*, *in* THE OECD CONVENTION ON BRIBERY, *supra* note 19, at 45, 84–119 (critiquing the implementation of transnational antibribery laws by signatories to the OECD Convention).

enforced its antibribery legislation with renewed vigor,[69] while European nations have been slow to prosecute offending corporations.[70]

A. THE UNITED STATES: NEW DRIVE AND NEW LAW

1. Increasingly Vigorous Enforcement

The United States has seen a large growth in enforcement under the FCPA by both the SEC and the DOJ.[71] In recent years, the SEC hired hundreds of employees to enforce all corporate compliance cases, the DOJ hired two attorneys to focus only on FCPA cases, and the FBI created a new four-person unit that handles only FCPA investigations.[72] Government officials publicly announced that they will be monitoring companies for FCPA violations more carefully than they have before.[73]

As a result of these changes, although only fifty persons and companies were named as defendants in the first twenty years after the FCPA was enacted, there were eighty-two defendants between 1997 and July 2007.[74] At the end of 2007, the U.S. government had open investigations into eighty-four companies for FCPA violations.[75]

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69. *See, e.g.*, Emma Schwartz, *Hiking the Cost of Bribery*, U.S. NEWS & WORLD REP., Aug. 13, 2007, at 31 ("[I]n recent years, federal prosecutors have begun cracking down on companies and their executives for bribing officials overseas. . . . Using a 1977 law, the Foreign Corrupt Practices Act, the feds have prosecuted four times the number of foreign bribery cases in the past fives years as in the preceding five.").

70. *See, e.g.*, Matthew Saltmarsh, *OECD Fears Weakening of U.K. Bribery Stance*, INT'L HERALD TRIB. (Paris), Mar. 15, 2007, at 10 ("An OECD working group said that previous recommendations to correct shortcomings in British law remained unimplemented, and Britain had failed to bring a single prosecution in foreign bribery cases since introducing a new law in 2001.").

71. *See, e.g.*, Russell Gold & David Crawford, *U.S., Other Nations Step Up Bribery Battle*, WALL ST. J., Sept. 12, 2008, at B1 (describing the DOJ prosecution of former Halliburton Co. executive Albert J. "Jack" Stanley and the SEC settlement with Baker Hughes Inc.); Schwartz, *supra* note 69.

72. Sue Reisinger, *On Bended Knee: Companies Are Disclosing Overseas Bribes in Record Numbers. But Is Confession Always Necessary?*, AM. LAW., July 2007, at 73, 74.

73. *See, e.g.*, Eric Torbenson, *Tougher Laws Have Reduced Financial Fraud, SEC Official Says*, DALLAS MORNING NEWS, Aug. 14, 2007, at A5 (quoting Deputy Assistant Attorney General Barry Sabin).

74. *See* William F. Pendergast & Jennifer D. Riddle, *Comments Addressing Recent and Future FCPA Enforcement Issues*, *in* THE FOREIGN CORRUPT PRACTICES ACT 153, 157 (2007).

75. *See* Gold & Crawford, *supra* note 71 ("The U.S. federal government

Penalties in the United States have also been increasing. The SEC and the DOJ fined Baker Hughes, Inc. forty-four million dollars for the bribery of Kazakhstani officials through third-party agents in Kazakhstan and Angola in order to obtain an oil services contract.[76] Titan Corporation reached a settlement with the U.S. government in which it paid more than twenty-eight million dollars in civil and criminal penalties for payments it made to the re-election campaign of the president of Benin in exchange for receiving higher fees for its telecommunications contract with the country.[77] As recently as August 2007, Textron Inc. agreed to disgorge $2.7 million in profits, and additionally pay nearly $2 million in fines and penalties for bribes, including kickbacks made to the government of Iraq relating to the U.N. Oil for Food Program.[78] Wary of stricter enforcement, companies increasingly self-report violations[79] and enter into deferred or nonprosecution agreements with U.S. Attorneys to avoid costly litigation and bad press.[80]

had open investigations into 84 companies at the end of last year.").

76. *See* Lucinda A. Low, et al., *Enforcement of the FCPA in the United States: Trends and the Effects of International Standards*, *in* THE FOREIGN CORRUPT PRACTICES ACT, *supra* note 72, 101, 123–24; Reisinger, *supra* note 72.

77. *See* Low et al., *supra* note 76, at 126–27; Reisinger, *supra* note 72.

78. Litigation Release, U.S. Sec. and Exchange Comm'n., SEC Files Settled Books and Records and Internal Controls Charges Against Textron Inc. for Improper Payments to Iraq Under the U.N. Oil for Food Program (Aug. 23, 2007), http://www.sec.gov/litigation/litreleases/2007/lr20251.htm. These amounts include disgorgement of $2,284,579 in profits, $450,461.68 in interest, a civil penalty of $800,000 pursuant to the SEC prosecution, and a $1,150,000 fine pursuant to a DOJ nonprosecution agreement. *Id.*

79. Gold & Crawford, *supra* note 71 (noting that companies are increasingly self-reporting their FCPA violations in hopes of receiving more lenient penalties).

80. Since August 2007, the following companies have entered into deferred or nonprosecution agreements with U.S. Attorney offices over allegations of FCPA violations: Faro Technologies, Inc. (June 2008, $2.95 million); AGA Medical Corp. (June 2008, $2 million); Willbros Group, Inc. (May 2008, $32.3 million); AB Volvo (Mar. 2008, $19.6 million), Flowserve Corp. (Feb. 2008, $10.5 million), Westinghouse Air Brake Technologies Corp. (Feb. 2008, $677,000), Lucent Technologies (Dec. 2007, $2.5 million), Akzo Nobel N.V. (Dec. 2007, $3.75 million), Chevron Corp. (Nov. 2007, $27 million), Ingersoll-Rand (Oct. 2007, $7 million); York International Corp. (Oct. 2007, $22 million), Paradigm B.V. (Sept. 2007, $1 million), Textron (Aug. 2007, $4.65 million) (agreements on file with author).

2. Passage of Sarbanes-Oxley

Observers offer a variety of reasons for the increase in prosecutions, plea agreements, and voluntary disclosures,[81] but a general consensus exists that the 2002 passage of the Sarbanes-Oxley Act[82] spurred increased prosecutions due to the increase of information to which the government had access.[83]

Congress passed the Sarbanes-Oxley Act (SOX) in 2002 in response to the public unraveling of several companies due to fraudulent transactions and the misreporting of corporate earnings.[84] The law includes many provisions designed to bolster the public's trust in corporate America,[85] but most notably re-

81. *See, e.g.*, Low, et al., *supra* note 76, at 8 (citing changes to the federal sentencing guidelines); Schwartz, *supra* note 69 (citing an increase in international cooperation and an uptick in the amount of corporate mergers and acquisitions); Claudius O. Sokenu, *Record-Setting Penalties Show New Push Under FCPA*, N.Y. L. J., Aug. 6, 2007, (citing cooperation between the SEC and the DOJ as a reason for an increase in prosecution); *cf.* David Hess, *A Business Ethics Perspective on Sarbanes-Oxley and the Organizational Sentencing Guidelines*, 105 MICH. L. REV. 1781, 1783 (2007) (noting that the Federal Guidelines were amended in 2004 due to a requirement in the Sarbanes-Oxley Act that they be reviewed).

82. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 15 and 18 U.S.C.); s*ee also* Press Release, White House, President Bush Signs Corporate Corruption Bill (July 30, 2002), http://www.whitehouse.gov/news/releases/2002/07/20020730.html.

83. *See* Low, et al., *supra* note 76 (describing how the enactment of Sarbanes-Oxley has intensified ethics and compliance programs of U.S. listed companies); Reisinger, *supra* note 72 ("The Sarbanes-Oxley Act of 2002 mandated extra record keeping duties, compliance programs, and 'whistle blower' hotlines that have turned up numerous bribe allegations."); Schwartz, *supra* note 69 (describing how Sarbanes-Oxley has "increased reporting requirements for public companies" leading "many firms to beef up internal investigation units" and provided incentives to disclose wrongdoing).

84. *See* Suzanne Malreaux, *Bush Signs Bill to Stop 'Book Cooking,'* CNN, July 31, 2002, http://archives.cnn.com/2002/ALLPOLITICS/07/30/bush.corporate.reform/index.html; *cf.* Hess, *supra* note 81, at 1782 (describing the persistent corruption concerns and the role of SOX in "restoring public trust in the marketplace").

85. *See, e.g.*, 148 CONG. REC. E1451 (daily ed. July 22, 2002) (statement of Rep. Sununu) ("[Sarbanes-Oxley will include] a requirement for real-time corporate disclosure, [in order to] better protect investors. . . . [It will] strengthen[] the penalties for corporate fraud, [which] will act as a better deterrent to those seeking to stretch or, [sic] test the boundaries of the law. . . . [And it will include an] investor restitution provision [which] will enable investors who lose money in the markets as a result of corporate malfeasance to reclaim the gains of corporate criminals."). Sarbanes-Oxley also includes a prohibition on nonaudit work by auditing firms, Sarbanes-Oxley Act §§ 201–209, a requirement that companies establish independent audit committees, § 301, the creation of an oversight board, §§ 101–109, and a prohibition on loans to corporate executives, § 402.

quires certification of company financial statements by top executives,[86] protects whistleblowers who report suspected corporate fraud from retaliation,[87] and holds corporate management and auditors responsible for maintaining and assessing an internal corporate system for financial reporting to the SEC.[88] The Act caused a good deal of consternation among corporations, which balked at the estimated cost of the new requirements.[89]

Additional certification and reporting requirements of Sarbanes-Oxley bolstered the existing accounting provisions of the FCPA and gave the SEC new information about the goings-on inside America's publicly traded companies.[90] It also upped the ante for companies, exposing corporate directors to increased liability if they chose not to comply with the law.[91] Under the pressure, many corporations chose to report dubious transactions that may or may not have constituted FCPA violations rather than take the risk that the SEC would find out on its own later.[92]

B. EUROPE: MIXED SIGNALS ON BRIBERY

Though the U.S. government turned up the heat on transnational bribery violations, enforcement in Europe was more lukewarm. The United Kingdom especially has been called to task for failing to enforce its laws against transnational bribery.[93] In early 2007, the U.K. halted an investigation into weapons manufacturer BAE Systems, with Prime Minister Tony Blair intimating that the prospect of losing "thousands of British jobs and billions worth of pounds for British industry"

86. Sarbanes-Oxley Act § 1350(a).

87. *Id.* § 1514A(a).

88. *Id.* §§ 7241(a), 7262.

89. *See, e.g.*, *Auditing Sarbanes-Oxley: A Price Worth Paying?*, ECONOMIST, May 21, 2005, at 71 ("America's businessmen are deeply unhappy, and with reason: the initial costs of the [Sarbanes-Oxley Act] have been bigger than expected."). A study by Ivy Xiying Zhang of the William E. Simon Graduate School of Business Administration at the University of Rochester predicts that the law will cost businesses $1.4 trillion. *Id.*

90. *See* Schwartz, *supra* note 69.

91. *Id.* ("The Sarbanes-Oxley Act of 2002 . . . increased reporting requirements for public companies and put the liability for their veracity directly on top executives.").

92. *See* Reisinger, *supra* note 72 (stating that, according to a case digest published by Shearman & Sterling LLP, from 2005 to 2007, twenty-one of the twenty-five new FCPA cases were self-reported).

93. Saltmarsh, *supra* note 70.

was not worth pursuing prosecution.[94] In addition, the U.K. government failed to prosecute any transnational bribery cases as of early 2007, despite numerous investigations.[95] A report by Transparency International in September 2008 suggests that little progress has been made since then.[96] An organization official lamented: "The Government has known for a decade that it had to act; but it has dithered indecisively while the country's reputation has been ruined."[97]

France, Italy, and the Netherlands have increased the amount of transnational bribery cases prosecuted.[98] But anecdotal evidence seems to indicate that these nations are not aggressive enough.[99] In one case, for example, Costa Rica brought charges against the French telecommunications company Alcatel in 2004, though prosecution by France itself was not forthcoming.[100]

Germany is an exception in Europe, with investigations of Bristol-Myers, GlaxoSmithKline, DaimlerChrysler, Philips, and Siemens AG currently underway.[101] As of October 2007, charges have been filed against Siemens executives involving the bribery of Italian officials.[102]

The wide discrepancy in prosecution of laws against transnational bribery requires a reevaluation of how regulators around the world pursue and put an end to this widespread international corruption.

94. Christopher Adams et al., *Blair Defends Move to Halt BAE Inquiry*, FIN. TIMES (London), Dec. 15, 2006.

95. *See* Saltmarsh, *supra* note 70.

96. *Cash for Honours Blackens UK's Reputation*, BIRMINGHAM POST, Sept. 24, 2008, at 9.

97. *Id.* (quoting Chandrashekhar Krishnan, executive director of Transparency International UK).

98. Doreen Carvajal, *A Global Effort to Root Out Corporate Bribery is Flagging*, INT'L HERALD TRIB. (Paris), July 18, 2007, at 9.

99. For example, these nations often will not prosecute instances of bribery of foreign officials by their domestic corporations, even when other nations found sufficient evidence to bring charges.

100. Carol Matlack et al., *Cracking Down on Corporate Bribery*, BUS. WK., Dec. 6, 2004, at 30.

101. Margaret Ayres et al., *Developments in U.S. and International Efforts to Prevent Corruption*, 41 INT'L LAW. 597, 606 (2007).

102. Saltmarsh, *supra* note 70.

III. RETHINKING THE UNILATERAL APPROACH TO CORPORATE AUDITING REQUIREMENTS

In order to get a tighter grip on foreign bribery, member states of the OECD should pass a new convention, called the Corporate Auditing and Certification Convention, which would require management of all companies publicly traded on stock exchanges within member states to certify that company books are accurate, certify that management has control over corporate assets, and have an independent auditor certify that such control existed. In addition, the OECD convention would mandate that national auditor boards would confer on a regular basis to ensure that auditing standards would be similar from nation to nation. The benefits that ratification would bring to shareholders in companies traded in signatory nations would make it more feasible to garner enough support to ratify the convention.

A. A NEW OECD CONVENTION ON CORPORATE AUDITING AND CERTIFICATION

First, member states would need to pass laws requiring corporate executives of publicly traded companies to certify that their companies' financial statements are accurate[103] and provide criminal sanctions for knowingly filing an incorrect financial statement.[104] These provisions would create greater accountability with corporate management for financial irregularities and prevent companies from claiming that they did not realize that employees created slush funds or bribed foreign officials.

Second, member states would need to pass laws requiring corporate executives of publicly traded companies to certify that management had control over all of the company's assets and have an external auditor attest to that fact.[105] This provision would enact the recommendations that the Council of the OECD made in May 1997 but that were not incorporated into

103. *Cf.* Sarbanes-Oxley Act of 2002 §§ 302(a)(1)–(3), 15 U.S.C. §§ 7241(a)(1)–(3) (2006) (requiring a signing officer to attest that the financial report fairly presents the financial condition of the corporation).

104. *Cf. id.* § 906(a), 18 U.S.C. § 1350(a) (2006) (requiring each periodic financial report to contain a written statement of the CEO and CFO (or equivalent thereof) that the report fairly represents the financial condition of the corporation).

105. *Cf. id.* § 404, 15 U.S.C. § 7262 (2006) (requiring management to establish adequate internal control structures for financial reporting).

the Convention on Bribery.[106] In addition, this provision would secure the obligation for internal controls with the requirement that both corporate management and external auditors affirm that adequate internal controls existed.

Finally, member states would agree to create national accounting boards that would confer on a regular basis to create substantially similar auditing guidelines for all OECD member nations.[107] These accounting boards would create the specific guidelines that corporate auditors would have to abide by when auditing the internal controls of publicly traded companies.

B. NECESSARY STEPS TOWARDS IMPLEMENTATION

The Corporate Auditing and Certification Convention, much like the OECD Convention on Bribery, would be drafted by the Council of the Organisation for Economic Co-operation and Development and come into force only after a majority of the largest exporting nations had signed the document.[108] By way of example, a few nations will be considered to demonstrate the necessary changes that they would need to enact when becoming a part of the new convention.

After the United States becomes a signatory to the Corporate Auditing and Certification Convention, Congress would not need to make many changes to existing United States law. The Sarbanes-Oxley Act already requires corporate management to certify the accuracy of books and adequacy of control over assets, as well as to have auditor certification.[109] Regulations concerning the Public Company Accounting Oversight Board, also created by the Sarbanes-Oxley Act, could be mod-

106. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, REVISED RECOMMENDATION OF THE COUNCIL ON COMBATING BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS (1997), *available at* http://www.oecd.org/document/32/0,3343,en_2649_34859_2048160_1_1_1_1,00.html.

107. *Cf.* Sarbanes-Oxley Act of 2002 §§ 101, 103, 15 U.S.C. §§ 7211, 7213 (2006) (establishing the Public Company Accounting Oversight Board to oversee and audit public companies).

108. *Cf.* Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, *supra* note 40.

109. Section 302 of the Act requires that management of public companies certify that their financial statements are accurate "in all material respects." Sarbanes-Oxley Act of 2002 § 302(a)(3), 15 U.S.C. § 7241(a)(3). Section 906 contains provisions for criminal sanctions against CEOs and CFOs who willfully and knowingly make material misstatements in financial reports. *Id.* § 906(a), 18 U.S.C. § 1350(a). Section 404 contains provisions for management certification that the internal controls of the company are adequate, backed up by an external auditor. *Id.* § 404, 15 U.S.C. § 7262.

ified to allow for its consultation with other national accounting boards set up pursuant to the new convention.[110]

Similarly, Japan has already enacted a law that mirrors Sarbanes-Oxley in the United States in several regards.[111] Minor adjustments to this legislation could bring that nation into compliance with the new convention.

European nations would have to pass new laws to implement the convention, although some European states have begun implementing rules requiring certification of internal controls.[112] France, for instance, has rules requiring management to assess its internal controls,[113] and the European Union requires that publicly traded companies have an audit committee.[114]

Though European Union member nations would sign the convention individually,[115] existing European Union law requires that any changes member nations make to their laws concerning regulation of companies and securities be in harmony.[116]

110. *Id.* §§ 101–109, 15 U.S.C. §§ 7211–7219.

111. *See* Kinyū Shōhin Torihiki Hou [Financial Instruments and Exchange Law (FIEL)], Law No. 65 of 2006; *see also* FINANCIAL SERVICES AGENCY, JAPAN, NEW LEGISLATIVE FRAMEWORK FOR INVESTOR PROTECTION: "THE FINANCIAL INSTRUMENTS AND EXCHANGE LAW" (2006), *available at* http://www.fsa.go.jp/en/policy/fiel/20061010.pdf. Similar to Sarbanes-Oxley, Japan's law requires that companies demonstrate internal control over their finances. Jeremy Grant, *Sarbox Changes Welcomed but Imitators Still Abound*, FIN. TIMES (London), Mar. 22, 2007, at 23.

112. *See* Robert A. Prentice & David B. Spence, *Sarbanes-Oxley as Quack Corporate Governance: How Wise is the Received Wisdom?*, 95 GEO. L.J. 1843, 1903 n.329 (listing several European nations with laws or proposed laws regarding assessment of internal controls).

113. Grant, *supra* note 111.

114. *Id.*

115. Although the European Union could itself be a signatory to the new convention, it still cannot bind its member states to treaties that it signs unless its member states have given it permission to do so, even after the new Reform Treaty was signed in Portugal in December 2007. Stephen Mulvey, *A Close Look at the Reform Treaty*, BBC NEWS, Aug. 3, 2007, http://news.bbc.co.uk/2/hi/europe/6928737.stm (last visited Jan. 19, 2009).

116. See NIAMH MOLONEY, EC SECURITIES REGULATION 843–47 (2002), for a discussion of securities-regulating institutions in the European Union.

C. The Benefits of an International Convention on Corporate Auditing and Certification

1. Decrease in the Bribery of Foreign Government Officials

Passage of a new OECD convention with powerful accounting provisions would better ensure that foreign bribery could not continue unnoticed. Slush funds and under-the-table transactions would be harder to hide with independent auditors combing over corporate files and corporate management running the risk of personal liability if their company's filings were incorrect.[117] Even if some governments failed to prosecute under their own accounting or bribery laws, the increased public information generated by the accounting requirements would make it easier for other nations to prosecute or for shareholders to sue for recovery.

2. Additional Benefits to Europe

Even if the proposed Corporate Auditing and Certification Convention results in a decrease in the bribery of foreign officials, European governments would still require a reason to motivate them into signing it.[118] The added costs to European companies of complying with certification and auditing requirements would prevent some nations from signing on, in the absence of any other compelling reason to agree to such an arrangement.

First, many European companies are already subject to these sorts of requirements, due to their listing on stock exchanges in the United States.[119] For example, companies such as Toyota Motor, Sony, HBSC, and BP are based in foreign countries, yet still need to abide by Sarbanes-Oxley since they are listed on the New York Stock Exchange.[120] These large

117. After the Sarbanes-Oxley Act passed, a similar effect took place in the United States. *See, e.g.*, Schwartz, *supra* note 69 (quoting Matt Morley, a Washington, D.C. lawyer who defends companies in bribery cases, stating that "[c]ompanies are less willing to take the risk that a violation they learned of won't be discovered").

118. The sweeping changes to United States law was due to the Enron crisis. *See, e.g.*, Stephen M. Bainbridge, *Sarbanes-Oxley: Legislating in Haste, Repenting in Leisure* 2 (UCLA Sch. of Law, Law & Economics Research Paper Series, Research Paper No. 06-14, 2006), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=899593.

119. Hannah Clark, *Sarbanes-Oxley Goes Global*, FORBES, July 13, 2006, *available at* http://www.forbes.com/2006/07/13/leadership-sarbox-governance-cx_hc_0713sarboxgoesglobal_print.html.

120. *Id.*

multinational corporations faced the decision of whether to delist in the United States and instead go to a competing exchange where Sarbanes-Oxley would not be enforced, or stay in the U.S. and invest in the necessary changes to corporate auditing practices that the law required. After investing so much money into making their own corporate practices more transparent, the companies have an incentive to force their counterparts listed on the London or Paris stock exchanges to abide by similar guidelines rather than get away with less rigorous auditing standards.

Second, European shareholders would benefit from the additional details about companies that they would gain from the requirement of certification and auditing.[121] Although European nations already have reporting requirements, they are not as stringent as requirements in the United States and Japan.[122] This lack of adequate information makes it more difficult for investors to fully understand the relative risk and value of owning a particular security. In addition, some studies show that companies with greater internal controls also perform better.[123]

A major hurdle to any convention would be the perception that America was attempting to force its laws upon other nations. Even some American commentators suggest that European nations should stand up to American attempts to outlaw international bribery.[124] But many Western nations already took steps against international bribery of their own accord. Adoption of a Corporate Auditing and Certification Convention would add a uniformity to laws and transparency to enforcement that currently does not exist.

So long as the perceived benefits to the shareholders are greater than the decrease in share value due to the increased

121. Prentice & Spence, *supra* note 112, at 1906 ("[C]ertification of financial statements and internal financial controls . . . provide useful information to the capital markets that will allow them to allocate capital more efficiently.").

122. *See* OECD Anti-Bribery Convention, *supra* note 59.

123. Prentice & Spence, *supra* note 112, at 1905 (citing a study which found that surveyed companies with effective internal controls had an average share price increase of over twenty-five percent, while those that had ineffective internal controls decreased more than five percent).

124. *See* Rockwell, *supra* note 14 ("[C]ountries should stand up to the U.S. government by taking the only correct free-market position: there should be no laws against bribing foreign officials. In many countries, bribes are the only means for outwitting leviathan, and thus serve as an institutional bulwark of prosperity.").

cost of regulation, European shareholders will also favor laws forcing companies to certify and audit their books, making implementation of the convention more feasible.

3. Additional Benefits to the United States

A corporate auditing and certification convention that incorporates many of the existing requirements of the accounting provisions of the FCPA and the certification and auditing requirements of Sarbanes-Oxley would benefit the United States in several ways.

First, such a treaty would level the playing field for United States companies.[125] As was the case after the passage of the FCPA in the 1970s,[126] American companies acted as guinea pigs for a new corporate governance law.[127] Enactment of an OECD convention would decrease the incentive for companies to delist or list on foreign stock exchanges to save them from the extra burden of complying with Sarbanes-Oxley.[128]

Second, such an OECD convention would increase the likelihood that United States regulators could bring non-U.S.-based companies to justice when they commit acts of foreign bribery. The increased information which audited and certified company records create would give prosecutors more information to work from when pursuing charges against American employees or subsidiaries of foreign companies.[129]

Third, just as a Corporate Auditing and Certification Convention would benefit American companies by leveling the playing field for companies, such a convention would benefit

125. *See, e.g.*, MOLONEY, *supra* note 116, at 7 (noting, in the context of European securities regulation, that "[r]egulatory divergences and the duplication of rules can amount to non-tariff barriers . . . and prevent the development of the level playing-field . . . .").

126. *See* Jain, *supra* note 16, at 9.

127. While SOX affects every company listed on the U.S. stock exchange, American companies make up the vast majority of the companies traded on the NYSE and NASDAQ (86.1% on the NYSE, and 90% on the NASDAQ in June 2006 as reported in http://www.world-exchanges.org/WFE/home.asp?menu=395).

128. *See* Clark, *supra* note 119 (stating that seventeen percent of European firms would consider delisting from United States stock exchanges to keep from having to comply with Sarbanes-Oxley).

129. *See* Joseph P. Covington et al., *FCPA Enforcement in a Sarbanes-Oxley World*, LAW J. NEWSLS.: CORP. COUN., Aug. 2005, http://www.jenner.com/news/pubs_item.asp?id=000013116724 (noting that increased self-disclosure of violations due to Sarbanes-Oxley has led to more prosecutions for FCPA violations).

potential American shareholders of European securities. Certification would increase the information available to potential shareholders of European securities, leading to more efficient distribution of capital.[130] Informed shareholders can make more informed decisions about whether a company is healthy or weak, increasing certainty and decreasing perceived risk.

Sarbanes-Oxley undoubtedly added cost to businesses. But despite widespread corporate opposition, the Act is likely here to stay as U.S. court challenges continue to founder. The D.C. Circuit in August 2008 ruled that Sarbanes-Oxley did not violate either the Appointments Clause or the principle of separation of powers.[131] While the losing plaintiffs in the D.C. Circuit looked to Congress and the SEC for relief,[132] action by either of those bodies looks increasingly unlikely as the housing crisis has turned the public against corporations[133] and has led to calls for increased corporate regulation by both the SEC[134] and the White House.[135]

With Sarbanes-Oxley as a reality for corporations in the United States, American corporations' best hope of competitiveness is for the costs to be shared by businesses in other nations. For American corporations, compliance should cost less with uniform laws on corporate auditing and certification than with a variety of standards.[136]

130. Prentice & Spence, *supra* note 112, at 1906 ("[C]ertification of financial statements and internal financial controls . . . provide useful information to the capital markets that will allow them to allocate capital more efficiently.").

131. *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 537 F.3d 667, 669 (D.C. Cir. 2008). It is unclear whether the plaintiffs will file a petition for certiorari to the Supreme Court. *See* Statement of Brad Beckstead, Managing Partner, Beckstead and Watts, LLP (Aug. 22, 2008), http://www.becksteadwatts.com/index.html ("I am currently discussing all legal options with our firm's attorneys.").

132. *See* Statement of Brad Beckstead, *supra* note 131 ("I encourage Congress and the SEC to take action now to remove the "barriers to entry" to US capital markets for small and developing companies by exempting micro- and small-cap public companies and smaller audit firms from the regulatory oversight of the Sarbanes-Oxley Act of 2002.").

133. *See* Kara Scannell et al., *Bailout Stirs Calls for Deeper Regulation*, WALL ST. J. Sept. 24, 2008, at A1.

134. *Id.* (quoting SEC Chairman Christopher Cox as stating the crisis highlighted a "regulatory hole that must be immediately addressed").

135. *Id.* (noting Treasury Secretary Henry Paulsen's advocacy for an increased government role in financial markets).

136. *Cf.* Mark B. Baker, *Promises and Platitudes: Toward a New 21st Century Paradigm for Corporate Codes of Conduct?*, 23 CONN. J. INT'L L. 123, 161 (2007) (stating that, in the context of state law, uniform laws on corporate

4. Additional Benefits to All Developed Nations

Though an OECD Corporate Certification and Auditing Convention would have unique benefits for the United States and Europe, it would also have positive effects on humanitarian efforts, diplomacy, and economies to all signatories.

First, such a convention would help ensure that foreign aid is better spent in developing economies. Currently, much foreign aid ends up lining the pockets of corrupt foreign officials rather than helping its intended recipients.[137] A corrupt atmosphere will drive away foreign investment, along with a community's chance to prosper from it.[138] Developing economies often lack the resources that developed nations possess when it comes to combating such abuses.[139] An international convention requiring certification of financial reports and auditing of internal controls would make foreign aid more effective.

A convention that banded nations together towards forcing multinational conglomerates to better report and authenticate their books and records would also improve the national security of member nations. One of the original reasons behind the Foreign Corrupt Practices Act was to ensure that corporations did not stray far into the area of international foreign policy through bribery,[140] and the same rationale holds true today.[141] Several powerful governments policing companies, all armed with common information about discrepancies in the company's financial records, would decrease the likelihood that one company will remain above the law.

compliance would "remove redundancies and economic inefficiency").

137. For example, the SEC alleges that Textron, an industrial equipment company, paid $650,539 in "kickback payments" as part of its sale of humanitarian supplies in the Iraq Oil for Food Program. U.S. Sec. and Exchange Comm'n, *supra* note 78.

138. *See* Allan Gerson et al., *Peace Building: The Private Sector's Role*, 95 AM. J. INT'L L. 102, 118 (2001) (stating that while a corrupt marketplace may benefit individual companies, a culture of corruption will drive off foreign investment).

139. *See* David Pilling, *Zoellick Charts Bank's New Direction*, FIN. TIMES (London), Aug. 10, 2007, at 2 (citing Cambodia's loss of its intellectuals to genocide as an example of how some countries lack the basic human capital to fight corruption).

140. Pieth, *supra* note 19, at 8 (citing fears that defense industries could open up illicit markets in the Middle East through bribery).

141. *See, e.g.*, Saltmarsh, *supra* note 70 (citing a statement by Prime Minister Tony Blair that a bribery investigation would damage diplomatic relations); Andrew Hill, *BAE Proves Its Readiness for Just This Sort of War*, FIN. TIMES (London), Aug. 9, 2007 (detailing the U.K.'s fear that investigating a defense corporation for its bribery would hurt foreign relations).

Although some of these benefits may accrue whether or not nations put forth a united effort towards mandating corporate certification of records and auditing of controls, a scheme with a common standard would go a long way in ensuring compliance and lowering costs for businesses.[142] The international financial community has already stepped towards other international corporate standards, most notably with the coalescing of national accounting practices around the International Financial Reporting Standards (IFRS).[143] In August 2008, the SEC voted to begin the process of switching to IFRS in place of the current GAAP standards used in the United States by 2014.[144] Canada and Japan plan to switch to the standard by 2011.[145] The adoption of uniform accounting standards by countries around the world demonstrates an existing commitment to transparency in corporate books and records, and bodes well for similar advances in auditing and certification standards.

CONCLUSION

Bribery of foreign government officials harms both the developing and developed world. Current government regulations, while an improvement over past systems, still fail to provide adequate enforcement of existing laws against bribery. In addition, the United States has taken a lead role in the prosecution of corporate bribers, thanks in part to its more robust requirements for the certification and auditing of financial reports of companies which are publicly traded there. By creating uniform standards through an international convention requiring man-

142. *See, e.g.*, MOLONEY, *supra* note 116, at 7 (noting, in the context of European securities regulation, that "[r]egulatory divergences and the duplication of rules can amount to non-tariff barriers . . . and prevent the development of the level playing-field . . . .").

143. The International Accounting Standards Board publishes the International Financial Reporting Standards (IFRS) which are permitted or required for use on financial reports in 113 nations. IASPlus.com, IAS Plus—Use of IFRSs by Jurisdiction, http://www.iasplus.com/country/useias.htm (last visited Jan. 19, 2009).

144. Kara Scannell & Joanna Slater, *SEC Moves to Pull Plug on U.S. Accounting Standards*, WALL ST. J., Aug. 28, 2008, at A1; News Release, Securities and Exchange Commission, SEC Proposes Roadmap Toward Global Accounting Standards to Help Investors Compare Financial Information More Easily (Aug. 27, 2008), *available at* http://www.sec.gov/news/press/2008/2008-184.htm.

145. *AICPA Announces Web Site on International Financial Reporting Standards*, CPA LETTER (Am. Inst. of Certified Pub. Accountants, New York, N.Y.), June 2008, at 1, *available at* http://www.aicpa.org/download/cpaltr/2008_06/jun08.pdf.

agement certification of financial reports and external auditing of internal controls, corporate activities will become more transparent world wide. While shareholders appreciate such transparency so they can better appreciate a corporation's worth and risk, governments can use this information to prosecute companies that try to obtain an unfair advantage through bribery of foreign government officials.