THE MIGRATORY PATTERNS OF BUSINESS IN THE GLOBAL VILLAGE

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“[W]hichever interpretation prevails at a given time is a function of power and not truth.”1

INTRODUCTION

The Bar Rouge could be any hipper-than-thou club in Los Angeles or New York. It has red lights (of course), loud trance music, a dense crowd of young professionals, and a rooftop deck with jaw-dropping views of the surrounding city. Executives huddle at tables, drinking away the night with the post-closing glow that follows a long, successful day or week in a conference room. Boisterous raillery erupts through the cigar smoke. The waitresses work the tables for tips. Tipping itself is a new, imported concept and, like so many others, its fate is uncertain.

There is something faintly old-school at work, despite the techno D.J. and faux Chihuly chandeliers. These laughing suits all know they’re on to something good, something absent in other places where business has lost the luster of unbridled possibility. Billions of dollars seem to flow into town every week. Everybody wants a piece of this place, but only these people, here at the Bar Rouge, know how to get it. This place is different. It is not New York, not L.A. Here the drinks are cheap and the cigars are Cuban.

Anyone who has recently stood at the Bar Rouge, or any of the many other rooftop bars along the Bund in Shanghai, staring across the barge-packed Huangpu River at the forest of gleaming new high-rises that spring up like mushrooms from the damp fields of the formerly pastoral Pudong, has witnessed a fundamental shift in the culture of business. Multinationals are flocking to China at a breathtaking pace. They cannot seem to build the skyscrapers fast enough to house them all.

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1. Attributed to Friedrich Nietzsche.
Companies have gone global in a big way. What is happening in China is a direct consequence. It is happening in Bangalore, in Eastern Europe, in Vietnam, and in many other emerging economies. As the global village becomes a megalopolis, more and more businesses operate in more and more places. In doing so, they must take a broad view of what is and is not appropriate, what rules and customs govern, and who is governed by them. International businesses have struggled with these issues for years. But that struggle has largely been one of learning to fit into a new culture, learning how to not offend people, learning how to “do business” as it is done, elsewhere. The goal of most businesses is not to change the cultures they enter, but to adapt to them.

Businesses have always been free to redefine themselves in light of the new cultures they enter, but the new globalized economy is making it clear that now, more than ever, where you are is who you are. For international businesses that have borrowed capital through the U.S. markets, however, this notion of “doing as the Romans do” is becoming more complex. The United States is increasingly using its securities laws to govern the behavior of corporations – and their employees – as well as that of U.S. citizens abroad. By requiring businesses and individuals to adhere to a U.S. model of behavior when acting overseas, the United States exerts a kind of moral imperialism that imposes U.S. business standards and ethics on transactions occurring wholly outside of the United States; these transactions even include those conducted through remote subsidiaries using foreign employees with little or no understanding of these U.S. based models of behavior.

Not surprisingly, companies are playing along. In the post-Sarbanes-Oxley world of ramped up penalties, personal liability for officers and directors, and the ever-present threat of criminal sanctions, no one wants to run the risk of failing to act in the face of suspicious information. The solution, it seems, is to run to the Securities and Exchange Commission (“SEC”) or the Department of Justice (“DOJ”) with everything and anything that might be a violation of something. The shibboleth seems to be – “See what good corporate citizens we are!”

And the government is only too happy to help by accepting voluntary disclosures and extracting fines for actions that may not really be violations of anything at all. And so everything gets disclosed, everyone pays a fine, and the cycle spirals round and round, with ever more tangential “violations” being swept up in the orgy of good corporate governance. Those companies that have not yet had to
disclose, have not yet had to atone at the top, stand idle on the sideline, wringing their hands and anxiously waiting their turn. What tip will come through the hotline, the nervous executive asks? What odd transaction will reveal itself through due diligence with a potential merger partner? How will something suspicious come to light? When will it be our turn to do our penance and tithe to the gods of corporate scandal?

This is a bad phenomenon, or at least a dangerous one. In this current climate, it is fair to say that the pendulum has swung too far. While good corporate compliance is essential, overkill and oversensitivity can have ruinous effects on the long-term health of business in America.

Back on the veranda at the Bar Rouge, where everyone is having such a good time, the concern becomes obvious. These people seem to like it here. The environment is inviting: cheap labor, friendly environmental laws, tax-free manufacturing zones. This is a country committed to business, committed to growth, committed to whatever businesses seem to need or want. There are a lot fewer hassles than in other countries. These facts alone make China so attractive that it raises an obvious question: What if everyone decided to stay? What if they opted out of all of that pesky U.S. regulation? And worse, what if China took a bold step toward encouraging them to do so?

This is one risk no one seems to have considered. But there are numerous examples of companies choosing to relocate for the purpose of receiving more favorable treatment in a new jurisdiction. Corporations already reincorporate outside the United States to avoid taxation, to avoid specific regulations, and even to explicitly avoid the likelihood of prosecution by U.S. authorities. Why not to avoid the burden of dealing with aggressive securities laws?

In light of this reality, the next obvious question is: What if China chose to compete with the United States for the most robust capital markets in the world? What if the Chinese securities regulation entity was a mirror-image of the Securities and Exchange Commission with the identical statutes, rules, and regulations that all major companies, law firms, investment banks, and accounting firms are already used to (minus annoying provisions like the Foreign Corrupt Practices Act (“FCPA”)) or, say, Rule 10b-5, along with a

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3. Exchange Rule 10b-5 sets out the private right of action on which nearly all plaintiff class action lawsuits for securities fraud are based. 17 C.F.R. § 240.10b-5 (2005).
few others)? I think the answer is obvious: the result will be capital migration from New York to Hong Kong. 4

While such a move by China seems a bit extreme and calculated, consider the following. For the past ten years China has been working to transform its banks from government accounts to actual commercial entities that are managed professionally. 5 The reason? So the Chinese banks can compete when they are exposed to foreign competition in 2006. China has been able to proceed with incredible efficiency and decisiveness, pumping $60 billion into its three biggest banks to offset bad loans, overhauling the credit-risk systems, and implementing audit committees and board structures to ensure that the management acts in the best interest of the bank (and not for their own financial gain). 6

To date, the plan seems to be working. By the end of August, 2005, foreign investors had agreed to put more than $15 billion into Chinese banks. 7 Although China’s banks have a long history of corruption and theft, big investors are betting that the profit potential to be realized by China’s booming economy, rise in consumerism, and growing middle-class outweighs the risk of problems. 8 The bottom line is that by investing in China’s biggest banks, foreign banks gain access to the broadest possible market.

As a recent popular book proclaims, in the twenty-first century the world has been flattened, and the playing field leveled, allowing any company to compete in the global economy from nearly any location in the world. 9 With this in mind, the United States is no longer in a moral or political position to assume that the world’s corporations must acquiesce to whatever position – moral or otherwise

4. The high costs of compliance associated with the implementation of Rule 404 of Sarbanes-Oxley, for example, have encouraged some public companies to go private. A survey of 147 public companies by Foley & Lardner, LLP, reported in the Wall Street Journal, found that 20% of the respondents considered going private up from 13% in 2003. Indeed, Meredith Enterprises, Inc., a real-estate investment trust with $13.3 million in market capitalization did exactly that. In its application to the SEC to have its shares delisted from the American Stock Exchange Meredith cited, among other reasons, the cost of complying with Rule 404 of Sarbanes-Oxley. See Deborah Solomon, At What Price? WALL ST. J., Oct. 17, 2005, at R3.


6. Id.

7. Id.

8. Id.

In the global megalopolis, American efforts to claim the deed to the moral high ground—or, at any rate, to define the shape of a particular lot in a moral subdivision—will fail when businesses are no longer required to reside in that part of town. While I don’t suggest that such a transformation is in the immediate offing, it remains a distinct possibility, especially in light of the costs and difficulties that many U.S. securities laws pose for multinationals that want to do business in China. For the purposes of this paper, I address the problems raised by just one of those laws, the Foreign Corrupt Practices Act. Although not enforced with much vigor since its inception, the SEC and DOJ have shown renewed interest in the statute. As such, publicly traded companies that, in the past, may not have shown much interest in the law are faced with making a number of business decisions about how to proceed with overseas conduct that may violate, or merely appear to violate, the FCPA’s prohibitions.

Section I discusses the evolution of the FCPA to the statute that is enforced today. Section II addresses how current enforcement of the FCPA creates dilemmas for U.S. multinationals, especially those that want to compete in China. Finally, Section III illustrates how the enforcement trend of the FCPA results in bad policy and how it may ultimately hurt the very market that Congress tried to protect when it passed the law in 1977.

I. THE FOREIGN CORRUPT PRACTICES ACT – “A BEACON FOR THE LIGHT OF INTEGRITY”?

A. Background

Following the Watergate scandal, investigations conducted by the Securities and Exchange Commission and the Internal Revenue Service discovered off-the-record “slush funds” used by U.S. multinationals to bribe foreign officials in order to obtain favorable business dealings and lucrative contracts.11 These investigations led

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10. As discussed more below, the FCPA was clearly an attempt to codify a moral reaction to the outrage over the corporate scandals that followed the Watergate fiasco.

to admissions by more than 400 U.S. companies, including 177 ranked in the Fortune 500, stating that they had bribed foreign officials.\textsuperscript{12} Such disclosures prompted members of the 95\textsuperscript{th} Congress to condemn these corporate practices as immoral and harmful to U.S. economic interests, and led them to immediately pass the FCPA. That was in 1977.

\textbf{1. Normative Concerns}

The congressional debates over the 1977 Act and its 1988 and 1998 amendments are replete with moral overtones, evoking value-laden definitions of bribery and characterizations of its effects on international commerce. Indeed, one author suggests that Puritan religious ideology, which since the founding of the nation fundamentally influenced the American sense of morality, shaped the definition of bribery under the FCPA.\textsuperscript{13} The legislative history of the Act supports this assertion; relevant congressional statements include:

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  \item "From a social perspective, business transactions that generate the payment of questionable or illegal payments are morally repugnant,"\textsuperscript{14}
  \item "The payment of bribes to influence the acts or decisions of foreign officials, foreign political parties or candidates for foreign political office is unethical . . . [i]t is counter to the moral expectations and values of the American public;"\textsuperscript{15}
  \item "These very important principles . . . define an American sense of morality in business;"\textsuperscript{16}
  \item "Bribery is not only morally bad, it’s bad business . . . [t]here’s just no disagreement on these principles or on the
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have uncovered in our recent experience with illegal and questionable payments has been the fact that, and the extent to which, some companies have falsified entries in their own books and records").
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\textsuperscript{15} \textit{Id.}
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venal effect of bribery, that it’s wrong;”17

- “I think what is at stake here is really, in a number of significant respects, the reputation of our own country, and I think that we have an obligation to set a standard of honesty and integrity in our business dealings not only at home but also abroad which will be a beacon for the light of integrity for the rest of the world.”18

2. Pragmatic Concerns

The FCPA has been characterized as an embodiment of the American business ethic,19 as representing the moral identity and values of the American people,20 and as an Act founded upon Western principles of democracy and capitalism.

In addition to staking out moral territory by prohibiting bribery, the members of the 95th Congress believed that the strength and future of American business and democratic principles were inextricably linked to the passage of the FCPA:

- “The revelation of improper payments invariably tends to embarrass friendly governments, lower the esteem for the United States among citizens of foreign nations, and lend credence to the suspicions sown by foreign opponents of the United States that American enterprises exert a corrupting influence on the political processes of their nations;”21
- “The interference in democratic ideals with corporate gifts undermines everything we are trying to do as a leader of the free world;”22
- “Most fundamentally, the uncovering of these improper past

practices has eroded confidence in corporate responsibility and in democratic and capitalistic institutions generally;”

• “What is at stake ultimately is confidence in, and respect for, American businesses, American corporations, American principles – indeed, the very democratic political values and free competitive economic system which we view as the essence of our most proud heritage and most promising future;”

• “Through this Act, the United States declared its policy that American companies should . . . act in accordance with the U.S. policy of encouraging the development of democratic institutions;”

• “[The FCPA’s principles] strengthen America’s trade policy, foster a faith in American democracy, and protect our interests in requiring an open environment for U.S. investment.”

B. The 1977 Result: Basic Prohibition of Bribery

The FCPA, as it was passed in 1977 and subsequently amended, prohibits bribery of foreign officials. This prohibition applies to three categories of actors: (1) “issuers”; (2) “domestic concerns”; and (3) other persons who take any act in furtherance of the corrupt payment while within the territory of the United States. “Issuers” are companies whose securities are registered in the United States or that are required to file periodic reports with the SEC. “Domestic concerns” are defined as any U.S. citizen or company incorporated in a U.S. state or territory. Issuers and domestic concerns are both

23. Prohibiting Bribes to Foreign Officials, Hearing Before the S. Comm. on Banking, Housing and Urban Affairs, 94th Cong. 43 (1976) (statement of Elliot L. Richardson, Secretary of Commerce).
24. Id.
27. The FCPA also contains certain books and records provisions and internal controls provisions to the Securities Exchange Act of 1934 that apply broadly to all issuers in all circumstances, regardless of whether bribery is alleged, but these are of no interest here. See 15 U.S.C. §§ 78m(b)(2)(A)-(B) (1977).
subject to the FCPA’s anti-bribery provisions anywhere in the world where they act.  

The conduct prohibited by the anti-bribery provisions results from a rather convoluted statutory structure that, boiled down, is relatively simple (even if the following sentence describing the proscribed conduct is not). It is a crime for any U.S. company, or any of its officers, directors, employees, or agents, to corruptly offer, pay, or promise to pay, anything of value to any foreign official, for the purpose of either influencing an act or decision of such foreign official in his official capacity, inducing the foreign official to do or omit to do any act, securing any improper advantage, or inducing the foreign official to use his influence with the foreign government to affect or influence any official decisions, for the purpose of gaining or retaining business. Basically, one can’t give anything to anyone if he intends for the receiver to do anything the receiver would not have otherwise been obligated to do anyway. Note that it does not matter if the receiver actually undertakes a course of action in response to the payment, all that matters is that the giver intends the receiver to do something.

The FCPA also requires every issuer to “make and keep books, records, and accounts which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets.” The Act defines “records” to include “accounts, correspondence, memorandums, tapes, discs, papers, books, and other documents or transcribed information of any type.” “Reasonable detail” means such level of detail as would satisfy prudent officials in the conduct of their own affairs. An issuer can violate the books and records provisions if a foreign subsidiary creates false records to conceal an illicit payment and the issuer parent then incorporates the subsidiary’s information into its own books and records.

Finally, the FCPA contains internal controls provisions that codify existing auditing standards and require issuers to devise and
maintain a system of internal accounting controls. No particular kind of internal controls system is required, but the system used should provide “reasonable assurances” that, “taken as a whole, reasonably meets the statute’s specified objectives.” The Department of Justice has primary responsibility for enforcing the anti-bribery provisions of the FCPA. However, the SEC can enforce violations of the FCPA’s recordkeeping and internal controls provisions.

C. 1988 Amendments: Exceptions and Affirmative Defenses

1. Facilitating or Expediting Payments

The FCPA was amended in 1988 to add certain exceptions and affirmative defenses designed to carve out banal or routine acts of bribery. At least one view of these defenses and exceptions is that they are a tacit admission by Congress that at least some bribery is necessary in order to do business abroad.

The most well known FCPA exception is for so-called “facilitating” or “grease” payments to low-level foreign officials who perform “routine governmental actions.” The purpose of this exception is to avoid liability where small sums are paid to speed up certain routine, non-discretionary governmental functions such as: the processing of permits, licenses, visas and work orders, or other official documents; providing police protection, power and water supply, cargo handling, or protection of perishable products; and scheduling inspections associated with contract performance or transit of goods across the country. “Routine governmental action” does not include decisions by foreign officials to award new business or to continue business with a particular party.

2. Reasonable and Bona Fide Expenditures

The FCPA also includes an affirmative defense applicable when the payment is “a reasonable and bona fide expenditure, such as travel
and lodging expenses, incurred by or on behalf of a foreign official . . .
directly related to . . . the promotion, demonstration, or explanation of
products or services.”

Thus, a company may pay the reasonable, necessary, and bona
fide expenses of government officials who travel to a corporate
location to inspect equipment or facilities in connection with a
potential sale of such equipment or facilities or products manufactured
there. Similarly, a company may cover the reasonable expenditures of
foreign officials relating to bringing such officials to review and/or
approve contractual work (e.g., fabrication of equipment at other
locations).

3. Written Laws of the Foreign Country

Finally, in a nod to the sovereignty of foreign nations, the FCPA
includes an affirmative defense where “the payment . . . was lawful
under the written laws and regulations of the foreign official’s . . .
country.” The issue of what constitutes a payment permissible under
the written laws of a country is a matter of significant debate. Because
no country has “written laws” affirmatively permitting bribery, this
affirmative defense is largely useless. Prior to the 1988 Amendments,
the State Department disclosed that no country possessed written laws
permitting bribery. Indeed, even more recently it was found that “very
countries proscribe illicit payments to foreign officials.”

Furthermore, because this defense only acknowledges “written
laws,” it excludes any customs, norms, or other informal “rules” of
behavior that might operate in a given society. As many academics
have noted, these “informal” rules can be just as powerful, if not more
powerful, in governing behavior than positive law.

The FCPA’s failure to take into account the general
understanding of how people in other cultures actually behave in a
business context is surprisingly short-sighted, especially given that
consideration of local customs and understandings is a hallmark of
common law jurisprudence. The reasonable man standard in the law
of negligence, for example, holds travelers responsible for adhering to
local customs, norms, and standards of knowledge, regardless of

43. DONALD ZARIN, DOING BUSINESS UNDER THE FOREIGN CORRUPT
44. E.g., ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS
whether such local standards are codified. As discussed more fully below, the FCPA turns this common law principal on its head by applying a double standard in foreign cultures where local tradition and custom are given more respect than formal law. Rather than requiring U.S. companies and citizens to comply with (or at least respect) foreign cultures, the FCPA attempts to force those cultures to adopt American standards.

The oft-used retort to this criticism is that the FCPA only compels American companies to behave a certain way. But this simplistic reasoning overlooks the actual realities of international business. A distant but wholly owned subsidiary may be staffed entirely (or almost entirely) with indigenous people steeped in the foreign culture. Or an “issuer” may well have its corporate headquarters based overseas and have only raised capital through the U.S. market. In both cases, merely ending the debate by calling them “American” companies misses the larger point: in a global economy, corporations can be citizens of the world.

D. 1998: The OECD Amendments and International “Support”

For many years, the United States stood alone in its quest for a world without bribery, or, at least, a world without bribery as defined by the United States. Between 1977, when the FCPA was passed, and 1988, when the law was amended to add the exceptions for grease payments and bona fide expenses, most U.S. multinationals considered the FCPA to be an “export disincentive” that they faced when competing with companies from other countries.

Additional amendments passed in 1998 sought to eliminate this complaint. The 1998 amendments implemented the Organization of Economic Cooperation and Development (“OECD”) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (“OECD Convention”). The OECD

45. See, e.g., Webster v. Blue Ship Tea Room, Inc., 198 N.E.2d 309, 312 (Mass. 1964) (holding that a Boston restaurant was not liable to a customer who choked on a bone while eating fish chowder because a reasonable consumer knows that fish chowder contains bones).
46. See infra Section III.
47. Daniel K. Tarullo, The Limits of Institutional Design: Implementing the OECD Anti-Bribery Convention, 44 VA. J. INT’L L. 665, 674 (2004). Tarullo was actively involved in the negotiation of the OECD Convention as Assistant Secretary of State for Economic and Business Affairs from 1993 to 1996 and later as Assistant to the President for International Economic Policy. Id. at 665.
48. In addition to adding the OECD language to the FCPA, the 1998
Convention was signed by twenty-nine nations, including all major trading nations, with the hope that nations who prohibited bribery would no longer be at a competitive disadvantage.49

The strains of normative certitude regarding bribery, as well as the pragmatic business consequences of forbidding it, were represented in the discussions surrounding the implementation of the OECD just as they had been twenty years earlier when the FCPA was initially passed into law. For many, the passage of the OECD Convention represented a universal consensus that “[b]ribery is immoral . . . bribery is a morally and socially pernicious practice.”50 For others, the OECD Convention proved that “[i]nternational business leaders have increasingly recognized that a global economy requires common rules and that these rules must be morally defensible.”51

But reaching the OECD Convention was not easy.52 In the wake of the FCPA in 1977, no other countries followed suit in criminalizing bribery. Some criticized the FCPA as being imperialistic. Others saw bribery as something that wouldn’t disappear by fiat but by economic

49. See OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, Art. 1, 112 Stat. 3302. The OECD Convention calls on all parties to make it a criminal offense “for any person intentionally to offer, promise, or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.”


52. For an interesting summary of the political negotiations and strategies that resulted in the OECD Convention, see Kenneth W. Abbott & Duncan Snidal, Values and Interests: International Legalization in the Fight Against Corruption, 31 J. LEGAL STUD. 141, 161-177 (2002) (summarizing the political negotiations and strategies that resulted in the OECD Convention).
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devolution. “It’s hard to escape the conclusion,” however, “that mercantile considerations played a major part in the position of other countries: U.S. prohibitions on bribery gave a potential advantage to non-U.S. competitors, an advantage that other countries were reluctant to remove.”

There were at least three factors that contributed to an interest in an international ban on bribery following the 1988 amendments. First, several large U.S. multinationals gave up their hope that Congress would repeal the FCPA and, if not on board with the negotiating process, at least were not trying to hinder it. Second, arguments about the efficiencies of bribery changed; instead of being seen as “grease” that allowed bureaucracies to work, bribery and corruption were increasingly seen as “impediments to economic growth and democratic accountability.” Third, the Clinton administration had a different policy agenda regarding national and international business interests. Specifically, U.S. officials from the State Department, Treasury Department, Commerce Department, and Office of the U.S. Trade Representative were very clear in meetings with OECD negotiating partners that the U.S. would not be helpful on certain issues unless progress was made on the OECD.

Although the adoption of the OECD Convention was a negotiating victory for the United States, even those who were instrumental in its architecture, like Assistant Secretary of State for Economic and Business Affairs Daniel K. Tarullo, concede that it is ineffective. Most signatory countries and their corporations do not appear to be complying with the convention. In addition, signatory countries are not enforcing the OECD Convention. The result is that

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53. See Tarullo, supra note 48, at 674.
54. Id. at 675-677.
55. Id. at 679.
56. Id. at 682.
II. DILEMMAS FACED BY U.S. CORPORATIONS IN CHINA

A. Interpretive Difficulties

1. Who is a “Foreign Official”?

In bearing that burden, U.S. companies face a statute loaded with compliance nightmares, the Foreign Corrupt Practices Act. For example, the FCPA’s anti-bribery provisions only restrict payments to “foreign officials.” The FCPA defines “foreign official” broadly to include any officer or employee of a foreign government or “instrumentality” of the government. 58 Notwithstanding the breadth of the statutory term “foreign official,” it is often difficult to determine whether in former communist states, such as China and the former nations of the Soviet Union, an individual is a foreign official. In such countries, as the government once owned and managed every facet of the national economy and still plays an instrumental role in economic development, it is difficult to determine what would be an “instrumentality” of the government for the purposes of the FCPA. 59

2. What is an “Instrumentality” of a Foreign Government?

The FCPA does not define what constitutes an “instrumentality” of a foreign government, and the available indicators of how the DOJ or the SEC might define the term are not encouraging for companies engaged in international business, especially those operating in China or states of the former Soviet Union.

At a minimum, all companies owned by foreign governments are considered instrumentalities. 60 Beyond that, however, the definitional
waters get murky. One source of guidance regarding the definition of “instrumentality” may be the Foreign Sovereign Immunities Act (“FSIA”).61 The purpose of the FSIA is to provide when and how parties may maintain lawsuits against foreign states. Thus, the definition of an “agency or instrumentality” of a government is an integral part of the law. Under the FSIA, an “agency or instrumentality of a foreign state” means any entity that: (1) is a separate legal person (corporate or otherwise); (2) is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership is owned by a foreign state or political subdivision thereof; and (3) that is neither a citizen of a state of the United States nor created under the laws of any third country.62 Based on this definition, an entity may qualify as a government agency or instrumentality if it is an “organ” of the government or if the government owns a majority of it.

Analysis under the “organ” prong of the FSIA is case-specific and often complicated. Factors in determining whether a foreign defendant satisfies the FSIA’s “organ” prong include: (1) the circumstances surrounding the entity’s creation; (2) the purposes of the entity’s activities; (3) the degree of supervision provided by the government; (4) the level of government financial support for the entity; (5) the entity’s employment policies, particularly regarding whether the foreign state requires hiring of public employees and whether the state pays the salaries; (6) the entity’s obligations and privileges under the foreign state’s laws; and (7) the entity’s ownership structure.63

Although the FSIA states that a majority ownership in an entity must be held by a government before the entity is considered an “instrumentality,” the SEC may take a much more conservative position. Section 16 of the Securities Exchange Act of 1934 requires all directors, officers, and principal stockholders of a company to file a report with the SEC upon any change in their ownership of company securities.64 A “principal stockbroker” is defined as a person who is,
directly or indirectly, the beneficial owner of more than 10 percent of any class of any equity security (other than an exempted security) that is registered pursuant to Section 12 of the Act. This definition may provide an even lower threshold of ownership to qualify as a person that the SEC considers to have control or influence over a company’s activities.

The bottom line is that under the FSIA definition of “agency or instrumentality,” an entity in which a foreign government’s stake is more than fifty percent may qualify as a government instrumentality for the purposes of the FCPA. Even if the government holds less than fifty percent, however, the entity may still be considered an “agency or instrumentality” if it bears the indicia of government control and involvement under the “organ” factors or if the SEC decides to apply the much lower, ten percent ownership standard.

The practical consequence is that it can be impossible for companies subject to the FCPA to know with certainty whether a company it does business with falls within this definition. Can you buy the salesman a fancy dinner in the hope of swaying him to buy your products? Can you give the purchasing agent a nice gift worth a few hundred U.S. dollars, but which equates to a month’s wages for the clerk? Can you even bring coffee and donuts to the pitch meeting? These are real problems when you can’t determine whether the person across the table is a foreign official. These problems are even tougher when the culture you’re in (and from which your employees come) defines bribery in a completely different way.

B. Moral Ambiguity of Bribery

1. FCPA Represents Bribery as Morally Wrong

Despite repeated assertions that “bribery is wrong” during the congressional debates regarding the FCPA and its amendments, very little was said about why bribery is wrong. Most explanations tend to be economic and appeal to such interests; that is, they ground the immorality of bribery in arguments about how bribery hinders market efficiency and harms transnational commercial relationships. Of course, economic arguments may also be used to support bribery. Bribery may inject a market element into the provision of public services and “actually improve efficiency when used to get
arguments underscore the duties of loyalty that individuals have by virtue of their public position, office or practice to act in the best interest of those that they are serving.66

The integrity of such arguments regarding the morality of bribery, however, seems lost on the FCPA. The FCPA prohibits bribery based on the notion that bribery is morally wrong, but allows exceptions for “grease” or facilitating payments.67 As noted above, such bribes are allowed to expedite non-discretionary acts that a foreign government official would routinely perform. The difficulty with this exception, however, is that it makes it difficult for the United States to maintain, with a straight face, the position that bribery is morally wrong. Instead, this exception seems to argue that bribery is morally wrong, unless it is more efficient to allow it.


66. See Stuart P. Green, What’s Wrong With Bribery, in DEFINING CRIMES: ESSAYS ON THE SPECIAL PART OF CRIMINAL LAW (R.A. Duff & Stuart P. Green, eds., 2005). Although Green offers a compelling analysis of bribery and why it is wrong, there are limits to the analysis’ applicability in the FCPA context, especially regarding bribes that occur in China. Specifically, Green argues that characterizing an act as bribery turns on whether an individual violates a positional duty. He acknowledges that different cultures and systems may have different understandings of the positional duties of certain government officials and, therefore, payments to such officials may not be bribery. Green illustrates his point by appealing to an example that involves a “grease payment” to a customs official. Much more interesting would be an analysis of a larger payment to a mid-level executive in a Chinese corporation whose majority shareholder is the government. What, if any, positional duties does such an individual hold and how are they defined? In the United States, the positional duties of government employees and officials are defined by duties to “the people.” In China, that analysis is not so clear. The Chinese government and the aims of privatization may define the mid-level executive’s positional duties differently than the DOJ or SEC would.

67. Some commentators have focused on this discrepancy but have only gone so far to say that facilitating payments “may still be considered bribes” and, rather than suggesting that the discrepancy be eliminated by repealing the FCPA or eliminating the 1988 amendment for facilitating payments, suggest that a monetary cap be established or more guidance given by Congress and the Department of Justice regarding the nature of grease payments. See, e.g., Rebecca Koch, The Foreign Corrupt Practices Act: It’s time to Cut Back the Grease and Add Some Guidance, 28 B.C. INT’L & COMP. L. REV. 379 (2005). Neither suggestion does much to address the moral incongruity.
exceptions added in 1988, has subjected the FCPA to criticism for being heavy-handed and imperialistic. As bribery has neither been universally defined, nor subject to moral condemnation on a global level, the FCPA has been characterized as a Western legal construct that presupposes a “moral high ground” ignoring the subtle differences among diverse cultures throughout the world.  

The culturally specific values embodied in the FCPA do not take into consideration the underlying sociological, economic, or anthropological factors that create a local tradition of legitimate gift giving, tipping and hospitality. In a growing number of cultures, these practices are not considered corrupt, but are rather recognized as means of gaining informal influence, building business relationships among clients, expressing loyalty and gratitude, and complying with formal etiquette.

Moreover, in many countries gift giving has been culturally perceived to be innocuous or even admirable. Anthropological accounts of traditional gift giving explain that the making of payments formulate elaborate networks of social relationships within cultures, aid in the redistribution of assets within a society, are made to maintain personal relationships, and have brought about the end to clan and family feuds.

2. Cultural Context for Bribery in China

a. Bribery is Illegal in China

Laws against bribery are on the books in the People’s Republic of China and, in response to domestic and international criticism over the prevalence of corruption in the country, the Communist Party of


China’s Central Commission of Discipline Inspection has implemented a number of programs to monitor government officials, down to the provincial level. The Chinese government has increased monitoring in order to aid cooperation among international organizations and governments in the fight against bribery and corruption, and to further strengthen domestic laws prohibiting bribery. That said, as of January 2005, China had still not signed the OECD Convention.

Despite stringent bribery laws and potential penalties, bribery not only persists but thrives in China. The healthy bribery environment can be partially explained by the under-enforcement of the legal prohibitions against bribery. Another explanation, discussed in more detail below, relates to the cultural nullification of the laws on the books.

Bribery of government officials in China takes many forms, including trips to visit company factories or headquarters with side vacations and entertainment, kickbacks based on a percentage of the sales commission for successfully awarded contracts, overseas education or scholarships for the children of government officials, cash payments to reduce the dutiable value of imports or to expedite customs approval, and fees paid to subsidiaries that then channel the


74. Bruce M. Boyd, *Government Corruption in China: Application of the Foreign Corrupt Practices Act*, 3 SANTA CLARA J. INT’L L. 234 (2005) (A expert on China at Harvard’s Kennedy School of Government is quoted as saying “In China, the most dominant form of bribery is no longer cash payments; more likely it’s organized, expense-paid trips to corporate headquarters in Los Angeles or Las Vegas”). See also Regan Morris, *Trade Missions That Do More Than Just Visit the Great Wall*, N.Y. TIMES, Aug. 5, 2005, at 6 (This practice is not limited to Chinese officials. American entrepreneurs interested in investing in China have been known to conduct government trade missions to arrange vacations in China.)


77. Id.
money to government officials (a practice known as “sign flipping” or “pocket swapping”). The demand for bribery is not limited to any particular industry.

Judging from the corruption and bribery cases prosecuted in the last few years, the offenders are of the economic realm, of the political realm, and also of [the] cultural realm; they are of different enterprises like factories, mines and farm; they are of different departments like commerce, finance, food, forestry, communications and transportation, water-conservancy and construction; they are of cultural, educational, hygiene, research institutions and organs of the Party and the government, and even judicial offices; they are of ordinary officials, stiff members of collective economic organs, other personnel controlling public property and important leaders and country rank, department rank, and even province rank.

As economic expansion in China created more opportunities for bribery, it also changed the nature of the bribes themselves. Small gifts, such as a silk quilt cover or a tin of coffee, may have been adequate gestures of guanxi in a smaller economy. However, as the standard of living has improved for the bribe recipients, the standard practice has shifted to larger gifts, such as refrigerators, color TV sets, cash or gold.

b. Cultural Nullification of Written Law

Elements unique to Chinese culture and politics influence the commission of bribery and impede the aggressive enforcement of local anti-bribery laws in the nation. These elements include: (1) China’s recent economic development and the widespread privatization of state assets; (2) the decentralization of political decision making and law enforcement altering official distributions of power; (3) the Confucian influence on the development of Chinese

(4) the guanxi tradition of gift giving to maintain networks of personal relationships.

Since implementing its socialist market economy reforms, China has undertaken an imperfectly carried out mission to privatize state owned entities. Despite their nominal status as private companies, these entities often retain connections to officials and the Communist Party. Indeed, top managers and members of boards of directors of Chinese corporations often have ties to the government, which, in any event, is often the majority owner in many listed Chinese companies.81

As a result, the setting of goals and objectives for these companies may reflect the previous system, with government officials dictating quotas and establishing monopolies on production.82 Additionally, the government may possess in excess of fifty percent of the ownership interest in private companies and may be influential in appointing management and employees in these newly privatized entities.83 Given the degree of government involvement in the daily operations of the private entity, government bureaucrats may be inextricably linked to the privatized entity, blurring lines of accountability and creating opportunities for corruption and advancement through bribery. The rapid and imperfect transition towards privatization inevitably has presented widespread opportunities for official bribery and the misappropriation of state-owned assets. Indeed, the number of documented incidents of bribery and corruption in China has increased over the last decade.84

These profound economic changes have coincided with the rapid decentralization of political decision making and law enforcement, further loosening constraints and mitigating accountability in the exercise of official authority. Decentralization of China’s administrative structure, vesting local officials with broad authority, has led to the under-enforcement and disrespect for anti-bribery laws

83. Id.
and policies. Despite concerted efforts by many Chinese officials to comply with these laws, the dual forces of decentralization and the growth of an extensive and diffuse economy undermine these efforts and give credence to the Chinese saying, “[t]he mountains are high, and the emperor is far away.” With official power delegated to local regions and industries, the central government’s ability to detect corruption has declined and incidents of bribery have increased.85

But even calling actions “bribery” imposes a western conception of law on the discussion. The Chinese legal tradition, under the influence of Confucianism, has emphasized the necessity of integrating legal principles with evolving standards of virtue and morality. The written law of China is not viewed as inherently authoritative or worthy of respect. Rather, laws are established and followed utilizing principles of equity and social justice, and behavior is guided by reference to the Confucian principle that the maintenance of strong familial and particularistic ties takes precedent over duties of loyalty owed to the state.86

The quality of such relationships emerges as a universal primary reference point in judging what one ought to do. In day to day business, these realities lead to patterns of choice and the determination of priorities that are expressed in concrete deeds, such as favoring in commercial deals those people with whom one has close relationships or guanxi.87

Furthermore, the exchange of gifts, favors and entertainment is a natural dynamic of any relationship in China, demonstrating the value of the relationship and the conferral of honor and respect to the recipient. The traditional Chinese practice of guanxi involves the cultivation and maintenance of personal relationships and networks of mutual obligation and indebtedness.88

86. CONFUCIUS, THE ANALECTS, 59-60, 65-66 (D. Lau trans.) (1979) (the five relationships stressed by the Confucian classics include: son to father, subject to ruler, wife to husband, younger brother to elder brother, and friend to friend).
These circumstances encourage the commission of “bribery” within informal relationship networks and the under-enforcement and disregard of the written anti-bribery prohibitions in practice. Relationships formed with government officials are “used to achieve organizational aims and objectives by the dispensing of favors or patronage” and reflect a dynamic form of social contracting. As reflected in the Chinese character for the term “official,” which consists of a hat – a symbol of power and prestige – under which there are two mouths – symbolizing that official greed is tantamount to consuming enough for two, large guanxi gifts to government officials are commonplace. As one businessperson stated, “To get business accomplished in China, there was and still is a heavy reliance on who you know or who you have a relationship with, rather than on the system and its laws.”

C. Business in China

In China they call it maintaining relationships, in America we call it bribery. But in the Bar Rouge, and places like it, the executives are not in America, so why should the American definition prevail?

Not surprisingly, American business executives are not always certain that it should. Interviews of China-based executives, sales agents, and distributors for nine U.S. multinationals revealed that their firms routinely win sales by paying bribes in China. The interviewees, who spoke with The Washington Post on condition of anonymity, acknowledged that it is industry practice to funnel funds through subsidiaries to government officials, or to pay entertainment and travel expenses for them.

The reporters noted that U.S. business leaders in China often describe their business presence and practices in China with almost missionary-like idealism, and seem to believe that the development of American business in China will lead to “more ethical” business


89. YANG WANG ET AL., BUSINESS CULTURE IN CHINA 75 (1998).


91. Dean Calbreath, China and the WTO: China’s Concept of Guanxi has a Dark Side, SAN DIEGO UNION-TRIBUNE, May 21, 2000, at I1 (internal quotations omitted).

practices abroad. As evidenced in the congressional debates for the FCPA, Americans tend to view the spread of capitalism and U.S. business as inextricably linked to the spread of freedom and democracy, and to a certain American moral perspective.

But increasingly in China, U.S. businesses are finding themselves on the short side of “ethical” behavior, either as defined by the FCPA or otherwise. At the end of the day, despite the FCPA and its possible civil or criminal sanctions, what matters to American businesses is getting a piece of the Chinese market. By 2010, China could be the world’s biggest exporter and could represent as much as 10% of the global trade. The possible economic boon for U.S. corporations and banks means that American businesses are only too happy to pander to the political and monetary demands made by Chinese officials. Given the hassles of complying with U.S. laws, and the increased penalties for failing to comply, U.S. businesses may be willing to do more than pander, they may pack up, especially if the incentives are right.

93. Id.
94. For an insightful discussion of American political idealism, see Michael Ignatieff, *Who Are Americans to Think that Freedom is Theirs to Spread?* N.Y. TIMES MAGAZINE, June 26, 2005, at 45.
96. Peter S. Goodman, *Common in China, Kickbacks Create Trouble for U.S. Companies at Home*, WASHINGTON POST, Aug. 23, 2005, at A1 (despite the belief that U.S. companies are shaping China, “in one key regard the dynamic operates in reverse, with U.S. companies adopting Chinese-style tactics to secure sales, as they compete in a market in which officials routinely control businesses, and purchasing agents consider kickbacks part of their salary”). See also Tina Rosenberg, *Building the Great Firewall of China, With Foreign Help*, N.Y.TIMES, Sept. 18, 2005, at Sect. 4, p. 11, col. 1 (Late Edition). Rosenberg describes how Yahoo! voluntarily provided the Chinese government with the electronic evidence that led to the arrest of Mr. Shi Tao, a journalist, who took notes at a meeting where a message from the Communist Party’s propaganda department warned that media coverage of the anniversary of the Tiananmen Square would not be allowed. Mr. Tao emailed the notes through his email provider, Yahoo, to a Chinese dissident in America, who posted them on the web. Rosenberg’s scathing conclusion: “But let’s not pretend that foreign investment will make China a democracy. That argument was born out of desperation and self-interest. Because China is too lucrative a market to resist, American and European businessmen have ended up endorsing the party-line through their silence—or worse. They are not molding China. China is molding them.”
III. AS COUNTRIES COMPETE TO ATTRACTION BUSINESS DOLLARS, AGGRESSIVE U.S. ENFORCEMENT MAY UNDERMINE THE U.S. MARKET

A. The Effect of the Sarbanes-Oxley Act

These days, companies are scared. Or, more precisely, the audit committees of publicly traded companies are scared, and for good reason. The Sarbanes-Oxley Act of 2002 (“Sarbanes-Oxley”) imposes far greater liability than ever before for corporate fraud, including personal liability and even criminal sanctions for individuals who willfully violate certain provisions. As such, no corporate director wants to be found to have had negative information about their company without having acted upon it. As a result, something is now done about everything.

Voluntary disclosures of FCPA violations have increased dramatically since the passage of Sarbanes-Oxley. Although the statute’s anti-bribery provisions have generated only a handful of cases since its passage, in 2004, the SEC and DOJ brought the largest number of FCPA enforcement actions ever and have imposed record level fines accompanied by an unprecedented variety of additional criminal and civil sanctions. Of course, the follow-on lawsuits by shareholders can make the economic price that companies pay for violations even higher than the cost of the imposed sanctions.

The result is a fair amount of anxiety in the marketplace. According to a study conducted by AMR Research, a technology-research center in Boston, U.S. public companies will spend $6.1 billion complying with Sarbanes-Oxley in 2005. Some companies

will go private to avoid these costs, others may simply go elsewhere.

B. The FCPA as an Example of a Trend of Aggressive Enforcement

Post-Sarbanes-Oxley, the trend is for corporate actors to turn themselves in, regardless of how much merit a case may have. In re: Schering-Plough Corporation102 is a good example of how some cases go these days.

In 2004, Schering-Plough settled an FCPA complaint with the SEC based on activities of a Polish branch of a Swiss Schering-Plough subsidiary. According to the SEC, Schering-Plough Poland paid approximately $76,000 over a two year period to a charitable foundation established to restore castles and historic sites in Poland.103 There was no dispute that this was a real, legitimate charity and that the funds were used for its charitable purposes.104 At issue was the fact that the founder of the foundation was also the director of a regional government body in Poland that either directly purchased or could influence the purchase of pharmaceuticals, Schering-Plough’s main product.105

Although the quantity of payments made was unusual, and there was a disproportionate increase in the sales of certain cancer drugs in the province where the government director held his post, there was no direct evidence of any actual bribery. In fact, the DOJ – which has enforcement authority over the FCPA’s anti-bribery provisions – did not pursue the case. Instead, the SEC extracted a $500,000 fine because “while the payments in fact were made to a bona fide charity, they were made to influence the [d]irector with respect to the purchase of Schering-Plough’s products” and, as a result, were improperly recorded in the company’s books and records as “donations.”106

To return for a moment to the actual language of the FCPA, it is important to note that the anti-bribery provisions require that the payment or promise to pay be made to an individual, not to an

at R1. See also Solomon, supra note 5, at R3 (annual Sarbanes-Oxley compliance varies depending on the company’s size, usually anywhere from a few hundred thousand dollars to more than $8 million).

103. Id. at 2.
104. Id. at 4.
105. Id. at 2-3.
106. Id. at 4.
entity.\textsuperscript{107} As the DOJ once noted in one of its few official opinions on the FCPA, where a payment is “made directly to a government entity – and not to any foreign government official – the provisions of the FCPA do not appear to apply.”\textsuperscript{108} In \textit{Schering-Plough}, the payment was not made to a governmental entity, but rather, to a charitable entity.

Thus, although it is likely that no violation of the FCPA’s anti-bribery provisions occurred in \textit{Schering-Plough}, because the SEC felt that what happened was kind of like bribery, characterizing the payments to a “bona fide charity” as “donations” in the books and records of the company violated the FCPA’s recordkeeping and internal controls provisions.\textsuperscript{109} With this kind of second-guessing about the word choice used to make accounting entries, what is a company to do?

Cases such as \textit{Schering-Plough} are problematic because they result in published litigation releases from the SEC which, while not officially “precedential,” are often the only thing that companies and their lawyers have to go on. The number of published, and therefore precedential, judicial opinions on the FCPA’s anti-bribery provisions is ludicrously small for a statute that is nearly 30 years old, which leaves counsel and their clients to read the tea leaves of SEC Litigation Releases, Settlements, and DOJ press releases. And because the government is not going to look a gift horse in the mouth, it keeps extracting settlements and publishing them, which in turn compels overly cautious audit committees to voluntarily disclose less and less egregious violations. “If \textit{Schering-Plough} was a violation, then maybe this – which isn’t quite as bad – is a violation too,” the thinking goes. And thus, the cycle continues, spiraling downward toward some absurd and nonsensical bottom.

One would think that eventually a company would refuse to pay a fine and would fight the government. But what few judicial decisions exist do not encourage a fight. The most recent, \textit{U.S. v. Kay},\textsuperscript{110} is instructive. There, the Fifth Circuit held that payments made to Haitian customs officials to reduce the duties owed on

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{109} In re \textit{Schering-Plough} Corp., Exch. Act Rel. No. 34-49,838, SEC Docket 3644 (June 9, 2004).
\item \textsuperscript{110} \textit{U.S. v. Kay}, 359 F.3d 738 (5th Cir. 2004).
\end{itemize}
\end{footnotesize}
imported rice could be considered a violation of the FCPA’s anti-bribery provisions.\footnote{Id. at 740.} The reasoning was that, “[a]voiding or lowering taxes reduces operating costs and thus increases profit margins, thereby freeing up funds that the business is otherwise legally obligated to expend. And this, in turn, enables it to take any number of actions to the disadvantage of competitors.”\footnote{Id. at 749.} Thus, the payments to the customs officials saved the company money which could have been used to “assist” the company in “obtaining or retaining business” within the meaning of the FCPA.\footnote{Id. at 743.}

Taken together, American businesses can legitimately fear that anything done that might have some conceivable economic benefit, that could therefore be used “to the disadvantage of competitors,” or any transactions recorded accurately in its books and records that the SEC might choose one day to describe differently, thereby rendering its books and records inaccurate, might constitute an FCPA violation if it touches a foreign official.\footnote{If you can figure out who is and is not a foreign official.} It is not just difficult to predict how the FCPA might be applied to a company, it is impossible.

To be sure, there is real bribery in the world and there are actions taken by companies that we would all agree violate the FCPA, but \textit{U.S. v. Kay} and \textit{Schering-Plough} are a very long way from those easy cases. Such enforcement decisions make life very difficult for corporate America and they do little to advance the agenda of those that actually believe the FCPA is a good law to have.

The long term risk of such decisions is that the costs of compliance and the continued risk of sanctions, even in the face of robust efforts to comply, may finally sour companies on doing business here. The bottom line is that companies might prefer to avoid the hassles of navigating such a vast and unpredictable landscape. Companies wondering what they can do in the face of these laws have one very simple answer: they can leave. Opt out. Pack up and head for more friendly climates. It has happened before, but there is nothing to compare it to now.\footnote{Apologies to Thomas Pynchon.}

\textbf{C. Jurisdictions Compete for Business by Redefining the Law}

It is axiomatic that different cultures have different ethical norms, different concepts of morality, and different methods of
enforcement. Normative ethical theorists posit that, despite all of these differences, there are universal fundamental moral principals that exist in all societies, on which all societies agree, at some level. Perhaps, but not so with law. There exists a well-documented history of jurisdictions competing for business through a “competitive market of laws” driven by economics and a seeming absence of moral content.\textsuperscript{116}

America’s own history provides a prime example of what is happening now on a global scale. In his discussion of nineteenth century American legal history, Lawrence Friedman notes the fact that:

\begin{quote}
[P]eople and goods moved freely across state lines was the most important fact of American law . . . If a New Yorker had money, and wanted a divorce, she went to another state. If the corporation laws of his state were too harsh to suit an entrepreneur, New Jersey was willing to accommodate, and later on, Delaware. The states could act as “laboratories” of social legislation, to use a later euphemism; but this was only half the story. The states acted also as competing sellers of jurisprudence in a vast federal bazaar.\textsuperscript{117}
\end{quote}

That bazaar has gone global, and it deals in much more than “social legislation.”

1. Domestic Competition Among States – Is China the New Delaware?

We begin with an example most business people, and every lawyer, already knows: Delaware. A quick sketch of the events immediately prior to Delaware cornering the market for corporate registrations illuminates the very real possibility that something similar can happen in the global marketplace.

It is difficult for people of this day and age to believe that widespread use of the corporate form for business purposes is a relatively new concept. In 1800, there were virtually no commercial corporations.\textsuperscript{118} By the late 1800s, a battle was raging among the

\begin{footnotes}
\item 116. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 410 (2d ed. 1986).
\item 117. Id.
\item 118. Id. at 511.
\end{footnotes}
states as they competed to attract more and larger businesses to their
dates. These days, even individuals in business for themselves

119. See generally Edward Q. Keasbey, New Jersey and the Great
    Corporations, 13 HARV. L. REV. 198 (1899).

118. Id. at 208.

117. Id. at 201.
American Bar Association in 1899, one topic of discussion was whether it was appropriate for a corporation to get a charter in one state and then conduct its business in another state “free from compliance with the beneficial restrictions” of that state’s laws. 126 Specifically at issue were instances where corporations doing business in New York had chosen to incorporate in New Jersey, thereby achieving “purposes . . . that had been declared illegal in New York.” 127 The net result was that “New Jersey destroyed the effect of the drastic measures taken elsewhere to stop the growth of great combinations of capital.” 128

At issue was a fundamental argument about the way that business ought to be conducted that is not unlike debates over how to define bribery and whether the cultural context in which it occurs should factor into that definition. Interestingly, one of the factors that motivated corporations to change their place of citizenship in 1899 was certain states’ “supervision of the business and the requirement of annual reports of the earnings or of the methods and the results of the business.” 129 In other words, some states had securities laws that companies didn’t like. If it was happening in the 1890s, when the world was far less interconnected, it is easy to imagine it happening now.

But they could not see it then. Instead, the naïve belief that sovereigns must respect one another prevailed. In 1899, it seemed obvious “that New Jersey must answer before the country for the policy by which she has permitted to be accomplished, under the forms of her law, a result which has been regarded by the courts and legislatures of many states as a serious menace to the social and political welfare of the people.” 130 It seems a lot of states didn’t like what New Jersey was brewing up in its “laboratory.” The voice of reason, it was believed, coming from the chorus of other sovereigns, would surely cause New Jersey to see the light and conform to the appropriate course of action as defined by its sister states.

In a passing remark that seems almost comical now, the speaker

126. Id. at 200.
127. Id. The illegal “purposes” focused mostly on corporate governance and structure. New York prohibited corporations over a certain size and, more importantly, prohibited business combinations, such that a parent company could not own all of the stock of a subsidiary charted in another state.
128. Id.
129. Id. at 203.
130. Id. at 202.
noted that “Delaware has lately entered into active competition with
the others.”131 Indeed, Delaware passed its famous corporations law
in 1899, effectively ending the land grab by authorizing incorporators
to write pretty much anything they wanted into their charter and
bylaws. This unbelievable degree of freedom proved so successful
that the term “Delaware corporation” has become part of the American
vernacular.132

Although we can look back on this speech and smirk at how
helpless the demand that New Jersey “answer before the country” was
in the face of sheer economic drive, we should probably take stock of
our current situation.133 Similar competition still happens.

Just as the United States and the partners it strong-armed into
half-heartedly adopting the OECD Convention proclaim that bribery is
immoral, inefficient, or whatever, we must stop and ask ourselves: Is
China the new Delaware? Or, perhaps more importantly, should we
be encouraging it to be by over-eager application of our securities
laws? Just as businesses once relocated from state to state, they can
now just as easily hop from nation to nation. It is happening as I write
this sentence.

2. **International Forum Shopping – Gambling on the Future**

Although gambling is legal in Nevada (another example of a
state cornering a market based on regulatory permissiveness), it is
illegal under federal law if it both uses an “instrumentality of interstate
commerce” and is illegal in the state where it is conducted.134 The

131. *Id.* at 201.
132. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 525 (2d ed.
1986).
133. This is not merely a historical phenomenon. A modern example, also
involving Delaware as well as South Dakota, is the relocation of the credit card
industry from New York. During the late 1970s, as inflation pushed interest rates
through the roof, credit card companies found themselves in a crunch because
usury laws capped the amount of interest they could charge. Citibank got South
Dakota to alter its usury laws in exchange for relocating its credit card business
there. Not one to be left out of profiteering, Delaware did the same thing the very
next year. Credit card companies flocked to these new, friendly jurisdictions. See
generally Robin Stein, *The Ascendancy of the Credit Card Industry*, FRONTLINE,
rise.html.
134. This is an oversimplification, but captures the essence of a combination of
federal laws that have been applied to interstate, or Internet, gambling operations.
DOJ takes the position that this includes gambling over the Internet, if any portion of the gambling activity takes place in a state where such gambling is illegal.\textsuperscript{135} But the U.S. is nearly helpless in actually prosecuting online casinos because many of them are based in other countries.

In 2003, Deputy Assistant Attorney General John G. Malcolm testified before the U.S. Senate Committee on Banking, Housing and Urban Affairs. In that testimony, he stated that “[w]hile the United States can bring indictments against [online casinos] or the individuals operating these companies, the federal government may not be able to bring such individuals or companies to trial in the United States.”\textsuperscript{136} But this reality has not stopped the U.S. from attempting to punish the online gaming industry.

On June 11, 2003, Mr. Malcolm sent a letter to the National Association of Broadcasters (the “Malcolm Letter”)\textsuperscript{137} stating that companies or individuals who accept and run advertisements for online casinos “may be aiding and abetting these illegal activities.”\textsuperscript{138} The Malcolm Letter went on to point out that “[b]roadcasters and other media outlets should know of the illegality of offshore sportsbook and Internet gambling operations since, presumably, they would not run advertisements for illegal narcotics sales, prostitution, child pornography or other prohibited activities.”\textsuperscript{139} While the

\textsuperscript{135} Oddly enough, this includes Nevada as well, which outlawed gambling over the Internet in 1997. \textsc{Nev. Rev. Stat.} § 465.091-094 (2001). \textit{See also Proposals to Regulate Illegal Internet Gambling: Hearing on S. 627 before the Senate Comm. on Banking, Housing, and Urban Affairs, 108th Cong. (2003) (Statement of John G. Malcom, Deputy Assistant Attorney General, Criminal Division, U.S. Dept. of Justice).}

\textsuperscript{136} \textit{See Proposals to Regulate Illegal Internet Gambling: Hearing on S. 627 before the Senate Comm. on Banking, Housing, and Urban Affairs, 108th Cong. (2003) (Statement of John G. Malcom, Deputy Assistant Attorney General, Criminal Division, U.S. Dept. of Justice).}


\textsuperscript{138} The Malcolm Letter explicitly states that “internet gambling and offshore sportsbook operations that accept bets from customers in the United States violate Sections 1084, 1952, and 1955 of Title 18 of the United States Code, each of which is a Class E felony.” \textit{Id.}

\textsuperscript{139} \textit{Id.}
Malcolm Letter was couched in the language of a “public service announcement,” its tone was overtly threatening. Although some news organizations and publishing companies stopped accepting advertising for online casinos, at least for a while, the U.S. position has had virtually no effect on the online gaming industry.

Indeed, during a speech in 2002, Mr. Malcolm estimated that, in 2003, online casinos would do approximately $4.2 billion in business. But just two years later, estimates are that, in 2005, the Internet Gambling industry will do approximately $9.9 billion in business. This staggering growth, in the face of the DOJ’s hostile position, demonstrates just how ineffective the U.S. can be at regulating behavior that can move offshore. The Cayman Islands, Antigua, and Gibraltar, among others, have gladly embraced this huge new industry by legalizing and protecting it.

The essence of a global economy, of Thomas Friedman’s “flat world,” is that businesses can compete effectively from anywhere. Thus, why not move to a country that wants their business? That encourages it? Efforts to enforce moralistic positions through legislation like the FCPA or aggressive enforcement postures like Mr. Malcolm’s are already failing in the current global climate. As the ability of businesses to compete from remote locations increases – as it surely will – the ability to “forum shop” for favorable laws will only increase.

D. The Not-so-Hypothetical Case of China

And so we return now to where we began: China, and the Bar Rouge, where everyone is talking about the possibilities. The people sipping cocktails on this rooftop deck exude a kind of radiant confidence that we can easily imagine must have existed among the corporate tycoons in the days before there were securities laws at all. The halls of businesses everywhere now echo the mantra, “One point three billion potential customers.”

While many criticisms can be levied against China, from inequality and workers rights to human rights and totalitarianism, there are advantages to this system. As Thomas Friedman points out, “Beijing’s leadership can order many reforms from the top down,

140. See Malcom, supra note 132.
whether it is a new road or accession to the World Trade Organization.”

Perhaps another, more frightening possibility is the wholesale export of the U.S. securities markets, but without the annoying parts, such as the FCPA, or, say, Rule 10b-5. This is by no means a flight of fancy.

The Chinese government could, if it wanted, simply copy the entire existing structure of the U.S. securities markets. It could base these markets in Hong Kong where, with the prevalence of the English language, the rules would not even need to be translated. China could eliminate class action lawsuits, the FCPA, and some of the more onerous provisions of the Sarbanes-Oxley Act. This would not necessarily damage this new market, after all, the U.S. capital markets were still regarded as the best in the world even without these provisions.

A similar shift is already occurring with China’s banks, and their success in the coming years will provide a great example of how well China might compete in areas such as securities regulation. Although it is unfathomable to most people to imagine a world where Wall Street is merely a secondary, less preferable capital market in which to borrow, blind faith that it cannot happen will not preserve the status quo. As the explosion and success of the overseas Internet gambling industry demonstrates, when business begins to migrate to another neighborhood in the global village, a massive exodus can follow with alarming speed. Continued aggressive enforcement of laws like the FCPA in close or questionable cases will only add fuel to this fire.

IV. CONCLUSION

1977 is ancient history. The state of play that existed at the time the FCPA was enacted has gone the way of shag carpet and the pet rock. Companies have less need than ever to be located within the United States to do business here. Although the U.S. securities markets are still the most robust and most trusted in the world, there is no reason to assume that a country such as China cannot compete with them by adopting a familiar, but preferable regulatory climate.

This is not to say that the U.S. should capitulate and permit companies to do anything and everything they want. It is only to warn that enforcement of laws like the FCPA must be more rational. The risk of a country like China competing to attract businesses that might

otherwise choose to raise capital through the U.S. markets is real. Over-eager and over-aggressive enforcement practices only increase dissatisfaction among U.S. issuers. The next time a company responds to a close case by investigating it, firing the bad apples, and disclosing it all to the SEC and DOJ – which is what the government wants good corporate citizens to do – the government might consider shaking their hand, instead of shaking them down.