SEC REGULATION OF ATTORNEYS UNDER THE FOREIGN CORRUPT PRACTICES ACT: DECISIONS ON EFFICIENCY AND THEIR ROLE IN INTERNATIONAL ANTI-BRIBERY EFFORTS

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1. INTRODUCTION

The independent agencies of the United States government operate with a finite amount of resources and funding. Congress allocates funds based on calculations of economics, domestic and foreign policies, and politics. Just as Congress must make spending choices, independent federal agencies must make choices on how to spend the funds they are allocated. Facing the yearly prospect of a limited budget, administrative agencies exercise discretion in spending their allocation of funds while carrying out their assigned functions.

Agencies use two methods in their attempt to achieve efficient spending: rulemaking and discretionary enforcement. Rulemaking is often used as a means of preventing future conduct that would be violative of a statute. Rules are promulgated by administrative agencies pursuant to authority provided in the relevant statute. Agencies, through rulemaking, thereby can avoid bringing many future enforcement actions in response to such activities.

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1 See, e.g., JOHN B. TAYLOR, ECONOMICS 971 (1995) ("In the past two decades government spending increased more than taxes in the United States .... As a result, budget deficits and government borrowing rose sharply.").

2 See id. at 972.

because clear rules notify the public of what activities are prohibited under specific statutory provisions. Rulemaking thus allows the agency to spend the funds that it would have spent on excessive enforcement actions in a more efficient manner. Administrative agencies also achieve efficient spending through the use of discretionary enforcement. Agencies pursue enforcement actions in situations that offer the greatest deterrence for the cost—a practice deemed permissible by the United States Supreme Court. Assuming equal costs, agencies will choose to enforce their regulations in cases where there is a high deterrent value. As enforcement costs vary, administrative agencies must analyze deterrence in light of these costs and choose courses of action which minimize costs and maximize deterrence.

Rulemaking and discretionary enforcement help agencies adhere to the doctrine of internal control. The doctrine of internal control mandates that "each spending agency has primary responsibility for ensuring that resources are used properly and efficiently." The United States Securities and Exchange Commission ("SEC") is a "spending agency." It regulates the U.S. securities markets and its enforcement decisions are governed by the doctrine of internal control. SEC decisions concerning the enforcement of the Foreign Corrupt Practices Act ("FCPA") exemplify adherence to the doctrine of internal control.

The FCPA prohibits issuers and domestic concerns from bribing foreign officials in efforts to further their business interests

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4 See Ernest Gellhorn & Ronald M. Levin, Administrative Law and Process in a Nutshell 296 (4th ed. 1997) ("[T]he rulemaking process can be more efficient than case-by-case adjudication, because it can resolve a multiplicity of issues in a single proceeding.").

5 See Moog Indus., Inc. v. F.T.C., 355 U.S. 411, 413 (1958) ("[T]he Commission alone is empowered to develop that enforcement policy best calculated to achieve the ends contemplated by Congress and to allocate its available funds and personnel in such a way as to execute its policy efficiently and economically.").

6 A high deterrent value exists in situations where the enforcement action is visible and the remedies are substantial. In such situations, the agency can expect others under its regulatory supervision to be deterred from similar activity.


8 Id.
abroad. Section 78dd-1 issuers are those entities whose securities are registered under section twelve of the Securities Exchange Act of 1934 ("1934 Act") or who must file reports under section 15(d) of the 1934 Act. Domestic concerns are individuals, who are U.S. citizens, nationals, or residents, and entities, which have principal places of business in the United States or which are organized under the laws of a state or territory of the United States and do not qualify as issuers under section 30A of the 1934 Act. The prohibitions in sections 30A and 78dd-2 are substantially the same and their differences lie only in whom they target and who enforces them.

Section 30A permits the SEC to pursue civil enforcement actions since the SEC has jurisdiction over the involved issuers. The SEC does not have jurisdiction over domestic concerns targeted by section 78dd-2. Accordingly, the Department of Justice ("DOJ") is responsible for section 78dd-2 civil and criminal enforcement actions, as indicated by the statute. For the purposes of this Comment, only section 30A is relevant because SEC FCPA enforcement actions for bribery of foreign officials arise under this section.

Enforcement of the FCPA is the responsibility of both the SEC and the DOJ. The SEC, whose jurisdiction includes only civil matters, enforces the civil aspects of the FCPA, while the

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9 See Foreign Corrupt Practices Act, 15 U.S.C.S. §§ 78dd-1, 78dd-2, 78m (Law. Co-op. 1999) (amending 15 U.S.C. §§ 78dd-1, 78dd-2, and 78m (1998)). Section 78dd-1 ("section 30A") concerns "[p]rohibited foreign trade practices by issuers," while section 78dd-2 addresses "[p]rohibited foreign trade practices by domestic concerns," which do not qualify as issuers. Id. §§ 78dd-1, 78dd-2 (emphasis added). Section 78m concerns the filing of periodical and other reports by issuers. These must be based on "books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer." 15 U.S.C.S. § 78m(b)(2)(A). This section's role in the prevention of foreign corrupt practices is to require issuers to state the purpose of all payments. In order to avoid liability, an issuer would have to report a bribe to a foreign official as "a bribe to a foreign official." 15 U.S.C.S. § 78m(b)(2)(A). The requirements of this section fall within SEC jurisdiction, but they do not address the actual act of bribery. Section 78m, therefore, is not a focus of this Comment.

10 This section amends the Securities Exchange Act of 1934 and exists as § 30A.


DOJ is responsible for criminal enforcement. As many commentators have observed, the DOJ tends to enforce the bribery provisions of the FCPA,\(^{14}\) while the SEC enforces the record-keeping provisions.\(^{15}\) The SEC, during a civil investigation, may recommend that the DOJ institute a criminal investigation. Such an investigation could lead the DOJ to seek attorney liability for advice given. Again, the FCPA does not provide for such liability, but when applied as a criminal statute, criminal conspiracy and aiding and abetting laws might, as with criminal bribery of public officials, be available to prosecutors. This Comment, however, only addresses the issue of the civil liability of attorneys during an SEC FCPA enforcement action concerning bribery.

A statutory prohibition against the bribery of U.S. public officials, similar in several ways to the FCPA, merits a brief analysis for the purpose of better understanding the elements of section 30A. That statute prohibits persons from “directly or indirectly, corruptly” giving, offering, or promising “anything of value to any public official or person who has been selected to be a public official . . . with [the] intent to influence any official act,” to influence the receiving party to participate in fraud, or to “do or omit to do any act in violation of the lawful duty of such official or person.”\(^{16}\) The section also prohibits public officials from demanding anything of value in return for any of the above-mentioned activities.\(^{17}\) According to the statute, a public official may be a “Member of Congress . . . an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof.”\(^{18}\) Many of the abuses of government targeted by section 201 are also the subject of section 30A.

Section 201 appears, in several ways, to be quite similar to the FCPA. Both statutes not only prohibit giving anything of value,
but also prohibit offers and promises to give such items.\textsuperscript{19} Provisions exist in each statute which are designed to attach liability to direct and indirect transfers of things of value.\textsuperscript{20} Thus, both statutes recognize that third-party conduits could be used in attempts to mask any identifiable quid pro quo between the giving and receiving parties. Finally, both statutes contain the adverb, “corruptly.”\textsuperscript{21} However, this similarity only exists at first glance.

An important distinction must be drawn between the two uses of “corruptly.” The FCPA requires that an issuer not use an “instrumentality of interstate commerce corruptly in furtherance of an offer, payment, or promise to pay” a foreign official.\textsuperscript{22} The state of mind required under the FCPA differs between sections 30A(a)(1)-(2) and 30A(a)(3).\textsuperscript{23} Under the first two subsections, recklessness or even serial negligence might satisfy the requirement. Thus, the act of giving, offering, or promising under section 30A(a)(1)-(2) would be considered a corrupt action, and corrupt intent or knowledge would not be required. By contrast, section 30A(a)(3) requires at least the knowledge that one’s actions are corrupt.

Section 201’s use of “corruptly” seems to require the same knowledge or intent as section 30A(a)(3).\textsuperscript{24} As a result, the finding of liability under the bribery statute involves proving a more heightened state of mind\textsuperscript{25} than does the finding of liability under section 30A(a)(1)-(2). In addition, the fact that bribery of public officials carries criminal liability,\textsuperscript{26} while a SEC FCPA enforcement action seeks civil liability,\textsuperscript{27} indicates that the DOJ must satisfy a higher standard of proof under section 201 than the SEC must under section 30A. The former must prove guilt beyond a

\textsuperscript{20} See id.
\textsuperscript{21} See id.
\textsuperscript{23} See infra notes 42-45 and accompanying text.
\textsuperscript{24} See, e.g., United States v. Strand, 574 F.2d 993 (9th Cir. 1978) (defining the requisite corrupt intent under § 201); see also 18 U.S.C. § 201(b)(1) (Law Co-op. 1999) (using “intent” as part of the statutory language).
\textsuperscript{25} Intent constitutes a more heightened state of mind than knowledge or recklessness (or serial negligence). See generally W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS (5th ed. 1984).
\textsuperscript{26} Title 18 of the United States Code enumerates federal criminal offenses. SEC enforcement is limited to civil actions.
reasonable doubt whereas the latter need only make a showing of liability by a preponderance of the evidence. Therefore, it appears that, on the whole, the SEC would have an easier time proving FCPA liability than the DOJ would proving guilt of criminal bribery. These observations support the reason why the SEC does not find attorneys liable for advice under the FCPA, while the DOJ will find them liable under the criminal bribery statute.

Attorney liability is not addressed by section 30A. The statute clearly enumerates those who may be found liable under its provisions: unless an attorney is an issuer, officer, director, employee, or agent of an issuer or a stockholder acting on behalf of an issuer, the attorney cannot be found liable. It is conceivable that an attorney, acting as an issuer’s agent, could use interstate commerce to offer something of value to a foreign official or political party. In this situation, however, the attorney would be liable for giving the item of value, not for giving legal advice.

Case law concerning the FCPA has only begun to emerge over the past decade. During the first ten years of the Act’s existence, most SEC FCPA enforcement actions were settled prior to administrative or district court adjudication. Certain FCPA-related cases that serve to define the FCPA’s purpose, its elements, and its application, however, have been litigated.

The liabilities of attorneys and accountants, under the U.S. securities laws, are addressed in U.S. case law. It should be noted

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See infra Section 2.


See, e.g., Dooley v. United Techs. Corp., 803 F. Supp. 428 (D.D.C. 1992) (establishing that while the FCPA does not apply to foreign corporations which are not issuers registered pursuant to 15 U.S.C. § 78(l), it does apply to foreign individuals acting as agents for domestic concerns or issuers, whether or not the individual was in the United States, as long as the federal courts otherwise have jurisdiction over the person); United States v. Liebo, 923 F.2d 1308 (8th Cir. 1991) (applying the criminal provisions of the FCPA); United States v. McLean, 738 F.2d 655 (5th Cir. 1984) (holding that an employee may not be found liable of FCPA bribery unless his employer is first found liable of the same violation); SEC v. World-Wide Coin Invs., Ltd., [1982-1983 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 99,149 (N.D. Ga. 1983) (concerning the first litigated violation of the FCPA’s accounting requirements). These cases address different issues surrounding the FCPA, but do not treat attorney liability under the Act.

See, e.g., Schatz v. Rosenberg, 943 F.2d 485 (4th Cir. 1991) (concerning when attorneys could be held liable to third parties for misrepresentations in

https://scholarship.law.upenn.edu/jil/vol20/iss4/6
that instances of professional persons’ liability are most often related to section 10(b) and Rule 10b-5 violations, in which a violation of section 78m could be included, but not a section 30A bribery violation. Section 10(b) and Rule 10b-5 violations concern the use of “any manipulative or deceptive device... in contravention of...” SEC rules designed to protect the investing public. Accordingly, misstatements or omissions in the section 78m required disclosure of asset dispositions might violate section 10(b) and its accompanying rule. The act of bribery, however, as opposed to its omission in financial statements, does not constitute deception of the investing public and, therefore, would be less likely to be actionable under section 10(b).

The SEC may, nevertheless, have authority, through means other than section 10(b), to bring actions against attorneys whose advice leads issuers to violate the FCPA’s bribery provisions. This authority is not made explicit by the FCPA, but might be implied by section 20 of the 1934 Act or SEC Rule 102(e).

The SEC, however, does not bring such actions, choosing instead to follow a more economically efficient and effective course of regulation— it defers to private actions, thereby preserving its limited enforcement resources. This Comment seeks to identify the enforcement benefits that the SEC gains through its deference to the private sector. These benefits result from the SEC’s ability to use its limited resources in areas other than attorney enforcement actions while maintaining a regulatory scheme via the very entities under its FCPA jurisdiction.

Section 2 of this Comment explains the legislative effort that created the FCPA. Section 3 offers a history of the SEC’s application of the FCPA. Section 4 discusses remedies under the FCPA.
Section 5 sets forth the economic argument concerning the benefits the SEC gains by deferring to the private sector. Finally, Section 6 identifies recent international developments concerning the bribery of foreign public officials. This discussion seeks to analyze the new international bribery convention, to comment on resistance it may face, and to explain U.S. efforts to comply with the agreement. Section 6 also offers insight as to how the new convention will affect the SEC and its regulation of attorneys.

2. CREATION OF THE FCPA

A brief overview of section 30A's structure follows. As already stated, section 30A targets issuers, a category which includes officers, directors, employees, and agents of the issuer, as well as stockholders "acting on behalf of such issuer." The statute prohibits issuers from using the mails or other forms of interstate commerce "corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to" foreign officials, foreign political parties, or persons whom it is known will transfer such things of value to foreign officials or political parties. The statute indicates that the prohibited activity must be specifically intended to influence foreign officials or political parties in their official decision-making process, to induce them into violating their lawful duties, or to induce them into exercising their influence over their respective government's acts or decisions.

Section 30A also provides an exception for routine governmental actions (grease payments), enumerates affirmative defenses, and explains the process whereby an issuer may seek the opinion of the Attorney General concerning the DOJ's policy on issuers' conformance with the statute. Such opinions, however, are non-binding on the DOJ and an issuer may still be found liable under the FCPA despite an opinion by the Attorney General favorable to the issuer.

38 Id.
39 See id.
40 See id. § 78dd-1(b)-(e).
41 In court, opinions of the Attorney General provide an issuer with only a rebuttable presumption that the conduct for which an opinion was given conforms with DOJ enforcement policies and that no violation occurred. See 15
The state of mind required for an issuer to be found liable is not uniform throughout section 78dd-1. Although "knowledge" appears as a requirement in subsection (a)(3), statutory construction indicates that lesser standards may be applicable to (a)(1)-(2), which does not mention a scienter requirement. This suggests that Congress, which purposely chose to include "knowing" in the third subsection, similarly chose not to limit the requirement to "knowing" in the first two subsections. There is no reason to assume that "knowing" should apply to the two subsections preceding the element’s introduction as these subsections “contain[] no words indicating that Congress intended to impose a 'scienter' requirement.” Thus, in the absence of an enumerated scienter requirement, one might choose to adopt more lenient standards such as "recklessness" or "gross negligence." Adopting a standard of serial negligence that applies to continuing acts that are negligent in nature might also be an option.

Whatever scienter requirement the courts apply, it makes sense for the standard to be less strict than those found in section 30A(a)(3). The first two subsections concern offers, payments, gifts, etc., made directly to foreign officials, political parties, and candidates, while the third subsection concerns offers, payments, etc., made to persons not in a position to personally approve business opportunities. Instead, these persons initially receiving payments or offers must directly or indirectly act as a conduit for these offers, funds, or gifts to reach those in decision-making positions. Owing to the more attenuated route taken in the latter scenario, there exists a greater need to confirm that the issuer was not only targeting the initial recipient, but also that the issuer desired a direct or indirect transfer to a foreign official, political party, etc. A "knowing" element helps to confirm that the intent behind the issuer's action was to influence decision-makers within government. On the other hand, offers, payments, gifts, etc.,


Exchange Act Release No. 34-15570, 16 S.E.C. Docket 1143, 1151 (1979) (concerning the fact that no scienter requirement was inserted in SEC Rule 13b2-1 because Congress had not placed such a requirement in § 13(b) of the Exchange Act).


See id.
made directly to persons or parties in positions of governmental control, do not require the same strict standard. The issuer’s target, in this case, is obvious, which makes it easier to infer the intent behind such an action since there is a direct payment or offer to the persons or parties in positions of governmental control. This direct payment or offer eliminates the necessity of evaluating possible reasons behind an offer or payment to an intermediary.

2.1. Impetus

Congress passed the FCPA as Public Law 95-213 in 1977. It was one of several efforts to curb corrupt practices which became an issue of U.S. policy following the Watergate investigation and prosecutions. Both Congress and the SEC uncovered evidence of foreign bribery by SEC-registered corporations as well as other domestic entities. The SEC investigation “revealed corrupt foreign payments by over 300 U.S. companies involving hundreds of millions of dollars.”46 These payments were perceived to be injurious to the United States’ interests.47 Congress designed the FCPA as “[a] strong anti-bribery law [that was] urgently needed to bring these corrupt practices to a halt and to restore public confidence in the integrity of the American business system.”48 The Act seeks to “make clear that cessation of [foreign bribery] is a matter, not merely of SEC concern, but of national policy.”49 Congress, in drafting the FCPA, also sought to minimize the federal government’s enforcement burden.50 Thus, the FCPA can be seen as a means of controlling foreign bribery while at the same time requiring only limited oversight by the SEC and the DOJ.

2.2. Legislative History

The FCPA’s legislative history contains three central reports which, if read in sequence, indicate the path that Congress took in

47 See id. at 3-4 (suggesting that these payments had negative effects on U.S. foreign policy, on “[c]onfidence in the financial integrity of [U.S.] corporations,” and on “[t]he efficient functioning of [U.S.] capital markets”).
48 Id. at 4.
49 Id. at 10.
50 See id. at 10 (“Direct criminalization entails … less of an enforcement burden on the Government. The criminalization of foreign corporate bribery will to a significant extent act as a self-enforcing, preventative mechanism.”).
reaching consensus on Public Law 95-213. Addressing enforcement responsibilities, the Senate Committee on Banking, Housing, and Urban Affairs justified SEC jurisdiction over section 30A violations as a means of preventing the DOJ from having to “duplicate the investigative capability already in the SEC at a greater cost to the Government.” Although the Committee recognized that the SEC can only bring an injunctive action, it determined that this limited remedy was a more efficient means of achieving regulation. The Committee noted that “[i]t is often difficult to assemble the degree of evidence required in a criminal action, but enough evidence may exist to enable the SEC to halt a continuation of the corrupt practices through an injunctive action.” The Report suggests that the FCPA does provide for attorney liability, but it does not specify which portion of the Act must be violated in order to attach such liability. Yet, despite this authorization, the SEC has not pursued such proceedings in the context of section 30A violations.

House Report 95-640 also indicates the desire for “a strong anti-bribery statute” that “would actually help U.S. corporations resist corrupt demands.” The House Committee on Interstate and Foreign Commerce expressed its support for a broad prohibition in House Report 95-640. A broad prohibition, it should be noted, would make for somewhat easier enforcement since neither the SEC nor the DOJ would be forced to pursue narrowly defined conduct. The two law enforcement agencies could exercise greater investigative and prosecutorial discretion and choose a variety of types of violations which would function as examples of prohibited conduct. Such discretion would aid the SEC in its regulatory mission since the agency, operating on a limited budget, could maximize the effects of its enforcement actions. Even without a broad prohibition, the SEC could expect com-

53 See id.
54 Id. at 12.
55 See supra text accompanying note 36.
57 See id. at 7.
paratively less difficulty with enforcement actions than the DOJ since it need only satisfy civil standards of proof instead of the criminal standards that the DOJ must satisfy.

House Report 95-640 also shows Congressional desire to "strengthen the Commission's ability to enforce compliance with the existing requirements of the securities laws." The Committee's suggestion that no proof of scienter be required in an SEC FCPA action (or any other SEC enforcement action) further indicates the ease of enforcement sought for the SEC. Finally, the minority position within the Committee expressed concern over limited SEC resources and advanced this concern as a reason for not giving the SEC bribery jurisdiction. This concern, however, could explain why the SEC does not seek to impose attorney liability for advice that leads to an instance of bribery in FCPA actions.

House Report 95-831 illustrates how the Senate and House compromised to achieve the House amendment contained in House Report 95-640. Although this report contains the FCPA as it was enacted two weeks after the report's printing, House Report 95-831 does not shed additional light on the issue of attorney liability.

3. SEC APPLICATION OF THE FCPA

The SEC announced an FCPA policy statement in 1980, declaring that "the Commission, as a matter of prosecutorial discretion" would not bring an enforcement action under the FCPA's bribery provision if the DOJ assured the alleged violator that it would not bring criminal proceedings. Nevertheless, during the

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58 Id. at 9.
59 See id. at 10. This, however, must be seen only as a desire during the legislative process. Since 1976, it has been established that proof of scienter is required in many SEC enforcement actions. See Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976). In addition, 1988 Amendments to the FCPA appeared to mandate a higher standard than the 1977 committee envisioned. See Pub. L. No. 05-366 (1988).
61 For additional information on the FCPA's legislative history, see the CONG. REC. 123 (1977): May 5 (considered and passed Senate); Nov. 1 (considered and passed House, amended); Dec. 6 (Senate agrees to conference report); and Dec. 7 (House agrees to conference report).
first eleven years of the FCPA’s existence, the SEC initiated injunctive actions and administrative proceedings under the Act. Until 1983, all these actions were settled through the consent process. In 1983, the first litigated FCPA case was judicially decided. The SEC’s FCPA litigation and settlement through the consent process continued steadily until the late 1980s, after which began a drought in FCPA enforcement actions.

The absence of FCPA enforcement actions lasted until 1997. Recently, two SEC officials indicated the likelihood of increased FCPA enforcement. These forecasts, made in mid-1997, appear to be fairly accurate. An international effort in 1997 and 1998 led to a Convention designed to implement FCPA-like prohibi-
Federal legislation resulting from this agreement amended the FCPA and gave the SEC increased enforcement abilities and targets. The Commission quickly should realize greater enforcement opportunities, as the decade-long "pattern of sporadic enforcement is about to change." These new opportunities will result from increased international transactions and the expanded SEC jurisdiction conferred by the amendment.

4. FCPA REMEDIES

The FCPA, as passed in 1977, did not enumerate any specific remedies available to the SEC in enforcing the Act. However, the 1999 amendment to section 78dd-2 included provisions allowing injunctive relief, other civil penalties, and criminal fines and imprisonment terms which are available in DOJ actions. The penalties available to the SEC were the injunctive and equitable remedies already granted by section 21 of the 1934 Act. Under this section, the monetary penalties allowed are divided into three tiers. FCPA violations would fall within the last two. The second tier requires violations involving "fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement." Tier three penalties mandate the same violation elements as those in tier two, plus also require that the violation cause substantial losses or the risk of such losses. Compared to tier two, tier three penalties allow the Commission to assess greater damages.

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69 See infra Section 5.1.
70 See infra Section 5.1.2.
71 DOING BUSINESS IN THE US, supra note 66, § 33.05; see infra Section 5.1.2 (discussing increased press coverage of possible FCPA-violative activities).
72 See infra Section 5.1.2.
73 See 15 U.S.C.S. § 78dd-2(d) (Law. Co-op. 1999) (indicating situations in which the Attorney General may seek injunctions and temporary restraining orders against domestic concerns as well as situations in which violations of subpoenas may be deemed contempt of court); 15 U.S.C.S. § 78dd-2(g) (Law. Co-op. 1999) (establishing the civil and criminal penalties that may be imposed on domestic concerns, their officers and directors, or their employees and agents, following a violation of the bribery provisions).
75 See id. § 78u (d)(3)(B)(ii)-(iii).
76 A penalty cap prevents the application of the last two tiers. See infra note 80 (imposing a penalty cap for FCPA actions brought by the SEC).
78 See id. § 78u(d)(3)(B)(iii).
Congress amended the 1934 Act in 1988. Among the changes to the Act was a FCPA-specific penalty, added to section 32(c), which provided that any party capable of violating the FCPA and under SEC jurisdiction "that violates section 30A(a) shall be subject to a civil penalty of not more than $10,000 imposed in an action brought by the Commission." 79 The 1998 amendments to the FCPA also made necessary adjustments to section 32(c). 80

4.1. SEC Remedies Against Issuers Who Violate the FCPA

During an FCPA enforcement action against an issuer, the SEC may select from among four different types of civil sanctions. 81 As previously indicated, the newly amended section 32(c) allows for a maximum civil monetary penalty of $10,000. 82 The general remedies, made available to the SEC through section 21 of the 1934 Act, still allow the SEC to bring injunctive actions against those about to engage in an FCPA violation. 83 The three-tiered monetary penalties, however, appear to be preempted by section 32(c)'s penalty cap. As a third sanction, "[t]he SEC also may enter a cease and desist order." 84 Finally, a violating party that functions as a contractor with the U.S. government may face debarment as mandated by the Federal Acquisition Regulations System. 85

Overall, these remedies are far from severe. A $10,000 penalty would barely effect many of the wealthy issuers under SEC jurisdiction. Of course, such a penalty might have a greater impact on an individual who violates the FCPA, such as a non-indemnified agent of an issuer. Nevertheless, corporations that are registered with the SEC seek to maximize profits; such a goal cannot be accomplished if the corporation finds itself constantly paying out

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79 Id. § 78ff(c)(1)(b) (Law. Co-op. 1999) (FCPA-specific criminal penalties were also included in this section).
80 See International Anti-Bribery and Fair Competition Act of 1998, H.R. REP. NO. 105-802 (1998), at 3 (maintaining the $10,000 maximum penalty in civil actions brought by the Commission and ensuring that the penalty would apply to § 30A(g), the newly created alternative jurisdiction for the SEC).
81 See DOING BUSINESS IN THE US, supra note 66, § 33.05(3)(c)(iii) (explaining the four remedies available to the SEC).
82 See supra note 80 and accompanying text.
83 See supra note 73.
84 See DOING BUSINESS IN THE US, supra note 66, § 33.05(3)(c)(iii).
$10,000 penalties to the U.S. government.\textsuperscript{86} An injunction requiring a violator not to engage in activities that violate the FCPA appears to be similarly benign. However, a violation of such an injunction could lead to greater penalties, assessed by the federal courts. The injunction process might provide the issuer with unwanted publicity, which could affect stock prices, other international dealings, and business in general. The same holds true if the SEC seeks a cease and desist order. The final penalty, debarment, can prevent an issuer from entering a market created by the U.S. government's procurement needs. Debarment operates as a disqualification from consideration for obtaining government contracts.

Whatever actual effect FCPA penalties have on violators, it is clear that the SEC recognizes the importance of FCPA enforcement and the resulting sanctions. Otherwise the recent increase and predictions of increased FCPA enforcement actions would not likely have occurred. The SEC has determined that FCPA enforcement is worth the possible sacrifice of some other enforcement actions and, therefore, has allocated some of its limited resources\textsuperscript{87} to this function.

4.2. SEC Remedies Against Attorneys Who Provide Advice Leading to an Issuer's FCPA Violation

The SEC may, in certain situations, bring actions against professionals\textsuperscript{88} whose conduct violates or aids in the violation of the securities laws. Certain conduct by attorneys is clearly open to SEC enforcement actions, such as the use of material non-public information concerning a merger when obtained through the attorney's fiduciary relationship with a client for trading purposes.\textsuperscript{89} Additionally, "[t]he federal securities laws contain express and implied secondary liability provisions."\textsuperscript{90} Section 20 of the 1934

\textsuperscript{86} Even if the benefits gained from a foreign corrupt practice outweigh the additional $10,000 cost, a repeat offender will likely attract the DOJ's attention and subject itself to considerably harsher penalties.

\textsuperscript{87} See infra Section 5.1.

\textsuperscript{88} Professionals in this context refer to accountants and attorneys.

\textsuperscript{89} See, e.g., Dirks v. SEC, 463 U.S. 646, 655 n.14 (1982) (asserting that an attorney has a fiduciary duty to his corporate clients due to his access to non-public corporate information).

\textsuperscript{90} MICHAEL J. KAUFMAN, SECURITIES LITIGATION: DAMAGES § 10:04, at 10 (1997).
Act imposes liability on those who control or aid and abet a primary violator.91 Controlling persons are "jointly and severally liable with the controlled person."92 Of course, an attorney who is hired by an issuer simply to render advice can hardly be considered a controlling person. Thus, potential liability for attorneys as controlling persons is unlikely to appear in an FCPA investigation.

The statute also states:

[Any]ny person that knowingly provides substantial assistance to another person in violation of a provision of [the Securities Exchange Act of 1934], or of any rule or regulation issued under [it], shall be deemed to be in violation of such provision to the same extent as the person to whom such assistance is provided.93

The SEC can bring aiding and abetting actions against attorneys under 15 U.S.C. section 78t(f). This provision "is applicable to actions brought by the Commission pursuant to section 21(d)(1) (for an injunction) and to section 21(d)(3) (to impose a penalty)."94 As indicated, penalties for FCPA violations may be sought under section 21(d)(1) and (3).95 Accordingly, attorneys, who aid and abet primary violators penalized under section 21, can face SEC enforcement actions under section 20.96 It is important to remember, however, that section 20 contains a scienter requirement: the attorney must "knowingly provide substantial assistance."97 As a result of this difficult requirement, the SEC may generally expect little success in regulating attorneys as aiders and abettors.

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91 See 15 U.S.C.S. § 78t (Law. Co-op. 1999); see also ABA/BNA LAWYERS’ MANUAL ON PROFESSIONAL CONDUCT § 301:616 (1996) (providing analyses of three criteria required to establish aiding and abetting liability and various courts’ treatments of controlling persons liability).
92 KAUFMAN, supra note 90, § 10:04, at 10.
94 HAROLD S. BLOOMENTHAL & SAMUEL WOLFF, EMERGING TRENDS IN SECURITIES LAW § 1.12, at 461 (1997-98 ed.).
95 Monetary penalties, however, cannot exceed $10,000 pursuant to FCPA amendments.
97 Id. § 78t(f).
Another tool that the SEC may use to find attorneys liable in the context of FCPA violations is Rule 102(e).\textsuperscript{98} In its report that accompanied the initial FCPA bill,\textsuperscript{99} the Senate Committee on Banking, Housing, and Urban Affairs recognized that the SEC may bring civil actions as well as hold administrative proceedings under Rule 102(e), which authorizes the SEC "to censure, suspend, or bar professionals, such as . . . lawyers, from practicing before the Commission."\textsuperscript{100} This report suggests that the FCPA's drafters originally conceived of SEC actions under Rule 102(e) against attorneys stemming from FCPA investigations. This, however, is the only discussion of Rule 102(e) proceedings and neither House report addresses such liability.\textsuperscript{101} Rule 102(e) likely can be used in conjunction with the FCPA, but the SEC chooses not to do so.

The SEC possesses the means to bring enforcement actions against attorneys whose advice leads to violations of the FCPA, but it chooses not to exercise these options. In order to understand this decision, the SEC's various calculations require consideration. First, however, alternative remedies that may be sought against counsel merit exploration.

4.3. Private Malpractice Actions Available to Issuers

The federal securities laws give way, at times, to private rights of action. Although the SEC holds primary responsibility for enforcing the securities laws, it often allows private parties to bring their own suits against violators.\textsuperscript{102} This provides a second level of securities law monitoring. Parties allowed private rights of action will exercise those rights if damaged severely enough by a violation. Private rights of action also enable regulatory gaps to be filled where the SEC cannot investigate and bring enforcement

\textsuperscript{98} 17 C.F.R. § 201.102(e) (1995).
\textsuperscript{100} S. REP. NO. 95-114, at 12, n.6 (1977), reprinted in 1978 U.S.C.C.A.N. 1784.
\textsuperscript{101} See supra notes 51-61.
\textsuperscript{102} See THOMAS LEE HAZEN, THE LAW OF SECURITIES REGULATION § 13.1, at 446 (3d ed. 1996) ("Although the securities laws provide a wide variety of express statutory remedies for injured investors, powerful private enforcement weapons have arisen out of implied rights of action."); LOUIS LOSS & JOEL SELIGMANN, FUNDAMENTALS OF SECURITIES REGULATION 969 (3d ed. 1995) ("Persons injured in securities transactions are frequently able to choose among a substantial number of private remedies.").
actions. Private actions, therefore, may sometimes be the only actions brought against a violator.

One important private right of action exists outside the federal securities laws: the attorney malpractice suit. If certain criteria are met, a client may successfully sue counsel for malpractice. An attorney is liable to a client if, while acting in her professional capacity, she “supplies false information for the guidance of others in their business transactions,” and causes the client to suffer pecuniary loss as a result of the client’s “justifiable reliance upon the information, if [the attorney] fails to exercise reasonable care or competence in obtaining or communicating the information.” In addition, “[p]rofessional persons in general ... are required not only to exercise reasonable care in what they do, but also to possess a standard minimum of special knowledge and ability.” In light of these guidelines, the jury in a malpractice suit is instructed that the professional whose conduct is in question “must have and use the knowledge, skill and care ordinarily possessed and employed by members of the profession in good standing.”

An attorney malpractice suit usually requires that the plaintiff call expert witnesses to testify as to what constitutes the appropriate standard of care and requisite special knowledge and ability for a professional. Since experts may offer different opinions on this matter, the outcome of a malpractice suit cannot be predetermined easily. Nevertheless, the likelihood of a successful malpractice action increases with the negligence of the attorney’s conduct. In situations where an attorney is retained to give a legal opinion based on a federal statute, little room is afforded to the attorney to misinterpret an unambiguous statute and remain within the standard of care. The activities prohibited by the

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103 See infra Section 5.1 (discussing the SEC’s limited resources and exercise of prosecutorial discretion).
106 Id. at 187 (discussing the formula used for doctors, which is generally applied to other professionals as well).
107 See, e.g., Wright v. Williams, 47 Cal. App. 3d 802, 804 (1975); O’Neil v. Bergan, 452 A.2d 337, 341 (D.C. 1982) (indicating that a plaintiff must call appropriate experts to testify as to standard of care if plaintiff is to make out a prima facie case of malpractice against an attorney).
FCPA are clear and are open to few differing interpretations. In fact, the major discrepancy present after the FCPA’s 1977 enactment—the mental state required for a violation to occur—has been largely set aside through the 1988 amendment. Thus, attorney malpractice suits stemming from incorrect FCPA interpretations should be successful assuming the plaintiff can prove the necessary elements of the malpractice action other than breach of the standard of care.

5. ECONOMIC ARGUMENT

5.1. The SEC’s Limited Resources

United States government agencies must execute their assigned functions within the limits allowed by their budgets. The SEC is not exempt from this general rule of operation. The SEC, however, can defray many of its expenses through the use of offsetting collections. These collections include fees paid by corporations to register securities with the SEC. In 1997, there was a fee of $303 per $1,000,000 of securities offered. This fee was reduced in 1998 to $295 per $1,000,000 and will be reduced to $278 per $1,000,000 in 1999. The SEC has at its disposal the excess of the first $200 fee, which is paid into the general fund of the U.S. Treasury. Therefore, assuming a constant rate of securities offerings, the SEC can expect a decrease in collections.

Budget estimates indicate that the SEC’s total net salaries and expenses will increase, causing its 1997 surplus of $62 million to

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103 See supra Section 1 (detailing the activity prohibited by section 78dd-1(a)).
110 These include the existence and breach of a duty, injury, and causation.
111 See OFFICE OF MANAGEMENT AND BUDGET, Analytical Perspectives, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1999, at 571 (1998). The SEC funding chart indicates that the $262 million in gross salaries and expenses for 1997 were offset by collections totaling $324 million. Thus, the net total for salaries and expenses was -$62 million. See id. at 571.
113 See id.
114 Other fees that may be used by the Commission are indicated in § 6(b) of the Securities Act of 1933 and § 31 of the Securities Exchange Act of 1934.
reach deficiencies of $13 million in the years 2000 through 2003.\textsuperscript{115} During this period of time, the SEC's offsetting collections are expected to decrease while gross salaries and expenses are generally expected to increase.\textsuperscript{116} Gross salaries and expenses are projected to increase by $81 million between 1997 and 1999.\textsuperscript{117} Selected workload data for those three years, however, indicates a fairly stable amount of activity within the SEC's Division of Enforcement.\textsuperscript{118}

The Division of Enforcement then can be expected to continue engaging in selective enforcement of the securities laws as mandated by a limited budget. In light of this budget constraint, the SEC pursues enforcement actions which offer the most benefit for their cost. These include highly visible actions against major securities firms, insider trading actions promising fairly substantial disgorgements of funds, and other actions whose penalties serve to deter others from engaging in future violative acts.

Such selective enforcement by the SEC is protected as a matter committed to agency discretion by law. Such matters include "allocation of prosecutorial effort."\textsuperscript{119} This protection finds legal support in a 1985 Supreme Court decision\textsuperscript{120} and is designed to allow "day-to-day working judgments how most effectively to deploy the limited resources Congress has placed at [an agency's] command."\textsuperscript{121}

\textsuperscript{115} See Office of Management and Budget, \textit{supra} note 111, at app. 571. The deficiencies include Congressional appropriations. See id.

\textsuperscript{116} See id.

\textsuperscript{117} See id.

\textsuperscript{118} See Office of Management and Budget, \textit{supra} note 111, at app. 1135 (1998). This chart estimates an increase in investigations opened from 408 in 1997 to 410 in 1998; investigations opened in 1999 are also expected to be at the 410 level. A slight decrease is expected in the number of administrative proceedings opened. See id. There were 286 in 1997 and 285 are expected in 1998 and again in 1999. The number of civil actions opened in 1998 and 1999 are expected to remain at 1997's level of 205. See id.

\textsuperscript{119} Peter L. Strauss, \textit{An Introduction to Administrative Justice in the United States} 222 (1989).


\textsuperscript{121} Strauss, \textit{supra} note 119, at 222.
5.2. The SEC’s Penalties Against Attorneys

The SEC may seek penalties in three types of actions brought against attorneys whose advice led a primary party to violate the FCPA. These include actions against attorneys as controlling persons, \(^{122}\) aider and abettor actions, \(^{123}\) and Rule 102(e) proceedings. \(^{124}\) Among the penalties that may be sought are injunctions, cease and desist orders, monetary penalties, and debarment. Nevertheless, the application of these penalties to attorneys promises only limited results.

Injunctions and cease and desist orders are designed to prevent current action from continuing or imminent action from being taken. Thus, an attorney who gave incorrect FCPA advice would be enjoined from doing so in the future. Other than the bad publicity inherent in facing an SEC investigation and being found liable, injunctions and cease and desist orders provide little more than a warning to such an attorney. In addition, it is unlikely that such a remedy would be applied under controlling person or aiding and abetting actions: under these actions, if the SEC finds the attorney in violation, the attorney can be held jointly and severally liable, thus subjecting him to whatever remedy is selected for the primary violator—such as monetary penalties.

Monetary penalties for aiding and abetting or controlling person liability would likely be assessed to the extent of the FCPA’s maximum $10,000 provision. Controlling person liability assesses joint and several liability “with and to the same extent as,” the controlled person \(^{125}\) and the aiding and abetting provision asserts that the person who gave assistance “shall be deemed to be in violation of such provision to the same extent as the person to whom such assistance is provided.” \(^{126}\) This suggests that if an attorney were found liable, a monetary penalty could not exceed $10,000. Of course, if his violation were due to more than negligent conduct and “involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement,” the second or third tier penalties of section 21(d)(3)(B) of the 1934 Act might

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\(^{124}\) See 17 C.F.R. 201.2(e) (1999).

\(^{125}\) 15 U.S.C.S. § 78t(a).

\(^{126}\) Id. § 78t(f).
apply. Such penalties certainly would be more significant than the $10,000 maximum allowed by the FCPA. However, an interpretation of negligence of the FCPA is more likely to occur when providing advice to a client since the attorney would reap little benefit from a client’s FCPA violation.

Following a determination of negligence, a Rule 102(e) proceeding may be convened by the Commission. "[T]he SEC can discipline attorneys under SEC Rule of Practice 102(e) which provides that the Commission may suspend, limit or bar 'any person' from practicing before it 'in any way.'" Furthermore, "professional misconduct, although not violating the securities laws, can be grounds for a Rule 102(e) suspension from practice before the SEC." Barring an attorney from practicing before the SEC appears to be a fairly detrimental penalty. A securities lawyer’s livelihood often stems from his practice and dealings with the SEC, whether in the context of offering securities, drafting prospectuses, or providing representation to a client during an SEC investigation. Thus, SEC debarment greatly reduces a securities lawyer’s employment options.

The SEC, however, tends to convene Rule 102(e) proceedings in situations where attorneys and accountants have made misrepresentations in violation of disclosure requirements or signed registration materials with knowledge of an issuer’s deficiency. In other words, the SEC employs Rule 102(e) most often to regulate attorneys who make, or apparently approve, misleading representations to the investing public. Advice to a client concerning the legality of an overseas payment is not a public representation because it does not affect the public’s investment decisions, and,

127 Second tier penalties may not “exceed the greater of (I) $50,000 for a natural person or $250,000 for any other person, or (II) the gross amount of pecuniary gain to such defendant as a result of the violation.” 15 U.S.C.S. § 78u(d)(3)(B)(ii). Third tier penalties may not “exceed the greater of (I) $100,000 for a natural person or $500,000 for any other person, or (II) the gross amount of pecuniary gain to such defendant as a result of the violation.” 15 U.S.C.S. § 78u(d)(3)(B)(iii) (Law. Co-op. 1999).

128 HAazen, supra note 102, § 7.10.

129 Id.

130 See KAUFMAN, supra note 90, § 10:04 (explaining common situations of attorney liability under § 12(a)(2) of the Securities Act of 1933 (“1933 Act”) and Rule 10b-5 promulgated under § 20(b) of the 1934 Act). SEC actions against attorneys in these contexts are quite understandable since these two sections concern the primary focuses of the two statutes—registration and disclosure under the 1933 Act and the 1934 Act, respectively.
therefore, is treated differently than public statements or show-
ings of approval.

In light of all the penalty options available to the SEC when a
primary FCPA violator acts on advice of counsel, a Rule 102(e)
debarment seems to offer the greatest deterrence. A debarred se-
curities lawyer would lose considerably more money from lost
business than from the $10,000 maximum penalty he would have
to pay under the FCPA as an aider and abettor or a controlling
person. Moreover, since the activity required to trigger second
and third tier penalties under section 21 is difficult to prove,131
most SEC FCPA investigations of attorneys and their advice
would seem to suggest that either injunctive or Rule 102(e) relief
should be sought. Although Rule 102(e) certainly acts as a greater
deterrent than an injunction or a cease and desist order, Rule
102(e) sanctions are not sought for two compelling reasons. First,
attorneys are reluctant to bring suits against other attorneys. Sec-
ond, private actions and remedies allow for a more efficient regu-
latory structure with respect to the monitoring the conduct of at-
torneys who offer advice regarding the FCPA.

5.3. Attorneys’ Reluctance to Bring Suits Against
Other Attorneys

Members of the legal profession are familiar with the signifi-
cance of setting precedents. In fact, precedent functions as one of
the main guides in determining an attorney’s course of action
when attending to a client’s needs. As a result, attorneys are care-
ful not to establish precedents that could, ultimately, cause harm
to themselves. “Lawyers punish other lawyers for very flagrant
violations—stealing a client’s money, for example. For most
other offenses, and for plain incompetence, lawyers are (under-
standably) rather gentle with themselves.”132 This is not surpris-
ing, as such an attitude tends to limit the gamut of attorney li-
abilities. Therefore, those offenses, such as “plain incompetence,”
which are not punished by other attorneys, must be addressed by
explicit legislation. However, attorneys are fairly prevalent in
most legislatures. Thus, the institution, of which they are a part,

enter, if not intentional, conduct).
132 LAWRENCE M. FRIEDMAN, AMERICAN LAW: AN INTRODUCTION 284
implicitly ensures individual attorneys' shelter from punishment as a means of protecting its own existence.

5.4. Private Remedies

Private remedies offer a more efficient means of monitoring attorneys whose advice leads to FCPA violations. The general theory of privatization\footnote{Privatization, a concept that emerged in the mid-1980s, involves "the transfer of public assets, infrastructure, and service functions to the private sector." Steve H. Hanke, Privatization: Theory, Evidence, and Implementation, in Control of Federal Spending at 101 (C. Lowell Harriss ed., 1985).} supports this assertion. While the owners of public enterprises, tax-payers do not have a claim against the assets of the enterprise, only the owners of private enterprises can make such claims. The latter, therefore, possess a greater incentive to oversee the actions of the private enterprises' managers and employees.\footnote{See id. at 102.} As a result, "private managers and employees find it difficult to engage in . . . behavior that is inconsistent with maximizing the present value of the private enterprise (the owners' wealth)."\footnote{Id. at 103.} "Thus, in theory, "private and public managers and employees can be expected to behave in different ways and, as a result, private firms will be more efficient than public firms."

This theory of increased efficiency also holds true in the context of private actions brought by issuers against attorneys for providing advice leading to FCPA violations. A few factors contribute to this enforcement efficiency.

5.4.1. Monetary Damages

A private malpractice suit offers the plaintiff three possible types of damages. First, attorney fees incurred during the malpractice suit might be available depending on what the substantive malpractice law and local procedural rules allow.\footnote{See, e.g., Fed. R. Civ. P. 54(d)(2).} Such fees, however, might be comparatively minor in light of other damages that could arise.
Malpractice is a cause of action under tort law. As such, a plaintiff issuer should be entitled to compensatory damages to return him to the position he would have been in had the tort not occurred. Similar to a contract law remedy, a plaintiff may seek the fees he paid an attorney for the FCPA advice sought to help return the issuer to his position prior to his transaction with the attorney. Alternatively, the issuer could seek damages for any penalties paid to the SEC due to the FCPA violation. In addition, the attorney would be liable for any costs that the issuer incurred during the course of the SEC's FCPA investigation and enforcement action. Finally, the issuer might seek damages to compensate him for any harm to his reputation that resulted from public disclosure of the FCPA violation. This last damages award, however, might be somewhat difficult to compute.

In addition to compensatory relief, punitive damages also might be available to the issuer. These are generally "not a matter of right, and . . . [are] always within the discretion of the jury or trial judge to withhold them." In addition, such damages will only be available if the attorney's "wrongdoing has been intentional and deliberate." Accordingly, mere negligence on the part of the attorney will not suffice as a basis for an award of punitive damages. Therefore, since the attorney's conduct would likely be no more than negligent, punitive damages will rarely be awarded to an issuer bringing an malpractice action. Nevertheless, the possibility of punitive damages provides the private sector with a greater deterrent than that afforded the by SEC. The 1934 Act, however, precludes punitive damages, instead limiting recovery to "actual damages." Thus, private damages present a monetary deterrent that is greater than SEC remedies' deterrent power. Moreover, even if punitive damages are not awarded, the compensatory damages assessment may exceed the FCPA's $10,000 damages limitation.

138 See KEETON, supra note 25.
139 A drop in the issuer's stock price might provide a starting point for making this calculation.
140 KEETON, supra note 25, § 2, at 14.
141 Id. at 9.

https://scholarship.law.upenn.edu/jil/vol20/iss4/6
5.4.2. Issuers and Their Resources

Publicly traded companies that are registered with the SEC occupy a position that is almost completely unique to the private sector. These issuers generally possess considerable assets. Issuers that conduct business overseas and are capable of making payments to foreign officials to increase business opportunities may generate revenues that are comparable to, or even dwarf, the SEC's annual budget.

Even issuers that do not bring in such large revenues still possess monetary resources unique to the private sector. Issuers have considerable discretion in the allocation of their resources as opposed to the SEC's discretion in the allocation of the U.S. Government's resources. The directors and officers of a corporation must answer to the corporation's shareholders, but are relatively free to allocate resources in the best interests of the corporation. The SEC, on the other hand, cannot allocate the government's resources, but must first wait until the government distributes the SEC's share of these resources through the budget process. Following this distribution, SEC spending is limited to activities for which special funds were designated or activities which the SEC established in its budget calculations during a previous year.

Issuers possess an additional resource that is often unavailable to the SEC in FCPA enforcement actions. The SEC may have difficulty gaining access to certain documents created by an issuer's advising attorneys due to the attorney-client privilege. Issuers, however, would have greater access to these documents while preparing and bringing an attorney malpractice suit.

Issuers generally maintain three resource advantages over the SEC. First, many private corporations possess assets at or above

143 Only the U.S. military's assets rival those of many companies.

144 In 1997, the SEC's actual salaries and expenses (gross) totaled $262 million. See OFFICE OF MANAGEMENT AND BUDGET, supra note 111, at 571.

145 The only constraint is that directors and officers of a corporation must allocate resources by following the business judgment rule. See, e.g., Shlensky v. Wrigley, 95 Ill. App. 2d 173 (1968) (applying the business judgment rule to a decision by the corporation's directors).

146 The best interests of the corporation are usually considered to be those which lead to profit maximization. See Milton Friedman, The Social Responsibility of Business is to Increase its Profits, N.Y. TIMES MAG., Sept. 13, 1970, at 32 (discussing corporate decision-making and the allocation of resources to charitable organizations).
the SEC's level. Second, corporate directors and officers are granted more discretion than the SEC to use their respective resources. Third, issuers that choose to bring private actions against their attorneys are generally afforded greater access than the SEC to critical evidentiary materials. The combination of these three advantages likely places the private sector in a better position than the SEC to regulate itself and those who operate within it.

5.4.2.1. Issuers May Choose to Use Resources to Sue and Will Use Them More Efficiently than the SEC

Following an enforcement action determining that an issuer has violated the FCPA, the corporation's directors and officers will face two choices, assuming the violation occurred after the issuer acted on errant advice of counsel. The issuer may elect to sue its counsel for malpractice and try to seek various remedies, or the corporation may choose not to bring an action against the attorney. The decision would likely be based on several factors. First, the directors and officers would need to determine the viability of the suit, possibly by examining the elements of an attorney malpractice suit. If the directors and officers of the corporation can establish the elements of a malpractice suit and have sufficient means to prove their existence—especially a breach of the standard of care—such as access to documents through which advice was given and through which the issuer described the situation, for which advice was sought, to the attorney, then the corporation likely would determine that a suit is viable. Second, the issuer would want to identify alternative actions it could take against the attorney. Third, the officers and directors would have to analyze the relative costs and benefits of choosing not to sue, bringing a malpractice suit, or following an alternative course of action. If a suit would not lead to profit maximization, it might not be in the best interest of the corporation, and the directors and officers likely then would follow a different course of action.

147 See supra Section 4.3. (describing the construction of malpractice actions).
148 See infra Section 5.4.2.2.
5.4.2.2. Issuers May Elect Not to Sue, but May Refrain from Retaining the Attorney or Law Firm in the Future

One alternative is not to sue, but instead to cease using the legal services of the attorney who offered incorrect advice. This course of action would serve as a deterrent to attorneys who function in FCPA advising roles; however, it might not be as great a deterrent as the threat of a malpractice suit. The legal market operates on the basis of reputation. Clients seek the best legal representation and advice that they can afford, while all attorneys and law firms strive to attract clients. Competition among law firms to attract clients can be fierce, and a client that disassociates itself from one firm can usually find a fairly long list of possible replacements. In this type of market, there is little demand for attorneys who offer incorrect advice. The threat of losing clients, therefore, should deter attorneys from taking actions that would lead to such losses. Additionally, law firms would face the same deterrent effect and would likely refrain from hiring or continuing to employ attorneys who drive clients away. The only disadvantage to using this alternative as a deterrent inheres in the collective action problem. However, since many issuers who do not retain new counsel instead choose to bring malpractice suits, the collective action problem appears to become a non-problem—either alternative is undesirable from the attorney's point of view. And, although some issuers may choose not to act at all, the threat of some type of action should be great enough to maintain a deterrent effect.

Both bringing a malpractice suit or discontinuing use of an attorney's legal services carry a deterrent effect. Although a successful malpractice suit promises substantially greater rewards to the issuer bringing it, such actions are significantly more expen-

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149 Clients that participate in this legal market—clients that are likely to face possible FCPA violations—should be considered fairly sophisticated parties.

150 The collective action problem, often referred to as the prisoner's dilemma, focuses on the reluctance of multiple parties to cooperate and act in the manner most beneficial to all of the parties. See, e.g., WILLIAM A. KLEIN & J. MARK RAMSEYER, BUSINESS ASSOCIATIONS: AGENCY, PARTNERSHIPS, AND CORPORATIONS 128-31 (3d ed. 1997). In the situation at issue, the collective action problem suggests that while some issuers might choose not to retain counsel in the future, many others will not follow this option. Thus, attorneys and law firms might not recognize as great a possibility for potential loss and therefore will not be deterred from rendering incorrect advice.
sive than retaining new counsel. Of course, the officers and directors will take this factor into account when deciding what course of action to follow. The threat of a non-legal sanction, therefore, ensures that some response is available to issuers of differing financial positions.

5.5. Private Remedies as More Efficient and Effective Deterrents than SEC Enforcement

The statutory ability of the SEC to regulate attorneys who provide errant advice to issuers, thereby leading to an FCPA violation, is easily recognizable. Whether the Commission seeks an injunction, chooses to bring an action against an attorney for aiding and abetting, or utilizes a Rule 102(e) proceeding, remedies against attorneys are available. Nevertheless, the SEC elects not to engage in such regulation, deferring instead to the private sector. This approach constitutes a more efficient and effective deterrent than SEC enforcement.

The SEC conducts its activities within the constraints of a limited budget. Despite its need to exact the maximum benefit from each budgeted dollar, the Commission's managers and employees, operating within the public sector, face little personal accountability to the taxpaying public. They function within a bureaucratic apparatus that offers considerable anonymity. The managers and employees of issuer corporations, however, are personally accountable to the share-holders of the corporation. Federal reporting rules ensure that these managers and employees cannot work with the same anonymity as their public sector counterparts. Thus, a more efficient work product emerges from highly accountable, private sector managers and employees who must seek to maximize profits in the best interest of their respective corporations. This work product includes a more efficient regulation of attorneys who provide incorrect advice, thereby leading to greater deterrence.

151 See Office of Management and Budget, supra note 112, at 133-34.
152 Employees include commissioners, attorneys, accountants, etc.
153 See Hanke, supra note 133, at 102 (containing a theoretical discussion of the accountability of public officials).
154 Id. at 103.
155 These are corporate directors, officers, and other employees.
156 See generally Hazen, supra note 102, §13.10.
157 See id. §13.10, at 631-32.
Just as the SEC is less efficient than the private sector in dealing with attorney malpractice, SEC remedies provide comparatively less effective deterrence. SEC injunctions simply prevent attorneys from continuing an unacceptable practice, but provide little in the way of punishment. The FCPA limits monetary penalties, for attorneys liable as controlling persons or as aiders and abettors, to $10,000. Second and third tier penalties only apply to the few attorneys who intentionally mislead their clients. Thus, the majority of liable attorneys would only face fines up to $10,000 as a result of SEC enforcement.

A significant disparity in resources exists between the private sector and the SEC. Issuers can take advantage of their various resources in order to bring actions against attorneys, whereas the SEC is limited in its enforcement capabilities. Thus, the private sector, rather than the SEC, promises to be the source of more actions against attorneys. Two additional characteristics of private remedies suggest that private actions are more efficient than SEC suits against attorneys. First, private malpractice suits can offer considerably more than a $10,000 fine as a deterrent. Second, an issuer’s decision to pursue the alternative of refusing to retain the attorney in the future offers a similarly high deterrent value.

6. SEC REGULATION OF ATTORNEYS IN LIGHT OF INTERNATIONAL DEVELOPMENTS RELATING TO THE FCPA

6.1. The International Anti-bribery Convention

Despite U.S. efforts to combat bribery of foreign officials by issuers and domestic concerns of seeking access to the markets of other countries, the FCPA, until recently, existed as a unique...
statute among the "major count[ies]". As a result, regulated entities protested that they suffered at the hands of the FCPA, arguing that foreign-registered competitors were relatively free to make the very payments to foreign officials which are prohibited by the FCPA. In fact, $15 billion in orders were lost, in one year, "to firms from other countries that allow bribes." In response, the United States lobbied for a multinational anti-bribery agreement.

These U.S. initiatives preceded the efforts that have helped usher in the new Organization for Economic Cooperation and Development ("OECD") Convention. In 1975, the United States presented the issue of corporate bribery to the General Agreement on Tariffs and Trade ("GATT"). No action was taken by GATT, or the United Nations ("UN"), in response to this effort. Similarly, the UN took no responsive action. Although the UN adopted a resolution to draft a treaty concerning corporate foreign bribery, this act constituted "part of the history of unsuccessful efforts within the UN to control real and perceived evils of multinationals operating in third world and nonmarket economies." The inability to secure a strong, multinational anti-bribery provision within the OECD, GATT, and the UN led observers to "consider the issue on a multinational

162 DOING BUSINESS IN THE US, supra note 66, § 33.05(3)(d). But see RALPH H. FOLSOM & MICHAEL W. GORDON, INTERNATIONAL BUSINESS TRANSACTIONS § 12.42 (1995) ("Only Sweden has adopted a law with sanctions similar to the United States.").

163 See id. § 12.42 (Supp. 1998) (indicating that a 1996 U.S. Government report "suggested that there was evidence that U.S. firms lost at least 36 contracts worth some $11 billion because of corrupt payments," while "U.S. firms suggested the figures to be closer to 139 contracts worth about $64 billion.").


165 See id.

166 See id.

167 See FOLSOM AND GORDON, supra note 162, § 12.44.

168 See id. § 12.44-.45.

169 See id. § 12.45.


171 FOLSOM AND GORDON, supra note 162, § 12.45.
level to be dormant or dead." The issue, however, is certainly not dead, and if it was indeed dormant it awoke during the mid-to-late-1990s.

In 1996, four multinational organizations acted to combat corruption and bribery of foreign officials. The Organization of American States ("OAS") drafted and approved the Inter-American Convention Against Corruption. During the same month that the OAS approved its Convention, the International Chamber of Commerce ("ICC") initiated efforts to strengthen its rules and procedures regarding bribery. The World Bank Group also promulgated anti-bribery guidelines in 1996. These guidelines provide the World Bank with the power to regulate loan bidders and borrowers in the event they engage in "fraudulent or corrupt conduct." The International Monetary Fund ("IMF") adopted anti-bribery guidelines in 1997 that "enunciate a policy of denying financial assistance to countries where corruption is so pervasive that it threatens economic recovery programs." The efforts by these organizations represented a new international desire to combat foreign corrupt practices by corporations. This desire, influenced by various international developments, ultimately led to the recent OECD Convention. The United States undoubtedly played a major role in orchestrating this FCPA-like convention, likely because of its interest in the Convention's success. Between May 1994 and April 1998, the

172 Id.
176 DOING BUSINESS IN THE US, supra note 66, § 13.4.
177 Id. § 13.5 (reviewing the role of the IMF in Governance Issues—Guidance); see Note, International Monetary Fund, available in IMF News Brief No. 97/15 (Aug. 4, 1997).
178 Among these were: corruption occurring under the unsuspecting European Commission; developments regarding the 2002 Winter Olympics; dissatisfaction with Indonesia’s President Suharto and similar displeasure with governments in Zimbabwe, Italy, Brazil, Pakistan, and Zaire; and economic crises in Russia, Indonesia, South Korea, and Bulgaria. See Honest Trade, supra note 164, at 22.
"U.S. government received allegations that bribes were used to influence the outcome of 239 international contract competitions." 179 These contracts supposedly totaled $108 billion, and approximately 75% of these cases involved companies from OECD member countries. 180

Twenty years after the FCPA’s inception, the countries comprising the OECD agreed to the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. 181 Prior to this Convention, the OECD had a set of guidelines on corporate bribery; however, their effect was minimal. 182 The new Convention called for OECD member countries “to introduce laws in their national legislatures by April 1998 that would subject companies to criminal penalties for bribing foreign officials while soliciting business.” 183 U.S. compliance with the Convention only required an amendment to the FCPA. 184 Other countries also created legislation in order to comply with the Convention. 185

6.1.1. Other Countries

U.S. compliance with the OECD Convention was met with little resistance from Congress. This type of anti-bribery prohibition was nothing new to U.S. securities laws and business practices. Compliance in the international community, however,

180 See id.
181 See DOING BUSINESS IN THE US, supra note 66, § 33.05(3)(d).
182 See FOLSOM AND GORDON, supra note 162, § 12.43 (“The OECD in 1976, at the urging of the United States, adopted a set of decisions and guidelines—a voluntary code—for its member nations. The guidelines have scarcely been heard from since.”).
183 DOING BUSINESS IN THE US, supra note 66, § 33.05(3)(d).
185 Thirty-four countries have ratified the Convention, including the “29 members of the OECD, along with Argentina, Brazil, Bulgaria, Chile, and the Slovak Republic.” Anti-Corruption: OECD Begins Study of Compliance with Anti-Corruption Treaty Outlawing Bribery, INT’L BUS. & FIN. DAILY (BNA), Apr. 28, 1999, at 1; see also Russia: OECD, Russia Agrees to Establish Group to Fight Corruption in Business, Government, INT’L BUS. & FIN. DAILY (BNA), July 29, 1999, at 2 (reporting that the OECD is “ready to open discussions’ for Russia to join the OECD Anti-Bribery Convention.”).
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might face varying levels of opposition. The OECD members will have to monitor each other's efforts as they adapt to their respective versions of the new legislation.\textsuperscript{186} The responses from foreign business enterprises will also merit the OECD's attention.

While some "[n]ations in transition have made some attempts to correct bribery," it "remains extremely serious" in other countries, such as China.\textsuperscript{187} Three classifications of corruption have been created by the British organization, Control Risks.\textsuperscript{188} These classifications include payments "to officials and business persons for favorable treatment," "nepotism carried to a level of domination of business by family and clan interests," and "the evolution of corruption into organized crime, with the participation of officials at the highest levels of government."\textsuperscript{189} Although the first category of corruption invites FCPA violations, the presence of activity contemplated by the other two categories suggests that a government may also be susceptible to bribery.

It appears, however, that the Convention might not face its greatest difficulty in countries with epidemic private sphere corruption, but in countries that have, at times, recognized little difference between the state and its private business enterprises. Also, countries that regulated bribery in a loose manner prior to the Convention might prevent total Convention adherence. For example, a German law concerning unfair competition does not prohibit general acts of bribery.\textsuperscript{190} Instead, German law prohibits kick-backs to employees or agents of a business establishment "for the purpose of competition."\textsuperscript{191} However, this law does not pro-

\textsuperscript{186} See International Anti-Bribery and Fair Competition Act of 1998, \textit{supra} note 184, at 3311.
\textsuperscript{187} FOLSOM & GORDON, \textit{supra} note 162, § 12.4 (relating a Chinese source that "reported that in the first half [of] 1996, 34,070 cases of economic crimes had been reported (bribes, embezzlement, graft, etc.) involving more than 7,000 officials, including 3,017 managers of state owned industries and 2,141 involved with banking and negotiable securities").
\textsuperscript{188} \textit{Id.}
\textsuperscript{189} \textit{Id.} The first classification is commonly addressed by FCPA-like prohibitions. The second classification, which has been common in Indonesia, and the third classification, "a problem with the former Soviet states," require greater domestic attention from the governments within the countries facing these types of corruption. \textit{Id.}
\textsuperscript{190} See 4 \textit{BUSINESS TRANSACTIONS IN GERMANY} § 37.05 (Dennis Campbell et al. eds., 1999).
\textsuperscript{191} \textit{Id.}
scribe bribes paid to the owner of a business establishment.\footnote{See id.}{192} Thus, a more comprehensive bribery prohibition might initially face some friction in its implementation and acceptance by business entities.

Countries where an FCPA-like prohibition might actually receive greater support are those whose national laws are based on Islamic Law. A portion of the Koran prohibits bribery.\footnote{See \textit{William M. Hannay, International Trade: Avoiding Criminal Risks} § 6.02 (1991).}{193} Accordingly, a number of Islamic nations have adopted anti-bribery provisions.\footnote{See id. §§ 6.02-6.04 (describing Iranian and Egyptian anti-bribery laws as well as prohibited payment laws and policies in Kuwait, Bahrain, the United Arab Emirates, Saudi Arabia, and Qatar). \textit{But see id.} (indicating restrictions on, or a lack of, such laws and policies in Jordan, Iraq, and Oman).}{194} Nevertheless, these provisions focus on foreign business enterprises trading with these governments, not on domestic concerns and their trade practices with foreign governments. As Islamic countries, that already are active in the growing global economy, increase their participation in the global economy, it is likely that an opportunity to monitor their implementation of FCPA-like statutes will arise. The same holds true for countries in other regions that also continue to play larger roles in international trade.

6.1.2. The United States and the 1998 Amendments to the FCPA

Ten years after it was last amended, the FCPA has undergone significant change. Although the 1998 amendments did not address the issue of regulating attorneys, several characteristics of the legislation merit attention as they have broadened the scope of the SEC's FCPA enforcement powers. First, section 30A now prohibits payments, offers, and the giving of anything of value to foreign officials, political parties, or conduits to officials or political parties for the added purpose of "securing any improper advantage."\footnote{International Anti-Bribery and Fair Competition Act of 1998, H.R. REP. No. 105-802, at 3 (1998).}{195} This amendment expands SEC enforcement power since any improper advantage that an issuer gains over its competitors likely would qualify under the FCPA.
A second significant amendment “expand[s] the definition of ‘foreign official’ to include an official of a public international organization.” The amendment provides that such organizations are those “designated by Executive Order pursuant to the International Organizations Immunities Act . . . (22 U.S.C. [section] 288),” or “any other international organization that is designated by the President for the purposes of this section.” This new provision adds potential targets of bribery and corruption which the SEC can address. Recently, there has been a flurry of press coverage concerning allegations that the Salt Lake Organizing Committee made improper payments to International Olympic Committee (“IOC”) members in order to successfully secure Salt Lake City as the site for the 2002 Winter Olympics. Since the IOC is a private international organization, even if the FCPA amendments already were in effect when the alleged bribery occurred, the activity still would not have been enforceable under the FCPA. However, the attention to corruption that this event triggered should lead to heightened awareness, both within the United States and abroad, concerning the problem of foreign corrupt practices. In turn, this awareness likely will lead to increased FCPA enforcement actions as SEC enforcement policies change in response to shifting public (and congressional) concerns.

A third amendment will expand SEC enforcement opportunities by creating a new basis for SEC FCPA jurisdiction. Section 30A(g) provides for liability to be assessed against U.S. issuers or U.S. persons acting as their agents who make prohibited payments outside of the United States, “irrespective of whether . . . they make any use of the mails or means or instrumentality of interstate commerce.” Although it would seem that most overseas–prohibited payments by a U.S. issuer could in some way be linked back through interstate commerce or the mails to the issuer, this portion of the amendment ensures that the SEC may enforce the FCPA in instances where it otherwise cannot meet the original jurisdictional means.

These three amendments, in addition to increased awareness of and concern over corporate bribery of foreign officials, should

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196 Id. at 19.
197 Id.
help lead to an increase in FCPA enforcement actions, especially as U.S. and foreign corporations continue to expand their operations across the globe. Although the FCPA amendments do not address attorney liability, the monitoring of attorney conduct will continue to be an important part of SEC enforcement policy. The OECD's Convention will add new dimensions to this issue.

6.2. Ramifications Concerning the SEC and Regulation of Attorneys

The process of regulating international corporate corruption and bribery of foreign officials is expanding in scope. International organizations and many OECD-member countries are adopting measures to prevent corrupt activities. The three amendments, discussed above, will enable the SEC to find additional FCPA violations which, a year ago, were outside the agency's reach. In order to take advantage of these increased opportunities, the SEC will have to refocus its investigation and enforcement efforts.

The amended FCPA clearly establishes jurisdiction over FCPA violators. SEC jurisdiction over foreign attorneys, who may become involved in advising issuers overseas due to growing international trade and economies, is not as definite. In fact, the SEC's means of regulating the conduct of attorneys practicing before it in the United States, such as Rule 102(e), are not enforceable against foreign attorneys who do not practice before the SEC. Due to the increased enforcement of the FCPA, which will likely stretch the SEC budget, and the decreased regulatory ability of the SEC with respect to foreign attorneys, it appears that the SEC will become even less efficient and effective in regulating attorneys whose advice leads to FCPA violations.

This decrease in effectiveness and efficiency, however, should be matched by an increase in the ability of the private sector to regulate attorneys. As international trade and investment grows, which is the goal of the OECD, corporations will have a greater presence in foreign countries. Accompanying this market expansion, corporations may find, depending on the laws of individual countries, increased standing to bring attorney malpractice suits.

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200 See OECD Guidelines for Multinational Enterprises, reprinted in FOLSOM AND GORDON, supra note 162, § 23.30 ("The common aim of the Member countries is to encourage the positive contributions which multinational enterprises can make to economic and social progress . . . .").
In the alternative, corporations may choose not to use foreign attorneys for fear of not being able to bring actions for incorrect legal advice. Foreign attorneys would, therefore, have an incentive to provide accurate advice and to support the creation or reform of attorney malpractice laws in their countries. Unless one or both of these actions are taken, corporations will be less likely to seek advice from foreign attorneys for any issue other than those which routinely arise in the attorneys' respective countries.

Finally, it should be noted that the Convention places great emphasis on the criminal punishment of bribery, an area in which the SEC does not have jurisdiction. Perhaps criminal sanctions are calculated to produce the greatest amount of international adherence to anti-bribery statutes when enacted. The Convention "require[s] countries to help each other prosecute cases; since each country has an interest in preventing others from stealing an advantage by bribery, they will all want to monitor each other's adherence to the new convention." Assuming that countries help each other prosecute, it is likely that they will focus on criminal prosecutions. The Convention emphasizes criminal enforcement, and most countries, in order to comply, have had to pass such criminal legislation. SEC civil investigations, however, may not be compatible with these criminal provisions. Of course, the overall effect of these amendments, the Convention, and international anti-bribery efforts on SEC FCPA enforcement and attorney regulation will not become apparent until after the atmosphere sought to be created by the Convention comes fully into existence.

7. CONCLUSION

Regulatory agencies within the U.S. government are required to operate within limited budgets and structure their regulatory policies with such constraints in mind. Like all agencies, the SEC is required to perform its regulatory functions while adhering to its annual budget. In order to accomplish this, the SEC must maximize the benefits that it derives from every activity it chooses to pursue. One way the SEC can effectively perform its functions is by using its ability as an administrative agency to exercise prosecutorial discretion. The agency exercises this discre-

201 Honest Trade, supra note 164, at 24.
tation throughout its various congressionally-created enforcement responsibilities, including the enforcement of the FCPA.

The SEC defers to the private sector and allows clients to pursue actions against attorneys whose advice leads a client to violate the FCPA. The private sector is better situated to monitor these attorneys due to its greater resources and comparatively greater deterrent capabilities. Issuers may bring malpractice suits, the threat of which itself is a deterrent. Malpractice suits are more effective than SEC actions due to the possibility of greater damage awards and the relative ease with which a client can obtain attorney-client documents. Alternatively, issuers may decide simply not to use the attorney's services in the future, an effective deterrent in the competitive legal market. The deterrent effects of threatened malpractice suits or the loss of business demonstrate that the private sector is a more efficient and effective regulator of attorney conduct, at least in terms of advice given relating to the FCPA.

Recent international efforts to combat corporate bribery of foreign officials have brought the issue of attorney regulation into the international arena. Although it is too early to determine exactly how attorney regulation will change under the various international anti-bribery provisions—if it changes at all—the expanding international economy and increased overseas investment by multinational corporations suggest that foreign attorneys will be retained more frequently to provide advice concerning these provisions than at present. Attorneys will be providing their services in numerous countries and will be subject to a variety of bribery provisions. It will be difficult for the SEC, or enforcement agencies from other countries, to sift through the multiple bribery laws applicable to each situation and to assert jurisdiction outside of their respective countries. The private sector will be able to provide a more efficient mode of regulating attorneys. Corporations operating across the globe will have standing to bring malpractice suits if provided for by a country's substantive law and will be in a position to choose whether or not to retain new counsel for future transactions. In conclusion, the private sector can provide comparatively more efficient and effective regulation of attorneys whose advice leads to foreign bribery and will receive deference from governmental entities that are assigned the task of enforcing the underlying anti-bribery provisions.