The Foreign Corrupt Practices Act Review Procedure: A Quest for Clarity

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Since its enactment in December 1977, the Foreign Corrupt Practices Act (FCPA) has been a source of widespread controversy and confusion. Critics in both government and the private sector have assailed the FCPA's vague language and sparse legislative history. They allege that the statute's ambiguities are causing many companies to forego possibly legitimate business opportunities to ensure compliance with the Act's provisions. Some companies are even withdrawing from certain foreign markets altogether. As a consequence, U.S. firms are losing millions of dollars in overseas business, thus compounding the United States' balance-of-payments problems.
In an effort to address these criticisms, the Justice Department, which shares enforcement responsibility for the Act with the Securities and Exchange Commission (SEC), promulgated the Foreign Corrupt Practices Act Review Procedure in March 1980 to provide guidance to companies on the meaning, scope, and application of the Act's anti-bribery provisions. Under the Review Procedure, a party concerned about violating the Act may submit details of a prospective transaction to the Criminal Division for review. After examining the proposed conduct, the Criminal Division will issue a review letter advising the party of its enforcement intentions under the FCPA if the transaction proceeds further.

While many applaud the Justice Department's effort to provide guidance on the Act, the Review Procedure has been criticized for being inadequate to the task. Problems such as the confidentiality of business information, the public nature of the review process, and the SEC's refusal to participate in review proceedings have deterred companies from using the Review Procedure. Justice Department demands for more detailed descriptions of transactions, the insufficiency of foreign lawyers' legal opinions, and translation problems have greatly delayed action on those review requests that have been submitted. One year after the Review Procedure was instituted, Justice has issued only four review letters.


5. The Justice Department has criminal enforcement responsibility for section 103 of the Act and civil and criminal enforcement responsibility for section 104, the Act's anti-bribery provisions. The SEC is responsible for the accounting provision of section 102 and for civil enforcement actions under section 103. See Shine, The Antibribery Provisions of the Foreign Corrupt Practices Act, II THE NEW REVIEW PROCEDURE UNDER THE FOREIGN CORRUPT PRACTICES ACT 3, 4-5 (R. Beckler, A. Levenson, R. Shine co-chairmen 1980) [hereinafter cited as NEW REVIEW PROCEDURE II].


8. See notes 136-66 infra and accompanying text.


Given the increasing importance of international commerce to the U.S. economy, it is imperative that a workable process exist for clarifying the FCPA. This Article examines whether the FCPA Review Procedure is such a process. The Article first considers the need for clarification of the Act and traces the events that led to the establishment of the Review Procedure. An overview of the Procedure is presented and its effectiveness in meeting the problems of the Act is evaluated. The Article then suggests changes in the Review Procedure and proposes an alternative method of providing guidance to the business community.

I 
NEED FOR CLARIFICATION

The legal and business communities have been nearly unanimous in their complaint that the Foreign Corrupt Practices Act is riddled with vagueness and ambiguity.\(^{11}\) The Act’s provisions are deceptively concise, with key words and phrases defined in neither the Act itself nor its legislative history. Some of the statute’s most blatant ambiguities include: (1) what duties of foreign government employees are “essentially ministerial or clerical,”\(^ {12}\) (2) the extent to

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\(^{12}\) It is clear from both the language of the Act and its legislative history that the ban on payments to foreign officials does not extend to payments to those “whose duties are essentially ministerial or clerical.” 15 U.S.C. §§ 78dd-l(b), 78dd-2(d)(2) (Supp. III 1979). Congress did not intend to prohibit “grease” payments or facilitating payments made to low-level government employees to secure the prompt and proper performance of actions to which the payor is entitled. H.R. REP. No. 831, 95th Cong., 1st Sess. (1977), reprinted in 186 INT’L TRADE REP. (BNA) (U.S. Export Weekly) N-6 to N-7 (Dec. 13, 1977) (statements of Sen. Tower on the floor of the Senate prior to passage). What is not clear is which employees perform “essentially ministerial or clerical” duties. The Act’s legislative history speaks vaguely of nondiscretionary actions, permits and licenses, citing few examples of specific positions. H.R. REP. No. 640, 95th Cong., 1st Sess. 8 (1977). In addition, while an employee such as a customs agent may perform only ministerial duties in one country, the powers of his counterpart in another country may be much broader. Though companies may consult foreign lawyers or commercial officers at U.S. embassies to determine the nature and scope of a government employee’s duties, their advice will not offer immunity against a contrary determination by the Justice Department. Estey & Marston, supra note 11, at 184.

To further complicate matters, though grease payments are exempt under the FCPA, the Justice Department has indicated that it may prosecute some payments under earlier enacted anti-bribery laws. Id. See note 96 infra and accompanying text. As one Justice
which the word "corruptly" protects business entertainment of foreign officials and courtesy gifts;\(^\text{13}\) \(^3\) under what circumstances a company has "reason to know" that a sales agent or other intermediary stated, the Department "hasn't felt absolutely bound by the intent of Congress." \(^{207}\) \(^3\) \(^{}\) \(^{}\) \(^{}\)

Further, while Congress did not place limits on the amount paid to ministerial or clerical employees, the Justice Department may infer that large sums are intended to be passed on to higher officials. Thus to avoid investigation, businessmen must consider not only the recipients of payments but also the size of payments. How much is too much would seem to depend on the services involved, the value of the business transaction, and customary practice in the foreign country.

Perhaps the most troubling ambiguity in this area is whether facilitating payments made to high level government officials are also exempt under the Act. In banning payments to foreign officials, the Act sets forth two tests. First, the payments must be intended to assist a company in "obtaining," "retaining" or "directing" business, and second, they must be made to an official whose duties are not "essentially ministerial or clerical." \(^{H.R. REP. No. 831, supra, reprinted in 186 INT'L TRADE REP. (BNA) (U.S. Export Weekly) N-7 (Dec. 13, 1977) (statement of Sen. Tower). Thus the language of the Act focuses both on the recipient of the payment and the purpose of the payment. As one commentator concluded, "[Congress] apparently provided a loophole allowing grease payments to be made to true foreign officials also." \(^{Baruch, The Foreign Corrupt Practices Act, 57 HARV. BUS. REV. 32, 46 (1979). If the duty to be performed by the "true foreign official" is not intended to obtain, retain or direct business, but merely to move a matter more quickly toward an eventual act or decision, a facilitating payment made to him would arguably be permitted under the FCPA.\(^{207}\) While the language of the Act would seem to support this reasoning, a reading of its legislative history can lead to a different conclusion. As one article suggests, in determining whether a payment to a particular person is excluded from the Act's prohibitions, Congress intended the focus to be on the nature of the foreign official's job, not on the particular act that he is paid to perform. \(^{Sprow & Benedict, The Foreign Corrupt Practices Act of 1977: Some Practical Problems and Suggested Procedures, 1 CORP. L. REV. 357, 361 (1978). Under this interpretation, a payment made to a civil servant whose duties involve the exercise of discretion would be unlawful even if the act he was paid to perform was essentially ministerial or clerical.\(^{208}\) This conclusion is supported by Senator Tower's statement on the floor of the Senate prior to the passage of the FCPA: "We discussed the possibility of excluding payments to secure the performance of 'essentially ministerial or clerical' duties, but rejected it in favor of a test that would look to the type of officer involved—not to the particular duty he was being asked to perform." \(^{H.R. REP. No. 831, supra, reprinted in 186 INT'L TRADE REP. (BNA) (U.S. Export Weekly) N-7 (Dec. 13, 1977). These inconsistencies between the language of the Act and its legislative history have led some to wonder "whether a large, corrupt payment to an official with ministerial duties is not prohibited while a small payment to expedite processing customs forms is prohibited if made to a more senior official." \(^{REPORT OF THE PRESIDENT, supra note 11, at 9-6.\(^{207}\) 13. The legislative history of the Foreign Corrupt Practices Act contains very little discussion of business entertainment expenditures and courtesy gifts. A literal reading of the Act suggests that any entertainment of foreign officials or gifts to them would be prohibited if intended to induce the foreign officials to use their positions in order to direct business to the payor. Logically, there should be no distinction between the payment of a bribe in cash or in kind, as that would undermine the objectives of the Act. But, as two commentators have concluded, it seems unlikely that Congress meant to prohibit small gifts that are of insufficient value to induce a government official to misuse his position, especially in countries where such gifts are customary or dictated by local rules of etiquette. \(^{Sprow & Benedict, supra note 12, at 360. It seems equally doubtful
ary is passing money on to a foreign official;\textsuperscript{14} (4) under what circumstances a company is liable for the acts of its officers, directors, employees, agents, stockholders, subsidiaries or partners;\textsuperscript{15} and (5) that Congress meant to prohibit tours of company offices and factories—including transportation, hotels, meals and entertainment expenditures—in order to familiarize foreign government officials with the company’s production methods and facilities.

Some observers believe that this interpretation of the Act is supported by the use of the word “corruptly” in 15 U.S.C. §§ 78dd-1(a) & 77dd-2(a) (Supp. III 1979). \textit{See}, e.g., Sprow & Benedict, supra note 12, at 359; Chamber of Commerce of the United States, Working Group on Overseas Business Practices, International Division, Statement of the Chamber of Commerce of the United States Regarding the Impact and Operation of Section 103 of the Foreign Corrupt Practices Act of 1977 (June 30, 1980), at 9 [hereinafter cited as Statement of the Chamber of Commerce] (on file at the Cornell International Law Journal). As explained in the Act’s legislative history, “[t]he word ‘corruptly’ is used in order to make clear that the offer, payment, promise, or gift, must be intended to induce the recipient to misuse his official position in order to wrongfully direct business to the payor . . . . The word ‘corruptly’ connotes an evil motive or purpose, an intent to wrongfully influence the recipient.” S. Rep. No. 114, 95th Cong., 1st Sess. 10 (1977), reprinted in [1977] U.S. CODE CONG. & AD.NEWS 4098, 4108 (emphasis added). If the gift or entertainment is customary or merely intended to create a pleasurable atmosphere for discussions between a company and government officials, it is unlikely that this alone would cause an official to “misuse” his position. Thus the Act would not seem to prohibit gifts and entertainment expenditures in these circumstances.

14. The provision of greatest concern to businessmen is the prohibition of payments to any person “while knowing or having reason to know” that all or a portion of the payment will be passed on to a foreign official, political party, party official or candidate. 15 U.S.C. §§ 78dd-1(a)(3), 78dd-2(a)(3) (Supp. III 1979) (emphasis added). \textit{See} \textit{REPORT OF THE PRESIDENT}, supra note 11, at 9-5. This clause prohibits indirect payments to foreign officials through intermediaries such as consultants and sales agents, who sometimes pass on part of their fees to government officials in order to achieve a desired sale. Local agents often play a critical role in obtaining business overseas, and in some countries the use of agents is required by law. \textit{Id.}

The Act’s legislative history does not intimate under what circumstances a company should have “reason to know” that an agent is making illegal bribes. Companies fear that in some countries where bribery is commonplace, “reason to know” will be presumed in all cases. Companies are uncertain about the extent of their obligation to investigate an agent’s practices, and they are concerned about how much protection instituting FCPA control procedures will provide them. \textit{Id.} To ensure compliance with the FCPA, many companies are requiring their sales agents to sign agreements in which they pledge not to bribe foreign officials in their work for the company. \textit{See The Anti-Bribery Bill Backfires}, supra note 11, at 143. But, as the Justice Department has made clear, a mere contract provision, without other affirmative precautionary steps, will not insulate a company from liability for its agents’ improper actions. U.S. Dep’t of Justice, Foreign Corrupt Practices Act Review Procedure Release No. 80-03 (Oct. 29, 1980). \textit{See} note 121 \textit{infra} and accompanying text.

15. Under the Act, both companies and their officers, directors, employees, agents and stockholders acting in the company’s behalf may be liable for violations of the anti-bribery provisions. 15 U.S.C. §§ 78dd-1(a), 78dd-2(a) (Supp. III 1979). The Act, however, does not make clear under what circumstances a company is liable for the actions of low level employees who make unauthorized bribes to foreign officials. The Act and its legislative history are similarly ambiguous on the subject of company liability for improper payments by subsidiaries. By its terms, the Act’s prohibition against bribery does not extend to foreign subsidiaries of American companies. This is supported by statements of the Act’s sponsors. \textit{See}, e.g., H.R. REP. No. 831, 95th Cong., 1st Sess. (1977), reprinted in 186 INT’L TRADE REP. (BNA) (U.S.Export Weekly) N-5 (Dec. 13, 1977) (statement of Sen. Proxmire). But if a U.S. parent company benefits from a bribe made by its foreign subsidiary and has knowledge that the bribe was made, it might still be liable under the Act. It is arguable that the parent tacitly approved the bribe by not
the application of the Act to contributions to political parties and candidates.\textsuperscript{16}

These ambiguities in the FCPA are especially troublesome because of the virtual absence of enforcement history under the Act.\textsuperscript{17} Companies cannot look to court decisions as aids in interpreting the Act or to SEC or Justice actions to determine enforcement policies. Companies are left in a legal void where commonplace business transactions must be undertaken with uncertain legal foundation and subject to harsh civil and criminal penalties. Small companies and new exporters without access to specialized counsel experienced in dealing with the Act are especially disadvantaged.\textsuperscript{18}

Critics of the FCPA claim that its ambiguities have resulted in significant losses in foreign sales, service and construction contracts. They contend that many companies, for fear of violating the Act, are intervening to stop its payment. \textit{See generally} Baruch, \textit{supra} note 12, at 48.

The liability of a company for the actions of joint venture partners and prime contractors is also unclear. If a company is a minority partner in a joint venture, it may be unable to control the payment of bribes to foreign officials despite its best efforts to do so. A similar problem faces subcontractors who have knowledge that the prime contractor is bribing foreign officials. Whether a company could be found liable under the FCPA in such circumstances is uncertain. Though a company would benefit from such a bribe, it would have neither approved of nor acted directly or indirectly in furtherance of the illegal payment. \textit{See generally} REPORT OF THE PRESIDENT, \textit{supra} note 11, at 9-3.

\textsuperscript{16} The FCPA forbids payments to foreign political parties, candidates and party officials for the purpose of obtaining or retaining business. 15 U.S.C. §§ 77dd-1(a)(2), 77dd-2(a)(2) (Supp. III 1979). The Act does not proscribe legitimate contributions to foreign political parties and candidates in countries where such contributions are legal. Whether a payment would be legal or illegal under the Act therefore depends on the intention of the payor. Unless the payor were motivated solely by an interest in the general policies of the government or the strengthening of a particular political party, he would be treading on dangerous ground.

What factors must be present to constitute a violation of the Act is unclear. Even contributions with the best of motives may be made under circumstances that could imply a corrupt purpose. The awarding of a major contract to a company that made a substantial contribution to a political candidate might suggest an improper motive. If this is enough to invite prosecution by the Justice Department, a company might be advised to refrain from seeking government contracts either before or soon after an election. This, however, would put companies in the anomalous position of desiring the election of a candidate for general political reasons but being financially penalized by his success at the polls.


\textsuperscript{18} \textit{See} 126 CONG. REC. S5875 (daily ed. May 28, 1980) (statement of Sen. Chaffee introducing S. 2763, a bill that would direct the Justice Department to provide compliance guidelines under the FCPA.) \textit{See also} REPORT OF THE PRESIDENT, \textit{supra} note 11, at D-6.
abandoning legitimate business practices that are essential in obtaining foreign contracts. Other companies are foregoing certain export-related opportunities, and some companies are withdrawing altogether from markets in Latin America, Africa, Asia and the Middle East where they fear they may most easily overstep the Act’s ambiguous bounds.\textsuperscript{19}

In its preliminary report, the Interagency Task Force on Export Disincentives confirmed that many U.S. companies are interpreting the Act cautiously.\textsuperscript{20} Export sales are generally a small proportion of total sales for most American companies. This is especially true of exports to less developed countries (LDCs), where FCPA problems are most prevalent. Firms are thus reluctant to risk large penalties under the FCPA when there is any question of the legality of a particular transaction.\textsuperscript{21} Rather than expose themselves to possible civil and criminal liability, firms often simply refrain from entering such uncertain export dealings.

Businessmen emphasize that the limited number of prosecutions brought under the Act does not reflect the extent of the deterrent effect on export transactions caused by ambiguities in the FCPA. The risk of successful prosecution is not the only concern. Companies fear the mere possibility of being charged with FCPA violations because of the adverse publicity such charges would engender.\textsuperscript{22} Even when convinced that a court would find no violation of the Act, some firms may forego export opportunities because of a concern that the Justice Department or SEC might interpret the Act differently and bring an enforcement action against them.\textsuperscript{23}

Concerns over ambiguities in the FCPA appear to be having a major effect on U.S. exports.\textsuperscript{24} While most sources have been reluctant to attempt to quantify the extent of losses caused by the

\textsuperscript{19} See generally REPORT OF THE PRESIDENT, supra note 11 at 10, 9-1 to 9-11, C-3, C-6 to C-14, D-8; Report on Export Disincentives, supra note 2, at 7-8; U.S. Firms Say '77 Ban on Foreign Payments Hurts Overseas Sales, Wall St. J., Aug. 2, 1979, at 1, col. 6; Singer, supra note 3, at 880-81; Butterfield, U.S. Law Against Bribes Blamed for Millions in Lost Sales in Asia, N.Y. Times, June 26, 1978, at 1, cols. 5-6. [Editor's Note: As this Article went to press, the General Accounting Office released the results of a survey it conducted of 250 U.S. companies doing business abroad. More than 30% of the companies reported that they had lost overseas business as a result of the FCPA. In the aircraft and construction industries, over 50% of the respondents reported losses. New Survey on Anti-Bribery Laws, San Francisco Chronicle, Mar. 7, 1981, at 46, col 1.]
\textsuperscript{20} Report on Export Disincentives, supra note 2, at 8.
\textsuperscript{21} Id. at 9.
\textsuperscript{22} REPORT OF THE PRESIDENT, supra note 11, at 9-3.
\textsuperscript{23} Id.
\textsuperscript{24} Nineteen American embassies have reported that the Act is having a negative impact on U.S. trade. REPORT OF THE PRESIDENT, supra note 11, at C-3. Foreign Service posts in eight LDCs, accounting for $6.5 billion in U.S. exports in 1978, perceived some negative export effects. Posts in seven LDCs, accounting for $7 billion in exports,
FCPA, a draft working paper of the Interagency Task Force on Export Disincentives placed the amount at about $1 billion annually. Other reports, however, suggest that this significantly underestimates losses caused by the Foreign Corrupt Practices Act.

While there is substantial evidence that the FCPA has caused trade losses, it is impossible to determine how much is attributable to ambiguity in the law and how much is due instead to genuinely prohibited bribery. This distinction is central to any analysis of proposals that seek to minimize the adverse impact of the FCPA. For while providing guidance to businessmen may reduce losses due to ambiguity in the law regarding facilitating payments or entertainment expenditures, only an amendment or repeal of the Act would prevent those losses due to a firm's inability to bribe foreign government officials. Complaints of some businessmen and government officials suggest that it is the latter problem that is the primary cause of lost overseas business. But a Commerce Department study found that many businessmen and attorneys believe that uncertainty concerning the meaning of the Act has a far greater impact on exports than the actual prohibition against bribery. An effective means of clarifying the Act's ambiguous provisions should thus significantly reduce trade losses.

perceived significant negative export effects. Report on Export Disincentives, supra note 2, at 9.

25. As the preliminary report of the Interagency Task Force on Export Disincentives explained, it is impossible to estimate precisely the costs of export disincentives. Report on Export Disincentives, supra note 2, at 4. Estimates must be based primarily on incomplete, anecdotal, and often unverifiable information. The effect of export disincentives generally cannot be separated from other factors causing changes in U.S. trade. In addition, firms studied were often unable or unwilling to provide sufficient details to permit authentication of cases. Id. Also, the Task Force found that the FCPA had been in effect for too short a period of time to permit meaningful analysis of trade data. The Task Force cautioned, however, that "lack of specific estimates . . . must not be mistaken for insignificance." Id. at 8.

26. Draft Working Paper, supra note 4, at M-1. Of this amount, $400 million is in one country alone. Id.

27. A Saudi businessman who has represented American companies claims that the FCPA prevented U.S. manufacturers from winning a $3 billion communications contract. Singer, supra note 3, at 881. A 1978 study by Neil H. Jacoby, Peter Nehemkis and Richard Eells estimated that an annual loss of just five percent of U.S. businesses abroad would cost $6 billion in sales and 120,000 jobs. Id. But a study by Barry Richman of sixty-five major U.S. companies found that only nine lost more than one percent of their total foreign sales by stopping questionable foreign payments and only one company lost more than five percent of its foreign sales. Id.

28. See, e.g., Butterfield, supra note 19, at 1, cols. 5-6; Telephone interview with Peter Clark, Staff Attorney, Multinational Fraud Branch, Criminal Division, U.S. Dep't of Justice, Washington, D.C. (Feb. 5, 1981).

29. REPORT OF THE PRESIDENT, supra note 11, at 9-3.
II
GOVERNMENT RESPONSE

A. THE PRESIDENT'S DIRECTIVE

The government has not been unresponsive to complaints about the Foreign Corrupt Practices Act. In 1978, the Carter Administration's Export Policy Task Force recommended to the President that the Justice Department issue guidelines to clarify the law. In his statement of the Administration's new export policy, President Carter approved the recommendation and publicly announced his intention to provide guidance on the FCPA:

At my direction, the Justice Department will provide guidance to the business community concerning its enforcement priorities under the recently enacted foreign anti-bribery statute. This statute should not be viewed as an impediment to the conduct of legitimate business activities abroad. I am hopeful that American business will not forego legitimate export opportunities because of uncertainty about the application of this statute. The guidance provided by the Justice Department should be helpful in that regard.

The President's directive reportedly followed an intense controversy between the Commerce and State Departments on the one hand and the Justice Department and Securities and Exchange Commission on the other. Commerce and State were sympathetic to the complaints of the business community and recommended that the Justice Department provide guidance. Justice and the SEC, however, opposed any form of guidance. They argued that any new criminal law always contains ambiguities and it is the duty of the courts, not administrative agencies, to interpret the law as individual cases are adjudicated. Guidance by the Justice Department or the SEC would only provide a roadmap around the FCPA.

30. Singer, supra note 11, at 1864.
33. Id.; Singer, supra note 11, at 1864.
34. Id. at 1865 (statement of Richard W. Beckler, then Deputy Chief of the Justice Department's Criminal Division, Fraud Section).
35. Taubman, U.S. Seen Clarifying Bribery Law, N.Y. Times, May 29, 1979, § D, at 6, cols. 4-6. A Justice Department official frankly stated the position of many at the Department: "All [businessmen] want to know is who they can bribe and who they can't. Well, we're not going to tell them—we'll go down kicking and screaming on this one." Berry, supra note 32, § D, at 7, col. 3. Stanley Sporkin, Director of the SEC's Enforcement Division, offered a similar perspective: "We don't have guidelines for rapists, muggers, and embezzlers, and I don't think we need guidelines for corporations who want to bribe foreign officials." Taubman, supra, § D, at 6, col. 4.
Surprisingly, a large segment of the business community also opposed the President's directive, at least publicly. Some businessmen stated that they did not find the provisions of the FCPA troublesome and therefore clarification was unwarranted. Others, who did not find the law ambiguous, feared that clarification of the law might make it harder for them to do business abroad. Many believed that the Justice Department would interpret the Act restrictively.

Congressional reaction to the President's directive was mixed. Opponents of guidance claimed that only Congress can authorize clarification of a law, and Congress did not authorize the Executive Branch to provide administrative guidance or to comment on the Foreign Corrupt Practices Act. Conversely, Senator William Proxmire, the chief sponsor of the FCPA in the Senate, stated that while any changes in the Act must be made by Congress, he hoped that "the Justice Department and the SEC will be able to work out a procedure which enforces the FCPA and provides predictability so that legitimate trade transactions can go forward."

B. JUSTICE DEPARTMENT DELIBERATIONS

Though reluctant to follow the President's directive, the Justice Department began deliberations on how best to resolve the statute's ambiguities. Over the ensuing months, the Department considered five means of providing guidance to the business community under the Act: (1) an information pamphlet for businessmen; (2)
detailed regulations, similar to the Commerce Department's antiboycott regulations;\textsuperscript{43} (3) an official compendium of hypothetical cases under the Act, modeled after the Antitrust Division's Guide to International Operations;\textsuperscript{44} (4) a listing of enforcement priorities, resembling that of the Antitrust Division;\textsuperscript{45} and (5) a business review procedure, again modeled after that of the Antitrust Division.\textsuperscript{46}

An information pamphlet for businessmen was viewed as perhaps the least useful of the five options. As conceived, the pamphlet would have included a brief explanation of the Act's provisions in non-legal terms. Though such a pamphlet would have been easy for the Justice Department to write, Department officials believed that the pamphlet would not provide the kind of substantive guidance on the Act mandated by the President's Export Policy Statement, and thus would not be very helpful to the business community.\textsuperscript{47}

Detailed regulations,\textsuperscript{48} advocated by some lawyers and businessmen,\textsuperscript{49} would provide one of the most effective means of clarifying the Act. By defining precisely such terms as "ministerial or clerical" and by delineating the scope of permissible business entertainment expenditures, regulations would resolve many of the FCPA's ambiguities. Justice Department officials, however, believed that promulgating regulations was not an appropriate function. First, the FCPA is not subject to useful generalizations. Based on the Department's limited experience in pre-FCPA investigations, it found situations from country-to-country so varied that rules on, for example, which government employees perform essentially ministerial or clerical duties, could not be given world-wide application.\textsuperscript{50}

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\item 43. The Commerce Department's antiboycott regulations appear at 15 C.F.R. § 369 (1980).
\item 46. 28 C.F.R. § 50.6 (1979).
\item 47. Telephone interview with Richard S. Shine, note 42 supra.
\item 48. The distinction made in this discussion between regulations and compendiums of hypotheticals is somewhat misleading. Though different in name, the two means of guidance are not always exclusive in form. The antiboycott regulations, note 43 supra, for example, include hypothetical illustrations. Thus, many of the advantages and criticisms of regulations may also apply to hypotheticals, and vice versa. See generally notes 179-87 infra and accompanying text.
\item 49. See, e.g., letter from the law firm of Jones, Day, Reavis & Pogue to Mr. George Fitzsimmons, Secretary, Securities and Exchange Commission (June 30, 1980) (submitted in response to the SEC's request for comments on the impact of the anti-bribery provisions of the FCPA) (on file at the \textit{Cornell International Law Journal}). See note 141 infra.
\item 50. Telephone interview with Richard S. Shine, note 42 supra.
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In addition, Justice officials were reluctant to write regulations without case law on which to base their interpretations of the Act.\textsuperscript{51} Finally, as one official noted, the Department did not intend to narrow the scope of the Act, which is what most advocates of regulations hoped it would do.\textsuperscript{52}

Some Justice Department officials advocated a compendium of hypotheticals because, unlike a business review procedure, it avoids high costs and bureaucratic snags.\textsuperscript{53} Like regulations, hypotheticals do not require companies to publicly reveal their proposed transactions.\textsuperscript{54} Some Department officials believed, however, that hypotheticals were potentially misleading in the context of actual business transactions.\textsuperscript{55} One official asserted that the FCPA might be "too complex an area of law" for this type of procedure.\textsuperscript{56} Further, many believed that, as in the case of regulations, the Department lacked sufficient enforcement experience under the Act to write authoritative and realistic hypotheticals and interpretations.\textsuperscript{57} The Antitrust Division Guide to International Operations, in contrast, was written after many years of enforcement experience and is supported by citations to specific court decisions.\textsuperscript{58}

The Department of Justice ultimately chose a listing of enforcement priorities and a business review procedure. Many in the Department initially viewed publication of enforcement priorities as one of the least desirable of the five options.\textsuperscript{59} They feared that a statement of enforcement priorities would undermine the government's enforcement efforts by providing a "roadmap for fraud."\textsuperscript{60} The President's Export Policy Statement, however, specifically directed the Justice Department to provide guidance to the business community on its enforcement priorities under the FCPA.\textsuperscript{61} Faced with this mandate, Assistant Attorney General Philip B. Heymann, in a December 1979 speech, announced the kinds of cases the Criminal Division considers the most urgent and egregious.\textsuperscript{62} The highest

\begin{itemize}
\item \textsuperscript{51} Id.
\item \textsuperscript{52} Id.
\item \textsuperscript{53} Daily Report for Executives (BNA) G-9 (June 28, 1979).
\item \textsuperscript{54} Id.
\item \textsuperscript{55} Telephone interview with Richard S. Shine, note 42 supra.
\item \textsuperscript{56} Daily Report for Executives (BNA) G-9 (June 28, 1979).
\item \textsuperscript{57} Telephone interview with Richard S. Shine, note 42 supra.
\item \textsuperscript{58} Antitrust Guide, note 44 supra.
\item \textsuperscript{59} Daily Report for Executives (BNA) G-9 (June 28, 1979).
\item \textsuperscript{60} Id. See notes 35 & 40 supra and accompanying text.
\item \textsuperscript{61} Statement of the President on United States Export Policy, 14 Weekly Comp. of Pres. Doc. 1631, 1633 (Oct. 2, 1978).
\item \textsuperscript{62} Speech of Assistant Attorney General Philip B. Heymann, entitled The Justice Department's Proposed Program to Provide Advice to Businesses in Connection with Foreign Payments, in New York City (Nov. 8, 1979), at 15, excerpts reprinted in New
\end{itemize}
priority cases include: bribery of foreign officials in markets where all competitors are American; bribes made in markets where Americans are the only companies engaged in corrupt practices; bribes made in countries where the local government is attempting to clean up corrupt business practices; and bribery of foreign cabinet officers and other high ranking officials. Heymann emphasized that an enforcement priority is merely a generalized statement of policy. The business review procedure is the way to determine whether a particular transaction will escape Justice Department enforcement activities.

The business review procedure is the cornerstone of the Justice Department's guidance program. The principal advantage of a business review procedure is that it offers the most certain way to determine the government's position on the application of the FCPA to a particular course of action. A business review procedure is especially helpful in clarifying "hard" cases, something other forms of guidance may be unable to do. A review procedure is also a very effective way of clarifying recurrent problems, such as whether the duties of a particular government employee with whom a firm frequently deals are "ministerial or clerical." Justice Department officials believed that this option would meet the needs of the business community while still providing the government the necessary flexibility to interpret the Act on a case-by-case basis.

The Justice Department first circulated a draft of its proposed business review procedure in September 1979. The draft met with extreme skepticism from the legal and business communities, and published reports were highly critical of it. Over the next six months, Justice Department officials met with concerned parties to


63. Id. Heymann identified five other factors affecting the likelihood of prosecution: (1) the size of the payment and the size of the economic transaction that the payment affects; (2) the past conduct of the violator; (3) involvement, either actively or passively, of a senior management official; (4) involvement of a lower-level employee where the company has been less than diligent in monitoring employee activities; and (5) the strength of available evidence and the chances for obtaining additional needed evidence. Id. at 16-18.

64. Id. at 15.

65. DAILY REPORT FOR EXECUTIVES (BNA) G-9 (June 28, 1979).

66. Id. As Deputy Assistant Attorney General John C. Keeney stressed, individual review is "less misleading [than written guidelines] and creates less problems for us." The Procedure will allow Justice to "implement the procedures without interfering with [its] law enforcement function." Quoted in Marcus, Agency to Help Businesses Obey Corrupt Practices Act, Nat'l L.J., Oct. 8, 1979, at 6, col. 1.

try to resolve some of the proposal’s major infirmities. These discussions resulted in regulations creating the new Foreign Corrupt Practices Act Review Procedure.

III
THE FCPA REVIEW PROCEDURE

A. HIGHLIGHTS OF THE REVIEW PROCEDURE

The Foreign Corrupt Practices Act Review Procedure is in many ways similar to the Antitrust Division’s Business Review Procedure. Under the FCPA Procedure, the Criminal Division, upon receiving a request for review of a proposed transaction, may (1) state its present enforcement intention under sections 103 and 104 of the Act with respect to the proposed business conduct; (2) decline to state its present enforcement intention; or (3) take such other position or action as it considers appropriate. The Criminal Division may also, in its discretion, refuse to consider a review request.

The subject of the review request must be an actual transaction, but the request need not involve only proposed conduct. The Criminal Division, however, will only consider a request for clearance of that portion of the transaction that does involve proposed conduct; it will not comment on past conduct.

Review requests must be specific and “contain in detail all relevant and material information bearing on the conduct for which review is requested and on the circumstances of the proposed conduct.” An appropriate senior officer with operational responsibility for the relevant transaction must sign the review request. Further, the chief executive officer of a requesting firm must desig-

68. Such problems included: the possibility of prosecution under other statutes; the publication of entire review requests and review letters; the lack of assurance of confidentiality of sensitive information; the requirement that the requesting company’s chief executive officer sign the review request; the sixty day response time to review requests; and the requirement that the whole transaction under review be prospective. Lempert, Fraud Unit Proposes Changes to Allay Fears on FCPA Review, Legal Times of Washington, Feb. 4, 1980, at 1, col. 3.


72. 45 Fed. Reg. 20,800 (1980) (to be codified in 28 C.F.R. § 50.18(h)).

73. Id. § 50.18(d).

74. Id. § 50.18(b).

75. Id. § 50.18(f).
nate that person as the signatory. In appropriate cases, the chief executive officer may be required to sign the request himself. The person signing the review request must certify that it contains a "true, correct and complete disclosure" with respect to the proposed conduct.

Requesting parties must provide the Criminal Division with "any additional information or documents the Division may thereafter request in order to review a matter." Any information furnished orally must be confirmed in writing and certified by the same person who signed the review request. The Criminal Division may also conduct whatever independent investigation it believes necessary. After receipt of the review request and any additional documents, the Criminal Division will make "every reasonable effort" to respond to a review request within thirty days.

Unlike the Antitrust Division Review Procedure, review letters issued under the FCPA Review Procedure are binding upon the Criminal Division. To be binding, a review letter must be signed by the Assistant Attorney General in charge of the Criminal Division or his delegate. Oral statements limiting the enforcement discretion of the Department are unauthorized and nonbinding. Further, review letters are binding only as to parties joining the request. The requesting party may rely upon a review letter to the extent that disclosure is accurate, complete and continues accurately and completely to reflect circumstances after the date the review letter is issued.

76. \textit{Id.}
77. \textit{Id.}
78. \textit{Id.} \S 50.18(g).
79. \textit{Id.}
80. \textit{Id.}
81. \textit{Id.} \S 50.18(i).
82. "A business review letter states only the enforcement intention of the [Antitrust] Division as of the date of the letter, and the Division remains completely free to bring whatever action or proceeding it subsequently comes to believe is required by the public interest." Antitrust Division Business Review Procedure, 28 C.F.R. \S 50.6(9) (1979).
83. Since the Criminal Division had not yet established the goodwill enjoyed by the Antitrust Division under its review procedure, authorities felt that an explicit and binding assurance of nonenforcement intentions was necessary under the FCPA. Speech of Assistant Attorney General Philip B. Heymann, supra note 62, at 11. Although the Antitrust Division is not bound by a review letter, "the Division has never exercised its right to bring a criminal action where there has been full and true disclosure at the time of presenting the request." 28 C.F.R. \S 50.6(9) (1979).
84. 45 Fed. Reg. 20,800 (1980) (to be codified in 28 C.F.R. \S 50.18(j)).
85. \textit{Id.} \S 50.18(e).
86. \textit{Id.} \S 50.18(k). In all three Justice Department releases where the Department determined to take no enforcement action, the following proviso appeared:

The FCPA Review Letter and this Release have no application to any party which did not join in the request, and can be relied upon by the requesting parties only to the extent that the disclosure of facts and circumstances in the request
A review letter, however, will not bind or obligate any other agency.\(^{87}\) Thus, the Securities and Exchange Commission, for example, could still bring a civil enforcement action against a party subject to its jurisdiction under section 103 of the Act for a transaction already cleared by the Criminal Division. The SEC, however, has stated that, on an interim basis, it will not take enforcement action alleging violations of section 103 against any party that has received clearance under the Review Procedure prior to May 31, 1981.\(^{88}\) The SEC did not, however, obligate itself to refrain from enforcing the Act's accounting and record-keeping requirements.\(^{89}\) The Review Procedure anticipates the possibility of such SEC enforcement and warns that a review letter shall not "in any way alter the responsibility of the party or parties to comply with the accounting requirements of section 102 of the Foreign Corrupt Practices Act."\(^{90}\) For parties not subject to SEC jurisdiction,\(^{91}\) however, clearance by the Criminal Division would "provide complete protection from enforcement action" under the FCPA.\(^{92}\)

A review letter, though, will not foreclose Justice Department prosecution under other laws, unless "specifically cited in the particular review letter."\(^{93}\) The Department has agreed not to use the "Kerner mail fraud theory"\(^{94}\) to reach conduct not covered by the

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\(^{87}\) 45 Fed. Reg. 20,800 (1980) (to be codified in 28 C.F.R. § 50.18(t)).

\(^{88}\) Securities Exchange Act Release No. 34-17099, supra note 17, at 59,002. By May 31, 1981, the Justice Department is expected to have completed a study of the first year of operation of the Review Procedure. Id. at 59,005. After evaluating the Department's findings, the Commission will reconsider its enforcement position and decide whether to continue its present policy, participate in the Review Procedure, or take other steps. Id.


\(^{90}\) See generally Speech of Assistant Attorney General Philip B. Heymann, supra note 62, at 11. The term "domestic concern" is defined as:

- any individual who is a citizen, national or resident of the United States;
- or
- any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States.


\(^{92}\) Dep't of Justice Release (March 24, 1980), at 2.

\(^{93}\) 45 Fed. Reg. 20,800 (1980) (to be codified in 28 C.F.R. § 50.18(m)).

\(^{94}\) See United States v. Isaacs, 493 F.2d 1124, 1149-50 (7th Cir.), cert. denied sub nom. United States v. Kerner, 417 U.S. 976 (1974). The Kerner mail fraud theory was used in the Isaacs case to find mail fraud under 18 U.S.C. § 1341 (1976) for use of the mails in the bribery of Otto Kerner, then governor of Illinois, on the ground that the
FCPA; it has no desire to "sandbag" business.\textsuperscript{95} Nevertheless, a Justice official warned that the Department would make no hands-off promises concerning violations of currency and export declaration statutes, which have been used in the past to attack questionable foreign payments.\textsuperscript{96}

An important element of the Review Procedure is the public release of information describing the identity of the party or parties submitting a review request, the general nature and circumstances of the proposed conduct, and the Criminal Division's enforcement decision.\textsuperscript{97} By publicizing the core of individual review requests and its decisions on them, the Criminal Division hopes to provide some guidance to the business community at large. While the Division would be bound only with respect to the requesting party, it wants to disseminate information about review transactions in order to give companies contemplating similar activities some predictability as to what the Justice Department is willing to sanction.\textsuperscript{98}

Because some parties may wish to keep some or all of the information supplied to the Criminal Division confidential, the Review Procedure includes a provision whereby a party may ask the Division "to delay or to refrain from ever making publicly available parts of a review request, and part or all of any information or documents submitted in support of the review request."\textsuperscript{99} To avoid public dis-
closure, however, a party must: (1) specify precisely the information that it asks not to be made public; (2) state the minimum period of time during which nondisclosure is considered necessary; and (3) justify the request for nondisclosure by showing that the material consists of trade secrets or commercial and financial information that is privileged and confidential under Exemption 4 of the Freedom of Information Act (FOIA), or is exempt under any other provision of FOIA.100

In the past, the Justice Department has not guaranteed in advance that information supplied to it would not be made publicly available, even if exempt under the Freedom of Information Act.101 The FCPA Review Procedure marks a major policy shift in this regard by limiting the discretionary authority of the Department. If the Justice Department determines that grounds for nondisclosure exist, then it will not disclose the exempt material except in general terms in the release describing the Criminal Division's enforcement decision. This release, when exempt, will not disclose the identity of the foreign country in which the proposed conduct is to take place, the identity of any foreign sales agents, or other types of identifying information.102 This last catch-all category allows parties to argue that disclosure of any fact will reveal the identity of the transaction to their competitors.103 Though the name of the requesting party will generally be released, even this fact may be withheld if it would enable competitors to pinpoint the transaction.104

If the Justice Department determines that grounds for nondisclosure do not exist under the Freedom of Information Act, the Department will notify the party submitting the FCPA review request of its determination at least seven days before any informa-

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100. 45 Fed. Reg. 20,800 (1980) (to be codified in 28 C.F.R. § 50.18(o)(1)). The Antitrust Division Business Review Procedure does not make reference to the Freedom of Information Act. Instead, a request for nondisclosure must be justified by showing that "disclosure would have a detrimental effect upon the requesting party's operations or relations with actual or potential customers, employees, suppliers (including suppliers of credit), stockholders, or competitors." 28 C.F.R. § 50.6(10)(c)(3) (1979).


104. Id. Of the first four review releases issued, two withheld the name of the requesting party. See U.S. Dept. of Justice, Foreign Corrupt Practices Act Review Procedure Releases Nos. 80-01, 80-03 (Oct. 29, 1980).
This seven day reprieve gives companies time to seek judicial action to prevent disclosure of information sought to be kept confidential.

A requesting party may withdraw a review request at any time. The Criminal Division, however, remains free to submit such comments to the party as it deems appropriate and to take any action at any time thereafter. The Division also reserves the right to retain documents and information submitted to it and to use them for “all governmental purposes.” Pursuant to this provision, the Criminal Division has indicated that the Justice Department will turn over information received from the requesting parties to regulatory agencies if a senior representative of an agency submits a written request for the information, and the Department determines that the request is for a lawful (and not a frivolous) purpose.

B. THE FIRST REVIEW RELEASES

The Justice Department published its first review releases on October 29, 1980. In Release Number 80-01, the Department stated that it did not intend to take enforcement action against a U.S. law firm seeking to do business in “a foreign country.” The law firm proposed to set up a $10,000 annual fund for the education and support of two adopted children of a foreign government official. The official’s position was essentially “ceremonial” and did not involve “substantive decision-making responsibilities.” The children's natural parents, who were employed by the foreign government, were “not in a position to make or to influence official decisions that would in any way benefit either the law firm or any corporations which may contribute to the education fund, in their dealings with the foreign government.” Since the law firm had not retained, nor did it anticipate retaining any business as a result of the proposed conduct, the Department stated that it did not presently intend to take enforcement action with respect to the proposed conduct. Significantly, the Justice Department did not publish the name of the law firm, the country, or the name or specific position of the “honorable...
ary government official.”112

In Release Number 80-02,113 the U.S. firm of Castle & Cooke, Inc. and two of its subsidiaries sought approval of an employee’s plan to seek election to the legislature of the foreign country in which he worked. The employee wanted to continue working for the corporation during the election, and if elected, while in office. The request stated that this employee’s position with the corporation did not involve “any type of advocacy work or any type of representation before the government on the company’s behalf.”114 The political position was part-time, and most legislators in that country held outside jobs. Based on the stipulation that the employee fully disclose his “continuing relationship with the corporation to his political party, the electorate and to the government,” and that he agree not to participate in legislative matters directly affecting his corporation, and based on the opinion of local counsel that the proposed conduct did not violate the foreign country’s laws, the Department agreed not to bring enforcement action with respect to the proposed conduct.115

In a third request,116 the Lockheed Corporation and the Olayan Group, a Saudi Arabian trading and investment company, proposed to enter into an agreement with each other to do business with the government of Saudi Arabia and with the Saudi Arabian Airlines Corporation (“Saudia”). The two firms sought Justice Department guidance on the FCPA implications of the fact that Olayan’s chairman, Mr. Suliman S. Olayan, was also an outside director of Saudia. After determining that Mr. Olayan had taken significant steps to disclose his joint affiliation, and to refrain from any action that might cause Saudia or the government of Saudi Arabia to be influenced in favor of Lockheed or the Olayan Group, the Department of Justice declared its intention to take no enforcement action on the basis of Mr. Olayan’s joint affiliation.117 Implicit in the review release, however, is the reservation that if Mr. Olayan uses his position to influence official action for the benefit of Lockheed or the Olayan Group, the Justice Department would not be bound by this review decision.

112. Id. It is probably reasonable to assume that the submitting party requested the Justice Department not to disclose these facts. See notes 101-04 supra and accompanying text.
114. Id.
115. Id.
117. Id.
In a fourth case, an unnamed U.S. firm sought approval of a contract with a West African attorney in which the attorney stipulated that he would not make payments to foreign officials in his work for the company. Pursuant to section 50.18(g) of the Review Procedure, the Criminal Division sought additional facts and circumstances concerning the attorney's background and qualifications. Since the contract and responses to Justice Department inquiries did not "reflect any facts or circumstances which could reasonably cause concern about the application or possible violation of the Act," the Department declined to respond to the review request. The Department warned, however, that if in fact there were a reasonable concern, the mere contract provision, "without other affirmative precautionary steps," would not be sufficient to protect the company from liability for the lawyer's actions.

IV CRITICISMS OF THE REVIEW PROCEDURE

A. GENERAL REACTION

The Review Procedure has not been received with overwhelming enthusiasm by either business or other government agencies or departments. In fact, its development has been accorded only lukewarm praise within the Justice Department itself. As two commentators observed, the Justice Department "has selected the form of guidance which is the least difficult for it to administer and the most onerous for U.S. businessmen to seek." The SEC is concerned that the Review Procedure will help businesses circumvent the provisions of the Act and has thus refused to participate in the review process. The Commission's principal objection to the Procedure is that the application of the FCPA will,
in many cases, turn on judgments concerning motivation and intent. These subjective questions, the Commission feels, do not easily lend themselves to guidance on the basis of a written description of a proposed transaction.\textsuperscript{125} Nevertheless, because many persons believed that companies were deterred from submitting review requests as a result of the SEC's refusal to participate in the review process,\textsuperscript{126} the Commission announced in August 1980 that, on an interim basis, it would not bring an enforcement action for bribery violations against any party receiving clearance under the Review Procedure prior to May 31, 1981.\textsuperscript{127}

The Commerce Department, which originally recommended both a business review procedure and a compendium of hypotheticals,\textsuperscript{128} believes that the Review Procedure alone will be inadequate. In the view of the Department's general counsel, the Justice Department Review Procedure "doesn't provide enough in the way of guidance to address the legitimate concerns and questions of the business community about the application of the act."\textsuperscript{129} He asserted that general guidelines are also needed.\textsuperscript{130}

A spokesperson for the National Association of Manufacturers, which opposed the adoption of any form of guidance, predicted that the Review Procedure will not be used very much. The business community will be reluctant to use the Procedure because of the Justice Department's authority to demand supporting documents. Firms do not want Justice pouring over documents and information that might be harmful to them. The spokesperson further indicated that since review letters would likely be written in narrow terms, clearance would be limited and thus would not give companies much

\textsuperscript{125} Securities Exchange Act Release No. 34-16593, Impact of the Antibribery Prohibitions in Section 30A of the Securities Exchange Act of 1934, 45 Fed. Reg. 12,574, 12,576 n.27 (1980). The Commission fails to note that the Review Procedure provides for the submission of supporting documents and independent investigations by the Justice Department of transactions under review. Thus the review process is not confined to the examination of "a written description" of a proposed transaction. Further, the Commission would have to base actual enforcement decisions made outside the Review Procedure on much the same information.

\textsuperscript{126} See note 141 infra and accompanying text.


\textsuperscript{129} Marcus, supra note 66, at 6 (statement of C.L. Haslam, General Counsel, Dep't of Commerce).

\textsuperscript{130} Id.
comfort. He predicted that the Review Procedure will only be used in situations in which the legality of a transaction is totally unclear.\footnote{131. Telephone interview with a National Association of Manufacturers spokesperson (Sept. 4, 1979).}

The legal community has sounded similar complaints, though it has offered a somewhat different perspective on the Procedure's use. Lawyers generally agree that the Review Procedure will not be widely used.\footnote{132. See, e.g., Surrey & Popkin, note 108 supra; SEC Joins Review Plan, Nat'l L.J., Sept. 15, 1980, at 10, col. 1; Huffman, Despite SEC Shift, Bar Still Cautious About FCPA Review, Legal Times of Washington, Sept. 1, 1980, at 1, col. 1.} But many believe that companies will submit review requests only when they are certain that the transaction will be approved or when it is a close question, not when the legality of the transaction is totally unclear.\footnote{133. Huffman, supra note 132, at 1. This author, however, tends to agree with the view expressed by other lawyers that "if a company has no problem, it doesn't need the government to tell it that." Id. (statement of Arthur Mathews). See also SEC Joins Review Plan, supra note 132, at 10 (statement of John M. Fedders). Except perhaps in close cases, the expense and delay of the review process would not seem to justify the superfluous security of Justice Department approval.} Companies will use the Review Procedure to "cover" themselves, not to clarify troublesome issues.\footnote{134. Surrey & Popkin, supra note 108, at 11. The initial review releases substantiate this view. See notes 109-21 supra and accompanying text. In each transaction reviewed, it was apparent that the requesting party had taken abundant precautionary measures to ensure that its conduct was beyond reproach and that Justice Department clearance would be certain. The transactions did not raise issues as much as they served as models of proper compliance conduct under the FCPA.} As one lawyer explained, "if you do have a problem, you won't tell the government because you know it will be investigated."\footnote{135. Huffman, supra note 132, at 1 (statement of Arthur Mathews).}

B. DRAWBACKS OF THE REVIEW PROCEDURE

To be an effective form of guidance, the Foreign Corrupt Practices Act Review Procedure must both be capable of resolving the ambiguities in the FCPA and be of such a form that it is usable by the business community. As presently conceived, the Review Procedure is lacking in both respects.

1. Resolution of Ambiguities

The FCPA Review Procedure is intended to clarify the ambiguities in the Act that have posed unintended obstacles to America's foreign trade.\footnote{136. Dep't of Justice Release (March 24, 1980), at 1. See generally notes 19-29 supra and accompanying text.} Theoretically, the Procedure achieves this goal by doing two things: (1) it provides individual companies with a statement of the Justice Department's enforcement intentions under the
FCPA with regard to specific business transactions; and (2) through publication of the core of review requests and decisions, it provides 
general guidance to the business community at large on the meaning 
and application of the Act's anti-bribery provisions.

a. Individual Review

Ideally, individual review eliminates ambiguity by providing a 
definitive statement of the government's position on the application 
of a law to a particular course of action. Until recently, however, the 
FCPA Review Procedure did not offer this advantage. Because of 
divided enforcement responsibilities under the Act, those companies 
under the jurisdiction of both the Justice Department and the SEC 
could not rely solely upon Justice Department approval. Because 
the SEC refused to participate in the administration of the Review 
Procedure, \(^{137}\) to formally coordinate its interpretation and enforce-
ment of the Act with the Justice Department, \(^{138}\) and to provide guid-
ance on its own, \(^{139}\) companies faced the possibility of being sued by 
the SEC for actions previously cleared by the Criminal Division. 
Thus the Review Procedure was only partly effective in resolving the 
statute's ambiguities.

While the SEC indicated that it was “unlikely” that it would 
take enforcement action against a party who had received a 
favorable review letter, \(^{140}\) the mere possibility that the Commission 
might later take such action undercut any certainty that the Review 
Procedure offered. Comment letters received by the SEC suggested 
that the Commission’s position was deterring many companies from 
using the Review Procedure. \(^{141}\) Faced with increasing pressure to

\(^{137}\) Dep't of Justice Release (March 24, 1980), at 1. Securities Exchange Act Release 
No. 34-17099, supra note 17, at 59,004.

\(^{138}\) The Commission has emphasized that while it does not formally coordinate its 
interpretation and enforcement of the Act with the Justice Department, it “work[s] 
closely with the Justice Department in administering the bribery prohibitions.” Id. at 
59,005. The Commission asserts that it is “aware of no difference of substance between 
the Commission and the Department of Justice with respect to interpretation of the brib-
ery prohibitions.” Id.

\(^{139}\) Securities Exchange Act Release No. 34-14478, Notification of Enactment of 

\(^{140}\) Dept. of Justice Release (March 24, 1980), at 2.

\(^{141}\) On February 21, 1980, the Commission issued a statement requesting public 
comment from issuers and other interested persons on the impact of the anti-bribery 
provisions of the FCPA. Securities Exchange Act Release No. 34-16593, supra note 125, 
at 12,574. The Commission sought comments on the impediments the FCPA presents to 
legitimate foreign commerce; what steps issuers have taken to comply with the Act; 
whether there are recurring questions or concerns with respect to the interpretation of the 
anti-bribery provisions; and what impact, if any, uncertainty may be having on competi-
tion in foreign markets. Id. at 12,576. The SEC also sought to determine what steps it 
should take to better administer the elements of the anti-bribery provisions, if any change 
was necessary. Id.
cooperate in clarifying the Foreign Corrupt Practices Act, the SEC modified its position in August 1980.\(^{142}\)

The Commission stood by its refusal to participate in the administration of the Review Procedure. It agreed, however, not to prosecute any party for bribery violations who had received Justice Department clearance before May 31, 1981.\(^{143}\) By that time, the Justice Department should have completed a study of the first year of operation of the Review Procedure.\(^{144}\) After evaluating the Department’s report, the Commission will reconsider its enforcement position and decide whether to continue its present policy, participate in the Review Procedure, or take other appropriate action.\(^{145}\) Though only a provisional measure, the SEC’s policy change eliminates a major drawback of the Review Procedure and permits an assured means of resolving ambiguities in the Foreign Corrupt Practices Act.

b. General Guidance

While the SEC’s new enforcement policy significantly enhances the effectiveness of the individual review process, it does nothing to improve the Review Procedure’s ability to offer general guidance to the business community at large. If the Procedure is to provide reliable general guidance, published review releases must reflect the views and enforcement policies of both the SEC and the Justice Department because each can bring enforcement actions under the
Act. At present, review releases represent only the position of the Justice Department. The SEC's policy to not sue companies that receive favorable review letters does not imply agreement with Justice Department review decisions. Theoretically, the Commission could bring an enforcement action against a company that relied on a Justice Department decision but did not itself seek individual review, even though the company's international transaction was identical to the conduct previously approved. Thus at best, review releases can only provide predictability as to how the Justice Department will apply the provisions of the FCPA.

Beyond the problems posed by the SEC's lack of participation in the review process, a review procedure is simply not an appropriate mechanism to provide general guidance on a statute. As many businessmen have argued, the precedential value of FCPA review letters will be limited because they only represent the Justice Department's position on the application of the Act to the particular transaction under review.\textsuperscript{146} Public releases describing the Department's enforcement decisions are not likely to convey the Criminal Division's perception of the limits of legitimate conduct under the Act. Slight changes in circumstances may result in a different enforcement decision. Further, if the Justice Department is to safeguard the confidentiality of certain business transactions, facts that were critical to the Department's enforcement decision may sometimes have to be deleted from published review releases. Thus, drawing analogies from review decisions will frequently be difficult—and dangerous.

In addition, published review releases are immutable and cannot be modified to reflect changes in government policy that will be inevitable as the Justice Department gains more enforcement experience under the FCPA. The publication of policy changes will have to await the submission of new review requests involving similar conduct and issues under the Act. Businessmen relying on previous review decisions in planning their international activities may sometimes be caught in transitional periods, during which they may find themselves the first victims of enforcement policy changes by being prosecuted for actions they reasonably believed to be sanctioned by the Justice Department.

Finally, experience under the Antitrust Division's Business Review Procedure has shown that the procedure is used far less than the complexity of antitrust problems would seem to necessitate.\textsuperscript{147} If

\textsuperscript{146} REPORT OF THE PRESIDENT, supra note 11, at 9-9.

\textsuperscript{147} From 1968 to 1978, only 230 review requests were submitted under the Antitrust Division Business Review Procedure, averaging fewer than 21 requests per year. Quee-
the FCPA Review Procedure is also only rarely used, it could be years before enough issues have been addressed under the Review Procedure to provide meaningful general guidance to the business community.\textsuperscript{148} While it is too early to determine whether the FCPA Review Procedure will be generally ignored, to date the Justice Department has not received a significant number of FCPA review requests.\textsuperscript{149}

2. Usable Form

Several aspects of the Review Procedure make it an impractical form of guidance to the business community. One problem cited repeatedly by businessmen and lawyers is the public nature of the Review Procedure.\textsuperscript{150} Because of the past adverse public reaction to revelations about corporate bribery,\textsuperscript{151} companies do not want their names associated with questionable foreign payments.\textsuperscript{152} Thus many firms are likely to shy away from a review procedure that entails public disclosure of the names of requesting companies. Some major corporations have in fact gone so far as to publicly deny the need for guidance on the Foreign Corrupt Practices Act while privately indicating strong support for it.\textsuperscript{153}

The public nature of the Review Procedure may also reveal sensitive information to competitors. Competitors may glean information either through the Criminal Division’s public releases or by filing a request for disclosure under the Freedom of Information Act.\textsuperscript{154} Though the Justice Department has attempted to assure con-
fidentiality of sensitive information submitted to it, the Department cannot guarantee that such information will not be disclosed. As one Justice official stated, "[w]e cannot by regulation amend the Freedom of Information Act."

Many lawyers and businessmen are worried that FOIA exemptions will not provide sufficient protection against the disclosure of the extensive documents and business information required in making FCPA review requests. They also fear that confidential information cannot be kept from Congress if a committee or legislator submits a proper request. The possibility of leaks via Congress worries many companies, and congressional requests for information are likely to be frequent if the problem of questionable foreign payments "continues to be a political football."

Further, the public nature of the review process exposes companies to potential litigation. A company employing the Review Procedure will have revealed its operations to shareholders, competitors and other governmental units. This could expose it to liability on two fronts. First, the Justice Department intends to share submitted documents and information with the SEC and other government departments and regulatory agencies. This will enable other government units to engage in often unwarranted and certainly unwanted searches for incriminating information both under the FCPA and other laws. Second, the Act may create a private cause of action for legal or equitable relief. Thus shareholders and competitors may be able to sue a company for injuries suffered as a result of questionable payments, even if the Justice Department declined to take enforcement action.

155. See notes 99-105 supra and accompanying text.
156. Speech of Assistant Attorney General Philip B. Heymann, supra note 62, at 10.
158. Id. A Justice Department official confirmed this problem, admitting that there would probably be no way to prevent Congressional access to information once the review process was complete. "Nor, perhaps," he stated, "should we want to prevent access." Id.
159. Id. (statement of Charles J. Queenan, Jr.).
160. See note 108 supra and accompanying text.
161. The SEC stated that "the legislative history of the Act ... contemplates that private rights of action properly could be implied under the Act on behalf of persons who suffer injury as a result of prohibited conduct." SEC Release No. 34-14478, supra note 139, at 7,754. This view was reiterated by SEC Special Counsel Frederick B. Wade, who added "that 'private enforcement' of the Foreign Corrupt Practices Act would provide 'a necessary supplement' to enforcement actions brought by either the Commission or the Department of Justice and that the implication of a private right of action would be appropriate 'to make effective the Congressional purpose.'" Letter from Frederick B. Wade to Mr. Raymond Garcia, Emergency Comm. for American Trade, Washington, D.C. (May 16, 1978), reprinted in [1978] FED. SEC. L. REP. (CCH) ¶ 81,701, at 80,806 (footnotes omitted). But see Note, A Congressional Response to the Problem of Questionable Corporate Payments Abroad: The Foreign Corrupt Practices Act of 1977, 10 L. &
As previously discussed, the Criminal Division’s authority to demand supporting documents and to conduct an independent investigation also undermines the usability of the Review Procedure. Especially in this delicate area, companies will be very reluctant to give the government virtually unlimited access to company records. Not only might an investigation uncover damaging documents relating to the proposed transaction, but it might also draw attention to questionable past transactions.

A related problem is the Review Procedure’s requirement that a review request “contain in detail all relevant and material information bearing on . . . the circumstances of the proposed” transaction. This requirement may oblige a company to reveal its knowledge that, for example, a particular sales agent has previously made “pass-through” payments to government officials. If some payments were made on behalf of the company (even without its knowledge or approval at the time), the company would be essentially precluded from submitting a review request. To do so would expose it to possible enforcement actions by the Justice Department and the SEC. Further, if the company submits a review request without revealing its knowledge of and/or participation in the payments, and the Justice Department later discovers this “oversight,” the company would lose the protection afforded by a review letter.

Considering the extent of questionable payments made by American companies before 1977, a requirement that firms disclose “all material information bearing on . . . the circumstances of the proposed” transaction may significantly deter many companies from using the Procedure.

The high cost of seeking review of a business transaction further undercuts the practicability of the Review Procedure. The costs of submitting a review request and complying with subsequent Justice Department demands for additional information and documents can be substantial. The burden of such costs is especially onerous to small companies, or when the value of the business transaction is

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162. See notes 78, 80 & 131 supra and accompanying text.
164. A review letter is binding upon the Justice Department only to the extent that the requesting party’s disclosure of information is accurate and complete. 45 Fed. Reg. 20,800 (1980) (to be codified in 28 C.F.R. § 50.18(k)).
165. At the time Congress enacted the Foreign Corrupt Practices Act, over 400 American companies had admitted making questionable or illegal foreign and domestic payments. H.R. Rep. No. 640, 95th Cong., 1st Sess. 4 (1977). The companies, including 117 of the Fortune 500 firms, paid more than $300 million to foreign government officials, politicians and political parties. Id.
relatively low. Faced with the already high costs of instituting FCPA compliance programs and accounting controls, companies may often find it more sensible to rely on the advice of private counsel or simply forego an export opportunity, rather than seek Justice Department review of a matter.

Finally, the dynamics of business negotiations often will not permit lengthy delays to determine the Justice Department’s position on a proposed course of conduct. Timing is often crucial to the conclusion of business agreements. Delays may enable foreign competitors who are not subject to anti-bribery laws to gain an advantage in negotiations. Further, constantly changing conditions may require modification of business proposals made several months previously, thus causing extended Justice Department review and possibly inspiring new demands by foreign officials. While the Review Procedure may be suitable to some kinds of business transactions, those requiring decisiveness and speedy action will not be amenable to consideration under the review process.

V
SUGGESTED CHANGES TO THE REVIEW PROCEDURE AND ALTERNATIVE MEANS OF GUIDANCE
A. SUGGESTED CHANGES

The drawbacks of the Review Procedure seriously diminish its effectiveness in providing guidance on the Foreign Corrupt Practices Act. Some of the drawbacks, such as the cost and time required to seek review of a transaction, are inherent in any review procedure and cannot be readily eliminated. Some problems, such as the Criminal Division’s authority to request supporting documents, could be solved, but only at the expense of the integrity of the Review Procedure. The amelioration of two problems, however, would result in a much more valuable and practicable review scheme.

166. The Review Procedure provides for a seemingly expeditious response to review requests. “The Criminal Division will make every reasonable effort to respond . . . within 30 days after receipt of the review request and of any requested additional information and documents.” 45 Fed. Reg. 20,800 (1980) (to be codified in 28 C.F.R. § 50.18(i)). In fact, however, requests for “additional information” may be extensive and cause the review process to last for months. One year after the Review Procedure was begun, the Justice Department had issued only four review releases. See notes 109-21 supra and accompanying text.

167. The Review Procedure could be restyled along the lines of the “no-action letters” offered by the SEC. See 17 C.F.R. §§ 200.81, 202.2 (1980). Under this procedure, review decisions are based only upon information submitted by companies in their review requests. The SEC has no authority to request supporting documents or to conduct an independent investigation. While such a procedure might be useful in clarifying some ambiguities, it would often be unable to provide reliable answers to questions on the
1. SEC Participation

The Securities and Exchange Commission must join in the administration of the Review Procedure. Its refusal to participate in the review process is one of the Procedure’s most serious defects. Until review letters and releases express the interpretative and enforcement views of both the Justice Department and the SEC, the Review Procedure can only be partly effective in clarifying the ambiguities of the Foreign Corrupt Practices Act.

Formal SEC participation in the review process would create an assured means of determining the government’s enforcement intentions with regard to specific business transactions. It would greatly enhance the Review Procedure’s ability to offer general guidance to the business community, and it would help guarantee that Justice Department and SEC interpretation and enforcement is uniform and consistent with congressional intent.

The President cannot force the SEC to join in the administration of the Review Procedure. If the Commission cannot be persuaded to do so voluntarily, then Congress should enact legislation mandating SEC participation. Alternatively, the SEC should be divested of its enforcement responsibility under section 103 of the FCPA and all enforcement power for the Act’s anti-bribery provisions should be consolidated in the Justice Department. Legislation that would accomplish this goal has recently been introduced in the Senate.168

2. Public Nature of the Review Process

The Justice Department should provide for maximum confidentiality of review proceedings. Until firms can submit review requests without fear that the identity of the requesting party and the specifics of its proposed conduct will become publicly known, most compa-
nies will refrain from using the Review Procedure. Though the Justice Department has attempted to furnish some protection to requesting parties, it has not gone far enough. Ideally, the review process should be entirely confidential. Inter-agency sharing of information and FOIA submissions, however, make this goal illusory. Even so, certain actions can be taken to minimize the public disclosure of review proceedings.

First, review releases should not disclose the names of parties involved in proposed transactions, the nature of the requesting company's business, or the country in which the proposed conduct is to take place. The Review Procedure can provide general guidance to the business community without this information, and it only brings unwarranted attention to requesting parties and their business associates. Instead, releases should be of a hypothetical nature, concentrating on the business practice in question and the Criminal Division’s enforcement decision. To disguise transactions even further, the Criminal Division should publish a release well after it issues a review letter. Releases could be published together on a quarterly or semi-annual basis.

Second, the Justice Department should permit companies to seek return of sensitive documents after the Criminal Division reviews them. By allowing companies to remove such materials from the possession and control of the Justice Department, the documents would be insulated from disclosure under the Freedom of Information Act. Obviously, the Department will not want to relinquish control over all documents a company desires to

169. See notes 99-105 supra and accompanying text.

170. The safeguard against naming the country involved could be relaxed when the Criminal Division has determined that a specific position in a particular country is "ministerial or clerical" in nature, but only when disclosing the name of the country would not risk revealing the identities of the parties involved in the transaction.

171. See Friedman, supra note 154, at 55-56. Alternatively, companies could merely provide the Criminal Division access to the documents and never actually release them to the government. Id.


In a paper on this subject, one author concludes that while the practice of seeking return of a document is an effective means of protecting information from public disclosure, "in view of the balance sought to be struck between confidentiality and providing guidance to the business community, it is unlikely that the Department of Justice would permit such a procedure." Friedman, supra note 154, at 56. Given the reduced role this Article has suggested the Review Procedure play in providing general guidance on the FCPA, however, this would no longer be a valid objection.
reclaim.\textsuperscript{173} A procedure should thus be established to enable companies to negotiate the return of selected documents in advance of their submission.\textsuperscript{174} Such a practice should meet the Justice Department’s need for detailed information on a proposed transaction as well as the desire of companies to protect sensitive material from public disclosure.

Finally, the Justice Department should construe FOIA confidentiality exemptions liberally. While courts are the final arbiters of FOIA requests, the Justice Department’s treatment of “confidential” information and its established practice for obtaining needed information in the future can be important factors in court decisions in FOIA cases.\textsuperscript{175} The Justice Department’s protective policy and consistent practice would set an important precedent in court deliberations.

Admittedly, even these measures will not solve all the problems associated with the public nature of the review process. Information on review requests will still be available to other departments and regulatory agencies,\textsuperscript{176} and the public will still have access to some information that firms hope to keep confidential. These changes should, however, go a long way toward addressing some of the business community’s major concerns.

\section*{B. Alternative Means of Guidance}

While the changes suggested above would substantially improve its effectiveness, the Review Procedure alone is not a sufficient form of guidance. Time constraints, high legal costs, the government’s authority to demand supporting documents and conduct an independent investigation, congressional and agency access to confidential information, and incomplete protection under the Freedom of Information Act will still deter many companies from submitting review requests. Additionally, the Review Procedure is unsuited to provide reliable general guidance on the meaning and application of

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\item At minimum, the Justice Department will want to retain those documents that establish the basic circumstances of the transaction under review. That information would be needed to prove that the circumstances have changed or that the company’s disclosure was inaccurate or incomplete, should the Justice Department later decide to prosecute a requesting party.
\item Documents a requesting party might wish to retain include both information that would not be exempt from disclosure under the Freedom of Information Act and information that would be exempt but is so sensitive that a company would also not want it readily available to others within the government.
\item \textit{See} National Parks & Conservation Ass’n v. Mořton, 498 F.2d 765, 768, 770 (D.C. Cir. 1974).
\item If the Securities and Exchange Commission joins in the administration of the Review Procedure and is bound by review decisions, this drawback would not be as severe.
\end{enumerate}
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the Act's anti-bribery provisions. As a consequence, without other means of guidance, businesses will be left to flounder in the ambiguities of the Foreign Corrupt Practices Act and trade losses will continue to mount.

Because of these problems, the Justice Department and the Securities and Exchange Commission should together give renewed consideration to the Commerce Department's recommendation to offer both a business review procedure and a compendium of substantive guidelines and hypotheticals. Such a dual form of guidance would provide business with the government's general position on troublesome areas of the FCPA and, if that is sometimes insufficient, with its official reaction to a company's specific proposed conduct.

The Commerce Department's suggested FCPA guidelines cover six major areas of ambiguity in the Foreign Corrupt Practices Act. The guidelines include a summary and explication of the Act's relevant provisions in each area, followed by analyses of illustrative business transactions. The Antitrust Division, and the Department of the Treasury presently

177. See notes 146-49 supra and accompanying text.
178. See note 128 supra and accompanying text. This author's support of the Commerce Department's recommendation does not imply approval of the specific guidelines proposed by the Department, which were only preliminary in nature. The guidelines, see notes 179-80 infra and accompanying text, do not sufficiently clarify all the ambiguities previously outlined in this Article or others identified by the legal and business communities. See notes 12-16 supra and accompanying text. See generally REPORT OF THE PRESIDENT, supra note 11, at 9-4 to 9-8.
179. These areas include: (1) contributions to candidates or political parties; (2) business entertainment and promotional gifts; (3) company liability for the acts of its officers, directors, employees or agents; (4) company liability for payments to intermediaries and "reason to know;" (5) payments to instrumentalities of foreign governments' and (6) grease payments, expediting payments and payments to clerical or ministerial employees. Draft Guidance Materials, note 128 supra. The Commerce Department omitted the fifth area ("payments to instrumentalities of foreign governments") from the draft because it had not yet developed an approach it considered satisfactory. Id.
180. In most instances the guidelines are based directly on relevant provisions of the Act or statements contained in its legislative history. Id. In some cases, however, distinctions or presumptions are introduced that are not mentioned either in the Act or in its legislative history. These distinctions and presumptions, the draft asserts, "are consistent with the provisions of the Act, as well as its legislative history, and are needed in order to guide enforcement policies within the Department, as well as compliance with the Act by firms and individuals, in areas where the Act is silent or ambiguous." Id.
181. ANTITRUST GUIDE, note 44 supra. The Guide includes fourteen fact situations illustrating recurrent international business transactions, followed by detailed analyses of the antitrust problems they raise and the Division's enforcement position on these problems. The Guide was generally well received by legal commentators. See, e.g., Baker, note 44 supra; Fugate, The Department of Justice's Antitrust Guide for International Operations, 17 VA. J. INT'L L. 645 (1977); Griffin, note 44 supra.
offer similar compendiums of guidelines and hypotheticals. These guidelines deal with very complex areas of law that have posed counselling problems as difficult as those under the Foreign Corrupt Practices Act. Thus, this form of guidance would seem equally appropriate for clarification of the FCPA.

Publication of substantive guidelines and hypotheticals would forewarn the business community of the kinds of conduct that would raise anti-bribery problems and provoke enforcement action. Equally as important, they would clarify what business practices would not be challenged. Guidelines would provide a coherent statement of the Justice Department's and the SEC's interpretation of the Foreign Corrupt Practices Act, and they would promote public discussion of the government's enforcement views. Further, guidelines and hypotheticals would offer companies the advantage of not having to publicly disclose their proposed business transactions; they would avoid the costs and delays of a business review procedure; they would not involve government examination of company records; and they could be modified and expanded as government policy changes.

The Justice Department has criticized the use of substantive guidelines and hypotheticals in this area because of the lack of judicial interpretation of the FCPA. The Department also feels that it has not had enough enforcement experience under the Act to write authoritative hypotheticals. This, however, is precisely why such guidance is needed. With few court decisions and enforcement actions to guide the business community, companies are at a loss to determine how the Act's ambiguous provisions will be applied. Although the Justice Department finds it difficult to interpret the Act without case law, U.S. businesses must interpret the FCPA with every international transaction. If the Justice Department and the

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91 Stat. 235, as amended by Export Administration Act of 1979, 50 U.S.C. §§ 2401-2420 (Supp. III 1979). The regulations include up to thirty-two brief, illustrative examples of definitions, prohibited conduct and other provisions of the statute, as well as lengthier supplemental "interpretations" of illustrative conduct.

183. Department of the Treasury Boycott Guidelines, 43 Fed. Reg. 3,454 (1978); 44 Fed. Reg. 66,272 (1979). The boycott guidelines consist of a series of questions and answers based on hypotheticals relating to fifteen areas of the international boycott provisions of the Tax Reform Act of 1976, I.R.C. § 999. The boycott guidelines and the antiboycott regulations have come under criticism from the business community because of conflicts in their interpretation of the boycott laws. While some of those conflicts have been resolved, others still remain. See generally REPORT OF THE PRESIDENT, supra note 11, at 9-15 to 9-18. To avoid this problem, it is essential that the Justice Department and the SEC coordinate their interpretations of the FCPA. Conflicting guidance will only increase uncertainty.

184. See notes 51, 57-58 supra and accompanying text.

185. Id.
SEC are able to make enforcement decisions without judicial assistance, then they should be able to advise the business community of their interpretations of the FCPA through substantive guidelines.\(^\text{186}\) While these guidelines would not carry the weight of judicial authority, they would provide some insight into the enforcement policies of the Justice Department and the SEC—the practical basis on which business decisions are made.\(^\text{187}\)

Especially in this period of apprehension about the meaning and application of the Foreign Corrupt Practices Act, the publication of substantive guidelines and hypotheticals seems necessary and urgent. While guidelines and hypotheticals may be too general to be useful in some instances, when combined with a business review procedure, they offer an important and practicable means of guidance to the business community.

**CONCLUSION**

The objectives of the Foreign Corrupt Practices Act are important ones and there is substantial support for them in the business community. But uncertainty as to the meaning and application of the Act has dulled that support. The Act has become an impediment to legitimate international trade, stifling initiative and encumbering business transactions.

Laws are never free from ambiguity. The compromises they reflect, the language in which they are written, and their need to encompass the unanticipated, all tend to make laws susceptible to varying interpretations. But if people are to conform their activity to a law, they must know what it says. Thus it should be the desire and the duty of government to clarify the ambiguities in the Foreign Corrupt Practices Act.

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186. The Commerce and Treasury Departments both provided guidance on the antiboycott laws under similar circumstances. See notes 182-83 *supra* and accompanying text.

187. Some business associations, including the Chamber of Commerce of the United States and the National Association of Manufacturers, have opposed the publication of a compendium of guidelines and hypotheticals. Statement of the Chamber of Commerce, *supra* note 13, at 2; Telephone interview with a spokesperson of the National Association of Manufacturers (Sept. 4, 1979). Many businessmen fear that the Justice Department may interpret the Act so as to make it more restrictive. Singer, *supra* note 11, at 1864-65. This fear may be a valid one. But even if it proves to be true, businessmen will still have the opportunity to change the SEC's and Justice Department's interpretations through reasoned public persuasion. Further, companies may always challenge these interpretations in court if they are charged with an FCPA violation. The essential point, however, is that the Justice Department and the SEC will hold these interpretations regardless of whether they release them to the public. It is better that the interpretations be openly disclosed rather than sprung upon an unsuspecting—and confused—business community.
The FCPA Review Procedure is one step toward this goal. In its present form, however, it is far from reaching that goal. The Justice Department and the Securities and Exchange Commission must join together to remedy the defects of the Review Procedure and reexamine the alternative means of providing guidance on the Foreign Corrupt Practices Act. Only then can a satisfactory solution be found to meeting the criticisms of the Act.