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## Civil RICO Misread: The Judicial Repeal of the 1988 Amendments to the Foreign Corrupt Practices Act

Raymond J. Dowd\*

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# Civil RICO Misread: The Judicial Repeal of the 1988 Amendments to the Foreign Corrupt Practices Act

Raymond J. Dowd

## **Abstract**

This Note argues that civil RICO should not provide a remedy for a party claiming injury due to the commercial bribery of a foreign official. Part I discusses the purposes and the legislative history of the FCPA and RICO. Part II analyzes cases that apply RICO to FCPA violations. Part III illustrates that applying civil RICO to FCPA violations frustrates congressional intent in enacting and amending both the FCPA and RICO. This Note concludes that under proper statutory construction, civil RICO's provisions do not apply to the act of bribing a foreign official.

# NOTES

## CIVIL RICO MISREAD: THE JUDICIAL REPEAL OF THE 1988 AMENDMENTS TO THE FOREIGN CORRUPT PRACTICES ACT

### INTRODUCTION

In the 1970s, the U.S. Congress enacted two controversial statutes to proscribe criminal behavior that had previously escaped proper punishment. In reaction to international and domestic bribery scandals, Congress enacted the Foreign Corrupt Practices Act (the "FCPA") to proscribe bribery of foreign officials and to eliminate corporate slush funds used for bribery.<sup>1</sup> Congress also enacted the Racketeer-Influenced and Corrupt Organizations Act ("RICO") to enable prosecutors and private litigants to combat organized crime and criminal abuse of legitimate business.<sup>2</sup>

In 1988, Congress amended the FCPA's bribery provisions by adding a scienter requirement, making corporate officers directly liable for violations, and increasing penalties for violations.<sup>3</sup> The weight of judicial authority has held that Congress intended the FCPA to provide no express or implied private right of action.<sup>4</sup> RICO, however, expressly provides a private right of action in cases involving multiple mail fraud, wire fraud, and Travel Act violations.<sup>5</sup> These crimes are invariably

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1. 15 U.S.C. §§ 78a, 78m, 78dd-1, 78dd-2 & 78ff (1988) [hereinafter FCPA]. See generally Perkins, *Bibliography on the Foreign Corrupt Practices Act of 1977*, 14 W. ST. U.L. REV. 491 (1987) (cataloguing legislative history, law review articles, cases, and treatises on Foreign Corrupt Practices Act).

2. 18 U.S.C. §§ 1961-1968 (1988) [hereinafter RICO].

3. See Pub. L. No. 100-418, tit. V, § 5003(a), 102 Stat. 1415 (1988) (codified as amended at 15 U.S.C. §§ 78m, 78dd-1, 78dd-2 & 78ff (1988)).

4. See, e.g., *Lamb v. Phillip Morris, Inc.*, 915 F.2d 1024 (6th Cir. 1990) (denying private right of action under FCPA, but allowing antitrust claims based on payment of bribes), *cert. denied*, 111 S. Ct. 961 (1991).

5. See 18 U.S.C. § 1961 (1988) (defining "racketeering activity"). The Travel Act prohibits travelling in interstate or foreign commerce or using a facility in interstate or foreign commerce, including the mail, with intent to distribute the proceeds of a number of unlawful activities, including bribery. See *id.* § 1952. The mail fraud statute forbids using or causing the mails to be used in any scheme to defraud or "for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." *Id.* § 1341.

the components of an FCPA violation.<sup>6</sup> Consequently, a private litigant who has no right of action under the FCPA may have a right of action under RICO.<sup>7</sup> This application of civil RICO to provide a private right of action contrasts sharply with the statutory scheme of the FCPA, in which Congress rejected a private right of action for bribing a foreign official in favor of a system of civil and criminal governmental enforcement backed with strong penalties.<sup>8</sup>

This Note argues that civil RICO should not provide a remedy for a party claiming injury due to the commercial bribery of a foreign official. Part I discusses the purposes and the legislative history of the FCPA and RICO. Part II analyzes cases that apply RICO to FCPA violations. Part III illustrates that applying civil RICO to FCPA violations frustrates congressional intent in enacting and amending both the FCPA and RICO. This Note concludes that under proper statutory construction, civil RICO's provisions do not apply to the act of bribing a foreign official.

## I. STATUTES GOVERNING FOREIGN BRIBERY

### A. *The Foreign Corrupt Practices Act*

#### 1. The Foreign Corrupt Practices Act

Scandals involving illegal corporate payments to public officials uncovered by the Watergate investigations spurred Congress to prohibit such corrupt payments.<sup>9</sup> The Watergate in-

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6. *Id.* §§ 1961-1968; *see id.* § 1952 (prohibiting travel or use of mails in furtherance of bribery scheme); *see also* *Environmental Tectonics v. W.S. Kirkpatrick, Inc.*, 847 F.2d 1052, 1063-64 (3d Cir. 1988) (holding that single bribery scheme involving multiple payments is violation of civil RICO), *aff'd*, 110 S. Ct. 701 (1990); Baruch, *International Transactions Which Violate the Foreign Corrupt Practices Act or Other Criminal Statutes*, in *LAW & PRAC. OF U.S. REG. OF INT'L TRADE*, Release 89-1, Booklet 11, 49-57 (C. Johnston ed. 1989) (discussing how FCPA violation may also be mail fraud, wire fraud, antitrust, RICO or Travel Act violation).

7. *See Williams v. Hall*, 683 F. Supp. 639 (E.D. Ky. 1988) (allowing RICO application to FCPA violations to create private right of action).

8. *Compare Lamb v. Phillip Morris*, 915 F.2d 1024 (determining that Congress intended no private right of action under FCPA), *cert. denied*, 111 S. Ct. 961 (1991) *with Environmental Tectonics*, 110 S. Ct. 701 (holding that competitor alleging business injury may sue for treble damages). *See infra* note 30 and accompanying text (discussing Congress's rejection of private damages action for FCPA violations).

9. *See S. REP. NO. 486*, 99th Cong., 2d Sess. 19 (1986) (views of Sen. Proxmire). The Watergate investigations examined the secret corporate funds that were used to finance the Committee to Re-elect former U.S. President Richard M. Nixon; *see also*

vestigations uncovered secret corporate funds used to finance not only illicit domestic political contributions, but also bribery of high-level foreign officials.<sup>10</sup> Congress found that hundreds of companies had paid huge bribes to foreign officials through these funds.<sup>11</sup> The scandals emanating from these revelations subsequently caused the resignation of many important foreign officials, especially in Japan, Italy, and the Netherlands.<sup>12</sup> As a result, Congress passed the FCPA to prevent future scandals that might hinder the executive branch's ability to conduct U.S. foreign policy.<sup>13</sup> In addition, Congress considered that bribery diminished the credibility of U.S. corporations, resulting in loss of business.<sup>14</sup> The FCPA, moreover, comported with international legal consensus on the impropriety of bribing a foreign official.<sup>15</sup>

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SENATE COMM. ON BANKING, HOUSING AND URBAN AFFAIRS, 94TH CONG., 2D SESS., REPORT OF THE SECURITIES AND EXCHANGE COMMISSION ON QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES 37-39 (Comm. Print 1976) (SEC survey of ninety-five corporations in which fifty-four admitted making payments to foreign officials); Baruch, *supra* note 6, at 3 (discussing 1988 FCPA amendments and other statutes that apply to bribery of foreign officials); Note, *Prohibiting Foreign Bribes: Criminal Sanctions for Corporate Payments Abroad*, 10 CORNELL INT'L L.J. 231 (1977).

10. See S. REP. NO. 486, 99th Cong., 2d Sess. 19-20 (1986) (views of Sen. Proxmire) (discussing bribery of high-level foreign officials).

11. See 134 CONG. REC. S15909 (daily ed. Oct. 14, 1988) (statement of Sen. Wirth). Senator Wirth noted that the FCPA "was a response to the revelations in the 1970's when more than 450 corporations disclosed millions of dollars in illegal or questionable payments to foreign agents." *Id.*; see 123 CONG. REC. 38,778 (1977) (statement of Rep. Eckhardt); Baruch, *supra* note 6, at 3; see also McLaughlin, *The Criminalization of Questionable Foreign Payments by Corporations: A Comparative Legal Systems Analysis*, 46 FORDHAM L. REV. 1071, 1072 (1978) (discussing FCPA's origins).

12. See McLaughlin, *supra* note 11, at 1072; see also S. REP. NO. 486, 99th Cong., 2d Sess. 20-21 (1986) (views of Sen. Proxmire) (discussing governmental scandals relating to foreign officials accepting U.S. bribes).

13. H.R. REP. NO. 640, 95th Cong., 1st Sess. 5 (1977); see Note, *Foreign Corrupt Practices: Creating an Exception to the Act of State Doctrine*, 34 AM. U.L. REV. 203, 221-22 (1984) (discussing congressional foreign policy concerns).

14. H.R. REP. NO. 640, 95th Cong., 1st Sess. 4-5 (1977); 123 CONG. REC. 38,778 (1977); see Note, *Corruption and the Foreign Corrupt Practices Act of 1977*, 13 MICH. J.L. REFORM 158, 162-63 (1979) (discussing circumstances surrounding FCPA's enactment). Other effects of bribery of foreign officials played a role in the FCPA's enactment. See S. REP. NO. 486, 99th Cong., 2d Sess. 20 (1986) (views of Sen. Proxmire) (noting that in both Iraq and Libya, "degree of corruption in the regime was a factor in the loss of public confidence that made a successful revolution possible").

15. See *Report of the Economic and Social Council Committee On An International Agreement On Illicit Payments*, U.N. Doc. E/1979/104 (May 25, 1979), reprinted in 18 I.L.M. 1025 (1979); *Declaration on International Investment and Multinational Enterprises*, Organisation for Economic Co-operation and Development Press Release A(76)20 (June 21, 1976), reprinted in 15 I.L.M. 967 (1976); *Permanent Council Resolution on the Behavior of*

In enacting the FCPA, Congress attacked foreign bribery in two ways.<sup>16</sup> First, Congress instituted preventative accounting measures.<sup>17</sup> Congress viewed these measures as a way to curb undisclosed payoffs.<sup>18</sup> The FCPA's accounting measures require business entities operating abroad to make a good faith effort to set up reasonably detailed internal accounting mechanisms.<sup>19</sup>

Second, Congress imposed punitive antibribery provisions.<sup>20</sup> The antibribery provisions of the FCPA prohibit business entities from making or promising to make a payment or gift directly or through an agent when the entity had "reason to know" that the payment would go to a foreign official.<sup>21</sup> The prohibition applies to payments made to influence an act or decision of a foreign official in his official capacity or in violation of his lawful duty.<sup>22</sup> To violate the FCPA, the business entity must make the payment to induce the foreign official to help the payor obtain, direct, or retain business.<sup>23</sup> The FCPA reaches only transactions where some action to assist the transaction took place "corruptly" in the United States through an

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*Transnational Enterprises*, Organization of American States CP/Res. No. 154 (167/75) (July 10, 1975), reprinted in 14 I.L.M. 1326 (1975) (recommending codes of ethical conduct for transnational corporations); *Commission on Ethical Practices Recommendations to Combat Extortion and Bribery in Business Transactions*, International Chamber of Commerce Pub. No. 315 (1977), reprinted in 17 I.L.M. 417 (1978) (condemning bribery and requesting home and host governments to take measures to prevent corrupt practices).

16. See S. REP. NO. 1031, 94th Cong., 2d Sess. 8 (1976) (noting that FCPA is comprised of both disclosure requirements and criminal prohibitions).

17. See 15 U.S.C. § 78m (1988).

18. 123 CONG. REC. 38,778 (1977); see Note, *The Foreign Corrupt Practices Act of 1977: An Analysis of Its Impact and Future*, 5 B.C. INT'L & COMP. L. REV. 405, 426 (1982) (discussing Congress' goals in enacting FCPA).

19. 15 U.S.C. §§ 78dd-1(b), (e) & 78m (1988).

20. See *id.* §§ 78dd-2(g) & 78ff.

21. *Id.* § 78dd-1(a)(1). The FCPA applies to business entities having securities registered under 15 U.S.C. § 78l or required to file reports under 15 U.S.C. § 78o(d). *Id.* § 78dd-1(a). In addition, the FCPA applies to "any officer, director, employee, or agent" of those business entities acting on behalf of the business. *Id.* § 78dd-1(a). The FCPA also applies to certain publicly-owned companies and their agents. *Id.* § 78dd-2. By its language, the FCPA applies only to "domestic concern[s]." *Id.* § 78dd-2(d)(1). Although foreign subsidiaries of U.S. corporations are not liable on the face of the FCPA, the statute reaches them in the majority of cases. See Baruch, *supra* note 6, at 8.

22. 15 U.S.C. § 78dd-1(a)(3)(A) (1988).

23. *Id.* § 78dd-1(a).

instrumentality of interstate commerce.<sup>24</sup> FCPA violations carry heavy penalties.<sup>25</sup>

The FCPA's prohibitions provided prosecutors with an effective recourse against business entities bribing foreign officials.<sup>26</sup> Prior to the enactment of the FCPA, prosecutors relied principally on mail and wire fraud statutes to reach those who bribed foreign officials.<sup>27</sup> The FCPA granted principal investigative authority and civil enforcement power to the U.S. Securities and Exchange Commission, and delegated subsequent criminal enforcement power to the U.S. Department of Justice.<sup>28</sup> The FCPA, set up as a prosecutorial tool, contains no reference to a private right of action.<sup>29</sup> Moreover, the legislative history contains multiple congressional refusals to grant a

24. *Id.* § 78dd-1(a). As one commentator noted, the requirement of an action in the United States,

couched in terms of the Commerce Clause of the Constitution, is a necessary element in order for Congress to exercise its legislative powers over such activities. In most cases, there will clearly be one or more "corrupt" actions, such as the transmission of monies abroad by wire, by letter, or by ship or plane, with the knowledge that the monies are to be used for an illegal payment. Other examples of actions which meet the jurisdictional means test would include a transatlantic phone call . . . during which an illegal offer was made or approved.

Baruch, *supra* note 6, at 32-33.

25. *See* 15 U.S.C. § 78ff (1988). The FCPA, as enacted, carried a US\$1,000,000 maximum penalty for corporations violating the statute, and US\$10,000 maximum fine along with a maximum of five years in jail for officers of the corporation violating the statute. *See* 15 U.S.C. § 78ff (1982). Congressional concern for enhanced punishment was evidenced by an increase in the maximum fines for FCPA violations to US\$2,000,000 for corporations and US\$100,000 for individuals with a maximum of five years in prison. *See* 15 U.S.C. § 78dd-2(g) (1988); *see also* S. REP. NO. 486, 99th Cong., 2d Sess. 13 (1986).

26. 122 CONG. REC. 30,419, 30,422 (1976) (statement of Sen. Proxmire) (discussing FCPA's potential deterrent effect); *see* Note, *supra* note 9, at 233 (discussing FCPA's potential role as prosecutorial tool).

27. *See* Letter from Elliot Richardson, Chairman of the President's Task Force on Questionable Corporate Payments Abroad, to Sen. William Proxmire, June 11, 1976, at 3, reprinted in *Prohibiting Bribes to Foreign Officials: Hearing on S. 3133, S. 3379, and S. 3418 Before the Senate Comm. on Banking, Housing and Urban Affairs*, 94th Cong., 2d Sess. 39-67 (1976).

28. *See* 15 U.S.C. § 78dd-2 (d)-(f) (1988) (delegating enforcement power); S. REP. NO. 1031, 94th Cong., 2d Sess. 3 (1976) (discussing delegation of enforcement power); 123 CONG. REC. H38,778-79 (daily ed. Dec. 7, 1977) (statement of Rep. Eckhardt); *see also* Bliss & Spak, *The Foreign Corrupt Practices Act of 1988: Clarification or Evisceration?*, 20 LAW & POL'Y INT'L BUS. 441, 446 (1989) (outlining FCPA enforcement scheme).

29. *See* 15 U.S.C. §§ 78a, 78m, 78dd-1, 78dd-2 & 78ff (1988).

private right of action under the FCPA.<sup>30</sup>

## 2. The 1988 Amendments to the Foreign Corrupt Practices Act

The FCPA's enactment brought immediate cries of protest from the business community, which claimed that the vagueness of the accounting and antibribery provisions rendered compliance with the FCPA's provisions impossible.<sup>31</sup> The FCPA's sweeping language, heavy financial penalties, and prison terms disturbed businesses that found themselves unable to establish cost-efficient guidelines for compliance with the FCPA's provisions.<sup>32</sup> Fear of damage to reputation ensuing from an FCPA indictment augmented corporate concerns.<sup>33</sup> During congressional hearings following the FCPA's

30. See, e.g., S. REP. NO. 1031, 94th Cong., 2d Sess. 3 (1976) (report to accompany S. 3664). This bill, S. 3379, a predecessor to the FCPA, introduced by Senator Frank Church, provided an express private cause of action for shareholders and competitors. *Id.* at 12; see S. 3379, 94th Cong., 2d Sess. at §§ 9-10, reprinted in 122 CONG. REC. 12,604, 12,607 (1976). These provisions provided for recovery of actual damages and attorneys' fees. *Id.* The Senate subsequently deleted the provisions creating a cause of action. S. REP. NO. 1031, 94th Cong., 2d Sess. 12-13 (1976). Senator Church also proposed an amendment to S. 3664, another FCPA predecessor bill, that would have provided competitors with a private right of action for treble damages and attorneys' fees. Amendment No. 2292, 94th Cong., 2d Sess., 122 CONG. REC. 30,333 (1976). The Senate defeated the Church Amendment shortly after U.S. Secretary of Commerce Elliot L. Richardson submitted a letter to the Senate opposing the treble damages provision. Letter from Secretary of Commerce Elliot L. Richardson to Senator John Tower (Sept. 15, 1976), quoted in 122 CONG. REC. 30,419 (1976); see Siegel, *The Implication Doctrine and the Foreign Corrupt Practices Act*, 79 COLUM. L. REV. 1085, 1109 (1979). The final bill approved by the Senate, S. 305, had no reference to private rights of action. 123 CONG. REC. S919 (daily ed. Jan. 18, 1977); see *id.* at S19,401 (daily ed. Dec. 6, 1977) (statement of Sen. John Tower) ("In view of the existing case law, it is difficult to conceive that the courts would imply a cause of action . . . neither the Senate nor the conferees expressed any opinion on the issue."); *id.* at H12,825 (daily ed. Dec. 7, 1977) (statement of Rep. Samuel L. Devine) ("I want to point out that the conferees did not intend to create a private right of action").

31. See Note, *Revision of the Foreign Corrupt Practices Act by the 1988 Omnibus Trade Bill: Will it Reduce the Compliance Burdens and Anticompetitive Impact?* 1989 B.Y.U. L. REV. 491, 494-95 (1989) (analyzing "chilling effect" of 1977 FCPA on U.S. exports). But see Note, *supra* note 18, at 429-30 (asserting that effect of FCPA not detrimental to U.S. trade).

32. See *Business Accounting and Foreign Trade Simplification Act: Joint Hearing on S.414 Before the Subcomm. on Int'l Finance and Monetary Policy and the Subcomm. on Securities of the Senate Comm. on Banking, Housing and Urban Affairs*, 98th Cong., 1st Sess. 77-78 (1983) (statements of Michael A. Samuels of U.S. Chamber of Commerce).

33. See Note, *supra* note 31, at 494-95.



enactment, industry experts and economic analysts testified to the FCPA's chilling effect on U.S. exports.<sup>34</sup>

As part of the 1988 Omnibus Trade Act,<sup>35</sup> Congress amended both the accounting and the antibribery provisions of the FCPA to enhance U.S. foreign trade and competitiveness.<sup>36</sup> Congress intended to clarify the FCPA's provisions to provide guidance to the legal and business communities.<sup>37</sup>

Although the business community's complaints provided much of the impetus for the formulation of the FCPA's 1988 amendments, the most compelling consideration was the need to enhance U.S. competitiveness.<sup>38</sup> Congress balanced four competing concerns in amending the FCPA's antibribery provisions: foreign policy, national competitiveness, prevention, and punishment.<sup>39</sup> Throughout the lengthy amendment pro-

34. See Longobardi, *Reviewing the Situation: What is to be Done with the Foreign Corrupt Practices Act?*, 20 *VAND. J. TRANSNAT'L L.* 431 (1987) (discussing congressional hearings on FCPA's "chilling effect").

35. Pub. L. No. 100-418, 102 Stat. 1107 (1988).

36. See Pub. L. No. 100-418, tit. V, § 5003(a), 102 Stat. 1415 (1988) (codified as amended at 15 U.S.C. §§ 78m, 78dd-1, 78dd-2 & 78ff). See generally Baruch, *supra* note 6 (discussing 1988 FCPA amendments and other statutes that apply to bribery of foreign officials); Bliss & Spak, *supra* note 28 (discussing effect of 1988 FCPA amendments); Fremanti & Katz, *The Foreign Corrupt Practices Act Amendments of 1988*, 23 *INT'L LAW.* 755 (1989); Note, *supra* note 31 (analyzing effects of 1988 FCPA amendments on U.S. exports); see also Longobardi, *supra* note 34 (outlining history of FCPA amendment process).

37. See 131 *CONG. REC.* 32,763, 32,778 (daily ed. Nov. 20, 1985) (noting that 1977 FCPA was unclear and inhibited exports).

38. See *id.* (expressing Congress's intent to provide guidance for business); see also Bliss & Spak, *supra* note 28, at 442 (discussing Congress's concern with national competitiveness).

39. See generally Longobardi, *supra* note 34 (outlining congressional concerns during amendment process). The Senate Report stated that

[t]he Committee recognizes the continuing need for international agreements outlawing bribery in the international marketplace. The unilateral position currently taken by the United States in terms of anti-bribery legislation, while laudable, constitutes a serious disadvantage to U.S. commerce. The Committee recognizes that bribery warps appropriate trade patterns and distorts the market as an efficient allocator of resources, but it believes that the most useful approach to this problem is a multilateral one.

The Committee bill would enhance U.S. efforts to achieve such international agreement by presenting a statute that effectively curbs bribery without imposing unnecessary trade disincentives. Recognizing this need, the bill calls for renewed efforts, both on multilateral and bilateral levels, to achieve international agreement on the prohibition of bribery.

S. REP. NO. 486, 99th Cong., 2d Sess. 13 (1986).

cess,<sup>40</sup> Congress was satisfied that the FCPA had a salutary effect on the executive's foreign policy powers.<sup>41</sup> In addition, Congress considered that the FCPA's preventative role had been effective.<sup>42</sup> On balance, however, Congress accepted the general criticism from the business community that the FCPA's vague standards inhibited both competitiveness and enforcement.<sup>43</sup> In addition, Congress noted that a multilateral approach would be the most effective way to combat bribery of foreign officials and that a too-strict unilateral U.S. prohibition would distort competition to the disadvantage of U.S. corporations.<sup>44</sup> Accordingly, in 1988, Congress amended the FCPA to make it both clear and precise.<sup>45</sup>

In the 1988 amendments, Congress first set out to define the scienter requirement for violations of both the accounting and antibribery provisions.<sup>46</sup> The original FCPA imposed the recordkeeping requirement without specifying the requisite intent for a violation.<sup>47</sup> To rectify this omission, the 1988 amendments provided that only violations committed "knowingly" were subject to criminal liability.<sup>48</sup> Congress intended this amendment to reduce the cost of compliance with accounting provisions, and to assuage the fears of firms anticipating sanctions for mere negligence or insufficiently detailed recordkeeping procedures.<sup>49</sup> Similarly, the 1988 amendments

40. See Fremanti & Katz, *supra* note 36, at 759. Proposals to amend the FCPA were introduced in 1980, 1981, 1983, and 1985. See *id.* at 759 n.27.

41. Cf. 134 CONG. REC. 8736-38 (1988) (statement of Sen. Proxmire) (noting that 1988 amendments reversed good results of FCPA).

42. See 131 CONG. REC. S32,763, S32,778 (daily ed. Feb. 7, 1985) (stating that Congress found FCPA's enactment positive step towards prohibiting foreign bribery).

43. See, e.g., 131 CONG. REC. S15,959 (daily ed. Nov. 20, 1985) (finding that FCPA "caused unnecessary concern among existing and potential exporters as to the scope of legitimate overseas business activities").

44. See *id.* (finding that "solution to the problem of corrupt payments by firms to obtain or retain business demands and [sic] international approach; accordingly, appropriate international agreements should be initiated and sought").

45. See Pub. L. No. 100-418, tit. V, § 5003(a), 102 Stat. 1415 (1988) (codified as amended at 15 U.S.C. §§ 78m, 78dd-1, 78dd-2 & 78ff).

46. See 15 U.S.C. § 78dd-2(h)(3)(A) (1988) (defining requisite state of mind for FCPA violation); see also Elden & Sableman, *Negligence is Not Corruption: The Scienter Requirement of the Foreign Corrupt Practices Act*, 49 GEO. WASH. L. REV. 819 (1981) (discussing uncertainty of original FCPA scienter requirement).

47. See 15 U.S.C. § 78m (1982).

48. See *id.* § 78m(b)(4) & (5) (1988).

49. See 131 CONG. REC. 2146 (daily ed. Feb. 7, 1985) (noting excessive concern

changed the antibribery scienter requirement from the broad "reason to know" to the narrower "while knowing" standard, which would require actual knowledge or willful ignorance.<sup>50</sup>

The 1988 antibribery amendments exempted certain payments from the FCPA's reach.<sup>51</sup> The FCPA's prohibitions now exempt any payment to a foreign official if the payment is made in order to expedite or to secure the performance of a routine governmental action.<sup>52</sup> The amendments also added two affirmative defenses that further limit the types of payments for which a business may be liable.<sup>53</sup> The first defense is that the payment made was lawful under the written laws of the official's country.<sup>54</sup> The second defense is that the payment was reasonable and bona fide, covering, for example, travel and lodging expenses related directly to the promotion of a product or to the execution of a contract.<sup>55</sup>

The 1988 amendments define previously vague terms such as "foreign official,"<sup>56</sup> "knowing,"<sup>57</sup> and "routine govern-

among businesses caused by FCPA's lack of clarity); *see also* Statement of Policy Concerning the Foreign Corrupt Practices Act, Exchange Act Release No. 17,500, 21 S.C.C. Docket 1466, *reprinted in* 46 Fed. Reg. 11,544 (1988); Bliss & Spak, *supra* note 28, at 452 (noting vexatious provisions).

50. 15 U.S.C. § 78dd-1(a)(3) (1988). The 1977 FCPA's lack of a scienter requirement set off a debate among critics as to what conduct the FCPA would reach. *See, e.g.*, Elden & Sableman, *supra* note 46, at 819 (discussing 1977 FCPA's scienter standard).

51. *See* 15 U.S.C. § 78dd-2(b) (1988) (excepting payments made to secure routine governmental actions from FCPA's purview); Bliss & Spak, *supra* note 28, at 455-57 (analyzing purpose of exception).

52. *See* 15 U.S.C. §§ 78dd-1(b) & 78dd-2(b) (1988).

53. *See id.* §§ 78dd-1(c) & 78dd-2(c) (providing affirmative defenses for payments that are legal under foreign country's law or for payments to reimburse foreign officials' bona fide expenses relating to contract performance or product promotion); *see also* Bliss & Spak, *supra* note 28, at 458 (discussing Congress's choice to enact affirmative defenses rather than exceptions).

54. *See* 15 U.S.C. § 78dd-1(c)(1) (1988); Bliss & Spak, *supra* note 28, at 458 (discussion of "written law" affirmative defenses).

55. *See* 15 U.S.C. § 78dd-1(c)(2) (1988); *see also* Bliss & Spak, *supra* note 28, at 458 (discussing scope of bona fide expense defense).

56. 15 U.S.C. § 78dd-1(f)(1) (1988). The FCPA now defines "foreign official" as "any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality." *Id.*

57. *Id.* § 78dd-1(f)(2)(A). Under the FCPA, a person's state of mind is "knowing" if

with respect to conduct, a circumstance, or a result, . . . (i) such person is aware that such person is engaging in such conduct, that such circumstance

mental action.”<sup>58</sup> The amendments provide businesses with a low-cost, streamlined procedure for determining the legality of a transaction by requiring the Attorney General to issue a legal opinion on a transaction within thirty days of a corporation’s request.<sup>59</sup> The amendments, however, failed to address the issue of a private right of action.<sup>60</sup>

At the time of the amendment process, the enforcement policy of the U.S. Department of Justice was to treat the FCPA as the sole criminal statute that applied in cases of bribery of foreign officials.<sup>61</sup> An amendment was proposed that would have made the FCPA the sole criminal statute that could be applied in the case of foreign bribery.<sup>62</sup> This original “exclusivity” proposal cited mail and wire fraud, conspiracy, “and other criminal statutes.”<sup>63</sup> The legislative history contains no specific reference to RICO.

During Senate hearings, a commentator pointed out that the suggested language in the Senate proposal, intended to

exists, or that such result is substantially certain to occur; or (ii) such person has a firm belief that such circumstance exists or that such result is substantially certain to occur.

*Id.*

58. *Id.* § 78dd-1(f)(3)(A). The FCPA defines “routine governmental action” as [a]n action which is ordinarily and commonly performed by a foreign official in — (1) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country; (2) processing governmental papers, such as visas and work orders; (3) providing police protection, mail pickup and delivery, or scheduling inspections associated with contract performance or inspection related to transit of goods across country; (4) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or (5) actions of a similar nature.

*Id.*

59. *See id.* § 78dd-1(e). The statute, as amended, provides a review procedure to ensure that payments meet the standards of both the Securities and Exchange Commission and the U.S. Department of Justice.

60. *See Lamb v. Phillip Morris, Inc.*, 915 F.2d 1024 (6th Cir. 1990) (noting that neither FCPA nor conference report accompanying FCPA contain reference to private right of action), *cert. denied*, 111 S. Ct. 961 (1991).

61. *See Business Accounting and Foreign Trade Simplification Act: Joint Hearings on S. 708 Before the Subcomm. on International Finance and Monetary Policy of the Comm. on Banking, Housing, And Urban Affairs United States Senate on S. 708, 97th Cong., 1st Sess. 155 (1981) (testimony of Robert McNeill, Executive Vice Chairman, Emergency Committee for American Trade) (supporting exclusivity provision to codify Justice Department policy).*

62. *See id.* at 28 (containing text of exclusivity proposal).

63. *See id.*

block the Justice Department's use of other statutes to increase FCPA liability, would immunize someone who committed murder in furtherance of the bribery of a foreign official.<sup>64</sup> The commentator proposed alternative wording to the effect that the FCPA would be the sole remedy for actions that would be legal but for the intent and effort to bribe a foreign official, thereby blocking use of the wire and mail fraud statutes, but allowing prosecution of other crimes.<sup>65</sup>

The provision eventually adopted by the U.S. Senate, only to be rejected by the House-Senate Conference Committee, would have required criminal prosecution of an overseas corporation exclusively as an FCPA violation where the prosecution was based on the theory that a foreign official defrauded or violated a fiduciary duty to a foreign government or its citizens.<sup>66</sup> In addition, the bill would have blocked charges for conspiracy to violate the mail or wire fraud statutes brought under the same theory.<sup>67</sup> The House-Senate Conference Committee rejected this prosecutorial limitation to allow the government to act in instances where it could not meet the burden of proof for an FCPA violation, but where it could show some wrongdoing.<sup>68</sup>

At the time of the amendments, Congress presumably knew of efforts to apply RICO in the criminal and civil context to many other statutes, including the FCPA.<sup>69</sup> Congress also knew that courts had denied shareholders the right to bring

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64. *See id.* at 426 (testimony of Prof. Philip P. Heymann of Harvard Law School).

65. *Id.*

66. *See* 131 CONG. REC. S15,959 (daily ed. Nov. 20, 1985) (providing that "no criminal action . . . may be brought against a domestic concern . . . based upon the theory that the foreign official or domestic concern violated a duty to or defrauded the foreign government or the citizens of a foreign country").

67. *See id.*

68. *See* 134 CONG. REC. H183 & H2117 (1988) (containing conference committee rejection of Senate's exclusivity provision).

69. *See* *Bosco v. Serhant*, 836 F.2d 271, 275 (7th Cir. 1987) (noting that in interpreting statute, court must assume that Congress was aware of current case law). Congress had ample notice of judicial difficulty in determining RICO's relationship to unrelated laws, including the FCPA. *See* *Williams v. Hall*, 683 F. Supp. 639, 641-42 (E.D. Ky. 1988); *see also* *Morast v. Lance*, 807 F.2d 926 (11th Cir. 1987); *Nodine v. Textron, Inc.*, 819 F.2d 347 (1st Cir. 1987). *Contra* *Komm v. McFlicker*, 662 F. Supp. 924 (W.D. Mo. 1987); *Callan v. State Chem. Mfg. Co.*, 584 F. Supp. 619, 621 n.2 (E.D. Pa. 1984). The *Williams* court, after analyzing RICO's relationship to other statutes, concluded that indirect injury due to FCPA violation is a sufficient basis for a RICO claim under section 1962(a) or (c). *See Williams*, 683 F. Supp. at 641-42.

derivative actions based on unlawful payments to foreign officials.<sup>70</sup> In addition, Congress presumably was aware that courts would not easily imply a private right of action in the FCPA context, because a recent U.S. Supreme Court decision had presumed against implied private rights of action, requiring instead that Congress provide explicitly for a private right of action when drafting legislation.<sup>71</sup>

Congress enacted the FCPA amendments to define the scienter standard for violations, to clarify the class of payments prohibited, to increase penalties for violations, and to provide guidance and uniform treatment for the business community.<sup>72</sup> The amendments provide corporations and individuals with a clearer idea of what behavior violates the law and foster increased investment and operations abroad.<sup>73</sup> The amendments contain no provision permitting or blocking prosecution of FCPA violations under the mail fraud, wire fraud, or RICO statutes.<sup>74</sup>

#### B. *The Racketeer-Influenced and Corrupt Organizations Act*

Congress enacted RICO, a remedial statute comprised of criminal and civil provisions, to correct weaknesses built into federal and state penal codes and to combat organized crime.<sup>75</sup> At the time of RICO's enactment, Congress perceived these

70. See, e.g., *Gaines v. Haughton*, 645 F.2d 761 (9th Cir. 1981), *cert. denied*, 454 U.S. 1145 (1982) (dismissing as immaterial shareholder's derivative suit based on Lockheed's improper payments to boost sales abroad); *Abbey v. Control Data Corp.*, 603 F.2d 724 (8th Cir. 1979), *cert. denied*, 444 U.S. 1017 (1980) (dismissing shareholder suit).

71. See *Touche Ross & Co. v. Redington*, 442 U.S. 560, 572 (1979) (noting that "when Congress wished to provide a private damage remedy, it knew how to do so and did so expressly").

72. See *supra* notes 56-60 and accompanying text (discussing Congress's reasons for 1988 amendments).

73. See Note, *supra* note 31, at 494-95 (outlining criticisms of 1977 FCPA to which Congress responded with 1988 amendments).

74. See 134 CONG. REC. H183 & H2117 (1988) (conference committee rejecting Senate's exclusivity provision).

75. See Pub. L. No. 91-452, § 1, 84 Stat. 923 (1970). The purpose of the Organized Crime Control Act of 1970 was

to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.

*Id.*

penal codes, designed to punish individuals engaging in isolated incidents of criminal behavior, to be unnecessarily limited in scope and impact with respect to organized crime.<sup>76</sup> In Congress's view, these penal codes did not dissuade career criminals from organizing for criminal purposes, and did not dissuade those who invested criminal proceeds in legitimate businesses.<sup>77</sup>

Congress created RICO in 1970 to combat organized crime.<sup>78</sup> Prior to RICO's creation, prosecutors relied on multiple counts of mail and wire fraud to prosecute career criminals engaged in racketeering activities.<sup>79</sup> The financial penalties provided through use of these fraud statutes were, however, insufficient to take the profit out of organized crime.<sup>80</sup>

Congress drafted RICO to attack the use of profits derived from criminal activity, not the crimes themselves.<sup>81</sup> RICO forbids investment of proceeds derived from a pattern of racketeering, acquiring an interest in a business with racketeering proceeds, or conducting an enterprise through a pattern of racketeering.<sup>82</sup> "Racketeering activity" includes any acts or threats involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in narcotics, mail and wire fraud, and other specified federal crimes.<sup>83</sup> Under RICO, a "pattern of racketeering activity" requires at least two predicate acts of "racketeering activity" to take place within ten

76. See 84 Stat. 923 (1970) (outlining Congress's purposes in enacting RICO).

77. See Lynch, *RICO: The Crime of Being a Criminal, Parts I & II*, 87 COLUM. L. REV. 661, 663 (1987) (outlining RICO's purposes).

78. See 18 U.S.C. §§ 1961-1968 (1988); see also Lynch, *supra* note 77, at 662 (discussing intent of Congress in enacting RICO).

79. See, e.g., *United States v. Mandel*, 415 F. Supp. 997 (D. Md. 1976), *aff'd in relevant part*, 591 F.2d 1347 (4th Cir. 1979); see Gevurtz, *Using the Antitrust Laws to Combat Overseas Bribery by Foreign Companies: A Step to Even the Odds in International Trade*, 27 VA. J. INT'L L. 211, 214 (1987) (noting prosecutors' use of mail and wire fraud statutes to reach foreign bribes); see also 18 U.S.C. §§ 1341 & 1343 (1988) (broadly prohibiting interstate use of mails and wires in furtherance of illegal purposes).

80. See Lynch, *supra* note 77, at 663 (discussing RICO's purposes).

81. See 18 U.S.C. § 1962 (1988) (prohibiting use or investment of proceeds of racketeering activity).

82. See *id.* § 1962 (a)-(c). Conspiracy to violate these sections is also prohibited. *Id.* § 1962(d). "Predicate act" is an informal term used by courts instead of "act of racketeering activity."

83. *Id.* § 1961(1)(A)-(D).

years of each other.<sup>84</sup> In addition, the acts must be related and continuous to constitute a pattern.<sup>85</sup>

Congress mandated that the courts liberally construe RICO's provisions in order to effect its remedial purposes of eradicating organized crime and eliminating loopholes in federal and state penal codes that would otherwise allow career criminals to escape with light penalties.<sup>86</sup> RICO's penalties are severe, including, for example, mandatory forfeiture provisions that are limited only by the extent of a violator's stake in the enterprise or assets traceable therefrom.<sup>87</sup> In addition, a RICO conviction carries a prison sentence of up to twenty years.<sup>88</sup>

Congress provided for private enforcement of RICO to add to the government's prosecutorial resources and to provide relief to those injured by criminal activity.<sup>89</sup> Accordingly,

84. *Id.* § 1961(5); see Note, *The Application of RICO to International Terrorism*, 58 *FORDHAM L. REV.* 1071, 1072-3 n.11 (1990).

85. See *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 239 (1989) (requiring showing of continuity and relationship to establish RICO pattern). Justice Scalia, in a sharply worded concurrence to the Court's establishment of this requirement, noted that

[e]levating to the level of statutory text [the requirements of relationship and continuity] . . . taken from the legislative history, the Court counsels the lower courts: "continuity plus relationship." This seems to me about as helpful to the conduct of their affairs as "life is a fountain." . . . Unfortunately, if normal (and sensible) rules of statutory construction were followed . . . whatever "pattern" might mean in RICO, it assuredly *does not* mean that.

*Id.* at 252 (citations omitted) (emphasis in original).

86. Pub. L. No. 91-452, tit. IX, § 904(a), 84 Stat. 947 (1970). Section 904 of Title IX Public Law Number 91-452 provided that "[t]he provisions of this title . . . shall be liberally construed to effectuate its remedial purposes." *Id.*

87. See 18 U.S.C. § 1964 (1988). RICO requires that a party be injured "by reason of" RICO violations. *Id.* Section 1964(c) provides that

[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

*Id.*; see Note, *Civil RICO is a Misnomer: The Need for Criminal Procedural Protections in Actions Under 18 U.S.C. § 1964*, 100 *HARV. L. REV.* 1288, 1292 & n.33 (1987) (noting that civil RICO recoveries may greatly exceed corresponding criminal penalties for proscribed behavior).

88. See 18 U.S.C. § 1963(a) (1988).

89. See *Seville Indus. Mach. Corp. v. Southmost Mach. Corp.*, 567 F. Supp. 1146, 1157 (D.N.J. 1983) (discussing Congress's intent in enacting RICO), *aff'd in part, rev'd in part*, 742 F.2d 786 (3d Cir. 1984), *cert. denied*, 469 U.S. 1211 (1985); see also Note, *The Conflict Over RICO's Private Treble Damages Action*, 70 *CORNELL L. REV.* 903 (1985) (discussing judicial attempts to narrow civil RICO's application).



RICO's civil provisions allow private and public civil remedies, including a cause of action for any person sustaining business or property injury due to a RICO violation.<sup>90</sup> To encourage private parties to bear the burden of conducting expensive litigation, RICO allows an injured party to recover treble damages and attorney's fees.<sup>91</sup> Plaintiffs have brought civil RICO suits against not only the career criminals targeted by Congress in drafting RICO, but also against public entities and corporations.<sup>92</sup> The U.S. Supreme Court has noted that civil RICO's private damages remedy was enacted over the objections of several members of Congress, who expressed concern that the remedy might be used against legitimate businesses rather than organized crime entities.<sup>93</sup>

Although Congress's original intent in drafting RICO was to punish criminal infiltration of legitimate businesses,<sup>94</sup> RICO's liberal construction rule has led courts to allow actions against anyone who commits more than one act in furtherance of a criminal scheme and whose behavior satisfies RICO's broad "pattern" requirement.<sup>95</sup> One commentator, noting arguments made in favor of using civil RICO to restore the integrity of interstate commerce in a manner similar to antitrust laws, observed that Congress had never even considered that civil RICO might be used in such a fashion.<sup>96</sup> In fact, the U.S.

90. See 18 U.S.C. § 1964 (1988).

91. *Id.* § 1964(c).

92. See, e.g., *Genty v. Township of Gloucester*, 736 F. Supp. 1322 (D.N.J. 1990) (involving civil RICO action against township); *Fiore v. Kelly Run Sanitation, Inc.*, 609 F. Supp. 909 (W.D. Pa. 1985) (involving civil RICO action against state agency); see also *Ashland Oil, Inc. v. Arnett*, 875 F.2d 1271 (7th Cir. 1989) (holding that corporation may conspire with own officers to conduct RICO enterprise); *Liquid Air Corp. v. Rogers*, 834 F.2d 1297 (7th Cir. 1987) (finding that corporation may be "person" under RICO), *cert. denied*, 492 U.S. 917 (1989); *United States v. Angelilli*, 660 F.2d 23, 30-31 (2d Cir. 1981) (holding that RICO applies to activities used to corrupt public officials), *cert. denied*, 455 U.S. 910 (1982).

93. See *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 487 (1985) (citing H.R. REP. NO. 1549, 91st Cong., 2d Sess. 58, 187 (1970)).

94. See *Lynch*, *supra* note 77, at 662.

95. See, e.g., *Environmental Tectonics v. W.S. Kirkpatrick, Inc.*, 847 F.2d 1052 (3d Cir. 1988), *aff'd*, 110 S. Ct. 701 (1990) (holding that even single episode of bribery can constitute RICO pattern).

96. *Reed, The Defense Case for RICO Reform*, 43 *VAND. L. REV.* 691, 709-11 (1990). Another commentator noted that the judicial system's failure to interpret narrowly civil RICO requires congressional action to limit private actions. See generally *Getzendanner, Judicial "Pruning" of "Garden Variety Fraud" Civil RICO Cases Does Not Work: It's Time For Congress To Act*, 43 *VAND. L. REV.* 673 (1990).

Supreme Court itself noted that private plaintiffs' use of the civil RICO statute had gone beyond what Congress had intended.<sup>97</sup>

Corporations have difficulty assessing potential liability for civil RICO violations because courts are currently divided as to whether an injury must be direct for a party to have standing to bring an action under RICO.<sup>98</sup> Indeed, one expert testified before Congress that the private bar's use of civil RICO has undermined the necessary role of prosecutorial dis-

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97. See *Sedima*, 473 U.S. at 500 (stating that "in its private civil version, RICO is evolving into something quite different from the original conception of its enactors"); see also *Haroco, Inc. v. American Nat'l Bank & Trust Co. of Chicago*, 747 F.2d 384, 399 (7th Cir. 1984), *aff'd*, 473 U.S. 606 (1985). In *Haroco*, the U.S. Court of Appeals for the Seventh Circuit noted that "[w]ith respect to the case before us, it does not seem at all likely that Congress anticipated the application of civil RICO to improperly calculated interest charges by a commercial bank." *Id.*; see 136 CONG. REC. E 2086 (1990) (statement of Rep. William J. Hughes). The sponsor of a bill to reform civil RICO noted that

it is clear from legislative history that the primary purpose for allowing private suits under RICO was to promote the public interest by allowing so-called "private attorneys general" suits. It was based on the premise that these civil suits would supplement governmental action and attack real criminal conduct—not just contract disputes written up to sound like crimes.

*Id.*

98. Compare *Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21 (2d Cir. 1990) (denying RICO standing to employee) and *Burdick v. American Express Co.*, 865 F.2d 527 (2d Cir. 1989) (per curiam) (denying RICO standing to employee terminated for claims of fraudulent employer conduct) and *Cullom v. Hibernia Nat'l Bank*, 859 F.2d 1211 (5th Cir. 1988) (denying RICO standing to employee discharged for refusal to participate in fraudulent bank loan scheme) and *Nodine v. Textron, Inc.*, 819 F.2d 347 (1st Cir. 1987) (denying RICO standing to employee terminated for reporting Canadian customs laws and Foreign Corrupt Practices Act violations) with *Shearin v. E.F. Hutton Group, Inc.*, 885 F.2d 1162 (3d Cir. 1989) (granting RICO standing to terminated employee) and *Morast v. Lance*, 807 F.2d 926 (11th Cir. 1987) (granting RICO standing to employee discharged for report of irregular transactions to Comptroller of the Currency) and *Williams v. Hall*, 683 F. Supp. 639 (E.D. Ky. 1988) (granting RICO standing to employee refusing to participate in FCPA violation) and *Komm v. McFliker*, 662 F. Supp. 924 (W.D. Mo. 1987) (granting RICO standing to employee discharged for reporting illegal behavior).

In his dissent to the landmark civil RICO case *Sedima, S.P.R.L. v. Imrex Co.*, Justice Marshall noted that

the defendant, facing a tremendous financial exposure in addition to the threat of being labeled a "racketeer," will have a strong interest in settling the dispute. . . . Many a prudent defendant, facing ruinous exposure, will decide to settle even a case with no merit. It is thus not surprising that civil RICO has been used for extortive purposes, giving rise to the very evils that it was designed to combat.

*Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 504-06 (1985) (Marshall, J., dissenting).

cretion that Congress took into account when it drafted RICO's broad language.<sup>99</sup>

## II. PRIVATE CAUSE OF ACTION UNDER THE FCPA

The FCPA has had an uncertain history of governmental enforcement, with little criminal case law examining the FCPA until 1990.<sup>100</sup> In the private civil realm, a recent U.S. Supreme

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99. See RICO REFORM: HEARINGS BEFORE THE SUBCOMM. ON CRIMINAL JUSTICE OF THE COMM. ON THE JUDICIARY HOUSE OF REPRESENTATIVES 99TH CONG., 1ST & 2D SESS. ON H.R. 2517, H.R. 2943, H.R. 4892, H.R. 5290, H.R. 5391, AND H.R. 5445, H.R. REP. NO. 140, at 178-79 (Comm. Print 1986) (statement of Newton N. Minow). Minow, quoting from the U.S. Attorney's manual, noted that

[t]he Manual states that despite the broad statutory language and the liberal construction clause, "it is the policy of the Criminal Division that RICO be selectively and uniformly used," and that RICO prosecutions would not be brought in "every case in which technically the elements of a RICO violation exist. . . ." Thus, a criminal RICO count that "merely duplicates" the elements of proof of a traditional Hobbs Act, Travel Act, mail fraud, wire fraud, gambling or controlled substances cases will not be asserted absent extraordinary circumstances. The Manual recognizes that if a proposed RICO claim serves only some evidentiary purpose rather than attacking "the activity which Congress most directly addressed — the infiltration of organized crime into the nation's economy," approval for prosecution would be given in exceptional circumstances. . . .

This reasoned interpretation of the statute and its purposes permits the Justice Department to focus its attention on the evil Congress sought to eliminate . . . . Although there is no indication that the civil remedy was to have any broader scope than the criminal provision which it supplements, private plaintiffs do not, and cannot be expected to, apply the interpretation of the Justice Department.

*Id.*

100. See generally Turza, *Corrupt Practices Act: How Far Have We Come?*, N.Y.L.J., Apr. 5, 1990, at 5 (noting that "[t]o date there have been no convictions under the [FCPA] amendments"). In the context of governmental civil and criminal enforcement, courts have addressed the conflict between the FCPA and RICO. See *United States v. Young & Rubicam, Inc.*, 741 F. Supp. 334 (D. Conn. 1990); *United States v. Blondek*, 741 F. Supp. 116 (N.D. Tex. 1990), *aff'd sub nom. U.S. v. Castle*, 925 F.2d 831 (5th Cir. 1991).

In *United States v. Young & Rubicam, Inc.*, the government prosecuted an advertising agency that had bribed a Jamaican official to obtain an account. *Young & Rubicam*, 741 F. Supp. 334. The court noted that "the indictment does not charge defendants with substantive violations of either FCPA or the Travel Act." *Id.* at 338. The court rejected the defendant's argument that the use of the Travel Act, a general statute, as a RICO predicate instead of the FCPA, a specific statute directly applicable to defendant's conduct, was improper. *Id.* The court rejected the defendant's argument that the mail fraud statute had often been used as a RICO predicate even though a more specific statute directly prohibited the underlying scheme. *Id.* The court noted that the government, by not charging the defendants with both a Travel Act and an FCPA violation, had avoided the prohibition on convicting and punishing a defend-

Court decision removing the act of state doctrine from the FCPA has opened the door to private plaintiffs to question the acts of foreign sovereigns that relate to FCPA violations.<sup>101</sup> Because of the different commands of the FCPA and RICO, courts are split as to whether a private person or corporation may bring suit when injured by another party's FCPA violations.<sup>102</sup> Current case law, however, has rejected the FCPA,

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ant under two separate crimes for a single criminal act, choosing instead to rely on the Travel Act. *Id.* at 338 n.2. Thus, the court noted that the New York bribery statutes provided an independent basis for a Travel Act violation, which in turn served as a RICO predicate. *Id.* at 339. Accordingly, the court in *Young & Rubicam* allowed prosecutors to prosecute FCPA violations through RICO, the Travel Act, conspiracy, and New York bribery statutes without using the FCPA at all. *Id.* at 342-45.

*United States v. Blondek* arose in the criminal context rather than the civil context of *Young & Rubicam*. Compare *Blondek*, 741 F. Supp. 116 with *Young & Rubicam*, 741 F. Supp. 334. In *Blondek*, U.S. prosecutors charged Canadian officials under the FCPA and U.S. conspiracy statutes. *Blondek*, 741 F. Supp. at 116. The court determined that the FCPA did not apply to foreign officials because Congress had intended to exclude them from the FCPA's reach. *Id.* at 119-20. In considering the conspiracy claim, however, the court noted that on its face the general conspiracy statute reached the foreign officials. *Id.* at 119. The court nevertheless declined to subject the officials to the conspiracy statute's reach. *Id.* at 120.

101. See *W.S. Kirkpatrick & Co. v. Environmental Tectonics, Inc.*, 110 S. Ct. 701, 706 (1990) (noting that sovereign's motive may be impugned by private U.S. plaintiff seeking treble damages).

Traditionally, the act of state doctrine bars U.S. courts from inquiring into the validity of public acts of a foreign government committed within its own territory. See *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682 (1976); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964); *Underhill v. Hernandez*, 168 U.S. 250 (1897).

In *Environmental Tectonics*, the Supreme Court rejected embarrassment of a foreign sovereign as grounds for invoking the act of state doctrine. *Environmental Tectonics*, 110 S. Ct. at 707. The Court noted that it "once viewed the doctrine as an expression of international law, resting upon 'the highest considerations of international comity and expediency' . . . [but has] more recently described it, however, as a consequence of domestic separation of powers." *Id.* at 704 (citations omitted). The Court endorsed judicial inquiry into both the legality of and the motivation behind a sovereign nation's act. *Id.* at 705. In addition, the Court rejected comity as a grounds for invoking the act of state doctrine. *Id.* at 706; see generally, Note, *The Act of State Doctrine: Reconciling Justice and Diplomacy on a Case-by-Case Basis*, 43 U. MIAMI L. REV. 1169, 1179-82 (1989) (discussing *Environmental Tectonics*); Comment, *International Commercial Bribery and the Act of State Doctrine*, 67 WASH. U.L.Q. 601, 603 (1989); *infra* notes 117-26 and accompanying text (discussing *Environmental Tectonics*).

102. Compare *McClean v. Int'l Harvester Co.*, 817 F.2d 1214 (5th Cir. 1987) (denying private right of action under FCPA) with *Williams v. Hall*, 683 F. Supp. 639 (E.D.Ky. 1988) (allowing RICO's application to FCPA violations to create private right of action).

standing alone, as providing a private right of action.<sup>103</sup>

Civil actions based on FCPA violations generally arise in two types of cases: those that involve corporate<sup>104</sup> or investor<sup>105</sup> injuries, and those that involve "whistleblowers" or em-

103. See *Lamb v. Phillip Morris, Inc.*, 915 F.2d 1024 (6th Cir. 1990) (rejecting private right of action based on FCPA antibribery provisions), *cert. denied*, 111 S. Ct. 961 (1991); *Eisenberger v. Spectex Indus., Inc.*, 644 F. Supp. 48 (E.D.N.Y. 1986) (refusing private right of action based on FCPA accounting provisions); *Lewis ex rel Nat'l Semiconductor Corp. v. Sporck*, 612 F. Supp. 1316 (N.D. Cal. 1985) (refusing private right of action).

In *Lamb*, the plaintiffs, who were Kentucky tobacco growers, brought antitrust and FCPA claims against large purchasers of tobacco, alleging that the purchasers had bribed the President of Venezuela to obtain controls on Venezuelan cigarette prices. *Lamb*, 915 F.2d at 1025. The plaintiffs alleged that those price controls artificially depressed domestic tobacco prices and ensured lucrative retail prices abroad. *Id.* The Sixth Circuit applied the *Cort v. Ash* test to determine whether a private right of action existed under the FCPA. *Id.* at 1028; see *infra* note 159 (discussing *Cort v. Ash* test). The Sixth Circuit rejected the notion of a private right of action under the FCPA alone. *Id.* at 1030.

In *Lewis*, a shareholder brought a derivative suit alleging violations of RICO and the accounting provisions of the FCPA. *Lewis*, 612 F. Supp. at 1318. The court dismissed the RICO claim for failure to allege the proper elements. *Id.* at 1325-26. The court held that the accounting provisions of the FCPA did not imply a private right of action under *Cort v. Ash*. *Id.* at 1333-34.

In a shareholder suit similar to *Lewis* based on violations of the FCPA's accounting provisions, *Eisenberger v. Spectex Industries, Inc.*, the court dismissed the RICO claim for failure to allege the proper elements and disallowed a private right of action. *Eisenberger*, 644 F. Supp. 48. The *Eisenberger* court found that Congress, in enacting the accounting provisions, did not intend to create a private right of action. *Id.* at 51. The court noted that Congress provides for a private remedy when it wishes to do so and that the FCPA's legislative history emphasizes the sole responsibility of the Securities and Exchange Commission (the "SEC") in prosecuting civil actions. *Id.*

104. See, e.g., *Clayco Petroleum Corp. v. Occidental Petroleum Corp.*, 712 F.2d 404 (9th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984). In *Clayco*, the Ninth Circuit rejected a corporation's argument that the passage of the FCPA signalled Congress's intent to allow a corporation to bring an action to recover for damages suffered due to another corporation's bribe of a foreign official. *Id.* at 409. The Ninth Circuit based its denial of a private cause of action on the act of state doctrine. *Id.* at 408-09; see *Hunt v. Mobil Oil Corp.*, 550 F.2d 68 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977) (holding that act of state doctrine precludes examination of foreign sovereign's motivations). But see Note, *Clayco Petroleum Corp. v. Occidental Petroleum Corp.: Should There Be A Bribery Exception to the Act of State Doctrine?*, 17 CORNELL INT'L L.J. 407 (1984) (arguing that although *Clayco* was correctly decided, prior conviction under FCPA should create exception to act of state doctrine).

105. See, e.g., *Sedco Int'l, S.A. v. Cory*, 683 F.2d 1201 (8th Cir.), *cert. denied*, 459 U.S. 1017 (1982). In *Sedco*, the Eighth Circuit considered an illicit payment to a foreign official that took place after the FCPA had been enacted, but before it became effective. *Id.* at 1203. The court allowed an investor who had been defrauded in a scheme involving the illicit payment to recover the money that he had loaned to the venture. *Id.* at 1204.

ployees fired for a refusal to participate in or conceal a foreign bribery scheme.<sup>106</sup> Currently, courts allow private actions in cases of FCPA violations where plaintiffs seek recovery from the bribing party for behavior other than a bare FCPA violation. For example, courts have granted parties standing to bring a private right of action under antitrust law against competitors alleging that they lost a contract due to an illegal foreign bribery scheme.<sup>107</sup> Also, under antitrust law, a producer may bring an action against a buyer who bribes a foreign official to obtain price controls in that country.<sup>108</sup> In addition, under common law claims of fraud, a defrauded investor may seek restitution of money that he loaned to a corporation engaged in a fraudulent scheme involving foreign bribery.<sup>109</sup>

A complaint pleading civil RICO claims based solely on FCPA violations, however, may allow a private action.<sup>110</sup> Courts applying civil RICO to FCPA violations generally assume without question that civil RICO, according to its express language, provides a private right of action when a foreign official is bribed.<sup>111</sup> After accepting the assumption that a private right of action exists, however, courts disagree as to what party may exercise that right.<sup>112</sup> Accordingly, many analyses of civil RICO's application to FCPA violations both start and stop at the question of the party's standing to bring an action.<sup>113</sup>

In applying civil RICO to an FCPA violation, courts limit standing by requiring a showing of "causation," that is, that the plaintiff was injured "by reason of" the defendant's FCPA violation.<sup>114</sup> In the corporate context, an assertion in the

106. *See, e.g.*, *Nodine v. Textron*, 819 F.2d 347 (1st Cir. 1987) (involving RICO suit by employee-plaintiff who was fired for reporting FCPA violations).

107. *See Sage Int'l, Ltd. v. Cadillac Gage Co.*, 534 F. Supp. 896 (E.D. Mich. 1981).

108. *See Lamb v. Phillip Morris, Inc.*, 915 F.2d 1024 (6th Cir. 1990), *cert. denied*, 111 S. Ct. 961 (1991).

109. *See Sedco Int'l, S.A. v. Cory*, 683 F.2d 1201 (8th Cir. 1982).

110. *See* 18 U.S.C. §§ 1961-1968 (1988). Courts have allowed a private right of action for FCPA violations under the antitrust laws. *See, e.g., Sage*, 534 F. Supp. 896.

111. *See, e.g., Nodine v. Textron, Inc.*, 819 F.2d 347, 348-49 (1st Cir. 1987) (assuming civil RICO provides private right of action but denying plaintiff standing).

112. *See, e.g., id.*

113. *See id.* at 348-49.

114. *See Nodine*, 819 F.2d 347 (holding that whistleblower has no RICO standing to sue for discharge due to refusal to participate in FCPA violation). *But see Williams*

pleadings that the plaintiff corporation was in competition for a particular contract that the defendant won through bribes may suffice to confer RICO standing and allege causation.<sup>115</sup> A pleading merely stating that another party who was engaged in a common transaction made unauthorized payments to officials of a foreign government may, however, be insufficient for lack of particularity.<sup>116</sup>

*Environmental Tectonics Corporation, International v. W.S. Kirkpatrick & Company*<sup>117</sup> involved a civil RICO action brought on underlying FCPA violations by a competitor corporation.<sup>118</sup> In *Environmental Tectonics*, the Environmental Tectonics Corporation (the "ETC"), a manufacturer of aircraft equipment and facilities, brought an action for damages against its competitor, W.S. Kirkpatrick & Company ("Kirkpatrick"), alleging that Kirkpatrick had won a Nigerian defense contract by bribing Nigerian officials.<sup>119</sup> In its complaint against Kirkpatrick, ETC pled violations of RICO, the New Jersey Anti-Racketeering Act, and the Robinson Patman Act.<sup>120</sup> The U.S. District Court for the District of New Jersey dismissed the case on act of state doctrine grounds.<sup>121</sup> The U.S. Court of Appeals for the Third

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v. Hall, 683 F. Supp. 639 (1988) (whistleblower has RICO standing to recover for discharge because of refusal to participate in FCPA violations).

115. See *Environmental Tectonics Corp., Int'l v. W.S. Kirkpatrick, Inc.*, 847 F.2d 1052, 1067 (3d Cir. 1988), *aff'd*, 110 S. Ct. 701 (1990).

116. Cf. *Citicorp Int'l Trading Co. v. Western Oil & Ref. Co.*, No. 88 Civ. 5377, 1991 U.S. Dist. LEXIS 450, at 13 (S.D.N.Y. Jan. 16, 1991) (dismissing FCPA claim for lack of particularity with leave to replead).

117. 659 F. Supp. 1381 (D.N.J. 1987), *rev'd*, 847 F. 2d 1052 (3d Cir. 1988), *aff'd*, 110 S. Ct. 701 (1990).

118. *Id.*

119. *Id.* at 1386.

120. See *id.*; 15 U.S.C. § 13(c) (1988); N.J. STAT. ANN. § 2C:41-2 (1982). ETC alleged that Kirkpatrick bribed the Nigerian officials through Panamanian subsidiaries it had established for that purpose. *Environmental Tectonics*, 659 F. Supp. at 1381. ETC based its claim on Kirkpatrick's guilty plea to FCPA violations. *Id.* at 1387.

121. *Environmental Tectonics Corp., Int'l v. W.S. Kirkpatrick, Inc.*, 659 F. Supp. 1381, 1402 (D.N.J. 1987), *rev'd*, 847 F.2d 1052 (3d Cir. 1988), *aff'd*, 110 S. Ct. 701 (1990). The U.S. Department of State expressed approval of the suit in a letter to the court. See *id.* at 1402-03 (app. A) ("If the adjudication of this suit were to involve a judicial inquiry into the motivations of the Government of Nigeria's decision to award the contract, the Department does not believe the act of state doctrine would bar the Court from adjudicating this dispute"). The court reasoned that the inquiry would embarrass the Nigerian government and hinder the executive's foreign policy powers since the executive did not control the timing of the decision, and would constitute an unconstitutional delegation of executive power to the judicial branch. See *id.* at 1391-98. The court noted, however, that "the amended complaint pleads

Circuit reversed the district court's dismissal on act of state grounds and remanded the case for trial, holding that ETC had standing to bring a civil RICO action against Kirkpatrick.<sup>122</sup>

In *W.S. Kirkpatrick & Co. v. Environmental Tectonics*,<sup>123</sup> the U.S. Supreme Court upheld the Third Circuit decision, finding that the act of state doctrine does not bar a suit that questions the motivation of foreign officials.<sup>124</sup> The Court held that a court may invoke the act of state doctrine only where adjudication would require a U.S. court to declare invalid the official act of a foreign sovereign performed on its own territory.<sup>125</sup> The U.S. Supreme Court did not disturb the Third Circuit's determination that ETC's allegations of Kirkpatrick's FCPA violations fulfilled civil RICO's requirements of pleading an injury and a "pattern" of racketeering activity.<sup>126</sup>

In the whistleblower context, courts similarly have re-

ETC's injury sufficiently to survive these motions to dismiss." *Id.* at 1389. The District court did, however, dismiss the RICO and New Jersey Anti-Racketeering Statute Act claims for failure to set forth the requisite "pattern of racketeering activity." *Id.* at 1391 & n.8; see *supra* note 101 and accompanying text (discussing *Environmental Tectonics*).

122. See *Environmental Tectonics v. W.S. Kirkpatrick, Inc.*, 847 F.2d 1052 (3d Cir. 1988), *aff'd*, 110 S. Ct. 701 (1990). The court premised its holding on the act of state doctrine and its basis in separation of powers. *Id.* at 1061-62. The court noted that "the Department [of State]'s factual assessment of whether fulfillment of its responsibilities will be prejudiced by the course of civil litigation is entitled to substantial respect." *Id.* at 1062. The court dismissed the potential embarrassment to the Nigerian government as speculative. *Id.* at 1061.

123. 110 S. Ct. 701 (1990).

124. *Id.*

125. *Id.* at 705. The Court added that

[a]ct of state issues only arise when a court *must decide*—that is, when the outcome of the case turns upon—the effect of official action by a foreign sovereign. When that question is not in the case, neither is the act of state doctrine. . . . Regardless of what the court's factual findings may suggest as to the legality of the Nigerian contract, its legality is simply not a question to be decided in the present suit, and there is thus no occasion to apply the rule of decision that the act of state doctrine requires.

*Id.* (emphasis in original). It is unclear, however, whether the Court intended to bar the doctrine's invocation in instances where the executive branch opposes resolution of the controversy or where the controversy involves sensitive national matters. *Id.* at 706.

126. See *Environmental Tectonics Corp., Int'l v. W.S. Kirkpatrick, Inc.*, 847 F.2d 1052, 1064 (3d Cir. 1988), *aff'd*, 110 S. Ct. 701 (1990). The Third Circuit had determined that although ETC's complaint alleged only one bribe paid in four installments, the complexity of the payment scheme satisfied RICO. *Id.* at 1063-64. The Third Circuit also based its determination that RICO's pattern requirement had been fulfilled on Kirkpatrick's hiring of an agent, the victimization of the citizens of Nige-



jected actions brought under the FCPA alone.<sup>127</sup> Courts are divided, however, as to the propriety of allowing an employee to recover for injuries stemming from FCPA violations by bringing civil RICO claims.<sup>128</sup> Courts differ as to whether the employee's injuries must flow directly from the employer's violation for the employee to have standing to bring suit under civil RICO.<sup>129</sup> Some courts require the employee to show that the dismissal was an essential part of the bribery scheme.<sup>130</sup> In contrast, a court may require an employee to show only the employee's involuntarily inclusion in a conspiracy to bribe a foreign official, and the employee's refusal to continue in the conspiracy that caused the wrongful dismissal.<sup>131</sup>

In *Reddy v. Litton Industries, Inc.* the U.S. Court of Appeals for the Ninth Circuit rejected an employee's suit on standing grounds.<sup>132</sup> The *Reddy* court considered a summary dismissal of an employee's wrongful termination action.<sup>133</sup> The employee claimed violations of RICO predicated on the employer's alleged violation of the FCPA.<sup>134</sup> During his employment, plaintiff Reddy allegedly uncovered a bribery scheme in-

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ria, and the victimization of U.S. citizens through the diminution of U.S. stature. *Id.* at 1063-64.

127. *See, e.g.,* *McClellan v. Int'l Harvester, Co.*, 817 F.2d 1214 (5th Cir. 1987). In *McClellan*, International Harvester, McClellan's employer, pled guilty to violations of the FCPA in connection with the purchase of turbines from Mexico, and in its offer of proof alleged that McClellan had violated the FCPA. *Id.* McClellan brought suit, alleging that International Harvester acted in collusion with the Department of Justice to make him the "scapegoat" of its bribery scheme, which he argued gave him a cause of action under the Eckhardt Amendment to the FCPA's antibribery provisions. *Id.* at 1219. The court, basing its decision on the factors enunciated in *Cort v. Ash*, rejected McClellan's claim. *Id.* at 1219. Although the Eckhardt Amendment, which Congress has since repealed, provided that an employee could not be held liable for FCPA violations unless his corporate employer had already been convicted, courts continue to rely on the McClellan decision. *See, e.g.,* *Citicorp Int'l Trading Co. v. Western Oil & Ref. Co.*, No. 88 Civ. 5377, 1991 U.S. Dist. LEXIS 450 (1991) (noting *McClellan* with approval).

128. *Reddy v. Litton Indus., Inc.*, 912 F.2d 291, 295 (9th Cir. 1990) (discussing split in authority on RICO standing in whistleblower cases); *see supra* note 98 and accompanying text (noting split in authority on granting RICO standing to terminated employees).

129. *See Reddy*, 912 F.2d at 295.

130. *See id.* at 295.

131. *See, e.g.,* *Williams v. Hall*, 683 F. Supp. 639 (E.D. Ky. 1988) (granting standing based on involuntary inclusion in conspiracy).

132. *Reddy v. Litton Indus., Inc.*, 912 F.2d 291 (9th Cir. 1990).

133. *Id.* at 293.

134. *Id.*

volving Litton Industries, Inc. ("Litton") and Saudi Arabian defense officials.<sup>135</sup> After Litton dismissed the plaintiff for reporting the scheme to his superiors, he sued, claiming that the dismissal came as a result of his disclosure of the bribery scheme.<sup>136</sup> The Ninth Circuit affirmed the district court's dismissal of Reddy's RICO claims with prejudice on standing grounds and remanded his pendent claims to state court.<sup>137</sup> The court noted that "the act of terminating Reddy's employment is not a predicate act as defined by § 1961(1) [of RICO], nor was that act essential to the alleged conspiracy between Litton and the Saudi Arabian officials."<sup>138</sup> The Ninth Circuit's decision contained no analysis of the FCPA.

The plaintiff's spectacular recovery in *Williams v. Hall*<sup>139</sup> illustrates the large stakes involved in civil RICO wrongful termination actions based on FCPA violations.<sup>140</sup> The employees alleged that for several years Ashland Oil, Inc. ("Ashland") conducted the procurement phase of its operations in part by illegally bribing officials of Middle Eastern countries, in violation of the FCPA.<sup>141</sup> Plaintiffs further alleged that when they refused to participate in the FCPA violations, Ashland discharged them.<sup>142</sup> In formulating their claim, plaintiffs alleged that Ashland was an enterprise operated through a pattern of racketeering activity.<sup>143</sup> The court recognized that the employees would be able to recover under state law, but that allowing the RICO claim would augment the plaintiffs' recovery with treble damages and attorney's fees.<sup>144</sup> The court focused exclusively on RICO's liberal construction language without considering the language or purpose of FCPA and allowed the ac-

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135. *Id.* at 292.

136. *Id.* at 293.

137. *Id.*

138. *Id.* at 295.

139. 683 F. Supp. 639 (E.D. Ky. 1988).

140. *See id.*; Sella, *More Big Bucks in Jury Verdict: Additions to the 1988 List*, 75 A.B.A. J. 69, 70 (July 1989). The court awarded the plaintiff US\$69,515,367. *Id.*

141. *Williams v. Hall*, 683 F. Supp. 639, 640 (E.D. Ky. 1988).

142. *Id.*

143. *Id.* The complaint contained allegations of multiple RICO predicate acts, such as wire fraud, mail fraud, and travelling in interstate and foreign commerce to deliver the bribes in violation of the Travel Act. *Id.* The plaintiffs also alleged securities fraud in that false financial statements were filed with the SEC and distributed to investors. *Id.*

144. *Id.* at 641.

tion.<sup>145</sup>

*Reddy* and *Williams* illustrate the inconsistent results arising from applications of civil RICO to FCPA violations.<sup>146</sup> They further illustrate that courts assume that civil RICO provides a private right of action in cases of FCPA violations, and do not examine congressional intent in enacting the FCPA to provide such actions.<sup>147</sup> The inquiry of both courts begins with the question of whether the plaintiff has suffered an injury due to the FCPA violation.<sup>148</sup> *Williams* correctly reasons that an employee injured by a refusal to participate in a conspiracy has suffered damages due to that refusal.<sup>149</sup> *Reddy's* finding that an employee involuntarily included in a bribery conspiracy is not injured by his disclosure of the conspiracy and subsequent discharge is incorrect.<sup>150</sup> *Reddy* ignores the common law of conspiracy whereby a person who has knowledge of the conspiracy must act affirmatively to disengage from that conspiracy to avoid liability for the acts of that conspiracy.<sup>151</sup> In addition, *Reddy* ignores that the discharge was an act in furtherance of that conspiracy.<sup>152</sup> Accordingly, if civil RICO applies to FCPA violations, results like *Williams* should be commonplace.

### III. COURTS SHOULD NOT READ CIVIL RICO TO ALLOW A PRIVATE RIGHT OF ACTION FOR FCPA VIOLATIONS

Congress did not intend the FCPA to provide a private right of action.<sup>153</sup> Congress did not enact civil RICO to privatize U.S. foreign policy.<sup>154</sup> Moreover, allowing private civil RICO actions based on an FCPA violation effectively would re-

145. *Id.* at 642.

146. Compare *Reddy v. Litton Indus., Inc.*, 912 F.2d 291, 295 (9th Cir. 1990) (denying RICO standing) with *Williams v. Hall*, 683 F. Supp. 639 (E.D. Ky. 1988) (granting RICO standing).

147. *Reddy*, 912 F.2d at 293-96; *Williams*, 683 F. Supp. at 640-44.

148. *Reddy*, 912 F.2d at 295; *Williams*, 683 F. Supp. at 643.

149. See *Williams*, 683 F. Supp. at 644 (analyzing conspiracy law).

150. See *Reddy*, 912 F.2d at 295 (finding that employee not injured "by reason of" FCPA violation).

151. See, e.g., *Fiswick v. United States*, 329 U.S. 211 (1946) (outlining common law doctrine of conspiracy).

152. *Reddy v. Litton Indus., Inc.*, 912 F.2d 291, 291 (9th Cir. 1990).

153. See *supra* note 30 (discussing Congress's repeated refusals to enact amendment to FCPA providing for private right of action).

154. See *supra* notes 75-97 (discussing congressional intent in enacting RICO).

peal major provisions of the FCPA both as enacted and as amended.<sup>155</sup>

A. *Implication Doctrine: A Framework for Analysis of Congressional Policy with Respect to Private Civil RICO Actions for FCPA Violations*

Where Congress enacts a criminal statute, but fails to provide an accompanying private right of action to protect parties injured due to violations of that statute, a court may allow such a remedy if the court determines that, in enacting the statute, Congress intended injured parties to have redress.<sup>156</sup> The U.S. Supreme Court, in *Cort v. Ash*,<sup>157</sup> developed an analysis to determine whether a statute implies a private right of action.<sup>158</sup> The *Cort v. Ash* factors provide a useful analytical tool to highlight the fundamental inconsistency of a private civil RICO action and the FCPA's statutory construction.<sup>159</sup>

The *Cort v. Ash* test consists of four elements for determining whether a federal statute implies a private right of action.<sup>160</sup> First, is the plaintiff a member of the class for whose

155. See *supra* notes 31-74 (discussing Congress's objectives in amending the FCPA).

156. See *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979) (analyzing availability of private right of action).

157. 422 U.S. 66 (1975).

158. See *id.* at 78.

159. See *Cort v. Ash*, 422 U.S. 66, 78 (1975); see also Note, *The Foreign Corrupt Practices Act of 1977: A Private Right of Action?*, 12 VAND. J. TRANSNAT'L L. 735 (1979) (applying *Cort v. Ash* analysis to the FCPA). The *McClellan* court used the *Cort v. Ash* test to determine whether the FCPA implies a private right of action. See *McClellan v. Int'l Harvester*, 817 F.2d 1214, 1219 (5th Cir. 1987) (applying *Cort v. Ash* to Eckhardt Amendment, formerly part of FCPA antibribery provisions); Siegel, *supra* note 30, at 1104-17 (applying *Cort v. Ash* analysis to FCPA). The *Cort v. Ash* analysis is appropriate where a court is unable to ascertain a clear congressional intent to either grant or preclude a private cause of action. *Id.* at 1096.

The *Cort v. Ash* test has also determined the denial of private rights of action under the FCPA's accounting provisions. See *Eisenberger v. Spectex Indus., Inc.*, 644 F. Supp. 48 (E.D.N.Y. 1986); *Lewis v. Sporck*, 612 F. Supp. 1316 (N.D. Cal. 1985). In *Lewis v. Sporck*, the legislative history of the FCPA did not provide for a private right of action, either explicitly or implicitly. 612 F. Supp. 1316 (N.D. Cal. 1985). The *Lewis* court searched the FCPA's legislative history, analyzed the legal context of the FCPA's enactment, and found no affirmative congressional intent to create a private right of action. *Id.* In analyzing whether Congress implicitly intended to create a private right of action, the court inferred a lack of intent from the FCPA's delegation of enforcement authority to the SEC and the Department of Justice (the "DOJ"). *Id.*

160. See *Cort v. Ash*, 422 U.S. at 78.

especial benefit Congress enacted the statute to create a federal right?<sup>161</sup> Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or deny one?<sup>162</sup> Third, is the remedy consistent with the underlying purposes of the legislative scheme to imply such an action?<sup>163</sup> Fourth, is the cause of action one traditionally relegated to state law so that it would be inappropriate to infer a cause of action based solely on federal law?<sup>164</sup> An analysis of these factors clearly illustrates that not only did Congress not intend a private right of action in drafting the FCPA, but also that allowing a private civil RICO action to effectuate the same remedy would subvert the FCPA's statutory framework and policies.

### 1. Congressional Intent to Create a Remedy

Many courts treat the issue of whether Congress intended to allow a private action, the second prong of the *Cort v. Ash* test, as dispositive.<sup>165</sup> The FCPA's antibribery provisions contain penal sanctions.<sup>166</sup> In the case of a statute that contains penal sanctions but no private cause of action, a court may imply the additional remedy of a private cause of action despite its absence from the statute only if Congress clearly intended to create such an action.<sup>167</sup> No such clear intent was evident in the enactment of the FCPA in 1977,<sup>168</sup> nor did any such intent become apparent during the FCPA's lengthy amendment process.<sup>169</sup>

In fact, the context in which the FCPA was amended in

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161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *See, e.g.,* *Temengil v. Trust Territory of Pac. Islands*, 881 F.2d 647, 653 n.8 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 2617 (1990).

166. *See* 15 U.S.C. § 78dd-2(g) (1988).

167. *National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974).

168. *See* Siegel, *supra* note 30, at 1104-13. *But see*, [1978 Transfer Binder] FED. SEC. L. REP. (CCH) 1,701 (reprinting SEC opinion that FCPA implies private cause of action).

169. *See supra* notes 38-74 and accompanying text (discussing FCPA amendments).

1988 shows a strong contrary policy.<sup>170</sup> In amending the FCPA, Congress provided severe, but clearly-defined civil and criminal penalties coupled with amendments that sought to limit corporate liability and enhance U.S. competitiveness.<sup>171</sup> The amendments' exceptions for facilitating payments, allowing the affirmative defenses of legality and reasonableness, and providing for a review letter procedure, are designed to be enforced solely under the discretion of an executive agency able to evaluate, in confidence, the propriety of a payment without causing international tensions.<sup>172</sup>

Congress's careful balance of preventive and punitive elements embodied in the FCPA's plain language would be disrupted by a private litigant able to precipitate the matter before the Securities and Exchange Commission had completed its investigations.<sup>173</sup> In addition, the provisions of "reasonableness" and "legality" as affirmative defenses that place the burden of proof on the defendant make sense only in the context of a Securities and Exchange Commission or Department of Justice proceeding; applying such standards to a private action would put corporations in the burdensome position of having to prove the reasonableness of their actions to competitors. While Congress recognized the need for punishment and enforceability, Congress took great care to define prohibited payments and the corresponding penalties.<sup>174</sup> During the process of amending the FCPA, Congress tried to enhance the competitiveness of U.S. corporations and limit their liability in

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170. See *supra* notes 31-63 and accompanying text (discussing congressional aims in amending FCPA).

171. See *supra* notes 38-74 (discussing FCPA amendments).

172. See, e.g., *Lewis v. Sporck*, 612 F. Supp. 1316, 1322 (N.D. Cal. 1985) (discussing importance of executive discretion). But see *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., Int'l*, 110 S. Ct. 701 (1990) (noting that embarrassment of foreign sovereign not concern of U.S. courts). The exceptions for legality and reasonableness and the affirmative defenses lend themselves to SEC or DOJ investigation, rather than to private litigation's awkward tool of extraterritorial discovery. See *infra* notes 237-38 and accompanying text (discussing enforcement difficulties due to foreign situs of FCPA enforcement).

173. See *Prohibiting Bribes to Foreign Officials: Hearings on S. 3133, S. 3379 and S. 3418 Before the Senate Comm. on Banking, Housing and Urban Affairs, 94th Cong., 2d Sess. (1976)*; *Unlawful Corporate Payments: Hearings on H.R. 3815 and H.R. 1602 Before the Subcomm. on Consumer Protection and Finance of the House Comm. on Interstate and Foreign Comm., 95th Cong., 1st Sess. (1977)*.

174. See *supra* note 25 and accompanying text (describing FCPA's prohibition of certain payments and corresponding penalties).

engaging in overseas operations.<sup>175</sup> Allowing a private civil RICO action for an FCPA violation would undermine Congress's intent to limit corporate liability.<sup>176</sup>

Moreover, Congress rejected several proposals that contained private rights of action.<sup>177</sup> It also rejected treble damages for both governmental civil actions and private litigation.<sup>178</sup> Congress did not intend that the judiciary inquire into whether a foreign government official's receipt of a payment was facilitating, corrupt, or reasonable at the behest of a private plaintiff lured by the prospect of treble damages.<sup>179</sup> Accordingly, Congress intended no private rights of action in the case of an FCPA violation—an intention that a private civil RICO action would subvert.

## 2. Creation of a Federal Right in a Subclass of Plaintiffs

An analysis of the first *Cort v. Ash* factor, whether Congress enacted the statute for the plaintiff's especial benefit or to create a federal right in the plaintiff, further highlights the degree to which a civil RICO action clashes with the FCPA's purposes.<sup>180</sup> Congress enacted the FCPA to protect the executive branch's ability to conduct foreign policy, to prevent the recurrence of foreign bribery scandals, and to protect U.S. competitiveness abroad, not to create a federal right in favor of a particular subclass.<sup>181</sup> The FCPA's amendment process was a tug of war between defenders of national morality on one side, and defenders of national competitiveness on the other—neither

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175. See *supra* notes 31-45 and accompanying text (discussing congressional efforts to enhance U.S. competitiveness and limit corporate liability).

176. See *supra* notes 31-54 and accompanying text (outlining reasons for FCPA's 1988 amendments).

177. S. 3379, 94th Cong., 2d Sess. §§ 9, 10, 122 CONG. REC. 12,604 (1976) (containing federal proposal for FCPA private right of action).

178. *Id.*

179. See *supra* note 30 and accompanying text (outlining Congress's disapproval of FCPA private right of action).

180. *Cort v. Ash*, 422 U.S. 66, 78 (1975) (citing *Texas & Pacific R. Co. v. Rigsby*, 241 U.S. 33, 39 (1916)).

181. See Siegel, *supra* note 30, at 1114 (noting that in enacting FCPA, Congress sought to provide protection for nation and economy as a whole, not competitors); *supra* notes 9-30 and accompanying text (discussing congressional goals in enacting FCPA).

group interested in protecting a particular subclass.<sup>182</sup> In fact, the corporate subclass that could claim a federal right, those injured by a corporation obtaining a contract through bribery, already has federal antitrust laws available to remedy practices involving unfair competition or abuses of market power.<sup>183</sup> While all U.S. citizens generally may claim that the FCPA protects their interests, private domestic plaintiffs do not fit into the recognizable subclass that *Cort v. Ash* requires.<sup>184</sup>

### 3. Consistency of the Remedy with the Legislative Purpose

The third factor determining whether a statute implies a private right of action is whether the remedy is necessary to effect, and is consistent with, the underlying purposes of the legislative scheme.<sup>185</sup> The purposes Congress intended to effectuate in enacting the FCPA, elimination of slush funds and provision of enforcement powers to government agencies, would not be appreciably enhanced by allowing a private right of action, except, perhaps, as an added deterrent.<sup>186</sup> Congress, in amending the FCPA, expressed its satisfaction with the FCPA's deterrent effect on corporate bribery of foreign officials; it chose, rather, to make FCPA compliance less costly, to limit corporate liability and to provide corporations with behavioral guidelines.<sup>187</sup> Accordingly, the argument that a pri-

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182. See, e.g., 134 CONG. REC. S4657, S4664 (daily ed. Apr. 25, 1988) (statement of Sen. Proxmire calling Omnibus Trade Act the "Bring Back Bribery Bill").

183. See, e.g., *Lamb v. Phillip Morris, Inc.*, 915 F.2d 1024 (6th Cir. 1990) (denying private right of action under FCPA, but allowing antitrust claims based on payment of bribes), *cert. denied*, 111 S. Ct. 961 (1991).

184. See *Cort v. Ash*, 422 U.S. at 79. The Court noted that [e]very criminal statute is designed to protect some individual, public, or social interest. . . . To find an implied civil cause of action for the plaintiff in this case is to find an implied civil right of action for every individual, social, or public interest which might be invaded by violation of any criminal statute. To do this is to conclude that Congress intended to enact a civil code companion to the criminal code.

*Id.*, quoting *Cort v. Ash*, 496 F.2d 416, 428-29 (3d Cir. 1974) (Aldisert, J., dissenting). The FCPA, however, provides for civil enforcement by the SEC. See 15 U.S.C. § 78dd-2 (d)-(f) (1988).

185. *Cort v. Ash*, 422 U.S. 66, 78 (1975); see *Chrysler Corp. v. Brown*, 441 U.S. 281, 317 (1979) (private right of action not necessary to make effective congressional purpose in Trade Secrets Act).

186. See *supra* notes 9-30 and accompanying text (describing Congress's purposes in enacting FCPA).

187. See *supra* notes 32-44 and accompanying text (discussing congressional efforts to enhance U.S. competitiveness and limit corporate liability).



vate right of action should exist on deterrence grounds fails.

Furthermore, not only is a civil RICO action unnecessary to effectuate the FCPA's purposes, but the allowance of such actions might hinder effective government investigation and enforcement and interfere with Executive Branch foreign policy powers. Private civil RICO actions would subvert the FCPA's limitation of enforcement actions to executive branch proceedings, open inquiries into areas of foreign policy, and apply U.S. law to acts occurring in foreign countries.<sup>188</sup> The FCPA's designation of the U.S. Department of Justice and the Securities and Exchange Commission as the sole enforcement authorities would thus be repealed by allowing a private civil RICO action.<sup>189</sup> Finally, allowing private civil RICO actions would increase the costs and liability involved in an FCPA violation, in direct contravention of the streamlining effect that Congress intended the 1988 amendments to have.<sup>190</sup>

Congress prescribed severe, but limited, financial penalties and prison terms for FCPA violations.<sup>191</sup> Private civil RICO litigation effectively would repeal this statutory scheme by exposing corporations to enormous financial liability: any competing corporation that lost a contract due to a foreign bribe could seek damages for the entire amount of the contract.<sup>192</sup>

#### 4. Availability of State Remedies

The fourth *Cort v. Ash* factor is whether the cause of action is one traditionally relegated to state law so that it would be

188. See *supra* note 101 and accompanying text (outlining concerns underlying act of state doctrine).

189. See S. REP. No. 486, 99th Cong., 2d Sess. at 19 (views of Sen. Proxmire); see also *Clayco Petroleum Corp. v. Occidental Petroleum Corp.*, 712 F.2d 404 (9th Cir. 1983) (noting that judicial interference hinders foreign policy), *cert. denied*, 464 U.S. 1040 (1984).

190. See 122 CONG. REC. 30,421 (1976) (statement of Senator Percy) (private right of action would merely produce legal harassment, rather than effective enforcement, and increase consumer and legal costs); see Letter from Secretary of Commerce Elliot L. Richardson to Senator John Tower (Sept. 15, 1976), *reprinted in* 122 CONG. REC. 30,419 (opposing treble damages in private action).

191. 15 U.S.C. §§ 78dd-2(g)(1) & (2) (1988).

192. See Amendment No. 2292, 94th Cong., 2d Sess., 122 CONG. REC. 30,333 (1976) (amendment rejected by Congress proposing private right of action for competitors).

inappropriate to infer an action solely based on federal law.<sup>193</sup> This factor focuses on the availability of an adequate state court remedy.<sup>194</sup>

This inquiry is relevant where an employee plaintiff questions not the acts of a sovereign, a federal concern, but rather an employer's decision to fire him, a traditional state concern.<sup>195</sup> The actions upon which the employee based his claim, the actual bribery of a sovereign power, could be challenged under state law for breach of fiduciary duty.<sup>196</sup> State law may also provide a right of action for wrongful termination.<sup>197</sup> As wrongful termination is traditionally a state law concern, a whistleblower case provides no occasion to create a federal remedy to supplant a traditional state concern.<sup>198</sup>

### B. *Civil RICO's Application to FCPA Violations Stretches Civil RICO Beyond Congress's Intent*

Although the FCPA does not create private rights that Congress intended to protect, courts have recently allowed private rights of action through RICO's civil provisions based upon FCPA violations.<sup>199</sup> RICO is a remedial statute that Congress created to enable prosecutors to attack organized crime

193. *Cort v. Ash*, 422 U.S. 66, 78 (1975).

194. *See Lewis v. Sporck*, 612 F. Supp. 1316, 1333 (D.C. Cal. 1985).

195. *See, e.g., Williams v. Hall*, 683 F. Supp. 639 (E.D. Ky. 1988).

196. *Id.*; *see D'Agostino v. Johnson & Johnson, Inc.*, 225 N.J. Super. 250, 542 A.2d 44 (1988) (allowing employee state remedy in case of wrongful termination related to FCPA violation), *aff'd*, 115 N.J. 491, 559 A.2d 420 (1990).

197. *See Williams*, 683 F. Supp. at 641; *see also D'Agostino*, 225 N.J. Super. at 250, 542 A.2d at 44.

198. *See Cort v. Ash*, 422 U.S. 66, 84-85 (1975). The Court insisted on the states' right to regulate corporate affairs, stating that

except where federal law expressly requires certain responsibilities of directors with respect to stockholders, state law will govern the internal affairs of the corporation. . . . We are necessarily reluctant to imply a federal right to recover funds used in violation of a federal statute where the laws governing the corporation may put a shareholder on notice that there may be no such recovery.

*Id.*

199. *See, e.g., Environmental Tectonics Corp., Int'l v. W.S. Kirkpatrick & Co.*, 847 F.2d 1052 (3d Cir. 1988) (allowing civil RICO action for FCPA violation), *aff'd*, 110 S. Ct. 170 (1990); *Petroleos Mexicanos v. Crawford Enters., Inc.*, 826 F.2d 392 (5th Cir. 1987) (allowing civil RICO action for FCPA violation); *Williams v. Hall*, 683 F. Supp. 639 (E.D. Ky. 1988) (allowing civil RICO action for FCPA violation).

for illegal behavior not adequately punished.<sup>200</sup> Congress created civil RICO and its treble damages award as a supplement to enlist private resources in its domestic war on organized crime, a war that Congress believed public prosecutorial resources were insufficient to handle.<sup>201</sup> Neither rationale for the application of civil RICO—lack of adequate punishment or lack of enforcement resources—exists in the FCPA context. Accordingly, allowing private civil RICO actions runs counter to Congress's intent in enacting RICO and its civil counterpart.<sup>202</sup>

Congress designed the FCPA, like RICO, to fill a prosecutorial gap in federal and state penal codes.<sup>203</sup> Both statutes replace creative prosecutorial uses of the mail and wire fraud statutes.<sup>204</sup> RICO now enhances the penalties of those statutes,<sup>205</sup> and the FCPA relies on them for jurisdictional purposes.<sup>206</sup> Both the FCPA and RICO carry strong penalties.<sup>207</sup> The statutes differ in that Congress enacted the FCPA to fill a specific gap in the law: that of penalties a party would incur by bribing a foreign official.<sup>208</sup> Congress enacted RICO to apply to statutory gaps in general.<sup>209</sup> The FCPA's specific prohibition of bribing a foreign official and the corresponding penalties cover the problem of foreign bribery; in amending the FCPA without adding a private right of action, Congress ac-

200. See *supra* notes 75-77 and accompanying text (discussing purpose of RICO statute).

201. See *supra* notes 75-77 and accompanying text (discussing purpose of RICO statute).

202. See 122 CONG. REC. 30,336 (1976) (statement of Sen. Percy) (warning that private right of action would cause legal harassment and would not enhance enforcement).

203. See *supra* note 26 and accompanying text (discussing FCPA objective of providing effective prosecutorial tool).

204. See *supra* note 27 and accompanying text (discussing prosecutorial reliance on mail and wire fraud statutes in cases of pre-FCPA bribes of foreign officials); *supra* notes 79-80 and accompanying text (discussing prosecutorial reliance on mail and wire fraud statutes in pre-RICO actions against organized crime).

205. See *supra* notes 81-85 and accompanying text (discussing RICO's basis in multiple acts of mail and wire fraud).

206. See *supra* note 24 and accompanying text (noting RICO's Commerce Clause jurisdictional predicate).

207. See *supra* note 25 (discussing FCPA penalties) and note 87 (discussing RICO penalties).

208. The FCPA deals specifically with the problem of foreign bribery. See *supra* notes 9-25 and accompanying text (discussing FCPA's purposes and structure).

209. See *supra* notes 75-80 and accompanying text.

knowledge that prosecutorial efforts had the desired deterrent effect without the private right of action.

Furthermore, RICO's attack on enterprise criminality is redundant in light of the FCPA's target: enterprises engaging in criminal conduct. Congress's intent that RICO have a "remedial" purpose argues strongly in favor of not applying RICO in the FCPA context where a remedy is strong, narrowly-tailored, effective and recently addressed by Congress.<sup>210</sup> The net effect of allowing civil RICO actions based on FCPA violations would be to expand civil liability far beyond the criminal liability that Congress intended to impose when it enacted RICO.<sup>211</sup>

When Congress takes time to isolate offensive conduct and to impose prohibitions on that conduct, as it did in enacting and amending the FCPA, the judiciary should not rewrite legislative efforts by applying the broad RICO statutes to prohibit conduct that Congress did not expressly proscribe.<sup>212</sup> Applying civil RICO in the FCPA context reverts to the bludgeons of mail and wire fraud to criminalize acts that the FCPA was designed to regulate. Inherent in a corporation's bribery of a foreign official are the components of that act: the use of the mails and other tools of interstate commerce, and the use and investment of the proceeds. Foreign bribery, by its nature, is ongoing, continuous, and related, even in the case of a one-time payment—automatically fulfilling RICO's pattern requirements.<sup>213</sup> The FCPA prohibits such behavior and sets out specific penalties for violations.<sup>214</sup> RICO's application would not only duplicate the FCPA's role, but it would also subvert the FCPA's basic policy objectives of corporate guidance, limitation of liability, and competitiveness.

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210. *Cf.* Note, *supra* note 87, at 1292-1301 (arguing that civil RICO is punitive in nature and should be accompanied by safeguards available in criminal proceedings).

211. *See supra* note 99 and accompanying text (discussing Justice Department's narrow interpretation of availability of RICO remedy).

212. *Business Accounting and Foreign Trade Simplification Act Joint Hearings Before the Subcomm. on Securities and the Subcomm. on International Finance and Monetary Policy of the Committee on Banking, Housing, and Urban Affairs on S. 708, 97th Cong., 1st Sess., 433 (1981) (statement of Harvey L. Pitt); see Chiarella v. United States, 445 U.S. 222, 235 n.20 (1980).*

213. *See H.J., Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 242-43 (1989) (outlining requirements for RICO pattern).*

214. *See 15 U.S.C. §§ 78a, 78m, 78dd-1, 78dd-2 & 78ff (1988).*

The FCPA takes much care to define the requisite scienter and the type of payment that violate the statute.<sup>215</sup> For example, Congress intended to exempt facilitating payments from the FCPA's prohibition.<sup>216</sup> Such payments might violate the mail fraud statute, which contains broader language and has a lower scienter requirement.<sup>217</sup> Payments deemed reasonable and bona fide are also legal.<sup>218</sup> Only payments "corruptly" made to influence an official in his official capacity are bribes.<sup>219</sup>

Application of the mail fraud statute would prohibit payments that Congress chose to exempt from the FCPA's reach.<sup>220</sup> A civil RICO action based on more than one violation of the mail fraud statute would bypass Congress's enforcement structure and impose greater penalties for the same conduct that the FCPA prohibits.<sup>221</sup>

RICO is unquestionably more effective at taking the profit out of the proscribed activity, as its aim is to destroy a criminal organization.<sup>222</sup> The FCPA has the gentler mission of stopping corporate misbehavior while preserving the operations on which the domestic economy and employment depend. This mission is consistent with the modern notion that individuals running large corporations are no longer merely manipulating their personal wealth, but acting as trustees for the pension funds and municipalities which have an increasingly large stake in those enterprises. On the contrary, RICO was designed to destroy the nominally legitimate enterprises used as shields for corruption. Moreover, the FCPA specifically sets out large fi-

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215. See *supra* notes 46-50 and accompanying text (outlining FCPA scienter requirement).

216. 15 U.S.C. § 78dd-1(b)(1988); see *supra* note 58 (defining routine governmental action).

217. 18 U.S.C. § 1341 (1988).

218. See *supra* note 53 and accompanying text (outlining FCPA exception for reasonable payments).

219. See *supra* notes 22-25 and accompanying text (defining "corrupt payment").

220. See *supra* note 5 (discussing reach of mail fraud statute); *supra* notes 51-55 (discussing exceptions and affirmative defenses contained in 1988 FCPA amendments).

221. See 18 U.S.C. § 1963 (1988) (providing for maximum twenty-year prison term and mandatory forfeiture provisions to extent of violator's holding under RICO).

222. See *supra* note 75-77 and accompanying text (describing RICO's purpose).

nancial penalties and stiff prison terms to punish violations,<sup>223</sup> whereas allowing private litigants to collect civil RICO's treble damages would create limitless corporate liability.<sup>224</sup>

Reading civil RICO to allow a private right of action would assume that Congress was unaware that bribery has a profit motive when it drafted the FCPA's penalty scheme. Because Congress did take the FCPA violator's profit motive into account, civil RICO fails to serve a remedial purpose in the context of foreign bribes. Civil RICO's basic remedial purpose is to enlist private litigants to combat pattern criminality and the corruption of legitimate enterprises.<sup>225</sup> The FCPA's provisions take into account that (1) a corporation is a legitimate enterprise and (2) that the corporation would be corruptly used if its agents bribed foreign officials, since the FCPA prohibits "corrupt" payments.<sup>226</sup>

### C. Problems Stemming from the FCPA's Enforcement Forum

The FCPA is a statute that regulates behavior the purpose or consummation of which usually takes place outside the United States.<sup>227</sup> In order for the FCPA to reach its target, namely, those who bribe foreign officials, the bribe must first be proved. The cross-border nature of FCPA jurisdiction and enforcement, where the judgment forum is a U.S. court, poses a variety of problems for both corporate<sup>228</sup> and individual<sup>229</sup>

223. See *supra* note 25 (discussing FCPA penalties).

224. See Lynch, *supra* note 77, at 752. This commentator has noted that the forfeiture provisions of RICO carry the possibility of financial sanctions that are both mandatory, because the judge has no discretion to moderate or remit a RICO forfeiture, and possibly draconian, since the extent of the forfeiture may be measured by the value of the defendant's interest in the enterprise rather than by the extent of the criminal conduct or profits therefrom.

*Id.* (footnotes omitted).

225. See *supra* notes 89-93 and accompanying text (discussing purpose of civil RICO).

226. See *supra* notes 20-25 (discussing payments prohibited by FCPA).

227. 15 U.S.C. §§ 78dd-1 & 78dd-2 (1988) (prohibiting bribery of foreign officials without geographic restriction).

228. For example, Congress expressed concern with limiting the scope of enforcement actions in its decision to leave foreign subsidiaries out of the text of the FCPA. 123 CONG. REC. 38,778 (1977) (statement of Rep. Devine).

229. *Unlawful Corporate Payments Act of 1977: Hearings on H.R. 3815 and H.R. 1602 before the Subcomm. on Consumer Protection and Finance, 95th Cong., 1st Sess.* 229 (1977). In his discussion with Harold M. Williams, SEC Chairman, and Harvey Pitt,

defendants. Judicial imposition of liability on one who bribes necessarily casts the alleged recipient in an unfavorable light—with particularly unfortunate consequences for the foreign official.<sup>230</sup> In the FCPA context, a private civil RICO action would allow a private party to activate the judicial machinery against a foreign official, thereby possibly convicting the foreign official without affording him due process protections. Fidelity to the FCPA delegation of enforcement power to the U.S. Department of Justice and the Securities and Exchange Commission would ensure that the foreign official does not suffer embarrassment before a proper case had been made.

A private civil RICO action for an FCPA violation also increases the risk that U.S. courts inquire into areas barred by the act of state doctrine. The FCPA's delegation of enforcement powers to the Securities and Exchange Commission and the U.S. Department of Justice limits such inquiries according

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SEC general counsel, subcommittee chairman Eckhardt presented the following concerns relating to the individual defendant in a foreign forum:

1. In a prosecution of a corporation's action overseas, the defendant would be in a position to produce what evidence there was to contradict any contention that the company had anything to do with the bribery, but an individual agent faced with a similar charge where the totality of proof would be overseas would not be in the same position, and his interest would be in conflict with those of the corporation;
2. It may be in a foreign government's interest to prove that the defendant agent did, without authorization, bribe a lower-level official, in order to remove the matter from political concern; the corporation may want to aid in showing violations for similar reasons; the agent becomes the Sacrificial Lamb who shifts the focus of the public eye away from the corporation and the government;
3. An individual can be put in jail while a corporation can't—making the stakes of winning much higher for the individual;
4. An individual would already be vulnerable to the law of the nation where the act occurred;
5. Geographic and evidentiary burdens would be great on the defendant who is brought to the United States, his witnesses would be halfway around the world—a disadvantage usually allowed only in the extraordinary cases like airplane hijacking;
6. A corporation's common defense would be that it knows nothing about the bribery, putting its interests directly at odds with those of the agent;
7. The agent would be protected by the issuer in at least those cases where the issuer chooses to contest the violation;
8. The heavy burden of proof placed on the individual would deny him due process.

*Id.*

230. See *supra* note 12 and accompanying text (describing impact of bribery scandals on foreign officials).

to executive branch discretion.<sup>231</sup> Congress drew this limitation to reach its goal of leaving the executive branch free to determine foreign policy.<sup>232</sup>

An FCPA private right of action poses additional problems that stem from the FCPA's unilateral nature. The United States is the only country to forbid overseas bribery.<sup>233</sup> If the FCPA carries with it a private civil RICO action for treble damages, a foreign corporation could recover for a U.S. corporation's violation. The U.S. corporation, however, would have no recourse against the foreign corporation bribing a third country's official since an FCPA violation requires a U.S. contact.

Even if the executive branch decides to allow a private individual to bring a civil RICO action against a foreign official, the courts may decline jurisdiction based on the principle of separation of powers.<sup>234</sup> The executive branch's use of the judiciary to inquire into some sovereign acts, but not others, constitutes an unconstitutional violation of the principle of separation of powers by executive branch delegation of foreign policy responsibilities to the judicial branch.<sup>235</sup> The power of U.S. judicial inquiry to affect foreign policy, viewed in light of the pre-FCPA scandals, is great.<sup>236</sup> An executive decision to allow embarrassment of a foreign government is not a proper basis for extending or contracting the jurisdiction of the judicial branch into a foreign forum.<sup>237</sup>

A final argument against using civil RICO to privatize U.S. foreign policy is the potentially unwholesome motivation of the frustrated party in a contract bidding. A private civil RICO action would provide a means to use the courts to inquire into

231. See *supra* notes 20-25 and accompanying text (describing types of prohibited payments).

232. See *supra* note 101 and accompanying text (discussing separation of powers and act of state doctrine concerns).

233. See Gevurtz, *Using the Antitrust Laws to Combat Overseas Bribery by Foreign Companies: A Step to Even the Odds in International Trade*, 27 VA. J. INT'L L. 211, 212-14 (1987).

234. Cf. *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 790 (1972) (Brennan, J., dissenting) (criticizing requirement of executive approval for judicial branch inquiry as violation of doctrine of separation of powers).

235. Cf. *id.*

236. See *supra* notes 9-12 and accompanying text (discussing pre-FCPA scandals).

237. Cf. *First Nat'l City Bank*, 406 U.S. at 790.



the actions of the party who won the contract, especially where the winner was not the low bidder. The U.S. judicial system, through its process of discovery, becomes the hired factfinder, compelling enterprises operating in a foreign forum that may have only a minuscule U.S. ownership to surrender their records. If the plaintiff happens to find an FCPA violation, treble damages and attorney's fees provide an attractive recompense. If the defendant has anything it does not wish to disclose for legitimate reasons, especially in countries with cultural biases against discovery, the civil RICO action becomes a means of extortion.

#### D. *Solution to the RICO Problem*

Currently, courts are fashioning complicated standing requirements under civil RICO by narrowly construing the requirement that the plaintiff be injured "by reason of" a RICO violation in a fashion analogous to the way that courts have narrowly construed the "antitrust injury" in antitrust cases.<sup>238</sup> These distinctions are inefficient and without legal basis. A return to principled statutory construction, where the court actually interprets conflicting statutory schemes in light of the purposes of those statutes would immediately solve the problem. Under traditional statutory analysis, where the express provisions of one statute would render another statute's provisions meaningless, the court looks to the legislative intent behind the two statutes to determine the proper remedy.<sup>239</sup> In addition, the enactment of a regulatory scheme under Securities and Exchange Commission and the U.S. Department of Justice

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238. Compare *Burdick v. American Express Co.*, 865 F.2d 527 (2d Cir. 1989) and *Cullom v. Hibernia Nat'l Bank*, 859 F.2d 1211 (5th Cir. 1988) (denying RICO standing to employee discharged for refusal to participate in fraudulent bank loan scheme) and *Morast v. Lance*, 807 F.2d 926 (11th Cir. 1987) (granting RICO standing to employee discharged for report of irregular transactions to government) with *Kansas and Missouri v. Utilicorp United, Inc.*, 110 S. Ct. 2807, 2810 (1990) (discussing requirements for showing "antitrust injury").

239. See *United States v. Blondek*, 741 F. Supp. 116 (rejecting suit against foreign official who accepted bribe despite broad language of conspiracy statute because of narrower FCPA language), *aff'd sub nom. United States v. Castle*, 925 F.2d 831 (5th Cir. 1991). The U.S. Supreme Court has traditionally narrowed the scope of broad penalties where Congress subsequently legislated lesser penalties covering the same behavior. See, e.g., *United States v. Yuginovich*, 256 U.S. 450 (1921) (holding that penalty provisions of general revenue laws repealed when Congress later enacted lesser penalties in more specific statute).

authority to provide guidance to corporations operating abroad should, in itself, imply a congressional intent to provide immunity from civil RICO suits.<sup>240</sup> Accordingly, in applying civil RICO to the FCPA, the court should look to the intent of Congress, and determine whether the remedy sought serves or subverts that intent.

Congressional mandates that a statute be construed liberally "in light of" remedial purposes do not mean that the statute be construed literally "in spite of" its remedial purposes.<sup>241</sup> Although a literal reading of civil RICO provides an express right of action in the FCPA context, if its "remedial" purposes are ignored, such a superficial reading creates an inconsistent, costly, and destructive result. In enacting civil RICO, Congress did not intend to create a general federal treble damages remedy for all interstate criminal actions involving fraud.<sup>242</sup> Accordingly, civil RICO does not apply to

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240. *Cf. United States v. National Ass'n of Sec. Dealers, Inc.*, 422 U.S. 694, 732-34 (1975) (finding SEC's regulatory authority sufficiently pervasive to confer implied immunity from antitrust liability); *Gordon v New York Stock Exch., Inc.*, 422 U.S. 659, 685 (1975) (stating implied repeal of antitrust laws necessary to effectuate provisions giving SEC direct regulatory power over exchange rules and practices).

241. *See Lynch, supra* note 77, at 664. One commentator has noted:

Though careful commentators have concluded that Congress intended RICO as a specific response to the problem of criminal infiltration of legitimate enterprises, courts, including the Supreme Court of the United States, and at least one highly influential commentator have found in the legislative history much broader purposes and have used their findings to justify sweeping interpretations of the statute. Since the latter view, which has had considerable influence on the development of the law, is wrong, and the commentators who criticize it have presented their conclusions in summary form, a careful review of the evidence [of congressional intent] is necessary to set the record straight.

*Id.* (footnotes omitted).

242. *See RICO Reform: Hearings Before the Subcomm. on Criminal Justice of the Comm. on the Judiciary House of Representatives 99th Cong., 1st & 2d Sess. on H.R. 2517, H.R. 2943, H.R. 4892, H.R. 5290, H.R. 5391, and H.R. 5445, 99th Cong., 1st & 2d Sess. 364-70 (1986)* (letter of John R. Bolton, Assistant Attorney General). The Department of Justice noted that

When it enacted section 1964(c) as part of the Organized Crime Control Act of 1970, Congress hoped that private civil suits would assist in preventing infiltration of legitimate business by organized crime, [but] that hope has not been realized. Fewer than ten percent of private civil RICO actions have been based on what is ordinarily considered to be organized crime activity. Instead, the vast majority of actions has [sic] arisen out of commonplace commercial transactions allegedly involving fraud on the part of businesses and individuals that have no connection to organized crime. . . .

We do not believe that, when it enacted RICO, Congress thought it

FCPA violations. This approach to statutory construction has been used successfully in the FCPA context before.<sup>243</sup> Any other result would be judicial legislation, eliminating the years of work Congress spent amending the FCPA.<sup>244</sup>

### *CONCLUSION*

Statutory construction mandates that the FCPA's statutory scheme be respected at the expense of a private civil RICO right of action. Alternatively, as a less efficient compromise, congressional enactment of an exclusivity provision of the type envisioned by the Senate would limit enforcement to those instances envisioned by Congress when it crafted the legislation. At least some of Congress's goals in amending the FCPA thereby would be realized, and corporate and individual defendants would no longer be at the mercy of unlimited, unwarranted private litigation.

*Raymond J. Dowd\**

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necessary to create a general federal remedy for fraud, or that it intended to do so.

*Id.* at 364-65.

243. See *supra* note 101 (discussing *Blondek*, where conspiracy statute not applied despite plain language due to FCPA's statutory scheme and purpose).

244. See Eskridge, *Public Values in Statutory Interpretation*, 137 U. PENN. L. REV. 1007, 1064 (1989). The commentator noted that

[s]ometimes, rather than providing too little policy guidance, Congress provides too much guidance, pushing the Court in different directions. In these cases, there is no way the Court can avoid compromising one or more statutory policies, and the use of public values analysis to make these hard choices is consistent with legislative supremacy. For example, Congress sometimes enacts a statute that on its face clashes with earlier enactments. The Court's narrowing interpretation to avoid implicit, unintended repeals subserves rather than undermines legislative supremacy.

*Id.* at 1064 (citation omitted).

\* J.D. Candidate, 1991, Fordham University.