“Time is running out for the merchants of crime and corruption in American society.” With these words, Richard Nixon accepted his nomination as the republican candidate in the 1968 presidential race. At that point, Nixon did not know how right he would be, even if this prediction would turn out to be true in a way he had not expected.

In 1968, Nixon was elected the 37th president of the United States and four years later, he was reelected to a second term that would become a nightmare for him and the nation. The country’s unrivaled dominance in the world economy was coming to an end, partly as a result of the Vietnam War. Rising unemployment, inflation, as well as trade deficits and significant pressure to reduce the value of the U.S. dollar had already prompted Nixon to abolish the dollar’s ties to the gold reserve. The resulting loss in the dollar’s value, as well as persistently weak growth with high inflation, seriously undermined the nation’s self-confidence. Nixon’s strategy of wresting a victory in Vietnam through bombing and expanding the war to Laos and Cambodia proved to be a serious mistake. In terms of domestic politics, the antiwar movement reached a high point. Martial law was declared at several universities, and the army and National Guard took violent action against some students. At the same time, it became apparent that the military superpower would experience a humiliating defeat in its fight against the small country of North Vietnam. With the civil rights movement and other progressive tendencies on the rise, the situation for African Americans and other minorities began to improve, much to the chagrin of conservatives, including Nixon. Simultaneously, critical media became more influential. Investigative reporting on the My Lai massacre and the publication of the Pentagon Papers in the New York Times proved that the government had systematically lied. Nixon, for his part, felt as though he were surrounded by enemies and developed downright paranoid tendencies.

The presidential race of 1972 started in this climate. The Democratic opponent, George McGovern, made it easy for Nixon: his proposals to


2 Jeffrey P. Kimball, Nixon’s Vietnam War (Lawrence, Kansas, 1998), 40-258.
radically redistribute wealth, reduce the military budget, and legalize marijuana drove the political center of U.S. society into the arms of the incumbent Republican, so Nixon’s reelection prospects were very good. Nevertheless, Nixon felt that he could not do without dirty tricks. The Committee to Re-elect the President (CREEP), bursting with criminal energy, placed its bets on undermining its political opponent by any means. On June 17, 1972, CREEP employees disguised as plumbers were caught installing bugging devices in the Democratic Party Headquarters at the Watergate complex. This spurred the worst government crisis since the Civil War. Nixon denied having had anything to do with the break-in even as he bribed those involved to remain silent and used his power to prevent the FBI from investigating the incident. Meanwhile, Nixon was reelected by a substantial majority in November 1972. As one Nixon intrigue after another came to light in the months that followed, Nixon was not afraid of severely impeding the judicial investigations. Thus he ordered the U.S. Attorney General to fire the special prosecutor for the Watergate case, whereupon the Attorney General himself resigned in October 1973. The dismissal of the special prosecutor, which went forward anyway, damaged the government’s reputation, as did the resignation of Vice President Spiro Agnew, who had taken bribes from companies for government contracts and evaded taxes as the governor of Maryland. It was the first time a vice president had resigned since 1832.

In February 1974, the House of Representatives began to look into impeaching Nixon, and in July the House recommended this procedure. Even so, Nixon continued to deny his involvement in the Watergate case almost to the end, even though he had to turn over the recordings of his telephone calls, thus providing definitive proof of his string-pulling and his remarkable command of scatological language. Nonetheless, as late as August 7, he refused to resign. After it had been made clear to him that the trial would result in his removal from office, he backed down. On August 9, he became the first president of the United States to resign.

For someone on the verge of a nervous breakdown and who had failed in every respect, Nixon departed with a surprisingly optimistic gesture. Unlike twenty-five members of his administration, he escaped going to prison since his successor, Gerald Ford, pardoned him on September 8. In Ford’s words, Nixon received a “full, free, and absolute pardon … for all offenses against the United States which he … has committed or may have committed … during the period from January 20, 1969.” This applied not only to Watergate but also to any possible crimes that had not yet been disclosed. The institutions of the state and political class of the U.S. had sustained serious damage both internationally and at home.

I. Business Watergate Disclosed

Although the Watergate case and surrounding events are widely known, it is not so well known that Watergate became the starting point for a long fight against corruption. The U.S. government now ranks this campaign just behind terrorism on its priority list of problems to address. Before 1973, no one really minded foreign corruption among corporations. Watergate, however, spurred a movement that evolved into a “compliance revolution” at the turn of the twenty-first century, fundamentally changing the parameters of corporate action in the process.

The Watergate investigations led to the discovery that U.S. enterprises like 3M, American Airlines, and Goodyear had made illegal payments to CREEP by means of secret offshore accounts. Many other firms used such accounts for hidden campaign contributions. Further investigations revealed that many more businesses had such accounts and that, as a rule, they also used them for bribery in foreign countries.

This caught the attention of the U.S. Securities and Exchange Commission (SEC), which is responsible for the protection of investors and the maintenance of fair and orderly markets. Stanley Sporking, Director of the SEC Division of Enforcement, watched the Watergate

Hearings on television and could not believe his ears. In his view, the biggest problem with the offshore accounts and foreign bribery consisted not in their political, fiscal, or moral explosiveness, but in the way they deceived the stockholders of the companies to whom these payments remained hidden. In the SEC’s “disclosure perspective,” bribery was perceived as a violation of securities laws because the utilized funds were not correctly accounted for. Such violations led to inaccurate bookkeeping, which in turn led shareholders to make distorted investment decisions that could be damaging.\(^6\) The SEC made further inquiries to other companies, getting 150 listed joint stock corporations to admit that they had created dubious slush funds and/or had bribed foreign officials. The more companies the SEC asked, the larger the problem became. In 1976-77, it knew of about 500 U.S. companies that had made questionable payments. Almost all large U.S. companies engaged in foreign bribery. The leftist think tank Council on Economic Priorities published a list of over $300 million in questionable payments.

The extent of such bribery exceeded all expectations. Both in the U.S. and abroad, there was a tremendous outcry against this problem, which was quickly dubbed “Business Watergate.”\(^7\) One could argue that this was a phenomenon inherent to capitalism — one that unmasked this economic system and undermined its legitimacy once and for all. In the 1960s and 1970s, there were strong anti-capitalist and anti-American tendencies in the Western world.\(^8\) Large segments of the U.S. population had already lost their trust in the establishment. Thus, the critical public eagerly took up the bribery issue, as it seemed to confirm their prejudices, especially those commonly leveled against multinational corporations.


Both the Senate and the House of Representatives conducted a whole series of hearings on foreign bribery, to which numerous CEOs of large corporations were summoned. Democratic Senator Frank Church, who had been one of the first senators to speak out against the Vietnam War in the 1960s, proved to be a driving force behind these hearings. As a leading foreign policy figure, he gave the debate a different, more effective impact than Sporking and the SEC. From his “foreign policy perspective,” corruption damaged the reputation and power of the United States and served, above all, the enemies of America. Furthermore, he maintained that the corruption spread by U.S. companies weakened U.S. allies. In 1976, he made this pithy observation in the Senate: “Payments by Lockheed alone may very well advance the communists in Italy. ... The Communist bloc chortles with glee at the sight of corrupt capitalism.” The leading power of the West, in his view, was discrediting itself — a very influential and substantive argument in the Cold War.

In the frosty climate of the Cold War, it was completely unacceptable — indeed, it was a hardly conceivable scandal — that U.S. companies did not even shy away from bribing communist politicians. In the Senate Committee on Foreign and Corporate Bribe, young Senator Joe Biden, today the Vice President of the United States, reported on his experience in the Subcommittee on Multinational Corporations of the Foreign Relations Committee. The latter had likewise addressed the issue of corruption in 1975 because, as Biden stated, “bribery ... directly flies in the face of our own foreign policy.” Biden noted that a hearing with representatives of U.S. multinationals had indicated that the companies’ bribery funds often served to cut other U.S. competitors out of markets in foreign countries. In one case, a CEO had testified that the only “reason why he was involved in one European

9 For a complete list of all the hearings, see Posadas, “Combating Corruption,” 350.
country was to keep free enterprise going in that country and the need to work against the advancement of communism ... That’s the reason why they gave money to these other political parties.” Biden had then asked, “as a joke”: “How much did you contribute to the Communist Party?” The response was surprising if not hair raising: “The faces sort of blanched and the attorney turned to the president of the corporation and conferred a second and said, ’Well, $88,000.’” The company’s president thus got entangled in the contradiction between common anti-communist rhetoric and the facts of reality. There was no doubt that this sort of duplicity and financial contributions to communists and other “shady characters in far-off countries” were utterly intolerable, particularly in the paranoid climate of the Cold War. Interestingly enough, the minutes of this hearing also reveal that foreign secretary Henry Kissinger had “urged that recipients of corporate bribes not be disclosed because they might embarrass officials of friendly governments.”

In 1975-76, a Senate subcommittee headed by Church dealt with the airplane manufacturer Lockheed, which the U.S. government had rescued from bankruptcy with a $250 million federal loan guarantee in 1971. It was determined that Lockheed had systematically bribed governments and high-ranking officials in foreign countries, including important NATO allies, since the 1950s. This scandal had broad implications. In the Netherlands, it led to a constitutional crisis because Prince Bernhard, who was heavily implicated in the scandal, only managed to escape a parliamentary investigation and a court proceeding by Queen Juliana threatening to abdicate. Nevertheless, the prince resigned from all his public posts. In Japan, Prime Minister Takanaka was arrested in 1973 and convicted in 1983.

Ernest Hauser, the former Lockheed lobbyist in Bonn, testified before the Senate subcommittee in 1975 that German Defense Minister Franz Josef Strauß and the CSU had received at least $10 million for the purchase of 916 Starfighter jets for the German Air Force. The documents presented as proof, however, turned out to be forged. From 1961, some of the Starfighters were imported from the U.S., while others were built by a consortium of German airplane manufacturers in Germany as licensed products. Such licensed production was

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11 Foreign and Corporate Bribes Hearings Before the Senate Committee on Banking, Housing, and Urban Affairs, 94th Cong., 2nd Session on S. 3133 (1976): 44 and 45 (Joseph Biden, Jr.)

12 Ibid., 40 (George Ball, Lehman Bros).

13 Ibid., 42 (William Proxmire, Committee Chair).

14 Ibid., 45 (William Proxmire, Committee Chair).
an important component of the reconstruction of the German aircraft industry after World War II. The media derided the Starfighters in the early 1960s as “widow makers” on account of their unreliability — 292 crashes and 116 dead pilots between 1961 and 1989 — before design improvements made them significantly safer. Strauß was never able to shake the reputation of being the corrupt “Starfighter from Bavaria.” The Federal Audit Office disapproved of the overpriced acquisition of the technically immature aircraft. Hauser later rescinded his statement after Strauß had sued him. The accusations could never be resolved because the files had been destroyed in the Ministry of Defense in 1969. In the German parliamentary election campaign of 1976, in which Strauß was in the running to be chancellor, the topic bubbled up again due to disclosures in the U.S. At the same time, a trip Lockheed had financed for Defense Minister Wörner was made known. In Italy, various former members of the government including Prime Minister Rumor were incriminated in the crisis, as was the incumbent President Leone, who resigned in 1978. Other Lockheed scandals came to light in Saudi Arabia, Sweden, Mexico, and Turkey, among other places. A company kept alive by the American taxpayer was providing unlimited ammunition for anti-Americanism and contributing to the destabilization of the nation’s most important allies.

In 1975, the SEC launched an inquiry into United Brands, who owned the Chiquita brand, the successor of United Fruit. In the course of this inquiry, the CEO of United Brands, Eli Black, jumped to his death from his office in a New York skyscraper. United Brands had paid Honduran president General Oswaldo López Arellano $1.25 million in kickbacks and promised him the same amount the following year. Finance Minister Bennaton Ramos personally oversaw the operation.


which was conducted via Swiss banks. A cartel of the banana-exporting countries Colombia, Costa Rica, Ecuador, Guatemala, Honduras, Nicaragua, and Panama lay behind this arrangement. Members of the cartel had wanted to secure a larger share of the banana business for their poor countries after twenty years of stagnant prices by significantly raising the export tax, thus challenging the oligopoly of United Brands, Standard Fruit, and Del Monte. In 1974, Honduras had doubled the tax. After the bribe was paid, the country rescinded the increase, saving United Brands $7.5 million in taxes. Even more importantly, the bribe caused the cartel to collapse. In the course of the investigation, it was also discovered that United Brands had been bribing Italian officials since 1970 with $800,000 to prevent import restrictions. The European Community, in which United Brands had a market share of 40 percent, established that this corporation had also seriously misused its market position. Under prevailing law, the corruption practiced abroad was not punishable in the United States as such. From the “disclosure perspective,” it merely presented a “book and records violation” because, after all, the bribery funds were not properly accounted for in the company books. United Brands asked the State Department, albeit in vain, to keep the case confidential to prevent damage to the country and the company. After it became public, a rebellion against the military government in Honduras broke out; when another military junta came to power, United Brands was partially expropriated.

Other serious cases of corruption included Gulf Oil’s alleged payment of $4 million to the South Korean governing party DRPRK, which several politicians had repeatedly demanded. Simultaneously, the company had made it possible for a Bolivian presidential candidate to purchase a helicopter. In 1975, Democratic Congressman Les Aspen published a list of payments by twenty corporations accused of or having admitted to having made questionable payments totaling $306 million. The list was dominated by defense and oil companies and topped by Lockheed ($229 million), Exxon ($50 million), Northrop ($30 million) and Gulf ($5 million). In the numerous hearings, most corporations admitted to making these payments but defended them with a number of arguments. They claimed, for example, that bribes appeared to be the only way to ensure the continuation of business in the respective countries. Very often the managers claimed that they wanted to “protect democracy” by supporting the right kinds of politicians. They also explained that in some countries under question, such payments were consistent with the


18 See Steve Striffler and Mark Moberg, Banana Wars (Durham, NC, 2003); Thomas P. McCann, On the Inside (Beverley, MA, 1987).


accepted way of doing business. Finally, they argued that political parties and officials exerted strong pressure by threatening to harm U.S. corporations by raising taxes, refusing to grant licenses, or even by nationalizing their assets.21

II. The Genesis of the Foreign Corrupt Practices Act (1977)

In the context of the Cold War, this situation had become untenable, particularly since the media and critical public raised the explosiveness of the issue to a fever pitch.22 The United States, a world power, was undermining its own legitimacy. Thus, in March 1976, President Gerald Ford deployed a “task force” of high-ranking officials to deal with it, although he balked at the suggestion of criminalizing bribery of foreign officials. The soft option — merely requiring disclosure — failed in the Democrat-controlled Congress.23 But Ford’s Democratic successor, Jimmy Carter, took up the issue as one of his first initiatives in 1977. The subcommittee in charge in the House of Representatives characterized the over 400 cases of bribery in its final report of September 1977 not only as “unethical” but also as a danger to the market economy and the competitiveness of the U.S. economy. Moreover, the report emphasized the foreign and military policy interests of the country. This text is extremely illuminating. Such corruption, it stated,

is counter to the moral expectations and values of the American public. But not only is it unethical, it is bad business as well. It erodes public confidence in the integrity of the free market system. It short-circuits the marketplace by directing business to those companies too inefficient to compete in terms of price, quality or service, or too lazy to engage in honest salesmanship, or too intent upon unloading marginal products. In short, it rewards corruption instead of efficiency and puts pressure on ethical enterprises to lower their standards or risk losing business ... Corporate bribery is also unnecessary ...

Corporate bribery also creates severe foreign policy problems for the United States. The revelation of improper payments invariably tends to embarrass friendly governments, lower the esteem for the United States among the citizens of foreign nations, and lend credence to the suspicions sown by foreign opponents of the United States that American enterprises exert a corrupting influence on the political

21 For a summary of these arguments, see ibid, 305-306.

22 For general information on the 1970s, see James T. Patterson, Restless Giant: The United States from Watergate to Bush v. Gore (New York, 2005), 13-130; and Thomas Borstelmann, The 1970s: A New Global History from Civil Rights to Economic Inequality (Princeton, 2012), 19-63.

processes of their nations ... [T]he Lockheed scandal ... jeopardized U.S. foreign policy ... with respect to the entire NATO alliance ... Finally, a strong anti-bribery statute would actually help U.S. corporations resist corrupt demands.24

The central arguments were entirely shaped by the Cold War. Corruption, the subcommittee maintained, supported weaker companies, undermining the productivity of the U.S. economy and alienating the most important members of the Western alliance of the United States. Furthermore, though not stated explicitly, the subcommittee was motivated by the fear that arms technology would proliferate in an uncontrolled way, as corrupt companies could potentially sell the technology to enemy states. These cumulative arguments persuaded Congress to pass the Foreign Corrupt Practices Act (FCPA), which Carter signed into law in December 1977. This act made it unlawful for U.S. companies to bribe foreign officials and politicians with the aim of obtaining unfair advantage and stipulated heavy fines and imprisonment of up to five years for violations. This was a unilateral step taken without consulting trading partners and allies, and it put American companies at least de jure at a disadvantage. The FCPA does not prohibit all forms of corruption. “Grease payments” intended to motivate subaltern officials to complete or accelerate the completion of their duties, such as stamping a customs form or visa, are explicitly excepted.25 The Act deals primarily with “grand corruption,” or payments for obtaining unfair advantages in the acquisition of contracts and for influencing political decisions.26 However, the SEC and the Department of Justice hardly used the FCPA at first,27 though it is possible that it had a deterrent effect that is difficult to measure. Skeptics believed that the FCPA had trained companies to better disguise their corrupt practices. In the 1980s, there were even serious though unsuccessful attempts to water down the FCPA because of constant and severe criticism from the pro-business forces in the Reagan administration. In 1988, however, there was an easing of tensions.

III. Approved by Courts and Ministries: Foreign Corruption by German Corporations

Just how far the United States had stuck its neck out and how unusual this unilateral criminalization of foreign corruption was in 1977 becomes apparent when we compare it to the situation in the Federal


25 The Senate Report formulates this exception as follows: The FCPA’s threat of sanctions “shall not apply to any facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party official.” Quoted in Spalding, “Unwitting Sanctions,” 364-65. Repeated word for word in the Omnibus Trade and Competitiveness Act of 1988, Title V, Subtitle A, Part 1 Sect. 30A.3b.


Republic of Germany. There, the technical term for bribe money was “useful expenditures,” which not only implied its legal nature but also its ability to be deducted from taxes. Thus, bribe money was classified as a normal expense in initiating new business, like expenses for advertising or brokers, for example. At the beginning of the 1970s, the head of the German Chambers of Commerce Abroad observed, “Whether we like it or not, without corruption business dealings with large portions of the world cannot be completed; economic relations would simply collapse without it.”28 In accordance with this sort of worldview, different legal and moral concepts, prescribed to the actors by the competition and local customary practices, had to be applied outside the Federal Republic. To disregard them was only possible by retreating from the respective market.

Corruption in foreign countries by German corporations went on for a long time with the government’s approval and the tax authorities’ full knowledge, although in most of these cases, violations broke the laws of the respective foreign states. In the Federal Republic, “useful expenditures” were not only tax deductible until 1999 (if paid to officials) or 2002 (if paid to recipients in the business world) the companies could also take the deductions without presenting receipts. One memo by the Federal Finance Ministry, for example, stated that it could be “justified in foreign transactions not to demand the name of the recipient when it is certain that the bribe monies are actually paid and required for business.”29 According to this line of argument, these payments were a matter of international practice allowed with the aim of keeping German companies from falling behind. To play it safe, German companies could also turn to the tax offices and have bribe monies they planned to pay acknowledged as tax-deductible in advance.

In the governing social-liberal coalitions under Chancellors Willy Brandt (1969-73) and Helmut Schmidt (1973-82), this practice was not uncontroversial. Hans Matthöfer had already expressed his opposition to bribes being tax-deductible in 1971, a year before he was appointed Parliamentary State Secretary of the Ministry of Economic Cooperation, which was in charge of development aid to third-world countries. As a development expert, he knew how damaging corruption could be. Indeed, corruption destroys governance that adheres to rules with sometimes disastrous effects, such as inflated prices, misallocation of capital, and undermining opportunities for growth. Matthöfer proposed an anti-corruption code to the United Nations. Rainer Offergeld, the State Secretary of the Finance Ministry from

28 Quoted in: Daniela Decurtins, Siemens: Anatome eines Unternehmens (Frankfurt/M., 2002), 244.
1975 to 1978 and also a Social Democrat, represented the opposing view: “Either one participates [in the practice], or one winds up high and dry.” However, during Matthöfer’s tenure as the Federal Finance Minister (1978-82), bribes remained tax-deductible.

In 1985, foreign corruption even received the stamp of approval from the German Federal Supreme Court (Bundesgerichtshof) when a German trading company sued a German client for reimbursement of a kickback that it had paid on his behalf. One of the trading company’s staff had bribed officials in Nigeria to win a contract there for the client. The client, however, had failed to pay the agreed upon sum. By way of explaining the background of the case, the Court stated that such bribes to “influential positions in the country” were “required” in order to conduct such transactions in Nigeria. “The parties knew this,” the Court said. “Because, on the other hand, the use of bribes is illegal in Nigeria and involves the danger of the provider getting blacklisted or possibly being prosecuted, European providers typically have locals take care of the ‘bribing.’”

This 1985 decision of the German Supreme Court reflects the nation’s ambivalence in dealing with foreign corruption. Whereas a lower district court had declared that the trading company was in the right for the simple reason that “the arrangement of the parties concerning the payment of bribes” did not violate “the German ordre public,” the Supreme Court followed a different course. As the act was unethical and at least formally illegal in the respective country, the company had no effective right to a commission. Had the client paid the agreed upon commission, however, that would not have been objectionable. This ruling sanctioned the long-standing practice of bribery, as it were, continuing as follows:

To be sure, a German entrepreneur cannot be expected to completely dispense with bribery of the relevant state organs in countries where this is the only means to acquire state contracts, thereby leaving the business to less conscientious competitors. Thus, he will not be able to accuse his employees and sales representatives of violating their official or contractual duties if, as is customary locally, they work with bribes in applying for such contracts; he may under certain conditions even have ... to repay bribes that they disbursed. However, it does not follow from this that the bribe agreement in itself ... would have to be legally recognized.

30 Ibid.

31 Entschließungen des Bundesgerichtshofes in Zivilsachen (BGHZ), Vol. 94 (Cologne, 1985), 268-75, here 269.
Legal acts that ... contradict ethical-legal principles are ... null and void.\textsuperscript{32}

According to this, agreements to bribe officials are not enforceable; the procedure in and of itself is judged as incorrect, though it is tolerated. Employees, thus, have a right to be reimbursed for bribe monies by their employers.

By the late 1980s, however, signs of a fundamental shift in the legal judgment and public perception of corruption began to emerge. In Germany, this was not driven by politics nor by the corporate world, but by a critical public and landmark regulatory decisions of the U.S. government and the international community.

IV. The Compliance Revolution of the 1990s and 2000s

A true shift only occurred between 1990 and 2002. It is no exaggeration to characterize it as a “compliance revolution.”\textsuperscript{33} There were eight interconnected causes for this:

1. Once the Cold War was over, a period of liberal-market and globalization euphoria set in. Corruption was now regarded as a non-tariff barrier to trade and development, and a practice at odds with democracy. This climate generated political pressure for reform. The end of the Cold War also made it easier for the international community to coordinate on the matter. Previous initiatives had often failed on account of the East-West dichotomy.

2. In this context, the change in the administration from George H.W. Bush to Bill Clinton was important. Whereas the Republican Bush would have utilized a failure of negotiations as a pretext for weakening or eliminating the FCPA, the Democrat Clinton emphatically supported efforts to internationalize the law. During Clinton’s administration, the FCPA came to be applied more strictly, not in terms of the number of proceedings (see Diagram 1 below) but in terms of the severity of the punishments and their visibility. For example, there were two spectacular FCPA cases against icons of American industry — General Electric (1992–94) and, once again, Lockheed (1994–95) — which led to heavy fines and renewed the public’s sensitivity to the topic.

3. The U.S. situation had arrived at a point at which there were two alternatives: either eliminate or weaken the FCPA, or develop an international agreement. Without the latter, the FCPA could not have

\textsuperscript{32} BGHZ, Vol. 94 (Cologne, 1985), 272. See also NJW 1985, 2405 and Frankfurter Allgemeine Zeitung, Dec. 28, 2011.

survived in the long term in the United States because U.S. companies’ complaints about the law putting them at a disadvantage could only be warded off if the American rules also applied to all major competitors. Rescinding the law, however, was the last thing that the Western allies wanted. The U.S. economy thus exerted strong pressure to prevent corrupt practices among its competitors.

4. The FCPA amendment of 1988 had made it the U.S. president’s duty to work toward an international agreement in order to eliminate the disadvantage that it allegedly subjected U.S. companies to. This put the topic at the top of the political agenda, and in 1989, the U.S. did indeed offer to develop an agreement against foreign corruption for the OECD (Organization for Economic Cooperation and Development). That same year, it launched the Ad Hoc Group on Illicit Payments, which worked at a remarkably slow speed, presenting its first non-binding recommendations only in 1994. Although these did not yet constitute a breakthrough, they generated momentum. Overcoming corruption became a political goal that the European Council, as well as the now forming anti-corruption lobby in civil society, embraced.

5. Within a few years of its founding in 1993, Transparency International (TI) developed into a powerful organization, active worldwide, that put the topic on the international agenda together with church groups and development policy organizations. Despite considerable opposition, the movement gained increasing support. In Germany, for example, this came through Federal President Richard von Weizsäcker and prominent managers like Marcus Bierich (Bosch) and Richard Brandtner (KfW, Kreditanstalt für Wiederaufbau [Reconstruction Credit Institute]). In 1998, Siemens joined TI-Germany as one of the first and most important corporate members. In the Federal Republic, political pressure was building to end tax deductions for bribe monies and, globally, to adopt a binding OECD convention.

In Germany, a first partial success was achieved in 1997, when bribery in business transactions within Germany was prohibited by the new §299 of the German criminal code. Bribing domestic civil servants had been prohibited since 1872. In 1975, this ban was extended to cover all officials. With the passage of the new section of the criminal code in 1997, bribes in domestic business transactions ceased to be tax-deductible.

In this context of increasing international pressure, the prospect of passing an OECD convention looked brighter. Although various

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European governments, above all the Christian-Liberal coalition in Germany, repeatedly rejected suggestions for combating foreign corruption, in May 1997 sixteen European companies explicitly advocated for the criminalization of foreign corruption and the end of such bribes being tax-deductible in an open letter to the ministers of economic affairs of the OECD states. The eight German signatories included, among others, representatives of Daimler Benz, Siemens, Bosch, ABB, and Metallgesellschaft. On behalf of Siemens, the chairman of the supervisory board, Hermann Franz, signed,36 putting his company on the frontline of the anticorruption movement while the majority of German companies remained silent. Since several of these companies (Siemens, Daimler, and ABB) were confronted with accusations of massive bribes a few years later, it seems likely that they were motivated to sign the letter because they were aware of corruption within their own companies, even if they might not have known the details. Additionally, they hoped to use politics to create a level playing field where competitors would no longer be able to use bribes and where they could refrain from corrupt practices by pointing to the convention if asked for bribes. It was obvious that the legal situation was going to change and that considerable legal risks would arise, so that something needed to change in the medium term. However, a one-sided renunciation of corruption seemed too dangerous to the business side of things, so the companies put their hopes in a general shift in the landscape of global competition. Perhaps, too, they were only jumping on the bandwagon in order to be on the right side of history.

7. In December of 1997, the Anti-Bribery Convention (officially known as the “OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions”) was signed by all OECD member states. It had succeeded because of the pioneering role of the most important industrial nations — the United States above all — and because of the public pressure and the tireless lobbying efforts of TI. The convention went into effect in seemingly record-breaking time on February 15, 1999, a little over one year later, obligating the signatory states to penalize active bribery of foreign officials. It is a universally valid _erga omnes_ law that can also be applied to acts committed in states that did not join the convention.37 Most of the forty-five signatory states passed corresponding laws by 2001, Germany in 1999, and the United States even as early as 1998 in the course of the Clinton administration’s tightening of the FCPA.

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37 Passive bribery, that is, accepting bribes, is by contrast not subject to the OECD Convention. The same is true of domestic bribery, bribing political parties, candidates, and other official offices, as well as “petty corruption,” that is, small amounts paid to prompt officials to fulfill their normal duties. These undesirable practices, according to the law, are domestic issues of each respective state and usually illegal there but do not need to be subject to the prosecution of third states. See Pieth, ‘Introduction’, 19-26.
With the tightening of the law, U.S. citizens and companies could now be prosecuted for bribery abroad even if they engaged in it outside of U.S. territory and without any connection to American accounts, books, or communications services. Even more serious was the extension of American jurisdiction to foreigners. Anyone who issued securities in the United States, thus listed on U.S. stock exchanges, had already been subject to the FCPA since 1977. This was now expanded to any sort of business activity in the United States, so that even using an account, e-mail server, or other service in the U.S. established jurisdiction. This gave the U.S. agencies authority over an almost unlimited geographic area. Thus, if a German company engages in bribery in Argentina and sends an e-mail for this purpose to someone who happens to be in the United States, uses a Google account, or hands over the money in an American airport, U.S. agencies can bring charges against that company. The same is true if the company simultaneously has business dealings in the United States that have nothing at all to do with the corruption in Argentina. Due to the size and importance of the U.S. economy, almost all larger companies in the world have business ties to the United States. This definition of national jurisdiction is therefore extremely extensive from a legal standpoint, giving the United States de facto the role of policing the world. In 2000, the relevant divisions in the Department of Justice and the SEC were significantly expanded. In other words, the FCPA now acquired real teeth.

In Germany, the criminal code saw the addition of §299 and §300 in 1997, which criminalized bribery in domestic business dealings, with punishments including fines or imprisonment of up to three years or even five years in particularly serious cases (bandenmäßige Kriminalität, or organized offenses such as a gang or crime-ring would engage in). In 1998, the Christian-Liberal-dominated Bundestag ratified the OECD Convention. To implement it nationally, the Law for Combating International Bribery (Gesetz zur Bekämpfung internationaler Bestechung, IntBestG) went into effect, which equated bribing foreign officials and representatives with bribing German officials and representatives. At first, however, the Bundestag, demonstrating remarkably inconsistency, rejected the abolition of tax deductions for bribe monies used abroad. In May 1999, the EU passed an anticorruption convention. After the Bundestag elections in the fall, the majority fell to the SPD and the Green Party, at which point the tax deductions were eliminated.

In 2002, the addition of subparagraph 3 enhanced §299 of the criminal code so that bribing people in foreign private firms was also
criminalized and subject to the same punishment as corruption in domestic business transactions. With this change, the Federal Republic had achieved the same penal standards as the United States a good quarter century after the FCPA. Now that bribery was prohibited worldwide in both public and private business, a new era — with regard to corruption — began in Germany.

8. At the advent of the twenty-first century, anticorruption measures around the world were seriously strengthened. As security and surveillance systems were ramped up after the terrorist attacks of September 11, 2001, illegal money flows were watched more closely and gradually shut down, which made it considerably more difficult to carry out bribe payments and other illegal money transfers. This affected not only border crossings with suitcases full of cash but also international bank transfers. A further step in the radical strengthening of efforts to fight corruption in the United States was the Sarbanes-Oxley Act (SOA) of 2002. This federal law constituted a response to the huge accounting scandals at Enron, Tyco, Adelphia, Peregrine, and Worldcom.

Enron was the straw that broke the camel’s back and demanded a political response. Enron’s bankruptcy was one of the largest in American history, and the Enron Corporation had also symbolized an era. In less than sixteen years, it had become one of the largest U.S. companies. It used the opportunities that the deregulation drive of the 1980s had created and established truly innovative methods of futures-trading in energy. In fact, it was perceived as a shining example of American entrepreneurship in the neoliberal 1990s. In 2001, Enron’s CEO Kenneth Lay — a close friend of the Bush family — was invited by George W. Bush to become an advisor to the transition team of the incoming president. Enron partially succeeded in influencing the government’s energy policy. In the fall of 2001, it became obvious that a huge scam had happened. The revelation of artificially inflated profits and fraudulent accounting practices sent Enron shares plummeting. Lay was about to be sentenced to a long prison term in 2006 when he died during the legal proceedings.

In this and the other scandals, investors lost billions — and their trust in the financial markets. Reestablishing this trust was relevant to the entire financial system. The Sarbanes-Oxley Act (SAO), a bipartisan initiative, thus passed in the House of Representatives with only three opposing votes and in the Senate without any. Upon signing it into law, George W. Bush triumphantly described it as “the most far-reaching
reforms of American business practices since the time of Franklin D. Roosevelt. The era of low standards and false profits is over; no boardroom in America is above or beyond the law.”

Indeed, it marked a draconian intensification of the accounting guidelines and applies to American and foreign companies if they are listed on U.S. stock exchanges. The SOA considerably expanded companies’ obligations in transparency and reporting, strengthened the independence and purview of auditors, and protected informants, or “whistle-blowers,” within their own companies. The provision that attributed direct personal responsibility to members of relevant managing boards had the most profound effect. These managers had to sign the detailed annual report, Form 20-F, and were personally accountable for the correctness and completeness of the information it contained. CFOs and CEOs were now no longer able to hide behind their function or their firm’s legal entity, but faced the threat of individual punishments of up to $5 million and twenty years of imprisonment. Simultaneously, conditions for enforcing the law improved: the SEC’s budget doubled by 2009.40 The SOA directly affected corrupt practices since these had always led to inaccurate bookkeeping. Many top managers had panic written all over their faces in 2002. Seemingly dormant problems that had long been hidden now bubbled up to the surface. Legal departments and attorneys had a lot of work, and cases of self-reporting abounded.

Diagram 1 shows how many cases were prosecuted and reveals the dramatic shift after 2000. Whereas the Department of Justice had only pursued 36 cases between 1977


and 2000 — in most years, only one case or none at all — between 2001 and 2011 that figure rose to 157, of which 57 cases were brought up against foreign defendants. The claim bandied about in Germany that the law was applied particularly to foreign companies had no factual basis whatsoever. There were only four cases with German defendants during the decade (Siemens AG, individual Siemens managers, Daimler, and Telekom). In the United States, cases of self-reporting abounded from 2002, and comprised about half of all the proceedings. Now, companies perceived an increased pressure to investigate corruption, so they tightened their compliance structures. The criminal sentences became much more severe. In 2006, an FCPA division was established at the FBI, and the respective divisions at the SEC and the Department of Justice were enlarged. One year before, the head of the Compliance Division of the SEC had experienced a momentous change of personnel. Young and highly motivated, Mark Mendelsohn took the top job in the division just in time to process the all-time biggest bribery case yet known in economic history: the case of the German company Siemens. In 2008, the case concluded, handing down fines of $800 million in the U.S. and an additional €596 million in Germany (2007-08). This was the highest fine for a corruption case in American and German history. From the perspective of legal history, this settlement was also groundbreaking because the SEC, the Department of Justice, and German law enforcement agencies worked together closely for the first time on a corruption case, and because a private American law firm, Debevoise & Plimpton, conducted most of the investigations. Although this is common practice in the United States, in Germany this was virgin territory and led to many critical comments from politicians and legal experts.

How high were the fines? Table 1 lists only the fines agreed upon by the SEC and the Department of Justice. Moreover, there were additional fines in other countries as well as legal cost and expenses for investigations to clarify the

<table>
<thead>
<tr>
<th>Rank</th>
<th>Company</th>
<th>Amount</th>
<th>Year</th>
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<tbody>
<tr>
<td>1.</td>
<td>Siemens AG</td>
<td>$ 800 million</td>
<td>2008</td>
</tr>
<tr>
<td>2.</td>
<td>KBR / Halliburton</td>
<td>$ 579 million</td>
<td>2009</td>
</tr>
<tr>
<td>3.</td>
<td>BAE</td>
<td>$ 400 million</td>
<td>2010</td>
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<tr>
<td>5.</td>
<td>Technip S.A.</td>
<td>$ 338 million</td>
<td>2010</td>
</tr>
<tr>
<td>6.</td>
<td>Daimler AG</td>
<td>$ 185 million</td>
<td>2010</td>
</tr>
<tr>
<td>7.</td>
<td>Baker Hughes</td>
<td>$ 44.1 million</td>
<td>2007</td>
</tr>
<tr>
<td>8.</td>
<td>Willbros</td>
<td>$ 32.3 million</td>
<td>2008</td>
</tr>
<tr>
<td>10.</td>
<td>Titan Corporation</td>
<td>$ 28.5 million</td>
<td>2005</td>
</tr>
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extent of illicit payments. In the spectacular Siemens case, these expenses added up to a total of €2.5 billion — in 2013 still a world record — and show how great the risks that the compliance revolution generated really are. This marked a completely new dimension of risk. In comparison, one of the largest scandals in the history of the Federal Republic, in which the use of the pharmaceutical Contergan had caused several thousand babies to be born with serious birth defects that would keep them severely disabled all their lives, the drug’s producer Grünenthal was obliged to pay €51 million (100 million DM in 1970). Grünenthal voluntarily paid another €50 million in 1998. Of course, these two cases are in no way comparable, but the juxtaposition of the sums demonstrates impressively just how much the Compliance Revolution has escalated companies’ financial risks.

For Siemens, paying the fines — which might have been much higher had the company not cooperated with authorities — was not even the biggest risk; being barred from government contracts and an incalculable loss of reputation were much more drastic risks. In the course of the corruption crisis, Siemens’ existence became endangered. To demonstrate how seriously they took this threat and how prepared they were to make a new start, Siemens replaced virtually the entire managing board, along with 130 senior executives — an unprecedented procedure in the history of the company.

In general, the FCPA fines from the 2000s onwards are set at a level that will be painful to the companies without destroying them. However, those who fail to cooperate with the SEC and the Department of Justice can expect much worse. For the future, we can also anticipate that the laws will be tightened even further, as the fight against corruption has been steadily gaining momentum worldwide. Corruption was a central theme of the Arab Spring; there is a strong anti-corruption movement from below in India; in Spain and Italy, discussions have started about the widespread practice of bribing politicians. The UN Convention of 2003 tightened the reins further when it went into effect in 2005. By June 2013, this Convention had been ratified by 165 states; only a few states like Sudan, North Korea, Syria, and Japan had not ratified it. Germany signed the convention in 2003 but has not yet ratified it. To do so would require strengthening and expanding §108e of the German penal code, which criminalizes the bribery of members of the Bundestag. Several initiatives that have attempted to do so have

41 For details, see Klaus Moosmayer, Compliance: Praxisleitfaden für Unternehmen, 2nd ed. (Munich, 2012), 11-32.


43 On this, see Berghoff and Rauh, “Korruption.” The authors are currently working on a book-length history of Siemens and the company’s compliance scandal.

failed in the Bundestag, most recently in June 2013. Citing concerns over the constitutionality of such legal reforms, the CDU and FDP, in particular, balk at the prospect of regulations that seek to draw a clearer dividing line between lobbying and bribery.

V. The Compliance Industry and Its Critics

Companies need to take corruption and compliance seriously. For legal experts, this is clearly the market of the future. A veritable compliance industry has come into being. Consultants, trainers, lawyers, experts, specialist journals, and blogs have all taken off. Highly specialized law firms not only advise their clients and represent them in court but also conduct research for the SEC and the Department of Justice on behalf of the companies under investigation. The companies, in turn, receive milder sentences for such forms of penitent cooperation and are willing to pay dearly for it.

Leading FCPA lawyers nowadays can earn $2 to 4.5 million a year. Typically, they come from the Department of Justice or the SEC. After a few years of serving the state and with spectacular successes as their credentials, they switch to working in these firms. The business magazine Forbes led a frontal attack on the “anti-bribery complex” in 2010.45 According to Forbes, this complex is essentially a conspiracy of former federal officials who first developed the state fight against corruption in order to then enrich themselves on the other side with their insider knowledge. The danger of an FCPA conviction is so threatening, Forbes claims, that the companies are prepared to pay just about any sum to protect themselves. Joseph Covington, who used to be responsible for FCPA suits at the Department of Justice and now works at the law firm Jenner & Block with 450 lawyers, uttered the following critical self-assessment of U.S. anti-corruption policies: “This is good business for law firms. This is good business for accounting firms, it’s good business for consulting firms, the media — and Justice Department lawyers who create the marketplace and then get yourself a job.”46 Such self-criticism is remarkable. Other lawyers in this field counter this argument with the claim that they merely charge market prices and that companies receive value in return. Their activities enable companies to save massive sums in fines, to secure the future of divisions and entire corporations with thousands of jobs, and to show firms a “path to salvation” through the jungle of legal provisions. Those working within the anti-bribery complex also point out that the transnational nature of business relations results

in highly complex questions of international law and that their work aims at showing firms a way to prevent corruption more effectively.47

A public debate about the costs and benefits of current compliance standards is certainly overdue.48 Part of the criticism comes unmistakably from groups with overt interests. The conservative U.S. Chamber of Commerce lobby, together with some (mostly Republican) lawmakers, put the topic of FCPA reform on the agenda and stigmatized the heightened pace of prosecutions as an example of the Obama administration’s hostility toward business. For this purpose, the lobbyists dusted off the old arguments of the 1970s and 1980s. However, they failed in their efforts to bring this topic into the spotlight in the election campaign of 2012. It seems unlikely that the clocks will be turned back. The fight against corruption will continue to be important, and will probably only grow more important in the future.

Another debate criticizes the fight against corruption in the West with an eye to developing countries. It is argued that in countries where bribery is perceived to be widespread, the present enforcement regime damages economic development by deterring investors and thereby implementing de facto economic sanctions. Although the FCPA and all ensuing legislation was enacted, among other things, in order to protect poor countries from the negative effects of corruption, these constitute a perverse and unintended consequence of Western anti-corruption efforts. The increasing commitment of rich countries to enforce anti-bribery measures could also pave the way for less committed countries to fill the resulting foreign direct investment void and drive down standards over all. China’s aggressive investment drive in Africa, Latin America, and Central Asia is frequently mentioned in this context. It is also undeniable that FCPA enforcement is emphatically biased against bribes paid in emerging countries, while bribes paid in the Western world are less likely to be prosecuted.49 Another somewhat ideological position in this debate is the thesis that Western anti-corruption codes are basically a form of cultural imperialism or neocolonial instruments to justify exploitation of the “south” by the “north.”50 Others comfort themselves with the idea that rising living standards and better salaries for public employees will resolve the corruption problem. This may be true for “petty corruption,” but it is doubtful that such changes would have much effect on “grand corruption,” which does not arise on account of economic and social hardship.51 While these arguments are exaggerated,

47 Author’s interview with a partner in a large law firm specializing in FCPA and White Collar Crime Litigation, Washington, DC, June 15, 2012.
49 This summarizes the position of Spalding, “Sanctions.”
they are nonetheless worth considering because we do not know much about the effects of anti-corruption policies in practice. The debate will go on and open up a new and fascinating research field for historians and social scientists alike, as this field has thus far received little attention beyond legal studies.

**Conclusion**

Since the 1970s, foreign corruption has been transformed from a minor infraction, more precisely a bookkeeping infraction, to a criminal offense with serious legal consequences. With the FCPA, the United States took a unilateral step, above all in order to combat anti-capitalist tendencies at home as well as anti-American resentments around the world. The law marked a reaction to the indescribable abuses which surfaced in this context. The end of the Cold War and the change in administration of 1993 spurred the internationalization of the FCPA. Whereas the Republican administrations of Ronald Reagan and George H.W. Bush had sought to weaken the law, the Clinton administration sought to universalize it. The main argument was that the one-sided disadvantage it brought to U.S. companies had to be eliminated. One can spend a lot of time speculating about whether the law was really so restrictive since so few prosecutions were actually opened. In the 1990s, the combined pressure of U.S. foreign policy and the U.S. economy managed to make the fight against corruption a matter for the international community. In practice, U.S. authorities received *de facto* an almost unlimited jurisdiction. Other push factors included a rather improbable alliance of effective initiatives from civil society, above all from the anti-capitalist camp. Finally, a certain momentum was generated on the stage of international organizations that made it impossible to go in reverse. In addition, a change in attitude was underway that made many averse to the dirty practice of corruption and its damaging effects. This was even true of some of those who actively engaged in it. They articulated the desire to be able to deflect the demands of corrupt governments with the help of strict, universal sets of rules. Despite all these advances, corruption is by no means extinct today. Combating it continues to be a high political priority. No large company can now afford to underestimate this sensitive topic.

Translated by Patricia C. Sutcliffe

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