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A Criminal Culture, The FCPA

The Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-1, *et seq.*, is one of those laws that makes for fabulous platitudes that endear the layman to the government and can be embraced solely on worthless generalities. The reason is unfortunately simple, as it's a law comprised of nothing more than worthless generalities, so vague and encompassing that it's made America into some Pollyanna joke in a flat world.

At the [Cato Institute](#), Walter Olson has ripped the covers off of the FCPA.

The Foreign Corrupt Practices Act, enacted in 1977 and the subject of a high-profile federal enforcement campaign in recent years, is a feel-good piece of overcriminalization that oversteps the proper bounds of federal lawmaking in at least four distinct ways, any of which should have prevented its passage. It is *extraterritorial*, purporting to punish overseas misdeeds which deprive no Americans of liberty or property and whose punishment is better left in the hands of authorities elsewhere. It is *vicarious*, inflicting massive liability on businesses and unknowing higher-ups over the actions of rogue local subsidiaries, salespeople and facilitators. It is *punitive*, menacing its targets with twenty-year prison terms and inflicting huge penalties over less-than-huge misbehavior. And finally, it is *vague*, leaving companies to [guess at](#) the proper line between tolerated payments (e.g., gratuities to speed up visa and license issuance in developing countries) and improper "bribes," and even such basic questions as who [counts as an "official."](#)

Sadly, he's not overstating the case. That it can be wrapped for the happily simplistic as forbidding corporate bribery overseas says enough for some. But even Lanny Breuer, head of the DOJ's criminal division, concedes that it's [not so simple](#).

A top [Justice Department](#) official said on Tuesday the agency will clarify next year what triggers anti-corruption probes into U.S. corporations.

Lanny Breuer, head of the criminal division, said his department expects to release "detailed new guidance" on the criminal and civil enforcement provisions of the [Foreign Corrupt Practices Act](#) (FCPA).

Between now and then, we'll just guess. Or more realistically, suffer whatever spits out of a DOJ computer and comports with what some kid assistant thinks is how business ought to happen. And when the "detailed new guidance" emerges out of Washington, no doubt it will answer all these incredibly difficult questions that make put American businesses at a shocking disadvantage to those from other countries, and strike fear in the hearts of executives who might well want to build roads and bridges in other countries, but can't get the gig because they won't take some local burgermeister to lunch for fear of a multimillion dollar prosecution.

I'm no [knee-jerk fan](#) of corporate America. and haven't been shy about attacking abuse when businesses fail to honor their responsibilities. But unlike others who mistakenly believe that we would do better without them, I fully recognize that they are a crucial part of our economy, our world, our existence. Let's face facts, we can't build fleets of cars in the back of our garage, or pave a million miles of highway from the back of a Schwinn. Heck, we wouldn't even have the Schwinn. We need corporate America to create the infrastructure, the products, that we rely upon for our ordinary existence.

And corporate America needs to be able to exist in a world market to sustain itself. It's either that or we sit smug in our platitudes as our wealth flows to China. More significantly, corporate America isn't inherently evil or wrong. It may not always be the white knight, but it similarly isn't always the black one either.

For as long as I can remember, America was viewed as the naive child of the world, strong but misguided in its inability to move beyond rules designed to appeal to third graders. Opposition to, and confusion by, the FCPA isn't meant to suggest that American corporations want to bribe banana republic dictators to get the job. But it flies in the face of every culture that isn't ours, part of that absurd belief that the entire world wants to be just like us. Because, you know, we're so wonderful that no one could possibly want to be any different.

At its core, the FCPA is our government's way of pretending to be the mean old school marm, telling all the nasty children of the world how to behave. If it doesn't appeal to the school marm's sensibilities, then it's a crime, and demands a hard smack across the knuckles. A very expensive hard smack.

This isn't the way to pay back corporate America for any grievances we may have with our KitchenAid refrigerators, or the gross multimillion dollar bonuses paid to executives while line workers can barely put food on the table. Hate corporations for what they do badly all you want, but try to live in a world where they don't exist, don't produce. This isn't our world.

As Wally explains, this is a law that puts an unaimed gun to the head of every corporation doing business across a border, and that's pretty much every corporation that exists. Cut the CEO's salary all you want (as it's not likely they can get a better job playing for the NBA), but don't make it impossible for corporations to compete in the global economy because we carry around fond memories of that school marm.

We may hate corporations, but we need them, and we need them to be productive around the globe. To tie them down because of vague, child-like notions of fairness that conflict with cultural norms everywhere else is just foolish and counterproductive. Surviving and competing in foreign cultures isn't wrong, and it shouldn't be a crime. The FCPA has got to go.