

Commercial Bribery: The Need for a Federal Criminal Statute

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Two airline executives were charged with taking thousands of dollars in "ten per cent kickbacks" from companies they hired to do promotional work for the airline.¹ One of the men pleaded guilty; the other has not been located.²

Suppliers paid to one restaurant chain employee more than \$500,000 during a period of several years.³ The payoffs were made to encourage the employee to purchase for the chain such items as meat and milk from the suppliers.⁴

An executive with one of the nation's largest banks received more than \$500,000 from a brokerage house in exchange for a promise that he would buy and sell stock through that firm.⁵ One transaction alone resulted in a loss of more than \$3,000,000 to clients of the bank.⁶

The foregoing are examples of commercial bribery. Commercial bribery has been defined as the bribery of another's employee for the purpose of inducing the employee to act in some way favorable to the interest of the briber.⁷

Kickbacks paid by business are conservatively estimated to exceed five billion dollars annually.⁸ Some experts have suggested that the real total could be closer to twenty or thirty billion dollars.⁹ Commercial bribery has an obvious effect on the national economy, as nearly all of its costs are passed on to the consumer in the form of higher prices

1. U.S. NEWS & WORLD REPORT, Oct. 29, 1973, at 38.

2. *Id.*

3. A. BEQUAI, WHITE COLLAR CRIME: A 20TH CENTURY CRISIS 42 (1978).

4. *Id.*

5. *Id.*

6. *Id.* at 43.

7. D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 10.6, at 700 (1973).

8. U.S. NEWS & WORLD REPORT, Oct. 29, 1973, at 38. Herbert Robinson, an attorney handling many white-collar crime cases, estimates the annual cost of commercial bribery at one percent of the gross national product. *Id.*

9. *Id.*

for goods and services.¹⁰

Such bribery also brings about an "erosion of the integrity of the buying operation itself which [can] contribute to further losses in other transactions."¹¹ For example, a supplier who destroys the competitive market by paying a bribe may force other suppliers to start paying kickbacks in order to stay in business.¹² Competition for shelf space in grocery stores is another example of the competitive dilemma. Bribery has become so pervasive in the supermarket industry that "certain soft drinks and beers are kept off the shelves unless the vendors of those products have bent to the system of kickbacks."¹³ As one commentator has described it:

[Commercial bribery's] growth is a very serious menace. There is an increasing disrespect of personal and business honesty on the part of our younger generation and a deplorable letdown of ethics on the part of a considerable number of our older generation. The unscrupulousness of the successful and the success of the unscrupulous engender a philosophy that the end justifies the means.¹⁴

Civil suits and state criminal statutes have not effectively solved the commercial bribery problem. A federal criminal statute is needed.

This Note will initially analyze the civil remedies that are available to persons harmed by commercial bribery. A discussion of the problems inherent in relying upon civil suits to stem commercial bribery will follow. State criminal statutes applicable to commercial bribery are then reviewed, followed by an analysis of why state statutes are ineffective. Next, the federal statutes that might apply to commercial bribery, particularly the Travel Act and the Mail Fraud Statute, will be discussed. Included in this discussion will be an examination of the problems and limitations involved in using existing federal statutes to solve the bribery problem. Finally, the advantages of a specific federal commercial bribery statute will be considered.

CIVIL SUITS

The most frequently used remedy to attack commercial bribery is civil litigation.¹⁵ Because an employee who accepts a bribe violates his fiduciary duty to his employer, he is subject to civil suit by the em-

10. *Id.*

11. H. EDELHERTZ, *THE NATURE, IMPACT AND PROSECUTION OF WHITE-COLLAR CRIME* 9 (1970).

12. *Id.*

13. U.S. NEWS & WORLD REPORT, Oct. 29, 1973, at 38.

14. Letter from W.G. Adams, Managing Director of the National Council of the Traveling Salesmen's Association to the Judiciary Committee of the House of Representatives (1926), reprinted in J. FLYNN, *GRAFT IN BUSINESS* 64 (1931).

15. NATIONAL DISTRICT ATTORNEY'S ASS'N, *THE PROSECUTOR'S MANUAL ON ECONOMIC CRIME* 29 (1977) [hereinafter cited as *ECONOMIC CRIME MANUAL*].

ployer.¹⁶ The breach of fiduciary duty gives the employer an absolute right to recover the unjust enrichment in the amount of the bribe from the employee.¹⁷ The employer may also sue the employee for damages resulting from the bribe.¹⁸ Those damages may include the expenses of the suit, such as attorneys' fees or the costs of investigating the bribe.¹⁹

The employer may also proceed against the briber.²⁰ The employer can recover from the briber if he can show actual damages.²¹ Courts may consider the amount of the bribe to be a reasonable estimate of the loss suffered by the employer.²² In those jurisdictions that have a commercial bribery statute,²³ the employer may use the statute in a civil proceeding against the briber to show that the purchasing contract was procured in violation of a penal statute.²⁴

Civil suits have been ineffective in stifling commercial bribery. It is frequently difficult for an employer to discover the bribe because bribes are usually secret.²⁵ In a large corporation an employee's increased affluence probably goes unnoticed.²⁶ Even if the employer discovers the bribe, it is difficult for him to obtain enough evidence to prove that the bribe actually occurred.²⁷ The wrongdoers are usually too clever to leave any lasting traces of the bribe, such as cancelled checks or company book records.²⁸ In addition, the employer may find it impossible to elicit testimony from an implicated party, since the party can claim the privilege against self-incrimination.²⁹

Most importantly, civil suits do not have a significant deterrent effect.³⁰ The employer's recovery from the employee may be limited to

16. *Canadian Ingersoll-Rand Co. v. D. Loveman & Sons, Inc.*, 227 F. Supp. 829, 832 (1964); *Tarnowski v. Resop*, 236 Minn. 33, 36, 51 N.W.2d 801, 803 (1952).

17. D. DOBBS, *supra* note 7, § 10.6, at 700. The right to recover the bribe is not dependent upon a showing that the transaction was unprofitable to the employer. *Id.* The employee has sufficiently damaged the employer by depriving him of the employee's "unbiased judgment and undivided loyalty." *Id.*

18. *Tarnowski v. Resop*, 236 Minn. 33, 36, 51 N.W.2d 801, 803 (1952).

19. *Id.*

20. D. DOBBS, *supra* note 7, § 10.6, at 701. The employer, however, may not recover the same damages from both the employee and the briber. RESTATEMENT (SECOND) OF AGENCY § 313, Comment b (1958).

21. D. DOBBS, *supra* note 7, § 10.6, at 701. Actual damages are frequently difficult to prove, because the actual price of the goods may or may not be equal to the price paid for the goods less the amount of the bribe. *Id.*

22. *Id.* at 702.

23. See note 34 *infra*.

24. See D. DOBBS, *supra* note 7, § 10.6, at 701.

25. Note, *Commercial Bribery: The Need for Legislation in Minnesota*, 46 MINN. L. REV. 599, 604 (1962).

26. *Id.*

27. Note, *Control of Nongovernmental Corruption by Criminal Legislation*, 108 U. PA. L. REV. 848, 861 (1960).

28. See *id.*

29. See *id.*

30. Note, *supra* note 25, at 604.

the employee's unjust enrichment in the amount of the bribe.³¹ His recovery from the briber may also be limited since it might be difficult for the employer to prove that the briber would have sold the goods at a lower price had the bribe not been paid.³² An additional problem is that courts might not allow the employer to recover from both the employee and the briber, especially if the employee is sued first.³³ As a result of these limitations, civil litigation has been ineffective in curbing the practice of commercial bribery.

STATE COMMERCIAL BRIBERY STATUTES

Currently twenty-one states have commercial bribery statutes.³⁴ The New York statute³⁵ is typical of most and has been used most frequently.³⁶ It provides that a person is guilty of a misdemeanor if he or she gives or offers any gift or gratuity to an employee of another without the knowledge and consent of the employer and with an intent to influence such employee's action in relation to his employer's business.³⁷ It is also a misdemeanor under the statute to accept or solicit such a bribe.³⁸

Few prosecutions, however, have been brought under state commercial bribery statutes.³⁹ There are several reasons why the statutes have not been enforced. First, there is the public's complacent attitude

31. See D. DOBBS, *supra* note 7, § 10.6, at 701.

32. *Id.* The limitation of damages problem can be avoided in states that provide for exemplary damages in their commercial bribery statutes. At the present time, Rhode Island is the only state that provides for such damages. See R.I. GEN. LAWS 11-7-6 (1970). In an interesting federal case, *Ranger, Inc. v. Sterling Nelson and Son, Inc.*, 351 F.2d 851 (9th Cir. 1965), *cert. denied*, 383 U.S. 936 (1966), the court allowed the competitors of a manufacturer who had bribed a state employee to recover treble damages under the antitrust laws. *Id.* at 854. Since commercial bribery also subverts ordinary competition, such a use of the antitrust laws seems justified in a commercial bribery context. See D. DOBBS, *supra* note 7, § 10.6, at 703.

33. See D. DOBBS, *supra* note 7, § 10.6, at 702. Dobbs indicates that if the employee is sued first, the employee's unjust enrichment would be prevented by a recovery in the suit against him. *Id.* This would leave only a damages claim against the briber, but the recovery from the employee would have eliminated the employer's damages. *Id.*

34. ECONOMIC CRIME MANUAL, *supra* note 15, at 29. See ARIZ. REV. STAT. ANN. § 13-2604 (Supp. 1979); CONN. GEN. STAT. § 53a-160 (1972); ILL. REV. STAT. ch. 38 § 29A-1 (1977); IOWA CODE ANN. § 722.10 (1979); KAN. STAT. ANN. § 21-4405 (Vernon 1974); LA. REV. STAT. ANN. § 14.73 (West 1974); MASS. GEN. LAWS ANN. ch. 271 § 39 (West 1968); MICH. STAT. ANN. § 28.320 (1962); MISS. CODE ANN. 97.11-11 (1973); NEB. REV. STAT. § 28-710 (1975); NEV. REV. STAT. § 613.110 (1973); N.H. REV. STAT. ANN. § 638:7 (1974); N.J. STAT. ANN. § 2A:170-88 (West 1971); N.Y. PENAL LAW § 180.00-08 (Consol. 1975); N.C. GEN. STAT. § 14-353 (1969); R.I. GEN. LAWS § 11-7-3 (1970); S.C. CODE § 16-17-540 (1977); UTAH CODE ANN. § 76-6-508 (1978); VA. CODE § 8-2-444 (1975); WASH. REV. CODE ANN. § 49.44.060 (1962); WIS. STAT. § 134.05 (1974).

35. N.Y. PENAL LAW §§ 180.00-08 (Consol. 1975).

36. ECONOMIC CRIME MANUAL, *supra* note 15, at 29. For a detailed analysis of the New York statute, see Note, *supra* note 25, at 616.

37. N.Y. PENAL LAW §§ 180.05-08 (Consol. 1975). The maximum penalty is a fine of \$500 and three months imprisonment. *Id.*

38. *Id.*

39. ECONOMIC CRIME MANUAL, *supra* note 15, at 29. The New York statute has been used much more frequently in civil suits than in criminal prosecutions. *Id.*

towards bribery.⁴⁰ The public seems to expect that a certain amount of corruption is customary in the business world.⁴¹ For example, under many of the commercial bribery statutes, it is a crime to give anything to an employee that could influence his actions in relation to the employer's business.⁴² Such provisions seem to encompass indirect payments, such as lavish entertainment and subsidies.⁴³ If the general public expects that these kinds of indirect payments will inevitably occur in the business world, prosecutors may not be willing to use their limited resources to prosecute this kind of commercial bribery.⁴⁴ This complacent attitude is also reflected in statutes that label the crime a misdemeanor and provide for only minor penalties.⁴⁵

Second, prosecutors have the same problems with discovering evidence and proving the bribe that civil litigants have.⁴⁶ The state must show that the briber had intent to influence.⁴⁷ The requisite intent may be inferred from acts of the briber and the circumstances under which they occur.⁴⁸ Prosecutors, however, do not have sufficient resources to make the lengthy investigations into company books that are involved, particularly where large national corporations are a part of the investi-

40. Note, *supra* note 27, at 861.

41. *Id.*

42. See N.Y. PENAL LAW § 180.00 (Consol. 1975) (gift or gratuity); R.I. GEN. LAWS § 11-7-3 (1970) (any gift or valuable consideration); WASH. REV. CODE § 49.44.060 (1962) (any compensation, gratuity, or award).

43. See Note, *supra* note 25, at 617.

44. See Note, *supra* note 27, at 861. A related problem is that some of the statutes provide that the bribe must be tendered without the knowledge and consent of the employer. See N.Y. PENAL LAW § 180.00 (Consol. 1975). In those states where bribing employees is the common business practice in a particular industry, the defendant may be able to claim that the employer had constructive knowledge and impliedly consented to the practice. See Note, *supra* note 25, at 619.

45. N.Y. PENAL LAW § 180.00 (Consol. 1975). See, e.g., ILL. REV. STAT. ch. 38, § 29A-1 (1977) (provides for maximum fine of \$500 and no prison sentence); N.J. STAT. ANN. § 2A:170 (West 1971) (provides for maximum fine of \$500 and six month prison sentence); WASH. REV. CODE ANN. § 49.44.060 (1962) (provides for maximum fine of \$250 and a 90 day prison sentence).

46. See text at notes 25-29 *supra*.

47. See N.Y. PENAL LAW § 180.00 (Consol. 1975) (requiring proof of intent to influence the agent's action in relation to his principal's business); VA. CODE § 18.2-444 (1975) (requiring showing of intent to influence the agent's action to the prejudice of his principal's business).

The intent must be to effect a change in the actual operation of the employer's business. In *People v. Jacobs*, 309 N.Y. 315, 317, 130 N.E.2d 636, 637 (1955), an employee of a steamship company supplied the defendant, a photographer, with copies of the passenger lists for \$10 apiece. The employee had notified his employer of this practice, but the employer had been indifferent to his actions. *Id.* at 318, 130 N.E.2d at 637. The court stated that this indifference was an indication that the company considered the employee's acts to involve no exercise of discretion in the conduct of the company's business. *Id.* Thus, there was no violation of the statute. *Id.*

48. *People v. Ritholz*, 359 Mich. 539, 546, 103 N.W.2d 481, 488 (1960). Where the prosecution is for an attempted bribe, the attempt need not be successful, nor is actual tender of the offer in person necessary. Most of the statutes proscribe both the tender and the solicitation of the bribe. See N.Y. PENAL LAW § 180.00 (Consol. 1975) ("a person is guilty of commercial bribery when he confers, or offers . . . any benefit upon any employee").

Several states have special provisions regarding the bribery of purchasing agents. Under those provisions, intent to influence need not be proved. A mere tender, solicitation, or acceptance of a gift constitutes the offense. See, e.g., MASS. GEN. LAWS ANN. ch. 271, § 39 (West 1968); VA. CODE § 8-2-444 (1975); WIS. STAT. § 134.05 (1974).

gation.⁴⁹ Frequently, none of the wrongdoers are willing to testify, and there might not be other evidence available.⁵⁰ This predicament may be cured by granting immunity to those participants who appear as witnesses.⁵¹ Unfortunately, only three states have included such a provision in their statutes.⁵²

Another way to aid the government in the prosecution of bribers is to enact statutes that prohibit the use of erroneous documents to cover up bribery.⁵³ A charge of erroneous reporting is easier to prove than the bribery offense.⁵⁴ At the present time the statutes of only one state contain a reporting provision.⁵⁵

FEDERAL REMEDIES

There are a variety of federal criminal statutes available to combat specific types of commercial bribery. These statutes, however, have limited applicability, because they provide criminal sanctions only for bribery committed by a specific class of government employee. The Federal Anti-Kickback Act,⁵⁶ for example, makes it a crime for an employee of a prime contractor under a government contract to receive a bribe with the intent to influence the awarding of a subcontract.⁵⁷ The statute also proscribes the giving of a bribe by a subcontractor or his employee with such an intent.⁵⁸ It is also a federal crime to offer or give a bribe to any United States employee,⁵⁹ federal meat inspector,⁶⁰

49. Note, *supra* note 27, at 861 n.95.

50. See text & notes 28-29 *supra*.

51. LA. REV. STAT. ANN. § 14.73 (West 1974) provides that:

The offender under this article who states the facts, under oath, to the district attorney charged with prosecution of the offense, and who gives evidence tending to convict any other offender under this article, may, in the discretion of the district attorney, be granted full immunity from prosecution for commercial bribery, in respect to the particular offense reported.

52. See LA. REV. STAT. ANN. § 14.73 (West 1974); MICH. STAT. ANN. § 28.320 (1962); N.J. STAT. ANN. § 2A:170-88 (West 1971).

53. Note, *supra* note 25, at 625. See MICH. STAT. ANN. § 28.320 (1962) which provides in part:

It shall be unlawful for any person to use or to give an agent, employee or servant of another, or for any agent, employee or servant, to use, approve or certify, with intent to deceive the principal, employer or master, any receipt, account, invoice or other document in respect of which the principal, employer or master is interested, which contains any statement which is false, erroneous or defective in any material particular or which omits to state fully the fact of any commission, money, property or other valuable thing having been given or agreed to be given to such agent, employee or servant.

54. ECONOMIC CRIME MANUAL, *supra* note 15, at 33.

55. See MICH. STAT. ANN. § 28.320 (1962).

56. 41 U.S.C. §§ 51-54 (1976).

57. *Id.* See *United States v. Grossman*, 400 F.2d 951, 954 (4th Cir. 1968), *cert. denied*, 393 U.S. 982 (1968).

58. 41 U.S.C. §§ 51-54 (1976). See *United States v. Barnard*, 255 F.2d 583, 585 (10th Cir.), *cert. denied*, 358 U.S. 919 (1958) (bribes allegedly received by employees of General Motors, which had a government contract for the manufacture of airplanes).

59. 18 U.S.C. § 201 (1976).

60. 21 U.S.C. § 622 (1976).

customs officer,⁶¹ revenue officer,⁶² or member of Congress.⁶³ None of these statutes apply to the type of bribery that takes place everyday in the private sector.

Federal governmental agencies have long had an interest in controlling bribery. The Federal Trade Commission has made efforts to eliminate commercial bribery in interstate commerce.⁶⁴ These efforts have been largely unsuccessful because the law enforcement power of the Commission is limited to issuing cease and desist orders.⁶⁵ The Federal Trade Commission recognized its own limitations as early as 1930 when it began urging Congress to make commercial bribery a federal crime punishable by fine and imprisonment.⁶⁶

Both the Internal Revenue Service and the Securities and Exchange Commission have recently become involved in the investigation of bribery.⁶⁷ It is doubtful that either agency has sufficient enforcement power to deter the crime effectively.⁶⁸ Both agencies, however, have broad investigatory powers that could be of tremendous assistance to the Justice Department in bribery prosecutions.⁶⁹

There are several federal statutes that have been used successfully in commercial bribery prosecutions. Those statutes are the Travel Act⁷⁰ and the Mail Fraud Statute.⁷¹ Neither statute is sufficient on its own, however, to combat commercial bribery at the federal level.

The Travel Act provides that anyone who travels or uses any facility in interstate commerce with an intent to commit bribery in violation either of the laws of the state in which committed or of the United States shall be fined not more than \$10,000 or imprisoned for not more than five years, or both.⁷² The problem with applying the Travel Act to commercial bribery prosecution is in determining whether the Con-

61. 18 U.S.C. §§ 212-13 (1976).

62. *Id.* § 211.

63. *Id.* §§ 204-205.

64. ECONOMIC CRIME MANUAL, *supra* note 15, at 29.

65. *Id.*

66. FEDERAL TRADE COMMISSION, ANNUAL REPORT 52 (1930).

67. See generally Note, *Federal Income Taxation—Public Policy and the Deductibility of Kickbacks Under § 162(c)(2)*, 35 OHIO STATE L.J. 686 (1974) [hereinafter *Taxation and Kickbacks*]; Note, *Bribes, Kickbacks, and Political Contributions in Foreign Countries—The Nature and Scope of the Securities and Exchange Commission's Power to Regulate and Control American Corporate Behavior*, 1976 WIS. L. REV. 1231.

68. *Taxation and Kickbacks*, *supra* note 67, at 714. The author suggests:

[R]enewed enforcement of state and federal commercial bribery statutes by the agencies originally charged with their administration is the only appropriate means of punishing the payers of kickbacks. The use of the Internal Revenue Code as an instrument for the enforcement of nontax laws is distasteful in principle and so complicated in practice that its abandonment is dictated.

Id.

69. TIME, Feb. 23, 1976, at 34.

70. 18 U.S.C. § 1952 (1976).

71. *Id.* § 1341.

72. *Id.* § 1952.

gress intended to include commercial bribery within the meaning of "bribery" as used in the Act.⁷³ The legislative history of the Act indicates that the crime of bribery was originally limited to the bribery of public officials by racketeering enterprises engaged in organized crime.⁷⁴

The circuit courts are split on the meaning of bribery in the Act. In *United States v. Pomponio*,⁷⁵ the Fourth Circuit dealt with the issue of whether a commercial bribery scheme in violation of a state commercial bribery statute was also a violation of the Travel Act.⁷⁶ The court held that the term "bribery" as used in the Travel Act includes commercial bribery.⁷⁷ It reasoned that any bribery involves moral turpitude, and therefore, there was no logical reason why Congress, in using the term "bribery," would have limited bribery to the corruption of public officials.⁷⁸

The Second Circuit in *United States v. Brecht*,⁷⁹ however, reversed commercial bribery convictions based on the Travel Act and held that Congress did not intend to include commercial bribery within the meaning of the Act.⁸⁰ In concentrating on the legislative history of the Act,⁸¹ the court discussed the case of *Rewis v. United States*⁸² which gave a restrictive interpretation of the Travel Act.⁸³ In *Rewis*, the Supreme Court stated that the "legislative history of the Act is limited, but does reveal that section 1952 was aimed primarily at organized crime."⁸⁴ Relying on this restrictive language in *Rewis*, the Second Circuit found there was no congressional intent to bring commercial bribery, which is not typically a feature of organized crime, within the scope of the Travel Act.⁸⁵

73. That Act provides in relevant part as follows:

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and thereafter performs or attempts to perform any of the acts specified . . . , shall be fined not more than \$10,000 or imprisoned for not more than five years, or both.

(b) As used in this section 'unlawful activity' means . . . (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States. *Id.* § 1952.

74. See *Hearings on the Attorney General's Program to Curb Organized Crime and Racketeering Before the House Committee on the Judiciary*, 87th Cong., 1st Sess. 11, 17 (1961).

75. 511 F.2d 953 (4th Cir. 1975).

76. *Id.* at 956.

77. *Id.*

78. *Id.*

79. 540 F.2d 45 (2d Cir. 1976).

80. *Id.* at 48.

81. *Id.* at 48-49.

82. 401 U.S. 808 (1971).

83. *Id.* at 811.

84. *Id.*

85. 540 F.2d at 50.

In *United States v. Perrin*,⁸⁶ the Fifth Circuit agreed with the reasoning in *Pomponio* and held that a Travel Act violation may be based on commercial bribery in violation of a state's commercial bribery statute.⁸⁷ The court stated that even though the primary impetus for the Act was the fight against organized crime, there was no reason to imply that only crimes associated with the underworld were outlawed by the Act.⁸⁸

Even if the Travel Act may be used in commercial bribery prosecutions, there is still a major limitation to the use of the Act. Since there is no federal commercial bribery statute, a Travel Act violation must be based on a state commercial bribery statute.⁸⁹ Currently only twenty-one states have commercial bribery statutes.⁹⁰ That leaves the federal prosecutors in twenty-nine states without a federal cause of action.

The other federal statute that has been used successfully for commercial bribery prosecution is the Mail Fraud Statute.⁹¹ That statute is based on a 1909 law⁹² that was designed to punish dealers in counterfeit money who represented the money as genuine United States currency.⁹³ The Mail Fraud Statute has now been enlarged to include not only counterfeit money, but any fraudulent device.⁹⁴

There are two elements to an offense of mail fraud: (1) A scheme⁹⁵

86. 580 F.2d 730 (5th Cir. 1978), cert. granted, 99 S. Ct. 1496 (1979).

87. *Id.* at 734.

88. *Id.* at 733. In a recent decision of this case, the Supreme Court affirmed the judgment of the Fifth Circuit. *Perrin v. United States*, 100 S. Ct. 311 (1979). The Court reasoned that at the time of the enactment of the Travel Act in 1961, federal statutes had extended the term "bribery" far beyond its common law meaning. *Id.* at 314. The Court concluded that as a result of this extended meaning, "Congress has clearly stated its intention to include violations of state as well as federal bribery law. Until statutes such as the Travel Act contravene some provision of the Constitution, the choice is for Congress, not the Courts." *Id.* at 318.

89. Both the *Pomponio* and *Brecht* convictions were based on violations of N.Y. PENAL LAW § 180.00 (Consol. 1975). *United States v. Pomponio*, 511 F.2d at 955, *United States v. Brecht*, 540 F.2d at 47. The *Perrin* convictions were based upon a violation of LA. REV. STAT. ANN. § 14.73 (1974). *United States v. Perrin*, 580 F.2d at 732.

90. See note 34 *supra*.

91. 18 U.S.C. § 1341 (1976). The statute provides in part:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, . . . places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, . . . any such matter or thing, shall be fined not more than \$1,000 or imprisoned not more than five years, or both.

92. Act of Mar. 4, 1909, ch. 321, § 215, 35 Stat. 1130 (current version at 18 U.S.C. § 1341 (1976)).

93. See H.R. REP. NO. 1501, 50th Cong., 1st Sess. 1 (1888).

94. Act of June 25, 1949, ch. 645, § 1, 62 Stat. 763; Act of May 24, 1949, ch. 139, § 34, 63 Stat. 94 (current versions at 18 U.S.C. § 1341 (1976)).

95. Courts have ruled that the words "scheme" and "artifice" include any plan or course of conduct intended to deceive others. *United States v. Bush*, 522 F.2d 641, 651 n.10 (7th Cir. 1975) (scheme to deprive public officials of information material to a decision involving the awarding of contracts); *United States v. Keane*, 522 F.2d 534, 545 (7th Cir. 1975) (scheme by alderman to vote

to defraud or to obtain money or property by means of false pretenses, representations, or promises;⁹⁶ and (2) the foreseeable use of the United States mails in furtherance of that scheme.⁹⁷ Generally, fraud within the meaning of the statute has been construed very broadly.⁹⁸ The Tenth Circuit, for example, has defined fraud as any conduct "reasonably calculated to deceive persons of ordinary prudence and comprehension."⁹⁹ It has been questioned, however, whether a scheme to defraud an employer of something intangible such as the loyal services of his employee is within the meaning of the Mail Fraud Statute.¹⁰⁰ Another problem in using the statute in commercial bribery prosecutions is in proving that the mails were used in furtherance of the scheme.¹⁰¹

One difficult problem to overcome in applying the statute to commercial bribery cases is proving that the defendant intended to defraud the victims of something of value within the meaning of the statute.¹⁰² Commercial bribery involves a scheme to deprive an employer of the loyal and faithful services of an employee.¹⁰³ The statute specifically requires a "scheme or artifice to defraud, or . . . obtaining money or property by false . . . pretenses."¹⁰⁴ It has been argued that the loss of an intangible thing, such as the loyal services of an employee, was not intended to be included in the meaning of the word "property" in the statute.¹⁰⁵ In a number of cases, however, courts have determined that the object of the scheme need not be money or any form of tangible property.¹⁰⁶ For instance, the Seventh Circuit upheld the conviction of

favorable action on properties owned by him, without disclosing his interest to his colleagues); *Fabian v. United States*, 358 F.2d 187, 194 (8th Cir.), *cert. denied*, 385 U.S. 821 (1966) (scheme involving fraudulent marketing and sale of stereo sets). *See generally* 2 E. DEVITT & C. BLACKMAR, *FEDERAL JURY PRACTICE AND INSTRUCTIONS* § 47.04, at 304 (1977).

96. A "false or fraudulent representation" may be made by "deceitful statements of half truths or the concealment of material facts." *Williams v. United States*, 368 F.2d 972, 975 (10th Cir. 1966), *cert. denied*, 386 U.S. 997 (1967); *Cacy v. United States*, 298 F.2d 227, 229 (9th Cir. 1961). *See generally* 2 E. DEVITT & C. BLACKMAR, *supra* note 95, § 47.04.

97. *United States v. Craig*, 573 F.2d 455, 486 (7th Cir. 1977); *United States v. Shryock*, 537 F.2d 207, 209 (5th Cir. 1976), *cert. denied*, 429 U.S. 1100 (1977) (defendant car dealer could reasonably foresee use of mails in the transfer of titles from dealer to purchasers following fraudulent odometer alterations); *United States v. Eisner*, 533 F.2d 987, 990 (6th Cir. 1976) (cashing out-of-state check is sufficient use of the mails, since it is foreseeable that it will be cleared through the mail). *See generally* 2 E. DEVITT & C. BLACKMAR, *supra* note 95.

98. *See, e.g., Durland v. United States*, 161 U.S. 306, 313 (1896); *United States v. States*, 488 F.2d 761, 764 (8th Cir. 1973), *cert. denied*, 417 U.S. 909 (1974); *Blachly v. United States*, 380 F.2d 665, 671 (5th Cir. 1967). *Contra, Shushan v. United States*, 117 F.2d 110, 115 (5th Cir. 1941).

99. *Gusow v. United States*, 347 F.2d 755, 756 (10th Cir. 1965).

100. *See text & notes 108-10 infra.*

101. *See United States v. Maze*, 414 U.S. 395, 403 (1974).

102. Henderson, *The Expanding Role of Federal Prosecutors in Combating State and Local Political Corruption*, 8 CUM. L. REV. 385, 394 (1977).

103. D. DOBBS, *supra* note 7, at 700.

104. 18 U.S.C. § 1341 (1976).

105. Henderson, *supra* note 102, at 394.

106. *See, e.g., United States v. Brown*, 540 F.2d 364, 374 (8th Cir. 1976) (corruption of public official); *United States v. Isaacs*, 493 F.2d 1124, 1131 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974)

former Illinois Governor Otto Kerner, Jr., who was convicted of receiving payoffs from corporations in exchange for allowing the corporations to select favorable dates for horse races.¹⁰⁷ The court held that Kerner had fraudulently deprived the citizens of Illinois of the loyal and faithful services of their governor.¹⁰⁸ Such a scheme to defraud was held actionable under the Mail Fraud Statute.¹⁰⁹ Similarly, when an employee accepts a bribe he too is depriving his employer of something of value within the meaning of the Mail Fraud Statute.¹¹⁰

The first case to use the Mail Fraud Statute in the commercial bribery context was *United States v. Proctor and Gamble Co.*¹¹¹ In that case employees of Proctor and Gamble Co. paid bribes to employees of Lever Brothers Co. in exchange for which the Lever Brothers' employees obtained secret processes and formulas and turned them over to Proctor and Gamble.¹¹² The court reasoned that inherent in a normal employer-employee relationship is the understanding that the employee will be loyal and honest in everything he does with or on behalf of his employer.¹¹³ Anyone who causes the employee to breach his duty is "defrauding the employer of a lawful right."¹¹⁴ Not only is liability imposed upon the person who causes the employee to defraud, but the employee himself must also share the blame.¹¹⁵ When the employee uses the employment relationship for the purpose of obtaining his employer's confidential information, he is "deliberately producing a false impression on his employer in order to cheat him."¹¹⁶

This extension of the scope of the Mail Fraud Statute is consistent with its purpose. The statute was intended to "prevent persons having fraudulent designs on others from using the post office as a means of effecting such fraud."¹¹⁷ The fraud committed by the employees in *Proctor and Gamble* did as much damage to the employer as if the employees had actually stolen money from him.¹¹⁸ The secret processes and experimental cakes of soap that were turned over to Proctor and Gamble were of unquestionable value to Lever Broth-

(corruption of public official); *United States v. States*, 488 F.2d 761, 766 (8th Cir. 1973) (scheme to submit false voter registration and absentee ballots).

107. *United States v. Isaacs*, 493 F.2d 1124, 1131 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974).

108. *Id.* at 1150.

109. *Id.* at 1149-50.

110. *See United States v. George*, 477 F.2d 508, 513 (7th Cir.), *cert. denied*, 414 U.S. 827 (1973).

111. 47 F. Supp. 676 (D.C. Mass. 1942).

112. *Id.* at 678.

113. *Id.* *See* RESTATEMENT OF AGENCY § 395, Comments a, b (1958).

114. 47 F. Supp. at 678.

115. *Id.*

116. *Id.* The court also necessarily found that the use of the mails was an essential step in carrying out the scheme of the defendants. *Id.* at 679.

117. *United States v. Loring*, 91 F. 881, 887 (D. Ct. N.D. Ill. 1884).

118. 47 F. Supp. at 678.

ers.¹¹⁹ Such a betrayal constitutes fraud within the meaning of the statute.¹²⁰

Recent cases tend to follow the rule established in *Proctor and Gamble*.¹²¹ The Seventh Circuit has twice used the Mail Fraud Statute to convict employees who had been disloyal and unfaithful to their employers. *United States v. George*¹²² involved an elaborate scheme in which a buyer for Zenith Radio Corporation received kickbacks from a supplier through a middleman.¹²³ The middleman submitted fictitious "commission" invoices to the supplier's company.¹²⁴ After the invoices were paid, the middleman paid part of the proceeds to the buyer.¹²⁵ Kickbacks paid to the buyer amounted to more than \$100,000.¹²⁶

The court found that the fraud committed was within the reach of the Mail Fraud Statute.¹²⁷ The buyer held himself out to be a loyal and faithful employee acting in Zenith's best interests; the actions of the employee, however, deprived Zenith of knowledge that the supplier would have accepted less profit.¹²⁸ Both the middleman and the supplier were liable under the statute because each intended to deprive Zenith of the honest and loyal services of the buyer.¹²⁹

The *George* case is analogous to *United States v. Bryza*.¹³⁰ There a purchasing agent of International Harvester accepted payments from salesmen and suppliers of other companies in exchange for aid in the procurement of International Harvester accounts.¹³¹ The Seventh Circuit affirmed the conviction under the honest and faithful services standard established in *Proctor and Gamble* and *George*.¹³²

119. *Id.*

120. *See Foshay v. United States*, 68 F.2d 205, 211 (8th Cir. 1934). The court in *Foshay* stated: "To try to delimit 'fraud' by definition would tend to reward subtle and ingenious circumvention and is not done." *Id.*

121. *E.g.*, *Post v. United States*, 407 F.2d 310, 328 (D.C. Cir. 1968). In that case the court held that promoters of a corporation who knowingly use their fiduciary position to obtain secret profits at the expense of the corporation breach their fiduciary duty and create an act of fraud that is actionable under the Mail Fraud Statute. *Id.* at 328-30.

122. 477 F.2d 508 (7th Cir. 1973).

123. *Id.* at 509.

124. *Id.*

125. *Id.*

126. *Id.* at 511.

127. *Id.* at 512.

128. *Id.* at 513. The court quoted Judge Learned Hand who had stated in a related context: A man is none the less cheated out of his property, when he is induced to part with it by fraud, because he gets a quid pro quo of equal value. It may be impossible to measure his loss by the gross scales available to a court, but he has suffered a wrong; he has lost his chance to bargain with the facts before him. That is the evil against which the statute is directed.

United States v. Rowe, 56 F.2d 747, 749 (2d Cir.), cert. denied, 286 U.S. 554 (1932).

129. 477 F.2d at 513. The supplier admitted that he agreed to make the kickback payments to the buyer to ensure that he would not lose the cabinet business. *Id.* at 514.

130. 522 F.2d 414 (7th Cir. 1975).

131. *Id.* at 415-20.

132. *Id.* at 421. The court found that International Harvester was denied the opportunity to negotiate the purchases with the knowledge of its employee's interests. *Id.* at 422.

The Seventh Circuit, however, is the only circuit court that has used the Mail Fraud Statute to affirm the conviction of an employee who has accepted kickbacks. Whether other courts would be willing to accept such an interpretation of the statute is unclear. Courts have been inclined to limit the applicability of the statute in other contexts.¹³³ The Eighth Circuit recently held that the statute did not extend to the receipt of unsolicited gratuities by officials responsible for the issuance of building permits.¹³⁴ As to the use of the mails requirement in the Mail Fraud Statute,¹³⁵ *United States v. Maze*¹³⁶ held that the statute did not extend to the unlawful use of another person's credit card.¹³⁷ In *Maze*, the defendant's use of the credit card in motels resulted in the mailing of sales invoices by the motels to the credit card owner's bank.¹³⁸ The Supreme Court found that the activity did not violate the Mail Fraud Statute, since the mailing of the sales invoices did not play a significant part in enabling the defendant to carry out his scheme.¹³⁹ The Court stated: "Congress could have drafted the mail fraud statute so as to require only that the mails be in fact used as a result of the fraudulent scheme. But it did not do this; instead, it required that the use of the mails be 'for the purpose of executing such scheme or artifice. . . .'"¹⁴⁰

Under this restrictive definition of the use of the mails, it is doubtful whether the Supreme Court would have found that the mailings involved in the *George* case were a sufficient use of the mails. The indictment in *George* did not even allege that the defendants themselves actually used the mails.¹⁴¹ Nevertheless, the Seventh Circuit found that the employer's sending checks to the supplier to pay for the merchandise constituted a sufficient use of the mails.¹⁴² Therefore, the use of the mails in *George* was not for the purpose of executing the scheme, but was only a result of the fraudulent scheme. The Supreme Court in *Maze* has rejected this interpretation of the statute.¹⁴³

THE NEED FOR A SPECIFIC FEDERAL STATUTE

A commercial bribery statute is needed to fill in the gaps created

133. *United States v. Maze*, 414 U.S. 395 (1974); *United States v. Lynn*, 461 F.2d 759 (10th Cir. 1972).

134. *United States v. McNeive*, 536 F.2d 1245, 1251 (8th Cir. 1976).

135. See text & note 101 *supra*.

136. 414 U.S. 395 (1974).

137. *Id.* at 405.

138. *Id.* at 396.

139. *Id.* at 401-02.

140. *Id.* at 402.

141. 477 F.2d at 510.

142. *Id.* at 511.

143. See text & note 140 *supra*.

by the federal and state statutes currently available. Observers of the business community have been calling for a federal statute for more than fifty years.¹⁴⁴

A federal commercial bribery statute would offer many advantages. It would aid in discovering bribes, since agencies such as the Securities and Exchange Commission, the Federal Bureau of Investigation, the Justice Department, and the Internal Revenue Service would have authority to probe into company books.¹⁴⁵ Records relating to the bribery would be easy to obtain.¹⁴⁶ Accountants who audit company books would have an incentive to check for kickbacks if they knew they might be accused of helping the company conceal a crime.¹⁴⁷

The federal investigatory power would be especially useful in industry-wide investigations involving a large number of states.¹⁴⁸ In addition, since bribes frequently involve the movement of a person across state lines or the use of a facility of interstate commerce, the commission of the offense implicates federal concerns.¹⁴⁹

Perhaps a federal statute would not affect the public's complacent attitude towards bribery. Nevertheless, if Congress were to pass a commercial bribery statute that would impose a severe penalty on anyone found guilty of the offense, the public would more likely recognize the serious nature of the bribery problem. More importantly, if a specific antibribery statute were available, federal prosecutors would have an incentive to pursue commercial bribery complaints.

The most important aspect of a federal criminal remedy would be its powerful deterrent effect. Since there is a high rate of success in the commission of commercial bribery,¹⁵⁰ the only way to deter businessmen from offering and accepting bribes might be to threaten the participants with a prison sentence. As one commentator has suggested, "[T]he prospect of being branded a criminal and sent to jail would give pause to even the more sorely tempted executive."¹⁵¹

The proposed Criminal Code Reform Act of 1978,¹⁵² which was

144. See J. FLYNN, *GRAFT IN BUSINESS* 293 (1931); Note, *Commercial Bribery*, 28 COLUM. L. REV. 799, 804 (1928). Flynn argued:

A federal law is essential. The manufacturer in a state subject to the laws of the state which has a law against commercial bribery is handicapped as against the manufacturer who is located in another state. . . . It is not enforced for this very reason, because it would be a discriminatory law, hitting the local manufacturer and not affecting his foreign rival.

J. FLYNN, *supra*, at 293.

145. TIME, Feb. 23, 1976, at 34.

146. *Id.*

147. *Id.*

148. Comment, *Bribery in Commercial Relationships*, 45 HARV. L. REV. 1248, 1249 (1931).

149. For other reasons why the offense implicates federal concerns see text & notes 8-14 *supra*.

150. Note, *supra* note 25, at 629.

151. TIME, Feb. 23, 1976, at 34.

152. S. 1437, 95th Cong., 2d Sess. (1978).

rejected by a House of Representatives subcommittee,¹⁵³ included a section proscribing commercial bribery.¹⁵⁴ The proposed section provided in part that a person is guilty of the offense if he gives or offers to give a bribe to an agent or fiduciary of another person.¹⁵⁵ Further, if an agent or fiduciary solicits or agrees to accept a bribe he too is guilty of commercial bribery.¹⁵⁶ The proposed statute would be an enormous aid to prosecutors in discouraging commercial bribery.

Nevertheless, there are several provisions that should be included in the statute if it is reintroduced in order to ensure its effectiveness. First, to encourage witnesses to testify, the statute should provide for immunity from prosecution to the first of the participants in the bribery scheme to supply evidence that leads to the conviction of the other participants.¹⁵⁷ In order to establish an independent method of enforcement, the statute should allow any person injured by commercial bribery to recover twice the amount of the recovery in a civil suit.¹⁵⁸ Similar to the treble damage award in civil antitrust suits,¹⁵⁹ this type of punitive sanction serves not only an enforcement purpose, but also acts as a deterrent against repetition of the offense.¹⁶⁰ Finally, the statute should provide for more stringent penalties.¹⁶¹ The statute rejected by the House classified commercial bribery as a Class E felony (maximum sentence of three years in prison) if the value of the bribe is in excess of \$100, but as a Class A misdemeanor (maximum sentence of one year in prison) in all other cases.¹⁶² In order to effectively deter a crime that is so easy to commit, the statute should provide for at least a

153. 36 CONG. Q. WEEKLY REP. 1701 (July 1978).

154. S. 1437, 95th Cong., 2d Sess. § 1751 (1978).

155. *Id.*

156. *Id.* Under the statute there is federal jurisdiction over the offense if

(a) a participant in the crime is an agent of a national credit institution, a small business investment company, a bank holding company, a prime contractor holding a negotiated contract with the United States government, or an authorized candidate or committee;

(b) movement of a person across a state or United States boundary occurs in the planning, promotion, or in the distribution of the proceeds of the offense; or

(c) the United States mail or a facility of interstate commerce is used in the planning, execution, or distribution of the proceeds of the offense.

Id.

157. See text & notes 50-51 *supra*.

158. See note 32 *supra*.

159. See 15 U.S.C. § 15 (1976).

160. The dual purpose served by the treble damage award is discussed in *P.W. Husserl, Inc. v. Simplicity Pattern Co.*, 191 F. Supp. 55, 60 (D.N.Y.), *rev'd on other grounds*, 298 F.2d 867 (1961). In *Husserl*, the court stated:

The private antitrust suit is part and parcel of enforcement machinery under antitrust laws and is designed as an instrument not only for redress of private wrongs, but for imposition of punitive sanctions, through recovery of treble damages, to act as a deterrent against a repetition of offense and to serve as a warning to potential violators.

Id.

161. See Note, *supra* note 25, at 629.

162. S. 1437, 95th Cong., 2d Sess. § 1751 (1978).

five year maximum sentence in those cases where the value of the bribe exceeds \$100.

CONCLUSION

Commercial bribery is a national problem that has flourished because of a lack of adequate authority and means to control it. Civil suits have not been effective in deterring the crime, nor have state prosecutors had the necessary resources to investigate the offense with success. Only the federal government has the sufficient investigative capabilities, but unfortunately, existing federal statutes are too limited in scope to be effective. Even the Travel Act and the Mail Fraud Statute, which offer the broadest coverage of the offense, have been narrowly interpreted by the federal courts or have limited applicability. A comprehensive statute is needed in order to give federal prosecutors the necessary ammunition to combat commercial bribery. To withhold such authority is to sanction the continuance of the crime.