The Foreign Corrupt Practices Act of 1977 (the FCPA) grew into a new phase of maturity in 2007, which is appropriate, since last year it also celebrated its 30th anniversary. The Department of Justice (DOJ), which estimated the number of open FCPA investigations and prosecutions at 60, also announced the creation of a five-member FBI task force assembled to investigate only possible FCPA violations.

These record-breaking numbers are no longer surprising. For years, the FCPA has been a growing focus of investigations and prosecutions inside the United States. But in 2007, the FCPA's application to cases outside the United States shifted into a markedly higher gear.

The case that grabbed the most headlines involved Siemens AG, the giant German electronics and electrical engineering firm. Until the passage of the German International Bribery Act in 1999 (by which Germany implemented the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions), corrupt payments to foreign officials by German entities were not just legal but tax deductible. Siemens plainly had difficulty adjusting to the new anti-corruption regime. By September 2007, reports had Siemens’ bribe total at a staggering $2.3 billion, which had been paid to cabinet ministers and dozens of other officials in Russia, Nigeria, and Libya to win telecommunications contracts.

In October 2007, Siemens agreed to pay a €201 million ($284 million) fine to settle the investigation by the Munich Office of Public Prosecution. But this resolution—with a fine amount that dwarfed the highest FCPA-related fine in history—was not the end of Siemens’ trouble. Instead, the DOJ and the Securities and Exchange Commission (SEC) both have open FCPA investigations of Siemens. Notwithstanding its German pedigree, Siemens tapped US lawyers from Debevoise & Plimpton to conduct its internal investigation—further evidence that international entities are now (properly) concerned about the FCPA, even more than the anti-bribery legislation in their home countries.

In November 2007, The New York Times ran a major piece on the DOJ’s investigation of BAE Systems, a British manufacturer of fighter jets and other military hardware. The Times reported that BAE had made billions of dollars in secret payments to members of the Saudi royal family over a period of 20 years to facilitate an $80 billion supply contract. The payments reportedly included

The FCPA goes global
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female escorts and luxury travel, including paying for the honeymoon of the daughter of Prince Bandar bin Sultan, the former Saudi ambassador to the United States. The matter was initially investigated by the Serious Fraud Office (SFO) in Great Britain. However, the SFO’s investigation was halted on the order of Prime Minister Tony Blair, apparently after Prince Bandar threatened to cut off the flow of intelligence information regarding possible terrorism suspects unless the investigation was terminated. (The British High Court is considering whether or not to order the SFO to reopen its investigation.) The DOJ began investigating BAE after it learned that the company had used American banks to make some of the questionable payments.

Although these cases—which are by no means isolated or anomalous—have become commonplace, one might ask how the DOJ and SEC assert jurisdiction over non-US entities making payments to foreign officials in foreign countries. The answer appears to be twofold.

First, in 1998, the FCPA was amended to assert territorial jurisdiction over foreign companies and nationals. A foreign company (or person) is now subject to the FCPA if it causes, directly or indirectly, an act in furtherance of a corrupt payment to take place within the United States (e.g., BAE’s use of a US bank to make corrupt payments abroad).

Second, the FCPA’s core jurisdiction covers all “issuers,” defined to encompass corporations that have issued securities registered in the United States or who are required to file periodic reports with the SEC. The DOJ has taken the position that foreign corporations whose stock is traded on a US exchange through American depository receipts also fall within the statute’s definition of “issuer.” This interpretation might be a stretch, but like many other aspects of the FCPA, it may not be subject to judicial review, because companies are loath to endure the costs and uncertainties of litigating FCPA issues.

With the DOJ’s increased commitment of resources, the FCPA will surely continue to have a major impact in 2008 and beyond. Corporate counsels—both inside and outside the United States—continue to seek education and advice regarding FCPA compliance, and this demand is met by countless articles and seminars. However, while the FCPA may present a few challenging issues, it is in fact a very straightforward statute.
The FCPA advice industry is a bit like the popular diet industry, where 250-page books are written to communicate the basic message “Eat less, exercise more.” With the FCPA, the message boils down to “Don’t pay bribes to foreign officials, and don’t look the other way while agents do it for you.”

In 2008 and beyond, as the FCPA continues to become more muscular and its impact worldwide continues to grow, some attention should be given to its innate frailties. First, the statute should obviously have its greatest application in major world markets with a history of and reputation for corrupt business practices. Three of the most dominant emerging economies are China, India, and Russia—three countries who ignominiously held the bottom three spots on Transparency International’s 2006 Bribe Payers Index. The FCPA may appear to have the momentum of an irresistible force, but these countries may yet prove to be immovable objects.

Second, the statute has always had certain drafting deficiencies. For example, it permits certain categories of “promotional payments,” which are expenses incurred for the non-corrupt purpose of promoting goods and services, not the corrupt purpose of obtaining or maintaining business or an unfair commercial advantage. But if payments are not made for a corrupt purpose, they are not prohibited by the FCPA, so the “promotional payments” exception is at best redundant and at worst an invitation to stray into a dangerous gray area.

Third, companies worldwide are growing increasingly concerned about the business impact of FCPA, in tandem with the Sarbanes-Oxley Act. These concerns are causing a flight of business from US exchanges, with London being the primary beneficiary. How far will US politicians and regulators be willing to take the causes of transparency and accountability when such causes start to eat into US financial interests in a down-turning economy?

But these are questions for the future. For now, the FCPA has the world on a very tight string.