

## CHAPTER 1

### An Overview and History of the FCPA\*

#### Chapter Contents

- § 1.01 Introduction
- § 1.02 Overview of the FCPA
  - [1] The Antibribery Provisions
  - [2] The Accounting Provisions
- § 1.03 History of the FCPA
  - [1] The Origin of the FCPA
    - [a] Watergate and Its Aftermath
    - [b] Justifications for Anticorruption Legislation
      - [i] The Ethical Imperative
      - [ii] The Pro-Business Argument
      - [iii] The Link Between Corporate Bribery and Foreign Policy
  - [2] The Legislative History of the FCPA
    - [a] Fundamental Debates
      - [i] Unilateral Action or Multilateral Accord
      - [ii] Disclosure or Criminalization
    - [b] The Succession of Legislative Proposals
      - [i] S. 3379
      - [ii] S. 3741
      - [iii] S. 3418
      - [iv] S. 3133
      - [v] S. 3664

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- [3] **Amendments to the FCPA**
  - [a] **1988 Amendments**
    - [i] **Incorporation of Domestic Bribery Standard**
    - [ii] **Antibribery Liability for the Acts of Third Parties**
    - [iii] **The Exception for Facilitating Payments**
    - [iv] **Affirmative Defenses for Payments That Are Lawful Under Local Laws and for Reasonable and Bona Fide Expenditures**
    - [v] **Culpability Standard for Criminal Violations of the Accounting Provisions**
    - [vi] **Reasonable Detail in Books and Records and the Reasonable Assurance of Control of Corporate Assets**
    - [vii] **Responsibility for the Accounting Practices of Minority-Owned Subsidiaries**
    - [viii] **President's Responsibility for Negotiating an International Antibribery Agreement**
    - [ix] **DOJ's FCPA Opinion Procedure**
  - [b] **1998 Amendments**
    - [i] **Prohibition of Payments to Secure Any Improper Advantage**
    - [ii] **Inclusion of Employees of Public International Organizations in the Definition of Foreign Official**
    - [iii] **Expanding the Extraterritorial Reach of the FCPA: Acts of U.S. Persons Committed Outside of the United States**
    - [iv] **Expanding FCPA Jurisdiction: Acts of Non-U.S. Nationals Committed Within the United States**
- [4] **A History of FCPA Enforcement**
  - [a] **Phase One: 1978 to 1998**
    - [i] **Lingering Confusion and Dissatisfaction with the FCPA**

- [ii] **Concerns about International Trade and Foreign Policy**
  - [iii] **Lack of Financial and Strategic Resources**
- [b] **Phase Two: Post-1999**
  - [i] **Developing International Anticorruption Consensus**
  - [ii] **Wave of Corporate Corruption Scandals in the United States**
  - [iii] **Aggressive DOJ and SEC Strategies and Emphasis on Corporate Cooperation**

The following appendix located after the text portion of this volume is applicable to this chapter:

**Appendix A: FCPA Statute**

The following appendix located on the disk accompanying this volume is also applicable to this chapter:

**Appendix R: DOJ Lay-Person's Guide to the FCPA**

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**§ 1.01 Introduction**

This chapter summarizes the provisions of the Foreign Corrupt Practices Act (the "FCPA" or the "Act") and provides a history of the Act's origins, enactment, amendment, and enforcement.

## § 1.02 Overview of the FCPA

The FCPA consists of antibribery and accounting provisions, violations of which may result in both criminal and civil penalties.

### [1]—The Antibribery Provisions

The antibribery provisions of the FCPA prohibit issuers of securities, domestic concerns, and other persons from making, authorizing, or offering a corrupt payment to a foreign official for purposes of influencing that official in his or her official duties or otherwise securing an improper advantage in order to assist the covered person or another in obtaining or retaining business. An antibribery violation requires proof of the following essential elements: (1) that an issuer, domestic concern, or other person subject to the FCPA; (2) made use of the mails or any means or instrumentality of interstate commerce in furtherance of; (3) an offer, payment, or promise to pay or give anything of value; (4) to a foreign official or to a third party while knowing that all or part of the payment or thing of value will be given to a foreign official; (5) corruptly for the purpose of influencing that official to do or to refrain from doing any official act, securing any improper advantage, or inducing the official to use his influence with a foreign government or instrumentality to affect any act or decision; (6) in order to assist the company or person in obtaining or retaining business.<sup>1</sup>

Violations of the antibribery provisions may lead to civil charges by the Securities and Exchange Commission (“SEC”) and civil or criminal charges by the Department of Justice (“DOJ”). Civil and criminal charges require proof of the same elements but entail different evidentiary standards. For a civil charge, the SEC’s burden of proof is a preponderance of the evidence. For a criminal charge, the DOJ’s burden of proof is beyond a reasonable doubt.

The antibribery provisions are subject to one statutory exception and two affirmative defenses. The exception allows for persons covered by the FCPA to make “any facilitating or expediting payment to a foreign official . . . the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official.”<sup>2</sup> This exception applies only to payments that are made in exchange for non-discretionary governmental action, to which the

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<sup>1</sup> 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a).

<sup>2</sup> 15 U.S.C. §§ 78dd-1(b), 78dd-2(b), 78dd-3(b).

payee is legally entitled.<sup>3</sup> It does not apply to payments intended to influence an official's decision to award new or continued business.

The antibribery provisions also contain two affirmative defenses.<sup>4</sup> The first stipulates that it shall be an affirmative defense that an offer or payment to a foreign official is lawful under the written laws or regulations of the foreign official's country.<sup>5</sup> The second provides an affirmative defense for certain reasonable and bona fide expenditures, such as payments for travel and lodging expenses incurred by or on behalf of a foreign official which directly relate to "(A) the promotion, demonstration, or explanation of the company's products or services; or (B) the execution or performance of a contract with a foreign government, or an agency thereof."<sup>6</sup>

### [2]—The Accounting Provisions<sup>7</sup>

The accounting provisions of the FCPA are separate from the antibribery provisions and require issuers to maintain adequate books, records, and internal accounting controls.<sup>8</sup>

The "books and records" accounting provision requires issuers to "make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of [their] assets."<sup>9</sup> False, misleading, or artificial entries in an issuer's books and records violate this provision. In this context, the government broadly construes the term "records." Virtually any form of business documentation may be deemed to be part of an entity's "books and records."

The "internal controls" accounting provision requires issuers to devise and maintain an adequate system of internal accounting controls.<sup>10</sup> This system must satisfy a set of rigorous criteria. Specifically, internal controls must be sufficient to provide reasonable assurances that: (1) transactions are executed in accordance with management's general or specific authorization; (2) transactions are recorded in a manner sufficient to permit the preparation of financial

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<sup>3</sup> 15 U.S.C. § 78dd-1(f)(3).

<sup>4</sup> The defendant bears the burden of proof for these affirmative defenses.

<sup>5</sup> 15 U.S.C. § 78dd-1(c)(1).

<sup>6</sup> 15 U.S.C. § 78dd-1(c)(2)(A-B).

<sup>7</sup> The antibribery provisions and accounting provisions are governed by separate statutory provisions.

<sup>8</sup> 15 U.S.C. § 78m. This requirement does not apply to domestic concerns.

<sup>9</sup> *Id.*

<sup>10</sup> 15 U.S.C. § 78m(b)(2)(B).

statements in conformity with generally accepted accounting principles, or any other applicable principles, and to maintain accountability for assets; (3) access to assets is permitted only in accordance with management's general or specific authorization; and (4) existing assets are compared with recorded accountability for assets at reasonable intervals, and appropriate action is taken with respect to any differences.<sup>11</sup>

An issuer is strictly liable for violations of the accounting provisions, as civil liability for an accounting provision violation does not require a demonstration of knowledge or intent.<sup>12</sup> Further, an issuer may be civilly liable for violations of the accounting provisions related to the books, records, and internal controls of its majority-owned subsidiaries.<sup>13</sup>

Criminal liability for violations of the accounting provisions can arise only when a person "knowingly circumvent[s] or knowingly fail[s] to implement a system of internal accounting controls or knowingly falsif[ies] any book, record, or account."<sup>14</sup> The government can criminally prosecute an issuer for violations of the FCPA's accounting provisions if (1) the issuer, through its agents, knowingly falsifies its books and records; or (2) the issuer, through its agents, knowingly circumvents or fails to implement a system of internal accounting controls.

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<sup>11</sup> *Id.*

<sup>12</sup> See:

*Seventh Circuit:* McConville v. SEC, 465 F.3d 780, 789 (7th Cir. 2006).

*Eleventh Circuit:* SEC v. World-Wide Coin Investors, Ltd., 567 F. Supp. 724, 749 (N.D. Ga. 1983).

<sup>13</sup> 15 U.S.C. § 78m(b)(6).

<sup>14</sup> 15 U.S.C. § 78m(b)(5). In this context, the term "person" includes corporations. See 15 U.S.C. § 78c(a)(9).

### § 1.03 History of the FCPA

#### [1]—The Origin of the FCPA

##### [a]—Watergate and Its Aftermath

The arrest of five burglars in the early morning hours of June 17, 1972 at the headquarters of the Democratic National Committee in the Watergate office complex initiated a critical passage in the history of American government.<sup>1</sup> The arrests also initiated a series of investigations, revelations, and legislative initiatives that transformed the practices of American companies in international markets.

In the aftermath of the Watergate burglary, investigations by the Watergate Special Prosecutor, Archibald Cox, and the Senate Select Committee on Presidential Campaign Activities, chaired by Senator Sam Ervin, uncovered evidence that President Nixon's 1972 reelection campaign committee had engaged in a host of corrupt practices with U.S. corporations.<sup>2</sup> These practices included the use of corporate slush funds to benefit President Nixon's political allies and the concealment of such funds from normal corporate accounting controls.<sup>3</sup>

Following these revelations, the SEC commenced an independent investigation into the issue of corrupt payments by U.S. companies.<sup>4</sup>

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<sup>1</sup> See generally, Bernstein and Woodward, *All the President's Men* (1974).

<sup>2</sup> See Foreign Payments Disclosure: Hearings Before the Subcomm. on Consumer Protection and Finance of the H. Comm. on Interstate and Foreign Commerce, 94th Cong. 1 (1976) (statement of Subcomm. Chairman Murphy):

“While investigating certain contributions to the former Presidential campaign, the Watergate Special Prosecutor uncovered a number of corporate political slush funds. These funds had been concealed from normal corporate accounting controls. Since such activities involved matters of possible significance to public investors, the Securities and Exchange Commission initiated its own investigation. Their investigation revealed that a number of U.S. corporations, in connection with their overseas operations, had used secret slush funds for questionable or illegal foreign payments.”

<sup>3</sup> *Id.* See also, Multinational Corporations and United States Foreign Policy, Hearings Before the Subcomm. on Multinational Corporations of the S. Comm. on Foreign Relations, 94th Cong. 110-13, 180-83 (1975). A board member of the Northrop Corporation testified to Congress that his company had made nearly \$500,000 in payments to a foreign consultant, which were used to make unlawful contributions to Nixon's 1972 presidential campaign.

<sup>4</sup> See The Activities of American Multinational Corporations Abroad, Hearings Before the Subcomm. on International Economic Policy of the H. Comm. on International Relations, U.S. House of Representatives, 94th Cong. 36 (1975). Philip A. Loomis, an SEC commissioner at the time, described the genesis of the SEC's involvement in the investigation of foreign corrupt practices:

Simultaneously, the SEC also instituted a voluntary disclosure program, which permitted companies to report acts of foreign bribery that may have implicated the U.S. securities laws.<sup>5</sup> During this period, more than 400 American companies, 177 of which ranked among the Fortune 500, admitted to paying bribes to foreign government officials, politicians, and political parties.<sup>6</sup> In aggregate, these bribes totaled more than \$300 million.<sup>7</sup>

The revelations involving Lockheed Aircraft Corporation illustrated the degree to which foreign bribery had become an entrenched practice of certain industries, and the degree to which it could affect U.S. foreign policy.<sup>8</sup> Lockheed admitted to engaging in an extensive pattern of bribing foreign officials. The company's chairman testified that, between 1970 and 1975, fifteen percent of all commissions paid by the company to foreign agents was transferred to foreign government officials as bribes, an amount totaling approximately \$22 million.<sup>9</sup> Lockheed's admissions scandalized governments around the world. In 1974, Japanese Premier Kakui Tanaka resigned after being accused of accepting nearly \$2 million in bribes from Lockheed.<sup>10</sup> In 1975, Italian President Giovanni Leone was also forced to resign, also following accusations of accepting approximately \$2 million in Lockheed bribes.<sup>11</sup> Similar Lockheed bribery scandals emerged in the Netherlands, Germany, Iran, the Philippines, Saudi Arabia, Sweden, and several other countries.<sup>12</sup>

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"[The involvement of the SEC in this area] may be said to have grown out of the investigations made by the Watergate Special Prosecutor's office of illegal, and therefore undisclosed, corporate campaign contributions in the 1972 elections. Our staff, observing these proceedings, recognized that the activities disclosed for the first time involved questions of possible significance to public investors, and that this might have a bearing upon our responsibilities. Accordingly, the Special Prosecutor's Office referred to us information obtained in various of its investigations."

<sup>5</sup> Sporkin, "The Worldwide Banning of Schmiergeld: A Look at the Foreign Corrupt Practices Act on Its Twentieth Birthday," 18 *Nw. J. Int'l L. & Bus.* 269, 272-273 (1998).

<sup>6</sup> H. R. Rep. No. 640, 95th Cong., 1st Sess., 1 (Sept. 28, 1977).

<sup>7</sup> *Id.*

<sup>8</sup> Lockheed Bribery Hearings Before the S. Comm. on Banking, Housing, and Urban Affairs, 94th Cong. (1975). See also, *Multinational Corporations and United States Foreign Policy: Hearings Before the Subcomm. on Multinational Corporations of the S. Comm. on Foreign Relations, 94th Cong.* 341-392 (1975) (Political Contributions to Foreign Governments: Lockheed Corp.).

<sup>9</sup> *Id.*, 94th Cong. at 27, 49, 52.

<sup>10</sup> Gustman, Note, "The Foreign Corrupt Practices Act of 1977: A Transactional Analysis," 13 *J. Int'l L. & Econ.* 367, 368 (1978) (internal citations omitted).

<sup>11</sup> *Id.*, 13 *J. Int'l L. & Econ.* at 368.

<sup>12</sup> See N. 8 *supra*.

**[b]—Justifications for Anticorruption Legislation**

The scale of international corporate bribery revealed by these preliminary investigations and hearings was staggering. Stanley Sporkin, then Director of the SEC's Division of Enforcement, later admitted that, during this period, the Commission was "overrun" with foreign corruption cases and realized the necessity of finding a "creative solution" to the problem.<sup>13</sup> During this period, lawmakers and commentators advanced three principal justifications for implementing aggressive measures to combat the foreign corrupt practices of U.S. companies.

*[i]—The Ethical Imperative*

Advocates of anticorruption legislation argued that the U.S. had an ethical imperative to prohibit corporate foreign bribery. The revelations of widespread foreign bribery offended the prevailing post-Watergate political climate, which was dominated by calls for reform.<sup>14</sup> Lawmakers sounded the primacy of this theme throughout deliberations and Congress, in enacting the FCPA, expressed that corporate foreign bribery "is unethical [and] counter to the moral expectations and values of the American public."<sup>15</sup>

*[ii]—The Pro-Business Argument*

Proponents of anticorruption legislation argued that regulation in this area may have a salutary effect on business. For example, W. Michael Blumenthal, President Carter's Treasury Secretary, maintained that bribery distorts economic transactions, inhibits competition and advancement, and is "not necessary for the successful conduct of business [in the United States] or overseas."<sup>16</sup> The Chairman of Gulf Oil testified before Congress that the enactment of strong

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<sup>13</sup> Sporkin, "The Worldwide Banning of Schmiergeld: A Look at the Foreign Corrupt Practices Act on Its Twentieth Birthday," 18 *Nw. J. Int'l L. & Bus.* 269, 272 (1998).

<sup>14</sup> See, e.g.: Romaneski, "The Foreign Corrupt Practices Act of 1977: An Analysis of Its Impact and Future," 5 *B.C. Int'l Comp. & L. Rev.* 405, 407 (1982); Surrey, "The Foreign Corrupt Practices Act: Let the Punishment Fit the Crime," 20 *Harv. Int'l L. J.* 293 (1979).

<sup>15</sup> H.R. Rep. No. 95-640, 95th Cong., 1st Sess., 4 (Sept. 28, 1977).

<sup>16</sup> Foreign Corrupt Practices and Domestic and Foreign Investment Disclosure: Hearings on S. 305 Before the S. Comm. on Banking, Housing, and Urban Affairs, 95th Cong. 67 (1977).

antibribery legislation may actually benefit U.S. multinationals. He reasoned that stringent legislation prohibiting foreign bribery would help companies to “resist the very intense pressures” to make improper payments in international markets.<sup>17</sup>

*[iii]—The Link Between Corporate Bribery and Foreign Policy*

Advocates of anticorruption legislation also argued that foreign bribery by American companies undermined U.S. foreign policy objectives.<sup>18</sup> During the mid-1970s, American lawmakers viewed communism as a pressing threat, and were acutely aware that communists used evidence of capitalist corruption to advance their political objectives.<sup>19</sup> The Lockheed scandal demonstrated that corporate bribery could create “economic and political instability [and risk] a backlash against American ideals and interests.”<sup>20</sup> The Congressional

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<sup>17</sup> Multinational Corporations and United States Foreign Policy: Hearings Before the Subcomm. on Multinational Corporations of the S. Comm. on Foreign Relations, 94th Cong. 4, 13 (1975). (statement of Bob Dorsey, Gulf Oil Corp. Chairman).

<sup>18</sup> The Activities of American Multinational Corporations Abroad: Hearings Before the H. Subcomm. on International Economic Policy of the H. Comm. on International Relations, 94th Cong. 22, 23-24 (1975) (statement of Feldman, Deputy Legal Adviser, U.S. Department of State).

“Corruption weakens the fabric of government, erodes popular support, and jeopardizes the important interests we share with our friends abroad. The free enterprise system is a vital factor in world economic growth upon which social progress, economic justice, and perhaps, ultimately, world peace depends... Corruption of friendly foreign governments can undermine the most important objectives of our foreign policy.”

<sup>19</sup> Foreign and Corporate Bribes: Hearings Before the S. Comm. on Banking, Housing, and Urban Affairs, 94th Cong. 39, 41-42 (1976) (statement of Ball, former Under Secretary of State for Economic and Agricultural Affairs and U.S. Ambassador to the United Nations).

“The vast volume of speeches, pamphlets, and advertising copy and propaganda leaflets extolling the virtues of free enterprise are cancelled every night when managements demonstrate by their conduct that a sector of multinational business activity is not free; it is bought and paid for. This is a problem that, like so many others, has relevance in the struggle of antagonistic ideologies; for, when our enterprises stoop to bribery and kickbacks, they give substance to the communist myth-already widely believed in Third World countries-that capitalism is fundamentally corrupt.”

<sup>20</sup> Unlawful Corporate Payments Act of 1977: Hearings Before the H. Comm. on Interstate and Foreign Commerce, 95th Cong. 171, 173 (1977) (statement of Rep. Solarz).

record reflects widespread, bipartisan endorsement of this principle and indicates that foreign policy considerations served as a prime motivating factor in the enactment of anticorruption legislation.<sup>21</sup>

## **[2]—The Legislative History of the FCPA**

### **[a]—Fundamental Debates**

The initial deliberations regarding the form, function, and scope of the prospective anticorruption legislation were marked by two fundamental tensions. First, lawmakers were divided between pursuing unilateral, domestic anticorruption legislation and postponing a domestic legislative response in favor of a multilateral, international approach. Second, lawmakers were divided between implementing a regulatory regime based on disclosure and one based on criminalization.

#### *[i]—Unilateral Action or Multilateral Accord*

Lawmakers acknowledged that, ideally, a U.S. prohibition against foreign bribery would be complemented by a similar international prohibition. In the absence of a multilateral accord, unilateral action risked placing U.S. companies at a significant comparative disadvantage against companies from nations that did not impose similar restrictions. However, it was also apparent to lawmakers that an international accord could take many years to achieve, and that to “wait until bribery is solved on a multilateral basis may well be to wait forever.”<sup>22</sup> Instead of waiting, U.S. lawmakers determined to implement comprehensive domestic anticorruption laws in the hope that they could then use the nation’s influence to shape a complementary set of international rules and sanctions.<sup>23</sup>

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<sup>21</sup> *Id.* Rep. Solarz concluded that “what is at stake is much more than the individual interests of corporations which are competing for a share of foreign markets. What is in fact at stake is the foreign policy and national interest of the United States.” Foreign Payments Disclosure: Hearings Before the Subcomm. on Consumer Protection and Finance of the H. Comm. on Interstate and Foreign Commerce, 94th Cong. 138, 141 (1976) (statement of Rep. Solarz).

<sup>22</sup> Unlawful Corporate Payments Act of 1977: Hearings Before the H. Comm. on Interstate and Foreign Commerce, 95th Cong. 171, 174 (1977) (statement of Rep. Solarz).

<sup>23</sup> Foreign and Corporate Bribes: Hearings Before the S. Comm. on Banking, Housing, and Urban Affairs, 94th Cong. 39, 40-41 (1976) (statement of Ball, former Under Secretary of State for Economic and Agricultural Affairs and U.S. Ambassador to the United Nations).

*[ii]—Disclosure or Criminalization*

The legislative history of the FCPA also contains an extended debate about whether to implement an enforcement regime based upon disclosure or criminalization. Proponents of a disclosure regime argued that it would prove too difficult to obtain sufficient evidence to conduct criminal corruption prosecutions.<sup>24</sup> Advocates of criminalization argued that disclosure alone would provide insufficient deterrence and could imply that bribery was permissible.<sup>25</sup> The successive legislative proposals summarized below reflect the tension between these two legislative strategies.

**[b]—The Succession of Legislative Proposals**

The version of the FCPA that was passed in December 1977 represented a synthesis of numerous legislative proposals.<sup>26</sup>

*[i]—S. 3379*

Senator Church proposed S. 3379, which contemplated an extensive program of disclosures by companies to the SEC.<sup>27</sup> The proposal required U.S. firms subject to SEC regulation to disclose all contributions, payments, and gifts to foreign government employees publicly.<sup>28</sup> Additionally, covered U.S. firms would be required to disclose payments to persons who did not qualify as foreign government employees, provided such payments were made to influence foreign governmental business.<sup>29</sup> This measure also provided for criminal sanctions for failing to comply with the disclosure program.<sup>30</sup>

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“[The] only action that could materially reduce [foreign bribery] is for the U.S. Government to utilize its powers as the domiciliary state of most of the largest multinational companies by enacting and enforcing comprehensive laws imposing on American corporations a standard of conduct in their overseas dealings fully as strict as that required at home.”

<sup>24</sup> See Ad Hoc Committee Report on Foreign Payments, the Association of the Bar of the City of New York, Report on Questionable Foreign Payments by Corporations 1-2, 18-19 (1977).

<sup>25</sup> Hearings on Foreign Corrupt Practices Before the S. Comm. on Banking, Housing, and Urban Affairs, 95th Cong. 94-99 (1977).

<sup>26</sup> See generally: Adler, “Amending the Foreign Corrupt Practices Act of 1977: A Step toward Clarification and Consolidation,” 73 J. Crim. L. & Criminology 1740 (1982); Bathen, “A Congressional Response to the Problem of Questionable Corporate Payments Abroad: The Foreign Corrupt Practices Act of 1977,” 10 Law & Pol’y Int’l Bus. 1253 (1978).

<sup>27</sup> S. 3379, 94th Cong., 2d Sess. (1976).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

*[ii]—S. 3741*

President Ford's Administration endorsed a second major proposal based on disclosure, S. 3741.<sup>31</sup> This measure required all U.S. firms, not merely U.S. firms subject to SEC jurisdiction, to disclose to the Secretary of Commerce all payments above a threshold amount that pertained to an official action of a foreign government.<sup>32</sup> Further, the proposal contemplated that the Secretary of Commerce would use his or her discretion to shape the specific reporting requirements and conduct investigations.<sup>33</sup>

*[iii]—S. 3418*

The SEC advanced its own proposal, S. 3418,<sup>34</sup> in which it outlined an enforcement regime based not on disclosure or criminalization, but on rigorous corporate accounting standards.<sup>35</sup> The SEC observed that foreign corporate bribery was usually accompanied by inadequate accounting documents or deliberately falsified books and records.<sup>36</sup> Therefore, the Commission reasoned that foreign bribery could be countered through heightened accounting requirements.<sup>37</sup> S. 3418 required issuers subject to Sections 12 and 15(d) of the Exchange Act<sup>38</sup> to prepare accurate accounting records<sup>39</sup> and to implement an "adequate system of internal accounting controls."<sup>40</sup> Finally, the proposal prohibited the falsification of corporate books and records and deceptive auditing practices.<sup>41</sup>

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<sup>31</sup> S. 3741, 94th Cong., 2d Sess. (1976).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> S. 3418, 94th Cong., 2d Sess. (1976).

<sup>35</sup> United States Securities and Exchange Commission, Report to the S. Comm. on Banking, Housing and Urban Affairs, Questionable and Illegal Corporate Payments and Practices, 94th Cong. 13 (1976).

<sup>36</sup> *Id.* See also, Foreign Corrupt Practices and Domestic and Foreign Investment Disclosure: Hearings on S. 305 Before the S. Comm. on Banking, Housing, and Urban Affairs, 95th Cong. 111, 120-22 (1977) (statement of Roderick M. Hills, Chairman of SEC).

<sup>37</sup> United States Securities and Exchange Commission, Report to the S. Comm. on Banking, Housing, and Urban Affairs, Questionable and Illegal Corporate Payments and Practices, 94th Cong. 13 (1976).

<sup>38</sup> 15 U.S.C. §§ 78l, 78o(d).

<sup>39</sup> S. 3418, 94th Cong., 2d Sess. (1976).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

*[iv]—S. 3133*

Senator Proxmire advanced a fourth major legislative proposal, S. 3133,<sup>42</sup> which combined features of previous disclosure and criminalization proposals. This measure required registered U.S. issuers to disclose publicly all payments greater than \$1,000 made by the issuer or its agents to foreign government employees, political parties, or candidates.<sup>43</sup> In addition to its disclosure provisions, S. 3133 included a criminal provision, which prohibited bribery of foreign officials. The prohibition incorporated the bribery laws of the country in which the payment was made. As such, the proposal would have allowed U.S. companies to be prosecuted in U.S. courts for conduct contrary to foreign bribery laws.<sup>44</sup>

*[v]—S. 3664*

After receiving criticism of various provisions of S. 3133, Senator Proxmire introduced a revised proposal, S. 3664.<sup>45</sup> The revised proposal removed the \$1,000 disclosure threshold and the criminal prohibition that incorporated foreign bribery laws.<sup>46</sup> It also extended the antibribery provisions to cover domestic concerns that were not otherwise covered by SEC jurisdiction.<sup>47</sup> The Senate approved S. 3664 unanimously on September 15, 1976.<sup>48</sup> As the House did not complete its review of the measure prior to adjournment, Senator Proxmire reintroduced S. 3664 as Title I of S. 305, which passed the Senate without debate on May 5, 1977.<sup>49</sup> On November 1, 1977, the House approved a similar measure, H.R. 3815, sponsored by Representative Eckhardt.<sup>50</sup> Subsequently, a conference committee reconciled the two measures, and President Carter signed the Foreign Corrupt Practices Act into law on December 19, 1977.<sup>51</sup>

This original version of the FCPA differs from the revised FCPA in several key aspects. The original Act did not provide an exception for facilitating payments, nor did it provide affirmative defenses for

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<sup>42</sup> S. 3133, 94th Cong., 2d Sess. (1976).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> S. 3664, 94th Cong., 2d Sess. (1976).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> S. Rep. No. 114, 95th Cong., 1st Sess., 2 (May 2, 1977).

<sup>49</sup> 123 Cong. Rec. S7193-95 (1977).

<sup>50</sup> H.R. 3815, 95th Cong., 1st Sess. (1977).

<sup>51</sup> 13 Weekly Comp. of Pres. Doc. 1990 (Dec. 21, 1977).

payments that are lawful under foreign laws or that relate to reasonable and bona fide promotional expenditures. These changes were implemented in the 1988 amendments, which also served to clarify such key concepts as liability for the acts of third parties, the culpability standard for criminal accounting violations, and the level of detail necessary for books and records. Additionally, the original Act contemplated a narrower extraterritorial reach, which was expanded substantially by amendments in 1998.

### [3]—Amendments to the FCPA

#### [a]—1988 Amendments

In 1981, the General Accounting Office (“GAO”) conducted a survey of corporations subject to the FCPA.<sup>52</sup> Thirty percent of the respondents reported that the Act led to a decline in their international business.<sup>53</sup> Among these companies, seventy percent reported that the Act was vague, which generated confusion and increased the costs of compliance.<sup>54</sup> This undercurrent of dissatisfaction manifested itself in multiple attempts to revise the FCPA. Although numerous proposals were introduced between 1980 and 1987,<sup>55</sup> the Act was not amended until 1988, with the passage of the Omnibus Trade and Competitiveness Act.<sup>56</sup> This measure implemented eight fundamental changes to the FCPA and imposed one condition on the President of the United States.

#### *[i]—Incorporation of Domestic Bribery Standard*

The 1988 amendments clarified the scope of prohibited payments under the FCPA by incorporating language from the domestic bribery statutes. Following the addition of this language, the FCPA prohibits payments to foreign officials for the purpose of inducing any act “in violation of the lawful duty of such officials.”<sup>57</sup>

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<sup>52</sup> United States General Accounting Office, “Report to the Congress: Impact of Foreign Corrupt Practices Act on U.S. Business” (March 4, 1981). The GAO distributed the survey to 250 randomly selected companies among *Fortune Magazine*’s top 1,000 companies.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> See, e.g.: Brennan, “The Foreign Corrupt Practices Act Amendments of 1988: ‘Death’ of a Law,” 15 N.C.J. Int’l L. & Com. Reg. 229 (1990); Freemantle and Katz, “The Foreign Corrupt Practices Act Amendments of 1988,” 23 Int’l L. 755 (1989).

<sup>56</sup> Pub. L. No. 100-418, 102 Stat. 1415 (Aug. 23, 1988).

<sup>57</sup> Pub. L. No. 100-418, 102 Stat. 1415, § 5003(a)(c), codified at 18 U.S.C. § 201.

*[ii]—Antibribery Liability for the Acts of Third Parties*

The 1988 amendments refined the terms of the FCPA's prohibition against the use of third parties to make payments in violation of the antibribery provisions. The original version of the FCPA stated that such payments were prohibited if made while "knowing or having a reason to know" that they would be used for a purpose that would violate the FCPA.<sup>58</sup> Following the passage of the FCPA, the DOJ clarified its position in this area, indicating that its policy was to prosecute cases only where the "evidence of awareness" of prohibited conduct was "so clear as to constitute actual knowledge of the bribe scheme."<sup>59</sup>

The 1988 amendments reflected the DOJ's policy by excising the phrase, "having a reason to know." The revised version of the Act made it unlawful to give, promise to give, or authorize "the giving of anything of value to . . . any person while knowing that all or a portion of such money or thing" will be used for a purpose that violates the FCPA.<sup>60</sup> The amendments also defined the term "knowing" to include an "aware[ness]," a "firm belief," or a "[substantial] certain[ty]."<sup>61</sup> The accompanying conference report further illuminated this concept, stating that the "knowledge required is not equivalent to recklessness; it requires an awareness of high probability" of the existence of improper circumstances.<sup>62</sup> Such a degree of awareness cannot be circumvented by a "deliberate avoidance of knowledge."<sup>63</sup>

*[iii]—The Exception for Facilitating Payments*

The 1988 amendments created an exception regarding the FCPA's general prohibition against foreign bribery. Originally, the FCPA excluded from its prohibitions payments to governmental employees who exercised only clerical, ministerial duties by excluding them from the definition of "foreign official."<sup>64</sup> The 1988 amendments expanded the definition of "foreign official" to include all categories

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<sup>58</sup> Pub. L. No. 95-213, 91 Stat. 1494, 1495, 1497 (Dec. 19, 1977).

<sup>59</sup> Freemantle and Katz, "The Foreign Corrupt Practices Act Amendments of 1988," 23 Int'l L. 755, 760 (1989).

<sup>60</sup> 15 U.S.C. § 78dd-2(a).

<sup>61</sup> *Id.*

<sup>62</sup> H. Conf. Rep. No. 576, at 919 (April 20, 1988).

<sup>63</sup> *Id.*, at 920.

<sup>64</sup> Pub. L. No. 95-213, 91 Stat. 1494, 1496, 1498 (Dec. 19, 1977).

of governmental employees.<sup>65</sup> At the same time, however, the Act was amended to exclude payments for “routine governmental action” from the general prohibition against corrupt payments to foreign officials.<sup>66</sup> Thus, instead of focusing on the official’s position within the government, the amendments focused on the purpose of the payment. This exception thus covers “any facilitating or expediting payment to a foreign official . . . the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official.”<sup>67</sup> It also specifically excludes any decision of a foreign official to influence the award of new or continued business.<sup>68</sup>

*[iv]—Affirmative Defenses for Payments That Are Lawful  
under Local Laws and for Reasonable and Bona  
Fide Expenditures*

The 1988 amendments also created two affirmative defenses to antibribery charges under the FCPA. First, the amendments provided that it would be an affirmative defense that a payment is “lawful under the written laws and regulations of the foreign official’s, political party’s, or candidate’s country.”<sup>69</sup> The accompanying conference agreement emphasizes that the mere absence of a written law in this area would not satisfy this affirmative defense.<sup>70</sup>

Second, the 1988 amendments provided that it would be an affirmative defense that the payment or gift constituted “reasonable and bona fide expenditure[s], such as travel and lodging expenses.” To qualify for this defense, the expense must be incurred by or on behalf of a foreign official, and must “directly [relate] to (a) the promotion,

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<sup>65</sup> Pub. L. No. 100-418, § 5003(f)(1), 102 Stat. 1415 (Aug. 23, 1988).

<sup>66</sup> Pub. L. No. 100-418, § 5003(f)(3)(A)-(B), 102 Stat. 1415 (Aug. 23, 1988).

<sup>67</sup> 15 U.S.C. §§ 78dd-1(b), dd-2(b) ; 15 U.S.C. §§ 78dd-1(f)(3)(A); 78dd-2(h)(4)(A). The statute includes a non-exhaustive list of purposes for which expenditures may be considered “routine governmental actions.” These include:

“(i) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country; (ii) processing governmental papers, such as visas and work orders; (iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country; [and] (iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration.”

<sup>68</sup> 15 U.S.C. § 78dd-1(f)(3)(B).

<sup>69</sup> Pub. L. No. 100-418, § 5003(a)(c), 102 Stat. 1415 (Aug. 23, 1988); 15 U.S.C. § 78dd-1(c)(1).

<sup>70</sup> H. Conf. Rep. No. 576, at 922 (April 20, 1988).

demonstration or explanation of the company's products or services, or (b) the execution or performance of a contract with a foreign government or agency thereof."<sup>71</sup> The accompanying conference report clarifies that, by definition, a payment made with corrupt intent cannot qualify for this "reasonable and bona fide" affirmative defense.<sup>72</sup>

*[v]—Culpability Standard for Criminal Violations of the Accounting Provisions*

The 1988 amendments clarified that criminal liability for violations of the accounting provisions applies only to those who "knowingly circumvent" accounting controls or "knowingly falsify" accounting records.<sup>73</sup> The accompanying conference report stated that this revision was intended to "ensure that criminal penalties" are only imposed for purposeful violations, whether through acts of commission or omission.<sup>74</sup> This standard was intended to include "deliberate falsification . . . and other conduct calculated to evade the internal controls requirement" but to exclude "insignificant or technical infractions or inadvertent conduct."<sup>75</sup>

*[vi]—Reasonable Detail in Books and Records and the Reasonable Assurance of Control of Corporate Assets*

The 1988 amendments also clarified the degree of "reasonable detail" that companies must use in keeping books, records, and accounts and the degree of "reasonable assurance" of control that they must exercise over corporate assets. The amendments stated that companies must provide "such a level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs."<sup>76</sup> The accompanying conference report indicated that this modification was intended "to clarify that the current standard does not connote an unrealistic degree of exactitude or precision."<sup>77</sup>

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<sup>71</sup> Pub. L. No. 100-418, § 5003(c)(2), 102 Stat. 1415 (Aug. 23, 1988), codified at 15 U.S.C. § 78dd-1(c)(2)(A-B).

<sup>72</sup> H. Conf. Rep. No. 576, at 922 (April 20, 1988).

<sup>73</sup> Pub. L. No. 100-418, § 500, 2102 Stat. 1415 (Aug. 23, 1988).

<sup>74</sup> H. Conf. Rep. No. 576, at 916-917 (April 20, 1988).

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*, at 917.

<sup>77</sup> *Id.*

*[vii]—Responsibility for the Accounting Practices of  
Minority-Owned Subsidiaries*

The 1988 amendments also addressed the nature of responsibilities that issuers must exercise for the accounting practices of subsidiaries in which they own a minority interest. Specifically, the amendments indicated that issuers discharge their responsibilities with respect to such subsidiaries when they make a good-faith effort to cause the subsidiary to comply with the FCPA's accounting provisions.<sup>78</sup> The conference report acknowledged that it would be unrealistic to require a minority owner to exert extensive control over the accounting practices of its subsidiary.<sup>79</sup>

*[viii]—President's Responsibility for Negotiating an  
International Antibribery Agreement*

The 1988 amendments charged the President of the United States with the responsibility of negotiating an international antibribery agreement that would reflect the core provisions of the FCPA.<sup>80</sup> The amendments stipulated that the President was obligated to apprise the Congress of the progress of these negotiations within one year.

*[ix]—DOJ's FCPA Opinion Procedure<sup>81</sup>*

The 1988 amendments also authorized the Attorney General to issue "general guidelines describing examples of activities that would or would not conform with the Justice Department's enforcement policy regarding FCPA violations."<sup>82</sup> As a result, the DOJ launched its Opinion Procedure in 1992.<sup>83</sup> Pursuant to the Opinion Procedure, the DOJ generally responds within thirty days to a written request from an issuer or a domestic concern for an "FCPA Opinion" with respect to an actual (i.e., not hypothetical) transaction to which the requester

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<sup>78</sup> Pub. L. No. 100-418, § 5002, 102 Stat. 1415 (Aug. 23, 1988).

<sup>79</sup> H. Conf. Rep. No. 576, at 917 (April 20, 1988). The Senate amendment specified that an issuer discharges its responsibility with respect to the accounting practices of a domestic or foreign subsidiary in which that issuer owns an interest of 50% or less when the issuer makes a good-faith effort to cause the subsidiary to comply. Originally, the House amendment recognized that the degree of influence required by the issuer over subsidiaries would vary from case to case. Ultimately, the House receded to the Senate on this point.

<sup>80</sup> Pub. L. No. 100-418, 102 Stat. 1415.

<sup>81</sup> See § 6.12 *infra* for a full discussion of the FCPA Opinion Procedure.

<sup>82</sup> H. Conf. Rep. No. 576, at 923 (April 20, 1988).

<sup>83</sup> Summary of the Foreign Corrupt Practices Act Opinion Procedure, 57 Fed. Reg. 39598 (Sept. 1, 1992).

is a party involving prospective conduct that implicates the FCPA.<sup>84</sup> The resulting DOJ FCPA Opinion must be in writing and broad enough to cover “whether the prospective conduct would, for purposes of the Department of Justice’s present enforcement policy, violate 15 U.S.C. 78dd-1 and 78dd-2.”<sup>85</sup> An FCPA Opinion favorable to the prospective conduct creates a rebuttable presumption in any subsequent enforcement action that such conduct complies with the FCPA.<sup>86</sup> An FCPA Opinion affects only the parties to the request and is binding only on the DOJ. Moreover, an FCPA Opinion cannot affect an issuer’s responsibility to comply with the FCPA’s accounting provisions nor the enforcement activities of other agencies.<sup>87</sup> Thus, the SEC may initiate a civil enforcement action against a requester, the issuance of an FCPA Opinion notwithstanding.<sup>88</sup>

### [b]—1998 Amendments

In 1998, the U.S. Senate unanimously ratified the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the “OECD Convention”).<sup>89</sup> The terms of this multilateral agreement required signatory nations to pass legislation implementing the Convention and conforming domestic law to its provisions. To this end, Congress began hearings on legislative proposals to amend the FCPA to conform to the OECD Convention. The rationale behind the OECD Convention was that the implementation of international anticorruption standards would encourage economic development and promote democracy, while helping to ensure fairer international markets for U.S. companies.<sup>90</sup> The Senate Committee on Banking, Housing, and Urban Affairs observed that since the passage

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<sup>84</sup> See generally, 28 C.F.R. Part 80.

<sup>85</sup> 28 C.F.R. § 80.8.

<sup>86</sup> 28 C.F.R. § 80.10.

<sup>87</sup> 28 C.F.R. §§ 80.11-80.12.

<sup>88</sup> Supplementary Information regarding the Foreign Corrupt Practices Act Opinion Procedure, 57 Fed. Reg. 39598-39599 (Sept. 1, 1992).

<sup>89</sup> Organization for Economic Co-operation and Development: Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 18, 1997, 37 I.L.M. 1 (1998).

<sup>90</sup> See Brown, “Extraterritorial Jurisdiction Under the 1998 Amendments to the Foreign Corrupt Practices Act: Does the Government’s Reach Now Exceed its Grasp?” 26 N.C.J. Int’l L. & Com. Reg. 239, 285 (2000) (citing Press Statement, James B. Foley, Deputy Spokesman, United States Department of State, OECD Convention on Combating Bribery of Foreign Public Officials (May 5, 1998)).

of the FCPA, “American businesses have operated at a disadvantage relative to foreign competitors who have continued to pay bribes without fear of penalty.”<sup>91</sup> A Commerce Department report estimated that, from 1994 to 1998, foreign bribery cost U.S. firms approximately 180 international commercial contracts, the aggregate value of which was approximately \$80 billion.<sup>92</sup>

The House adopted the International Antibribery and Fair Competition Act on October 20, 1998.<sup>93</sup> The Senate passed the measure on the following day.<sup>94</sup> President Clinton signed the Act into law on November 10, 1998.<sup>95</sup>

Whereas the central objective of the 1988 amendments was to clarify the provisions of the FCPA, the central objective of the 1998 amendments was to expand the reach of the Act in accordance with the terms of the OECD Convention and the developing international consensus against transnational corruption.<sup>96</sup> Specifically, the 1998 amendments made four changes to the FCPA.

*[i]—Prohibition of Payments to Secure Any Improper Advantage*

First, the scope of the FCPA’s prohibition against improper payments was expanded to mirror the terms of the OECD Convention. The OECD Convention prohibits corrupt payments to a foreign official to influence that official to act or refrain from acting in relation to the performance of official duties, or “in order to obtain or retain business or other improper advantage in the conduct of international business.”<sup>97</sup> Although existing FCPA prohibitions were broad and may already have reflected this principle, the amendments removed any uncertainty on this point. The amendments modified the language

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<sup>91</sup> S. Comm. on Banking, Housing, & Urban Affairs, *The International Antibribery Act of 1998*, S. Rep. No. 277, 105th Cong., 2d Sess., 2 (July 30, 1988).

<sup>92</sup> *Id.*

<sup>93</sup> 144 Cong. Rec. H11670-72 (Oct. 20, 1998).

<sup>94</sup> 144 Cong. Rec. S12973-74 (Oct. 21, 1998).

<sup>95</sup> Pub. L. No. 105-366, § 1, 112 Stat. 3302 (Nov. 10, 1998).

<sup>96</sup> See, e.g.: Brown, “Extraterritorial Jurisdiction Under the 1998 Amendments to the Foreign Corrupt Practices Act: Does the Government’s Reach Now Exceed its Grasp?” 26 N.C.J. Int’l L. & Com. Reg. 239 (2000); Duncan, “The 1998 Foreign Corrupt Practices Act Amendments: Moral Empiricism or Moral Imperialism,” 1 APLPJ 1 (2000).

<sup>97</sup> Organization for Economic Co-operation and Development: *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, Dec. 18, 1997, 37 I.L.M. 1, 4, 8-9 (1998).

of the FCPA, clarifying that it is unlawful for issuers or domestic concerns to bribe a foreign official for the purpose of “securing any improper advantage.”<sup>98</sup>

*[ii]—Inclusion of Employees of Public International Organizations in the Definition of Foreign Official*

Second, the 1998 amendments expanded the definition of “foreign official” to conform to the definition under the OECD Convention. Specifically, the amendments reflected the OECD’s concept of “public international organizations.” The revised FCPA includes within the definition of “foreign official” any officer or employee of a “public international organization,” along with existing categories of “foreign officials,” including any “officer or employee of a foreign government or any department, agency, or instrumentality thereof,” as well as any “person acting for or on behalf of” such entities.<sup>99</sup>

*[iii]—Expanding the Extraterritorial Reach of the FCPA: Acts of U.S. Persons Committed Outside of the United States*

The 1998 amendments also expanded the extraterritorial reach of the FCPA. This expansion was motivated by the OECD Convention’s directive to signatory nations to exercise jurisdiction over anticorruption measures to the broadest extent possible.

To that end, the 1998 amendments clarify that corrupt acts by “United States persons,” committed outside the United States in furtherance of a violation of the antibribery provisions will be subject to U.S. jurisdiction.<sup>100</sup> This extraterritorial reach applies “irrespective of whether [a U.S.] person makes use of the mails or any means or instrumentality of interstate commerce in furtherance of” a violation of the antibribery provisions.<sup>101</sup>

*[iv]—Expanding FCPA Jurisdiction: Acts of Non-U.S. Nationals Committed Within the United States*

The 1998 amendments also expanded the jurisdiction of the FCPA to any non-U.S. national who acts in furtherance of a corrupt payment

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<sup>98</sup> 15 U.S.C. §§ 78dd-1(a)(2)(A), -2(a)(1)(A), -3(a)(1)(A).

<sup>99</sup> 15 U.S.C. §§ 78dd-1(f)(1)(B), -2(h)(2)(B), -3(f)(2)(B). See also, 22 U.S.C. § 288.

<sup>100</sup> 15 U.S.C. §§ 78dd-1(g), -2(i).

<sup>101</sup> *Id.*

to a foreign official in violation of the antibribery provisions while in the territory of the United States.<sup>102</sup>

#### **[4]—A History of FCPA Enforcement**

The history of the FCPA is characterized by nearly twenty years of sporadic enforcement, followed by a dramatic surge in the incidence, scope, and rigor of enforcement during the new millennium. Given this development, this section addresses the history of the FCPA in two chronological phases. The first phase, which covers a period of relatively little enforcement, is comprised of the two decades between the passage of the Act and the implementation of the 1998 amendments. The second phase covers the more vigorous period of enforcement following the 1998 amendments.

##### **[a]—Phase One: 1978 to 1998**

A number of factors caused the sporadic enforcement of the Act in the years immediately following the enactment of the FCPA.

###### *[i]—Lingering Confusion and Dissatisfaction with the FCPA*

In this early stage, there was substantial confusion about the central provisions of the Act. The GAO's 1981 survey revealed that a significant percentage of companies subject to the FCPA found it to be vague.<sup>103</sup> This dissatisfaction with the Act extended to lawmakers, as evidenced by the multiple amendments that were proposed to the Act between 1980 and 1987.<sup>104</sup>

###### *[ii]—Concerns about International Trade and Foreign Policy*

The unilateral nature of the FCPA discouraged rigorous enforcement. The regulators were sensitive to the prospect that, in the absence of an international consensus against foreign bribery, aggressive enforcement of the FCPA risked harming U.S. trade.<sup>105</sup> Likewise,

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<sup>102</sup> 15 U.S.C. § 78dd-3(a).

<sup>103</sup> United States General Accounting Office, Report to the Congress: Impact of Foreign Corrupt Practices Act on U.S. Business (March 4, 1981). The GAO distributed the survey to 250 randomly selected companies among *Fortune Magazine's* top 1,000 companies.

<sup>104</sup> See, e.g.: Brennan, "The Foreign Corrupt Practices Act Amendments of 1988: 'Death' of a Law," 15 N.C.J. Int'l L. & Com. Reg. 229 (1990); Freemantle and Katz, "The Foreign Corrupt Practices Act Amendments of 1988," 23 Int'l L. 755 (1989).

<sup>105</sup> See Foreign Payments Disclosure: Hearings Before the Subcomm. on Consumer Protection and Finance of the H. Comm. on Interstate and Foreign Commerce, 94th Cong. 126 (1976).

the Lockheed scandal had sensitized enforcement authorities to the potential harm that American corporate bribery scandals could inflict upon foreign governments, and, by extension, upon the foreign policy interests of the United States.<sup>106</sup>

*[iii]—Lack of Financial and Strategic Resources*

In this early stage of enforcement, U.S. authorities were not only unable to rely upon their foreign counterparts for assistance, but they also had relatively scant domestic resources with which to combat international corporate corruption.<sup>107</sup>

Similarly, in the years immediately following the Act's implementation, the DOJ and SEC lacked the benefit of experience in this new area of regulation and had yet to develop the sophisticated enforcement strategies upon which they now rely. For example, it was not until the 1990s that the U.S. government promulgated a standardized approach to investigating, prosecuting, and sentencing companies. In 1991, the U.S. Sentencing Guidelines added provisions specifically addressing the treatment of business organizations. These provisions formulated an influential enforcement paradigm, guided by an overarching emphasis on corporate cooperation.<sup>108</sup> Specifically, the Guidelines stated that companies charged with wrongdoing could win credit for instituting compliance programs, cooperating with investigations, and disclosing wrongdoing, thereby securing more lenient treatment or less severe penalties. Conversely, companies that resisted cooperation with the government would risk harsher treatment and more severe penalties. This enforcement paradigm took root and has survived, as cooperation remains a dominant theme in FCPA investigations, prosecutions, and settlements.

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<sup>106</sup> See: Lockheed Bribery Hearings Before the S. Comm. on Banking, Housing, and Urban Affairs, 94th Cong. (1975); Multinational Corporations and United States Foreign Policy: Hearings Before the Subcomm. on Multinational Corporations of the S. Comm. on Foreign Relations, 94th Cong. 341-392 (1975) (Political Contributions to Foreign Governments: Lockheed Corp.).

<sup>107</sup> 452 Sec. Reg. & L. Rep. A-6 (1978).

<sup>108</sup> *United States Sentencing Guidelines Manual*, Ch. 8 (1991). In 1984, the Sentencing Reform Act created the United States Sentencing Commission. 28 U.S.C. § 991(a) (Supp. III 2003). In 1987, the Commission instituted mandatory sentencing guidelines for individuals and added the Organizational Guidelines in 1991.

**[b]—Phase Two: Post-1999**

Several factors contributed to the sharp rise in FCPA enforcement during the first years of the new millennium.

*[i]—Developing International Anticorruption Consensus*

As signaled by the OECD Convention, international acceptance of anticorruption principles had increased dramatically by the late 1990s. This growing awareness of the problem of foreign corporate corruption made it more difficult for American companies to disguise corruption in permissive international settings. Increasingly, U.S. enforcement authorities could rely upon the international community to assist in the identification and prosecution of potential FCPA violations.

*[ii]—Wave of Corporate Corruption Scandals in the United States*

Shortly after the year 2000, a series of high-profile corporate scandals surfaced in the United States. The dramatic revelations of corrupt activity at Enron, Arthur Andersen, WorldCom, Tyco, and other companies spurred public outrage and invited an aggressive enforcement response.<sup>109</sup> This impulse to reform generated the Sarbanes-Oxley Act of 2002, which established numerous measures to promote broader corporate disclosure, more exacting accounting standards, and heightened responsibility for both corporations and their senior executives.<sup>110</sup> This reform impulse was also reflected by President George W. Bush's creation of the Corporate Fraud Task Force in 2002.<sup>111</sup> The stated objective of the Task Force was to strengthen the "efforts of

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<sup>109</sup> For example, Alan Greenspan criticized the wave of "infectious greed" that had "grip[ped] much of [the] business community." "The Markets: Market Place; Yes, He Can Top That," N.Y. Times (July 17, 2002), available at <http://www.nytimes.com/2002/07/17/business/the-markets-market-place-yes-he-can-top-that.html> (last visited Aug. 10, 2012). Greenspan stressed the need to assert governance "responsibilities . . . with very stiff penalties for noncompliance" and noted that "even a small increase in the likelihood of large, possibly criminal penalties for egregious behavior of CEOs can have profoundly important effects on all aspects of corporate governance . . . ." "Fed Chief Rips Corporate Misconduct," Wall Street Journal, p. A6 (July 17, 2002).

<sup>110</sup> Pub. L. No. 107-204, 116 Stat. 745 (July 30, 2002).

<sup>111</sup> Exec. Order No. 13271, 67 Fed. Reg. 46091 (July 9, 2002), available at <http://www.justice.gov/archive/dag/cftf/execorder.htm> (last visited Aug. 3, 2011).

the Department of Justice and Federal, State, and local agencies to investigate and prosecute significant financial crimes, recover[ing] the proceeds of such crimes, and ensur[ing] just and effective punishment of those who perpetrate financial crimes.”<sup>112</sup>

*[iii]—Aggressive DOJ and SEC Strategies and Emphasis on Corporate Cooperation*

During this period, the DOJ and SEC pursued more forceful enforcement strategies.<sup>113</sup> In 1999, the DOJ issued the Holder Memorandum, which transferred the Sentencing Guidelines’ cooperation paradigm to the charging stage of proceedings, announcing an eight-factor test to be used by prosecutors as they contemplated bringing criminal charges against a company.<sup>114</sup> The Holder Memorandum emphasized the importance of a company’s cooperation, as well as its “timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of corporate attorney-client and work product privileges.”<sup>115</sup> The Holder Memorandum also stressed the necessity of a company’s maintaining a well-designed and implemented compliance program, sufficiently staffed and funded, which actively administered effective regulations and could withstand prosecutorial scrutiny.<sup>116</sup>

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<sup>112</sup> *Id.*

<sup>113</sup> During this period, the DOJ and SEC also pursued more aggressive interpretations of various provisions of the FCPA itself.

<sup>114</sup> Specifically, the Holder Memorandum encouraged Federal prosecutors to consider: (1) the severity of the company’s offense and the attendant risk of harm to the public; (2) the extent to which wrongdoing pervaded the organization, and the extent to which management may have been knowledgeable or complicit; (3) the company’s history of wrongdoing; (4) the company’s “timely and voluntary” disclosure of wrongdoing, its cooperation with the investigation, including its willingness to waive attorney-client and work product privileges; (5) the strength of the company’s compliance program; (6) the company’s remedial response to the wrongdoing, including its willingness to terminate culpable individuals; (7) the potential collateral consequences of criminal charges; (8) the availability, adequacy, and appropriateness of alternative remedies, such as civil or regulatory enforcement proceedings. Memorandum from Eric Holder, Deputy Attorney Gen., to U.S. Attorneys, Regarding Bringing Criminal Charges Against Corporations (June 16, 1999), available at <http://www.justice.gov/criminal/fraud/documents/reports/1999/charging-corps.PDF> (last visited Aug. 10, 2012).

<sup>115</sup> *Id.*, at II(A)(4). See also, VI(B).

<sup>116</sup> *Id.*, at VII(B).

In 2003, the DOJ supplanted the Holder Memorandum with the Thompson Memorandum.<sup>117</sup> Although the two memoranda announced similar factors for determining whether a prosecution was warranted, the Thompson Memorandum explicitly required that prosecutors assess those factors in all cases involving corporate crime.<sup>118</sup> This mandate reflected the harsher enforcement climate in 2003. It allowed prosecutors to demand exacting cooperative measures from companies seeking to avoid prosecution.<sup>119</sup> As a corollary, the Thompson Memorandum also announced that, in certain instances, non-prosecution agreements (“NPAs”) and deferred-prosecution agreements (“DPAs”) could provide an appropriate means of resolving investigations of corporate wrongdoing.<sup>120</sup> These dynamics provided strong incentives for companies to make voluntary disclosures.

The years that followed the Thompson Memorandum witnessed a rise in the number of NPAs and DPAs between companies and the government.<sup>121</sup> In many instances, these agreements forced settling companies to make substantial concessions to prevent an indictment. In 2006, the Thompson Memorandum was superseded by the McNulty Memorandum, which sought to check the government’s ability to force companies to accede to prosecutorial demands, particularly with regard to privilege waivers. The McNulty Memorandum instructed

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<sup>117</sup> Memorandum from Larry D. Thompson, Deputy Attorney General, to United States Attorneys, Regarding Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003), available at [http://www.justice.gov/dag/cftf/corporate\\_guidelines.htm](http://www.justice.gov/dag/cftf/corporate_guidelines.htm) (last visited Aug. 10, 2012).

<sup>118</sup> See United States Department of Justice, *Criminal Resource Manual*, § 9-28.300 (2008), available at [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/28mcrm.htm](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm). (last visited Aug. 3, 2011). (“In conducting an investigation, determining whether to bring charges, and negotiating plea agreements, prosecutors must consider the [nine] factors . . .”). Thompson, N.117, *supra*, at II(A).

<sup>119</sup> Thompson, N. 117 *supra*, at 1. “Too often business organizations, while purporting to cooperate with a [DOJ] investigation, in fact take steps to impede the quick and effective exposure of the complete scope of wrongdoing under investigation. [This Memorandum clarifies] that such conduct should weigh in favor of a corporate prosecution.”

<sup>120</sup> *Id.*, at VI(B). The guidelines permit NPAs and DPAs “in exchange for cooperation when a corporation’s timely cooperation appears to be necessary to the public interest and other means of obtaining the desired cooperation are unavailable or would not be effective.” (Internal quotations omitted).

<sup>121</sup> Orland, “The Transformation of Corporate Criminal Law,” 1 *Brook. J. Corp. Fin. & Com. Law* 45, 47 (2006).

prosecutors not to view a company's refusal to waive privilege as a factor in its charging calculus.<sup>122</sup>

In 2008, the Filip Memorandum further refined DOJ's policies for the investigation and prosecution of corporate crime, particularly in the area of cooperation between business organizations and the government.<sup>123</sup> It was issued in response to additional concerns raised about the effect of the Holder, Thompson, and McNulty memoranda on the preservation of the attorney-client privilege and work product protection. Among the changes effected, the Filip Memorandum eliminated the consideration of privilege waivers as a factor in crediting a corporation's cooperation and DOJ's determination as to whether to bring charges against it. Rather, the key factor in assessing cooperation is whether a corporation has timely disclosed facts relevant to the investigation.<sup>124</sup> In addition, the revised principles announced by the Filip Memorandum were incorporated for the first time into the United States Attorney's Manual and became binding on all federal prosecutors.<sup>125</sup>

Along similar lines, the SEC also pursued a set of enforcement policies. In 2001, the Commission advanced the "Seaboard Report,"<sup>126</sup> which announced a thirteen-factor model for "determining whether, and how much, to credit [a company's] self-policing, self-reporting, remediation and cooperation" in making decisions about enforcement.<sup>127</sup> In January 2010, the SEC announced a policy designed to

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<sup>122</sup> The Thompson Memorandum was partially supplanted by the McNulty Memorandum, which was issued in December 2006 and is discussed in greater detail *infra*. Memorandum from Paul J. McNulty, Deputy Attorney General, to U.S. Attorneys, Regarding Principles of Federal Prosecution of Business Organizations (Dec. 12, 2006), available at [http://www.justice.gov/dag/speeches/2006/mcnulty\\_memo.pdf](http://www.justice.gov/dag/speeches/2006/mcnulty_memo.pdf) (last visited Aug. 10, 2012).

<sup>123</sup> Memorandum from Mark Filip, Deputy Attorney General, to Heads of Department Components and U.S. Attorneys, Regarding Principles of Federal Prosecution of Business Organizations (Aug. 28, 2008) available at <http://www.justice.gov/dag/readingroom/dag-memo-08282008.pdf> (last visited Aug. 10, 2012).

<sup>124</sup> See Remarks Prepared for Delivery by Deputy Attorney General Mark R. Filip at Press Conference Announcing Revisions to Corporate Charging Guidelines (Aug. 28, 2008), available at <http://www.justice.gov/archive/dag/speeches/2008/dag-speech-0808286.html> (last visited Aug. 10, 2012).

<sup>125</sup> *Id.*

<sup>126</sup> Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, SEC Rel. Nos. 34-44969 and AAER-1470 (Oct. 23, 2001).

<sup>127</sup> *Id.*

encourage corporate cooperation in enforcement actions.<sup>128</sup> For the first time, the policy explicitly contemplated the use of DPAs and NPAs by the SEC.<sup>129</sup>

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<sup>128</sup> See: Press Release 2010-6, “SEC Announces Initiative to Encourage Individuals and Companies to Cooperate and Assist in Investigations” (Jan. 13, 2010); SEC, Division of Enforcement, Enforcement Manual § 6.2.3-4 (Jan. 13, 2010).

<sup>129</sup> *Id.*