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The Foreign Corrupt Practices Act:

A Systemic Solution for the U.S. Multinational

James C. Nobles, Jr.

Christina Maistrellis¹

U.S. companies doing business abroad face innumerable obstacles. One of those obstacles is the U.S. Foreign Corrupt Practices Act (FCPA or the Act), which prohibits bribing foreign officials to obtain business.² The FCPA now has been on the books since 1977; however, in complying with the Act, U.S. companies doing business abroad in some respects face greater challenges now than they did at the time of the FCPA's enactment. The past two decades have seen a rapid expansion of global business. U.S. companies now aggressively pursue business expansion in markets that were not even options in 1977. In many of these new markets they encounter corruption at a level which is virtually a part of the culture; they face competition from foreign companies with different attitudes toward both commercial and governmental bribery. The FCPA risks for U.S. companies are enhanced because they must adopt innovative techniques of doing business in these markets, including the use of brokers, agents, representatives and other "go betweens" over which they have little control. In this environment, U.S. companies must reevaluate how they do business abroad to avoid violations of the FCPA.

Bribery appears to be more prevalent in international business than ever before. The question of whether this seemingly apparent increase in corruption is a real increase in absolute terms, or simply is a reflection of a heightened awareness coupled with exposure to business practices in many newly-opened economies is debatable. Irrespective of the situation, the Organization for Economic Cooperation and Development (OECD) member nations have agreed to undertake actions to combat bribery of governmental officials in international transactions.³ The OECD Recommendation on Bribery in International Business Transactions represents the first multilateral effort to prevent international business corruption outside of the money laundering area. This increased focus on bribery of foreign governmental officials is part of a broader focus on business ethics in the international arena by Transparency International, the Caux Round Table and similar organizations.⁴

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2. Pub. L. No. 95-213, 91 Stat. 1494 (1977) (codified as amended at 15 U.S.C. §§ 78m (b), 78dd-1, 78dd-2, 78ff (a) & (c) (1988)); See also, *U.S. Firms Bemoan Their Disadvantage Vying for Foreign Work Without Bribes*, Wall St. J., June 10, 1994, A6, col 1; *Buying Business*, Wall St. J., November 5, 1993, at A1; *Foreign Corrupt Practices Act - Compliance and Enforcement Procedures*, N.Y. Law J., December 15, 1980, at 29, col. 1.

3. RECOMMENDATION OF THE COUNCIL OF THE OECD, May 27, 1994, Organization for Economic Cooperation and Development, Press Release.

4. See *Breaking the Spiral of Corruption*, Fin. Times, April 15, 1994; *Saints and Sinners* Fin. Times, March 25, 1994; and *The Search for Universal Ethics*, Fin. Times, July 22, 1994.

Although the U.S. business entity clearly has had potential liability under the Act since its enactment, the emphasis in recent years on criminal liability of organizations has changed the stakes for U.S. businesses. The foundation of this increased emphasis is an escalation in the degree of regulation of business by federal and state governments. Concurrent with increased regulation, federal prosecutors have shown an elevated interest in pursuing business crimes. The Federal Sentencing Guidelines (Guidelines),⁵ which "standardize" the sentencing of entities, support the federal prosecutors' efforts in pursuing business entities.

FCPA violations are clearly within the bribery provisions of the Guidelines for Organizational Defendants, which were issued in 1991.⁶ The Guidelines place a premium on having effective programs in place to "prevent or detect violations of the law."⁷ If an entity has established a compliance program which meets the requirements of the Guidelines, the Court is permitted to subtract three (3) points in calculating the entity's "culpability score" which forms the basis for sentencing in all violations of federal crimes, including violations of the FCPA.⁸ The FCPA penalties are substantial. Under the 1988 amendments to the FCPA, the monetary penalties were increased from \$1 million to \$2 million for business entities, and from \$10,000 to \$100,000 for individuals.⁹ Of course, the most formidable penalty for violating the Act is a five (5) year prison sentence which individuals face for each violation of the Act.¹⁰ For the U.S. multinational, perhaps the most significant deterrent is the embarrassment and tarnished reputation which results from being charged with a violation of the FCPA. For others, FCPA charges can jeopardize their businesses.¹¹ Moreover, defending FCPA charges significantly drains management time and financial resources.

In theory, the FCPA is straightforward. Bribery of foreign governmental officials in order to obtain a commercial advantage is prohibited. In practice, the answers to many FCPA questions are often varying shades of gray, but are rarely black and white, clear-cut answers. The nature of international business today makes it quite possible for an "inadvertent" violation of the FCPA to occur. The fact patterns involving FCPA issues usually raise potential violations of other laws¹² and business ethics issues. These factors translate into a need for U.S. companies doing business internationally to develop methods of addressing liability risks under the FCPA. These risks can be decreased, and even eliminated through the development, adoption and application of policies and procedures within companies. For the practitioner advising a company on adopting a FCPA policy, it is imperative that he or she have a thorough understanding of the FCPA, including the

5. 18 U.S.C.S. Appx. (1994).

6. See, 18 U.S.C.S. Appx. § 8C2.5(f) cmt. 10 (1994).

7. 18 U.S.C.S. Appx. § 8C2.5(f) (1994).

8. *Id.*

9. 15 U.S.C. §§ 78ff (c), 78dd-2 (g) (1988).

10. *Id.*

11. See *Lockheed Faces Possible Action by Air Force*, Wall St. J., June 24, 1994, A12; *Lockheed Barred from Exporting Hercules*, Fin. Times, August 26, 1994, 1, col 3; and *Lockheed Unit will be Denied Permits for Exports on Illegal Payment Charge*, Wall St. J., August 25, 1994, B1, col 3. See Sheldon Krantz, *In a Hanging Mood*, Mar/Apr. 1994, Bus. L. Today 5.

12. See notes 106-111 and accompanying text.

standard of intent for violations under the FCPA. Thus, this article will provide a brief overview of the FCPA, discuss the standard of intent applicable to the FCPA, outline the elements of an FCPA policy, and conclude by addressing how a FCPA policy might be applied in hypothetical situations.

I. The FCPA — A Primer

In response to information that some U.S. companies were routinely bribing foreign governmental officials in order to obtain business, Congress saw a need for a strong antibribery law.¹³ In 1977, Congress filled this perceived “gap” in U.S. law by enacting the FCPA as an amendment to the Securities Exchange Act of 1934 (Exchange Act).¹⁴ In 1988, Congress amended the FCPA as a part of the Omnibus Trade and Competitiveness Act (OTCA),¹⁵ in order to clarify the standard of intent and other ambiguous provisions.¹⁶ The FCPA has two distinct provisions — the antibribery prohibitions and the accounting controls.¹⁷

A. ANTIBRIBERY PROVISIONS: WHAT IS PROHIBITED?

Under the FCPA, both direct and indirect bribery of foreign governmental officials is illegal.¹⁸ With respect to direct bribery, the FCPA makes it unlawful to use the U.S. mail or another instrument of U.S. interstate commerce¹⁹ to “corruptly”²⁰ make a payment to

13. S. REP. No. 114, 95th Cong., 1st Sess., (1977).

14. Pub. L. No. 95-213, 91 Stat. 1494 (1977) (*codified as amended at* 15 U.S.C. §§ 78m (b), 78dd-1, 78dd-2, 78ff (a) & (c) (1988)).

15. Pub. L. No. 100-418, 102 Stat. 1107 (1988) (signed by President Reagan on August 23, 1988) (*codified at* 15 U.S.C. §§ 78a, 78m, 78dd-1, 78dd-2, 78ff (1982)). See Section II *infra*.

16. See note 74 and accompanying text.

17. 15 U.S.C. §§78m(b), 78dd-1, 78dd-2 (1988).

18. Reference to a “payment” within the text of this article includes an “offer, gift, promise to give, or authorization of the giving of anything of value.” 15 U.S.C. §§ 78dd-1 (a) (issuers), 78dd-2 (a) (domestic concerns) (1988).

19. 15 U.S.C. §§ 78dd-1 (a) (issuers), 78dd-2 (a) (domestic concerns) (1988). As is the case in other areas, interstate commerce is defined broadly for FCPA purposes. For example, a phone call from the United States, or a flight from a U.S. airport is interstate commerce. See *e.g.*, *United States v. Silicon Contractors, Inc.*, a FCPA case where part of the scheme for transferring an illicit payment involved a trip from Louisiana to the Cayman Islands. The “instrumentality of interstate commerce” used in violation of the Act was the Louisiana airport and the interstate and foreign bank processing channels. See Laura E. Longobardi, *Reviewing the Situation: What is to be Done with the Foreign Corrupt Practices Act*, 20 Vand J. Transnat'l L. 431, 484 (1987) citing Offer of Proof, *Silicon*, Crim. No. 85-251 at 4 (E.D. La., filed June 27, 1985). See *United States v. Silicon Contractors, Inc.*, Exhibit A, 2 FCPA REP. 697.14 Crim No. 85-251.

20. 15 U.S.C. §§ 78dd-1 (a) (issuers), 78dd-2(a) (domestic concerns) (1988). For a detailed explanation of the “corrupt” aspect, see note 68 and accompanying text.

a foreign government official²¹ in order to influence him to act (or not to act), or to induce him to use his influence within the government, in order to obtain, retain or direct business to a particular person or entity.²² In addition, the Act prohibits making payments to any foreign political party²³ or foreign party official, or to any candidate for foreign political office with the purpose of securing a business opportunity.²⁴

The Act contains identical prohibitions on indirect bribery. No payment may be made to a third party with the knowledge²⁵ that it either directly or indirectly will be used to influence a foreign official or foreign political party or candidate.²⁶ Under this prohibition, a U.S. company can be vicariously liable²⁷ for the acts of a third party, such as a foreign agent or a sales representative.

An important and well-known exception to the FCPA is that "facilitating or expediting" payments (also known as "grease payments") made to foreign officials in furtherance of "routine governmental action" are permissible.²⁸ Although the OTCA amended the facilitating or expediting payments exception in an attempt to clarify its scope²⁹, considerable ambiguity continues to surround this exception. While permitted payments can be made under the grease payments exception for actions which are "ordinarily and commonly performed by a foreign official,"³⁰ the definition of "routine governmental

21. A "foreign official" includes "any officer or employee of a foreign government or any department, agency, or instrumentality," as well as any person who acts in an "official capacity" on behalf of or for a government department or agency. 15 U.S.C. §§ 78dd-1 (f)(1) (issuers), 78dd-2 (h)(2) (domestic concerns) (1988). This definition, like other FCPA provisions, is open to interpretation. For example, whether an officer of a state-owned business would be considered a foreign official is unclear. See, Hurd Baruch, *International Transactions Which Violate the Foreign Corrupt Practices Act or Other Criminal Statutes*, in 11 U.S. Reg. Int'l Trade, 1, 22 (1989).
22. 15 U.S.C. §§ 78dd-1 (a)(1)(A)&(B) (issuers), 78dd-2 (a)(1)(A)&(B) (domestic concerns) (1988).
23. Reference to a "foreign official" within the text of this article includes any foreign political party, party official or candidate for foreign political office.
24. 15 U.S.C. §§ 78dd-1 (a)(2) (issuers), 78dd-2(a)(2) (domestic concerns) (1988).
25. See Section II *infra* for a detailed analysis of the "knowing" standard.
26. 15 U.S.C. §§ 78dd-1 (a)(3) (issuers), 78dd-2 (a)(3) (domestic concerns) (1988).
27. Vicarious liability is "indirect or imputed legal responsibility for acts of another; for example, the liability of an employer for the acts of an employee, or, a principal for torts and contracts of an agent." Black's Law Dictionary 1566 (6th ed. 1990).
28. 15 U.S.C. §§ 78dd-1 (b) (issuers), 78dd-2 (b) (domestic concerns) (1988). In fact, in some countries the prohibitions of the FCPA are so well known that governmental officials demand bribes by requesting "facilitating payments". In other, less sophisticated countries, government officials solicit "tips".
29. The original FCPA's description of a facilitating payment - which allowed payments to officials with "essentially ministerial or clerical duties" - generated confusion because it focused on the role of the payee instead of a transaction's effect. (FCPA of 1977, § 103(a), § 78dd-1 (b) (issuers) (1977); *id.*, § 104 (a) 15 U.S.C. § 78dd-2 (b) (domestic concerns) (1977).
30. 15 U.S.C. §§ 78dd-1 (b) (issuers), 78dd-2 (b) (domestic concerns) (1988).

action"³¹ is narrow. The payment of bribes for all governmental actions which are routine is not permissible. The Act does not extend the exception to routine governmental actions which involve "any decision by a foreign official ... to award new business to or to continue business with a particular party."³² Thus, decisions by foreign officials which may bring a company business and are discretionary in nature, regardless of whether they involve an ordinary activity such as obtaining a license, are prohibited.³³

B. ACCOUNTING STANDARDS

The FCPA's accounting provision requires "issuers,"³⁴ or publicly traded U.S. companies to take two affirmative measures to prevent and uncover unlawful payments. First, issuers are required to keep their books, records and accounts "in reasonable detail."³⁵ Second, issuers also must create internal accounting control systems to give "reasonable assurances" that steps have been taken to "record transactions as necessary" in order to conform with accounting principles, and to "maintain accountability for assets."³⁶ Although the FCPA does not mandate a particular monitoring system, companies are, in effect, required to create a due diligence policy for their accounting standards. A company can be criminally liable for violation of the accounting provisions if they are "knowingly"³⁷ circumvented; otherwise, civil liability is the government's recourse.³⁸

C. WHO IS COVERED?

The classes of persons covered by the FCPA are bifurcated. The antibribery provisions have a broader application since they apply to all "domestic concerns,"³⁹ as well as to issuers.⁴⁰ A domestic concern includes any business enterprise (corporation, partnership, association, joint-stock company, etc.) which either was created under the U.S. laws, or has its principal place of business within the United States.⁴¹ Furthermore, "any individual who is a citizen, national, or resident of the United States," falls within the category

31. Actions which qualify as "routine governmental actions" 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; (iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or (v) actions of a similar nature." 15 U.S.C. §§ 78dd-1 (f)(3)(A) (issuers), 78dd-2 (h)(4)(A) (domestic concerns) (1988).

32. 15 U.S.C. §§ 78dd-1 (f)(3)(B) (issuers), 78dd-2 (h)(4)(B) (domestic concerns) (1988).

33. H.R. Conf. Rep. No. 576, 100th Cong., 2nd Sess., (1988).

34. For an explanation of the "issuers" category, see notes 43-44 and accompanying text, which discusses who is covered by the FCPA.

35. 15 U.S.C. § 78m (b)(A) (1988).

36. 15 U.S.C. § 78m (b)(B) (1988).

37. For a discussion of this standard of intent, see section II *supra*.

38. 15 U.S.C. § 78m(b) (4),(5).

39. 15 U.S.C. § 78dd-2 (1988).

40. 15 U.S.C. § 78dd-1 (a) (1988). By definition, issuers are a subset of domestic concerns. For an explanation of issuers, see notes 43-44 and accompanying text.

41. 15 U.S.C. § 78dd-2 (h)(1)(B) (1988).

of a domestic concern.⁴² As a result of the wide reach of this provision, all U.S. companies, as well as individual U.S. employees, find themselves subject to the prohibitions and penalties of the antibribery provisions of the FCPA.

The FCPA's accounting standards apply only to "issuers," a much narrower class than domestic concerns.⁴³ Issuers are U.S. companies who either must register with the SEC according to § 12 of the Exchange Act of 1934⁴⁴ or must file reports with the SEC pursuant to § 15(d) of the 1934 Act.⁴⁵ The accounting standards are not as broad as the antibribery provisions; however, the group of companies which are "issuers" and thus subject to the accounting controls is large. For example, foreign corporations which register their stock with the SEC for sale and trading on U.S. exchanges are issuers.

The extraterritorial reach of the FCPA does have limits. Foreign corporations not having stock registered in the United States do not fall within the definition of an issuer or domestic concern.⁴⁶ However a foreign individual who acts as an agent for either a U.S. resident or domestic concern will be subject to the FCPA if a court has subject matter jurisdiction over the action.⁴⁷ In addition, all U.S. residents and citizens are clearly covered by the FCPA regardless of whether they are employed by foreign entities or employed

42. 15 U.S.C. § 78dd-2 (h)(1)(A) (1988).

43. 15 U.S.C. § 78m(b) (2) (1988).

44. Companies which are required to register with the SEC include those who participate in interstate commerce, whose securities are exchanged on the national stock exchange, whose assets amount to over \$1 million, and those who have over 500 stockholders. 15 U.S.C. § 78.

45. 15 U.S.C. § 78m (b) (1988).

46. The Act generally does not apply to foreign corporations, including foreign subsidiaries of U.S. corporations. See *Dooley v. United Technologies Corp.*, 803 F. Supp. 428, 239 (D.D.C. 1992) (because the legislative history of the FCPA reflects Congress' concern for international comity, whether dealing with "a U.S.-owned foreign subsidiary or a foreign corporation," the FCPA did not reach the British corporations which were defendants in the case). See H.R. Rep. No. 640, 95th Cong., 1st Sess. (1977) (the House Report's proposal to allow the FCPA to reach foreign subsidiaries was not adopted). The assumption that foreign corporations are exempt is further supported by the Committee on Banking, Housing and Urban Affairs' Report which states that the FCPA would not apply to "all overseas payments." The Committee described a hypothetical situation in which a foreign national made a payment for a foreign subsidiary without the use of U.S. interstate commerce, and without informing the U.S. company of the transaction; it concluded that this example would fall outside the FCPA's reach. S. Rep. 114, 95th Cong., 1st Sess. (1977), Foreign Corrupt Practices and Domestic and Foreign Investment Disclosure Acts of 1977.

47. See *Dooley*, 803 F. Supp. at 439. The District Court of the District of Columbia interpreted the following statement in the legislative history: "[F]oreign nationals or residents can be liable in certain circumstances." The court held that this statement meant Congress intended for the FCPA to apply to foreign individuals, but not to foreign corporations. The Saudi Arabian defendants in *Dooley* were therefore subject to the FCPA because they were foreign individuals who were allegedly acting as agents for a domestic concern, were within the United States and satisfied the minimum contacts needed for a U.S. court to assert jurisdiction. The court reasoned that "[o]nce a foreign individual is found to be under the jurisdiction of a U.S. court, concerns about international comity are limited". *Id.* at 440.

abroad.⁴⁸ Moreover, a U.S. parent corporation would be liable for illegal FCPA payments made by its subsidiary if U.S. prosecutors could prove that the U.S. parent was aware of, sanctioned or authorized the payments.⁴⁹ Foreign governmental officials are not subject to prosecution in the U.S. either for violating the FCPA or conspiring to violate the FCPA.⁵⁰

D. COLLATERAL CONSEQUENCES

In addition to criminal liability under the FCPA, the payment of bribes to foreign governmental officials can have important collateral consequences. The payment of a bribe can be a violation of other criminal laws in addition to the FCPA.⁵¹ If U.S. government funds are involved (e.g., as in the case of the Foreign Military Sales program), a person disclosing that payment to the U.S. government could receive an award under the Whistleblower Protection Act of 1989.⁵² FCPA violations can also jeopardize the defendant's contracts with the federal government.⁵³ For large defense contractors, disbarment from U.S. government contracts could well be the most significant deterrent to engaging in conduct proscribed under the FCPA.

Illegal FCPA payments also have U.S. tax consequences. In calculating its taxable income, a U.S. taxpayer is not permitted to deduct any payments made in violation of the FCPA.⁵⁴ Even illegal payments made by foreign corporations who are not U.S. taxpayers

48. The Act does not define "resident", thereby creating substantial ambiguity as to the scope of coverage for non-citizens. This omission is particularly puzzling in view of the fact that under U.S. law "resident" is defined in different ways for different purposes. Cf., I.R.C. § 7701(b) for the definition of "resident" for income tax purposes; Treas. Reg. § 20.0-1(b) prescribing those residents subject to U.S. estate and gift taxes (i.e., domiciliaries); and resident according to the immigration laws means "the general place of abode."; and 8 U.S.C. § 1101 (a) (30), (33) defining "residence" for immigration purposes.
49. An authorized payment would satisfy the intent standard needed to incriminate an issuer or domestic concern for indirect bribery. See §§ 78dd-1 (a)(3), 78dd-2 (a)(3). Furthermore, if the U.S. company is an issuer, the government has the option of prosecuting it for a failure to maintain the proper accounting controls required in §78(m)(b)(B). S. REP. No. 114, 95th Cong., 1st Sess., (1977).
50. *United States v. Castle*, 925 F.2d 831 (5th Cir. 1991) (affirming the dismissal of an indictment of foreign governmental officials under the general conspiracy statute for conspiracy to violate the FCPA on grounds that Congress did not intend that foreign governmental officials have liability under the FCPA).
51. See Section III *infra* which discusses other criminal statutes which could apply.
52. Pub. L. No. 101-12, 103 Stat. 16 (1989) (codified as amended in scattered sections of 5 U.S.C.).
53. See *Lockheed Faces Possible Action by Air Force*, Wall St. J., June 24, 1994, A12; *Lockheed Barred from Exporting Hercules*, Fin. Times, August 26, 1994, 1, col 3; and *Lockheed Unit will be Denied Permits for Exports on Illegal Payment Charge*, Wall St. J., August 25, 1994, B1, col 3. See Sheldon Krantz, *In a Hanging Mood*, Mar/Apr. 1994, Bus. L. Today 5.
54. I.R.C. §162(c)(1). The tax implications of the payment of foreign bribes offers an unique insight into how different countries view actions illegal under U.S. law pursuant to the FCPA. For example, Dutch tax law permits a Dutch taxpayer to deduct bribes, tips and kickbacks in calculating taxable income for Dutch tax purposes. Article 7, Dutch Income Tax Act of 1964. Under Dutch law, two criteria must be met in order for a taxpayer to deduct the payment. First, the taxpayer must be considered to be trustworthy. Second, the taxpayer must show that the circumstances in

may have a U.S. tax impact. For example, a United States shareholder of a foreign corporation which is a Controlled Foreign Corporation (CFC)⁵⁵ must include in income as Subpart F Income⁵⁶ any illegal bribes, kickbacks, or other payments paid by the CFC during the taxable year.⁵⁷ Included as Subpart F Income are those payments made by the CFC which would be "unlawful under the [FCPA] if made by a United States Person." Further, a CFC may not reduce its earnings and profits for U.S. tax purposes by the amount of the unlawful FCPA payment.⁵⁸

E. AFFIRMATIVE DEFENSES

There are two affirmative, but limited, defenses to the FCPA. First, an affirmative defense exists if the payment is legal under the written laws of the foreign country.⁵⁹ Since it is unlikely that a foreign country's laws would sanction bribery of its officials, this exception is of little importance. The second affirmative defense is for a "reasonable and *bona fide* expenditure," such as travel and lodging expenses; this payment can result from either "promotion, demonstration, or explanation of products or services," or from carrying out a contract with a foreign government.⁶⁰

F. GUIDELINES AND OPINIONS BY THE ATTORNEY GENERAL

In response to criticism from the U.S. business community that the Act was unworkable,⁶¹ the 1988 amendments recommended that the Attorney General issue guidelines for the FCPA, and directed the Attorney General to provide advisory opinions from time to time in response to inquiries by companies who are concerned with whether prospective conduct will violate the Act.⁶² As of 1990, the Attorney General had not issued any

Note 54, continued

the foreign country are such that it is likely that the taxpayer would be required to make the payment in order to achieve sound business goals (thereby increasing the taxable profits in The Netherlands). Disclosing the identity of the beneficiary of the payment is not a condition precedent under Dutch law to deducting the payment. It is the authors' understanding that, in practice, Dutch taxpayers discuss the tax treatment of the payments with Dutch tax authorities before the payments are made in order to obtain advance approval for the deduction. In contrast, under German law, bribes and kickbacks may be deducted in calculating taxable German income; however, the identity of the payee of the bribe or other illegal payment must be disclosed to the German tax authorities.

55. See I.R.C. § 951 for a definition of "Controlled Foreign Corporation".

56. See I.R.C. § 952 defining Subpart F Income and I.R.C. §-951(a)(1)(A) requiring a current inclusion of Subpart F Income in the U.S. taxable income of a United States shareholder.

57. I.R.C. § 952(a)(4).

58. I.R.C. § 964(a).

59. 15 U.S.C. §§ 78dd-1 (c)(1) (issuers), 78dd-2 (c)(1) (domestic concerns) (1988).

60. 15 U.S.C. §§ 78dd-1 (c)(2) (issuers), 78dd-2 (c)(2) (domestic concerns) (1988) (emphasis in original).

61. See Judith L. Roberts, *Revision of the Foreign Corrupt Practices Act by the 1988 Omnibus Trade Bill: Will it Reduce the Compliance Burdens and Anticompetitive Impact?* 1989 B.Y.U.L. Rev. 491.

62. The OTCA removed the Attorney General's discretion to deny an advisory opinion, and imposed on the Attorney General a 30 day time constraint to issue an advisory opinion after receiving a completed request. 15 U.S.C. §§ 78dd-1 (e)(1) (issuers), 78dd-2 (f)(1) (domestic concerns) (1988).

guidelines interpreting the FCPA,⁶³ however the Attorney General has issued several advisory opinions.⁶⁴ When the Attorney General issues an advisory opinion, the opinion creates a "rebuttable presumption" that the conduct specified in the request complies with the antibribery provisions of the FCPA.⁶⁵ This presumption "may be rebutted by a preponderance of the evidence."⁶⁶

II. Standard of Intent

The FCPA's antibribery provisions prohibit both direct and indirect bribery payments which are made "corruptly in furtherance of "securing business."⁶⁷ The corrupt standard of intent "connotes an evil motive or purpose," such as "an intent to wrongfully influence the recipient."⁶⁸ If a defendant "intends" to bribe a foreign governmental official in order to obtain or retain business, the corrupt nature of the act will be presumed.⁶⁹ Further, as is the case with most other federal criminal statutes, one is not required to be successful in the bribery attempt to have liability under the Act.⁷⁰

Perhaps the most ambiguous aspect of the FCPA is the requisite intent needed to constitute indirect bribery: an offense occurs if one makes a payment "while knowing" it would subsequently be used to bribe a foreign official to obtain, retain or direct business. Under the FCPA, the "knowing" standard of intent is fulfilled if: "(i) such person is aware that such person is engaging in such conduct, that such circumstance exists, or that such result is substantially certain to occur; or (ii) such person has a firm belief that such cir-

63. 55 Fed. Reg. 28,694 (July 12, 1990).

64. Through October, 1993, the Attorney General had issued twenty-three (23) advisory opinions.

65. 15 U.S.C. §§ 78dd-1 (e)(1) (issuers), 78dd-2 (f)(1) (domestic concerns) (1988).

66. *Id.*

67. 15 U.S.C. §§ 78dd-1 (a) (issuers), 78dd-2(a) (domestic concerns) (1988).

68. S. REP. No. 114, 95th Cong., 1st Sess., (1977); See H.R. REP. No. 640, 95th Cong., 1st Sess., (1977); See *United States v. Liebo*, 923 F.2d 1308, 1312 (8th Cir. 1991) (the court upheld a jury instruction charging that an act is done corruptly under the FCPA if done voluntarily and intentionally, and with a bad purpose to accomplish either an unlawful result or lawful result by unlawful means).

69. See *Liebo*, 912 F.2d at 1312. Query whether one could ever bribe a foreign governmental official to obtain business, but not do so "corruptly" with the meaning of the FCPA. Consider the following. A U.S. construction company contracts to construct a road in a foreign country for a mining operation. The road will cross territory governed by a tribal chief hostile to the mining operation. Without the chief's blessings, the construction company will undoubtedly face added difficulties in constructing the road. When approached by the U.S. construction company, the chief indicates that he desires to have a small road constructed to his village. The road will traverse lands owned personally by the chief, and would obviously enhance the value of that property. On the other hand, all of the inhabitants of the village will also benefit by having a better means of transportation. If the construction company builds the village road, it is clear that it has paid something of value to a foreign governmental official in order to obtain or retain business. On the other hand, because the road will also bring great benefit to the entire village population, it is questionable (and perhaps doubtful) that a federal prosecutor could make a case that this payment was "corrupt".

70. H.R. REP. No. 640, 95th Cong., 1st Sess., (1977).

cumstance exists or that such result is substantially certain to occur.”⁷¹ Under the FCPA as originally enacted, a person committed an offense if a payment was made while “knowing, or having reason to know” that the prohibited bribery actions would result from the transaction.⁷² Because the “reason to know” standard proved to be unworkable and vague,⁷³ the 1988 Amendments changed the intent standard to “knowing.”⁷⁴ However, the exact meaning of the “knowing” standard has yet to be determined.

Many U.S. persons and businesses fail to appreciate the breadth of the “knowing” standard. The “knowing” standard includes not only actual knowledge, but also intent which, “while falling short of what the law terms ‘positive knowledge,’ nevertheless evidence[s] a conscious disregard or deliberate ignorance of known circumstances that should reasonably alert one to the high probability of violations of the Act.”⁷⁵ By inferring knowledge through a “high probability test,”⁷⁶ Congress addressed what is known as the “head in the sand” problem, in which companies are “willfully blind”⁷⁷ or deliberately ignorant of warning signs of an illegal transaction in order to avoid acquiring the requisite knowledge.⁷⁸

The willful blindness standard is entrenched in U.S. criminal law.⁷⁹ In fact, the willful

71. 15 U.S.C. §§ 78dd-1 (f)(2)(A) (issuers), 78dd-2 (h)(3)(A) (domestic concerns) (1988). The FCPA further states that when “knowledge of the existence of a particular circumstance is required for an offense, such knowledge is established if a person is aware of a high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist.” 15 U.S.C. §§ 78dd-1 (f)(2)(B) (issuers), 78dd-2 (h)(3)(B) (domestic concerns) (1988).

72. The FCPA of 1977, 15 U.S.C. §§ 103(a) (issuers), 104(a) (domestic concerns) (1977).

73. See, Roberts, note 61 *supra* (stating that the FCPA’s “lack of clarity, which critics claim imposes an unduly oppressive compliance burden on U.S. business” is partly to blame for its anticompetitive impact). See Gary M. Elden and Mark S. Sableman, *Negligence Is Not Corruption: the Scierter Requirement of the Foreign Corrupt Practices Act*, 49 GEO. WASH. L. REV., 819 (1981) (illustrating the confusion surrounding the meaning of intent under the FCPA with its analysis of the various interpretations of the “reason to know” standard).

74. 15 U.S.C. §§ 78dd-1 (f)(2) (issuers), 78dd-2 (h)(3) (domestic concerns) (1988).

75. H.R. Conf. Rep. No. 576, 100th Cong., 2d. Sess. (1988).

76. The legislative history to the 1988 Amendment describes the “high probability” test in stating that “knowledge of a fact may be inferred where the defendant has notice of the high probability of the existence of the fact and has failed to establish an honest, contrary disbelief.” H.R. Conf. Rep. No. 576, 100th Cong., 2d. Sess., (1988).

77. “A court can properly find willful blindness only where it can almost be said that the defendant actually knew. He suspected the fact; he realized its probability; but he refrained from obtaining the final confirmation because he wanted in the event to be able to deny knowledge.” Glanville Williams, *Criminal Law* § 57, at 159 (2d ed. 1961).

78. H.R. Conf. Rep. No. 576, 100th Cong., 2d. Sess., (1988).

79. The willful blindness concept is no stranger to the judicial arena. See Jonathan L. Marcus, *Model Penal Code Section 2.02(7) and Willful Blindness*, 102 Yale L. J. 2231, 2232 n.5 (1993) (for a list of the cases which illustrate that all federal circuits have utilized the willful blindness doctrine). See also Comment, *Willful Blindness as a Substitute for Criminal Knowledge*, 63 Iowa L. Rev. 466, 471 (1977) (stating that the doctrine of willful blindness, which originated in England, gained acceptance in the United States in the 1960s); See also J. Ll. J. Edwards, *The Criminal Degrees of*

blindness concept has been incorporated into the Model Penal Code.⁸⁰ The willful blindness standard has been applied in numerous areas of criminal law. For example, laws making it an offense to “knowingly” make false statements to government agencies,⁸¹ or to authorized firearms dealers for merchandise,⁸² have not required actual knowledge. Similarly, U.S. Courts of Appeals consistently have upheld jury instructions which state that “a person who makes a statement with reckless disregard of the truthfulness of the statement and with the conscious purpose to avoid learning the truthfulness of the statement, is deemed to have knowledge of the statement and its truthfulness or lack thereof.”⁸³

Courts also have not required prosecutors to prove that defendants had actual knowledge in drug cases. *United States v. Jewell*⁸⁴ is a drug transportation case which, as the first Ninth Circuit case to comprehensively address willful blindness, is a leading precedent for the doctrine. Jewell, the defendant, accepted a \$100 offer from “Ray”, a stranger, to drive a car from Tijuana, Mexico across the border into the U.S. Jewell testified that although he accepted Ray’s offer immediately after he refused Ray’s attempt to sell him marijuana, he was unaware of the presence of the drugs in the car which he agreed to transport.⁸⁵ The U.S. Court of Appeals for the Ninth Circuit upheld the inclusion of the willful blindness doctrine in the jury instructions, stating that “deliberate

Note 79, continued

Knowledge, 17 Mod. Law Rev., 294, 298 (1954) (an English judicial authority states that “[f]or well-nigh a hundred years, it has been clear from the authorities that a person who deliberately shuts his eyes to an obvious means of knowledge has sufficient *mens rea* for an offence based on such words as ... “knowingly.”).

80. The “high probability test of the Model Penal Code states: “when knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it did not exist.” Model Penal Code § 2.02(7) (Official Draft in 1962, Revised in 1985). The FCPA’s legislative history follows the “high probability” concept advocated in the Model Penal Code. In addition, the Model Penal Code’s description of the high probability test has been cited approvingly. *See, e.g., United States v. Bright*, 517 F.2d 584, 587 (1975), which supports a “balanced” jury instruction that included the high probability test in conjunction with “its negation by an actual belief of the non-existence of the fact” to determine when one has the requisite knowledge.

81. 18 U.S.C.S. § 1001 (1979 & Supp. 1994).

82. 18 U.S.C.S. § 922 (6) (1979).

83. *United States v. Evans*, 559 F.2d 244, 246 (5th Cir. 1977), *cert. denied*, 434 U.S. 1015 (1978) (in which the defendant appealed a conviction for fraudulent submission of Medicare claims); *See also United States v. Abrams*, 427 F.2d 86 (2nd Cir. 1970), *cert. denied*, 400 U.S. 832 (1970) (in which a defendant-attorney contested an inference that he knowingly made false statements to the Immigration and Naturalization Service on an affidavit relating to alien’s application for an extension of stay in the United States); *See also United States v. Egenberg*, 441 F.2d 441 (2nd Cir. 1971), *cert. denied*, 404 U.S. 994 (1971) (in which a certified public accountant was prosecuted for knowingly submitting false statements on departing alien income tax returns and for paying bribes to tax technicians who reviewed his returns). For cases regarding the illegal acquisition of firearms, *see, e.g. United States v. Wright*, 537 F.2d 1144 (1st Cir., 1976), *cert. denied*, 429 U.S. 924 (1976); *United States v. Thomas*, 484 F.2d 909 (6th Cir. 1973), *cert. denied*, 414 U.S. 912 (1973).

84. 532 F.2d 697 (9th Cir. 1976) (en banc), *cert. denied*, 426 U.S. 951 (1976).

85. *Id.* at 698-99.

ignorance and positive knowledge are equally culpable.”⁸⁶ The *Jewell* instruction has been followed in subsequent controlled substance cases in other circuits: it has been “commonly used” in the Second Circuit,⁸⁷ and the Seventh Circuit has stated that the instruction is appropriate “when it addresses an issue reasonably raised by the evidence.”⁸⁸ However, the Ninth⁸⁹ and Tenth⁹⁰ Circuits have limited the situations in which the *Jewell* instruction can be used. Whether the *Jewell* instruction is “commonly”⁹¹ or “sparingly”⁹² used, the case law illustrates that “[c]onstruing ‘knowingly’ in a criminal statute to include willful blindness to the existence of a fact is no radical concept in the law.”⁹³

The willful blindness concept does not mean that a U.S. person or entity will be automatically liable for all bribes of foreign governmental officials that occur indirectly. For example, it is unlikely that either recklessness or negligence alone would infer the requisite degree of knowledge for liability under the FCPA.⁹⁴ Academics have noted the need for

86. *Id.* at 700. *But see*, the dissenting opinion in *Jewell*, which was written by Judge Anthony M. Kennedy (now Justice Kennedy). Judge Kennedy stated that a problem with the willful blindness doctrine is its “uncertain[ty] in scope”: “[t]here is disagreement as to whether reckless disregard for the existence of a fact constitutes willful blindness or some lesser degree of culpability.” *Id.* at 706.

87. *United States v. Rodriguez*, 983 F.2d 455, 458 (2d Cir. 1993) (in deciding whether a “conscious avoidance” instruction is merited, “precise consideration” is given to the content of the instruction, making it clear to jurors that knowledge is to be inferred “only when persuaded beyond a reasonable doubt that the defendant was aware of a high probability of the fact in dispute and consciously avoided confirming that fact”). *See United States v. Fletcher*, 928 F.2d 495, 502, *cert. denied*, 112 S. Ct. 67 (1991).

88. *United States v. Diaz*, 864 F.2d 544, 549 (7th Cir. 1988). *See United States v. Anzoulatos*, 962 F.2d 720 (7th Cir. 1992) (where the Court of Appeals upheld jury instructions based on the *Jewell* reasoning in determining whether a car salesman knowingly violated a money laundering statute, 18 U.S.C.A. § 1956 (a)(1)(B) when selling vehicles to drug dealers with car titles which were not in the buyers names).

89. *See United States v. Sanchez-Robles*, 927 F.2d 1070, 1073 (9th Cir. 1991), which states that the *Jewell* instruction should not be used when there is either actual knowledge, or when there are “no suspicious circumstances surrounding the activity beyond direct evidence of the illegality itself.” *Sanchez-Robles* referred to *United States v. Garzon*, 688 F.2d 607 (9th Cir. 1982) to illustrate a circumstance where the defendant lacked knowledge of the illegal activity, thus making the *Jewell* instruction inappropriate: because the defendant voluntarily disclosed the contents of a package of cocaine to an undercover agent, and thus did not show any evidence of willful blindness to the contents, the deliberate ignorance instruction was not used.

90. *See United States v. Manriquez Arbizu*, 833 F.2d 244, 248-49 (10th Cir. 1987) (stating that the “willful blindness” instruction is inappropriate if the evidence points “solely to direct knowledge of criminal venture”).

91. *See Rodriguez*, 983 F.2d at 457.

92. *See Sanchez-Robles*, 927 F.2d at 1073.

93. *United States v. Sarantos*, 455 F.2d 877, 881 (2nd Cir. 1972).

94. A logical inference from the 1988 amendments’ increase in the standard of intent to “knowing” from “reason to know” is that a reckless failure to investigate a situation would not constitute an offense under the FCPA. This interpretation is also supported by the Conference Committee’s decision not to adopt the proposal set forth by the House of Representatives to include “reckless disregard” as an incriminating standard of intent. H.R. Conf. Rep. No. 576, 100th Cong., 2d.

parameters on the willful blindness doctrine. Otherwise, a significant erosion of the knowing standard likely will occur "leaving it essentially synonymous with the 'reason to know' or 'mere negligence standards.'"⁹⁵ For the FCPA defendant, the problem with the willful blindness concept is, however, that the underlying offer to pay or the actual payment to a foreign governmental official to receive or retain business is *intentional*. The only question on the indirect front is whether the requisite intent filters up the hierarchy to taint a person liable under the FCPA — a U.S. citizen, resident or domestic concern.

To further exacerbate the uncertainty surrounding the standard of intent, the legislative history to the 1988 amendment regarding the intent standard suggests that a court should, when construing whether willful blindness exists in a particular case, bifurcate the intent standard by applying "the appropriate 'mix' of subjective and objective standards implied in such a carefully structured test."⁹⁶ There are no published decisions applying a willful blindness test in a FCPA case which appears to be due to the fact that no indirect violations of the FCPA have been prosecuted.⁹⁷ Thus, the weight which a court will instruct a jury to place on objective facts, as opposed to the subjective issue of what one actually believed, is far from conclusive. In the meantime, companies are left to battle factual situations which could be viewed objectively in hindsight. As a result, they must put policies and procedures in place to avoid illegal payments being made directly or indirectly to foreign governmental officials in the first instance, and if such a payment does occur, to perhaps mitigate any inference that they did have the requisite intent.

Note 94, continued

Sess., (1988). Furthermore, this explanation of the knowing standard has been used in other areas of the law. See *United States v. Bright*, 517 F.2d 584, 588 (2d Cir. 1975) (in which a lower court's conviction for mail fraud was reversed and remanded because the jury was instructed that requisite knowledge was satisfied if the defendant acted either with "reckless disregard" or with a "conscious effort to avoid learning the truth"; the U.S. Court of Appeals for the Second Circuit concluded that the jury instruction should have stated the elements of knowledge in the conjunctive, and not in the disjunctive, in order to explain that mere foolishness was insufficient to meet the knowledge standard). See *United States v. Jacobs*, 475 F.2d 270, 287 (2d Cir., 1973), *cert denied sub nom Lavelle v. United States*, 414 U.S. 821 (1973) (in deciding whether a defendant knew treasury bills in his possession were stolen, the court stated that "guilty knowledge cannot be established by demonstrating mere negligence or even foolishness").

95. Roberts, note 61 *supra* at 503 n.57 (citing to Comment, *Willful Blindness as a Substitute for Criminal Knowledge*, 63 Iowa L. Rev. 466, 471 (1977), which noted that the increased use of the willful blindness doctrine in drug abuse cases to ease "the prosecutorial burden of proving the essential element of knowledge" could compromise the knowing requirement).

96. An "objective standard" is used in determining whether the circumstances alerted one to a "high probability" that one would violate the Act. Whereas, in inferring whether one actually believed a violation would result, a "subjective standard" is used. H.R. Conf. Rep. No. 536, 100th Cong., 2d. Sess., (1988), at 374. See Roberts, *supra* note 61., at 502.

97. *But see, U.S. v. Harris Corporation*, No. CR 90-0456 CAL (N.D. Cal. filed August 31, 1990) in which the government alleged as an overt act in an FCPA indictment that one co-defendant, a consultant, had told another co-defendant that he (the consultant) had "an in" with the Government of Colombia and that the co-defendant would "have to look the other way" with respect to payments to Colombian officials.

III. Is Due Diligence Necessary?

Another ambiguous aspect of the FCPA is whether there is a due diligence defense to FCPA violations which would allow a company to claim that a conviction is not warranted because it had established a comprehensive compliance policy to prevent violations of the FCPA. An analysis limited to the statutory language and legislative history of the FCPA leads one to conclude that a court would find a due diligence defense irrelevant, and thus would not allow evidence of due diligence to be introduced at trial. The text of the FCPA does not address or establish a due diligence defense. Furthermore, Congress considered and rejected this concept while devising the FCPA's 1988 amendments.⁹⁸

Despite the omission of the due diligence defense from the FCPA, companies should not assume that the exercise of due diligence, including the adoption of policies and procedures designed to avoid FCPA liability, is not relevant. First, it appears that in a situation involving the payment of a bribe by a non-management level employee or third party, that due diligence and policies and procedures would mitigate entity liability if properly designed and followed within a company.⁹⁹ By showing that the alleged actions were against company policy and procedures, corporate intent becomes more difficult to infer.¹⁰⁰ Second, and equally as important, a well-developed program reduces the chances for FCPA violations to occur in the first instance, and thus alleviates the likelihood for a company to be held vicariously liable.

A preventative policy is particularly compelling with respect to violations which occur as a result of payments by agents and other third parties. An effective policy prescribes procedures for a company to follow in hiring agents and other third parties, incorporates an educational program to inform them of the FCPA and its ramifications, and includes procedures for insuring that the policy is not only implemented, but is also respected and followed.¹⁰¹ In fact, it is difficult to imagine a U.S. company routinely doing business through foreign agents, representatives and other third parties without having an effective FCPA policy in place. If a company has an effective policy in place, it is arguable that the company could not have had the requisite intent needed to violate the FCPA, assuming, of course, that the policy is designed also to avoid willful blindness situations. On the other hand, due diligence cuts both ways. If the company has a policy in place, but is consciously ignorant of matters brought to its attention, the FCPA policy might prove the prosecutor's case in that given the objective factors coupled with the company's policy, the company should have known that FCPA payments would occur.

A strong, effective FCPA policy also might play a protective role. Although the case

98. H.R. Conf. Rep. No. 576, 100th Cong., 2d. Sess., (1988). The House Committee's proposal, which was rejected, had prescribed a "safe harbor" defense for FCPA violations in which a company would not be liable for FCPA violations by its employees or agents "if it had established procedures "reasonably expected to prevent and detect violations." *Id.*

99. For a differing opinion, see Seth Maxwell, *The Foreign Corrupt Practices Act and Other Arguments Against a Due Diligence Defense to Corporate Criminal Liability*, 29 UCLA L. Rev., 447, 482-83 (1982), which used case law and legal theories to disprove the due diligence defense.

100. See Kep Schlegal, *Just Desserts For Corporate Criminals*, at 85 (1990) (stating that a showing of due diligence should remove corporate intent causing "the individual actor, and not the corporation itself, [to] be the party subject to blame").

101. See Section V below for the application of a FCPA Policy.

law on the FCPA is limited, the cases which the Securities and Exchange Commission (SEC) and Department of Justice (DOJ)¹⁰² have prosecuted have involved egregious FCPA violations.¹⁰³ As a result, in many of these cases the defendants have entered into consent decrees and pleaded guilty without a trial.¹⁰⁴ One could infer that, perhaps federal prosecutors exercise prosecutorial constraint in pursuing non-egregious FCPA cases, in particular those cases involving indirect situations. On the other hand, the paucity of FCPA actions might be driven by other factors. In the typical fact pattern, most of the criminal activity occurs outside of the United States. Thus, prosecutors face the obstacles inherent in prosecuting an extraterritorial case. These include the formidable task of obtaining the cooperation of foreign officials in order to prove a case, and discovering information which often is located overseas. Because of the burdens involved, prosecutors may be pursuing a wise policy of focusing on those FCPA cases where the intent to violate the FCPA is more apparent and the wrongful conduct more flagrant.

Due diligence implemented through an enforcement policy is also a factor in calculating the sentence for a convicted company. If a company has established "an effective program to prevent and detect violations of law," the Federal Sentencing Guidelines provide for the subtraction of three points from the culpability scale which determines the severity of a sentence.¹⁰⁵ Thus, even if evidence of due diligence procedures are not admissible in the trial of a FCPA case, this evidence is clearly relevant in sentencing.

Evidence of due diligence also might be relevant for other purposes. The current prosecutorial approach of charging defendants with every imaginable offense within the

102. Responsibility for bringing civil and criminal suits for violations of the antibribery provisions is shared between the SEC and the DOJ. The SEC is responsible for actions against issuers while the DOJ has jurisdiction over domestic concerns. 15 U.S.C. §§ 78ff, 78dd-2 (g)(1). Although the SEC investigates criminal actions against issuers, generally the DOJ is in charge of prosecuting the criminal cases. See Notes, Robert S. Levy, *The Antibribery Provisions of the Foreign Corrupt Practices Act of 1977: Are They as Valuable as We Think?* 10 Del. J. Corp. L. 71, 77 (1985) (citing 452 Sec. Reg. L. & Rep. (BNA) A-3 (1978)). Finally, the SEC has jurisdiction over both the civil and criminal actions for violating the FCPA's accounting provisions. 15 U.S.C. § 78m(b).
103. See, e.g., Final Judgment of Permanent Injunction, *United States v. Carver* (S.D. Fla. entered Apr. 9, 1979), reprinted in 2 FCPA Rep. at 647 (Dec. 31, 1982) (in which a \$1,500,000 payment was directly made to the Director of Petroleum Affairs of Qatar to obtain a drilling concession from Qatar's government; the transaction was not difficult to prove because the defendants contacted the United States Ambassador to Qatar for assistance in renegotiating the concession).
104. See, e.g., *United States v. Silicon Contractors, Inc.*, Criminal No. 85-251 (E.D. La., June 27, 1985) (in which Silicon agreed to a permanent injunction and to a \$150,000 fine in settling criminal charges for participating in the bribery of Mexican officials to gain a contract).
105. 18 U.S.C.S. Appx. § 8C2.5 (f) (1994). An exception is made for the culpability scale reduction if the offense was committed or condoned by "an individual within high-level personnel of the organization, a person within high-level personnel of the unit of the organization within which the offense was committed where the unit had 200 or more employees, or an individual responsible for the administration or enforcement of a program to prevent and detect violations of law." *Id.*

scope of the defendant's alleged conduct also is prevalent in the FCPA area. A U.S. exporter or importer, who takes part in a fraud against a foreign government by means of an illegal payment to a foreign official, is in violation of federal laws regarding the making of reports and statements to the U.S. government.¹⁰⁶ Potentially, foreign bribery also can be prosecuted under federal statutes which prohibit fraud through the use of the United States mail or wire communications, as well as under the antitrust laws.¹⁰⁷ In addition, foreign bribery can be prosecuted under the Travel Act,¹⁰⁸ which prohibits the travel or use of an instrumentality in interstate commerce with the intent to perform an unlawful activity.¹⁰⁹ Finally, the Racketeer Influenced and Corrupt Organizations Act (RICO),¹¹⁰ with its formidable 20 year maximum prison sentence, can also be invoked to prosecute a company for foreign bribery.¹¹¹

In a given case, a prosecutor might be compelled to prosecute the offenders under other criminal statutes. For example, violations of other statutes might be easier to prove than a violation of the FCPA. Evidence needed to prove other criminal violations might be available in the United States, while the evidence necessary to obtain a FCPA conviction could be unattainable in a foreign country. As these other statutes likely will require different elements to constitute an offense, a court might allow into evidence a company's due diligence standards and procedures with respect to the intent standard.

IV. FCPA Policy and Procedures

The implementation of FCPA policies and procedures for a due diligence program should be tailored to fit the needs of each company or business. On one end of the spectrum, a very small trading company can adopt a basic statement that it follows the FCPA, and incorporate simple FCPA representations in its agreements as appropriate. In contrast, a diversified multinational with offices in several countries is required to take a different approach. The Federal Sentencing Guidelines set forth standards to determine what constitutes an effective compliance program, recognizing that an effective program will vary from company to company.¹¹² Among the factors to take into consideration in

106. Baruch, note 20 *supra* at 76-78 (referring to four statutes used by the DOJ to prosecute false statements and reports, including 18 U.S.C. § 1001, which prohibits "false official statements". See, e.g., *Liebo*, 923 F.2d 1308 (1991) (where *Liebo* appealed convictions for making a false statement to a government agency in violation of 18 U.S.C. § 1000 in addition to appealing his conviction for violating the bribery provisions of the FCPA).

107. Baruch, note 20 *supra* at 49 (citing to the mail and wire fraud statutes, 18 U.S.C. §§ 1341, 1343, and to antitrust laws under the Sherman Act, 15 U.S.C. §§ 1, 2).

108. 18 U.S.C. § 1952.

109. Baruch, note 20 *supra* at 57.

110. 18 U.S.C. §§ 1961-1968 (1991).

111. Baruch, note 20 *supra* at 54. See *U.S. v. Young & Rubicam, Inc.*, 741 F. Supp. 334 (D. Conn., 1990) (illustrating that the government does not necessarily pursue the crimes most directly connected to the alleged actions, the U.S. District Court of Connecticut upheld an indictment which did not charge defendants with substantive violations of the FCPA but instead used alleged FCPA violations as a basis for violating the Travel Act; the violations of the Travel Act then functioned as predicates for charges of thirty-three RICO offenses).

112. 18 U.S.C.S. Appx. § 8A1.2 cmt. (k) (1994).

designing a program are: (i) the size of the organization; (ii) the likelihood that certain offenses may occur because of the nature of its business; and (iii) the prior history of the organization.¹¹³

The FCPA policy must not only include an appropriate policy standard, but also implement, monitor and enforce its program.¹¹⁴ At a minimum, the FCPA policy must incorporate compliance standards and procedures which are "reasonably capable of reducing the prospect of criminal conduct."¹¹⁵ In other words, a company must design and implement its compliance program in such a manner that the program effectively self-polices the organization. Further, given the standard of intent under the FCPA, the program must be designed to take into account the willful blindness concept. A multinational might incorporate the FCPA procedures into broader business ethics, insider trading, antitrust or anti-boycott rules programs. An effective compliance program would include the following elements.

A. THE FCPA POLICY STATEMENT

The FCPA policy statement is the cornerstone of a FCPA compliance program. The policy statement should, of course, affirm that it is the company's position that its business activities are conducted in compliance with the FCPA. The policy statement should explain the FCPA in layman's terms. The draftsman must keep in mind that the company's employees will rely upon this explanation.

The policy should incorporate procedures for compliance with the FCPA. For example, the policy should include procedures for due diligence with respect to prospective partnerships and joint ventures, and the parties who have a financial interest in those entities. Other issues the policy should address include gifts given and payments made by the company and its employees, political contributions made by the company's employees or its advisors, and the proper documentation for reimbursement of out-of-pocket expenses and costs incurred with respect to foreign-related business.

For virtually any company engaged in international business, an effective policy must include procedures to govern the appointment of and relationship with agents, representatives, consultants, advisors, "go betweens" and other third parties. At the outset of any relationship with these third parties, the company first must ascertain with whom it is dealing.¹¹⁶ A comprehensive due diligence review must be made prior to entering into each new relationship. In addition, the policy should require that all contracts with third parties include provisions regarding FCPA compliance.

Issuers must also develop and implement a policy to assure accounting records are accurately maintained. The accounting controls require accurate recordkeeping in order to prevent and detect FCPA violations which might be manifest in the form of slush funds, off-book accounts or through the improper classification of expenses. In order to insure that the corporate transactions are accurately recorded, a company should take steps to document all expenditures through means such as receipts, invoices, checks, or statements. Furthermore, it is wise to implement a policy which requires at least two

113. *Id.*

114. 18 U.S.C.S. Appx. § 8A1.2 cmt. (k) (1994).

115. 18 U.S.C.S. Appx. § 8A1.2 cmt. (k)(1) (1994).

116. See *Lockheed Faces Possible Action by Air Force*, Wall St. J., June 24, 1994, A12.

management personnel to approve all major expenditures and to confirm that they are recorded correctly.

B. IMPLEMENTATION OF THE POLICY

A company not only must adopt an appropriate policy for its businesses, but also should confirm that the policy is properly implemented. Implementation consists of several components. First, the company must insure that the employees are aware of the policy. The company should adopt a means of disseminating the policy to its employees. Second, the company must assign a high level employee to oversee the implementation of the policy.¹¹⁷

Third, the company must communicate the policy to the employees.¹¹⁸ Communication can occur in many different ways. The company can hold training sessions to explain the FCPA policy and compliance program, and to give employees ample opportunity to ask questions. These training sessions could effectively use videos and hypothetical situations to illustrate the policy. Agents, representatives and other third parties with whom the company does business also could be required to participate in these training sessions. Similarly, the company can publish brochures and other explanatory materials on the policy. After the policy has been disseminated and explained, the company should obtain a statement from each employee certifying that he or she has reviewed and understands the policy.

Fourth, the company should consider participating in industry associations which address business ethics and FCPA issues, and which assist members in self-governing their FCPA compliance. One example of an industry which has effectively implemented a business ethics policy to address the FCPA is the defense industry. The Defense Industry Initiative on Business Ethics and Conduct was formed in 1986, and since that time it has been very active in defining, adopting, implementing and monitoring ethics and FCPA standards for the defense industry.¹¹⁹

Perhaps the most important implementation aspect of a FCPA policy is that it should become a part of the culture of the company. Lower level employees and third parties will deem a FCPA policy important only if they know that their superiors place a high degree of importance on compliance with the policy.

C. MONITORING COMPLIANCE

Under a self-policing approach to the FCPA, a company must take reasonable steps to achieve compliance with its policy.¹²⁰ Effective monitoring includes implementing systems designed to detect violations of the FCPA and implementing procedures for reporting and investigating suspected violations.

Systems designed to detect violations might include an annual certification program whereby those employees and third parties engaged in the international aspects of the company's business must participate. This certification program could require that the employees and third parties answer a questionnaire as to their activities for the previous

117. 18 U.S.C.S. Appx. § 8A1.2 cmt. (k)(2), (k)(3) (1994).

118. 18 U.S.C.S. Appx. § 8A1.2 cmt. (k)(4) (1994).

119. 1993 Annual Report to the Public and the Defense Industry, Defense Industry Initiative on Business Ethics and Conduct.

120. 18 U.S.C.S. Appx. § 8A1.2 cmt. (k)(5) (1994).

year, and certify that they have not violated the FCPA. In certain situations, the certification procedure alone will not be sufficient. Instead, in areas of sensitivity or in situations in which the company might question whether the employee or third party would complete the questionnaire and certification in a frank and candid manner, the company should consider having a high level employee interview those employees and third parties. In such cases, the company should adopt a guideline for questions for the interviewer to ask.

A successful monitoring program must include a means by which employees and third parties may discuss areas of concern and report suspected violations with high-level management and legal counsel.¹²¹ In a larger company, the avenue of reporting would most likely take the form of a "hotline" or other confidential telephone lines through which employees can leave messages to report their concerns. Given the sensitive nature of FCPA issues, companies should secure telephone answering machines and voice mail systems used for reporting concerns, and assign the employee and/or inquiry a code name to be used in all communications regarding a reported situation. The company also should determine how its legal counsel should interact with the monitoring program.¹²² In fact, it might consider requiring that all inquiries be made directly to its legal counsel.

A FCPA compliance program is not complete unless it provides for disciplinary action to be taken against those employees and third parties who violate its FCPA policy.¹²³ Determining the appropriate discipline and sanctions for an employee is wise for reasons other than the criminal liability aspect of the FCPA. If the egregious act actually has occurred, the company must address the question of whether it should disclose the conduct to the government. The FCPA does not contain any affirmative duty to disclose violations to the government; therefore, failure to disclose an offense should not result in further criminal liability to either the company or any U.S. person who may have committed an offense. However, there may be other considerations. For example, under the Sentencing Guidelines voluntary disclosure of a criminal act is a mitigating factor for a court to consider when imposing a sentence.¹²⁴

121. *Id.*

122. In any event, the company must take steps to preserve the attorney-client privilege with respect to all communications with its legal counsel in order to avoid discovery. If corporate counsel needs information from company employees in order to inquire whether a breach in corporate policy has occurred, the purpose of counsel conducting an investigation into actions which might have legal implications should be made clear to the employees. *Upjohn Co. v. United States*, 499 U.S. 383 (1981) (the Supreme Court extended the attorney-client privilege to communications between Upjohn Co. employees and in-house counsel in order to determine the nature and extent of questionable payments made by Upjohn's subsidiaries to foreign government officials). The attorney-client privilege exists with middle and lower-level employees, in addition to the high-level management who are actually liable, because the "privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound informed advice." *Id.* at 390. Although the communications are not discoverable, the attorney-client privilege does not extend to facts. *Id.* at 395.

123. 18 U.S.C.S. Appx. § 8A1.2 cmt. (k)(6) (1994).

124. A company can decrease its culpability score by five (5) points if it reports the offense to the proper governmental authorities in a timely manner, as well as cooperates with government investigations and affirmatively accepts responsibility for its actions. 18 U.S.C.S. § 8C2.5 (g)(1) (1994).

As a final component of a FCPA program, a company should consider installing an audit or self governance committee to oversee the implementation and operation of the program.¹²⁵ This committee should be charged with the responsibility for insuring that necessary systemic changes are made to the FCPA program to respond to problems the company encounters in the FCPA area.

V. A FCPA Compliance Program in the Real World

The FCPA prohibitions are fairly simple. The difficulty U.S. companies encounter is in applying its prohibitions to the real world scenarios which arise in their day-to-day business activities. The U.S. company must exercise constant vigilance in ensuring that its policies and procedures are adequate for its operations and that these programs are consistently followed. Consider the following hypothetical situations involving U.S. companies.¹²⁶

A. THE THIRD PARTY RELATIONSHIP WITH FOREIGN GOVERNMENT

Acme Tool, a U.S. company, manufactures printing presses. To sell its presses internationally, it utilizes agents, distributors and representatives. Before retaining any agents, distributors or representatives, Acme Tool conducts extensive due diligence on the companies and individuals involved.¹²⁷ Several years ago, Acme Tool retained Atco, a company in the country of Atlantis, to act as its distributor in Atlantis. Prior to retaining Atco, Acme Tool conducted its usual due diligence on Atco's background and qualifications. Atco is incorporated under the laws of Atlantis, and is wholly-owned by Atlantis nationals. No Atco employees or officers are U.S. citizens or residents. Atco is well respected in Atlantis, and it is widely known that Atco is one of the most effective distributors in selling to the Atlantis government. In fact, Atco represents several U.S. companies which sell to the Atlantis government. It has now come to Acme Tool's attention that Atco has, over the years, increased its margins on the presses sold to the Atlantis government. Atco's mark-up is fifty-percent (50%) of the price at which Acme Tool sells to Atco while Acme Tool's gross profit margin on the presses is five percent (5%). Moreover, Acme Tool also knows that Atco's mark-up on sales to private companies in Atlantis is only ten percent (10%).

Should Acme Tool be concerned about Atco's high mark-up on sales to the Atlantis government? The hallmarks which make a third party effective are also the factors which raise FCPA questions. The agent, representative or other third party may have close relationships with governmental officials, including family relationships. The agent, representative or other third party may make large profits on its transactions with the government, leading to questions regarding the nature of the relationship.

One might question whether Acme Tool would have FCPA liability since it does not have actual knowledge of any illicit payments; however, as discussed above, actual knowl-

125. 18 U.S.C.S. Appx. § 8A1.2 cmt. (k)(7) (1994).

126. The following hypotheticals are not intended to reflect or depict any specific actual factual situations. Any similarity of the hypotheticals to persons, businesses or governments is merely coincidental.

127. In conducting its due diligence, Acme Tool addresses the "red flags" for relationships with agents and other third parties. Red flags are warning signs which should alert a company to the possibility that FCPA violations are or may be occurring. 1 FCPA Rep. at 100.06 (July 1991).

edge is not required for FCPA liability.¹²⁸ Is knowledge of high profits made on governmental transactions enough to cause Acme Tool to be on notice of a "high probability" that Atco is making payments to foreign governmental officials by selling the presses at inflated prices? Answers to these factual questions are rarely clear. Under the FCPA, Acme Tool would most likely be required to undertake some level of review and investigation of the situation. To preserve attorney-client privilege, this investigation should be conducted by its legal counsel.¹²⁹ The scope of the inquiry should depend upon the information uncovered as the investigation unfolds.

Because of the factual nature of FCPA issues, it is virtually impossible to develop a check list of factors counsel should review in conducting an investigation. In this situation, however, counsel should begin with an analysis of the economics of the transactions. Are there any independent factors which would explain the higher mark-up? For example, is Atco performing services incidental to the sale to the government which it does not perform for its commercial customers? Are the presses sold to the government the same models, with the same performance guarantees and warranties as those sold commercially? Is Atco modifying the printing presses sold to the government, for example, by adding security equipment? What is the method of selling to the Atlantis government (by open tenders or a private bid process)?

Another area of inquiry should revolve around relationships.¹³⁰ Has Atco's relationship with the Atlantis government changed? More specifically, is Atco's relationship with those branches through which the printing presses are sold different than it was when Acme Tool conducted its due diligence? Have new governmental officials taken office who are more favorably disposed to Atco. If so, do those governmental officials have special relationships with Atco? What is the nature and basis for those relationships?

At the outset of its relationship with Atco, Acme Tool might have anticipated this situation and taken steps to avoid FCPA liability. First, as a basic proposition Acme Tool should have incorporated into its agreement with Atco an affirmation that Atco would comply with the FCPA. While Atco is not itself subject to the FCPA, Acme Tool is subject to the Act. Thus, Acme Tool must protect itself against indirect FCPA violations occurring through Atco's actions. Second, the agreement should also have contained representations

128. See Section II of the text for a discussion of the intent standard.

129. *Upjohn Co. v. United States*, 499 U.S. 383 (1981). See note 122 and accompanying text.

130. Recognizing the danger in hiring a foreign firm or foreign agent with a special relationship to the foreign government, a number of companies have requested advisory opinions from the Attorney General. See, e.g., *Department of Justice Review Procedure Release*, No. 84-1, August 16, 1984 printed in 3 FCPA Rep. 721. An American firm requested an advisory opinion where it sought to hire a foreign firm as a marketing representative. The principals of this company were related to the head of state of the foreign government, and one principal personally managed the private affairs and business matters for the head of state. The American firm secured representations from the marketing representative concerning violations of the FCPA. After reviewing the facts and the due diligence procedures of the American firm, the Attorney General stated that no enforcement action would be taken. See, e.g., *Department of Justice Review Procedure Release*, No. 85-2, January 1987 printed in 3 FCPA Rep. 722.01. An American business wanted to hire a foreign agent who had previously held an official position in the foreign government, provided that written representations would be made regarding the FCPA. The Attorney General stated that no actions against the American company would be taken.

as to Acme Tool's ownership, and an affirmative requirement that Atco notify Acme Tool should changes occur in Atco's direct or indirect ownership. Third, Acme should have included provisions in the agreement requiring Atco to provide annual certifications with respect to its FCPA compliance. Fourth, the agreement should have provided Acme Tool with the right to audit Atco's books and records in order to confirm compliance with the FCPA. Thus, in this case, if Acme Tool's legal counsel were not able to conclude early in the investigations that no FCPA violations had occurred, Acme Tool should have a right under its agreement with Atco to request an audit of Atco's books and records.

B. THE JOINT VENTURE RELATIONSHIP

SmithCo, a U.S. steel tubing manufacturer, wishes to develop a distribution network in Rogaria. SmithCo has contacted Roco, a distributor of specialty metals in Rogaria, to discuss the possibility of distributing the SmithCo steel tubes in that country. Roco is unwilling to act as SmithCo's distributor in Rogaria because it does not wish to make substantial investments in the specialized handling equipment and inventory which it would be required to purchase. SmithCo and Roco instead decide to form a 50-50 joint venture through which they will distribute tubes in Rogaria. The primary purchaser of the SmithCo tubing will be the Rogarian state-owned power company. The joint venture will be operated through JointCo, a jointly-owned Rogarian company. Although the Rogarian power company purchases of SmithCo tubes could be very substantial, SmithCo is concerned about the FCPA because Rogaria is a country with a reputation for corruption, particularly in purchases by state-owned companies. While anxious for the business, SmithCo wants to insure that it does not have liability under the FCPA.

Since the primary customer for the steel tubes is a state-owned company, questions involving the FCPA are raised.¹³¹ Although a foreign wholly or partially owned subsidiary generally is not subject to the FCPA, and a parent company can not have vicarious liability for a subsidiary's violations, the exposure for SmithCo is one of indirect liability.¹³² Thus, as a basic proposition, SmithCo must ensure that JointCo adopts and implements a FCPA compliance policy. The only question is the scope and nature of that policy.

131. Although the Department of Justice has issued an advisory opinion concerning an American company's relationship with a government-owned business, the questions of to what extent state-owned companies are subject to the FCPA remain unanswered. The advisory opinion on this issue addressed an American company's relationship with a government-owned business in a country where, in order to conduct business with the military, all foreign suppliers had to contract with that government-owned business. According to the foreign country's rules, the American company had to pay the government-owned company a percentage of the total contract price of the defense equipment sold. The American company represented to the Attorney General that, in order to avoid making a payment to a foreign official or government-owned business, it would pay the commissions directly to the country's treasury or would deduct the commission from the total purchase price. The Attorney General stated that no enforcement action would be taken. *Department of Justice Review Procedure Release*, No. 93-2, May 11, 1993 printed in 3 FCPA Rep. 727. Since in many countries state-owned companies are intertwined with the government, for planning purposes one must assume, as did the American company in the advisory opinion, that state-owned companies are fully subject to the FCPA.

132. See *supra* note 49 and accompanying text.

As is the case in many FCPA situations, the difficulties arise in the details. SmithCo probably will not encounter much resistance from Roco to its position that JointCo adopt and implement a FCPA policy and procedures.¹³³ In fact, as is the case in most joint ventures, it is not the joint venture entity which causes the major FCPA concern for the U.S. venturer. For example, SmithCo should have access to JointCo's books and records. Thus, it would not be required to insist upon any special audit rights with respect to JointCo vis-a-vis the FCPA. Furthermore, as an owner of JointCo, SmithCo should exercise a certain degree of control over JointCo.

The problem encountered in foreign joint ventures is the extent to which the FCPA policy extends to the foreign joint venturer or venturers. From one viewpoint, the FCPA does not apply to the actions of an entity which is not a domestic concern. However, a U.S. company can not hide behind the guise of a joint venture relationship to shield itself from actions undertaken by its foreign co-venturer. For example, if JointCo receives business because of Roco's illegal payments to officials of the state-owned power company, SmithCo would have liability under the FCPA if it can be shown that SmithCo is substantially certain that Roco would make the illegal payments. The prosecutor would not be required to prove that JointCo itself made the illegal payments. Instead, a prosecutor would only be required to show that Roco made the payments and SmithCo had reason to know that the payments would be made. Both SmithCo and Roco would be beneficiaries of the illegal payments through their ownership of JointCo.

How does SmithCo, a law abiding U.S. company, protect itself in this situation? Given the standard of intent under the FCPA, it would appear that SmithCo would be required to not only conduct extensive due diligence with respect to Roco, but also to insist that Roco adopt a FCPA policy. SmithCo should also insist that Roco represent and warrant that it does not, and will not violate the FCPA. In addition, SmithCo should require Roco to provide periodic certifications as to its compliance with the FCPA. SmithCo should also require Roco to make available its books and records to SmithCo for audit to confirm compliance with the FCPA.

What course of action is SmithCo required to take if it discovers that Roco has paid bribes to Rогarian officials in its activities unrelated to JointCo's business? Once SmithCo has knowledge of Roco's payment of bribes in Roco's activities unrelated to JointCo's business, does SmithCo have "automatic" FCPA liability if it should later be discovered that Roco has made illegal payments with respect to Jointco's business? At what point is SmithCo required to divest itself of its interest in JointCo?

C. THE BENEFICIAL OWNERSHIP CASE

John's BioTech, based in the U.S., has developed a bacteria agent which is used to clean municipal waste systems. John's BioTech has approached the Catina government about the possibility of selling its product for use in the country's waste systems. A Catina govern-

133. See *Department of Justice Review Procedure Release*, No. 86-1, July 18, 1986 printed in 3 FCPA Rep. 723 (in which the Attorney General did not object to an American company entering into a joint venture relationship with a foreign venturer who was a member of the British parliament (MP) but held no position within the British government; the MP agreed to make full disclosure of his relationship with the U.S. corporation, and agreed not to participate in any legislative votes nor use its influence in order to benefit the corporation).

mental official has said that the Catina government is interested in the product, and because of the poor condition of the country's waste disposal systems, it anticipates placing a large order. However, the governmental official said that all orders must be placed through an import agent, CatCo, a corporation based in the Isle of Man. When John's BioTech contacted CatCo at its office in London, CatCo agreed to include the bacterial agent in the products it offers to the Catina government, but only if it receives a sales commission of forty percent (40%). Since John's BioTech has a similar commission agency relationship with a company in another country to whom it pays a five percent (5%) commission, John's BioTech objected to the high commission requested by CatCo. In response, CatCo says that John's BioTech can simply add its commission to the selling price of the product. In conducting its due diligence on CatCo, John's BioTech learns that CatCo is wholly-owned by the 1994 Prosperity Trust, a trust formed under the laws of Jersey.

To what extent is a U.S. company required to ascertain with whom it is dealing? What result should occur when the U.S. company cannot ascertain the ownership of a foreign entity? For example, if John's BioTech contacts the trustee of the 1994 Prosperity Trust directly, it almost certainly will be told by the trustee that banking and other laws prohibit the disclosure of such information. Has John's BioTech satisfied its obligations under the FCPA by having made the inquiry in the light of the high commission being paid by CatCo and the apparent willingness of the Catina government to pay the commission?

To what degree is John's BioTech required to inquire about beneficial ownership and direct and indirect relationships? For example, assume that CatCo discloses to John's BioTech that the beneficiaries of the 1994 Prosperity Trust are all of the members of the Kesu tribe and their descendants. Upon further investigation, John's BioTech learns that the Kesu tribe is a small tribe in the country of Catina, and that a majority of the Catina ruling party, including the governmental official who referred John's BioTech to CatCo, are members of this tribe. What action should John's BioTech take at this point? Is John's BioTech required to walk away from this transaction on the basis that Catina governmental officials could potentially receive an economic benefit from the commissions? Is it sufficient for John's BioTech to receive a representation from the trustee that no Catina governmental officials or their relatives would receive any distributions under the trust? Must John's BioTech go further and require that the trustee disclose how distributions would be made under the trust pursuant to a letter of wishes or other instruments? What result if under the trust (or a letter of wishes) the class of beneficiaries may later be changed or narrowed?

D. THE UNEXPLAINED PAYMENT CASE

PetroTina, an Asian company, owns a chemical facility which it wishes to sell to a purchaser who will disassemble the plant and move it to another site. Harry Jones, an unemployed U.S. chemical engineer has learned through a trade journal that the equipment is being offered for sale. Mr. Jones' friend, George Rodriguez, is a native of Devania who has been able to convince the Devania government to purchase the chemical plant as a part of its economic development plan for a depressed region of the country. Although PetroTina has offered the plant through advertisements in industry publications at a sales price of \$30 million, the Devania government has agreed to pay \$60 million for the plant. Mr. Jones and Mr. Rodriguez will pay PetroTina \$30 million for the plant, and divide the profits. Mr. Rodriguez has told Mr. Jones that he "must receive \$25 million to make the deal work." Mr. Jones asks his attorney to prepare a "short" contract to reflect his relation-

ship with Mr. Rodriguez and to "protect him". In preparing the contract, Mr. Jones' attorney asks him about the economics of the transaction and the reason for the disparity in the compensation between he and Mr. Rodriguez. In response, Mr. Jones says "that's the deal".

Is Mr. Jones' attorney under a duty to inquire further? Is the high mark-up coupled with the unexplained disparate sharing of the profit enough to cause Mr. Jones to have "knowingly" violated the FCPA (assuming, of course, that a portion of the \$25 million received by Mr. Rodriguez is used to pay bribes to Devania governmental officials). Does placing FCPA representations and warranties in the agreement between Mr. Jones and Mr. Rodriguez have any effect whatsoever in this type of transaction?

The structure of this transaction could be critical to the FCPA analysis. For example, if Mr. Jones' attorney drafts the agreement to provide for a mere sharing of the profits, the relationship between Mr. Jones and Mr. Rodriguez would most likely be that of a general partnership under the laws of most U.S. states.¹³⁴ If Jones' attorney drafted the agreement to provide that it would be governed by the laws of one of the U.S. states, the partnership almost certainly would be a U.S. domestic concern under the FCPA even though its activities might be wholly conducted in foreign countries.¹³⁵ Thus, if an illegal FCPA payment is made, the partnership could be prosecuted as directly violating the Act.

Would the result change if the transaction is structured as a buy-resell transaction whereby Mr. Jones purchases the chemical plant from PetroTina, and then resells it to Mr. Rodriguez for resale to the Devania government? It would appear that the buy-resale situation should be analyzed as a possible indirect violation of the FCPA.¹³⁶ In the final analysis, the restructuring of the sale could create a distinction without a difference with respect to Mr. Jones' liability since the same standard of intent will apply in either situation.¹³⁷

134. See U.P.A. § 7(4) (the sharing of profits is prima facie evidence of the existence of a partnership unless the facts of the situation fall into the prescribed exceptions to this presumption).

135. 15 U.S.C. § 78dd-2 (h)(1)(B) (1988).

136. In an advisory opinion, the Department of Justice addressed a buy-sell arrangement between an American company, Latana Boatyard, Inc. (Latana) and a foreign corporation which anticipated reselling Latana's boats to the Nigerian government. The foreign corporation, Milverton Holdings, Ltd. (Milverton) was organized under English law and wholly owned by a Nigerian national. Under Milverton's arrangement with Latana, Latana would be fully paid for its boats before they were delivered, and Latana would not be involved in the reselling of the boats. Both Latana and Milverton represented that the FCPA would not be violated, and Latana intended to obtain written certificates from its employees stating that they were not aware of any FCPA violation. Furthermore, Latana agreed to disclose to the Nigerian government the price and terms of its sales contract with Milverton. The Attorney General stated that the DOJ did not intend to take action against Latana. *Department of Justice Review Procedure Release*, No. 87-1, December 17, 1987 printed in 3 FCPA Rep. 724.

137. 15 U.S.C. §§ 78dd-1 (a)(3) (issuers), 78dd-2 (a)(3) (domestic concerns) (1988).

VI. Conclusion

The FCPA creates substantial liability for the U.S. company doing business internationally, particularly in view of the fact that to be successful in many countries, the U.S. company must utilize a variety of brokers, middlemen and other third parties. Global competition is a fact of life in today's business environment. Thus, the successful U.S. company cannot simply turn its back on these foreign markets. Instead, it must adopt strategies for approaching those markets in light of the many ambiguous provisions of the FCPA. One of those strategies includes the development and implementation of effective FCPA guidelines and procedures to avoid criminal liability in the U.S.