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The Foreign Corrupt Practices Act Amendments of 1988: "Death" of a Law

Bartley A. Brennan*

The Members of Congress who authored this elimination of the antibribery law chose the perfect vehicle. They needed a big bill that would be handled by a myriad of committees so they could bury the few fatal lines that killed the Foreign Corrupt Practices Act deep in this forest of hundreds of thousands of words. They needed a controversial bill that would concentrate the debate on a series of economic matters that shook and divided the country and distracted the press from the death knell to antiforeign bribery law. What an opportunity to slip through a bribery repealer. The authors of the provision fully understood the gutting provision could not stand by itself. Even in a moderately complex bill the amendment would be vulnerable. But pushed by one of the many committees developing the details of this king size trade bill that was furiously contested by Congress and the President, the press and public could hardly be expected to notice the death of the Foreign Corrupt Practices Act.¹

I. Introduction

An extraordinary eight year effort by some members of Congress and some business lobbyists to amend the Foreign Corrupt Practices Act of 1977 (FCPA or Act)² culminated on August 23, 1988, with the enactment of the Omnibus Trade and Competitiveness Act of 1988 (Trade Act).³ The 1988 FCPA Amendments are

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¹ 134 CONG. REC. S 8528 (daily ed. June 24, 1988) (statement of Sen. Proxmire).

² Pub. L. No. 95-213, 91 Stat. 1494 (1977) (codified at 15 U.S.C. §§ 78a, 78m, 78dd-1, 78dd-2, 78ff (1982)).

³ Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (1988) (codified in scattered sections of 15 U.S.C. (1988)) [hereinafter Trade Act]. For a discussion of previous efforts to amend the 1977 Act, see H.R. 2157, 99th Cong., 2d Sess. (1985) and S. 2033, 100th Cong., 2d Sess. (1986). See also Brock, *Progress Report on Efforts to Amend the Foreign Corrupt Practices Act*, 4 DET. C.L. REV. 1083 (1983); Brennan, *Amending the Foreign Corrupt Practices Act of 1977: "Clarifying" or "Gutting" a Law?*, 11 J. LEGIS. 56, 57 (1984); Longobardi, *Reviewing the Situation: What is to be Done With the Foreign Corrupt Practices Act?*, 20 VAND. J. TRANSNAT'L L. 431, 449-61 (1987); Roberts, *Revision of the Foreign Corrupt Practices Act by the 1988 Omnibus Trade Bill: Will it Reduce the Compliance Burdens*

only six pages in this approximately four hundred page piece of legislation whose goals only indirectly, at best, were to amend the FCPA.⁴ Those seeking to amend the FCPA had, over an eight-year period, failed to obtain passage of such amendments when they were introduced as separate bills.⁵ Furthermore, the Trade Act itself was once vetoed by the President and was passed as a result of a series of compromises worked out in a Trade Bill Conference Committee.⁶ It is therefore not surprising that proponents of the FCPA, such as Senator Proxmire, have charged those who have been successful in amending the Act with seeking to "gut" the law.

This Article analyzes the major changes that the 1988 Amendments made to the accounting and antibribery sections of the 1977 FCPA. Throughout the discussion particular attention will be given to the way in which the 1988 Amendments address the problems created by the 1977 Act. These problems are identified in a 1981 report issued by the General Accounting Office, which conducted a survey of U.S. corporations.⁷ This Article concludes that the 1988 Amendments severely undercut the original objectives of the 1977 Act.

In reviewing the 1988 Amendments to the FCPA, it should be remembered why the 1977 Act was enacted. In the period from 1974 to 1976, approximately 435 corporations voluntarily disclosed to the Securities and Exchange Commission (SEC) that they had made improper or questionable payments to foreign officials or members of foreign political parties.⁸ Such bribery led to the down-

and Anticompetitive Impact?, 1989 B.Y.U.L. REV. 491; 15 U.S.C. §§ 78m(b), 78dd-2, 78tt (1982 & Supp. IV 1986).

⁴ The stated goals of the Trade Act are to:

- (1) authorize the negotiation of reciprocal trade agreements;
- (2) strengthen United States trade laws;
- (3) improve the development and management of United States trade strategy; and
- (4) through these actions, improve standards of living in the world.

Trade Act § 1001(b), *supra* note 3, at 1120.

⁵ See sources cited *supra* note 3.

⁶ Following modification in the conference committee, Congress passed H.R. 3. 134 CONG. REC. H 2363, 2375 (daily ed. Apr. 21, 1988); 134 CONG. REC. S 4926-27 (daily ed. Apr. 27, 1988). However, the President vetoed it because of its perceived protectionist tone. 134 CONG. REC. H 3531 (daily ed. May 14, 1988). The House voted to override the veto, 134 CONG. REC. H 3552 (daily ed. May 24, 1988), but the Senate sustained the veto. 134 CONG. REC. S 7385 (daily ed. June 8, 1988). The Congress then passed H.R. 4848 which, with the deletion of two provisions, was the same as H.R. 3. 134 CONG. REC. H 5694 (daily ed. July 13, 1988); 134 CONG. REC. S 10731 (daily ed. Aug. 3, 1988). The Conference Report which contains the compromises was part of H.R. 3, as originally introduced, and was adopted by the committee members as the legislative history of the Amendments. H.R. CONF. REP. NO. 576, 100th Cong., 2d Sess., 134 CONG. REC. H 1863, H 2116 (daily ed. Apr. 20, 1988), *reprinted in* 1988 U.S. CODE CONG. & ADMIN. NEWS 1949 [hereinafter CONFERENCE REPORT].

⁷ U.S. GENERAL ACCOUNTING OFFICE, REPORT TO THE CONGRESS: IMPACT OF FOREIGN CORRUPT PRACTICES ACT ON U.S. BUSINESS (Mar. 4, 1981) [hereinafter GAO REPORT].

⁸ See SECURITIES AND EXCHANGE COMMISSION, REPORT TO THE SENATE COMM. ON BANKING, HOUSING, AND URBAN AFFAIRS, 94TH CONG., 2D SESS., QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES (Comm. Print 1976) [hereinafter SEC REPORT].

fall of governments and officials in Japan, the Netherlands, and Korea.⁹ By weakening its statute against bribery, the United States does not present itself as a good political and economic model for other nations to follow. This message is especially inappropriate at a time when the Soviet Union and several Eastern European nations are evolving toward economies based on the U.S. model.

II. The Accounting Provisions of the FCPA

A. The 1977 Accounting Provisions

The accounting section of the 1977 Act amended section 13(b) of the Securities Exchange Act of 1934 (Exchange Act)¹⁰ and attempted to prevent bribery of foreign officials by requiring U.S. corporations to establish accounting control systems.¹¹ Specifically, the 1977 accounting control provisions required every issuer of registered securities¹² to maintain internal controls sufficient to provide "reasonable assurances" that certain objectives would be met.¹³ Willful violation of these provisions by registrants or any person involved in the direction or management of a corporation was punishable under the Exchange Act.¹⁴ Punishment could include a fine of up to \$10,000 and/or imprisonment for up to five years, or a Securities and Exchange Commission (SEC) civil enforcement action.¹⁵ The SEC jointly administers the FCPA with the Department of Justice. The SEC also has the power to recommend criminal prosecution or to bring a civil action.

⁹ BUSINESS ACCOUNTING AND FOREIGN TRADE SIMPLIFICATION ACT: JOINT HEARINGS ON S. 708 BEFORE THE SUBCOMM. ON SECURITIES AND THE SUBCOMM. ON INTERNATIONAL FINANCE AND MONETARY POLICY OF THE SENATE COMM. ON BANKING, HOUSING, AND URBAN AFFAIRS, 97th Cong., 1st Sess. 3 (1981) [hereinafter JOINT SENATE HEARINGS].

¹⁰ 15 U.S.C. § 78a (1982).

¹¹ *Id.* § 78m(b)(2)(B).

¹² Securities are registered pursuant to 15 U.S.C. § 78(l) (1988).

¹³ Section 102 of the 1977 Act provided that:

Every issuer . . . shall—

(A) make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer; and

(B) devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that—

(i) transactions are executed in accordance with management's general or specific authorization;

(ii) transactions are recorded as necessary (I) to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and (II) to maintain accountability for assets;

(iii) access to assets is permitted only in accordance with management's general or specific authorization; and

(iv) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.

¹⁵ U.S.C. § 78m(b)(2) (1982).

¹⁴ *Id.* § 78ff(a).

¹⁵ *Id.*

The major criticisms of the accounting provisions of the 1977 FCPA fell into three categories: (1) the cost of compliance due to the vagueness of the standards delineated in the record keeping and disclosure section; (2) the lack of a materiality standard as to what must be disclosed; and (3) criminal penalties for failure to meet record keeping and accounting control provisions.¹⁶ In order to determine the validity of these criticisms, Congress requested that the General Accounting Office (GAO) undertake a study of corporations subject to the FCPA.¹⁷ Over half of the companies that responded to the survey noted that the cost of complying with the FCPA outweighed the benefits received.¹⁸

B. *The 1988 Amendments to the Accounting Provisions*

The 1988 Amendments make three basic changes to the accounting section. First, the Amendments attempt to clarify the standard by which violations of the accounting provision of the FCPA can be prosecuted. Critics had complained¹⁹ about the imposition of criminal penalties for technical or insignificant errors.²⁰ The SEC had previously stated that it would recommend criminal prosecution "only in the most serious and egregious cases."²¹ However, because of the discretionary and often subjective nature of such recommendations, the business community argued for decriminalization.²² The Amendments attempt to clarify this uncertainty by restricting criminal liability to situations where a corporation knowingly circumvents or fails to implement a system of controls.²³ Thus, this change codifies the existing SEC policy that criminal prosecutions will not take place for mere negligence or for technical violations.

Second, the Amendments address the situation where a U.S.

¹⁶ See generally Brennan, *supra* note 3.

¹⁷ See GAO REPORT, *supra* note 7.

¹⁸ *Id.* at 58. In response to the question regarding the extent to which this non-benefit/cost increased the overall cost of accounting, 27.8% chose "little or no extent," 49.5% chose "some extent," 13.4% chose a "moderate extent," 4.1% chose a "great extent," and 5.2% chose a "very great extent." *Id.* at 58-59. See JOINT SENATE HEARINGS, *supra* note 9, at 166 (statement of Mr. John Subak, Group Vice Pres. and Gen. Counsel, Rohn and Haar Co.); *but cf. id.* at 452 (statement of John C. Burton, Professor of Accounting and Finance, Graduate School of Business, Columbia Univ.); see also FOREIGN CORRUPT PRACTICES ACT—OVERSIGHT: HEARINGS BEFORE THE SUBCOMM. ON TELECOMMUNICATIONS, CONSUMER PROTECTION, AND FINANCE OF THE COMM. ON ENERGY AND COMMERCE, HOUSE OF REPRESENTATIVES, 97th Cong. 1st & 2d Sess. 176 (1981 & 1982) [hereinafter HOUSE SUBCOMMITTEE HEARINGS] (statement of SEC Chairman Shad) (discussing whether these costs are front end costs or continuing costs due to the degree of detail required by "the reasonable detail standard").

¹⁹ *SEC's Enforcer Runs Tight Ship, But Critics Charge He's Too Soft*, Wall St. J., June 3, 1982, at 19, col. 2.

²⁰ GAO REPORT, *supra* note 7, at 31-33.

²¹ *Id.* at 71.

²² See JOINT SENATE HEARINGS, *supra* note 9, at 141 (statement of R. McNeil).

²³ 15 U.S.C. § 78m(b)(4), (5) (1988).

corporation would be held liable for the failure of its minority-owned subsidiary to adhere to the accounting requirements. The 1988 Amendments now provide that in the event a U.S.-based multinational owns fifty percent or less of a foreign firm, the former discharges its responsibility under the accounting provision if it uses its influence in "good faith to the extent reasonable under the circumstances" to cause the foreign firm to maintain an accounting system which meets the requirements of the FCPA.²⁴ Such circumstances include the degree of ownership and the laws and practices of the country in which the foreign firm is located.²⁵ A showing of "good faith" creates a presumption that the U.S. corporation has met the 1977 Act's requirement of keeping records in "reasonable detail," and of providing "reasonable assurances" that the transaction was recorded.²⁶

Third, the Amendments seek to clarify further the terms "reasonable detail" and "reasonable assurances." The 1977 FCPA record keeping provision²⁷ required every company registered under the Exchange Act, whether or not it did business internationally, to maintain a system of accounting controls "to provide reasonable assurance" that transactions were made in the proper manner.²⁸ Also, the Act required every company to keep records "which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer."²⁹ The 1988 Amendments define these two terms to mean that "level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs."³⁰ The Conference Report states that the concept of "reasonableness of necessity" contemplates the weighing of a number of relevant factors, including the cost of compliance.³¹ It should be noted the Conference Report expresses concern that a cost-benefit standard could weaken the accounting controls systems now in place.³²

C. Policy Implications

Despite the above three changes, the 1988 Amendments fail to provide adequate guidelines because they do not include a "materiality" standard familiar to accountants and securities lawyers.³³ The

²⁴ *Id.* § 78m(b)(6).

²⁵ *Id.*

²⁶ *Id.*

²⁷ 15 U.S.C. § 78m (1982).

²⁸ *Id.* § 78m(b)(2)(B).

²⁹ *Id.* § 78m(b)(2)(A).

³⁰ 15 U.S.C. § 78m(b)(7) (1988).

³¹ See CONFERENCE REPORT *supra* note 6, at H 2116.

³² *Id.*

³³ "Materiality" includes all information which is significant to the decision of potential investors as to whether they will or will not invest in a stock. Such information in-

lack of a materiality standard regarding what must be disclosed under the 1977 FCPA led to confusion in the business and legal communities. The American Bar Association Committee on Corporate Law and Accounting concluded that, based on the legislative history of the FCPA, a "materiality standard" existed.³⁴ The SEC, however, concluded that Congress intended that a "reasonableness standard" should be used in reviewing cases brought under the FCPA.³⁵ The GAO, on the other hand, recommended that a "materiality standard" *not* be adopted by Congress.³⁶ The GAO concluded that the adoption of such a standard would weaken the intent of the accounting provisions of the FCPA.³⁷ It argued that while "materiality" is geared to disclosure for investors, it is not appropriate for assessing the adequacy of internal accounting.³⁸ The GAO pointed out that the FCPA seeks to provide disclosure not for the purpose of investor knowledge but to prevent bribery.³⁹

The prudent person standard, however, opens up the accounting section of the FCPA to a series of questions because the level of detail and assurance needed to "satisfy prudent officials in the conduct of their own affairs" is unclear. Does a "prudent official" standard clarify the "reasonable assurances" and "reasonable detail" language that it was intended to clarify? How "prudent" does one need to be? When should the "prudent official" learn of prohibited payments—before or after they are made? In the event that knowledge comes to the official after the fact, what action should be taken, as at that point there is a violation of both the accounting and antibribery sections of the FCPA?

Also, it might be argued that a "prudent official" standard raises the level of awareness that is required of corporate officials, as opposed to a "reasonableness" standard.⁴⁰ The question for individual corporate officers, companies, and the courts is whether this standard represents a stricter approach than the "reasonableness" stan-

cludes information affecting the "managerial integrity" of the corporation. See *Weisberg v. Coastal States Gas Corp.*, 609 F.2d 650 (2d Cir. 1979), *cert. denied*, 445 U.S. 1951 (1980).

³⁴ GAO REPORT, *supra* note 7, at 19, 25-26.

³⁵ *Id.* at 19, 26-27.

³⁶ *Id.* at 28.

³⁷ *Id.* at 30.

³⁸ *Id.* at 28, 30.

³⁹ *Id.*

⁴⁰ The "prudent man" test is most often used by states as an investment standard which a trustee must strictly follow as part of a fiduciary responsibility. For example, under New York's "prudent man rule," a trustee must employ such diligence and such prudence in the care and management of funds, as general prudent men of discretion employ in their own like affairs. *Withers v. Teachers' Retirement Sys.* New York, 447 F. Supp. 1248, 1254 (S.D.N.Y. 1978). See also *Employee Retirement Income Security Program*, 29 U.S.C. § 1104(a)(1) (1982) (defining the "prudent man standard of care" as a fiduciary acting "with the care, skill, prudence, and diligence under the circumstance then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims").

dard set out in the FCPA prior to its amendment. Although the 1988 Amendments sought to clarify the accounting section, it appears that they only created more confusion.

III. The Antibribery Provisions of the FCPA

A. The 1977 Antibribery Provisions

In addition to the accounting provisions of the 1977 FCPA which mandated disclosure of questionable or illegal payments, Congress also provided antibribery provisions which prohibited the bribery of any foreign official.⁴¹ Under this section, not all payments were prohibited. Instead, only those payments that were driven by corrupt intentions, those made to influence certain persons to commit or fail to perform certain acts, and those made for the purpose of retaining business were prohibited.⁴²

Corporate and government officials, as well as academicians and lawyers, criticized the bribery sections of the 1977 FCPA for vaguely defining what constituted compliance.⁴³ Some commentators suggested that this vagueness forced U.S. corporations to forego business opportunities abroad for fear of violating the FCPA and incurring its stiff criminal sanctions.⁴⁴ The GAO Report found that of "the 30% of our respondents who reported that the Act had caused a decrease in their overseas business, approximately 70% rated the clarity of at least one of the anti-bribery provisions as inadequate or very inadequate."⁴⁵ The major ambiguities to the antibribery provisions noted by the respondents FCPA were the following:

⁴¹ 15 U.S.C. § 78dd-1 (1982). The antibribery section of the FCPA applies to the following: (1) issuers "of domestic concerns;" (2) officers; (3) directors; (4) employees; (5) agents; and (6) some stockholders of issuers of domestic concerns. *Id.* § 78dd-2(c). All "domestic concerns" included both SEC registrants and nonregistrants. *Id.* § 78dd-2(d)(1).

⁴² 15 U.S.C. § 78dd-1(a) (1982) provided that:

It shall be unlawful for any issuer, . . . officer, director, employee, or agent of such issuer or any stockholder thereof acting on behalf of such issuer, to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value.

In passing the FCPA, Congress sought to obtain the "broadest" possible application of the Act to international business by incorporating the language of the domestic mail fraud statute. *See* 18 U.S.C. § 1341 (1988). The United States Supreme Court has interpreted this statute liberally, stating that it must be sufficiently flexible to reach "new" fraud not yet identified. *See* *United States v. Maze*, 414 U.S. 395, 405-06 (1974).

⁴³ *See generally* JOINT SENATE HEARINGS, *supra* note 9. *See also* H. WEISBERG & E. REICHENBERG, *THE PRICE OF AMBIGUITY* 13 (1981).

⁴⁴ WEISBERG & REICHENBERG, *supra* note 43, at 13.

⁴⁵ *SEE* GAO REPORT, *supra* note 7, at 38, 59. It should be noted that 67.7% of the respondents stated that the FCPA had little or no impact on business. None of the respondents were of the opinion that the FCPA had a positive impact on their business.

- (1) the degree of responsibility a company has for the actions of the foreign agents;
- (2) the definition of the term "foreign official";
- (3) whether a payment is a bribe (illegal under the FCPA) or a "facilitating payment" (legal under the FCPA); and
- (4) the dual jurisdiction of the SEC and Department of Justice.⁴⁶

B. *The 1988 Amendments to the Antibribery Provisions*

The 1988 Amendments change the antibribery provisions of the 1977 FCPA in seven areas.

1. *Corrupt Payments*

The 1988 Amendments attempt to clarify the definition of what type of payments are prohibited. The Amendments change this definition in two respects. First, payments under the 1977 FCPA were prohibited if their purpose was to influence "*any act or decision of such foreign official in his official capacity, including a decision to fail to perform his official functions.*"⁴⁷ The 1988 Amendments alter this provision to forbid payments or offers to pay foreign officials for the purpose of "*influencing any act or decision of such foreign official in his official capacity, or inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official.*"⁴⁸ Thus, it would seem at first glance that the language was changed in order to bring the FCPA into compliance with U.S. bribery laws.⁴⁹ However, as one commentator has noted, the conferees failed because our domestic bribery statute forbids *all* corrupt payments intended to influence official functions, while the FCPA, as amended, increases the number of already existing categories of facilitating or "grease" payments.⁵⁰

Second, under the 1977 FCPA, payments were only illegal if made "in order to assist such issuer in obtaining or retaining business"⁵¹ Some confusion arose as to whether lobbying fell within the definition of "retaining business." Although the Conference Committee rejected a proposed amendment that would have broadened the definition of "retaining business," the Conference Report does attempt to clarify the provision. It states that the conferees:

wish to make clear that the reference to corrupt payments for "retaining business" in present law is not limited to the renewal of con-

⁴⁶ *Id.* at 38.

⁴⁷ 15 U.S.C. § 78dd-2(a)(1)(A) (1982) (emphasis added).

⁴⁸ *Id.* § 78dd-1(a)(1)(A)(i) (1988) (emphasis added).

⁴⁹ See 18 U.S.C. § 201(b)(1)(C) (1988).

⁵⁰ See *infra* note 70 and accompanying text. See also Bliss & Spak, *The Foreign Corrupt Practices Act of 1988: Clarification or Evisceration?*, 20 LAW & POL'Y INT'L BUS. 441, 455 n.77 (1989).

⁵¹ 15 U.S.C. § 78dd-1(a) (1982).

tracts or other business, but also included a prohibition against corrupt payments relating to the execution or performance of contracts or the carrying out of existing business, such as a payment to a foreign official for the purpose of obtaining more favorable tax treatment. . . . The term should not, however, be construed so broadly as to include lobbying or other normal representations to government officials.⁵²

The Conference Report as noted here sought on one hand to broaden the scope of prohibited payments beyond the purpose of "retaining business" but also to liberalize its interpretation so as not to include lobbying or normal representations. These conflicting objectives may have unfortunate repercussions in light of the expansion of categories of lawfully permitted facilitating or "grease" payments discussed below.

2. *The "Reason to Know" Standard for Third Party Payments*

In addition to prohibiting payments directly to "foreign officials," the 1977 FCPA also prohibited corporate entities or officers from giving anything of value to "any person, while knowing or having reason to know that all or a portion of such money or thing of value will be offered directly or indirectly" to various persons.⁵³ These payments are referred to as third party payments.

Almost fifty percent of the respondents surveyed by the GAO found the "reason to know" language either "very inadequate" or "marginally inadequate."⁵⁴ Lawyers and legal scholars argued that a "reason to know" standard increased the potential liability of a company and its officers for the acts of foreign agents or more closely affiliated third parties even if the company was unable to monitor or control their conduct. Several recurring questions were asked. What does "reason to know" mean? Is "reason to know" something less than full actual knowledge? If so, how much less, and should it be used in prosecution of criminal conduct?⁵⁵ Those favoring the language as it stood under the FCPA pointed out that "reason to know" language existed in twenty-nine provisions of other federal laws.⁵⁶ An analysis of these provisions, however, showed that thirteen of the twenty-nine provisions were civil or administrative statutes as contrasted with the FCPA, a criminal statute that provided for up to five years imprisonment.⁵⁷ The remaining provisions fell into areas relating to federal safety standards or other types of regulatory procedures. Furthermore, similar "reason to know" language is in-

⁵² CONFERENCE REPORT, *supra* note 6, at 918.

⁵³ 15 U.S.C. §§ 78dd-1(a)(3), 78dd-2(a)(3) (1982).

⁵⁴ GAO REPORT, *supra* note 7, at 60.

⁵⁵ See Hibey, *The Practical Necessity for Amendment of the Foreign Corrupt Practices Act: S. 708—The Current Legislative Initiative*, 10 HOFSTRA L. REV. 1121 (1982).

⁵⁶ SEE JOINT SENATE HEARINGS, *supra* note 9, at 416 (statement of W. Dobrovir).

⁵⁷ 15 U.S.C. § 78ff(c) (1982).

cluded in eight provisions of the criminal code which has been replaced by the Federal Criminal Code Revisions.⁵⁸

Perhaps the most significant problem was that no precedents existed interpreting the "reason to know" language of the 1977 FCPA. In addition, because both the Department of Justice and the SEC had joint enforcement authority, a question was raised as to whether the agencies had the same interpretation of the "reason to know" language.⁵⁹

The 1988 Amendments delete the "reason to know" language and apply a "knowing" standard, which is defined as follows:

(A) A person's state of mind is "knowing" with respect to conduct, a circumstance, or a result 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 circumstance exists or that such result is substantially certain to occur.

(B) 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.⁶⁰

This standard is the result of a compromise in the Trade Bill Conference Committee (Committee). The House version defined "knowing" for criminal liability as being "aware or substantially certain" or "consciously disregarding a high probability" that a payment would be made for prohibited purposes.⁶¹ Civil liability would have applied under the House version if the corporation had actual

⁵⁸ See Fedders, *The "Reason to Know" Standard—A Troublesome Ambiguity in the U.S. Foreign Corrupt Practices Act*, 4 MIDDLE EAST EXECUTIVE REP. 2, 20 & n.14 (July, 1981) listing the provisions; and R. BECKLER, A. LEVENSON & R. SHINE, *THE NEW REVIEW PROCEDURE UNDER THE FOREIGN CORRUPT PRACTICES ACT II 105-08* (1980) listing and describing the provisions.

⁵⁹ A related concern stemmed from parallel investigations, wherein the Department of Justice was pursuing a criminal investigation before an impaneled grand jury and the SEC staff was conducting a civil investigation. Should corporate counsel advise their clients to remain silent pursuant to the fifth amendment and prevent the SEC from engaging in document discovery because of the possible implications in a criminal proceeding? U.S. CONST. amend. V. In doing so, would a client be biased in a civil proceeding? In one case, the court held that parallel investigations by the SEC and Department of Justice may be conducted as long as they are independent and legally authorized. *SEC v. Dresser Inds., Inc.*, 628 F.2d 1368, 1377 (D.C. Cir.) (en banc), cert. denied, 449 U.S. 993 (1980). See generally Hibey, *supra* note 55, for an analysis of these issues. Wallace L. Timmeny, former Deputy Director of the SEC Division of Enforcement, promotes the theory that doing business in certain unspecified foreign countries where corruption was known to be commonplace would constitute a "red flag" warning that any payment to a local agent might involve a bribe and, thereby, require that a U.S. entity conduct a far-reaching investigation prior to engaging the agent in order to avoid a charge of negligent, or even reckless, violation of the FCPA. See Timmeny, *SEC Enforcement of the Foreign Corrupt Practices Act*, 2 LOY. L.A. INT'L & COMP. L. ANN. 25 (1979).

⁶⁰ 15 U.S.C. § 78dd-1(f)(2)(A), (B) (1988).

⁶¹ CONFERENCE REPORT, *supra* note 6, at 919.

knowledge of its agent's bribe or if the corporation recklessly disregarded the "substantial risk" that a bribe would be made.⁶² This dual standard for criminal and civil liability was criticized by the business community for fear of possible vicarious liability and potential substantial civil fines.⁶³ The House then added a due diligence defense to meet this criticism. As noted above, the House and Senate versions dealing with third party liability were resolved in the Conference Committee with a "knowing" standard being adopted for criminal liability; the dropping of civil liability for recklessly disregarding that an agent would pay a bribe, and the deletion of the due diligence defense.

The "reason to know" standard has been replaced by a standard that is more difficult for prosecutors to meet. The Conference Report made it clear that "simple negligence" or "mere foolishness" was insufficient for criminal liability.⁶⁴ However, the Committee also stated that management will be held liable for "conscious disregard," "willful blindness," or "deliberate ignorance."⁶⁵ In other words a "head in the sand" state of mind approach by management will not be tolerated. Citing several federal cases the Conference Report noted that the knowledge requirement is not equivalent to recklessness. It requires "an awareness of a high probability of the existence of the circumstance."⁶⁶ The Conference Report goes on to state that the FCPA covers circumstances where any "reasonable person would have realized the existence of the circumstance or result" and the defendant "consciously chose not to ask about what he had reason to believe he would discover."⁶⁷ Courts are instructed to use a mix of subjective and objective standards to determine the level of knowledge based on this test.⁶⁸

It would appear that the only circumstance from which a company must now protect itself is the intentional disregarding of some mix of subjective and objective signals that illegal payments were made by an agent or employee to a third party. It is not clear at this point what the signals are. As one commentator has pointed out, the Conference Report does not cite any cases which "suggest liability where the consequences of the factual knowledge possessed by the defendant result in future conduct prohibited by the statute,"⁶⁹ yet the language of the statute imposes liability in cases where there is an

⁶² *Id.*

⁶³ See 134 CONG. REC. S 2589 (daily ed. Mar. 18, 1988) (Statement of California Trade Commission).

⁶⁴ CONFERENCE REPORT, *supra* note 6, at 919-20.

⁶⁵ *Id.*

⁶⁶ *Id.* (quoting *United States v. Jacobs*, 475 F.2d 270, 287 n.37 (2d Cir. 1973)).

⁶⁷ *Id.* (quoting *United States v. Picciandra*, 788 F.2d 39, 46 (1st Cir. 1986)).

⁶⁸ *Id.*

⁶⁹ See Hill, *Foreign Representatives: Saudi Law and the FCPA*, *Foreign Corrupt Prac. Act Rep.*, (Bus. L., Inc.) 200.0101, 200.0127 (Apr., 1989).

awareness or belief "such result is substantially certain to occur."⁷⁰ It would seem clear that the language substituted for the "reason to know" standard may in fact prevent serious prosecution of violators of the FCPA.

3. *Facilitating Payments*

The Amendments change the exemption for facilitating or "grease" payments. These payments are not made to obtain or retain business but merely to expedite a business activity in which the ministerial level employee is already employed. An example is the payment of thirty dollars to a customs official to move paperwork along so that a shipment of nondurable goods can be unloaded quickly. Many foreign governments permit such facilitating payments even though they are illegal in the United States and several other countries.⁷¹

Under the 1977 FCPA, facilitating payments were allowed in several ways. The 1977 FCPA defined "foreign official" as any officer or employee of a foreign government or one of its departments, agencies, or instrumentalities.⁷² This definition expressly excluded any employee whose duties were "essentially ministerial or clerical."⁷³ Corporate officials frequently complained that this language was unclear. Are employees of a publicly held nationalized corporation considered "foreign officials?" Is an official, or member of that official's family residing in a foreign country, who is also involved in the private sector a "foreign official?" How should the law treat individuals who simultaneously hold positions in both government and business? Can an excluded "ministerial or clerical" employee be paid a "facilitating payment" to use his influence to induce a "foreign official" to act, as long as the clerical employee does not pay the official from funds received from a U.S. corporation?

As stated above, the 1977 FCPA also proscribed only "corrupt" payments. The legislative history of the FCPA defined a corrupt payment as one made "to induce the recipient to misuse his official position in order to wrongfully direct business to the payor or his client" and requires an "evil motive or purpose."⁷⁴ Because ministerial employees were excluded from the definition of foreign official, it is clear the FCPA was not intended to proscribe grease or facilitating payments.⁷⁵ Moreover, social gifts or routine expenditures for marketing products were lawful. However, consistent complaints about

⁷⁰ 15 U.S.C. § 78dd-1(f)(2)(A)(i) (1988).

⁷¹ See Comment, *The Foreign Corrupt Practices Act of 1977: A Solution or a Problem?*, 11 CAL. W. INT'L L.J. 111, 131 (1981).

⁷² 15 U.S.C. § 78dd-2(d) (1982).

⁷³ *Id.* §§ 78dd-1(b), 78dd-2(d)(2).

⁷⁴ H.R. REP. NO. 640, 95th Cong., 1st Sess. 8 (1977).

⁷⁵ S. REP. NO. 114, 95th Cong., 1st Sess. 10, *reprinted in 1977 U.S. CODE CONG. &*

enforcement officials' interpretation led to requests for a congressional clarification of the statute.⁷⁶

Despite the apparently clear legislative intent that facilitating payments to ministerial or clerical employees not be proscribed, thirty-eight percent of those responding to the GAO questionnaire rated the clarity of the provisions inadequate.⁷⁷ The dilemma raised was that a large corrupt payment to an official with "ministerial" duties might *not* be prohibited while a small payment to expedite customs papers may be prohibited if made to a senior "official."⁷⁸ Furthermore, middle-level employees of U.S. corporations did not fully understand what constituted a facilitating payment. The decision to make such a payment would often have to be made quickly because hesitation might cause a delay in transportation or unloading of goods.

The 1988 Amendments now allow payments to *any* foreign official if they are facilitating or expediting payments for the purposes of expediting or securing the performance of a routine governmental action.⁷⁹ "Routine governmental action" is defined as follows:

an action which is ordinarily and commonly performed by a foreign official in:

(i) obtaining permit[s], 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 order[s];

(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.⁸⁰

Payments can now be made to *any* foreign official, not just ministerial or clerical persons, as long as they fall within the five catego-

ADMIN. NEWS 4098, 4108. The Report of the Senate Banking, Housing, and Urban Affairs Committee stated that:

The statute covers payments made to foreign officials for the purpose of obtaining business or influencing legislation or regulations. The statute does not, therefore, cover so-called "grease payments" such as payments for expediting shipments through customs or placing a transatlantic telephone call, securing required permits, or obtaining adequate police protection, transactions which may involve even the proper performance of duties.

1977 U.S. CODE CONG. & ADMIN. NEWS at 4108.

For a discussion of the importance of the corrupt intent requirement, see Elden & Sableman; *Negligence Is Not Corruption: The Scierter Requirement of the Foreign Corrupt Practices Act*, 49 GEO. WASH. L. REV. 819 (1980-81).

⁷⁶ See JOINT SENATE HEARINGS, *supra* note 9, at 154 (statement of R. McNeil); *id.* at 265 (statement of M. Feldman).

⁷⁷ GAO REPORT, *supra* note 7, at 60.

⁷⁸ *Id.* at 41.

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

⁸⁰ *Id.* § 78dd-1(f)(3)(A).

ries. This substantially changes the intent of the 1977 FCPA as well as the breadth of the exception. The 1977 FCPA facilitating payments language was directed at the type of foreign official (ministerial or clerical), while 1988 amendments are directed at the type of duties to be performed. The "actions of a similar nature" language greatly expands the types of activities that may be allowed as "grease" or facilitating payments.

4. *Affirmative Defenses*

In addition to expanding the "grease" payment exceptions for criminal prosecution, the 1988 Amendments also provide for two affirmative defenses for those accused of violating the FCPA. First, it is now an affirmative defense if a payment to a foreign official is lawful "under the written laws" of the foreign country.⁸¹ The Conference Report makes it clear "that the absence of written laws in a foreign official's country would not by itself be sufficient to satisfy this defense."⁸² Also, in interpreting what is lawful under written law, the conference committee members state that "normal rules of legal construction should apply."⁸³

This defense was added in response to complaints that U.S. companies were losing business because actions forbidden by the 1977 FCPA were permitted in foreign countries and undertaken by foreign competitors.⁸⁴ A related problem was the lack of uniformity among nations regarding the propriety of facilitating payments.⁸⁵ While a foreign agent might legally receive such a payment under the law of his or her country, the U.S. corporation making the payment might be violating the FCPA.

A study by Dr. John Graham of the University of Southern California, which reviewed all available empirical data, concluded that:

(a) During the 1978-1980 period, the FCPA had no negative effect on export performance of American industry. No differences in U.S. markets shown were discovered in nations where the FCPA was reported to be a trade disincentive both in terms of total trade with each country as well as for sales in individual product categories.

(b) During the 1977 statute, U.S. trade with bribe-prone countries has actually outpaced our trade with non-bribe-prone ones.⁸⁶

Dr. Graham further concluded that the FCPA has not hurt the competitive position of U.S. industry. In fact, Dr. Graham's study provides support for the proposition that improper foreign payments

⁸¹ *Id.* § 78dd-1(c)(1).

⁸² CONFERENCE REPORT, *supra* note 6, at 922.

⁸³ *Id.* at 921-22.

⁸⁴ See H. WEISBERG & E. REICHENBERG, *supra* note 43, at 13.

⁸⁵ See Comment, *supra* note 70, at 129-31, for a list of countries which prohibit facilitating payments, including France, Switzerland, Jordan, El Salvador, and Saudi Arabia.

⁸⁶ Graham, *Foreign Corrupt Practices: A Manager's Guide*, 18 COLUM. J. WORLD BUS. 89 (1983).

are at least unnecessary. He suggests, therefore, that management should question payments to foreign firms on economic as well as ethical grounds.⁸⁷

Another complaint was that the FCPA sought to export U.S. morality. However, David D. Newsome has argued that the corrupt association of a U.S. company and a foreign official carries political implications for both actors which do not concern other foreign multinational corporations. He notes that "American businessmen often ask, 'Why us?' Why should America's multinationals be singled out for restrictions when all around them their competitors operate without such restrictions?"⁸⁸ Mr. Newsome concludes that the answer lies in the unique position which U.S. corporations have in world business ventures, coupled with their role in domestic affairs of foreign nations.⁸⁹ He states that "[o]ur companies cannot escape the fact that their activities will never be totally detached from local sensitivities relating to United States intervention of any sort in the internal affairs of another country."⁹⁰ Thus, from both an economic and a moral viewpoint, this new affirmative defense seems unnecessary and unwise.

The second affirmative defense established by the Amendments allows payments to be made for "reasonable and bona fide expenditures."⁹¹ Examples include travel and lodging expenses incurred by or on behalf of a foreign official, party, party official, or candidate that are "directly related to (A) the promotion, demonstration or explanation of products or services; or (B) the execution or performance of a contract with a foreign government or agency thereof."⁹² In general, this second affirmative defense codifies the procedure followed by the Justice Department under the 1977 FCPA.⁹³

5. Repeal of the "Eckhardt Amendment"

The "Eckhardt Amendment," which was included in the 1977 Act, prevented the prosecution of employees or agents of an issuer or U.S. corporation unless the concern itself was found to have violated the FCPA.⁹⁴ The 1988 Amendments delete the language that prevented such prosecution.⁹⁵

Congressman Eckhardt originally proposed such language to prevent senior management of companies from using agents or em-

⁸⁷ *Id.*

⁸⁸ See HOUSE SUBCOMMITTEE HEARINGS, *supra* note 18, at 391 (statement of D. Newsome).

⁸⁹ *Id.*

⁹⁰ See *id.* at 391-92.

⁹¹ 15 U.S.C. § 78dd-1(c)(2) (1988).

⁹² *Id.*

⁹³ See 28 C.F.R. § 50.18 (1985).

⁹⁴ 15 U.S.C. § 78dd-2(b)(3) (1982).

⁹⁵ CONFERENCE REPORT, *supra* note 6, at 919-20.

ployees as "scapegoats." Also, the legislative history indicates that the sponsors of the 1977 Act were concerned that agents or employees might not have the resources to defend themselves against charges of violations of the FCPA.⁹⁶ The 1988 Amendments now open the door for the "scapegoat" scenario. Therefore, it is now important that individual employees and agents retain their own counsel when any possibility exists of a violation of the FCPA under the "knowing" standard. The repeal of the "Eckhardt Amendment" may create a difficult working environment for employees or agents and their employers or principals.

6. Enforcement

The 1988 Amendments make four significant changes to the enforcement structure of the FCPA. First, the Justice Department has been given civil injunctive and subpoena authority with respect to violations by U.S. concerns.⁹⁷

Second, the Justice Department, after consultation with interested departments and the public, must determine within one year of the enactment date of the 1988 Amendments the extent to which "compliance with this section would be enhanced and the business community" assisted by the issuance of guidelines for enforcement.⁹⁸ Thus, the 1988 Amendments effectively give the Attorney General the discretion to determine whether any guidelines should be issued. This amendment seems inconsistent with President Carter's September 26, 1978, announcement that the Department of Justice would "provide guidance" to the business community; however, the Department and the SEC did not respond enthusiastically.⁹⁹ This amendment does not meet the needs of the business

⁹⁶ See H.R. REP. NO. 640, 95th Cong., 1st Sess. at 11 (1977).

⁹⁷ 15 U.S.C. § 78dd-1(d) (1988).

⁹⁸ *Id.*

⁹⁹ On September 26, 1978, President Carter announced that he was directing the Department of Justice to "provide guidance to the business community concerning its enforcement priorities under the recently enacted foreign anti-bribery statute." President's Statement on United States Export Policy, 14 WEEKLY COMP. PRES. DOC. 1631, 1633 (Sept. 26, 1978). The Department of Justice, however, responded negatively, asserting that, "all they (businessmen) want to know is who they can bribe and who they can't. Well, we're not going to tell them—we'll go down kicking and screaming on this one." Berry, *Justice is Reluctant Guide on New Bribe Legislation*, Wash. Post, Oct. 10, 1978, at D7, col. 2. The Department of Justice supported this view in hearings on S. 708, but added, however, that if the law required guidelines, the Department of Justice would issue them. See JOINT SENATE HEARINGS, *supra* note 9, at 77-78 (statement of E.C. Schmults, Deputy Att'y Gen.); S. 708, *supra* note 3, § 8 (providing for the issuance of guidelines by an interagency task force). The Department of Justice created the FCPA Review Procedure in March, 1980. The procedure has been criticized because it permits the Justice Department to use the information submitted by advice-seeking companies in the Department's subsequent prosecutions for violations of the FCPA. See generally Surrey & Popkin, *An Exercise in Non-Guidance: The Foreign Corrupt Practices Act Review Procedure*, 3 MIDDLE EAST EXEC. REP. 3 (May, 1980). See also GAO REPORT, *supra* note 7.

community or other departments of government for guidance. The 1988 Amendments seem to foreclose the possibility that any such guidelines will be issued.

Third, the Justice Department is required to provide opinions on the legality of actions for issuers or U.S. concerns that request them within thirty days.¹⁰⁰ A rebuttable presumption of conformance with the FCPA will exist if the Department issues a letter indicating that the conduct of the U.S. concern conformed with the FCPA.¹⁰¹ This change essentially codifies a procedure used by the Justice Department, but gives the Department only thirty days to act and adds the "rebuttable presumption" language. The rebuttable presumption may in fact lead to more requests under the Justice Department's Review Program, while providing another defense for potential violators.

Fourth, the 1988 Amendments create a new civil fine of \$10,000,¹⁰² and increase the maximum criminal fine for individuals from \$10,000 to \$100,000.¹⁰³ Criminal fines for U.S. corporations are increased from \$1 million to \$2 million.¹⁰⁴

7. *International Agreement*

Finally, the 1988 Amendments authorize the President to negotiate an international agreement with the member countries of the Organization for Economic Cooperation and Development (OECD) to halt questionable payments to foreign officials.¹⁰⁵ A newly added section indicates that it is the intent of Congress that the President *should* negotiate an agreement with the OECD.¹⁰⁶ The President is required to submit a report to Congress on the progress of the negotiation and those steps that should be taken in the event that negotiations fail.¹⁰⁷ President Carter and the State Department were rebuked at the United Nations when they attempted to negotiate such an agreement.¹⁰⁸ The Reagan Administration pursued negotiations at lower ministerial levels but was unsuccessful.¹⁰⁹

The 1988 Amendments ostensibly continue the past attempts to put U.S. concerns at the bargaining table without a competitive disadvantage. This action seems unnecessary in light of the Graham study which concludes that U.S. corporations are not placed at a

¹⁰⁰ 15 U.S.C. § 78dd-1(e)(1) (1988).

¹⁰¹ *Id.* As of 1986, only 18 companies submitted requests to the Justice Department under the review procedure set up in 1980. See Longobardi, *supra* note 3, at 465.

¹⁰² 15 U.S.C. § 78ff(c)(1)(B), (2)(C) (1988).

¹⁰³ *Id.* § 78ff(c)(2)(A)-(B).

¹⁰⁴ *Id.* § 78ff(c)(1)(A).

¹⁰⁵ Pub. L. No. 100-418, § 5003d(1), (d)(2)(A), 102 Stat. 1424 (1988).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ See Brennan, *supra* note 3, at 76-77.

¹⁰⁹ *Id.*

competitive disadvantage by the FCPA.¹¹⁰ One could also conclude that if international negotiations fail, the President might recommend the repeal of the FCPA.

C. Policy Implications

The 1988 Amendments make four significant changes to the anti-bribery section of the 1977 FCPA. First, they alter the definition of "corrupt payments" and allow U.S. companies and issuers to make extensive use of "grease" or facilitating payments never intended by the 1977 Act. They send the wrong signals to the U.S. business community and to foreign officials; that is, it is acceptable to bribe if you keep it "small." Second, they change the "reason to know" standard for criminal liability to a "knowing" standard and define the latter in such a way that prosecutors will find it difficult, if not impossible, to prosecute violators of the FCPA. Third, two new affirmative defenses have been added for U.S. concerns thereby further enhancing the environment for bribing foreign officials and making prosecution of violations of the FCPA more difficult. Finally, the repeal of the "Eckhardt Amendment" subjects middle-level managers to prosecution but exempts senior-level executives who can show they have no knowledge of questionable payments. This change not only will create an adversarial environment within domestic concerns, but also will require that employees involved in transactions abroad retain their own counsel when there is the potential for a violation of the FCPA.

IV. Conclusion

The 1988 Amendments to the FCPA seek to redefine legally and ethically acceptable conduct for U.S. concerns doing business in foreign nations. Those who espouse an efficiency view that the "right to export" is best for the nation have succeeded in "gutting" the FCPA after an eight-year struggle. In the meantime, those who have been concerned about the legal and ethical conduct of U.S. companies doing business abroad have lost the battle to maintain the standards established by the 1977 FCPA. Scientifically sound studies (as opposed to anecdotal comments) indicated that the 1977 FCPA was at most a minor disincentive to export expansion, with other variables being far more important.¹¹¹ Moreover, the 1988 Amendments send the wrong signals to U.S. and foreign business

¹¹⁰ See Graham, *supra* note 85, at 93.

¹¹¹ *Id.*; see Sternitzke, *The Great American Competitive Disadvantage: Fact or Fiction*, 10 J. INT'L BUS. STUD. 25, 32-35 (1979). Sternitzke concludes that "over the last decade the lagging long run growth of American exports has been due mainly to the loss of competitiveness of American manufacturing goods in affluent markets, and has been attributable only incidentally to commodity structure or mix of American exports." See Graham, *supra* note 85.

communities at a time when new markets are opening in Eastern Europe. If we as a nation wish to encourage the adoption of an economic model based on competition for those who have experienced the poverty of a command model, bribery, under the guise of "facilitating payments," we will only give ammunition to those in Eastern Europe and elsewhere who are opposed to reform. While the proponents of the 1988 Amendments have won in the short run, a return to pre-FCPA (1977) conduct by domestic concerns doing business abroad will lead to more stringent legislation in the long term.

