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Damned If You Do, Damned If You Don't? The OECD Convention and the Globalization of Anti-Bribery Measures

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ARTICLES

Damned If You Do, Damned If You Don't? The OECD Convention and the Globalization of Anti-Bribery Measures

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ABSTRACT

This article explores the efforts of the international community to battle corruption by focusing on the recently promulgated Organization of Economic and Cooperative Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. For many years the United States battled corruption by prohibiting its domestic businesses from bribing foreign officials. Other countries, however, generally viewed U.S. policy as a form of unilateral commercial disarmament and declined to pass their own anti-bribery legislation. The Convention, therefore, marks a recent shift by the international community, as it requires signatories to enact laws to punish domestic corporations for bribes paid to foreign officials.

The authors begin by examining the U.S. Foreign Corrupt Practices Act (FCPA), the precursor to the OECD Convention, and by describing all cases initiated by the government pursuant to the FCPA. The authors then discuss multinational anti-bribery efforts that ultimately led to the adoption of the Convention. The article focuses on the provisions of the Convention as well as the implementing legislation of various signatories. Finally, the authors explains compliance measures that multinational U.S. corporations have adopted to protect themselves from FCPA

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violations and outlines measures that such corporations can take to ensure compliance with implementing legislation under the OECD Convention.

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The [OECD Convention] criminalizes the giving of bribes.

— *World Trade, January 1999 at p. 58*[1]

Going in [to a developing] country you have to be ready to grease a few palms.

— *World Trade, Same Edition, Different Title, at p. 88*[2]

I. INTRODUCTION

At the outset of the new millennium, thirty-four industrialized countries agreed to outlaw conduct that had previously been standard operating procedure at many multinational corporations by adopting the Organization for Economic Cooperation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention).[3] Under the broadly drafted Convention, the signatories[4] agreed to enact laws that

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1. Skip Kaltenheuser, *A Little Dab Will Do You? The Movement to De-Grease International Commerce*, WORLD TRADE, Jan. 1999, at 58, 58.

2. Richard Knee, *Shipping to Africa: Weak Infrastructure and Culture Shock*, WORLD TRADE, Jan. 1999, at 88 (quoting Kennan A. Brennan, president and CEO of Phyto-Riker Pharmaceuticals Inc.). These two quotations from different articles in the same edition of the same publication demonstrate a dilemma inherent in contemporary international business.

3. *See* Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, S. TREATY DOC. NO. 105-43, at V (1998) [hereinafter OECD Convention on Bribery].

4. The twenty-nine members of the OECD are Australia, Austria, Belgium, Canada, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States. In addition to the member states, Argentina, Brazil, Bulgaria, Chile, and the Slovak Republic signed the Convention. *OECD Convention on*

would punish as criminal activity bribes paid by domestic companies to foreign officials for "improper advantage in the conduct of international business."[5]

For decades, the United States was effectively the sole country to prohibit its national businesses from bribing foreign officials.[6] Many overseas competitors were not disappointed to see the high-minded United States engage in a commercial form of unilateral disarmament. They viewed bribery as an integral part of international business culture,[7] particularly in developing countries, to be accepted as any other necessary evil. Some countries even allowed bribes as legitimate income tax deductions. Other competitors felt that, while admirable, U.S. measures were not something they could afford to imitate in a highly competitive global market. Still others took the view that bribery was caused by demand from the payee—not the payor—and that prevention of bribes in foreign developing countries was the responsibility of authorities in those countries.

In this atmosphere of ambivalence, the policy shift of the signatories to the OECD Convention took many companies by surprise, multilateralizing a dilemma that corporate America has faced for years. That is, a company may lose a major foreign contract unless it pays the "right person," yet that payment may violate applicable anti-corruption laws. The two quotations at the beginning of this article, taken from different articles in the same publication, provide a telling illustration of the contradictory forces now impelling business decisions.

How great a threat anti-bribery compliance poses to business relationships remains unclear.[8] For example, it is debatable how

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Combating Bribery to Enter into Force on 15 February 1999, (visited Oct. 26, 1999) <http://www.oecd.org/news_and_events/release/nw98-124a.htm>.

5. OECD Convention on Bribery, *supra* note 3, art. 1(1).

6. This prohibition is embodied in the Foreign Corrupt Practices Act, 15 U.S.C. §§ 78m(b), 78dd-1 to -2, 78ff (1994), *as amended by* International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-306, 112 Stat. 3302.

7. The view that corruption is systemic and unavoidable is not uniquely held by overseas competitors, however. For example, the recent Olympics bribery scandal provided a forum for domestic cynicism to be voiced as well. *See, e.g.*, Michael Wilbon, *In Olympics, Bribery Is a Participation Sport*, WASH. POST, Feb. 11, 1999, at D1:

> I'm sorry that I'm having so much trouble working up indignation over the escalating scandal involving the International Olympic Committee members and, oh, every city that's hosted the Olympics since Zeus won the gold medal in the decathlon. . . . [B]ribery is as big a part of the Olympics as track and field.

8. U.S. officials have alleged that between May 1994 and April 1998 bribes influenced 239 international contract competitions in which the sum value

much U.S. business has materially suffered from U.S. bans on bribes to foreign officials or whether these prohibitions have created more efficient and better-organized enterprises.[9] What is clear, however, is the magnitude of the risk assumed by a violator of anti-bribery law. Using the U.S. regime as a template, an individual faces, *per unlawful payment*, a fine of $2 million and incarceration for five years. Given these sanctions, the expansion of criminal punishment throughout the developed world has seized the attention of more than one multinational executive.

Recognizing that companies and individuals involved in international business for the first time may be "damned" if they do not comply with the OECD Convention and applicable implementing legislation, this article focuses on how to abide, in a practical sense, by both the letter and spirit of these new laws. Multinational corporations must ensure that they act to protect themselves from inadvertent and intentional violations of anti-bribery law by their agents.

This article, in Part II, will first describe the precursor to the OECD Convention, the U.S. anti-bribery regime, the U.S. Foreign Corrupt Practices Act (FCPA), as it is currently enforced by the U.S. Department of Justice (DOJ) and the Securities and Exchange Commission (SEC). This section also summarizes the facts and disposition of all cases initiated pursuant to the FCPA.

Part III then discusses the global efforts to combat bribery that preceded the OECD Convention and analyzes the provisions of the OECD Convention itself. This section also compares the implementing legislation of various signatories to the OECD

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of the contracts at stake totaled $108 billion. *See* Glenn R. Simpson, *Foreign Deals Rely on Bribes, U.S. Contends*, WALL ST. J., Feb. 23, 1999, at A3. However, no statistics in the public record support the notion that the FCPA has substantially hindered the overseas business endeavors of U.S. companies. *See* Daniel Pines, Comment, *Amending the Foreign Corrupt Practices Act to Include a Private Right of Action*, 82 CAL. L. REV. 185, 208 (1994).

9. For example, the president of United Technologies Corporation fired the president of a foreign subsidiary for making gifts to foreign officials in violation of the FCPA. After the firing, he observed:

> Market share and profitability stayed up and even increased and, after a year or two of tenacious effort, we were able to shorten our long, long overdue collection period on government receivables in one of the more notorious problem countries. Those early experiences taught me that the only way to run our business is with the most rigorous and demanding standards of compliance with law and regulations.

Quoted in Benjamin B. Klubes & Roberto Iraola, *The Foreign Corrupt Practices Act: A Compliance Primer for American Businesses in an Era of Trade Globalization*, 1 FOREIGN CORRUPT PRACTICES ACT REP. (Business Laws) [hereinafter FCPA Rep.] 105.001, 105.007 n.7 (1998).

Convention, and sets out the future prospects of the OECD Convention and its progeny.

Lastly, Part IV surveys compliance measures that multinational U.S. corporations have adopted to protect themselves from violations of the FCPA. This section then enumerates steps that non-U.S. companies can take to assure their compliance with applicable implementing legislation under the OECD Convention.

II. LEADING THE WAY—U.S. EFFORTS TO CURB BRIBERY

> Since the enactment in 1977 of the Foreign Corrupt Practices Act (FCPA), U.S. businesses have faced criminal penalties if they engaged in business-related bribery of foreign public officials. Foreign competitors, however, did not have similar restrictions and could engage in this corrupt activity without fear of penalty.
>
> —William Jefferson Clinton[10]

A. *The Statutory Framework*

1. Foreign Corrupt Practices Act

a. Origins

In the mid-1970s, it was revealed that U.S. corporations were making potentially illegitimate payments to foreign officials.[11] Allegations of questionable transactions were not confined to insignificant businesses or minor officials in obscure countries. Rather, the public became aware that corporate giants like Exxon, Gulf, Mobil, and Lockheed had made payments to presidents, prime ministers, and royalty of major trading partners.[12]

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10. Statement on Signing the International Anti-Bribery and Fair Competition Act of 1998, 34 WEEKLY COMP. PRES. DOC. 2290 (Nov. 10, 1998).

11. *See, e.g.*, Robert M. Smith, *Simon Criticizes Lockheed for Obscurity on Bribery*, N.Y. TIMES, Aug. 26, 1975, at 1.

12. *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, 433 (1987). When the FCPA was enacted, the governments of Japan, Italy, and the Netherlands had recently been destabilized by the implication of their officials in various bribery schemes. *See id.* True to its nature, history has come full circle—all three countries are signatories to the OECD Convention.

The media exposure surrounding apparent bribes of foreign officials catalyzed the creation of a voluntary disclosure program by the SEC under which the SEC agreed that enforcement actions would not target corporations that disclosed past payments and created internal anti-bribery procedures.[13] The SEC's voluntary program opened the disclosure floodgates. Over 400 companies, 117 of which were Fortune 500 companies, voluntarily disclosed substantial bribes.[14] Hearings were held,[15] an anti-bribery bill was introduced and passed with little debate,[16] and President Carter signed the FCPA into law in late 1977.[17] Until last November, the FCPA had been amended only once, in 1988, to provide two affirmative defenses.[18]

b. Anti-Bribery Provisions

The FCPA is divided into two discrete areas of application, the anti-bribery provisions and the accounting provisions. The anti-bribery provisions make it unlawful for any issuer or domestic concern

> 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 to
>
> (1) any foreign official . . .

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13. *See Hearings on Activities of American Multinational Corporations Abroad Before the Subcomm. on Int'l Economics Policy of the House Comm. on Int'l Relations*, 94th Cong. 57, 63-64, 66 (1975) (statement of Phillip Lommis, Jr., Commissioner, Securities and Exchange Commission); *see also SEC Offers Amnesty in Corporate Payoffs*, BUS. WK., Aug. 4, 1975, at 20; Note, *Disclosure of Payments to Foreign Government Officials Under the Securities Acts*, 89 HARV. L. REV. 1848 (1976).

14. H.R. REP. NO. 95-640, at 4 (1977). *See generally* SUMMARY: U.S. GENERAL ACCOUNTING OFFICE, IMPACT OF FOREIGN CORRUPT PRACTICES ACT OF U.S. BUSINESS, REPORT TO CONGRESS (1981).

15. *See Prohibiting Bribes to Foreign Officials: Hearings on S. 3133, S. 3379 and S. 3418 Before the Senate Comm. on Banking, Housing and Urban Affairs*, 94th Cong., 2d Sess. (1976); *Unlawful Corporate Payments: Hearings on H.R. 3815 and H.R. 1602 Before the Subcomm. on Consumer Protection and Finance of the House Comm. on Interstate and Foreign Comm.*, 95th Cong., 1st Sess. (1977).

16. Julia Christine Bliss & Gregory J. Spak, *The Foreign Corrupt Practices Act of 1988: Clarification or Evisceration?*, 20 LAW & POL'Y INT'L BUS. 441, 445-46 & n.23 (1989) (noting that only four pages of the Congressional Record covered the House debate).

17. Foreign Corrupt Practices and Investment Disclosure Bill: Statement on Signing S. 305 Into Law, [1977] PUB. PAPERS 2157 (Dec. 20, 1977).

18. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 5003, 102 Stat. 1107, 1415 (amending 15 U.S.C. § 78dd-1). *See generally* Bliss & Spak, *supra* note 16.

> (2) any foreign political party or official thereof or any candidate for foreign political office for purposes of-
> (A)(i) influencing any act or decision of such party, official, or candidate in its or his official capacity,
> (ii) inducing such party, official, or candidate to do or omit to do any act in violation of the lawful duty of such party, official, or candidate, or
> (iii) securing any improper advantage; or
> (B) inducing such party, official, or candidate to use its or his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality
>
> in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person.[19]

Stated simply, it is a federal crime for any U.S. person or entity to offer or to pay, either directly or through an intermediary, anything of value to a foreign government official in order to gain an improper commercial advantage in obtaining or retaining business.

i. Coverage

The FCPA's anti-bribery provisions apply to persons or entities subject to U.S. jurisdiction who knowingly participate in a prohibited transaction. Specifically, these provisions apply to any "issuer" of securities registered with the SEC, as well as to any officer, director, employee, agent, or stockholder acting on behalf of the issuer.[20] They apply with equal force to U.S. persons and entities designated as "domestic concerns."[21] The anti-bribery provisions do not apply directly to foreign persons, that is, natural persons who are not citizens, nationals, or residents of the United States, or to foreign entities that are not SEC-

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19. 15 U.S.C. § 78dd-1(a)(1) to -1(a)(2) (1994), *as amended by* International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-306, § 2, 112 Stat. 3302, 3302.

20. *Id.* at § 78dd-1(a), *as amended by* International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-306, § 2, 112 Stat. 3302, 3302.

21. *Id.* at § 78dd-2(a), *as amended by* International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-306, § 3, 112 Stat. 3302, 3304. A "domestic concern" is:

> (1)(A) a citizen, national, or resident of the United States; and
> (B) any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States.

Id. § 78dd-2(h)(1).

registered.[22] If they are otherwise subject to U.S. jurisdiction, however, such foreign persons and entities can face liability for knowingly assisting a U.S. person or entity in making an improper payment.[23] Furthermore, while the anti-bribery provisions do not apply to foreign-incorporated subsidiaries of U.S. corporations, a U.S. parent can face liability for knowing participation in improper payments made by a foreign subsidiary.[24]

ii. Violations

The FCPA prohibits payments that are made corruptly with the intent to influence any act or decision of a foreign official or to induce an official to do or refrain from doing any act in violation of the lawful duty of an official.[25] The FCPA is violated even if an official does not select the course of action preferred by the person making the bribe, so long as the briber possesses the requisite intent to wrongfully influence a recipient's actions.[26] The FCPA defines "foreign official" broadly to include any officer or employee of a foreign government or "instrumentality" of the government, which is generally understood to include officers and employees of a commercial enterprise owned by a foreign government.[27] The definition of "foreign official" was broadened

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22. *See id.* § 78dd-2(h)(1) (defining "domestic concern").

23. *See* Dooley v. United Technologies Corp., 803 F. Supp. 428, 440 (D.D.C. 1992).

24. The FCPA is strictly limited in application to SEC-registered "issuers" and domestic concerns. *See generally* 15 U.S.C. §§ 78dd-1, 78dd-2 (1994), *as amended by* International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-306, 112 Stat. 3302. *See also* Department of Justice, *Foreign Corrupt Practices Act Antibribery Provisions* (visited Oct. 27, 1999) <http://www.usdoj.gov/criminal/fraud/fcpa/dojdoc/htm>. ("A foreign-incorporated subsidiary of a U.S. firm will *not* be subject to the FCPA, but its U.S. parent may be liable if it authorizes, directs, or participates in the activity in question.").

25. 15 U.S.C. §§ 78dd-1(a), 78dd-2(a) (1994), *as amended by* International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-306, §§ 2-3, 112 Stat. 3302, 3302, 3304.

26. United States v. Arthur, 544 F.2d 730, 734 (4th Cir. 1976).

27. 15 U.S.C. §§ 78dd-1(f)(1), 78dd-2(h)(2) (1994), *as amended by* International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-306, § 2, 112 Stat. 3302, 3302-03. Support for this interpretation of "foreign official" is provided by the Foreign Sovereign Immunities Act, which defines "instrumentality of a foreign state" as any enterprise in which a foreign state is a majority owner. 28 U.S.C. § 1603(a)-(b) (1994). Notwithstanding the breadth of the FCPA definition of "foreign official," it frequently is difficult to determine if an individual is a foreign official in formerly totalitarian states such as Russia where the government once owned and managed every facet of the national economy. *See* Christopher F. Dugan & Vladimir Lechtman, *Current Development: The FCPA in Russia and Other Former Communist Countries*, 91 AM. J. INT'L L. 378, 382 (1997).

further by the 1998 FCPA amendments to include any officer or employee of an international organization as defined by executive order.[28] The FCPA prohibits the payment of money or anything else of value such as gifts or valuables.[29]

The clearest form of a violation of the anti-bribery provisions occurs when a U.S. corporation pays a sum of money to foreign government officials to induce them to award a government contract to the U.S. corporation. In all instances, the basis for a violation is an improper *quid pro quo*: a U.S. person gives something of value to a foreign official—no matter how indirectly—expecting the official to use her position for the commercial benefit of the U.S. person.[30]

iii. Indirect Bribery

The anti-bribery provisions explicitly prohibit payments made directly to a foreign government official, as well as payments made to an intermediary while "knowing" that all or some of the payment will be passed on improperly to a foreign government official.[31] A company is considered to have knowledge of a payment if it is aware of a "high probability" that the payment will be made and consciously disregards that probability.[32]

FCPA issues frequently arise when a U.S. corporation employs a marketing representative or sales agent in a foreign country. If the marketing representative pays a bribe to a foreign government official, the U.S. corporation may be required to demonstrate that it did not retain the marketing representative

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28. 15 U.S.C. § 78dd-2(h)(2)(B) (1994).

29. *See id.* §§ 78dd-1(a), 78dd-2(a), *as amended by* International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-306, §§ 2-3, 112 Stat. 3302, 3302-05.

30. *See Arthur*, 544 F.2d at 735. One of the 1998 amendments to the FCPA outlawed payments made with the intent to acquire "any improper advantage." International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, §§ 2(a)(1), 3(a)(1), 4, 112 Stat. 3302. It is unclear how such broad language will be applied by enforcement authorities, but it appears that the provision was enacted with the intent that the FCPA ban payments made to foreign officials for any reason, be they transactional or otherwise. For example, assume the following set of facts: (1) an American industrialist is taken hostage in a foreign country; (2) it is federal policy that money will not be traded for hostages; (3) the American corporation makes a payment to a foreign official in exchange for the industrialist's release. Has the corporation violated the FCPA by making a payment to a foreign official for an improper purpose? Much of the ambiguity inheres in "advantage," which is undefined by the FCPA.

31. 15 U.S.C. §§ 78dd-1(a)(3), 78dd-2(a)(3) (1994), *as amended by* International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-306, §§ 2-3, 112 Stat. 3302, 3302-05.

32. *Id.* §§ 78dd-1(f)(2)(B), 78dd-2(h)(3)(B).

"knowing" that she would pay a bribe to a foreign government official. The legislative history of the FCPA makes clear the drafters' intent to eliminate any "head-in-the-sand" problem.[33] One report explicitly states that "knowledge" covers "both prohibited actions that are taken with 'actual knowledge' of intended results as well as other actions that . . . evidence a conscious disregard or deliberate ignorance of known circumstances that should reasonably alert one to the high probability of violations of the Act."[34]

iv. Joint Ventures

Joint ventures may present special concerns under the FCPA where one of the parties to the venture is a foreign official (or someone close to an official), a state-controlled company, or a company controlled by a foreign official.[35] Even if the identity of joint venture partners does not pose a risk of FCPA violations—that is, they are not "foreign officials" or the like—the actions of those partners may create a liability risk. Although some joint venture partners may not be subject to the FCPA, they may nonetheless trigger FCPA liability in the same fashion as a U.S. agent or consultant if the U.S. partner authorizes the foreign partner's actions or otherwise satisfies the "knowledge" requirement.[36] Indeed, it may be simpler to satisfy the

33. H.R. REP. NO. 100-576, at 920 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1949, 1953. *See infra* notes 219-29 and accompanying text (discussing United States v. F.G. Mason Eng'g, 3 FCPA Rep. 698.70 (D. Conn. 1990) in which a guilty plea was entered where company chose to "avoid learning" about misconduct); *see also Proceedings of the Seventh Annual Conference on Legal Aspects of Doing Business in Latin America: Adapting to a Changing Legal Environment*, 9 FLA. J. INT'L L. 1, 40 (1994) (presentation of Clyde McFarland entitled *Recent Developments: Franchising Agency, Licensing, Distribution Law, and Related Matters*).

34. H.R. REP. NO. 100-576, at 920 (1988).

35. It is no simple task to determine whether or not a person is a "foreign official," especially in those countries deemed "big emerging markets," or "BEMs," by the Commerce Department. The list of ten BEMs includes Mexico, Brazil, the People's Republic of China, India, and Indonesia. While these rapidly expanding markets hold great opportunity for international investment, several are viewed as being among the world's most corrupt. *See, e.g., Asia Corrupt-O-Meter*, FORTUNE, Aug. 21, 1995, at 26. It is likely, then, that OECD Convention entanglements will arise involving transactions in the BEMs. *See, e.g., ITA's Outgoing Garten Calls for Anti-Bribery Campaign, Focus on BEMs*, DAILY REP. FOR EXECUTIVES, Oct. 17, 1995, at A-8; SEC v. Triton Energy Corp., 3 FCPA Rep. 699.471 (D.D.C. 1997) (FCPA violation involving joint venture with Indonesian company).

36. *See* 15 U.S.C. §§ 78dd-1(a)(3), 78dd-2(a)(3) (1994), *as amended by* International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-306, §§ 2-3, 112 Stat. 3302, 3302-05.

"knowledge" requirement in the context of a shared enterprise than in an agency relationship.

v. Conspiracy

Sometimes, crucial evidence for the prosecution is situated in a country that is unfriendly to the U.S. government. Nevertheless, a defendant cannot relax once government prosecutors realize they cannot obtain relevant foreign evidence. Charges of conspiracy to violate the FCPA are often attached to indictments for alleged acts that directly violate the FCPA, and conspiracy is often the crime for which a defendant ultimately is convicted.[37] Because a U.S. enforcement agency can prove a case for conspiracy by demonstrating the existence of a mere agreement to violate the FCPA and one act in furtherance of that agreement, it can prosecute and convict defendants in cases in which it cannot prove all elements of a classic FCPA violation.[38]

vi. Exceptions

Legitimate reasons exist for giving money or something else of value to a foreign government official. Two examples are lawful political contributions and payments for bona fide services rendered by an official outside of her official capacity. If an official receiving a payment is in a position to abuse her office to benefit the payor, however, the payment would receive special scrutiny under the FCPA.

Despite the existence of certain legitimate payments, the anti-bribery provisions are subject to only one statutory exception, which is applied in limited circumstances. The FCPA permits "facilitating or expediting payments" to foreign government employees "to expedite or to secure the performance of a routine governmental" function.[39] Routine governmental functions include the following: obtaining licenses, permits, or visas; processing work orders; providing police protection, mail

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37. *See, e.g., infra* Part II.B.1 (discussing cases such as United States v. Mead, United States v. Tannenbaum, United States v. Lockheed, United States v. Steindler, United States v. F.G. Mason Eng'g, United States v. Pou, United States v. Young & Rubicam, Inc., and United States v. Napco Int'l, all of which involved charges of conspiracy to violate the FCPA).

38. *See* cases cited *supra* note 37 (plea to conspiracy to violate FCPA resulting in every case where charge of conspiracy was made).

39. 15 U.S.C. §§ 78dd-1(b), 78dd-2(b) (1994).

delivery, or phone and water service; and scheduling inspections related to contract performance or the transit of goods.[40]

vii. Defenses[41]

The FCPA also provides for two affirmative defenses. That is, a payment is justified if it (1) is legal under the laws of a foreign official's country[42] or (2) represents reimbursement of reasonable expenses incurred by a foreign official in connection with the demonstration of products or services.[43] The burden is on the defendant to show that a payment fits within one of these narrow categories.[44]

To meet its burden under the first affirmative defense, a defendant must show that the payment in question was permitted under the written law of the foreign country, which often proves to be a complex endeavor.[45] In difficult cases, however, the legality of a payment under foreign law may be demonstrated by a foreign statute or regulation, the issuance of an advisory opinion by a foreign government agency, the issuance of regulations by a unit of local government, or a course of

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40. *Id.* §§ 78dd-1(f)(3)(A), 78dd-2(h)(4)(A), *as amended by* International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-306, § 3, 112 Stat. 3302, 3304-05.

41. While the FCPA provides two affirmative defenses to allegations of bribery, the statute as a whole was recently—and creatively—based as an affirmative defense against a breach of contract claim. ISMES, S.p.A. v. Murphy & Assocs. involved a contract dispute between a U.S. company and an Italian company, which was majority-owned by the Italian government. Under the contract, the U.S. company agreed to pay a commission to the Italian company for sales to a Russian government-owned joint venture. When the U.S. company was not permitted to share its commissions with the Italian company, it created a consulting agreement with the Italian company on the side. However, when the U.S. company learned that the Italian company intended to share its commission with the Russian joint venture, it canceled all commission payments. The breach of contract action followed.

The U.S. company argued that performance of the contract would have violated the FCPA's bribery provisions, making the contract illegal and unenforceable. Although the argument did not lead to a favorable jury decision, the defensive use of the FCPA in a civil action is noteworthy.

42. 15 U.S.C. §§ 78dd-1(c)(1), 78dd-2(c)(1) (1994).

43. *Id.* §§ 78dd-1(c)(2), 78dd-2(c)(2).

44. *See* LEONARD B. SAND ET AL., 4 MODERN FEDERAL JURY INSTRUCTIONS: CIVIL ¶ 73.01, at 73-2 (1998) (stating civil litigation burden of proof jury instruction as follows: "[T]he burden is upon the defendant to establish the affirmative defense"); *see also* Department of Justice, *supra* note 24 ("because these defenses are 'affirmative defenses,' the defendant would be required to show . . . that the [travel or entertainment] payment met these requirements. The prosecution would not bear the burden of demonstrating in the first instance that the payments did not constitute this type of payment.").

45. *See* Department of Justice, *supra* note 24.

conduct of a foreign government or government agency indicating that the payment is legal.[46]

The second defense permits the payment of non-excessive travel and entertainment expenses of foreign officials to learn about or to be trained by host U.S. companies.[47] The key to a payment being covered by this defense is the "non-excessive" aspect of the payment. Thus, if travel or entertainment expenses are overly lavish, the defense does not apply. Because of the factual nature of any analysis under this defense, the DOJ has issued several Advisory Opinions in response to inquiries about the propriety of various payments made to foreign officials.[48]

viii. Penalties

The FCPA imposes harsh penalties for violations of the anti-bribery provisions. A corporation or an individual acting for herself may be subject to fines of $2 million for each violation.[49] The FCPA states that an individual acting on behalf of a corporation is subject to fines of up to $100,000 and imprisonment of up to five years for each violation.[50] However, under other federal law, fines for individual violators may be increased to $250,000,[51] or, if the violator has derived a pecuniary gain or created a pecuniary loss from the violation, fines may total twice the value of the gain or loss.[52] Applicable sentencing guidelines may increase jail time for white collar

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46. The DOJ lists the foregoing methods as demonstrative of legality in a foreign jurisdiction but suggests that parties planning to justify payments to foreign officials under the auspices of this affirmative defense either seek the advice of counsel or utilize the DOJ's Advisory Opinion procedure. *See id.* Even if a party obtains an opinion from foreign counsel that a payment is not explicitly outlawed, that opinion is not per se exculpatory. A defendant also must show that the payment was proper under the written law or regulation of the foreign jurisdiction. *See* 15 U.S.C. §§ 78dd-1(c)(1), 78dd-2(c)(1) (1994); H.R. CONF. REP. No. 100-576, at 922 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1949, 1955 (emphasizing requirement that legality of payment must be based on *written* law).

47. *See* 15 U.S.C. §§ 78dd-1(c)(2), §§ 78dd-2(c)(1).

48. *See* Department of Justice, *Review Procedure Release Nos. 81-02, 82-01, 83-02, 83-03, 85-01, 92-01* <http://www.usdoj.gov/criminal/fraud/fcpa/revindx.htm>.

49. *See* 15 U.S.C. § 78dd-2(g)(1)(A) (1994), *as amended by* International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-306, § 3, 112 Stat. 3302, 3304-05.

50. *See id.* § 78dd-2(g)(2)(A), *as amended by* International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-306, § 3, 112 Stat. 3302, 3304-05.

51. *See* 18 U.S.C. § 3571(b)(3) (1994).

52. *See id.* § 3571(d).

defendants.[53] In addition, civil penalties of up to $10,000 can be imposed on either a corporation or an individual.[54] A conviction under the FCPA may result in additional, supplemental penalties under other laws.[55]

The statute of limitations under the FCPA is five years for criminal actions[56] and civil actions.[57] When the DOJ must obtain evidence from foreign countries, however, the period in criminal actions may run for an additional three years once a request to a foreign country is filed with the federal court.[58]

ix. Advisory Opinions

If a U.S. person or entity is contemplating prospective conduct that raises issues under the anti-bribery provisions, the FCPA permits the person or entity to request an opinion from the DOJ as to whether the conduct would constitute a violation under the DOJ's present enforcement policy.[59] The DOJ, which enforces the anti-bribery provisions, is required to provide its opinion within thirty days of receiving the request.[60] If the DOJ opines that the prospective conduct would *not* constitute a violation of the anti-bribery provisions, the opinion creates a rebuttable presumption that the conduct is lawful.[61]

c. Accounting Provisions

The FCPA amended the Securities Exchange Act (SEA) of 1934[62] to incorporate certain record-keeping requirements into the SEA.[63] The accounting provisions impose strict requirements on publicly-held U.S. corporations to

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53. *See* UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL, § 8C2.5 (Nov. 1995) (high-level status of corporate officer increases culpability).

54. *See* 15 U.S.C. § 78dd-2(g)(1)(B), -2(g)(2)(C), *as amended by* International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-306, § 3, 112 Stat. 3302, 3304-05.

55. These collateral sanctions are discussed *infra*, Part II.A.2.

56. *See* 18 U.S.C. § 3282 (1994).

57. *See* 28 U.S.C. § 2462 (1994).

58. *See* 18 U.S.C. § 3292(a)(1), (2)(c)(1) (1994).

59. *See* 15 U.S.C. §§ 78dd-1(e), 78dd-2(f) (1994).

60. *See id.* §§ 78dd-1(e)(1), 78dd-2(f) (1994).

61. *See id.* §§ 78dd-1(e)(1), 78dd-2(f)(1). The DOJ opinion procedure is found at 28 C.F.R. pt. 80.

62. S. REP. NO. 95-114, at 1 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4098, 4098-99.

63. *See* 15 U.S.C. § 78m(b)(2) (1994).

> (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) advise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that-
> (i) transactions are executed in accordance with management's . . . authorization,
> (ii) transactions are recorded . . . in conformity with generally accepted accounting principles . . .
> (iii) access to assets is permitted only in accordance with management's . . . authorization; and
> (iv) the recorded accountability for assets is the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.[64]

These requirements generally were intended to prohibit the use of "off-the-books" slush funds used to pay foreign officials[65] and were already part of the generally accepted accounting principles in the United States.[66] The accounting provisions require issuers (1) to make and keep books and records "which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of assets of the issuer,"[67] and (2) to "devise and maintain a system of internal accounting controls" that provides "reasonable assurances" that transactions are authorized.[68]

While designed specifically to deter or expose improper payments to foreign government officials, these provisions have much broader applicability. The provisions apply to transactions that are wholly domestic in nature and that have nothing whatsoever to do with bribery.[69]

To date, the FCPA's accounting provisions have had little practical effect. The SEC, which has principal responsibility for civil enforcement of the provisions, has treated them as an afterthought, alleging violations only as an additional theory when proceeding against a person or entity for more substantive wrongdoing under the securities laws.[70] The DOJ, which has

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64. *Id.*

65. *See* SECURITIES AND EXCHANGE COMM'N REPORT, 94TH CONG., 2ND SESS., REPORT ON QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES 23, 24 (Comm. Print 1976).

66. *See* 15 U.S.C. § 78m(b)(2)(B)(ii) (1994).

67. *Id.* § 78m(b)(2)(A).

68. *Id.* § 78m(b)(2)(B).

69. *See also* United States v. Crop Growers Corp., 954 F. Supp. 335, 356 (D.D.C. 1997) (relying on 15 U.S.C. § 78m(b)(2)(A) in non-FCPA context). *See, e.g.*, United States v. Joyce, 1997 U.S. App. LEXIS 2289, at *3 (10th Cir. 1997) (describing plea to violation of 15 U.S.C. § 78m(b)(2)(A) in non-FCPA context).

70. *See, e.g.*, *In re* Playboy Enterprises, Inc., Securities Exchange Act Release No. 17059, 1980 SEC LEXIS 911 (Aug. 13, 1980). In *Playboy*, the SEC alleged that perquisites provided to Hugh Hefner were not properly disclosed in

responsibility for the criminal enforcement of the accounting provisions, generally alleges violations of these provisions only when pursuing violations of the anti-bribery provisions.[71]

The civil and criminal penalties applicable to the FCPA accounting provisions are the same as those that apply to all other violations of the SEA. Criminal penalties are available only for "knowing" violations of the accounting provisions, such as deliberate circumvention of a company's internal accounting controls or knowing falsification of company books and records.[72]

The penalties for accounting violations are arranged in three "tiers." In the first tier, the penalty may equal the greater of $5000 for a natural person or $50,000 for any other person, or the gross amount of pecuniary gain realized by a defendant as a result of the violation.[73] The second tier applies when the violation involves "fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement," and the maximum penalty increases to $50,000 for a natural person or $250,000 for any other person.[74] The third tier applies if, in addition to fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement, the violation also "directly or indirectly results in substantial losses or created a significant risk of substantial losses to other persons."[75] The maximum penalty for a third-tier violation increases to $100,000 for a natural person and $500,000 for any other person.[76]

2. Gap-Filler Statutes

Several other U.S. anti-bribery statutes supplement the FCPA's foreign application by focusing on bribes paid to domestic public officials and private sector persons.

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proxy statements and the SEC Form 10-K. *See id.* at *33-39. The SEC also appended a claim that Playboy had inadequate systems of control and approval and incomplete recordkeeping. *See id.* at *39-46. Absent the FCPA claim, the SEC still would have brought the action based solely on the proxy statement and Form 10K allegations. However, since there was evidence to support an FCPA claim, it was asserted as well.

71. *See, e.g.*, United States v. Lockheed Corp., 3 FCPA Rep. 699.175 (N.D. Ga. 1994); United States v. Steindler, 3 FCPA Rep. 699.131 (S.D. Ohio 1994); United States v. Harris Corp., 2 FCPA Rep. 698.95 (N.D. Cal. 1990) (DOJ anti-bribery enforcement actions that included accounting provision charges). Each of these cases is discussed in more detail *infra* at Part II.B.1.

72. *See* 15 U.S.C. § 78m(b)(4) (1994).

73. *See id.* § 78u(d)(3)(B)(i).

74. *Id.* § 78u(d)(3)(B)(ii).

75. *Id.* § 78u(d)(3)(B)(iii).

76. *See id.*

a. Federal Bribery Statute[77]

The Federal Bribery Statute makes it a crime to corruptly give, offer, or promise anything of value to any U.S. public official or person selected to be a public official with the intent to influence any official act.[78] Because the federal bribery statute applies only to federal public officials, all fifty states have enacted statutes prohibiting bribery of state and local public officials.[79]

"Public official" includes members of Congress and employees of the federal government, whether appointed or elected,[80] but does not include former officials.[81] Also included are private persons responsible for carrying out a federal program or policy who act under governmental authority on behalf of the United States.[82]

Giving anything of value, such as goods, services, or promises of future business or employment, can constitute a bribe under the Federal Bribery Statute.[83] To be found liable, a defendant must have made the payment in exchange for a specific decision or other action.[84] If the payor gives the bribe with the requisite intent, it does not matter that the official is not influenced by the bribe or that the official does not have the authority to bring about the payor's desired result.[85]

Possible penalties for Federal Bribery Statute violations include a prison term of fifteen years, fines valued at three times the amount of the bribe, or both.[86] Additionally, a public official who violates the bribery statute may be disqualified from holding any office of "honor, trust, or profit under the United States."[87]

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77. *See* 18 U.S.C. § 201 (1994).
78. *See id.* § 201(b).
79. The California and New York statutes exemplify the typical state statute. *See* CAL. PENAL CODE §§ 67-68 (West 1999), N.Y. PENAL LAW §§ 200.00, 200.30 (McKinney 1999).
80. *See* 18 U.S.C. § 201(a)(1)-(2) (1994).
81. *See* United States v. Hipkins, 756 F. Supp. 233, 236-38 (D. Md. 1991).
82. *See* Dixson v. United States, 465 U.S. 482, 496 (1984).
83. 2 F. LEE BAILEY & HENRY B. ROTHBLATT, DEFENDING BUSINESS AND WHITE COLLAR CRIMES § 21:9 (2nd ed. 1984); *see also* United States v. Rasco, 853 F.2d 501, 505 (7th Cir. 1988), *cert. denied*, 488 U.S. 959 (1988) (bribery element met by proof of an ability and a desire to pay a bribe).
84. 2 KATHLEEN F. BRICKEY, CORPORATE CRIMINAL LIABILITY, § 9:31, at 297-98 (2d ed. 1984).
85. *See* United States v. Kurzban, 703 F. Supp. 5, 7 (E.D.N.Y. 1989).
86. *See* 18 U.S.C. § 201(b) (1994).
87. *Id.*

b. False Statements Statute[88]

Under the False Statements Statute, it is a crime to "knowingly and willfully falsif[y], conceal[], or cover[] up by any trick, scheme or device a material fact, or make[] any false, fictitious or fraudulent statements or representations."[89] A "statement" may consist of a claim or a document that relates to a subject within the jurisdiction of any department or agency,[90] whether or not the person making the statement realizes it.[91] In the commercial bribery context, the False Statements Statute is used either to punish false claims that no illegal payments were made or to punish the submission of false accounting records that hide acts of bribery.[92]

For purposes of the statute, a statement or representation is "material" if it could affect or influence a government function.[93] There is no statutory requirement that the government agency actually rely upon, or be influenced by, the statement.[94] The statement must be false at the time it is made,[95] and the person making the statement must be aware that the statement is false or misleading or must have consciously avoided determining the truthfulness of the statement.[96]

Violators of the False Statements Statute may be incarcerated for five years per false statement.[97] In addition, an individual may be fined $250,000; if pecuniary gain or loss resulted from the false statement, the individual may be fined twice the gain or loss.[98]

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88. *See id.* § 1001.

89. *Id.*

90. *See id.*

91. Any department or agency of the three branches of the federal government qualifies as a "department or agency" for subject matter jurisdiction purposes under the False Statements Statute. *See* United States v. Bramblett, 348 U.S. 503, 509 (1955).

92. *See, e.g.*, United States v. Blandford, 33 F.3d 685, 704-06 (6th Cir. 1994) (upholding conviction based on false statements made by a state legislator regarding his acceptance of bribes).

93. *See* United States v. Corsino, 812 F.2d 26, 30 (1st Cir. 1987) (quoting United States v. Markham, 537 F.2d 187, 196 (5th Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977)).

94. *See* United States v. Diaz, 690 F.2d 1352, 1357-58 (11th Cir. 1982).

95. *See* 3 BRICKEY, *supra* note 84, § 13:16 at 278.

96. 6 ARKIN & RAKOFF, BUSINESS CRIME ¶ 35.03 (1991).

97. *See* 18 U.S.C. § 1001 (1994).

98. The False Statements Statute prescribes any fines that may be imposed under Title 18. *See id.* § 1001(1994).

c. Commercial Bribery Coverage

Commercial bribery occurs when payment is made to a private-sector employee or official with the intent to influence her conduct regarding her employer's affairs.[99] Giving and receiving such bribes is prohibited.

Although there is no single federal statute prohibiting commercial bribery, the Mail and Wire Fraud Statutes,[100] the Bank Bribery Act,[101] and the Racketeer Influenced and Corrupt Organizations Act (RICO)[102] all provide penalties for commercial bribery. Additionally, many states prohibit commercial bribery through their own enactments.[103]

i. Mail Fraud[104] and Wire Fraud Statutes[105]

The mail and wire fraud statutes make it a crime to participate in a scheme to defraud or to obtain money or property by means of false pretenses, representations, or promises effected through the United States mail or interstate wire, radio, or television communications.[106] The commercial bribery laws generally prohibit a person from conferring or agreeing to confer a benefit upon an employee, agent, or fiduciary without the consent of that person's employer, if such benefit is intended to influence the employee's conduct with respect to the employer's affairs.[107] These laws are based on the belief that the employer is the victim of a fraud when the employee has used her position to obtain illegal benefits in exchange for making or influencing certain

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99. *See* REV. REV. STAT. ANN. § 207.295 (Michie 1997).

100. The mail fraud statute is codified at 18 U.S.C. § 1341, and the wire fraud statute is at 18 U.S.C. § 1343.

101. 18 U.S.C. § 215 (1994).

102. *Id.* §§ 1961-68 (1994).

103. *See, e.g.*, ALA. CODE § 13A-11-120 (1975); ALASKA STAT. § 11.46.670 (Lexis 1998); HAW. REV. STAT. ANN. § 708-880 (Michie 1999); 720 ILL. COMP. STAT. 5/29A-1 (West 1993); IOWA CODE ANN. § 722.10 (West 1993); KAN. STAT. ANN. § 21-4405 (1995); LA. REV. STAT. ANN. § 14.73 (1999); MISS. CODE ANN. § 97-9-10 (1994); NEB. REV. STAT. § 28-613 (1995); NEV. REV. STAT. ANN. § 207.295 (Michie 1997); N.Y. PENAL LAW §§ 180.00, 180.05 (McKinney 1999); N.D. CENT. CODE § 12.1-12-08 (1997); S.D. CODIFIED LAWS § 22-43-1 (Michie 1998).

104. 18 U.S.C. § 1341 (1994).

105. *Id.* § 1343.

106. *See id.* §§ 1341, 1343.

107. *See, e.g.*, N.Y. PENAL LAW § 180.00 (McKinney 1999).

decisions affecting the employer's business.[108] To violate these statutes one must intend specifically to participate in the scheme and must use mail, wire, radio, or television services to carry out or promote the illegal activity.[109]

A violator of the commercial bribery statutes may be fined, imprisoned for up to five years, or both.[110] If the violation affects a financial institution, fines may be increased to $1 million and the term of imprisonment may be extended to thirty years.[111]

These statutes can play a particularly important anti-bribery role in cases in which out-of-country payments are legal under the FCPA because they were not made to a "foreign official."[112] For example, in the 1970s the DOJ used the mail and wire fraud statutes to prosecute acts that now are classic FCPA violations.[113] In one case, the DOJ obtained indictments under the wire fraud statute for bribes of foreign government officials to approve computer purchases.[114] In another case, indictments were obtained under the wire fraud statute for bribes of foreign officials in exchange for their approval of applications for work permits for expatriates.[115] Thus, collateral to the FCPA regime, the wire and fraud statutes may criminalize the bribery of foreign private persons.[116]

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108. *See, e.g.*, United States v. Reece, 614 F.2d 1259, 1261 (10th Cir. 1980) (depriving an employer of loyal service by participation in a kickback scheme constitutes fraud under the mail fraud statute).

109. MARVIN G. PICKHOLZ ET AL., GUIDE TO WHITE COLLAR CRIME 7 (1986).

110. *See* 18 U.S.C. §§ 1341, 1343 (1994).

111. *See id.* §§ 1341, 1343.

112. They also may be enforceable against foreign subsidiaries that may not be subject to the FCPA. *See* Dooley v. United Technologies Corp., 803 F. Supp. 428, 439 (D.D.C. 1992).

113. William F. Pendergast, *Foreign Corrupt Practices Act: An Overview of Almost Twenty Years of Foreign Bribery Prosecutions*, 1 FCPA REP. 102.001, 102.018 n.4 (1998).

114. United States v. Control Data Corp., Criminal No. 78-210 (D.D.C. Apr. 26, 1978) (information and plea agreement filed same day) (information, notice of plea agreement, and plea agreement on file with authors).

115. United States v. The Williams Cos., Criminal No. 78-144 (D.D.C. March 24, 1978) (information and plea agreement filed same day) (information, notice of plea agreement, and plea agreement on file with authors).

116. *See, e.g.*, United States v. Van Cauwenberghe, 827 F.2d 424 (9th Cir. 1987). In *Van Cauwenberghe*, the United States indicted and extradited a Belgian on grounds that he had violated the wire fraud statute in connection with a scheme to defraud a Belgian corporation and investment broker. *Van Cauwenberghe* demonstrates that the wire fraud statute may create jurisdiction over schemes to defraud—or bribe—private foreign persons. *See also* United States v. Boots, 80 F.3d 580, 587 (1st Cir. 1996) ("Federal wire prosecutions have been based on frauds against private foreign and individuals."); Christopher M. Curran, *Beyond the FCPA: The Federal Mail and Wire Fraud Statutes May*

ii. Bank Bribery Statute[117]

The bank bribery statute makes it illegal for any officer, director, employee, agent, or attorney of any financial institution connected with the federal banking system to solicit, accept, or agree to receive anything of value if the person giving the gift intends it as a reward for business dealings with the financial institution.[118] The extent of the penalties for violating the statute depends on the value of the gift. If the gift is worth less than $1000, the recipient may be ordered to pay a fine of $1000, to serve a full year in prison, or both.[119] For giving a gift worth more than $1000, a person may be fined the greater of $1 million or three times the value of the gift, sentenced to a prison term of thirty years, or both.[120]

iii. RICO

RICO prohibits a person from engaging in a "pattern" of racketeering activity consisting of two or more violations of certain crimes listed in the statute,[121] including bribery, mail fraud, or wire fraud.[122] In fact, at least one court has found conduct violating the FCPA as a Travel Act violation, which is a RICO predicate crime.[123] The criminal penalties for bribery-related RICO violations include imprisonment of up to twenty years and forfeiture of all proceeds and property derived from the racketeering activity.[124]

Notwithstanding the lack of a private right of action under the FCPA,[125] RICO also provides a private cause of action for treble damages, the elements of which may be met by FCPA-

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Prohibit Foreign Bribery in Circumstances When the FCPA Does Not (on file with author).

117. 18 U.S.C. § 215 (1994).

118. *See id.* § 215(a).

119. *See id.*

120. *See id.*

121. *See id.* §§ 1961(5), 1962 (1994).

122. *See id.* § 1961.

123. *See* United States v. Young & Rubicam, Inc., 741 F. Supp. 334, 338-39 (D. Conn. 1990).

124. *See* 18 U.S.C. § 1963 (1994).

125. *See* Lamb v. Phillip Morris, Inc., 915 F.2d 1024 (6th Cir. 1990) (affirming dismissal of private FCPA action for failure to state a claim), *cert. denied*, 498 U.S. 1086 (1991); *see also* Lewis v. Sporck, 612 F. Supp. 1316, 1333 (D.C. Cal. 1985) (FCPA accounting provisions do not imply private right of action).

violative conduct.[126] Thus, a private RICO action could be wielded as a business weapon by an envious party alleging that a competitor's bribery of a foreign official enabled the competitor to win a foreign contract.[127]

3. Collateral Sanctions

As if the mammoth fines and lengthy terms of incarceration imposed by the FCPA and similar laws provide inadequate punishment, convicted violators—or those simply alleged to have violated the FCPA—may suffer a number of additional sanctions.

FCPA defendants can be barred from participation in procurement by federal government agencies.[128] A mere indictment for an FCPA violation is grounds for suspension,[129] and once an agency bars or suspends a company from nonprocurement or procurement activities, other agencies in turn must exclude the company.[130] Additionally, companies that violate the FCPA may be prevented from receiving State Department export licenses, and, if under indictment, they can be barred from receiving licenses until they receive a full-fledged acquittal.[131] Other programs from which FCPA violators can be barred or suspended include those of the Overseas Private Investment Corporation[132] and the Commodity Futures Trading Commission.[133] Furthermore, the Department of Commerce will not provide advocacy assistance on foreign government procurement projects to corporate violators of the FCPA, who may also be excluded from participating in trade missions.[134]

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126. *See, e.g.*, Environmental Tectonics v. W.S. Kirkpatrick, Inc., 847 F.2d 1052, 1063 (3rd Cir. 1988), *aff'd*, 493 U.S. 400 (1990).

127. For more speculation about federal criminal statutes that might apply in the context of foreign bribery, *see generally* Don Zarin, *Other U.S. Laws Applicable to Overseas Bribery, in* DOING BUSINESS UNDER THE FOREIGN CORRUPT PRACTICES ACT 11-1 (1995).

128. *See* 48 C.F.R. § 4.602-2(a)(3) (1998).

129. *See* 48 C.F.R. § 9.405-2(a) (1998); *see generally* Non-procurement Debarment and Suspension, 53 Fed. Reg. 19,161 (1988).

130. *See* 48 C.F.R. § 9.405(a) (1998).

131. 22 C.F.R. §§ 120.1(b), 120.24(f).

132. *See* 22 C.F.R. § 709.1(b) (1999).

133. *See* 17 C.F.R. §§ 3.55, 3.60 (1998).

134. These collateral sanctions target corporations, but foreign countries are also monitored by the United States. The Uruguay Round Agreements Act requires the President to report to Congress those countries that fail to effectively prohibit bribery in connection with government procurement if the United States acquires products from those countries in significant amounts. 19 U.S.C. § 2515(d) (1994). As a result, the Office of the United States Trade Representative (USTR) has requested comments for the preparation of at least one such report.

B. *The FCPA at Work*

Bland statutory recitals shed little light on how the FCPA works in real life. Explication of the facts and dispositions of various FCPA cases reveals, at least in part, how corporations become entangled in the FCPA, how the DOJ and SEC apply the law, and how violations eventually are resolved. With the preceding statutory summary as introduction, the following case summaries address DOJ prosecutions under the anti-bribery provisions of the FCPA as well as SEC enforcement actions under the Act's accounting provisions.

1. DOJ Anti-Bribery Prosecutions[135]

a. Brazil Nuts[136]

Control System Specialists, Incorporated and its president allegedly violated the FCPA, the federal bribery statute and the federal conspiracy statute.[137] Specifically, the DOJ charged that the defendants, who purchased, repaired, and resold surplus military equipment, conspired with a U.S. Air Force employee and a Brazilian Air Force officer to violate the FCPA.[138] The defendants made payments to the U.S. Air Force employee to

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See, e.g., Request for Comments Concerning Foreign Government Discrimination in Procurement, 61 Fed. Reg. 5044 (1996). Furthermore, in the past few years, the USTR has considered governmental indifference to corruption to be a trade barrier worth noting in its annual report on foreign trade practices. *See* Request for Public Comment with Respect to the Annual National Trade Estimate Report on Foreign Trade Barriers, 63 Fed. Reg. 59,619 (1998); Request for Public Comment with Respect to the Annual National Trade Estimate Report on Foreign Trade Barriers, 62 Fed. Reg. 59,014 (1997); Request for Public Comment with Respect to the Annual National Trade Estimate Report on Foreign Trade Barriers, 61 Fed. Reg. 56,081 (1996); Request for Public Comment with Respect to the Annual National Trade Estimate Report on Foreign Trade Barriers, 60 Fed. Reg. 55,614 (1995).

135. Because many FCPA bribery prosecutions end in plea agreements between the DOJ and the accused parties, few published judicial opinions exist. Thus, most of the cases described below are not reported in the Federal Reporter series and are identified by the docket numbers assigned them by the federal district courts. Where available, the Federal Reporter citation is provided. Because the number of anti-bribery cases is small, all actions brought during the past ten years are summarized. The cases are organized in reverse chronological order.

136. United States v. Control Sys. Specialists, Inc., 4 FCPA Rep. 699.587 (S.D. Ohio 1998).

137. *See id.* at 699.587-.590.

138. *See id.* at 699.588-.589.

steer surplus military equipment to them.[139] The defendants then refurbished the equipment and sold it to the Brazilian Aeronautical Commission.[140] The defendants also formed a sham company that made "consultant fees" payments to the Brazilian Air Force Officer.[141] In reality, the "consultant fees" were illegal payments made in exchange for the officer's influence with the Brazilian government.[142]

The defendants each waived formal indictment and pleaded guilty to all counts.[143] Under the plea agreement, the company president potentially faced seven years in prison and a $250,000 on each count, and he agreed to make full restitution of any damages caused by the criminal acts.[144] The company faced a fine of $500,000 on each count and also agreed to make full restitution.[145] Ultimately, the president was sentenced to three years of probation and 150 hours of community service.[146] The company received a $1500 fine and one year of probation.[147]

b. Oil Slick[148]

The DOJ recently charged Saybolt, Incorporated (Saybolt), a petroleum inspection company, and Saybolt North America, Inc., both subsidiaries of a Dutch company, with violating the FCPA's anti-bribery provisions.[149] Specifically, the DOJ claimed that Saybolt's president and Chief Executive Officer (CEO) and Saybolt's chairman jointly authorized a $50,000 payment to Panamanian government officials upon their request.[150] According to the information, the payment was made to the Panamanian Minister of Mines and Materials in a Panama City bar.[151] In return for the payments, Saybolt received government contracts for a Panamanian Saybolt affiliate, a lease of prime real

139. *See id.* at 699.588.
140. *See id.*
141. *Id.* at 699.589.
142. *See id.*
143. *See id.* at 699.591, 699.595.
144. *See id.* at 699.591.
145. *See id.* at 699.595.
146. *See* 1 FCPA Rep. 101.034.
147. *See id.*
148. United States v. Mead, 3 FCPA Rep. 699.533 (D.N.J. 1998).
149. *See* Department of Justice, *Press Release: Saybolt Inc. Agrees to Plead Guilty to Falsifying Reports to the EPA and Violating the Foreign Corrupt Practices Act and to Pay a Fine of $4.9 Million* (Aug. 18, 1998) <http://www.usdoj.gov/usao/ma/pr/prev98/sayblt.htm> [hereinafter *Saybolt Agrees to Plead Guilty*].
150. *See Mead*, 3 FCPA Rep. at 699.539.
151. *See id.* at 699.533.

estate bordering the Panama Canal, and expedited tax advantages.[152]

Saybolt's president, a British citizen with U.S. resident alien status, was arrested and charged with violating the FCPA, conspiring to violate the FCPA, and racketeering.[153] The chairman of the board of directors, a Dutch national and resident, was indicted in absentia on identical charges.[154] He remained a fugitive at the time of the disposition.[155]

Saybolt and Saybolt North America pleaded guilty to violating and conspiring to violate the FCPA.[156] Pursuant to the plea agreement, the companies were fined $4.9 million, received five years of probation, and agreed to cooperate in the investigation and prosecution of the individuals involved.[157]

The Saybolt case is notable for several reasons. For one, it signals a new initiation process for FCPA cases. Violations of the FCPA are generally brought to the attention of authorities by whistleblowers or disgruntled former employees. In this case, however, the FCPA violations were discovered in the course of an unrelated criminal investigation pursuant to environmental laws.[158] Second, the case demonstrates how severe FCPA penalties can be in relation to the size of the violations. Here, a $50,000 bribe resulted in a $1.5 million fine to the corporation. Third, the chairman of Saybolt's board appears to be the first non-resident foreign national to be indicted for violating the FCPA. This jurisdictional expansion was justified by the chairman's positions of authority in two U.S. corporations. Finally, the nature of the DOJ's evidence demonstrates the means by which modern business communications technology can create a damning paper trail that previously was unavailable to prosecutors. In alleging the conspiracy, the indictment quoted extensively from numerous, explicit electronic mail and telefax transmissions describing the negotiations and decisionmaking surrounding the $50,000 bribe.[159] In the past, much of this evidence would not have existed because it would have been conveyed orally instead of being communicated electronically.

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152. *See id.* at 699.536-.537.
153. *See id.* at 699.540.
154. *See Saybolt Agree to Plead Guilty, supra* note 149.
155. *See id.*
156. *See id.*
157. Only $1.5 million of the fine was delegated to the FCPA charges. The rest of the fine resulted from falsification of petroleum test data in violation of the Clean Air Act. *See id.*
158. *See id.*
159. *See Mead*, 3 FCPA Rep. at 699.539.

c. Garbage In, Garbage Out[160]

The president of Tanner Management and certain unnamed co-conspirators were accused of conspiring to violate the FCPA.[161] In particular, they were accused of offering to make payments of between $120,000 and $200,000 to an undercover agent posing as an Argentine procurement officer.[162] The offer of payments was intended to induce the false procurement officer to purchase garbage incinerators for the government of Argentina. To disguise the offered payments, the president of Tanner Management opened a bank account for a non-existent business entity.[163]

The president pleaded guilty to one count of conspiracy to violate the FCPA.[164] Pursuant to the Federal Sentencing Guidelines, his plea made him eligible for twelve to eighteen months of incarceration.[165]

d. Plane Dealers[166]

The DOJ accused Lockheed Corporation (Lockheed) of making a $1 million payment to a business operated by a member of the People's Assembly of the Arab Republic of Egypt.[167] The payment allegedly was made with an intent to cause the official to help Lockheed win an aircraft sales contract with the government of Egypt.[168] The charges resulted from an investigation conducted by special agents of the Defense Criminal Investigative Service and the Defense Contract Audit Agency in connection with loan financing administered by the U.S. Defense Department.[169]

According to the charging documents, Lockheed entered a consulting agreement with the Egyptian official before she became a member of the People's Assembly.[170] The official received a monthly retainer for "devot[ing] her best efforts to the development of markets and sales prospects" for Lockheed in

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160. United States v. Tannenbaum, 4 FCPA Rep. 699.583 (S.D.N.Y. 1998).
161. *See id.* at 699.586.
162. *See id.* at 699.584.
163. *See id.* at 699.587.
164. *See id.* at 699.584.
165. *See id.* at 699.585.
166. United States v. Lockheed Corp., 3 FCPA Rep. 699.175 (N.D. Ga. 1995).
167. *See id.* at 699.179.
168. *See id.* at 699.178.
169. *See id.* at 699.176-.177.
170. *See id.* at 699.177.

Egypt.[171] She also was to receive a commission based on the number of planes Lockheed sold in Egypt.[172] When the official later was elected to the People's Assembly, Lockheed's regional vice president prepared documents transferring the consulting agreement to the official's husband; Lockheed, however, continued to pay the Assembly member a monthly retainer.[173]

The government of Egypt purchased the aircraft from Lockheed using financing it obtained from a program administered by the U.S. Defense Security Assistance Agency (DSAA).[174] Lockheed falsely certified to the DSAA that it had not made any bribes, rebates, gifts, kickbacks, or gratuities in exchange for favorable treatment.[175] Further, the sales contract between Lockheed and the government of Egypt attested that the contract price did not include a sales commission, and that if Lockheed had in fact paid a sales commission, the contract price would be reduced by the amount of that commission.[176]

Later, when the U.S. financing agency announced that it intended to notify the Egyptian government that Lockheed paid a commission on the sale, the official prepared a letter forfeiting the commission.[177] The Lockheed regional vice president then prepared a document indicating that the company would no longer pay a commission for the sale.[178] Lockheed ultimately paid the official a "termination fee" equal to the value of the lost commission but claimed that the payment was unrelated to the sale of aircraft.[179] Lockheed eventually admitted that the payment was not a termination fee but rather a payment to the Egyptian government official in exchange for her assistance in obtaining the aircraft sales contract for Lockheed.[180]

In addition to the charges leveled at Lockheed, the DOJ individually accused Lockheed's Director of Middle East and North African sales of falsely certifying to the DSAA that the termination fee paid to the Egyptian official was not connected to the sale of aircraft and of arranging the transfer of funds from Lockheed to the official.[181] It also accused the regional vice

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171. *Id.*
172. *See id.*
173. *See id.* at 699.178.
174. *See id.* at 699.182.
175. *See id.* at 699.181.
176. *See id.* at 699.178.
177. *See id.* at 699.181-.182.
178. *See id.* at 699.182.
179. *See id.* at 699.183.
180. *See id.* at 699.176.
181. *See* United States v. Love, 3 FCPA Rep. 699.187 (N.D. Ga. 1995).

president of executing the Termination Agreement with the official and arranging for the delivery of the termination fee to her Swiss bank account.

Lockheed eventually pleaded guilty to conspiracy to violate the anti-bribery and accounting provisions of the FCPA by making improper payments and falsifying records, and agreed to pay a $24.8 million fine.[182] Additionally, the Director of Middle East and North African sales for Lockheed Aeronautical pleaded guilty to creating a false document relating to the payment of a bribe and received a sentence of three years of probation.[183] The officer was fined $20,000 and was barred from working on defense contracts for a period of three years. The regional vice president of Lockheed International also pleaded guilty to violating the FCPA, was fined $125,000, and was sentenced to an eighteen month term of imprisonment.[184]

e. Spilled Milk[185]

Vitusa Corporation (Vitusa) contracted to sell powdered milk to the government of the Dominican Republic.[186] After Vitusa made three deliveries of powdered milk, the government failed to pay its bill in full. The president of Vitusa unsuccessfully contacted numerous U.S. and Dominican government officials seeking their assistance in obtaining payment for the powdered milk.[187] A local Dominican government official informed a Vitusa business agent that he would use his influence to encourage the government to pay the outstanding balance to Vitusa in exchange for a "service fee."[188]

The president of Vitusa discussed the "service fee" with a U.S. embassy official who informed him that the payment would violate the FCPA. Despite this warning, the president decided to pay the fee and notified the embassy official by facsimile that he had already made his decision. When the Dominican government made a payment on the powdered milk contract, Vitusa arranged for part of the payment to be placed in the bank account of its

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182. *See Lockheed Corp.*, 3 FCPA Rep. at 699.186.

183. *See Love*, 3 FCPA Rep. at 699.188-.189.

184. *See* 1 FCPA Rep. 101.019.

185. United States v. Vitusa Corp., 3 FCPA Rep. 699.155 (D.N.J. 1994); United States v. Herzberg, 3 FCPA Rep. 699.165 (D.N.J. 1994).

186. *See Vitusa Corp.*, 3 FCPA Rep. at 699.159.

187. *See id.* at 699.160.

188. *See id.* at 699.159.

business agent, knowing that its agent would forward the money to the Dominican government official.[189]

Vitusa, and its president individually, both pleaded guilty to a single count of making an unlawful payment to a foreign official in violation of the FCPA.[190] The company was fined $20,000, while the president was fined $5000 and sentenced to probation for two years.[191] The president's cooperation with prosecutors was a mitigating factor that prevented him from receiving more severe punishment.[192]

f. Jet Setters[193]

General Electric (GE) contracted with the Israeli Government to provide tools, equipment, testing facilities and training to maintain GE engines used in Israeli jet fighters. In turn, GE subcontracted the work to an Israeli firm.[194] Instead of paying the subcontractor directly, GE made payments to the Israeli subcontractor's U.S. sales agent. The sales agent then diverted a portion of the funds to European bank accounts established for the GE international sales manager and an Israeli Air Force general.[195]

The Israeli government later contracted to purchase seventy-five new jet engines from GE. Israel financed the purchase and the earlier service contract through the U.S. Foreign Military Financing Program, which is administered by the DSAA. The DSAA required GE and the Israeli government to provide certifications that the borrowed funds were being used properly.[196]

The GE international sales manager and the Israeli general represented that GE, through its Israeli subcontractor, would provide funding for the testing of the new engines even though the Israeli Air Force conducted the engine tests independent of any GE funding. The international sales manager then instructed the subcontractor to bill GE for the testing. GE paid the Israeli subcontractor pursuant to the bill, and, like the funds derived from the service contract, the sales funds were diverted to bank

189. *See id.* at 699.164
190. *See id.* at 699.155; *Herzberg*, 3 FCPA Rep. at 699.166.
191. *See* 1 FCPA Rep. 101.018.
192. *See* 3 FCPA Rep. 699.166.
193. United States v. Steindler, 3 FCPA Rep. 699.131 (S.D. Ohio 1994).
194. *See id.* at 699.131.
195. *See id.* at 699.133.
196. *See id.* at 699.132.

accounts maintained for the benefit of the GE international sales manager and the Israeli general.[197]

The international sales manager signed a contractor certification, which was ultimately provided to the DSAA, in which he falsely stated that the contract for the sale of jet engines did not contain any undisclosed agreements or improper payments.[198] The international sales manager also made false statements on GE questionnaires regarding his outside business interests and falsely stated that he would comply with GE policies prohibiting transactions like those in which he was engaged.[199]

The DOJ charged the international sales manager with bribing a general in the Israeli Air Force.[200] The international sales manager pleaded guilty to conspiracy to violate the FCPA, wire fraud, and money laundering.[201] He was sentenced to seven years of imprisonment and ordered to forfeit almost $1.8 million.[202] The general was convicted in Israel on related charges and sentenced to thirteen years in prison.[203]

GE was charged with violating the False Claims Act and with fraud and money laundering.[204] Under its plea agreement with the DOJ, the company paid $59.5 million in civil fines and $9.5 million in criminal penalties.[205] A General Electric employee who exposed the company's misconduct received a $13.5 million reward under a federal "whistle blower" statute.[206]

g. Down the Stretch They Come[207]

American Totalisator Company (ATC) was accused of making payments to its Greek business agent "knowing that all or a portion" of those payments would be forwarded to a Greek official in violation of the FCPA. In exchange for the payments, the official allegedly assisted ATC in obtaining and retaining business with the Greek Horse Racing Administration.[208] The DOJ brought an action for a permanent injunction against ATC, and

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197. *See id.* at 699.134.
198. *See id.*
199. *See id.* at 699.136.
200. *See id.* at 699.152-.153.
201. *See* 1 FCPA Rep. 101.017.
202. *See id.*
203. *See id.*
204. *See Steindler*, 3 FCPA Rep. 699.147-.151.
205. *Whistle-blower Gets $13 Million*, CHICAGO TRIB., Dec. 5, 1992, at 10.
206. *See id.*
207. United States v. American Totalisator Co., 3 FCPA Rep. 699.067 (D. Md. 1993).
208. *See id.* at 699.068.

ATC consented to a final judgment, entered by the district court, in which ATC was permanently enjoined and restrained from violating the FCPA, and in which it agreed to cooperate fully with a DOJ criminal investigation of the matter.[209] The DOJ declined to pursue criminal prosecution of ATC, presumably as a result of ATC's cooperation as well as a lack of evidence.[210]

h. Just the Fax[211]

The Harris Corporation (Harris) employed a consultant for the purpose of securing telecommunications business with Telecom, a telecommunications company controlled by the government of Colombia. The DOJ alleged that part of the commissions paid to Harris's consultant were forwarded to a member of the Colombian legislature in exchange for his influence in securing contracts with Telecom, in violation of the FCPA. Harris allegedly also paid commissions to a Colombian company, knowing that the company was partly owned by a member of the Colombian legislature. Commissions paid to the company were tied to the value of contracts Harris received from the Colombian government, and the DOJ alleged that the commissions were payments for the legislator's assistance to Harris in obtaining and maintaining telecommunications business with Colombia.[212] The DOJ also charged that Harris violated the FCPA's accounting provisions by failing to maintain records and accounts that accurately reflected the transactions and dispositions of its assets.[213] Specifically, the illegal commission payments allegedly were falsely described as "consultant retainer fees," "consultant expenses," and "incidental fees" to conceal their true nature.[214]

According to the indictment, the vice president and the director of administration of Harris both knew when they hired the consultant that he had "an in" with the government of Colombia.[215] After the consultant was hired, he sent the vice president a fax indicating that he would not travel to Colombia unless he had $5500 in cash. The vice president forwarded this fax to the director of administration. At some point the director of

209. *See id.* at 699.071-.072.
210. *See id.* at 699.070-.073.
211. United States v. Harris Corp., 2 FCPA Rep. 698.95 (N.D. Cal. 1990).
212. *See id.* at 698.97.
213. *See id.* at 698.97-.98.
214. *Id.* at 698.97.
215. *Id.* at 698.98.

administration made a notation of a phone call with the consultant in which he indicated that the $5500 was for a bribe, and the director later signed a check request for the money.[216] On a separate occasion the director of administration and the vice president submitted a check request for the consultant, which included $3000 in "incidental fees."[217]

The trial court dismissed the charges against Harris and the named officers after assessing the evidence presented at trial by the DOJ as insufficient to sustain a conviction under the FCPA.[218]

i. Spy vs. Spy[219]

F.G. Mason Engineering (Mason) and its president both admitted to paying kickbacks to a German official in order to secure and retain business with the German Military Intelligence Service.[220] The German official was responsible for the selection, procurement, and testing of electronic surveillance equipment for the Military Intelligence Service and other agencies of the German government.[221] In exchange for his influence in securing business for Mason, the German official received kickbacks representing thirteen percent of the payments Mason received from procurement contracts. A written agreement executed by the parties indicated that the payments were to be made in exchange for the German official's consulting services.[222] The agreement provided that the company would continue to pay commissions to the official's family in the event of his death.[223]

Mason's president allegedly knew the agreement and payments to the German official were illegal, but he "consciously chose to avoid learning of the specific provisions of law that prohibited this conduct."[224] Although the German official provided some minor technical assistance to the company, Mason's president recognized that the commissions were paid for

216. *See id.*
217. *See id.* at 698.99.
218. *See* 1 FCPA Rep. 101.016.
219. United States v. F.G. Mason Eng'g Inc., 2 FCPA Rep. 698.70 (D. Conn. 1990).
220. *See id.* at 698.82-.86.
221. *See id.* at 698.70.
222. *See id.* at 698.71.
223. *See id.*
224. *Id.* at 698.83.

influence with the German military, not for legitimate business advice.[225]

Mason and its president both pleaded guilty to conspiring to violate the FCPA by making the payments to the German official.[226] As part of the plea agreement, the president cooperated in the prosecution of the German official in Germany.[227] Mason and its president were sentenced to probation for five years and jointly were ordered to pay a $75,000 fine.[228] Because Mason had an ongoing contractual relationship with the German government at the time the plea agreement was executed, it was ordered to make restitution by giving the government a $160,000 credit toward existing contracts and discounts on future purchases of equipment or services.[229]

j. Bus Fuss[230]

A business agent for Eagle Bus Manufacturing (Eagle) met with the president and vice president of the Saskatchewan Transportation Company (STC), a government-owned Canadian corporation, to negotiate a contract for the sale of eleven buses. At the meeting, STC officers told Eagle's agent that a $50,000 (Can.) payment was a prerequisite to their approval of the contract. The president and vice president of Eagle allegedly approved the payment, and Eagle's vice president traveled to Canada with the business agent to meet with the STC officers and to finalize the method of payment.[231]

At the direction of its officers, the STC proffered a check to Eagle's agent.[232] The agent converted the check to cash and gave it to the officers. Later, Eagle's agent prepared a letter to STC, falsely stating that STC would receive a volume discount for the buses.[233] The discount was intended to disguise the illicit nature of the $50,000 payment.

A trial court acquitted Eagle's president and vice president of charges that they approved the payment to the STC president and vice president in violation of the FCPA, citing insufficient evidence

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225. *See id.* at 698.83-.84.
226. *See id.* at 698.77.
227. *See id.* at 698.87.
228. *See* 1 FCPA Rep. 101.016.
229. *See id.*
230. United States v. Morton, 2 FCPA Rep. 698.62 (N.D. Tex. 1990); United States v. Blondek, 2 FCPA Rep. 698.68 (N.D. Tex. 1990).
231. *See Blondek*, 2 FCPA Rep. at 698.69.
232. *See id.*
233. *See id.* at 698.6901.

of intent to bribe the Canadian officials.[234] Eagle's agent pleaded guilty to conspiracy to violate the FCPA and was sentenced to probation for three years.[235] Eagle avoided prosecution by cooperating with the DOJ, but was permanently enjoined from violating the FCPA.[236]

The DOJ, conceding that foreign officials could not be prosecuted for violating the FCPA, nevertheless sought to prosecute the Canadian officials for *conspiring* to violate the FCPA. The federal district court dismissed the indictment against the Canadian officials, ruling that the FCPA's exemption of foreign officials from prosecution disallowed use of a general conspiracy statute to charge those same officials with conspiring to violate the FCPA.[237]

In its ruling, the district court noted "the overwhelming evidence of a Congressional intent to exempt foreign officials from prosecution for receiving bribes" even though Congress possessed the power to reach foreign officials.[238] The drafters of the FCPA, the court asserted, were aware of the potential jurisdictional, enforcement, and diplomatic difficulties posed by application of the law to non-citizens. This awareness prompted the drafters to intentionally exclude foreign officials from the reach of the FCPA.[239]

k. More Plane Dealings[240]

A retired general from the Dominican Republic, his aide, a pilot, and a lawyer were accused of participating in a scheme to violate the FCPA by paying bribes to Dominican generals in exchange for the release of aircraft seized in narcotics trafficking prosecutions. The pilot and the aide both pleaded guilty to conspiring to violate the FCPA and were sentenced to three years probation. The lawyer was acquitted by a court ruling that the

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234. *See id.* at 698.6902-.6906.

235. *See* United States v. Morton, 2 FCPA Rep. 698.62, 698.65-.67 (N.D. Tex. 1990).

236. *See* United States v. Eagle Bus Mfg., 2 FCPA 698.6910 (S.D. Tex. 1990).

237. United States v. Blondek, 741 F. Supp. 116 (N.D. Tex. 1990), *aff'd* United States v. Castle, 925 F. 2d 831 (5th Cir. 1991). *Blondek* established that the DOJ cannot target foreign government officials under the FCPA. However, the OECD Convention may expand the DOJ's ability to target foreign government officials through cooperation with foreign authorities. *See* discussion *infra*, at notes 375-80.

238. *Blondek*, 741 F. Supp. at 119.

239. *See id.*

240. United States v. Pou, 1 FCPA Rep. 102.008 (S.D. Fla. 1989).

evidence presented at trial was insufficient to sustain a conviction. The general fled to the Dominican Republic prior to his trial.[241]

I. It Didn't Ad Up[242]

The DOJ accused Young & Rubicam Incorporated (Young & Rubicam), an advertising company, of making payments to the Jamaican Minister of Tourism and another Jamaican tourism official.[243] In exchange for the payments, the two officials allegedly used their positions to help Young & Rubicam secure an advertising account with the Tourist Board of Jamaica and to induce the Tourist Board "to make unnecessary and excessive expenditures for advertising services."[244]

The illicit payments were passed from Young & Rubicam to certain intermediaries who deposited the payments with a company created for receiving the kickbacks.[245] One intermediary received additional payment after he threatened to expose the bribes, and the New York regional director of the Jamaica Tourism Board also received payments after he discovered the bribes.[246]

In addition to paying kickbacks, a subsidiary of Young & Rubicam made shirts to be used in the Minister of Tourism's reelection campaign. The value of the shirts was deducted from the amount of kickbacks paid to the Tourism Minister.[247]

Young & Rubicam prepared periodic submissions to the DOJ pursuant to the Foreign Agents Registration Act in which it listed foreign agents working on behalf of the company and described their activities.[248] With one exception, the company declined to disclose the existence of the Jamaican company in its DOJ submissions. When a Young & Rubicam account executive referred to disbursements to the Jamaican company in a

241. *See id.* at 102.008.

242. United States v. Young & Rubicam, Inc., 2 FCPA Rep. 698.38 (D. Conn. 1989). The court's ruling on several pretrial motions not directly connected with the substance of the FCPA claim in this case is reported at United States v. Young & Rubicam, Inc., 741 F. Supp. 334 (D. Conn. 1990).

243. *See Young & Rubicam, Inc.*, 2 FCPA Rep. at 698.39.

244. *Id.*

245. *See id.* at 698.40-.45.

246. *See id.* at 698.40.

247. *See id.* at 698.44.

248. *See generally id.*

submission, the kickback scheme was threatened with exposure.[249]

As a result of its activities, the company was charged with violating the FCPA, RICO, and state bribery law, and with conspiring to violate the FCPA.[250] Young & Rubicam pleaded guilty to conspiring to bribe a Jamaican official and paid a $500,000 fine.[251] The DOJ also brought charges against Young & Rubicam's executive vice president, vice president, senior vice president and director of business affairs, and an account executive.[252] The charges against the individual officers were dismissed for lack of evidence.[253]

m. Tired Out[254]

An official of the Iraqi Trading Company, a state-owned agency through which the Iraqi government purchased all of its tires, told the regional export manager of Goodyear International Corporation (Goodyear) that he would assist Goodyear in obtaining business with the Iraqi government in exchange for a cash payment. The Iraqi official indicated that Goodyear competitors in France, Korea, and Japan were willing to pay him cash commissions. If Goodyear did not make the payments, the Iraqi official indicated that the company would receive only limited business from the Iraqi government.[255]

The Goodyear export manager informed the Iraqi official that paying the commissions violated company policy. Later, the export manager repeated the conversation to his direct superior who, in turn, discussed the matter with Goodyear's European director and a Goodyear vice president. The vice president told him to "get the business, I don't want to know how", and he relayed the mandate to the export manager originally in contact with the Iraqi official.[256]

Amidst negotiations over the exact amount Goodyear would pay the Iraqi official, he arrived at Goodyear's offices in Greece.

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249. *See id.* at 698.44.
250. *See generally id.*
251. *See id.* at 698.5101.
252. *See id.* at 698.38-.39.
253. *See* 1 FCPA Rep. 101.015.
254. United States v. Goodyear Int'l Corp., 2 FCPA Rep. 698.1601 (D.D.C. 1989).
255. *See id.* at 698.19.
256. *Id.* This provides yet another example of the head-in-the-sand managerial approach the FCPA does not permit a corporation or corporate officer to adopt.

The Iraqi official produced an advance copy of a report that detailed the Iraqi government's tire requirements for the following year, the contents of which would not be available to Goodyear competitors for several months. The Iraqi official accepted the commission proposed by the export manager and insisted that he be paid in cash.[257]

To disguise the cash payments, the export manager commissioned a Greek company to prepare marketing reports for Goodyear, and paid the Greek company an amount well in excess of the value of the reports. The Greek company deposited the proceeds of the marketing reports in its bank account, then transferred funds to the personal account of Goodyear's export manager. The export manager subsequently withdrew the money and made a cash payment to the Iraqi official. Later, when the Iraqi official required another payment, the export manager arranged for a Greek advertising company to bill Goodyear for fictional advertising charges. Once again, money was transferred from the advertising company's bank account to the export manager's personal account so that he could make cash payments to the Iraqi official. Through the sham transactions, Goodyear paid bribes to the official totaling nearly a million dollars.[258]

Goodyear eventually discovered the bribery scheme during an internal investigation and informed the DOJ that it had uncovered potential FCPA violations.[259] After the subsequent DOJ investigation, Goodyear pleaded guilty to bribery charges, paid a $250,000 fine, and agreed to cooperate with the DOJ investigation of other involved parties.[260] Goodyear's regional export manager pleaded guilty to federal income tax violations after he failed to report $75,000 he received in kickbacks for his role in the bribery scheme.[261] The regional export manager was sentenced to two years of probation and was fined $10,000.[262]

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257. *See id.* at 698.19-.20.
258. *See id.* at 698.20.
259. *See id.* at 698.21
260. *See id.* at 698.17-.18.
261. Pete Yost, *Government Says Former Top Executives Involved in Scheme to Pay Bribes*, ASSOC. PRESS, May 11, 1989, *available in* LEXIS, News Library, AP File.
262. *Id.*

n. Plane Guilty[263]

The DOJ charged Venturian Corporation (Venturian) and its subsidiary Napco International (Napco) with bribing a foreign official in violation of the FCPA, preparing false corporate tax returns and accounting records to disguise bribes, and conspiring to defraud the U.S. government.[264] Specifically, the companies were charged with making payments to a captain in the Niger Air Force and his cousin, Embassy Counsel at the Niger Embassy in Washington. In exchange for the payments, the Niger officials were to use their influence to secure contracts for aircraft parts and maintenance contracts with the Air Force and Ministry of Defense of Niger, for which the officials would receive payments representing ten percent of the net revenue Napco realized on the contracts.[265]

The vice president of Napco's aerospace division authorized commission payments to individuals identified as "agents" who were, in fact, relatives of the Niger air force captain and, in one instance, included his cousin's girlfriend. The "agents" performed no services for Napco, and Napco's vice president made the payments knowing that they would be forwarded to the air force captain and his cousin.[266] When the cousin married, Napco's vice president paid for the newlyweds to fly to Niger for the wedding and to Europe for the honeymoon. The airline tickets were charged on a Napco credit card and were characterized as "commission expenses" in company records.[267]

Venturian and Napco ultimately pleaded guilty to charges of conspiracy, bribery of a foreign official, and filing a false tax return.[268] The companies were ordered to pay $785,000 in fines, $140,000 to the U.S. government for settlement of civil liability, and $75,000 for settlement of tax liability.[269] The vice president of Napco's aerospace division was convicted at trial.[270] His conviction was reversed later on grounds unrelated to the FCPA,

263. United States v. Napco Int'l, 2 FCPA Rep. 697.74 (D. Minn. 1989); United States v. Liebo, 2 FCPA Rep. 697.97 (D. Minn. 1989).

264. *See Napco Int'l*, 2 FCPA Rep. at 697.74.

265. *See id.* at 697.75.

266. *See id.*

267. *See id.* at 697.76.

268 *See id.* at 697.77.

269. *See id.*

270. *See Former Minnesota Company Executive Convicted of Bribing Foreign Officials*, 2 FCPA Rep. 698.16.

and he was retried.[271] The vice president was re-convicted and sentenced to eighteen months in prison.[272] His initial sentence was suspended, and he received three years of probation, sixty days of home confinement, and 600 hours of community service.[273]

2. SEC Accounting Enforcement[274]

As noted above, the accounting provisions of the FCPA were enacted to prohibit the use of off-the-books slush funds for making payments to foreign officials.[275] The SEC enforces the accounting provisions through administrative proceedings and civil actions brought in federal district court under the SEA, as amended by the FCPA. Violations of the FCPA accounting provisions often are intertwined with other unlawful behavior policed by the SEC, such as the preparation of materially misleading quarterly or annual financial reports, false statements to auditors, and insider trading.[276] Thus, in addition to fines for FCPA accounting violations, other penalties may be imposed on accounting provision violators under other laws. For example, accounting violations may lead to being barred from serving as the officer or director of a publicly traded company, barred from practicing as an accountant before the SEC, or ordered to disgorge monies received from insider trading.[277]

a. IBM[278]

The DOJ recently commenced investigation of IBM due to alleged payments made by IBM's Argentine subsidiary to

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271. *See* United States v. Liebo, 923 F.2d 1308 (8th Cir. 1991).

272. *See Former Minnesota Company Executive Convicted of Bribing Foreign Officials*, *supra* note 270, at 698.16.

273. *See* 1 FCPA Rep. 101.013.

274. There are many more reported cases involving violations of the accounting provisions than there are of the bribery provisions. Therefore, the following summary briefly covers only some of the most recent SEC civil actions based on the FCPA accounting provisions.

275. *See supra* notes 62-68 and accompanying text.

276. The accounting enforcement actions discussed *infra* provide several examples of this. *See infra* Parts II.B.2.a-h.

277. *See* 15 U.S.C. § 78(u)(d)(2) [1994]; 17 C.F.R. § 201.102(e) [1999]; *see also, e.g.*, *SEC v. Bilzerian*, 814 F. Supp. 116 (D.D.C. 1993) (disgorgement appropriate remedy for security law violation).

278. Homer E. Moyer, Jr., *The FCPA: The Evolving Picture of Risks, Compliance, and Enforcement*, at 9 (speech given Nov. 17, 1998; copy of handout on file with authors).

Argentine officials.[279] Argentine tax authorities conducted a routine audit of a local company and discovered that millions of dollars reported as paid to the company were, in fact, either deposited in a Swiss bank account or were missing.[280] The U.S. criminal investigation proceeded on the theory that IBM used the local shell company to pay bribes to government officials.[281]

Although no direct evidence in support of the DOJ theory has been exposed, IBM has lost the contract in issue and has become embroiled in several related civil lawsuits.[282] Allegations that IBM ignored competitive bidding requirements and overcharged the Argentine government have also prompted local investigation of other major IBM contracts.[283]

b. Triton Energy[284]

Triton Indonesia, a Delaware corporation, entered into a joint venture for the operation of a gas and oil recovery project in Indonesia.[285] Triton Indonesia's work was supervised by Pertamina, Indonesia's national oil company.[286] Under the joint venture, Triton Indonesia was entitled to reimbursement of certain expenditures related to oil and gas exploration.[287] Auditors from Pertamina and the Indonesian Ministry of Finance performed joint audits of Triton Indonesia to verify the amount of reimbursements and to assess tax liability.[288] In these audit "negotiations," Triton Indonesia allegedly made an improper payment to a government official to favorably influence the results of the audit.[289] Later, Triton Indonesia allegedly hired an intermediary to make subsequent improper payments.[290]

The SEC claimed that Triton Indonesia made payments to its business agent "knowing or recklessly disregarding the high probability" that the agent would pass the payments to Indonesian government officials to influence their decisions

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279. *See id.*
280. *See id.*
281. *See id.*
282. *See id.* at 9-10.
283. *See id.* at 10.
284. SEC v. Triton Energy Corp., 3 FCPA Rep. 699.471 (D.D.C. 1997).
285. *See In re* David Gore, 3 FCPA Rep. at 699.463.
286. *See id.*
287. *See id.*
288. *See id.*
289. *See id.* at 699.464.
290. *See id.*

during the audit to the business advantage of Triton Indonesia.[291]

The SEC charged officers of Triton Indonesia with violating the accounting provisions of the FCPA by making false entries to conceal the nature of the payments, and further asserted that Triton Indonesia failed to create and maintain adequate internal accounting controls that would have revealed the improper payments.[292] The SEC also accused officers of Triton Energy of knowing about the nature of the payments Triton Indonesia made to its business agent and of failing to establish policies or procedures that would have prevented the FCPA violation.[293]

Ultimately, the SEC filed a civil injunction action against Triton Energy Corporation and the president and vice president of its subsidiary Triton Indonesia, alleging violations of the FCPA's accounting provisions.[294] The SEC also instituted administrative proceedings against the president and vice president of Triton Energy, the commercial manager of Triton Indonesia and the controller of Triton Indonesia. The SEC reached a penalty agreement with Triton Energy under which Triton Energy paid a $300,000 penalty and the president of Triton Indonesia paid a $50,000 penalty. The president and vice president of Triton Energy, the commercial manager of Triton Indonesia, and the controller of Triton Indonesia agreed to "cease and desist" from committing further violations of the SEA or the FCPA.[295] In June, 1997, the SEC filed a consent settlement with the vice president of Triton Indonesia, who agreed to pay a $35,000 fine.[296] While most actions under the FCPA accounting provision do not involve allegations of bribery, the Triton case directly involved such allegations. Because the SEC pursued the action, rather than the DOJ, the penalties imposed were civil rather than criminal.

c. Eating Crow[297]

The SEC alleged that the former president and chairman of the board of Wilshire Technologies, Incorporated (Wilshire) caused the company to overstate its earnings from the sale of new

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291. *See* SEC v. Triton Energy Corp., 3 FCPA Rep. 699.471, 699.471 (D.D.C. 1997).

292. *See id.*

293. *See id.* at 699.472.

294. *See id.* at 699.471.

295. *See id.* at 699.472.

296. *See id.* at 699.473.

297. SEC v. Crow, 3 FCPA Rep. 699.559 (S.D. Cal. 1998).

and untested products in two quarterly financial statements. The SEC alleged that his behavior violated the record-keeping and internal control provisions of the FCPA and the SEA.[298]

The president of Wilshire eventually consented to a final judgment enjoining him from violating the accounting and record-keeping provisions of the SEA. The president was also enjoined from violating the insider trading, antifraud, and internal control provisions of the securities laws. The president was ordered to pay disgorgement of $1,248,444, plus interest, and was barred from serving as an officer or director of a company that reports to the SEC.[299]

d. Laser Photonics[300]

The SEC accused the former president and CEO of Laser Photonics, Inc. of violating the record-keeping and accounting control provisions of the SEA by falsifying company records in order to inflate the company's publicly reported revenues and profits. The president and other company officers allegedly ordered the creation of documents that reflected fictitious sales and that improperly recorded sales returns and billing errors. The president also was accused of trying to cover up the scheme by forging, altering, and concealing corporate records, and by procuring false sales confirmations from company customers in order to deceive company auditors.[301]

The president consented to the entry of a final judgment enjoining him from future violations of the record-keeping provisions of the SEA, barring him from serving as a company officer or director for five years, and ordering him to pay a civil penalty of $40,000.[302]

e. Micro Management[303]

The former president of California Micro Devices Corporation was accused of participating in falsification of company shipment records in order to inflate the company's publicly reported revenue. The former managers of the company's manufacturing

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298. *See id.* at 699.560.
299. *See id.* at 699.559-.560.
300. SEC v. Fukuhara, 3 FCPA Rep. 699.560 (M.D. Fla. 1998).
301. *See id.*
302. *See id.*
303. SEC v. Gupta, 3 FCPA Rep. 699.549 (N.D. Cal. 1998).

plants also were accused of falsifying sales and shipment records.[304]

The president and plant managers reached settlement agreements with the SEC. The president was assessed a civil penalty of $72,250, was barred from serving as an officer or director of a public company, and was enjoined from future violations of the securities laws. The plant managers were ordered to disgorge all insider trading profits and to pay civil penalties for insider trading and other violations. They were also barred from serving as officers or directors of a public company for a five-year period.[305]

The company's former chief accounting officer was prosecuted in a separate action for record-keeping violations and insider trading.[306] A final judgment ordered the accounting officer to disgorge an insider trading penalty of $86,000, barred him from serving as an officer or director of a public company, and imposed a separate civil penalty of $86,000. In a separate administrative proceeding against the officer, the SEC obtained a consent order prohibiting him from practicing as an accountant before the SEC.[307]

f. Sensormatic[308]

The SEC filed a civil action in federal court against three officers of Sensormatic Electronics Corporation (Sensormatic), instituted an administrative proceeding against the company, and brought administrative proceedings against the company's former controller and the former director of management information systems.[309]

The civil action filed by the SEC alleged that Sensormatic's executive vice president and its vice president of finance supervised manipulation of the company's quarterly revenue and earnings statements in order to inflate revenue recognition in a particular quarter to reach earnings goals and meet analyst quarterly earnings provisions.[310] The revenue and earnings manipulation allegedly was achieved by falsifying shipment and

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304. *See id.*
305. *See id.*
306. *See* SEC v. Romito, No. 95-29857 (N.D. Cal., Dec. 19, 1995), *available at* <http://www.sec.gov/enforce/litigrel/lr14776.txt>.
307. *See id.*
308. *In re* Sensormatic Electronics Corp., 3 FCPA Rep. 699.546 (D.D.C. 1998).
309. *See id.* at 699.546.
310. *See id.*

sales records. To conceal the record-keeping irregularities, the officers ordered the creation of false accounting records, made false statements to company auditors, and intentionally circumvented internal corporate accounting controls. The former president was accused of declining to halt the improper accounting practices even though he was aware of their existence. The final judgment in the civil action fined two officers $50,000 each and fined another officer $40,000. One of the officers settled in a separate administrative proceeding, which barred him from practicing before the SEC as an accountant for a period of five years.[311]

In the administrative proceeding, the SEC made the same allegations of revenue and earnings manipulation against Sensormatic that it made against the individual officers in the civil matter.[312] The SEC charged that the alleged practices violated the FCPA record-keeping and internal control provisions. Sensormatic consented to a cease and desist order but did not suffer any pecuniary liability.[313]

The SEC also brought administrative proceedings against Sensormatic's controller and director of information systems. According to the SEC order, the controller was aware that shipping documents were backdated, which created inaccurately recorded revenue so that Sensormatic's earnings were misstated. The controller was barred from practicing before the SEC as an accountant for a period of three years. The company's director of information systems also was accused of falsifying accounting records and was enjoined from further violation of the record-keeping and internal control provisions of the SEA.[314]

g. Bausch & Lomb[315]

A former sales director of the contact lens division of Bausch & Lomb was accused of violating the FCPA record-keeping and internal control provisions. The sales director "knew, or was reckless in not knowing" that the company recorded revenue from consignment sales in a manner that overstated annual company income.[316] The sales director consented to the entry of a final judgment ordering him to pay a $10,000 civil penalty and

311. *See id.* at 699.547-.548.
312. *See id.* at 699.546.
313. *See id.* at 699.547.
314. *See id.* at 699.548.
315. SEC v. Logan, 3 FCPA Rep. 699.509 (D.D.C. 1997).
316. *See id.*

enjoining him from further violation of the record-keeping and internal controls provisions of the FCPA.[317]

h. DeGeorge[318]

The SEC filed a civil action in federal court alleging that the chief executive officer and controlling stockholder of DeGeorge Financial Corporation repeatedly failed to disclose to company auditors related-party transactions and the use of company funds to pay personal expenses. The officer was ordered to disgorge $204,000 and to pay civil penalties of $50,000 for his violation of the FCPA record-keeping and accounting control provisions, and other violations of the securities laws.[319]

In a separate administrative proceeding, the company was ordered to cease and desist violation of the record-keeping and internal control provisions and to retain an independent consultant to review company policies and procedures governing related-party transactions. The company was not ordered to pay any fines.[320]

III. ANTI-CORRUPTION MULTILATERALISM AND ITS DOMESTIC EFFECTS

> Powerful financial organizations have globalized corruption as an accepted tool of business; the fight against corruption must be globalized as well.
>
> — *Oscar Arias Sanchez*[321]

> [F]ighting corruption requires many leaders. In national and local governments, in parliaments and city councils, in the judiciary and security forces and among citizens in every community. It also requires partnership. No single effort will do the job.
>
> — *Donald J. Johnston*[322]

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317. *See id.*

318. SEC v. DeGeorge, C.A. No. 3:97 CV 2382 (D. Conn., Nov. 12, 1997), *available at* <http://www.sec.gov/enforce/litigrel/lr15556.txt>.

319. *See id.*

320. *See id.*

321. Oscar Arias Sanchez, *Foreword* to NATIONAL INTEGRITY SYSTEMS: THE TI SOURCE BOOK (visited Oct. 27, 1999) <http://www.transparency.de/documents/source-book/foreword.html>. Sanchez was the president of Costa Rica from 1986 to 1990 and won the Nobel Peace Prize in 1987 for his peace efforts in Central America.

322. Donald J. Johnston, *Building Integrity in Government: The OECD as Part of a Multiple Response—Address at the Global Forum on Fighting Corruption and Safeguarding Integrity Among Justice and Security Officials* (Feb. 24, 1999)

A. *The OECD Convention on Bribery*

The OECD Convention was completed in November 1997 and was signed the following month. In addition to the twenty-nine member countries of the OECD, Argentina, Brazil, Bulgaria, Chile, and the Czech Republic signed the Convention and committed themselves to enacting legislation to criminalize the bribery of foreign officials.[323]

1. Background

The importance of the OECD Convention is instilled by its potent membership, which encompasses all of the world's major economic powers and binds all companies doing business out of those countries. The Convention, however, is not the first step taken in international collaboration against business corruption. Multilateral organizations, both governmental and non-governmental, laid the groundwork for the Convention with a series of earlier initiatives. The convergence of these initiatives, noted *infra*, in the mid-1990s facilitated the broad consensus among the OECD's disparate membership for adoption of the ambitions agenda of the Convention.

a. Inter-Governmental Efforts

The Organization of American States (OAS) presaged the OECD agreement when its members adopted the first multilateral anti-bribery initiative in March 1996.[324] The Inter-American Convention Against Corruption (OAS Convention) entered into force the next year in March 1997 and required its signatories to enact statutes that, like the FCPA, criminalize the bribery of government officials.[325] The OAS Convention provides for extradition of violators[326] and seizure of their assets,[327]

<http://www.usia.gov/topical/econ/integrity/document/johns.htm>. The Honorable Donald J. Johnston is the Secretary-General of the OECD.

323. *See* OECD Convention on Bribery, *supra* note 3.

324. The countries that have signed the OAS Convention are Argentina, the Bahamas, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Trinidad & Tobago, the United States, Uruguay, and Venezuela. *See Inter-American Convention Against Corruption* (visited Oct. 28, 1999) <http://www.oas.org/En/prog/juridico/english/Sigs/b-58.html>.

325. *See* Inter-American Convention Against Corruption, March 29, 1996, S. TREATY DOC. NO. 105-39, art. III (1998).

326. *See id.* art. XIII.

establishes accounting and disclosure provisions,[328] and calls for international cooperation in evidence-gathering.[329] The OAS Convention has functioned as a geographic and legal bridge from the FCPA to the OECD Convention.

In February 1996, the United States Trade Representative (USTR) formally requested the World Trade Organization (WTO) to assume a leadership role in combating bribery and corruption by passing anti-bribery measures at the first WTO ministerial meetings in December 1996.[330] The USTR argued, in part, that the composition of the WTO allowed it, better than other, more industrialized multilateral organizations, to pass measures banning the *receipt* of a bribe.[331] Although the WTO did not address the issue with the specificity the USTR desired, it issued a Ministerial Declaration that created a working group to research transparency in the government procurement process.[332] In June 1999, the OECD announced that it would analyze how WTO rules combat corruption and bribery.[333]

In November 1996, the Economic and Social Council of the United Nations submitted to the General Assembly a draft Declaration Against Corruption and Bribery in International Commercial Transactions. The Declaration stated the Council's resolve that members of the United Nations should enact domestic legislation to prohibit bribery of foreign officials and tax deductions for such corrupt payments.[334] The General Assembly adopted the Declaration in December 1996.[335]

On May 26, 1997, the European Union Council adopted a "Convention in the fight against corruption involving officials of the European Communities or officials of the Member States of the European Union."[336] This Convention criminalizes bribery of

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327. *See id.* art. XIV.

328. *See id.* art. III.

329. *See id.* art. XIV.

330. *See* WTO, *Statement by the Honourable Charlene Barshefsky Acting United States Trade Representative* (Dec. 9, 1996) (visited Oct. 10, 1999) <http://www.wto.org/wto/archives/st5.htm>.

331. *See id.*

332. *See* WTO, *Singapore Ministerial Declaration* (Dec. 18, 1996) (visited Oct. 10, 1999) <http://www.wto.org/wto/archives/wtodec.htm>. Transparency International, discussed *infra* Part III.A.1.6, recently applied more pressure to the WTO to assert its authority against corruption in international trade. *See WTO Urged to Act on Trade Corruption*, FIN. TIMES, Sept. 23, 1998, at 10.

333. *OECD to Study How WTO Rules Combat Corruption and Bribery*, INSIDE U.S. TRADE, June 18, 1999.

334. *See* U.N. GAOR, 51st Sess., Agenda Item 12, U.N. Doc. A/RES/51/191 (1997) *accessed at* <gopher://gopher.un.org:70/00/ga/recs/51/RES51-EN.191>.

335. *See id.*

336. 1997 O.J. 1 (C195).

officials whether or not Community financial interests are at stake, but it is limited to acts of bribery involving European Union and Member State officials.[337]

In June 1997, leaders of the G-7—the United States, France, Germany, Japan, the United Kingdom, Italy, and Canada—plus representatives of Russia and the European Union met at the Denver Economic Summit and established an agenda to fight corruption.[338] The G-7 agreed to coordinate their anti-corruption activities and to encourage other countries to follow suit.[339] The G-7 finance ministers reconvened in April 1998 in Washington,

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337. *See id.* The Committee of Ministers of the Council of Europe established the Group of States Against Corruption (GRECO) in May 1998. GRECO's stated purpose is to fight corruption through "mutual evaluation and peer pressure." *Agreement Establishing The Group of States Against Corruption-GRECO*, Comm. Of Ministers, 102nd Sess., Res. (98) 7 (May 6, 1998), *available at* <http://www.usdoj.gov/criminal/ fraud/fcpa/E2198.htm>. As a continuation of the establishment of GRECO, the Council of Europe passed its own anti-corruption treaty on January 27, 1999. *See Criminal Law Convention on Corruption*, Jan. 27, 1999, Europ. T.S. No. 173, *available at* <http://www.coe.fr/eng/legaltxt/173e.htm>. The Council's treaty is patterned after the OECD Convention, but certain provisions stand out as unique. First, the Council of Europe's treaty criminalizes acts constituting "trading in influence." The treaty defines "trading in influence" as making improper payment to someone who claims to have an improper influence over a governmental decisionmaker. *Id.* art. 12. "Trading in influence" is considered "background corruption" that undermines the trust citizens place in public administration. *Explanatory Report on the Criminal Law Convention on Corruption*, Council of Europe, GMC (98) 40 (Dec. 1, 1998), *available at* <http://www.usdoj.gov/ criminal/fraud/fcpa/ gmc9840e.htm> (explaining Article 12). Second, the treaty explicitly states that "collaborators of justice and witnesses" will receive special protection. *See Criminal Law Convention on Corruption, supra* art. 21. Concern for the safety of "collaborators of justice" may require anonymity, bodyguards, or changes of identity. *See Explanatory Report, supra* art. 21. Third, the treaty encourages parties to provide each other with "spontaneous information." *See Criminal Law Convention on Corruption, supra* art. 22. Given the transnational character of corruption, one state may obtain information regarding acts of corruption in other states, and governments should be encouraged to share such information with any party that has jurisdiction over the offense. *See Explanatory Report, supra* art. 22.

The Current Signatories to the treaty are Albania, Belgium, Bulgaria, Croatia, Cyprus, Denmark, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Lithuania, Luxembourg, Moldova, Norway, Poland, Portugal, Romania, Russia, Slovakia, Slovenia, Sweden, the former Yugoslav Republic of Macedonia, Ukraine, and the United Kingdom. European Council, *Chart of Signatures and Ratifications* (visited Oct. 5, 1999) <http://www.coe.fr/ tablconv/173t.htm>. The substantial participation of eastern European countries is notable, given their general absence from other anti-corruption measures.

338. Office of the Chief Counsel for International Commerce, US Department of Commerce, *The Anti-Corruption Review* (Jan. 1999) (visited Oct. 5, 1999) <http://www.ita.doc.gov/legal/main.htm>.

339. *See id.*

D.C. and issued a communiqué in support of the anti-corruption efforts of other parties, including international financial institutions and the OECD.[340]

b. Non-Governmental Efforts[341]

Transparency International formed in 1994 with the sole purpose of curbing corruption "by mobilising a global coalition to promote and strengthen international and national Integrity Systems."[342] With chapters either formed or forming in over ninety countries, Transparency International has already catalyzed much reform, including the OECD Convention,[343] and continues to participate in important debates on corruption and to lobby for enhanced anti-bribery initiatives.[344]

While Transparency International shares goals with those who enact anti-bribery legislation—eliminating corruption and its antidemocratic effects—it employs a different approach to achieve those goals.[345] Instead of attempting to expose individual cases,

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340. *See id.*

341. Although non-governmental efforts are not coupled with enforcement capability, they possess a certain moral authority that can influence the decisionmaking of those in government who can enact and enforce desirable policy.

342. Transparency International, *Mission Statement* (visited Oct. 5, 1999) <http://www.transparency.de/mission.html>.

343. *See, e.g.*, David Sanger, *Business Bribes To Foreigners To Be Banned By End of 1998*, N.Y. TIMES, May 24, 1997, at 5 (noting Transparency International's involvement in passage of OECD Convention); Paul Blustein, *Pact to Bar Bribery Is Reached; Major Nations Agree To U.S. Request*, WASH. POST, May 24, 1997, at F-1.

344. For example, Transparency International was well-represented at the recent Global Forum on Fighting Corruption. *See* Chad Bowman, *Gore to Unveil Diplomatic Initiatives in Fight Against International Corruption*, DAILY REP. FOR EXECUTIVES, FEB. 23, 1999, at A-27 (quoting Transparency International representative). Indeed, Transparency International's Managing Director Jeremy Pope spoke at the opening session with U.S. Vice President Al Gore, U.S. Secretary of State Madeleine Albright, OECD Secretary General Donald Johnson, and U.N. Crime Center Executive Director Pino Arlacchi. U.S. Department of State Office of the Spokesman, *Media Schedule for Vice President Gore's Global Forum on Fighting Corruption, February 24-26, 1999* (visited Oct. 5, 1999) <http://secretary. state.gov/www/briefings/statements/1999/ps990223.html>. Transparency Inter-national is also working closely with the OECD to extend the anti-corruption work of the two groups into eastern and central Europe. *See* Lawrence Speer, *OECD, 'Transparency' Group Open Front in East Europe in War Against Corruption*, DAILY REP. FOR EXECUTIVES, Jan. 13, 1999, at A-5.

345. Transparency International's approach is premised on the belief that simply enacting anti-corruption laws fails to achieve long-term change, observing that "if it were just a matter of laws and enforcement, the problem of corruption would have been solved long ago. Even countries with the worst levels of corruption have laws banning public service corruption. These laws are simply

as the DOJ does, Transparency International emphasizes prevention and systemic reform.[346] In an attempt to apply pressure to various governments and stimulate public debate about corruption, Transparency International began publishing a Corruption Perceptions Index (CPI) in 1995 and the Bribe Payers Perception Index (BPI) in 1999.[347] The CPI is derived from numerous polls of experts and the general public regarding their perceptions of the extent of corruption.[348] Ninety-nine countries are ranked in numerical order, creating a "who's who" in corruption image from Denmark, currently perceived as the least corrupt nation, to Cameroon, currently viewed as the most corrupt.[349]

Perhaps more relevant to the OECD Convention than the CPI, the BPI ranks the largest exporting countries in terms of their perceived willingness (based on polling in fourteen developing countries) to pay bribes to win business.[350] The BPI revealed that countries such as China/Hong Kong and South Korea were most willing to pay bribes, while Sweden, Australia, and Canada were viewed as least willing.[351] Upon the release of the BPI, the chairman of Transparency International urged that governments of leading exporting countries "must take determined actions to stop businesses headquartered in their countries from bribing foreign officials."[352]

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never enforced and systems of accountability are ignored." Transparency International, *Applying the Framework: Administrative Reforms*, *in* NATIONAL INTEGRITY SYSTEMS: THE TI SOURCE BOOK (visited Oct. 5, 1999) <http://www.transparency.de/documents/source-book/b/Chapter_7/index.html.>.

346. This is, perhaps, a luxury possessed by international organizations such as Transparency International that a government cannot afford. While an international organization may engage in philosophical debate and organize extra-governmental efforts, an administration must obtain convictions to demonstrate its determination to solve a problem.

347. Transparency International, *The Corruption Perceptions Index* (visited Nov. 5, 1999) <http://www.transparency.de/documents/cpi/cpi-bpi_press-release.html>. On October 26, 1999, Transparency International released its latest Corruption Perceptions Index and a new Bribe Payers Perception Index. The Bribe Payers Perception Index ranks the leading exporting nations by the extent to which their domestic firms are perceived to engage in bribery abroad. *See id.*

348. *See id.*

349. *See id.*

350. Transparency International, *1999 Bribe Payers Index* (visited Nov. 15, 1999) <http://www.transparency.de/documents/cpi/index.html>.

351. *Id.*

352. Transparency International, *New Poll Shows Many Leading Exporters Using Bribes* (visited Nov. 15, 1999) <http://www.transparency.de/documents/cpi-bpi_press-release.html>.

The BPI indicates that the willingness to pay bribes is partially a function of culture. While U.S. companies have long been subject to the formal anti-bribery constraints of the FCPA, U.S. companies did not distinguish themselves for their anti-bribery rectitude in the BPI survey.

Another non-public group furthered the cause of anti-bribery advocates in March 1996 by urging its membership to adopt new conduct rules to eliminate bribery and extortion in international trade. The conduct rules of the International Chamber of Commerce (ICC) advocated stronger domestic laws, enhanced enforcement of those laws, increased governmental transparency, and the elimination of tax deductions for corrupt payments.[353] More specifically, the ICC rules stated that *private* businesses may not give or receive bribes or kickbacks, may not make unreasonably high payments to agents, must properly account for all transactions, should propagate anti-corruption codes, and should create internal control systems as a prophylactic measure.[354] The ICC issued new Rules of Conduct in 1999 that prohibit extortion and bribery for *any* purpose.[355]

In August 1996, the World Bank released guidelines regarding procurement financed by loans from the International Bank for Reconstruction and Development or credits from the International Development Association.[356] Pursuant to the guidelines, borrowers, bidders, suppliers, and contractors are all required to observe the "highest standard of ethics" during procurement and execution of contracts.[357] If a bidder is believed to have engaged in corruption or fraud, the World Bank will reject proposals for awards.[358] Likewise, if a borrower is found to have engaged in similar conduct, the remaining portions of loans already granted will be canceled.[359] In either event, the company will be barred from World Bank financing for an indefinite period of time, and the World Bank will claim a right to inspect and

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353. *See* International Chamber of Commerce, *Extortion and Bribery in International Business Transactions Rules and Recommendations* (visited Oct. 11, 1999) <http://www.iccwbo.org/home/statements_rules/rules/1996/briberydoc.asp>.

354. *See id.*

355. *See* International Chamber of Commerce, *Preface to 1999 Edition of ICC Rules of Conduct*, (visited Nov. 5, 1999) <http://www.iccwbo.org/Commissions/Extortion_bribery/briberydoc99.htm>.

356. WORLD BANK, GUIDELINES: PROCUREMENT UNDER IBRD LOANS AND IDA CREDITS 7 (1996) & ADDENDUM (1997); INTER-AMERICAN DEVELOPMENT BANK, ADDENDUM TO BASIC PROCUREMENT POLICIES AND PROCEDURES OF THE IDB (1998).

357. *Id.*

358. *See id.*

359. *See id.*

audit the books and records of the corrupt supplier or contractor.[360]

The World Bank has served noticed that it is serious about its anti-corruption initiatives.[361] In August 1997, the International Monetary Fund decided to halt aid to Kenya due to systemic corruption.[362] In support of the International Monetary Fund's decision, the World Bank announced that it would not provide a $71 million credit to Kenya until corruption concerns were addressed.[363] In October 1997, the World Bank sued a former employee and an outside contractor for breach of contract, fraud, and conspiracy, and it received favorable judgments against all defendants in February 1999.[364] The World Bank also recently declared misprocurement on roughly forty contracts having a total value of $40 million.[365]

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360. *See id.*

361. *See, e.g.*, Governance and Anti-Corruption (visited Nov. 4, 1999) <http://www.worldbank.org/wbi/gac> (directory for extensive World Bank coverage of anti-corruption efforts).

362. *See* Michela Wrong & Michael Holman, *World Bank Warns Kenya About Corruption*, FIN. TIMES (London), Aug. 9, 1997, at 36; *see also* Salamat Ali, *International Politics of Kickbacks*, Nov. 1, 1999 (visited Nov. 1, 1999) <http://dawn.com/daily/text/ebr13.htm> (discussing pressure of International Monetary Fund on Pakistan to more effectively restrict tax evasion and bribery).

363. *See id.*; *see also* Statement of Treasury Secretary Robert E. Rubin (Feb. 24, 1999) (visited Oct. 10, 1999) <http://www.usia.gov/topical/econ/integrity/document/rubin.htm> (stressing the importance of international institutions to global anti-corruption regime).

364. *See* The World Bank Group, *Preventing Corruption in Bank Projects and Keeping our Own House in Order*, (visited Oct. 5, 1999) <http://www.worldbank.org/publicsector/anticorrupt/preventing.htm>.

365. *See id.* The World Bank is quick to note that these forty contracts are a drop in the barrel of 45,000 contracts worth about US $45-50 million. *See id.* In May 1998, the World Bank established an Oversight Committee on Fraud and Corruption to review each allegation of corruption received by members of the World Bank Group. *See id.* The committee holds weekly meetings and has established a telephone hotline with multilingual capabilities that can receive allegations of corruption at any moment. *See id.* All hotline reports are forwarded to the committee and callers may remain anonymous. *See id.*

The World Bank recently—and permanently—debarred an employee and three British-registered corporations from being awarded Bank-financed contracts. The allegations of fraudulent activity pertained to procurements of computer equipment by agencies of Turkmenistan in 1995. *See* Transparency International, *Press Release: World Bank Debars Staff Member & Corporations: Three UK Firms and an Individual Accused of Corruption*, (visited Oct. 5, 1999) <http://www.transparency.de/documents/pressreleases/1999.21.04.wbank.htm>. It is also notable that in January 1998, prior to the entry into force of the OECD Convention, the International Development Bank (IDB) amended its procurement policies and procedures to provide for inspection of financial records and penalization for accounting improprieties. Where it discovers corrupt practices, the IDB can either

In light of the mounting pressure from the accretion of anti-bribery regulations, agreements, and declarations, consensus at the OECD began to coalesce around a global anti-bribery regime. The awakening of anti-corruption reform demands would not permit Western OECD members to remain aloof from corruption problems in lesser-developed countries.[366] With a membership binding all major economic players, the OECD's anti-corruption regime breaks new ground because of the breadth of its coverage, not for its novelty.

2. Provisions

a. Illicit Payments

The OECD Convention entered into force on February 15, 1999, sixty days after it was ratified by Canada.[367] The scope of the OECD Convention is similar to that of the FCPA, requiring signatories to

> take such measures as may be necessary to establish that it is a criminal offence under law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.[368]

In effect, the OECD took the FCPA definition of bribery and broadened it. The Convention prohibits payments to foreign

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reject contract awards outright or accelerate loan repayments. *See* IDB PRESS RELEASE NO. NR-12198 (Jan. 29, 1998).

366. *See, e.g.*, Simpson, *supra* note 8, at A3 (according to U.S. reports, France and Germany pay most bribes); Nora M. Rubin, *A Convergence of 1996 and 1997 Global Efforts to Curb Corruption and Bribery in International Business Transactions: The Legal Implications of the OECD Recommendations and Convention for the United States, Germany, and Switzerland*, 14 AM. U. INT'L. L. REV. 257, 293-98, 304-07 (1998) (describing German corruption and Swiss wartime financial dealings with Nazis).

367. The Convention was to enter into force sixty days after it was ratified by five of the ten signatory countries with the ten largest export shares. If ratification had not occurred by December 31, 1998, the Convention would have entered into force as soon as two signatories informed the OECD Secretary-General of their intent to accept the Convention. The alternative entry-into-force measure was avoided when Canada ratified the Convention on December 1, 1998.

368. OECD Convention on Bribery, *supra* note 3, art. 1(1).

officials to obtain or retain business or to secure *any* improper advantage.[369]

Like the FCPA, the OECD Convention applies to monetary and non-monetary payments and to payments made through intermediaries.[370] It also exempts "facilitation payments" made to induce public officials to perform their routine governmental functions, such as issuing licenses or permits,[371] and any payment made for an advantage "permitted or required by the written law or regulation of the foreign public official's country, including case law."[372] There is no indication, however, that either the FCPA or the OECD Convention exempts future payments to government officials or intermediaries arising out of previously signed contracts through a grandfather policy or otherwise.

An unlawful payment made to retain business is unlawful whether or not a company already is the best-qualified bidder or properly could be awarded the business without making the payment.[373] "Other improper advantage" refers to anything to that a company is not clearly entitled, such as an operating permit for a factory which does not meet statutory requirements.[374] Like the FCPA, the Convention does not provide a *de minimis* exception that would permit payments for advantages of value below a certain threshold.[375] A payment that violates Article 1 of the Convention is also punishable irrespective of the results of the payment, the "perceptions of local custom, the tolerance of such payments by local authorities, or the alleged necessity of the payment[.] . . . "[376]

369. *See id.* art. 1.

370. *See id.* art. 1(1).

371. Commentaries on the Convention Combatting Bribery of Foreign Public Officials in International Business Transactions, Nov. 21, 1997, S. TREATY DOC. NO. 105-43, at 22 (1998) [hereinafter Commentaries on the Convention].

372. *Id.* para. 8.

373. *See id.* para 4.

374. *See id.* para. 5.

375. *See generally* OECD Convention on Bribery, *supra* note 3.

376. Commentaries on the Convention, *supra* note 371, para. 7.

b. Inchoate Offenses

Convention signatories also must

> take any measures necessary to establish that complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign official shall be a criminal offence. Attempt and conspiracy to bribe a foreign public official shall be criminal offences to the same extent as attempt and conspiracy to bribe a public official of that Party.[377]

Thus, the mere proffer of an unlawful payment to a foreign official must be punishable under each signatory's implementing legislation to the same extent a bribe of a domestic official would be.[378] Conspiracy to bribe a foreign official will be similarly punishable.[379] As a result, a person who agrees to make an unlawful payment will be subject to penalty if any action is taken to further the goal of the agreement.[380]

c. Foreign Officials

A "foreign public official" to whom payments may not be made for any improper advantage can be

> any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country; including for a public agency or public enterprise, and any official or agent of a public international organisation[.][381]

The Convention broadened the scope of "foreign public official" to encompass officials and agents of international organizations, officials of "all levels and subdivisions of government, from national to local[,]"[382] and possibly private corporations if they enjoy preferential government treatment vis-à-vis competitors.[383] Unlike the FCPA, however, the Convention does not bar payments to foreign political parties or candidates for foreign public office.[384]

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377. OECD Convention on Bribery, *supra* note 3, art. 1(2).
378. *See* Commentaries on the Convention, *supra* note 371, para. 11.
379. *See* OECD Convention on Bribery, *supra* note 3, art. 1(2).
380. This conclusion assumes that "conspiracy" as used in art. 1(2) of the OECD Convention is substantially similar to "conspiracy" under U.S. law.
381. OECD Convention on Bribery, *supra* note 3, art. 1(4)(a).
382. *Id.* art. 1(4)(b).
383. *See* Commentaries on the Convention, *supra* note 371, para. 15.
384. *See generally* OECD Commentaries on Bribery, *supra* note 3. The OECD's commentary accompanying the Convention indicated that such political

d. Jurisdiction

The Convention's provision for the exercise of jurisdiction over bribe payors is also broader than the corresponding provisions in the FCPA. While FCPA jurisdiction is limited to "issuers" and "domestic concerns," the Convention covers "any person" within the territory of a state.[385] Significantly, the OECD Convention obliges signatories to exercise jurisdiction over those who bribe officials on either a territorial or nationality basis.[386] Territorial jurisdiction is to be exercised broadly so that "an extensive physical connection to the bribery act is not required."[387]

Each signatory must review its legal framework for asserting jurisdiction to determine if it is "effective in the fight against the bribery of foreign public officials[.]"[388] If a signatory determines that its jurisdictional bases are insufficient to combat bribery, it must "take remedial steps" which, assumedly, would entail amendment of its jurisdictional law.[389]

Politics enters the jurisdiction analysis when a national of one party to the Convention makes an unlawful payment in the territory of another party to the Convention. In such a case, when both parties have jurisdiction over an offender, they must consult with each other to determine "the most appropriate jurisdiction for prosecution."[390]

e. Sanctions

The Convention calls for "effective, proportionate and dissuasive criminal penalties" as sanctions for bribery of a foreign public official.[391] To ensure that violators receive "effective, proportionate and dissuasive" sanctions, the signatories must impose penalties that are "comparable to that applicable to the bribery of the Party's own public officials."[392] Such penalties must include "deprivation of liberty sufficient to enable effective

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payments comprised a subject of common concern that was to be addressed in accelerated negotiations to be completed by early 1999.

385. *Id.* art. 1(1).

386. *See id.* art. 4(1)-(2).

387. Commentaries on the Convention, *supra* note 371, para. 25.

388. OECD Convention on Bribery, *supra* note 3, art. 4(4).

389. *Id.*

390. *Id.* art. 4(3).

391. *Id.* art. 3(1).

392. *Id.*

mutual legal assistance and extradition."[393] Civil or administrative sanctions may include fines, exclusive from entitlement to public benefits or aid, disqualification from public procurement or placement under judicial supervision.[394]

The OECD Convention requires countries that do not impose criminal liability on corporations, such as Japan, to ensure that corporations also are subject to "effective, proportionate, and dissuasive" sanctions, including monetary sanctions.[395] Signatories also must provide for the seizure and confiscation of bribe proceeds or for the imposition of fines of comparable value.[396]

f. Accounting Transparency

In addition to its anti-bribery provisions, the OECD Convention requires signatories to prohibit, like the SEA, non-transparent accounting practices by taking

> such measures as may be necessary, within the framework of its laws and regulations regarding the maintenance of books and records, financial statement disclosures, and accounting and auditing standards, to prohibit the establishment of off-the-books accounts, the making of off-the-books or inadequately identified transactions, the recording of non-existing expenditures, the entry of liabilities with incorrect identification of their object, as well as the use of false documents, by companies subject to those laws and regulations, for the purpose of bribing foreign public officials or of hiding such bribery.[397]

As with sanctions for violations of the anti-bribery provision, sanctions for violations of the accounting provision are to be "effective, proportionate and dissuasive."[398]

g. Mutual Legal Assistance

The mutual legal assistance provision of the Convention is optimistic, requiring each signatory to

> provide prompt and effective legal assistance to another Party for the purpose of criminal investigations and proceedings brought by a party concerning offences within the scope of this Convention and for non-criminal proceedings within the scope of this Convention

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393. *Id.*
394. *See* Commentaries on the Convention, *supra* note 371, para. 31.
395. *See* OECD Convention on Bribery, *supra* note 3, art. 3(2).
396. *See id.* art. 3(3).
397. *Id.* art. 8(1).
398. *Id.* art. 8(2).

> brought by a Party against a legal person. The requested Party shall inform the requesting Party, without delay, of any additional information or documents needed to support the request for assistance and, where requested, of the status and outcome of the request for assistance.[399]

In other words, the mutual legal assistance provision requires the signatories to work together aggressively to search out bribery of foreign officials and to cooperate in building criminal cases against offenders.[400] Thus, the signatories are to assist each other, upon request, by making persons available to assist in investigations or to participate in proceedings and by temporarily transferring a person in custody to the requesting party.[401] The requesting party is to keep the transferred person in custody and to return the person without requiring formal extradition proceedings.[402]

The Convention also explicitly states that a request for mutual legal assistance may not be declined on the ground that assistance by a signatory would violate that signatory's bank secrecy laws.[403] This provision exemplifies the Convention's theme of international cooperation to combat bribery by placing the Convention's goals in supremacy over highly valued domestic laws.

h. Extradition

The Convention further promoted international cooperation in combating bribery by making bribery of a foreign public official an extraditable offense.[404] In the absence of extradition treaties between individual signatories, the OECD Convention suffices as a legal basis for extradition.[405] If a signatory country refuses to extradite one of its own nationals accused by another signatory of making a bribe, the refusing signatory must submit the case to its own authorities for prosecution.[406]

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399. *Id.* art. 9(1).

400. The DOJ is particularly encouraged by the mutual legal assistance provisions of the OECD Convention due to its belief that the provisions will enhance the DOJ's ability to obtain evidence of violations that occur overseas.

401. *See* Commentaries on the Convention, *supra* note 371, para. 31.

402. *See id.*

403. *See* OECD Convention on Bribery, *supra* note 3, art. 9(3).

404. *See id.* art. 10(1).

405. *See id.* art. 10(2).

406. *See id.* art. 10(3).

i. Closed Loopholes

Two provisions of the Convention attempt to hinder the parties from circumventing the intent of the Convention. First, the Convention explicitly states that prosecutorial discretion "shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved."[407] Thus, the Convention mitigates the effectiveness of certain political excuses a signatory might offer for non-enforcement of its implementing legislation.

Second, the Convention states that any statute of limitations applicable to a signatory's implementing legislation must "allow an adequate period of time for the investigation and prosecution" of an offense.[408] Presumably, this provision was enacted to prevent a party from establishing a statute of limitations so brief that it would prevent prosecutors from enforcing the implementing legislation.

Notwithstanding these attempts to close loopholes, one notable deficiency of the Convention is its failure to ban explicitly the tax-deductibility of foreign bribes. Nonetheless, the OECD has recommended in the past that states cease recognition of such deductions, and its Committee on Fiscal Affairs is monitoring bribery tax treatment by its members.[409] Moreover, bribes can no longer stand as legitimate tax deductible items after implementation of Convention obligations] because criminalizing a payment surely must proscribe permitting its deductibility under any tax code. In addition, the Convention calls for the creation of a program, operating within the context of

407. OECD Convention on Bribery, *supra* note 3, art. 5.

408. *Id.* art. 6.

409. *See* Update on the Implementation of the OECD Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials (visited Nov. 4, 1999) <http://www.oecd.org/daf/noncorruption/tax98.htm>; *see also* Tax Treatment of Bribes in OECD Member Countries (visited Nov. 4, 1999) <http://www.oecd.org/daf/nocorruption/taxstatus.htm>. As of July 30, 1999, the OECD Recommendation on bribe deductibility had prompted the following member states to pass legislation outlawing the practice: Austria, Belgium, Denmark, France, Germany, Iceland, the Netherlands, Norway and Portugal. *See id.* Australia, Luxembourg, New Zealand, Sweden, and Switzerland did not have such laws in effect, but appropriate legislation has been proposed or drafted in each country. *See id.* All other OECD member states banned deductions for bribe payments prior to promulgation of the OECD Recommendation. *See id.*

the OECD Working Group on Bribery in International Business Transactions, to monitor the Convention's implementation.[410]

B. *Multilateral Implementation*[411]

Instead of resting on its laurels after adopting the Convention, the OECD has continued to expand its anti-corruption efforts. In collaboration with the Organization for Security and Cooperation in Europe, the OECD organized an anti-corruption conference in July 1998 in Paris that was attended by 175 officials from over thirty-five countries.[412] In September 1998, the OECD, the OAS, Argentina, and the U.S. Agency for International Development (USAID) jointly held an anti-corruption conference in Buenos Aires.[413] In October 1998, the OECD coordinated with USAID and the Turkish International Cooperation Agency to present a three-day anti-corruption in Istanbul attended by eighty-five leaders from twenty countries.[414] Simultaneous with these efforts to enlarge the group of nations fighting corruption, the OECD continued to propel implementation of the Convention by its signatories.

1. Current Status of Member Legislation

Although it took about four years for the OECD to pass the Convention after the OECD adopted an anti-bribery Recommendation,[415] ratification and implementation by the

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410. *See* OECD Convention on Bribery, *supra* note 3, art. 12. The DOJ believes the monitoring program will toughen anti-bribery legislation enacted by the signatory countries.

411. Many of the countries participating in the OECD Convention must extensively alter current laws or introduce new legislation to implement the Convention. For example, the mutual assistance provisions of the Convention specifically state that bank secrecy is not a valid reason to deny enforcement assistance, which runs head-on with the legal culture of one signatory in particular, Switzerland.

412. *See* OECD-OSCE Conference Executive Summary, *National and International Approaches to Improve Integrity and Transparency in Government: Executive Summary* (visited Oct. 5, 1999) <http://www.oecd.org/daf/nocorruption/parisum.htm>.

413. *See* OECD, *Buenos Aires Workshop; Combating Bribery in International Business Transactions in Latin America* (visited Oct. 5, 1999) <http://www.oecd.org/daf/nocorruption/argcon.htm>.

414 *See* OECD, *Istanbul Workshop; Combating Corruption in Transition Economies: Executive Summary* (visited Oct. 5, 1999) <http://www.oecd.org/daf/nocorruption/istcon.htm>.

415. *Summary of OECD Anti-Bribery Convention*, INT'L L. NEWS 10 (Winter 1998).

individual signatories is progressing rapidly. This section describes the steps already taken and the expected actions by each participant to ratify and implement the OECD Convention as of the publication of this article.[416]

Argentina. The Spanish text of the Convention has been finalized and inter-ministerial consultations on the amendments to the Argentine Penal Code are complete. The draft bills to ratify and implement the Convention was submitted to the Legal and Technical Secretariat of the Presidency. The bill will soon be submitted to Parliament which is expected to deliberate on the issue in early 2000.[417]

Australia. The Australian Federal Parliament tabled draft legislation to criminalize bribery of foreign public officials in international business transactions on March 3, 1998.[418] The legislation and the Convention were referred to the Joint Standing Committee on Treaties for examination.[419] The Committee on Treaties tabled its report on July 2, 1998, and recommended that Australia sign the Convention and enact implementing legislation with a few minor amendments.[420] A federal election interrupted the process of implementing the Convention, but Australia signed the Convention on December 7, 1998.[421] Implementing legislation was passed by the Parliament and received Royal Assent on June 17, 1999. The instrument of ratification was deposited with the OECD Secretariat on October 18, 1999, and the implementing legislation will come into effect on December 18, 1999.[422]

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416. The following descriptions of the status of implementation in each signatory country are based on information released piecemeal by the OECD. *See Steps Taken and Planned Future Actions by each Participating Country to Ratify and Implement the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (last modified Oct. 6, 1999) <http://www.oecd.org/daf/nocorruption/annex2.htm> [hereinafter *Steps*]. Some countries have also posted their implementing legislation on the Internet. The OECD has created a website that provides links to the various postings. *See Links to National Implementing Legislation* (last modified Sept. 14, 1999) <http://www.oecd.org/daf/nocorruption/links1.htm> [hereinafter *Links*].

417. *See Steps, supra* note 416, at Argentina.

418. *See Commonwealth of Australia-Parliamentary Debates* (Mar. 3, 1998) <http://www.aph.gov.au/hansard/senate/dailys/ds030398.pdf> at 226.

419. *See Steps, supra* note 416, at Australia.

420. *See Commonwealth of Australia-Parliamentary Debates* (July 2, 1998) <http://www.aph.au/hansard/senate/dailys/ds020798.pdf> at 4678.

421. *See Criminal Code Amendment—Explanatory Memorandum* 2 (visited Oct. 28, 1999) <http://www.aph.gov.au/parlinfo/billsnet/6es201.pdf>.

422. A violator of the Australian law could be imprisoned for ten years. Of particular interest, the current draft of the Australian bill provides a detailed explanatory chart of the types of conduct that would be lawful under its

Austria. Austria's implementing legislation entered into force in Austria on October 1, 1998.[423] The First Chamber of Parliament passed the bill on March 24, 1999.[424] The Second Chamber Committee declined to veto the bill on April 13, 1999, the ratification process was finalized, and the ratification instrument was deposited with the OECD Secretariat on May 24, 1999.[425]

Belgium. Ratification and implementation of the Convention is a two-step process in Belgium. The ratification bill was adopted by Parliament on April 22, 1999, and it received royal sanction on June 9, 1999. The instrument of ratification was deposited with the OECD Secretariat on July 23, 1999. With respect to the implementation of the Convention, the legislative proposal to revise the penal law was passed by Parliament at the beginning of February 1999, was published on March 23, 1999, and entered into force on April 3, 1999.[426]

Brazil. A draft text has been sent to the Brazilian Congress by the executive branch of government and is under examination by the Chamber of Deputies.[427] The ratification process should be completed this year. Internally, bribery is covered by a law passed by the Brazilian Congress in March 1998 that outlaws money laundering and related crimes and usage of financial systems for illicit purposes.[428] Among other things, the law establishes the Council on Financial Activities Control.[429]

Bulgaria. Bulgaria ratified the Convention on June 3, 1998 and deposited its ratification instrument on December 22, 1998.[430] Parliament passed a Law on Amendment to the Penal Code on January 15, 1999, which entered into force on January 29, 1999.[431] An explanation of "foreign public official" in compliance with the Convention was incorporated into the Penal Code.[432]

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implementing legislation. The bill also would shift the burden of proof to defendants pleading a "facilitating payment" defense. *Criminal Code Amendment (Bribery of Foreign Public Officials) Bill 1999*, <http://www.aph.gov.au/parlinfo/billsnet/bills.htm>. Under the FCPA, the prosecution bears the burden of showing that a payment was not a facilitating payment.

423. *See Steps, supra* note 416, at Australia.
424. *See id.*
425. *See id.*
426. *See id.* at Belgium.
427. *See id.* at Brazil.
428. *See Link, supra* note 416, at Brazil (English version).
429 *See id.*
430. *See Steps, supra* note 416, at Bulgaria.
431. *See id.*
432. *See id.*

Canada. The Senate adopted the new legislation on December 3, 1998, and the House adopted it on December 7, 1998.[433] The legislation received royal assent on December 10, 1998 and was ratified a week later on December 17.[434] The law entered into force on February 14, 1999.[435]

Chile. The draft legislation for ratification and implementation of the Convention was presented to the Chamber of Deputies on January 5, 1999 to inform the Commission for External Relations.[436] Parliament is expected to approve the bill following the Presidential election in December 1999, and ratification is expected to occur in early 2000.

Czech Republic. The Criminal Code amendment was adopted by Parliament and entered into force on July 1, 1999. Parliament currently is considering the draft ratification law, which is expected to be approved by the beginning of 2000.[437]

Denmark. Denmark has prepared its draft ratification and implementation legislation. The government submitted the draft legislation to Parliament in the spring of 1999 and re-submitted it to Parliament in October 1999. The legislation was scheduled to undergo its first parliamentary reading on October 27, 1999. Adoption and entry into force of the legislation was expected to occur by the end of 1999.[438]

Finland. The legislation for ratification and implementation was approved by Parliament on October 9, 1998, and the ratification was deposited on December 10, 1998.[439] The amended Penal Code entered into force on January 1, 1999.[440] According to a Presidential Decree issued February 5, 1999, the Convention entered into force internally on February 15, 1999.[441]

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433. *See id.* at Canada.
434. *See id.*
435. The Canadian law imposes greater penalties on recipients of unlawful payments and those who assist the recipient in concealing or converting the payments than it does on those who make the payments. The "supply side," or givers of payments, may be imprisoned for only five years. Corruption of Foreign Officials Act, R.S.C. ch. 34, § 3(2) (1999) (Can.). The "demand side," or recipients and launderers of payments, may be imprisoned for ten years if an "indictable offense" action is brought or may be imprisoned for six years and fined $50,000 if a "summary conviction" action is brought. *Id.* at §§ 4(2), 5(2). According to the Canadian Department of Justice, there is no limit to the fines that could be imposed on corporations. *Highlights of the Corruption of Foreign Public Officials Act*, <http://canada/justice.gc.ca/news/communiques/1999/corback%5Fen.html>.
436. *See Steps, supra* note 416, at Chile.
437. *See id.* at Czech Republic.
438. *See id.* at Denmark.
439. *See id.* at Finland.
440. *See id.*
441. *See id.*

France. The Council of Ministers approved the draft legislation after consideration by the State Council.[442] It then submitted the ratification and implementing legislation to Parliament, which adopted the ratification law on May 25, 1999. The ratification was to be submitted to the Senate on November 10, 1999 and to the National Assembly on December 14, 1999.[443]

Germany. Germany ratified the Convention on November 10, 1998.[444] The Act on Combating International Bribery, containing Germany's implementing legislation, was passed on September 15, 1998 and entered into force on February 15, 1999 with the Convention.[445]

Greece. Greece's Parliament ratified the Convention on November 5, 1998, and passed the implementing legislation on the same day.[446] Greece deposited its ratification instrument on February 5, 1999.[447]

Hungary. The ratification and implementing legislation to amend the Hungarian Criminal Code was submitted to parliament in May 1998. The ratification legislation was approved on December 4, 1998 and Hungary deposited its instrument of ratification on that date. The amendment of the Criminal Code was passed in December 1998 and entered into force on March 1, 1999.[448]

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442. *See id.* at France.

443. *See id.*; *see also* Le Journal Official: Loiset Decrets (visited Oct. 9, 1999) <http://www.legifrance.gouv.fr/citoyen/actualite/preparation/corruption.htm>.

444. *See Steps, supra* note 416, at Germany.

445. *See id.* The German law clarifies that judges and soldiers are "foreign officials" within the meaning of the Convention. *See* Act on Combating Bribery of Foreign Public Officials In International Business Transactions (Sept. 9, 1997) <http://www.oecd.org/daf/noncorruption/pdf/actga.pdf>. Germany's implementing legislation provides for punishment by fine or imprisonment not exceeding five years. *See id.* at art. 2, § 2(1).

446. *See Steps, supra* note 416, at Greece.

447. *See id.*

448. *See id.* at Hungary. This provision in Hungary's implementing legislation, appears to directly contradict the intent of the Convention. *See* Commentaries on the Convention, *supra* note 371, para. 3. Like the Canadian law, the Hungarian law punishes perpetrators on the supply and demand side of corrupt transactions. *See* Crimes Against the Purity of Public Life §§ 250-53 <http://www.oecd.org//daf/nocorruption/pdf/hunlaw.pdf>. Of particular interest is Hungary's broad assertion of jurisdiction over certain corrupt "acts committed by *non*-Hungarian citizens *abroad*[.]" *Id.* § 4 (emphasis added). Also notable is a potential loophole in the Hungarian law. A violator of the law's anti-bribery provisions is excused from punishment if he conferred a payment or favor upon the official out of a fear that otherwise he would be paced at an unlawful disadvantage. *Id.* § 258/B. If the official engages in extortion as a matter of course, however, the briber could truthfully argue that she would have been

Iceland. Iceland deposited its instrument of ratification on August 17, 1998 and Parliament passed the implementing legislation on December 22, 1998.[449]

Ireland. The draft legislation for ratification of the Convention has been approved. However, further legislation in one or two areas is required to make Irish law entirely in accord with the Convention. In May 1999, the Convention was presented to the Dail. The Prevention of Corruption Bill was expected to be published in late 1999.[450]

Italy. The Chamber of Deputies approved the bill for ratification on March 24, 1999.[451] The Senate is expected to pass the bill in the near future. Amendment of Italian law to provide for non-criminal sanctions is a new feature for the legal system. A provision providing for non-criminal sanctions of Euro 1.5 million are expected to be introduced within six months of final approval of the bill.[452]

Japan. On April 10, 1998, Japan formally submitted to the National Diet the Convention and its implementing legislation in amendment of the Unfair Competition Prevention Law. The National Diet approved the Convention on May 22, 1998.[453] The implementing legislation was adopted on September 18, 1998, and the instrument of acceptance was deposited on October 13, 1998.[454] The Japanese law will impose fines of as much as 300 million yen on Japanese corporations that violate the implementing law, and individuals can be assessed fines of three million yen.[455]

Korea. Korea formally submitted the bill to ratify the Convention along with its implementing legislation to the National Assembly in October 1998. Both bills were quickly approved by the National Assembly on December 17, 1998, and Korea deposited its instrument of ratification on January 4, 1999.[456]

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unlawfully disadvantaged had he elected not to make payment. Thus, her actions would be excused. This bizarre result eludes the spirit of the law but is one that follows from a reasonable reading of the law.

449. *See id.* at Iceland.

450. *See id.* at Ireland.

451. *See id.* at Italy.

452. *See id.*

453. *See id.* at Japan.

454. *See id.*

455. *Japan to Amend Law on Bribery to Conform With OECD Agreement*, INT'L TRADE REP., Apr. 8, 1998, at 604.

456. *See Steps, supra* note 416, at Korea.

The implementing legislation went into effect on February 15, 1999.[457]

Luxembourg. The *Counseil D'Etat* was expected to ratify and implement the Convention by the end of October 1999. The legislative process was expected to be complete by early 2000.[458]

Mexico. The Mexican Senate approved the OECD Convention as an international treaty on April 22, 1999. Both Chambers in Congress approved the implementing legislation in late April. The Mexican instrument of ratification was deposited with the OECD Secretariat on May 27, 1999.[459]

Netherlands. Bills to ratify and implement the Convention were sent to Parliament in April 1998.[460] Three EU treaties were simultaneously submitted. Ratification of the Convention by the Kingdom of the Netherlands is complicated because Aruba and the Netherlands Antilles participate in the process and must approve the law before Parliament does.[461]

New Zealand. Implementing legislation was submitted to the Parliament in September 1999. November elections delayed deliberation on the legislation which will be discussed when the Parliament reconvenes in 2000. Passage of the implementing legislation is expected shortly thereafter.[462]

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457. *See id.* Korean law now provides that an individual violator may be imprisoned for five years or fined 20 million won or twice the amount of the profit obtained by the illicit act if the profit exceeds 10 million won. *See Act on Preventing Bribery of Foreign Public Officials in International Business Transactions*, (Dec. 17, 1998) <http://www.oecd.org/daf/noncorruption/pdf/korea.pdf> at art. 3(1). If the convicted payor made the payment in relation to business for a legal entity, the entity may be fined 1 billion won. *See id.* at art. 4. The legal entity will not be subject to sanctions, however, if it exercised proper supervision over the guilty representative. *See id.*

458. *See Steps, supra* note 416, at Luxembourg.

459. *See id.* at Mexico.

460. *See id.* at Netherlands.

461. *See id.*

462. *See Steps, supra* note 416, at New Zealand. New Zealand's draft legislation is noteworthy in its reference to "tainted property," which is defined as the proceeds of a violation or property used to commit the violation. *See Relevant New Zealand Legislations* (last modified Sept. 14, 1999) <http://www.oecd.org/daf/noncorruption/pdf/nzlaw.pdf>, app. 3.6, §2. In addition to imposing imprisonment and fines upon a convicted party, the government could also seek forfeiture of all "tainted property." *See id.* Perhaps indicative of its status as an island-nation, New Zealand's legislation also contains a detailed jurisdictional section with regard to corruption crimes committed on ships or aircraft outside of its territory, which includes assertions of jurisdiction over British and Irish citizens. *See id.* app. 5.1, § 8(1). Also noteworthy is the bill's requirement that prosecution under the law can not occur without approval of the Attorney-General, and in cases of prosecution against a judge, only after a resolution of the House of Representatives. *See id.* app. 4.1, § 1.

Norway. At the end of May 1998, Norway completed its consultation with relevant private and public parties and submitted ratification and implementation legislation to Parliament. The amendments to the Penal Code were passed on October 27, 1998 and entered into force on January 1, 1999. The instrument of ratification was deposited on December 18, 1998.[463]

Poland. Bills for implementing and ratification legislation were drafted separately. The ratification bill was to be forwarded to the Parliament in November 1999 if no objections were voiced by the Council of Ministers. The implementing legislation was to be submitted to the Prime Minister in November 1999 for final arbitration. If the Prime Minister settled the matter, both bills were to be forwarded to Parliament by the end of 1999.[464]

Portugal. The ratification procedure was nearly completed in October 1999, with the Convention under review by specialized committees of Parliament. The competent authorities within the Ministry of Justice are finalizing the draft of the implementing legislation that would amend current criminal law.[465] A copy of the draft legislation is to be provided to the OECD as soon as it is publicly available.

Slovak Republic. The Parliament approved ratification of the Convention on February 11, 1999, and the implementing legislation entered into force on September 1, 1999. The instrument of ratification was deposited with the OECD Secretariat on September 24, 1999.[466]

Spain. The draft ratification legislation was submitted to Parliament in the fall of 1998 as approved by the Council of Ministers. The Parliament subsequently gave permission to ratify the Convention. A draft implementing text was approved by the Council of Ministers on January 29, 1999 after review by the General Law Council. The draft text of the implementing legislation was submitted to the Parliament for examination during the fall 1999 session.[467]

Sweden. The ratification and implementing legislation was passed by Parliament on March 25, 1999. The instrument of ratification was deposited with the OECD on June 8, 1999. The

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463. *See Steps, supra* note 416, at Norway.
464. *See id.* at Poland.
465. *See id.* at Portugal.
466. *See id.*
467. *See id.* at Spain

implementing legislation was entered into force on July 1, 1999.[468]

Switzerland. The larger Chamber of Parliament debated draft ratifications and implementing legislation on October 7, 1999. The smaller chamber of Parliament was scheduled to debate the legislation in December 1999, and the law was expected to enter into force in early 2000. Ratification of the Convention was also expected to occur in early 2000.[469]

Turkey. The draft ratification bill has been submitted to Parliament. Inter-ministerial consultations on the implementing text are completed as well, and a draft implementation bill is expected shortly.[470]

United Kingdom. The United Kingdom deposited its instrument of ratification on December 14, 1998. Although internal consultations have confirmed that current U.K. law complies with the Convention, formulation of a new public statute on corruption is under consideration. A public discussion on proposals for new corruption legislation likely will be published prior to Parliament's summer recess.[471]

Additionally, steps are being taken to bring the Channel Isles, the Isle of Man, and U.K. Overseas Territories within the scope of the Convention, which will require new legislation.[472] The territories will adhere to the Convention through ratification of U.K. law and not by individual ratification of the Convention. On March 17, 1998, a White Paper was published titled "Partnership for Progress," which expressed a desire for Overseas Territories to comply with relevant financial regulations and to meet all international standards that apply to money laundering, transparency, and cooperation with enforcement authorities by the end of 1999.[473]

United States. On July 31, 1998, the Senate approved the Convention and the implementing legislation.[474] Congress completed action on the implementing legislation in October 1998, and on November 10, 1998 the President signed both the ratification instrument and the implementing legislation. The instrument of ratification was deposited on December 8, 1998.[475]

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468. *See id.* at Sweden.
469. *See id.* at Switzerland.
470. *See id.* at Turkey.
471. *See id.* at United Kingdom.
472. *See id.*
473. *See id.*
474. *See id.* at United States.
475. The FCPA was amended to redefine "foreign official" to include officials of public international organizations, to make it unlawful to make payments for

2. Implementation and Enforcement

a. Implementation Review

Despite the great strides that the transparency-in-government movement has taken in recent years, reformers seek to enjoy similar success with other perceived problem areas. Efforts are underway to expand the list of signatories to the OECD Convention,[476] to create an anti-corruption agreement for Africa,[477] to pursue similar objections in Asia,[478] to counteract the use of offshore financial centers to circumvent prohibitions on bribery,[479] to promulgate laws that outlaw private commercial

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any "improper advantage," and to broaden the jurisdiction of the law. International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302 (1998).

476. For example, Israel recently requested to join the Convention. *OECD Examines Offshore Financial Resorts in Anti-Bribery Drive*, INSIDE U.S. TRADE, Feb. 26, 1999, at 24.

477. *See* Stuart E. Eizenstat, *An Anti-Corruption & Good Governance Strategy for the 21st Century—Address at the Global Forum on Fighting Corruption and Safeguarding Integrity Among Justice and Security Officials*, (Feb. 24, 1999) <http://www.usia.gov/topical/econ/integrity/document/eizen.htm> (describing recent African Ministerial Declaration on corruption and public accountability issued by leaders from eleven African nations). Over 1600 delegates from 135 countries attended the ninth International Anti-Corruption Conference in Duban, South Africa in Fall 1999. *Anti-Corruption Conference Ends with Call for International Mechanisms to Recover Looted Money* (visited Nov. 4, 1999) <http://www.transparency.de/documents/press-releases/1999/1999.10.15.durban_commitment.html>. The Conference adopted a resolution calling for international conventions to impede money laundering and to help developing countries recover funds looted by corrupt leaders. *See id.* The host country of the Conference, South Africa, announced that it soon would become a party to the OECD Convention. *See id.*

478. The OECD and the Asian Development Bank sponsored a conference on combatting corruption in Asian and Pacific economies in Manila from September 29 to October 1, 1999. OECD Anti-Corruption Unit, *Outreach* (visited Nov. 4, 1999) <http://www.oecd.org/daf/nocorruption/outreach.htm>. More than 200 participants from 36 countries attended the workshop, which was convened to raise awareness of corruption issues and to identify effective anti-corruption strategies. *See id.*

479. *See OECD Begins Study of Compliance With Anti-Corruption Treaty Outlawing Bribery*, DAILY REP. FOR EXECUTIVES., Apr. 28, 1999, at A-6; *OECD Examines Offshore Financial Resorts in Anti-Bribery Drive*, *supra* note 447; *Daley Vows to Expand Fight Against Corruption* (January 19, 1999) <http://www.usia.gov/topical/econ/integrity/news1.htm> (speech to Transparency International by U.S. Commerce Secretary William Daley).

corruption,[480] to ban bribes related to foreign political activity,[481] and to eliminate the tax deductibility of bribes made in the course of business, where applicable.[482]

As momentum for enhanced anti-bribery regulation bills, there are those who warn of the danger of over-legislation and under-enforcement.[483] They assert that the next steps taken should be those that effect the goals of the Convention itself, rather than those that promulgate new ideas and inspirational rhetoric. While it seems an obvious point, ratification and implementation by the signatories will be—or should be—the current primary focus. By late October 1999, sixteen of the thirty-four signatories still had not ratified the Convention.[484] Among those failing to ratify the Convention were France, Italy, and the Netherlands, representing a substantial portion of OECD exports.[485]

The OECD will review the anti-corruption regime of each signatory to ensure that it complies with the Convention and that it coheres with the regimes of the other parties to Convention. Pursuant to its review procedure, the OECD examined Germany, Norway and the United States in April 1999 and intended to evaluate Bulgaria, Canada, Finland, Greece, and Korea in July 1999.[486] The OECD hopes to examine all signatories by the

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480. *See, e.g.*, Johnston, *supra* note 322 ("The OECD Convention goes very far to protect international public procurement from corruption. . . . But does it make sense to stop there?").

481. *See* Eizenstat, *supra* note 477 (explaining that the U.S. seeks to expand Convention to cover bribery of foreign political parties, party officials, and candidates for public office); *Daley Vows to Expand Fight Against Corruption*, *supra* note 479.

482. *See Daley Vows to Expand Fight Against Corruption*, *supra* note 479 (noting that several OECD countries still permit this practice); *see also* Nora M. Rubin, *supra* note 366, at 289 (colorfully observing that until recently "If a German bribes a German, he gets thrown in jail; if he bribes a foreign official, he gets a tax deduction.").

483. *See, e.g.*, Nancy Dunne, *US Presses Drive Against Business Bribery*, FIN. TIMES (London), Feb. 24, 1999, at 7 (observing that the DOJ failed to bring a single prosecution between 1994 and 1996 when U.S. businesses assumedly engaged in at least some level of corruption); Daniel Kaufman, *Challenges in the Next Stage of Anti-corruption*, *in* NEW PERSPECTIVES ON COMBATING CORRUPTION 139, 156-57 (1998) ("concrete and informed action" preferable to corruption conferences and academic papers).

484. *See Steps*, *supra* note 416.

485. *See* Andrew J. Pincus, Presentation at the Global Forum on Fighting Corruption and Safeguarding Integrity Among Justice and Security Officials (Feb. 25, 1999) (notes of speech as prepared for delivery on file with authors). Pincus is General Counsel for the U.S. Department of Commerce.

486. *See* OECD Anti-Corruption Unit, *Launching of the Monitoring Procedure* (visited Oct. 5, 1999) <http://www.oecd.org/daf/nocorruption/whatsnew.htm>.

spring of 2000 in order to produce a comprehensive progress report.[487]

The review process is broken into two different time periods.[488] The principal objective of Phase I, scheduled to last from 1999 to April 2000, is to evaluate whether the implementing legal texts of the various signatories meet the requirements of the Convention.[489] Phase I involves elements of self- and mutual-evaluation whereby each signatory responds to an OECD questionnaire. Once the OECD asks follow-up questions, the signatory has an opportunity to supplement its original answers.[490] Finally, during formal examination by the OECD, a country can make an initial short presentation of its approach to fighting corruption.[491] Business and civil society groups are not invited to participate in the formal evaluation process of signatories.[492]

Phase II has only been outlined at this point, but its stated purpose is to study and assess the enforcement structures in place.[493] Phase II is scheduled to be finished by 2005, and its structure is similar to that of Phase I.[494] A questionnaire will be issued, a provisional report on country performance will be drafted, the OECD will consult with individual signatories, and a final report will be adopted.[495]

b. Enforcement

The day-to-day battles against international business corruption will be fought with several different weapons. Sophisticated diagnostic surveys are being used to assess the value of corruption costs in private or public business.[496]

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487. *See id.*

488. The review process is described on the OECD website. OECD Anti-Corruption Unit, *Procedure of Self and Mutual Evaluation of Implementation of the Convention and the Revised Recommendation* (1998) <http://www.oecd.org/daf/nocorruption/selfe.htm>.

489. *See id.*

490. *See id.* The U.S. responses to the questionnaire and supplemental questions can be found at <http://www.usdoj.gov/criminal/fraud/fcpa/firstqu.htm> and <http://www.usdoj.gov/criminal/fraud/fcpa/suppleme.htm>.

491. *See id.*

492. *See id.*

493. *See id.*

494. *See id.*

495. *See id.*

496. *See* Eizenstat, *supra* note 477.

Progress against corruption in Albania, Georgia, and Latvia has been attributed to the use of these diagnostics.[497]

The United Nations, and entities supported or sponsored by the United Nations, also will exert pressure in support of anti-corruption initiatives. For example, a recent report on human development in South Asia, partially funded by the U.N. Development Program, called for a "bold, concrete anti-corruption agenda" in the face of damaging and pervasive corruption in South Asia (including Pakistan, India, Bangladesh, Sri Lanka and Nepal).[498] The report called for independent audits of government procurement action, separate "corruption courts," disclosure requirements audits of government procurement action, separate "corruption courts," disclosure requirements regarding the assets of public officials, and transparent procurement laws.[499] Indeed, the report was prescient in that the military of one south Asian nation, Pakistan, used high-level corruption as justification for overthrowing the civilian government.

Economic and lending institutions also limit corruption. Economic policy changes that would reduce the power held by public officials may thereby diminish the bargaining power of the "demand-side" of bribery.[500] For example, the incentives to accept bribes may be reduced if tariffs and other trade barriers are lowered, market-determined exchange and interest rates are unified, licensing requirements are lessened, monopolies are eliminated, and barriers to entry for new entrepreneurs are discarded.[501]

More significantly, intelligence agencies will engage in an increasing amount of anti-corruption work. The U.S. Central Intelligence Agency (CIA) and the National Security Agency (NSA) both have taken a more active role in economic affairs recently, collecting data related to international contracts.[502] The

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497. Daniel Kaufman et al., *New Frontiers in Diagnosing and Combating Corruption*, PREMNOTES (The World Bank: Oct. 1998).

498. Mahbub ul Haq, *1999 Report on Human Development*, Human Development Center. The report stated that the widespread corruption of South Asia had several invidious effects. Namely, corruption reduced the availability of basis social services and had increased their costs, attenuated the rule of law, distorted decisionmaking on development programs, and encouraged the flight of desparately-needed capital. *See Report: Corruption in South Asia Dangerous*, DAILY YOMIURI, Nov. 3, 1999, at 8.

499. *Report: Corruption in South Asia Dangerous*, *supra* note 498, at 8.

500. *See* Cheryl W. Gray & Daniel Kaufman, *Corruption and Development*, FIN. & DEV. Mar. 1998, at 10.

501. *Id.*

502. *See* Simpson, *supra* note 8, at A3. *See* James Bamford, *Loud and Clear: The Most Secret of Secret Agencies Operates Under Outdated Laws*, WASH. POST,

implication is that the U.S. intelligence community is substantially involved in monitoring corruption and its effects on bidding by U.S. companies under the premise that corruption that directly harms U.S. economic interests and competitiveness indirectly threatens U.S. national security interests. U.S. FCPA enforcement efforts rely heavily on classified documents and government sources that will not be revealed.[503]

Labeled the "secret weapon" in the fight against corruption,[504] the Internet already has contributed greatly to the transparency movement.[505] Nothing eliminates corruption like access to information, and that is exactly what the Internet provides. In fact, the U.S. Vice President's office recently proposed that an Internet-based reporting device be implemented to enhance the mutual evaluation process among countries attempting to work together to combat bribery.[506] As more governments become openly involved in anti-corruption efforts and cloak-and-dagger agencies like the CIA attempt to expose bribery, the risk of liability to violators, and those innocently associated with violators, dramatically increases. Amid the spread of mechanisms to prevent or expose corruption, reducing the risk of liability becomes ever more important.[507]

Nov. 14, 1999, at B1 (discussing concerns regarding the NSA's ability "to extend its eavesdropping network almost without limits" and concerns among some U.S. allies that the NSA "may have turned from eavesdropping on the communists to eavesdropping on businesses and private citizens in Europe and the United States"); *see also CIA's Ignominious Role in Economic Espionage*, S.F. CHRON., Feb. 2, 1997, at 10 ("CIA sources said [economic] spying is routine[.]").

503. Telephone conversation of author with source at DOC General Counsel's office (around March 3, 1998).

504. Albert Gore, *Keynote Address at the Global Forum on Fighting Corruption and Safeguarding Integrity Among Justice and Security Officials.* (Feb. 24, 1999) <http://www.usia.gov/topical/econ/integrity/document/gore.htm>.

505. The citations to this article provide ample evidence that the best and most comprehensive source of information about anti-corruption efforts around the globe is found on the Internet. Indeed, two anti-corruption websites have been created to serve as fora for disclosure and discussion of transparency problems and issues. *See* Anti-Corruption Network for Transition Economies (visited Nov. 4, 1999) <http://www.nobribes.org> (anti-corruption forum focusing on eastern Europe and states of the former Soviet Union); Respondent (visited Nov. 4, 1999) <http://www.respondanet.com> (Spanish language anti-corruption forum focusing on the Americas with link to English version).

506. *See* Gore, *supra* note 504. While the Internet may be extremely useful in western nations such as those that comprise the OECD, its efficacy in lesser-developed nations as a tool against corruption remains to be seen.

507. OECD Convention violations were recently exposed in South Africa and Lesotho, where several major international construction companies allegedly bribed the chief executive officer of the $150 million Lesotho Highlands Water Project with $2.5 million in payments. E. Ogoso Opolot, *International Firms in SA*

IV. REDUCING LIABILITY—COMPLIANCE MEASURES

In modern business it is not the crook who is to be feared most; it is the honest man who doesn't know what he is doing.

— Owen D. Young[508]

We call on corporations to adopt effective anti-corruption programmes.

— Peter Eigen[509]

The FCPA has profoundly affected U.S. corporate culture, and it is expected that the OECD Convention will similarly influence corporate activity in the OECD member states. Although the U.S. government has brought fewer than thirty cases under the FCPA anti-bribery provisions since their enactment, the severe penalties of the FCPA have served as ample motivation for U.S. companies to take measures to ensure that they adhere to the law. Increased enforcement and escalation of penalties in the 1990s—best exemplified by the $59 million paid by General Electric pursuant to a plea bargain—greatly increase the importance of compliance with anti-bribery law. In addition to fines, individuals involved in misconduct have been sentenced to lengthy periods of incarceration, and companies can suffer collateral sanctions such as debarment and suspension from procurement activities. The summary of FCPA enforcement actions provided *supra* in Part II.B illustrates how the severity of FCPA penalties, the cost of defense efforts, and the negative publicity resulting from charges of violations steer companies toward plea agreements instead of toward mounting a full defense. Although some targeted companies are ultimately acquitted, the strain, cost, and embarrassment incurred in

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Bribery Scandal, EAST AFRICAN, Aug. 17, 1999 (visited Nov. 5, 1999) <http://www.africanews.org/south/southafrica/stories/19990817_feat18html>. The project was originally awarded to a Chinese firm but that contract was terminated due to alleged bribers of Ugandan officials that totaled almost thirty percent of the contract money. *See id.* The accused firms are from Canada, Italy, France, Germany, and Switzerland—all parties to the OECD Convention. *See id.*

508. Attributed in *Quotes to Inspire You* at <http://cyber-nation.com/victory/quotations/authors/quotes_young_owend.html>. Time magazine named Owen D. Young, American lawyer and financier, its 1929 Man of the Year for his leadership in the post-World War I Second Reparations Conference.

509. Transparency International, *New Poll Shows Many Leading Exporters Using Bribes* (visited Nov. 15, 1999) <http://www.transparency.de/documents/cpi/cpi-bpi_press-release.htm>.

mounting a defense serve as adequate incentives to implement the best compliance program possible.[510]

Knowing how to comply with anti-bribery law, particularly within the ever-expanding international regime, is no simple task. Using the FCPA once again as an example, there is only limited guidance on compliance with the twenty-year-old statute. No implementing regulations exist, and there is almost no applicable case law. When the FCPA was amended in 1988, the DOJ was instructed to solicit comments from other agencies and the public and to determine whether it should issue compliance guidelines.[511] After the required consultation, however, the DOJ determined that guidelines were unnecessary.[512] Thus, practitioners and others seeking to comply with the FCPA have been relegated to reading legal tea leaves. The DOJ and the Department of Commerce issued an FCPA brochure in 1992 that is self-described as only a "general description."[513] Although the DOJ has a formal opinion procedure,[514] little more than thirty issue analyses have been placed in the public domain since 1980.[515] Furthermore, these few DOJ opinions do not function as binding precedent and are strictly limited to the facts of the transactions at issue. Even if DOJ opinions could be relied upon as precedent, their utility would be limited because the DOJ rarely explains its reasoning for authorizing a transaction. The DOJ generally recites the facts and its conclusion with no further explanation. There is even less information regarding the future

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510. If the costs created by a simple allegation of wrongdoing are not adequate incentive to institute a compliance program, at least one more potential benefit of a compliance program is worth noting. The Federal Sentencing Guidelines provide that the existence of an effective compliance program can reduce the liability of a convicted party, regardless of the program's failure to prevent the pertinent violation. FEDERAL SENTENCING GUIDELINES MANUAL, § 8C2.5(f) (1999).

511. 15 U.S.C. § 78dd-2(e).

512. 55 Fed. Reg. 28,694 (1990).

513. *See* United States Department of Justice Fraud Section, Criminal Division & United States Department of Commerce Office of the Chief Counsel for International Commerce, *Foreign Corrupt Practices Act Antibribery Provisions* (visited Oct. 5, 1999) <http://www.usdoj.gov/criminal/fraud/fcpa/dojdoc.htm>; <http://www.ita.doc.gov/legal/fcparev.html>.

514. Companies can request a DOJ opinion regarding the legality of prospective transactions under 15 U.S.C. § 78dd-2(e) and 28 C.F.R. § 80.

515. *See* Department of Justice, *FCPA Review Procedure Releases*, <http://www.usdoj.gov/criminal/fraud/fcpa/revindx.htm> (DOJ opinions issued between 1980 and 1992); Department of Justice, *FCPA Opinion Releases*, <http://www.usdoj.gov/criminal/fraud/fcpa/opiindx.htm> (DOJ opinions issued between 1993 and 1998).

enforcement of the implementing legislation of the OECD countries.

Notwithstanding the lack of compliance standards established by enforcement authorities, the vast majority of multinational U.S. companies has developed and implemented FCPA compliance programs, and these programs can serve as models for other companies currently establishing their own compliance mechanisms. The widespread adoption of compliance programs has created expectations on the part of enforcement authorities that companies will have them in place. While compliance programs vary in scope and detail among different corporations, they all are intended to establish procedures that are reasonably expected to prevent and detect violations of the FCPA. These so-called "due diligence" procedures are crucial to the institution of a corporate "culture of compliance" that will help protect the company from FCPA violations and any accompanying penalties.[516] Moreover, in the event of a violation and detection by enforcement authorities, due diligence serves as a defense by establishing that the company acted reasonably, used best efforts to prevent the violation, and did not have knowledge of wrongdoing.[517]

Any compliance program should be tailored to the individual needs and potential degree of exposure of each company. Although foreign bribery is commonly associated with government procurement, a compliance program should cover all international corporate activity because the OECD Convention, like the FCPA, in fact applies to all international transactions, including investments, purchases, and sales. Foreign multinational corporations now under the OECD Convention regime should borrow extensively from the FCPA compliance programs adopted by U.S. companies that generally include some or all of the following elements.

A. *Corporate Policy Statement*

The creation of a compliance program starts with a clear statement that corporate policy is to adhere strictly to the

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516. H. Lowell Brown, *Parent-Subsidiary Liability Under the Foreign Corrupt Practices Act*, 50 BAYLOR L. REV. 1, 39 (1998).

517. The exercise of "due diligence" in preventing an FCPA violation is not a statutory defense. *See* H.R. CONF. REP. ON H.R. 3, 100th Cong., 2d Sess. 916, 922 (1988) (rejecting explicitly a "due diligence" exception). Nevertheless, the adoption of due diligence measures create a de facto defense, in that the company should not be held liable for the unlawful acts of employees or intermediaries when the company has no reason to know of those acts.

mandates of all applicable anti-bribery laws. To create a corporate "culture of compliance,"[518] however, a company must go beyond the mere issuance of a statement from a lawyer hidden away in a corporate office. Rather, company leadership must endorse the anti-bribery corporate policy from the chief executive officer through all levels of management. Failure by management to voice its support for the policy may create the misimpression that non-compliance will be tolerated and that the stated anti-bribery policy is a hollow one.[519]

Corporate policy statements normally are incorporated into a general manual of a company or a company code of business conduct. Anti-bribery policy provisions can range from short and general, to lengthy and detailed. Using the FCPA and its applicability to a U.S. company as the template, a simple policy statement might read as follows:

> The Company is committed to ensuring that its global business operations are conducted lawfully and honestly and are free from the influence of corruption. In furtherance of this objective, all Company managers are expected to make Foreign Corrupt Practices Act[520] compliance a priority, and all Company employees are expected to comply with the U.S. Foreign Corrupt Practices Act[521] and the Company's Code of Business Conduct. Accordingly, no payments of money, gifts, services, entertainment, or anything of value may be offered or made available in any amount, directly or indirectly, to any government official or employee in any country where such payments are illegal or not customary. Such payments are not legal in the United States,[522] and should not be made in other countries, even if legal there, if they are in violation of U.S.[523] laws, regardless of the nationality of the recipient. If there is any question as to the applicability of the U.S.[524] laws to a particular transaction or arrangement, the

518. *See* Brown, *supra* note 516, at 40 (listing steps necessary to establish a "culture of compliance").

519. *Id.* at 43-45.

520. Or, for a foreign corporation, the OECD Convention implementing legislation of the applicable jurisdiction.

521. *See id.*

522. Or, in the jurisdiction to which the corporation is subject.

523. *See id.*

524. *See id.*

> legal department must be contacted. The Foreign Corrupt Practices Act[525] imposes severe penalties for failure to follow these policies.

Longer policy statements may provide greater detail regarding the elements of an anti-bribery law violation and of the controls instituted by the company.[526] Regardless of their complexity, however, the most important functions of policy statements are to ensure that (1) relevant company personnel are sensitive to the general requirements of the law, and (2) personnel know to refer any potential bribery law questions to company experts, usually the legal department.

Some U.S. company compliance programs exceed FCPA requirements by forbidding payments or bribes to private-sector, non-governmental parties in normal commercial transactions. Such policies often are adopted formally in compliance with U.S. laws governing "commercial bribery," discussed previously in Part II.A.2.c. An illustrative policy statement to this effect might read as follows:

> The Foreign Corrupt Practices Act by its terms is limited to payments to government officials. However, the Company policy exceeds FCPA requirements and prohibits *any* similar questionable payments to *any* party for *any* reason.[527]

The policy statement also may refer to the narrow exception and limited defenses of the FCPA, that is, "facilitating" payments to government officials for the performance of routine duties, payments permitted by local law, and certain limited business expenses. Because of the narrowness of these exceptions, any reference to them should require advance approval by the legal

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525. Or, the OECD Convention implementing legislation of the applicable jurisdiction.

526. A "whistleblower" policy might also be added to the policy statement whereby the company affirms that it will protect from retribution any person who reports an anti-bribery law violation.

527. A real-life example of such language is provided by United Technologies Corporation, which maintains an FCPA website on its intra-net service. The website states in relevant part: "These pages address only the Foreign Corrupt Practices Act. The UTC Code of Ethics contains a much broader prohibition on the payment of bribes. A payment that is not prohibited under the Foreign Corrupt Practices Act may well be prohibited by UTC's Code of Ethics." <http://www.corphq.utc.com/emhand/BPO/brochures/corrindex.html> (access restricted) (on file with authors). The same website describes the FCPA, explains its elements, and provides phone numbers for employees to call if they suspect a bribe has been or will be made or offered.

department or another suitable office within the company. If coverage of commercial bribery is included within the policy statement, the statement also may refer to broader exceptions for entertainment of private individuals.

Although it was not subject to the FCPA or the OECD Convention at the time, a Danish consulting firm drafted a "Gifts Policy" in 1995 that exemplifies a detailed policy statement.[528] The policy first states a general principle that visible gifts are considered normal business practice while invisible gifts are considered bribes. Under the policy, gifts of company paraphernalia, such as ties, pens, and umbrellas, are encouraged. Also permissible are gifts of reasonably priced flowers, wine, or dinner invitations if a specific reason for the gift is stated on the bill.

The Danish firm appears to have drafted the "Gift Policy" in imitation of the FCPA's delineation between large gifts and "facilitating" payments.[529] The policy lists examples of invisible, improper gifts, such as presents worth more than US $200, direct cash presents, cash presents made through an intermediary, and secret "employment" of non-employees.[530] Like the FCPA, the Danish policy provides an exception. Unofficial fees paid to carry out necessary day-to-day duties in connection with contracted work are permissible if the payor attaches a note to the expense claim detailing the efforts made to avoid payment of the fee. Even with the note, however, company staff review the propriety of the payment as a further screening measure.[531]

B. *Accounting Procedures*

As discussed *supra*, the FCPA prohibits bribery *and* requires companies to implement accounting controls to ensure that their records are accurate, transparent, and properly retained. Thus, many U.S. companies incorporate some reference to the FCPA accounting provisions in their compliance programs, particularly

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528. Transparency International, *Applying the Framework: The Private-Corporate Sector*, *in* THE TI SOURCE BOOK (visited Oct. 5, 1999) <http://www.transparency.de/documents/sourcebook/b/Chapter_13/index.html>.

529. *See generally* discussion of FCPA exceptions, *supra* notes 39-40 and accompanying text.

530. *See* Transparency International, *supra* note 509.

531. The efforts of the Danish firm provide evidentiary support for Denmark's reputation as the least corrupt country in the world. Transparency International, *The Corruption Perceptions Index* (visited Oct. 5, 1999) <http://www.transparency.de/documents/source-book/b/Chapter_13/index.html>.

focusing on hidden, inaccurate, incomplete, misleading or false entries. Of course, in the absence of the FCPA's accounting requirements, multinational companies still would have important reasons to ensure the accuracy of their records. An example of a policy statement regarding accounting practices, with reference to the FCPA, follows.

> The Company's business records must always be prepared accurately and reliably and stored properly. All transactions must be reflected on the company's books, records and accounts, as must all other events that are the subject of a specific regulatory record-keeping requirement. No undisclosed or unrecorded funds or assets of the company or its subsidiaries shall be established for any purpose. No false or artificial entries shall be made in any company books or records for any reasons. No payment shall be approved or made with the intention or understanding that it is to be used for any purpose forbidden under the Foreign Corrupt Practices Act[532] or this corporate policy. Any employee having any information or knowledge of a hidden fund or asset, or any false or artificial entry, or any inappropriate payment, must inform the legal department. Records must be retained in accordance with the company's record retention and destruction policy and may never be destroyed to avoid disclosure in a legal proceeding. Any questions regarding the treatment of records should be referred to the legal department.

Because many companies already possess transparent accounting policies to comply with various domestic laws, they need only amend those policies to include references to specific language of the FCPA or any other applicable OECD Convention implementing law.

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532. Or, the OECD Convention implementing legislation of the applicable jurisdiction.

C. *The Human Element*

1. Personnel Compliance

a. Training

A fundamental feature of every effective compliance program is a requirement that employees understand the applicable legal requirements and the requisite procedures to ensure conformity with the law. Accordingly, employees should be provided with information on the law that is drafted in layman's terms. Compliance information should be communicated through the corporate policy manual, company website, lunchroom posters, and periodic memoranda or other publications. Senior management should participate in the communication of this information to validate the importance of compliance.

Employees should be provided a toll-free telephone number or hotline that they can call to report misconduct or suspicious activity or to raise questions about proposed actions that may implicate anti-bribery law. It is probable that most companies already have toll-free numbers or hotlines in place for other reporting purposes that may either be modified or expanded to accommodate calls regarding potential anti-bribery law violations.[533] The company may accept calls anonymously and should maintain a log of all calls received. Once the substance of a call is transmitted to the appropriate company official, a decision can be made regarding how to pursue the matter. The original caller, if not anonymous, should be contacted and advised of the results of the investigation.[534]

Additionally, relevant personnel should be encouraged to attend periodic seminars or workshops on anti-bribery law compliance. For these purposes, "relevant personnel" includes, in particular, those who work with foreign government agencies or officials, those who are directly involved with foreign agents, consultants, distributors, or investment partners, and in-house counsel.

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533. For example, "If you have a question or concern about a payment made to a foreign official, press '7' now."

534. *See* Brown, *supra* note 516, at 50.

b. Verification

Some U.S. companies implement additional protective measures to ensure compliance with the FCPA. The most common additional control employed by companies is a requirement that personnel involved in transactions connected to foreign governments or agents execute a periodic certification that they have not violated the FCPA. A common method of "compliance affirmation" is a requirement that employees involved in international operations annually attest in writing that they have acted in a manner consistent with the company's anti-bribery policy and the requirements of the FCPA. The company may require additional attestations prior to the commencement of a major transaction or at the culmination of complex and competitive negotiations. One benefit of the attestation requirement is that it motivates employees to ensure they are familiar with FCPA requirements. Such an affirmation may read as follows:

> I, ________, hereby certify that I have read and understand the Company's business policy for complying with the U.S. Foreign Corrupt Practices Act, and further certify that during the twelve-month period ending ________ I have not paid or given anything of value, either directly or through third parties, to an official of a foreign government, officer of a political party, or candidate for political office, or official of an international organization, for the purpose of influencing an act or decision to assist in obtaining or retaining business for the Company, or for any improper advantage, and I have no reason to believe that anyone else has done so. I further attest that I have no knowledge of any fund within the corporation that was created or maintained, or from which expenditures have been made, for purposes other than those reflected on the books and records of the Company.

Like the corporate policy, the attestation should be tailored to employ the precise language of any applicable implementing legislation under the OECD Convention.

c. Other Controls

Two other controls employed by some companies are worth briefly mentioning. The first control is a company policy that its independent auditor will perform procedures specifically designed to assess whether payments or transactions have occurred that may be questionable under the FCPA. The second control is integration of compliance with law and corporate policy as a factor to be weighed in personnel review. Personnel may be tempted to believe that disregard or circumvention of law or corporate policy is permissible if they believe that the law or policy impedes the success of the business. Thus, any tendency of personnel to ignore anti-bribery policy can be limited if compliance with bribery policy, and company policy in general, is an element of performance measurement and resultant compensation.[535]

2. Third Party Compliance

The most difficult aspect of OECD Convention compliance will derive from the fact that a company may not indirectly bribe government officials by knowingly making payments through third party intermediaries. The summary of FCPA enforcement actions in Part II.B. demonstrates that companies sometimes are held liable for violations by subsidiaries and for unlawful payments made through sales agents. Third party intermediaries can include agents, sales or marketing representatives, consultants, distributors,[536] and joint venture partners.[537] Thus, transactions and arrangements with state-owned enterprises are particularly risky.

As previously stated, the "knowledge" standard of the FCPA is broad, encompassing actual knowledge as well as instances where there is a "high probability" that an intermediary will undertake prohibited conduct or where a company "deliberately" or "consciously" avoids knowledge of the intermediary's violative acts. The "knowledge" standard effectively requires a company to take reasonable "due diligence" measures to ensure that payments to third parties do not result in FCPA violations and to

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535. *See id.* at 45 (discussing the integration of compliance into performance criteria).

536. Although a typical distributor arrangement does not involve direct payment to a distributor, a company nevertheless can be held liable under the FCPA if it provides excessive price discounts or rebates to a distributor in exchange for bribes to foreign officials.

537. An overseas joint venture, or an affiliate or subsidiary, generally is deemed an agent of a parent if the parent controls subsidiary voting, there are officers or directors common to both entities, and the venture or subsidiary is financially dependent upon the parent. Where the parent has only a non-controlling or a minority interest in the venture or affiliate, the parent nevertheless should protect itself by requesting compliance with anti-bribery rules and by documenting such efforts.

prevent the company from being deemed "knowingly" involved in any misconduct by its intermediaries. It is unclear how broadly the members of the OECD will interpret "knowledge" in their enforcement efforts, but it would behoove companies now subject to the OECD Convention to implement some set of due diligence measures.

The FCPA itself provides little guidance regarding the required "due diligence," but its legislative history and subsequent administrative pronouncements are instructive. These sources demonstrate that those subject to the FCPA should employ great care in their selection of overseas business partners, should obtain assurances that the third party will not make a prohibited payment, and should monitor the third party activities where possible and appropriate. These key features of third-party due diligence procedures are separately examined below.

a. Screening

Because multinational companies are potentially liable for the corrupt acts of a third party, many companies include in their compliance programs a multi-tiered screening process of all overseas intermediaries.[538] First, a company collects background information on a prospective intermediary, including the intermediary's experience and references, its government affiliations, and its corporate structure and financial status. Such information typically is acquired through questionnaires, interviews, and investigations. Once the information is collected, a company must assess whether the intermediary presents an unacceptable risk of an FCPA violation. Some companies routinely require a formal analysis of candidates to enhance the standardization of the process, to ensure that the necessary information is collected, and to select the intermediary on a competitive basis.

i. Identifying Candidates and Qualifications

Identifiable and objective qualifications are a prerequisite to a screening process because the purposes of the process are to select an intermediary that is capable of conducting company business and simultaneously to create a paper trail in support of the final decision. Full documentation of legitimate business reasons for selection of an intermediary helps insulate a company

538. For purposes of the following discussion, "intermediary" is used in reference to any agent, representative, consultant, partner, or employee.

from liability under the FCPA because it shows the justifiability of the decision.

Although there are an infinite number of possible qualifications to seek in an intermediary, several should hold priority in the majority of selections. These include: (1) a reputation as an ethical businessperson; (2) financial stability, which may be established by longevity in the area; (3) an understanding of the applicable laws, trade-related and otherwise; (4) knowledge of local business custom; and (5) ability to grow with the business.[539]

Once qualifications are in place, a company must identify a pool of candidates from which to choose the intermediary. A company that already has a presence in the foreign market will be aware of who to consider or, in the alternative, whom to contact to obtain referrals. If the company has no contacts in the foreign market, however, it must locate a neutral source, if possible, to provide it with referrals. Some companies are assisted by the U.S. Chamber of Commerce, which has branches in most foreign countries. The U.S. Chamber of Commerce maintains rolls of foreign business contacts and will, in some cases, introduce a company to a potential intermediary. If the U.S. Chamber of Commerce has only a weak presence in a region, it can steer a company to a private consultant who can identify candidates.

ii. Questionnaires

The best way to kick-start research of candidates is to obtain background information from the candidates themselves. A standard questionnaire is an effective tool to get information that a company can use to further investigate a candidate and that can be used to compare the candidate's responses with the responses of other candidates.

Most companies already have some sort of employment questionnaire. For purposes of bribery law, the questionnaire

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539. Even if no anti-bribery law existed, these qualifications probably would top a list of sought-after qualifications in a foreign intermediary, if only for business reasons. In the context of anti-bribery law, however, they also demonstrate an ability to conduct overseas business the "right" way without being forced to resort to bribery or other improper payments.

In typical domestic business dealings, one might also search for a candidate with access to government officials and inside information. While this may be the case in the establishment of any legitimate business relationship, it is probably prudent to avoid listing these among the roster of qualifications for a foreign intermediary.

should be based on the qualifications the company has determined are important and should also seek to elicit information that is relevant to the law. Thus, in addition to standard business questions,[540] the questionnaire should request the following information: (1) a roster of the full names of all officers and employees of the candidate; (2) a listing of all governmental or political positions held by any officer or employee of the candidate; (3) a listing of all governmental or political positions held by any relative of any officer or employee of the candidate; (4) a comprehensive listing of all of the candidate's business affiliations, including subsidiaries or total or partial ownership of any other enterprise; and (5) pointed questions regarding possible benefits of the business relationship accruing to any governmental or political official. The same types of questions must be asked of a non-company, individual candidate.

iii. Interviews

Once the questionnaires are submitted and reviewed, the candidate pool can be reduced to those warranting an interview. Interviews, of course, should address the subject matter of the questionnaire and should probe its strengths and weaknesses. A special advantage of the interview is its ability to give the company a sense of the candidate's personality and veracity. After the interview, a formal memorandum recording the conversation and the interviewer's impressions should be drafted and submitted to the final decisionmaker.

iv. Investigation

While information provided by the candidates is helpful, it is by no means the end of due diligence screening. The company should seek to verify the candidate's offerings through its own investigation. Thus, local governmental bodies can be contacted to verify biographical and business information. Business associates of the candidate should be contacted, including, but not limited to, the references provided on the questionnaire. Internet and other on-line services should be utilized to provide other background information.

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540. These questions would address financial statements, banking references, general references, facilities information, qualifications/training in the relevant business, experience, and business plans.

If the candidate is a large company or a prominent individual, the U.S. Department of Commerce may be able to provide information either through its "International Company Profiles" or through the assistance of desk officers specializing in the candidate's country. Other governmental entities may be contacted, such as U.S. embassies or Department of State desk officers, and private commercial firms such as Dun & Bradstreet may have reference material concerning the candidate. Full documentation of all investigative efforts should be placed in the candidate's file.

v. Legal Analysis

If the candidate is a foreign company, legal due diligence must be conducted to verify that the company is in compliance with the hiring party's local law, including the OECD Convention implementing legislation. If the investigation demonstrates that no foreign official is involved in any manner in the proposed business relationship, little legal analysis is required. However, full legal documentation must occur if a foreign official or political actor, or a company owned in part by such a person, is involved.

While the OECD Convention does not prohibit hiring a "foreign official," the relationship between the payments and the official's position determines the propriety of the payments. The greater the rank of an official, particularly if there is an established link between the official's responsibilities and the payment's intent, the greater the likelihood of a violation.

Because it is sometimes difficult to discern whether or not a government or government official is involved in a foreign company, any doubts should be resolved with written legal opinions stating the reasons why the relationship is proper and repeating the legitimate business reasons for pursuing the relationship.

A full review also should be conducted of the law of the foreign country (even if the country is not party to the OECD Convention), probably through consultation with local counsel. In addition to researching all foreign law that addresses bribery of public officials, legal research should also address local agency law, government procurement law, labor law, the law of third-party beneficiaries, and tax law. Specific questions to ask may include whether the country prohibits or regulates the use of intermediaries, prohibits payment of a commission in government procurement, when intermediaries can be hired and fired, and how intermediaries must be registered.

vi. Selection

Once all information is accumulated, the company's hiring personnel must review and compare the files of the candidates. Of course, business considerations generally play the largest role in selecting an intermediary. To assure compliance with the FCPA and other anti-bribery law, however, certain types of information are considered "red flags," or signs that the intermediary might intend to make a prohibited payment, which warrant further review and possible disqualification of a candidate. "Red flags" arise when a candidate's file results in a "yes" answer to any of the following questions:[541]

(1) whether prohibited payments are commonplace or traditional in the country in question;[542]
(2) whether the reputation of, or prior experience with, the intermediary suggests the possibility of prohibited payments;
(3) whether the intermediary's proposed level of compensation is abnormally high either as a percentage or in absolute terms;
(4) whether the intermediary is unwilling to provide certifications to the effect that it has not and will not make a prohibited payment;
(5) whether the intermediary has an affiliation or close relationship with a foreign government or any of its relevant officers;

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541. *See* Department of Justice, *Foreign Corrupt Practices Act Antibribery Provisions* (visited Nov. 4, 1999) <http://www.usdoj.gov/criminal/fraud/fcpa/dojdocb.htm>.

542. While the DOJ stresses the importance of this factor, it does not maintain a list of high-risk countries. The Corruption Perceptions Index published by Transparency International may be the most reliable source in analyzing this factor. For explanation of the contents of the Corruption Perceptions Index, see *supra* notes 347-49 and accompanying text. It is important to note, however, that the Corruption Perceptions Index does not rank every country in which transactions may occur. Furthermore, a high or low ranking on the Index should not be considered dispositive of a transaction; further due diligence surrounding a country should be conducted.

What makes the "corrupt country" factor unique is that it is not transaction-specific. Therefore, the only way to avoid the danger imposed by this factor is to refuse to do business in a country that has a bad reputation. Withdrawal from a country is not required, as demonstrated by the legislative history of the FCPA which states that the "mere fact of doing business in a country where corrupt payments are common" is not, alone, violative of the FCPA. S. REP. NO. 100-85, at 52 (1988).

(6) whether the proposed payment to the intermediary would be made in an abnormal or concealed fashion, such as in cash, or through a third country bank account;
(7) whether there is an absence of bona fide business reasons for retaining the intermediary;
(8) whether there are other circumstances that could later be viewed as suggesting the intermediary might make inappropriate payments, such as indications that a payment is to be earmarked for a government official when made to the intermediary, or whether the intermediary holds itself out as having special access or otherwise suggests some correlation between payment to the intermediary and government access or influence of government decisions.

No single factor is determinative in establishing whether a company should conclude that a prospective intermediary is a risk of a violation of the applicable OECD Convention implementing legislation; all facts and circumstances surrounding the retention of the intermediary must be considered together.

b. Contract

Compliance programs also may require that the written contract with the intermediary contain a provision acknowledging the intermediary's adherence to the pertinent anti-bribery law, and the company's anti-bribery policies. Such a contractual provision might read as follows:

> _________ represents and agrees that (i) it will not pay or give anything of value, directly or indirectly or through third parties, to an official of a foreign government, officer of any political party, candidate for any political office, or official of an international organization for the purpose of influencing an act or decision in their official capacity, or inducing them to use their influence with the foreign government to assist in obtaining or retaining business for or with, or directing business to, or providing some other economic benefit to the Company or for any unlawful purpose; (ii) none of ________'s directors, officers, major shareholders, or employees are officers or representatives of any government or political party, candidates for any political parties, or officials of any international organizations; (iii) full disclosure of the

> existence and terms of this agreement may be made at any time to whomever the Company's counsel determines has a legitimate need to know such terms; (iv) all compensation and expense reimbursements to ______ are subject to audit; and (v) _____ will immediately notify the Company in the event any of ______'s directors, officers, major shareholders, or employees should become governmental officials, candidates or appointees for any government office, officers of any political party, or officials in any international organization, or in the event such government officials, candidates, party officers, or officials of an international organization should become directors, major shareholders or employees of ___________.

Similar provisions can be used for arrangements with subsidiaries, joint venture partners, and contractors.

There is no set of standard, minimum, or maximum contractual provisions.[543] What is reasonable depends upon the individual intermediary. The more indicia of an intermediary's inclination to make a prohibited payment, the more specific and comprehensive the contractual undertakings of the intermediary should be. In such a case, the company should consider the following additional provisos for inclusion in the contract:

(1) the intermediary will provide an opinion from local counsel acknowledging that local law permits the relationship or transaction in question;
(2) the intermediary covenants to maintain accurate, complete, and transparent accounting;
(3) the company has the right to terminate the relationship if the intermediary breaches any covenants, or if a change in circumstances enhances the likelihood of a violation;[544]

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543. For example, another prophylactic measure employed by many compliance programs is a certification requirement whereby the overseas intermediary executes a certification or other assurance that it has not, and will not, make a prohibited payment. Certifications of compliance often are required on a set schedule and may be patterned after those required of employees, as discussed *supra*.

544. A company's commitment to abiding by anti-bribery law may be questioned absent a contractual provision for a remedy.

(4) the intermediary covenants to indemnify the company for any and all damages arising from the intermediary's breach;[545]
(5) all payments will be made by check or wire transfer and will be made directly to the intermediary; cash payments will not occur and neither will payment to a third party;
(6) no rights or obligations of the intermediary may be assigned or delegated to a third party;
(7) the company reserves the right to perform random compliance audits of intermediaries;
(8) travel and entertainment expenses will be paid only after company approval and thorough documentation.

A company has little day-to-day control over the actions of a foreign intermediary; the extent of possible hands-on monitoring is extremely limited. However, individualized tailoring of contracts between a company and a foreign intermediary, by including any or all of the provisions suggested above, demonstrates that a company has made substantial efforts to comply with all applicable anti-bribery law.

c. Controls

Once a relationship with an intermediary has begun, a company can protect itself further by employing certain procedural safeguards. For instance, a company may permit its foreign intermediary to forward invoices from agents only if they contain a complete description of the services rendered and may stipulate that the invoices will be compared with the terms of the agreement under which the services are performed. Similarly, it may be advisable to stipulate that payment for the agent's services will be made directly by check to the agent or her account in a financial institution in the country in which the services are being performed. Further, a company can ensure that payments never will be made to entities that did not provide services or to numbered accounts in third countries. Such measures make it more difficult for an agent to avoid recognition of the appropriate compensation.

545. In practice, indemnity may be difficult to obtain from a foreign party, but an indemnification clause may act as a deterrent to malfeasance and serves as another indication of the company's dedication to compliance.

d. Monitoring

Many compliance programs provide that, even after a foreign representative is retained, the company will continue to monitor her activities. Monitoring is important because a company can be held liable for unlawful acts of long-time, previously reliable agents. Monitoring can prevent a company from being surprised when a private sector agent becomes affiliated with a government after it is retained by the company.

If a company suspects that a representative has made a prohibited payment, it is incumbent upon the company to investigate the matter and, if necessary, to terminate the relationship. After there is reason to believe that a foreign intermediary has made or will make a prohibited payment, any payment to that intermediary could be viewed as a violation of the applicable anti-bribery law. The company also must determine how and why the prohibited payment was made and must then fine-tune its compliance efforts to avoid recurrence of the violation.

Compliance programs also may impose other internal controls in addition to third-party screening and assurance requirements. In particular, the following requirements commonly are added as components of a third-party compliance program: (1) all agreements with overseas intermediaries must be reduced to writing and must contain a certification as discussed above; (2) payments to intermediaries may not be made in cash or to third country bank accounts; and (3) independent auditors have special instructions and permission to examine dealings with overseas intermediaries.

Identical concerns attach to investments in foreign affiliates, such as subsidiaries and joint ventures; similar "due diligence" measures, therefore, are common in dealings with these entities. In particular, a company may seek appropriate written certifications from relevant foreign partners or employees that they comply with all pertinent bribery laws. A company entering a joint venture may require its foreign partner to certify (1) that no corrupt payments were made to "foreign officials" in connection with entering into or securing necessary approvals for the relationship; (2) that its participation in the transaction is permitted by local law; (3) that no portion of the proceeds paid by the concerned company into the venture will be used to fund payments in connection with securing government approvals; and

(4) that the foreign partner's books and records are accurate and complete. The company also can require that the affiliate or joint venture partner adopt an anti-corruption policy, including the above measures for screening third-party intermediaries.[546]

V. CONCLUSION

> He who profits illicitly troubles his own house, but he who hates bribes will live.
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> — *Proverbs 15:27*[547]

U.S. companies subject to the unilateral prohibitions of the FCPA have long complained that they were losing contracts because of bribery by non-U.S. competitors, and that the futility of complaining coupled with concerns about retribution by officials who were recipients of the bribes, left them without recourse. With the adoption of the OECD Convention, multinational companies who have evidence that they lost business because of competitor bribery will be more likely to complain directly to prosecutors in the competitor's home country, with recourse to their own governments, the OECD Working Group, and the press, if the prosecutors fail to take action. Some will act as private attorneys general, aggressively rooting out evidence of competitors' bribery, using the Convention as a tool to right perceived competitive imbalances.

The U.S. government has committed its considerable diplomatic and intelligence resources to enforcing the OECD Convention, and is under domestic political pressure to follow through. The U.S. State Department will ensure that regular comprehensive reviews of the adequacy of enforcement efforts by Convention members occur, and it will monitor cases prosecuted by members.[548] A U.S. Undersecretary of State asserted that

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546. A final concern regarding the retention of third-party affiliates is the possible application of local law restrictions on the hiring, payment, and termination of intermediaries. For example, in the Middle East and Latin America there are restrictions on the use of sales agents and on the termination of agreements with sales intermediaries. Similar restrictions apply in some European and Asian countries. Thus, many multinational corporations factor these constraints into their screening of third-party intermediaries.

547. *Proverbs* 15:27 (New American Standard Bible).

548. Delegation of Responsibility Under the Senate Resolution of Advice and Consent to Ratification of the Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions, Memo. of June 10, 1999, 64 Fed. Reg. 32,795 (1999).

there now are "very substantial" risks for OECD companies "tempted to acquiesce in the payment of bribes."[549]

The OECD also will perform regular reviews of implementation and enforcement of Convention obligations that also will be closely monitored by anti-bribery groups such as Transparency International.[550] Further, international lending institutions will exercise greater vigilance against possible bribery in connection with projects in developing countries.

Given the dramatically expanded international legal framework prohibiting bribery of foreign officials and the increased likelihood that prosecution will be sought and publicly supported, it is incumbent upon multinational companies to implement compliance measures. A compliance program can be tailored to the specific circumstances and needs of an individual corporation, but in most instances, it would be advisable for the program to adopt in some fashion the fundamental elements discussed in Part IV. The first element is a corporate policy that the company is committed to adhering to the requirements of the local anti-bribery law implementing the OECD Convention. Other elements entail internal procedures to ensure that personnel involved with foreign governments or agents are well-informed of the anti-bribery prohibitions and the compliance measures they must adhere to, and that accurate accounting records are maintained and retained. The final element establishes procedures that will ensure that relations with third party intermediaries are monitored and controlled to the fullest extent practicable.

Earnest implementation of anti-bribery compliance measures should insulate multinational corporations from liability under the OECD Convention and related national laws. It also will help developing countries improve their processes for procuring much needed goods and services, and may add a measure of civility and ethics to the often rough-and-tumble atmosphere of international government procurement competition.

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549. Stuart E. Eizenstat, Testimony before the Senate Foreign Relations Committee, June 9, 1998 (visited Nov. 4, 1999) <http://www.senate.gov/~foreign/stat.htm>.

550. *See* discussion of OECD review procedure, *supra* notes 486-95 and accompanying text.