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**Recognizing and Defending Against
Foreign Corrupt Practices Act Violations**

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Introduction

The Foreign Corrupt Practices Act (FCPA or Act) is a by-product of the Watergate scandal of the 1970s. It has drawn more attention in recent years as the likelihood that information regarding illicit payments made by a U.S. company or an affiliated third party in violation of the Act will be brought to the attention of U.S. enforcement authorities has increased. This, coupled with the expansion of foreign trade by U.S. companies, makes it imperative that counsel for multinational construction companies (or those companies wishing to expand operations into foreign markets) be familiar with the provisions of the Act.

The FCPA has two substantive parts: (1) the accounting provisions, which impose certain accounting and record-keeping requirements upon publically held U.S. companies; and (2) the foreign payments provisions, which make it illegal for any U.S. company or U.S. citizen, national, or resident to bribe a foreign official for the purpose of obtaining or retaining business. This overview focuses on the foreign payments provisions as these present the greatest exposure to non-publically held construction companies working outside of the United States.

Specifically, the FCPA prohibits:

- (1) U.S. corporations or any officer, director, employee, agent or stockholder acting on behalf of such corporation, or
- (2) U.S. citizens, nationals, or residents from
- (3) using an instrumentality of interstate commerce
- (4) corruptly

- (5) in furtherance of an offer, payment, or promise to pay or authorization of the payment of
- (6) anything of value
- (7) to any foreign official,
- (8) foreign political party or official thereof or any candidate for foreign political office, or
- (9) to any person while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official,
- (10) for purposes of influencing any act or decision of such foreign official, inducing such official to do or omit to do some action, or induce such official to influence any act or decision of such government,
- (11) in order to assist in obtaining or retaining business, or directing business to any person.

In addition, the FCPA was amended in October 1998 (hereinafter “the 1998 Amendments”) in order to conform the FCPA to the Organization for Economic Co-operation and Development (OECD) Convention. The 1998 Amendments made several important changes:

- (i) they applied the nationality basis of jurisdiction to U.S. nationals and U.S. companies, and
- (ii) they extended the application of the FCPA to foreign persons and entities, including foreign subsidiaries of U.S. companies, which commit any act in furtherance of a prohibited payment while in the territory of the United States.

By its terms, the FCPA applies to U.S. corporations and their officers, directors, employees, or agents acting on their behalf. It generally does not apply to foreign corporations, unless some act in furtherance of the bribe occurs within the territory of the United States. For example, it does not “cover payments by foreign nationals acting solely on behalf of foreign subsidiaries where no acts by the foreign person in furtherance of the bribe occur within the territory of the United States and where the issuer, reporting company, or domestic concern had no knowledge of the payment.” Accordingly, any bribe which is wholly conceived of and executed by a foreign company outside of the territory of the United States, including a foreign subsidiary of a U.S. corporation, without the participation of the U.S. corporation, falls outside the purview of the FCPA.

On the other hand, the legislative history makes very clear that a U.S. company that participates in a bribery scheme abroad, directly or indirectly through any other person or entity, is subject to liability under the FCPA. The notion of participation indirectly through a foreign entity often creates the greatest uncertainty. For example, liability may attach where a U.S. corporation “authorizes” a third party to make an illicit payment, or pays anything of value to a third party, “knowing” that all or a portion of such thing of value will be offered, given, or promised to a foreign official to obtain or retain business. The “third party” may include foreign sales representatives or any other intermediaries such as foreign distributors, consultants, independent contractors, foreign subsidiaries, or other legal entities. Furthermore, the FCPA’s standards of knowledge and authorization impose liability even in the absence of actual knowledge or explicit authorization.

Section 1: The Foreign Payments Provisions

§ 1:1 U.S. Companies and U.S. Citizens

In enacting the FCPA, Congress intentionally limited its jurisdictional scope principally to U.S. entities. During its deliberations, the conference committee, recognizing the jurisdictional, enforcement, and diplomatic difficulties inherent in extending U.S. law to foreign entities such as subsidiaries of U.S. companies, opted against the application of the Act to such foreign entities.¹ Congress did, however, include U.S. citizens, nationals, or residents who engage in illicit conduct within the jurisdictional reach of the FCPA, even if they are serving merely as employees of foreign companies. Similarly, foreign nationals who serve as officers and directors, and in certain circumstances, employees or agents of U.S. companies, may be subject to the application of the FCPA.^{1,1}

Specifically, the FCPA applies to:

- (a) issuers;²
- (b) domestic concerns;³ or
- (c) any officer, director, employee, or agent of such issuer or domestic concern, or any stockholder thereof acting on behalf of such issuer or domestic concern.

§ 1:1.1 Issuers

Issuers⁴ that have a class of securities registered pursuant to section 12 of the Exchange Act or that are required to file reports under section 15(d) of the Exchange Act⁵ are subject to the FCPA. This includes several subsets of entities:

- Issuers with a class of securities registered on a national securities exchange pursuant to section 12(b) of the Exchange Act
- Issuers with a class of equity securities listed on the National Association of Securities Dealers Automated Quotation (NASDAQ) System;
- Issuers that have \$10 million or more in assets on the last day of their most recent

- fiscal year and that have a class of equity securities held by 500 or more persons, with the exception of issuers specifically exempt under section 12 or the rules thereunder or that have received an exemption from the SEC;⁶
- Foreign private issuers whose securities are registered under the Exchange Act;⁷
 - Banks and other financial institutions that file Exchange Act reports with the Office of the Comptroller of the Currency (OCC) or other appropriate financial institution agency, also known as “section 12(i) companies”;⁸ and
 - Issuers that offered securities to the public using the vehicle of a registration statement and prospectus pursuant to the Securities Act of 1933—but only during the one-year “duty to update” period following the offering (“section 15(d) registrants”).⁹

§ 1:1.2 Domestic Concern

The term “domestic concern” means:

- (A) any individual who is 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.¹⁰

The application of the FCPA was originally limited to business enterprises organized in the United States or which have their principal place of business there. It did not cover foreign companies, including foreign subsidiaries of U.S. companies. The legislative history confirms that only U.S. (and not foreign) companies were covered by the FCPA.¹¹

But U.S. citizens, nationals, and residents, even those employed by foreign companies, were and are subject to the FCPA's jurisdiction if they engage in illicit payments abroad.¹²

An interesting issue was whether a foreign corporation which is doing business in the United States through a branch office and whose branch office uses an instrumentality of interstate commerce to make an illicit payment to a foreign official would be subject to the FCPA. Since presumably the foreign corporation neither is organized under the laws of a state of the United States,¹³ nor has its principal place of business in the United States,¹⁴ it would appear to fall outside the purview of the Act.¹⁵ However, the 1998 amendments to the FCPA, which extends the FCPA to foreign corporations and foreign nationals who commit any act in furtherance of a prohibited payment while in the territory of the United States, render this issue moot.^{15.1}

§ 1:1.3 Officer, Director, Employee, Agent, or Stockholder

The application of the FCPA also extends to the officers, directors, employees, agents, or stockholders of U.S. companies who engage in illicit conduct on behalf of a U.S. company. This may include non-U.S. nationals.

In imposing liability, the FCPA originally distinguished between foreign nationals who were officers, directors, or stockholders of U.S. companies and those who were employees or agents of U.S. companies. The FCPA reached foreign national officers or directors of a U.S. company, or a foreign national stockholder acting on behalf of a U.S. company.¹⁶ In contrast, foreign national employees or agents¹⁷ of a U.S. company were subject to criminal liability¹⁸ under the FCPA only if such persons were "otherwise subject to the jurisdiction of the United States."¹⁹

The distinction between officers and directors, on the one hand, and employees

and agents on the other hand, had its origins in the so-called Eckhardt amendment. Originally, the FCPA required a finding that the U.S. company violated the FCPA as a predicate to any liability for the actions of the employee or agent of that company.²⁰ This requirement was repealed in the 1988 Amendments. As a result, an employee or agent of a U.S. company can be held liable under the FCPA, even if the U.S. company is acquitted or never charged with an offense.²¹ Presumably, this also applies to foreign nationals who are employees or agents of a U.S. company.²²

The 1998 amendment to the FCPA eliminated the differing treatment for foreign national employees or agents of a U.S. company, and deleted the phrase “otherwise subject to the jurisdiction of the United States.” As a result, all employees or agents of U.S. businesses will be subject to both civil and criminal penalties.^{22.1} In addition, if a foreign corporation’s securities are listed on a U.S. stock exchange, its foreign national employees may be subject to the jurisdiction of the FCPA as well.^{22.2}

§ 1:1.4 Foreign Natural and Legal Persons

The OECD Convention calls on each member State to establish jurisdiction over the bribery of a foreign official committed by “any person” in whole or in part in the territory of the member State.²³ In contrast, the scope of the FCPA had been limited principally to U.S. companies and to U.S. citizens, nationals, and residents.²⁴ The Act generally did not apply to foreign corporations^{24.1} and their foreign national employees, even if such persons committed a substantial part of the illicit conduct within the territory of the United States.

To conform the FCPA to the OECD Convention, the 1998 amendments to the FCPA expanded the scope of the FCPA to cover foreign natural and legal persons, but required, as a jurisdictional nexus, that such foreign persons commit an act in furtherance of the bribery of a

foreign official “while in the territory of the United States.”^{24.2} As a result of this amendment, the FCPA now applies to “any person” but contains differing jurisdictional standards for different categories of persons.

The Administration had originally proposed to amend the FCPA by expanding its application to “any person” who uses an “instrumentality of interstate commerce” in furtherance of a prohibited payment. Such a provision would have substantially expanded the reach of the FCPA, as the jurisdictional requirement to use an instrumentality of interstate commerce has been very broadly construed. The impact of the provision would have been felt principally by foreign subsidiaries of U.S. companies, since these entities are most likely to use an “instrumentality of interstate commerce.” Moreover, since none of the other OECD members intended to apply the OECD Convention to their foreign subsidiaries, unless some illegal conduct occurred within their own State, the Administration proposal would have tilted the playing field unevenly between the United States and the other OECD members. Accordingly, after considerable internal debate within the Administration, the Administration proposal was revised^{24.3} to apply to foreign natural and legal persons only when such persons actually commit an act in furtherance of a prohibited payment “while in the territory of the United States.”^{24.4} Moreover, the legislative history made clear that the foreign national or company must take some action while “physically present” within the territory of the United States.^{24.5}

The term “territory of the United States,” however, is given a broad interpretation to encompass all areas over which the United States asserts territorial jurisdiction.^{24.6} This includes not only the actual territorial boundaries of the fifty states, as well as territories, possessions, and commonwealths, but also includes airplanes flying under its flag, and

persons aboard aircraft en route to the United States.^{24.7} Under this broad interpretation, a telephone call made by a foreign national on a U.S. airline flying over Europe could arguably be deemed to be an act within the territory of the United States. Moreover, in an indication of potentially broad enforcement intentions, a Department of Justice official, at a conference on the FCPA, suggested that the Department might consider an act physically done outside the territory of the United States (for example, email sent by foreign national from abroad) that triggers/causes an act to be done within the territory of the United States to be sufficient to meet this jurisdictional requirement.^{24.8} Such an interpretation would effectively bring the jurisdictional requirement close to the “instrumentality of interstate commerce” test. This approach had been rejected by the Administration in its internal deliberations.

Under this new amendment, foreign corporations, particularly foreign subsidiaries of U.S. companies, and foreign national employees of foreign subsidiaries, may now, for the first time, be independently liable under the FCPA.^{24.9} This can occur even though the U.S. parent company had no knowledge of or involvement with such conduct. While the U.S. parent company may not be liable under the FCPA for the improper conduct engaged in by its foreign subsidiary, the press reports of the indictment of a U.S. company’s foreign subsidiary are unlikely to make such a fine distinction. Accordingly, this amendment constitutes a significant expansion of the FCPA.

Notwithstanding the above discussion, however, recent FCPA enforcement actions appear to constitute a significant, unwarranted expansion of subject matter jurisdiction over foreign subsidiaries of U.S. companies. In a Plea Agreement that arose from a voluntary disclosure, DPC (Tianjin) Co. Ltd., a wholly-owned Chinese subsidiary of Diagnostics Products Corporation (“Diagnostics”), pled guilty to one count of a violation of the

FCPA.^{24.10} DPC produces and sells diagnostic medical equipment. It made payments totaling approximately \$1.6 million from 1991 to 2002 to physicians and laboratory personnel employed by government-owned hospitals in the PRC to influence their decisions to purchase the company's products. Diagnostics had no knowledge of and did not authorize the improper conduct.

It is unclear from the pleadings whether the Chinese subsidiary committed any act in furtherance of the improper payments while in the territory of the United States, a prerequisite for criminal liability under the FCPA.^{24.11} Rather, the Plea Agreement charged the Chinese subsidiary with being an "agent" of Diagnostics.^{24.12} As an agent, the jurisdictional nexus required for liability is the use of an instrumentality of interstate commerce.^{24.13} The plea agreement indicates that the Chinese subsidiary caused a proposed budget to be sent from Los Angeles to China by phone, facsimile, and email, and sent an email message from China to Diagnostics in California, which attached a monthly report that included payments to laboratory personnel and doctors.

Similarly, in a plea agreement arising from a voluntary disclosure by Schnitzer Steel Industries, Inc., its South Korean subsidiary, SSI International Far East, Ltd. ("SSI Korea"),^{24.14} made improper payments to managers of government-owned customers in exchange for continued business. SSI Korea entered a guilty plea to violations of the antibribery and books and records provisions of the FCPA, and Schnitzer Steel entered into a deferred prosecution agreement.^{24.15}

Paralleling the situation in DPC, the information filed in SSI International Far East alleged that SSI Korea acted as Schnitzer Steel's "agent" in China. Furthermore, the DOJ alleged that SSI Korea "acted within the territorial jurisdiction of the United States" by transmitting

requests to the United States parent company for approval and to wire transfer funds to make illicit payments.

In effect, the Department of Justice appears to be asserting that actions outside the United States which “cause” actions to take place within the United States in furtherance of a prohibited payment constitute acts “within the territorial jurisdiction of the U.S.”^{24.16}

Most recently, in another Plea Agreement that arose from a voluntary disclosure, several British companies and their U.S. affiliate^{24.17} pled guilty to a violation of the FCPA and conspiracy to violate the FCPA, for improper payments to customs officials in Nigeria. The fines totaled \$26 million.^{24.18} The basis for the assertion of jurisdiction over Vetco Gray Controls Limited, a British company, appears to be based upon its use of co-defendants and other affiliated U.S. entities and their personnel to perform acts within the U.S. in furtherance of illicit payments. In effect, it “caused” acts to occur within the territory of the United States.

The 1998 amendments to the FCPA created a limited and narrow basis for asserting subject matter jurisdiction over a foreign subsidiary (that is, if it commits any act in furtherance of the bribe while in the territory of the United States). The legal support for the recent actions by the Department of Justice to stretch the jurisdictional reach of the FCPA, albeit in the context of plea agreements, is at best questionable.

§ 1:2 Jurisdiction

§ 1:2.1 Instrumentality of Interstate Commerce

An additional jurisdictional prerequisite to liability under the FCPA is the requirement that the U.S. company “make use of the mails or any means of instrumentality of interstate commerce in furtherance of” an illicit payment.²⁵ The term “interstate commerce” covers trade, commerce, transportation, or communication among the states or between any foreign

country and any state, or between any state and any place outside the United States. It also includes the intrastate use of a telephone or other interstate means of communication or any other interstate instrumentality.²⁶

The inclusion of the phrase “in furtherance of” as part of this jurisdictional standard was intended to make clear that for liability to attach, the use of interstate commerce need only be in furtherance of making a prohibited payment.²⁷ This clause significantly broadened the jurisdictional scope of the FCPA, making it easier to meet this requirement. Under this standard, the use of an interstate facility need only be “incident to an essential part of the scheme.”²⁸

For example, in *Schmuck v. United States*,²⁹ the defendant was charged with mail fraud for rolling back odometers of used cars and then selling the automobiles to unknowing retail dealers for inflated prices due to low-mileage readings. The dealers in turn resold the cars to their customers. To complete the resale transaction, the dealer mailed a title-application form to the State Department of Transportation. The Court was called upon to decide whether the mailing of the title-application form by the automobile dealers (who were not involved in the fraudulent scheme) was “in furtherance” of the fraudulent scheme. In affirming the conviction, the Court stated that “[i]t is sufficient for the mailing to be ‘incident to an essential part of the scheme,’ . . . or ‘a step in the plot.’”³⁰ The Court distinguished several cases in which the mailing occurred after the defendant’s scheme had already reached fruition³¹ and concluded that in those instances, the use of the mail was not “in furtherance” of the scheme to defraud.³² The Court also stated that innocent or routine use of an instrumentality of interstate commerce, as well as use of an instrumentality of commerce that may have been counterproductive to the scheme, was sufficient.³³

As a practical matter, the interstate commerce nexus will generally be an easy element to meet.^{33.1} A telephone call or trip to the United States by the agent or employee of the foreign subsidiary to discuss the matter would suffice. So too would the transnational use of computers, the repatriation of earnings, or the consolidation of the books and records.^{33.2}

§ 1:2.2 Nationality Jurisdiction

The 1998 Amendments expanded the jurisdictional basis for the prosecution of U.S. companies and U.S. citizens by adding an alternative basis for jurisdiction—the nationality principle.^{33.3} Under this alternative standard, the FCPA would apply the nationality principle of jurisdiction to illicit payments made by U.S. citizens and U.S. companies that take place wholly outside the United States, without any use of an “instrumentality of interstate commerce” in furtherance of the illicit conduct.

The alternative nationality principle of jurisdiction would apply to:

- (1) “issuers” organized under the laws of the United States, or a State, territory, possession or commonwealth of the United States or a political subdivision thereof,^{33.4}
- (2) Any officer, director, employee, agent or stockholder of such issuer that is a U.S. citizen or national,^{33.5} acting on behalf of such issuer,^{33.6}
- (3) Any corporation, partnership, association, joint stock company, business trust, unincorporated organization, or self proprietorship organized under the laws of the United States or any State, territory, possession or commonwealth of the United States, or any political subdivision,^{33.7}
- (4) Any individual who is a citizen or national^{33.8} of the United States.^{33.9}

A foreign national employee of a U.S. company who resides abroad would not be subject to the alternative jurisdictional standard. Rather, the regular jurisdictional requirement—use of

an instrumentality of interstate commerce—would apply. However, a foreign national employee of a U.S. company who makes an illicit payment outside the United States would subject the U.S. company to liability under the alternative nationality standard of jurisdiction, under principles of respondeat superior.

The application of the alternative nationality principle of jurisdiction effectively replaces/vitiates the “instrumentality of interstate commerce” standard for U.S. citizens and U.S. companies. However, as a practical matter, this change is unlikely to have a significant effect. The “instrumentality of interstate commerce” standard has been very broadly interpreted. It would be a rare factual situation, indeed, where a U.S. company or U.S. citizen engaged in the bribery of a foreign official without otherwise using an instrumentality of interstate commerce in furtherance of the illicit conduct.^{33.10}

§ 1:3 Corruptly

In order to be in violation of the FCPA, a payment must be made “corruptly.” The term “corruptly” connotes an evil motive or purpose, an attempt to wrongfully influence the recipient. In the legislative history, the “corruptly” requirement makes clear that in order to violate the FCPA, a payment must be intended to influence the recipient to “misuse his official position” in order to wrongfully direct or obtain business.³⁴ It encompasses a quid pro quo element: a nexus between the illicit payment and the expected conduct of the foreign official.

The FCPA thus applies to payments made for a corrupt purpose, but it does not require that the violative action be fully consummated, or succeed in producing the desired outcome.³⁵ A willful attempt to influence a foreign official through an offer or promise (or authorization of the offer or promise) of anything of value suffices. The prohibition

against “corrupt” payments also applies to payments made by third parties, where the corporation pays the third party knowing that the payment will be passed on in whole or in part to a foreign official for a proscribed purpose.³⁶ On the other hand, an employee who makes an illicit payment at the behest and direction of his supervisor may not be acting corruptly under the FCPA.³⁷ The payment of money to a foreign official in true extortion situations, such as to keep an oil rig from being dynamited, would also not constitute a corrupt payment.³⁸

Congress intended the “corruptly” standard under the FCPA to conform with the “corruptly” requirement under the domestic bribery law.³⁹ To establish the crime of bribery under the domestic bribery statute, the money or value must be knowingly offered or given to an official with the intent and expectation that, in exchange for the money, some act of the official would be influenced.⁴⁰ The money must be offered or given with more than some generalized hope or expectation of ultimate benefit on the part of the donor.⁴¹ This distinction between a payment in consideration for⁴² some conduct by the official and a payment with “some generalized expectation” of ultimate benefit (for example, goodwill) can be most clearly understood in the comparison between an unlawful bribe and lawful business entertainment. It is the quid pro quo aspect of the payment that distinguishes between the lawfulness or illegality of the expenditure.⁴³

The focus is upon the subjective intent of the briber—the defendant’s intention in making the payment, rather than the recipient’s intent in carrying out official acts. A party can be convicted of bribery despite the fact that the recipient had no intention of altering his official activities, or even lacked the power to do so.⁴⁴ It is neither material nor a defense to bribery that the official might lawfully and properly make the very recommendation

or take the very action that the briber wanted the official to make without the bribe.⁴⁵ Evidence of an awareness of the illegality of the transaction may also be sufficient to prove corrupt intent.⁴⁶

In the context of the FCPA, a payment to a foreign official with the intent to influence his decision, induce him to do or omit to do any act, or induce him to use his influence with a foreign government entity, in exchange for the payment, constitutes corrupt intent.^{46.1}

§ 1:4 Foreign Official

The FCPA proscribes only illicit payments made to a foreign official, foreign political party or official thereof, or a candidate for foreign political office.⁴⁷ It was not intended to, and does not, address bribes or kickbacks paid to employees of private, nongovernmental entities.⁴⁸ Nor does the FCPA proscribe payments (for example, discounts or donations) made directly to a government department or agency that are not for the personal use or benefit of a foreign official.⁴⁹

The term “foreign official” was originally defined by the FCPA as “any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality.”⁵⁰ The 1998 amendments to the FCPA, to conform the FCPA to the OECD Convention, added “public international organizations” to the definition of a foreign official.^{50.1}

Accordingly, the term “foreign official” encompasses (1) any officer or employee of any department, agency, or instrumentality of a foreign government; or of a public international organization; and (2) any person acting in an official capacity for or on behalf of a foreign government, department, agency, or instrumentality, or for or on behalf of a public

international organization.

The scope of these elements is described below.

§ 1:4.1 Officer or Employee

Neither the FCPA nor its legislative history contains any guidance on the scope of the terms “officer” or “employee.” There are no cases under the FCPA that further define these terms. Nor is it clear whether the scope of these terms should be determined with reference to foreign local law.⁵¹ The domestic bribery statute⁵² and the Federal Tort Claims Act (FTCA),⁵³ and the cases decided thereunder, offer the most instructive guidance in delineating the scope of these terms under the FCPA.

Based upon these statutes and cases, an “officer” of a foreign government would include individuals appointed by the head of state or by heads of executive departments and individuals who hold positions authorized by statute. An “employee” of a foreign government would include individuals whose day-to-day performance is supervised by the governmental authority.

Under the domestic bribery statute, the term “public official” is defined to mean inter alia “an officer or employee or person acting for or on behalf of the United States . . . in any official function.”⁵⁴ This language is similar to the FCPA definition of “foreign official.” In interpreting the meaning of “officer” under this statute, the court in *United States v. Bordonaro*⁵⁵ held that the term includes members of draft boards whose positions are authorized by federal statute and who are appointed by the President. In *Felder v. United States*,⁵⁶ the circuit court ruled that “officers” include “persons acting under appointments ‘embracing the idea of tenure, duration, emolument, and duties.’” Based on this definition, the court went on to hold that the Attorney General and the United States Attorney would be considered “officers” of the

United States.

United States v. Marcus⁵⁷ involved the alleged bribery of the District Enforcement Supervisor in the Office of Price Administration. This individual was appointed by the head of the Office of Price Administration, an emergency executive department. The circuit court, in affirming the status of this individual as an “officer,” held that an officer is one “appointed by the President by and with advice and consent of the Senate, or by the President alone, the courts of law or the head of some executive department of the government.”⁵⁸

The scope and meaning of the term “employee” of the United States often arises in cases under the FTCA.⁵⁹ In such cases, the court is frequently asked to discern whether an alleged tortfeasor is an employee of the United States, rather than an independent contractor. The U.S. Supreme Court addressed this question in United States v. Orleans⁶⁰ and Logue v. United States⁶¹ and indicated that the determination turns on whether the government has the authority to supervise the alleged tortfeasor’s day-to-day operations.

In Resendez v. United States,⁶² the Ninth Circuit elaborated on the control test established by the Supreme Court. The court noted that there are additional factors that “traditionally determine the existence of the common-law relationship of master and servant” that should also be examined to “determine whether the wrongdoer is an employee of the Government for whose torts the United States must respond.” They include:

the extent of control which the master may exercise over the details of the work; whether or not the one employed is engaged in a distinct occupation or business; the nature of the occupation, with reference to whether the work is usually done under the direction of the employer or by a specialist without supervision; the skill required in the particular occupation; whether the employer or the workman supplies the tools, equipment, and the place of work for the person doing the work; the length of time for which the person is employed; the method of payment, that is, whether by time or by the job; whether or not the parties believe they are creating the relation of master and servant, etc.⁶³

The control test has been applied in numerous other cases. For example, in *Kirchmann v. United States*,⁶⁴ which involved a suit alleging groundwater contamination caused during construction of a missile site, the Eighth Circuit held that employees of General Dynamics who had contracted with the Air Force to build the missile facility were not government employees for purposes of the FTCA. The basis for the court's decision was that the Air Force did not exercise day-to-day control over their physical performance in the disposal of hazardous waste at the missile site.⁶⁵

The Fourth Circuit came to a similar conclusion in *Berkman v. United States*.⁶⁶ The case involved the issue of whether a maintenance contractor at an airport, owned and operated by the Federal Aviation Administration (FAA), should be considered an "employee" of the United States. The court held that, even though, under the FAA's contract with the maintenance contractor, the FAA had the right to inspect the maintenance contractor's performance and to ensure that the services provided were in compliance with the terms of the contract, the maintenance contractor could not be considered an employee because there was no evidence that the FAA took control over the actual performance of the contractor's services at the airport on a day-to-day basis.⁶⁷

§ 1:4.2 Agency or Instrumentality of Foreign Government

The breadth and scope of the term "agency or instrumentality" of a government are not delineated in the FCPA or in its legislative history. There have been no court decisions pertaining to its meaning in the FCPA. Any guidance on the application of this phrase must be based upon the interpretation of other statutes and court cases.

The Foreign Sovereign Immunities Act of 1976,⁶⁸ which sets forth the principles for determining whether a foreign state is entitled to immunity from the jurisdiction of U.S.

courts, defines an “agency or instrumentality of a foreign state” as any entity that “is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof.”⁶⁹ Under this standard, if an entity is an organ of a foreign state (or political subdivision), or if a majority of the entity’s shares or other ownership interest is owned by a foreign state (or political subdivision), then the entity is considered an agency or instrumentality of the foreign state.

In *First National City Bank v. Banco Para El Comercio Exterior de Cuba*,⁷⁰ the Supreme Court considered whether Cuba’s exclusive agent in foreign trade, established as a separate juridical entity, was a government “instrumentality” under the Foreign Sovereign Immunities Act. The Cuban government had supplied all the capital, owned all the stock, and designated all members of the governing board. In holding that the agent was a government instrumentality, the Court stated that the typical government instrumentality is created by an enabling statute that specifies its powers and duties and is managed by a board selected by the government.⁷¹

It is therefore likely that an entity that is entirely owned by a foreign state would come within the definition of a government agency or instrumentality under the FCPA. The same is true when the entity is created by an enabling statute that specifies its powers and duties and is managed by a board selected by the foreign government. Similarly, when a company is established under the private commercial code of a foreign state, the company would likely be deemed a government agency or instrumentality, for purposes of the FCPA, if a majority of the ownership interest is owned by the foreign state.⁷² Thus, a state trading corporation,^{72.1} a mining enterprise, a transport organization such as a shipping line⁷³ or an airline,⁷⁴ or a steel company could come within the definition of an agency or instrumentality.⁷⁵

The reach of the term “agency or instrumentality ” of a foreign government, however, remains unclear. While it would appear unlikely that a foreign company established under the commercial code of its country, and in which the foreign government is only a minority shareholder, would be deemed an agency or instrumentality of the foreign government, an FCPA Opinion Procedure Release⁷⁶ and informal comments by a Justice Department official⁷⁷ suggest a more expansive view. According to this view, an employee who works for a quasi-governmental body or for a state-owned entity involved in a process of privatization that has not yet been completed would be considered a foreign official under the FCPA.^{77.1}

More recently, a Justice Department official⁷⁸ stated that one should look beyond the government’s voting rights or ownership of shares in a state-owned commercial enterprise, to such factors as whether the employee of the entity has a governmental role, or maintains the rights and privileges of a government position. He further commented that the FCPA looks at individuals capable of exerting influence.

The U.S. government’s response to the OECD ’s review of the FCPA provides further insight regarding the factors that the Department of Justice considers in determining which state-owned enterprises are “instrumentalities”: The foreign states own characterizations of the enterprise and its employees, that is, whether it prohibits or prosecutes bribery of the enterprise’s employees as public corruption, the purpose of the enterprise, and the degree of control exercised over the enterprise by the foreign government.^{78.1}

These comments suggest that a combination of state ownership of the enterprise, and the governmental responsibility, privilege or influence of the employee may be considered by the Justice Department in determining when an individual is a foreign official

under the FCPA. As a practical matter, however, these comments shed little light in resolving this issue. In actuality, the Justice Department does not have a position on this issue, although it has rejected the assertion that one should look to local law in determining whether a foreign individual is a foreign official under the FCPA.^{78.2}

Other domestic statutes and court cases have applied different standards in determining the scope of the term “agency or instrumentality.” The courts have applied a narrow standard under the FTCA, requiring that the Federal government exercise control over the detailed physical performance and day-to-day operations of the entity.^{78.3} A different, more liberal test has been applied to determine when an entity is a federal instrumentality for purposes of protection from state or local taxation: whether the entity performs an important governmental function.^{78.4} In one case involving a determination of whether a Trust Fund constituted a public instrumentality subject to Federal government procurement guidelines, the court looked to such factors as the purposes for which the Trust was established, the public or private character of the entity creating the Trust, the degree of governmental control exercised over its administration, and the method of funding.^{78.5}

A more conservative approach would apply the concept of “controlled-in-fact” to determine when a state-owned enterprise is governmental. This standard is contained in such extraterritorial regulations as the U.S. antiboycott laws.^{78.6} Under this standard, a state-owned commercial enterprise will be presumed to be governmental if:

- (i) the foreign government entity owns or controls, directly or indirectly, more than 50% of the voting rights;
- (ii) the foreign government owns or controls 25% or more of the voting securities, and no other entity or person owns or controls an equal or larger percentage;

(iii) a majority of members of the board are also members of the governing body of the government department;

(iv) the foreign government has the authority to appoint the majority of the members of the board; or

(v) the foreign government has the authority to appoint the Chief Operating Officer.

Although the Justice Department may assert an even more expansive view of the scope of an “agency or instrumentality,” it would be very difficult to sustain a conviction under the FCPA if foreign government ownership or control of the state-owned enterprise falls below the above standard.^{78.7}

Another area of uncertainty concerns the possible reach of the FCPA to a second-tier entity (that is, a subsidiary of the state-owned enterprise), and further tiers (subsidiary of the subsidiary). Arguably, a state-owned enterprise is governmental only with regard to the first tier—the entity that is owned directly by the foreign state. A second-tier entity—a company owned by the first-tier entity—should fall outside the scope of the term agency or instrumentality.^{78.8}

§ 1:4.3 Acting For or On Behalf Of

The FCPA and its legislative history provide no guidance on the meaning of the term “acting for or on behalf of.” It is therefore necessary once again to look to the domestic bribery statute and the FTCA, and cases thereunder, for some guidance on the meaning and scope of this term.

These statutes and cases suggest that the term “acting in an official capacity for or on behalf of,” under the FCPA, would likely include individuals whose activities are controlled by the foreign government or who occupy a position of public trust and have official

governmental responsibilities.

For example, in *Thompson v. Dilger*,⁷⁹ a federal court in Virginia held that “a person does not act on behalf of a federal agency in an official capacity where . . . there is no governmental authority to supervise the person’s daily activities.” At issue in *Thompson* was whether a weapons inventor who was working on developing an armor-piercing rifle “with unofficial government encouragement, but without a government contract or official funding” fell within the purview of the FTCA as a “person acting on behalf of a federal agency in an official capacity.” The court, applying the control test adopted in *Logue*⁸⁰ and *Orleans*,⁸¹ concluded that he did.

The level of control over the alleged tortfeasor’s activities was also determinative in *Guccione v. United States*.⁸² The question at issue in that case was whether a former con man turned FBI informant and operative could be considered an “employee” of the United States for purposes of the FTCA. The court of appeals held that although the informant was “not technically a federal ‘employee,’” he was acting on the government’s behalf as an undercover operative because he rendered his services while under the control and supervision of the FBI and its special agents.⁸³

The leading decision addressing the meaning of the term “acting for or on behalf” in the domestic bribery statute is *Dixson v. United States*.⁸⁴ In *Dixson*, the Supreme Court ruled that whether an individual acted for or on behalf of the United States does not depend upon the existence of a “direct contractual bond” with the government, but rather turns on whether the person occupies a position of public trust with official federal responsibilities.⁸⁵ The Court then went on to hold that the defendants, who were responsible for administering federal community development grants, were “public officials,” given their operational roles in

administering a social service program administered by Congress and the fact that they were charged with abiding by federal regulations.⁸⁶

In an earlier case, *United States v. Griffin*,⁸⁷ a federal court held that defendants, who were empowered to conduct a competitive bidding system in connection with the solicitation and awarding of bids for a federal program, were “acting for or on behalf of the United States.” The court was persuaded by testimony that the low bidder among those from which the defendants solicited bids, although not guaranteed to be awarded the contract, in fact was awarded the job 95% of the time. In the court’s view, the “defendants were placed in a position of responsibility and were enabled to exercise discretion to act for and on behalf of [the government]. . . .”⁸⁸

In *United States v. Gelb*,⁸⁹ the Second Circuit Court of Appeals, relying on *Dixson*, held that certain postal employees were “public officials” for purposes of the bribery statute because they held “positions of public trust” and were “acting for the United States in an official capacity.” The basis for the court’s holding was that the postal employees were charged with ensuring that bulk-paid mail of private mailers had proper documentation reflecting payment.⁹⁰

§ 1:4.4 Public International Organization

The OECD Convention included officials of a “public international organization” within the definition of a foreign public official.^{90.1} Accordingly, to conform the FCPA to the OECD Convention, the 1998 Amendments expanded the definition of a foreign official to include any official or employee of a public international organization, or any person acting on behalf of a public international organization.^{90.2}

The “public international organizations” covered by the FCPA are those organizations

designated by Executive Order pursuant to the International Organizations Immunities Act, 22 U.S.C. § 288 (1998), or any other international organization designated by the President by Executive Order.^{90.3} This includes such organizations as the Organization of American States, the European Space Agency, and the Hong Kong Economic and Trade Offices, and the World Bank.^{90.4}

§ 1:5 Foreign Political Party or Official Thereof or Any Candidate for Foreign Political Office

The Act proscribes illicit payments not only to foreign officials, but also to a foreign political party, an official of a foreign political party, or a candidate for foreign political office.⁹¹ The inclusion of this class of individuals in the FCPA is a recognition that such persons may be influential in the award of government business.

The FCPA recognizes that “corrupt” payments are not intended to include legitimate and lawful campaign contributions made in the course of legitimate lobbying and other normal representations to foreign government officials.⁹² Generally, political contributions are not tied to the support of any particular transaction and are therefore not intended as a quid pro quo. However, reliance on the absence of corrupt intent does not provide an adequate comfort level in defending oneself under the FCPA.

In some instances, campaign contributions may be lawful under the written laws of a foreign country.⁹³ Such a situation may constitute a rare instance in which the affirmative defense (for payments that are lawful under the written laws of a foreign country) may be applicable.⁹⁴ However, in many countries, such payments may not be impermissible, although not expressly permitted under the written laws of that country.⁹⁵ It is preferable for U.S. companies to avoid making any campaign contributions that are not expressly permitted under the written laws of the foreign country.

A more difficult practical issue arises where the foreign agent of the U.S. company makes political campaign contributions. It may be difficult, as a practical matter, to know whether such payments are provided for legitimate reasons or are improperly proffered as a quid pro quo. If the foreign country's laws do not require disclosure of such contributions, the possibility for abuse is further increased. If the "campaign contributions" of the foreign agent in fact constitute illicit payments (that is, are intended as a quid pro quo), the U.S. company could be subject to scrutiny by enforcement authorities to determine whether it authorized such payments to be made, or whether it intended to utilize the foreign agent as an intermediary for illicit political contributions.

To minimize this possibility, the U.S. company may want to prohibit the foreign agent from making any campaign contribution. If this is not practical, then the U.S. company should require disclosure of the contributions. In addition, the agency agreement should contain, in addition to other appropriate representations, the following additional representation:

- that any campaign contribution will, at all times, be in compliance with local law;
- that no campaign contributions shall be made in exchange for any specific benefits related to any transaction; and
- that the foreign sales agent will keep accurate books and records of all campaign contributions and such contributions shall be subject to audit by the U.S. company or its designee.

§ 1:6 Anything of Value

The FCPA prohibits payments and gifts or the giving of "anything of value" to influence the receiving foreign official.⁹⁶ The phrase "any- thing of value" is not defined in the FCPA or

in its legislative history. The term is, however, contained in many other U.S. criminal statutes, and it has been broadly construed to encompass both tangible and intangible benefits that an official subjectively believes to be of value.⁹⁷

In *United States v. Williams*,⁹⁸ the Court of Appeals for the Second Circuit considered the meaning of the phrase “anything of value” contained in the domestic bribery statute⁹⁹ and the unlawful gratuity statute.¹⁰⁰ In that case, a U.S. Senator received shares of stock in several corporations in return for his help in obtaining government contracts. Although the stock had no commercial value, the senator expected that the shares would have commercial value when he received them. The court affirmed the lower court’s jury instruction that construed the statute to focus on the value the defendant subjectively attached to the items received.¹⁰¹ The court further stated that “[t]he phrase ‘anything of value’ in bribery and related statutes has consistently been given a broad meaning . . . to carry out the congressional purpose of punishing misuse of public office.”¹⁰²

Similarly, in *United States v. Gorman*,¹⁰³ the Court of Appeals for the Sixth Circuit held that loans and promises of future employment to public officials constituted a “thing of value” under the unlawful gratuity statute.¹⁰⁴ The court stated that in order to put the underlying policy of the statute into effect, the term “thing of value” should be broadly construed. The focus therefore was placed on the value that the official subjectively attaches to the gift.¹⁰⁵

The phrase “thing of value” has been construed broadly to also include intangible items, such as information,¹⁰⁶ sex,¹⁰⁷ the testimony of a witness,¹⁰⁸ and assistance in arranging for the merger of two unions.¹⁰⁹

The Model Penal Code uses terms such as “benefit” and “pecuniary benefit” in its

bribery provisions.¹¹⁰ The term “benefit” is defined as “gain or advantage, or anything regarded by the beneficiary as gain or advantage, including benefit to any other person or entity in whose welfare he is interested. . . .”¹¹¹ According to the Model Penal Code commentary, the purpose of defining the term so broadly is “to reach every kind of offer to influence official or political action by extraneous incentives.”¹¹² Under this standard, the giving of a benefit, not to the beneficiary himself (that is, the official), but rather to a third person or entity whose well-being the beneficiary is interested in, would constitute a benefit. For example, an offer to admit the child of an official to college in exchange for favorable action by the official would constitute a “benefit” under this standard.¹¹³

It is unclear, however, whether the term “anything of value” under the FCPA extends to payments given to a third party in whose welfare the official is interested. While the U.S. domestic bribery statute¹¹⁴ explicitly forbids the payment of anything of value by which a public official himself will not benefit but that will be of advantage to “any other person or entity,”¹¹⁵ the FCPA does not contain a comparable provision.^{115.1}

The FCPA instead appears to focus on whether there is any intent or expectation that the official will personally benefit from the thing of value. In a Department of Justice Review Procedure,¹¹⁶ a U.S. company retained a Sudanese government corporation as its agent. Commissions were to be paid directly to the Sudanese corporation, and not to any individual, for deposit in an authorized financial institution in Sudan. The Department of Justice declined to take any enforcement action, commenting that “[t]here is no expectation that any individual Sudanese government official will personally benefit from the proposed agency relationship.”¹¹⁷

The Court of Appeals for the Eighth Circuit, however, in *United States v. Liebo*,¹¹⁸ suggested the possibility of a more expansive view. In that case, the defendant was convicted of

providing airplane tickets for the honeymoon of an official in the Niger Embassy in order to influence another official who was the relative and friend of the embassy official. The indictment made clear that the recipient (the Embassy employee) was himself a foreign official.¹¹⁹ Nevertheless, the court commented that the relationship between the two relatives/friends was such that a jury could infer that the gift provided to the Embassy official was intended to buy the influential official's help in getting the contract award.¹²⁰

Some Department of Justice Review Procedure Releases further indicate that U.S. enforcement authorities consider payments to other persons in whose well-being an official is interested (for example, relatives) constitute the giving of something of value to an official. In one case,¹²¹ the Department of Justice declined to take any enforcement action with respect to a fund for the American education and support of the adopted children of a foreign official who was elderly and semi-invalid and whose duties were only ceremonial and did not involve substantive decision-making responsibilities. This release implicitly suggests that something of value given to the children of an official may constitute value given to the official.¹²²

In *SEC v. Schering-Plough*,^{122.1} the SEC initiated an enforcement action against Schering-Plough for the violation of the books and records and internal control provisions of the FCPA arising from the conduct of its subsidiary. The Polish office of the subsidiary made a series of donations to a charitable organization in Poland that restores castles and other historical sites in the Silesian region of Poland. The founder and president of the foundation was also the Director of the Silesian Health Fund, a government body that provides money to purchase pharmaceutical products and influences purchases by hospitals. The SEC took the position that, while the payments were made to a bona fide charity, they were in fact bribes

intended to influence the director to purchase the company's products. In effect, the payments to the foundation constituted "value" to the official.

§ 1:7 Payments to Third Parties

Foreign sales agents were responsible for many of the questionable foreign payments disclosed during the 1970s.¹²³ As a result, the FCPA included a provision delineating the circumstances under which a U.S. company or its officers and employees would be held accountable for illicit payments made indirectly through intermediary third parties.¹²⁴

The U.S. domestic bribery statute¹²⁵ does not contain a special standard for illicit payments made through intermediary third parties. Rather, criminal liability generally depends upon a person's involvement as an accomplice, such as aiding and abetting.¹²⁶ In contrast, the FCPA may hold a U.S. company directly responsible for the conduct of a third party, if the U.S. company "knew" that the money or thing of value given to the third party would be used, directly or indirectly, to make an illicit payment. Interestingly, however, the foreign intermediary engaging in the illicit conduct may be outside the scope of, and therefore not subject to, liability under the FCPA.¹²⁷

Specifically, the FCPA proscribes payments made to "any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office. . . ."¹²⁸ While "any person" would include the agent (that is, foreign sales representative) of a U.S. company, the third-party payment provision applies to any entity or individual, in the United States or abroad. Thus, a marketing consultant, distributor, joint venture partner, foreign subsidiary, contractor, or subcontractor would be included within the scope of this provision.

The third-party payment provision continues to create great uncertainty and confusion regarding potential liability under the FCPA.¹²⁹ A frequent concern is the extent to which a U.S. company may be liable under the FCPA for the improper conduct of its sales agent or consultant, or other third party. Frequently, a U.S. company not directly involved in an illicit payment discovers that a third party with which it has a commercial relationship—be it a sales representative, distributor, contractor/subcontractor, or joint venture partner—has made an illicit payment with regard to a contract award involving the sale of the U.S. company’s goods or services. Moreover, it is infrequent that the U.S. company would know for certain that the third party in fact made a prohibited payment. More frequently, suspicions or concerns are raised when allegations or inconclusive information comes to its attention.¹³⁰ The allegations of wrongdoing are generally vehemently denied by the third party. The third party may also have important contacts and ties with government officials, thereby making it difficult and commercially damaging to disengage from the relationship. It is in this kind of commercial setting that the potential liability of a U.S. company for actions of a third party is most murky, making the actions required of the U.S. company unclear.¹³¹

In addition to the third-party payment provision discussed above, the FCPA also prohibits a U.S. company from “authorizing” a prohibited payment.¹³² Thus, for example, if a U.S. company [knows of and]¹³³ authorizes its controlled foreign subsidiary or foreign agent to make a bribe, liability would attach to the U.S. company.¹³⁴ The FCPA also would apply in cases where a U.S. company “authorizes” its controlled foreign subsidiary to make an illicit payment indirectly through an intermediary, such as an agent of the foreign subsidiary.^{134.1}

In sum, under the FCPA, a U.S. company may be subject to potential liability with regard

to improper payments made by a third party, when:

(1) the U.S. company pays anything of value to a third party (for example, agent, distributor, consultant) knowing that all or a portion of such value is or will be offered, given or promised, directly or indirectly, to a foreign official in connection with the sale of the U.S. company's product or service; or

(2) the U.S. company authorizes¹³⁵ any improper payment made or to be made by a third party (for example, foreign subsidiary) in connection with the sale of the U.S. company's equipment or services.

§ 1:8 Knowledge Standard

§ 1:8.1 Repeal of “Reason to Know” Standard

Prior to the 1988 Amendments, a U.S. company could be liable for a payment made to an intermediary party, while knowing or having reason to know that the payment would be given to a foreign official.¹³⁶ The 1988 Amendments deleted the “reason to know” standard relating to payments to third parties. The “reason to know” standard created significant uncertainties for U.S. companies regarding their potential liability under the FCPA with respect to operations abroad. This standard appeared to encompass the situation where a U.S. company negligently disregarded the risk that a sales agent may use payments made to it by the U.S. company to bribe a foreign official.¹³⁷

In clarifying the bribery standard through the deletion of “reason to know,” Congress in effect eliminated only the possibility that simple negligence could be a basis for criminal liability. At the same time, Congress made it clear that the knowledge standard extended beyond actual knowledge, to cover a conscious disregard, willful blindness, or deliberate ignorance of circumstances that should alert one to the likelihood of an FCPA violation.¹³⁸

In practical terms, the distinction may not be very significant.

§ 1:8.2 Current Definition of Knowledge

The FCPA, as amended, makes it very clear that the knowledge standard does not require proof of actual knowledge.

Under the FCPA:

(2) (A) A person's state of mind is "knowing" with respect to conduct, a circumstance, or a result if –

- (i) such person is aware that such person is engaging in such conduct, that such circumstance exists, or that such result is substantially certain to occur; or
- (ii) such person has a firm belief that such circumstance exists or that such result is substantially certain to occur.

(B) When knowledge of the existence of a particular circumstance is required for an offense, such knowledge is established if a person is aware of a high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist.¹³⁹

The legislative history explains that this standard is intended to encompass concepts of "conscious disregard" or "deliberate ignorance" of circumstances:

The Conferees intend that the requisite "state of mind" for this category of offense include a "conscious purpose to avoid learning the truth." Thus, the "knowing" standard adopted covers both prohibited actions that are taken with "actual knowledge" of intended results, as well as other actions that, while falling short of what the law terms "positive knowledge," nevertheless evidence a conscious disregard or deliberate ignorance of known circumstances that should reasonably alert one to the high probability of violations of the Act.

. . . [T]he Conferees also agreed that the so-called "head-in-the-sand" problem—variously described in the pertinent authorities as "conscious disregard," "willful blindness" or "deliberate ignorance"—should be covered so that management officials could not take refuge from the Act's prohibitions

by their unwarranted obliviousness to any action (or inaction), language or other “signaling device” that should reasonably alert them of the “high probability” of an FCPA violation.

. . . As such, it covers any instance where “any reasonable person would have realized” the existence of the circumstances or result and the defendant has “consciously chose[n] not to ask about what he had ‘reason to believe’ he would discover.”¹⁴⁰

The FCPA thus imputes knowledge where factual information possessed by a U.S. company indicates a “high probability ” that conduct prohibited by the statute may result.¹⁴¹ Moreover, if a company consciously disregards or deliberately ignores circumstances that should reasonably have alerted it to a high probability of a violation, the standard will be satisfied.^{141.1} This standard appears to apply both to past conduct (that is, a high probability that a bribe has already been made) and to future conduct (that is, a high probability of a future illicit payment).

Congress intended that the “knowing” standard contained in the FCPA be consistent with the knowledge standard for criminal liability as developed by existing case law. There is ample precedent for imputing criminal liability under the knowledge standard to those who act in conscious disregard or deliberate ignorance of the incriminating facts.¹⁴²

In *United States v. Jewell*,¹⁴³ the Ninth Circuit Court of Appeals held that the term “knowingly ” as used in criminal statutes is not limited to positive knowledge, but includes the state of mind of one who does not possess positive knowledge only because he consciously avoided it.¹⁴⁴

[T]he rule is that if a party has his suspicion aroused but then deliberately omits to make further enquiries, because he wishes to remain in ignorance, he is deemed to have knowledge. . . . The rule that willful blindness is equivalent to knowledge is essential, and is found throughout the criminal law.¹⁴⁵

In *United States v. Jacobs*,¹⁴⁶ the defendant, charged with dealing in stolen U.S. Treasury

Bills, responded that he did not know the bills were stolen. The court of appeals affirmed the lower court's charge to the jury with respect to guilty knowledge:

[K]nowledge is established if the defendant was aware of a high probability that the bills were stolen, unless the defendant actually believed that the bills were not stolen.

Knowledge that the goods have been stolen may be inferred from circumstances that would convince a man of ordinary intelligence that this is the fact. The element of knowledge may be satisfied by proof that a defendant deliberately closed his eyes to what otherwise could have been obvious to him.

Thus, if you find that a defendant acted with reckless disregard of whether the bills were stolen and with a conscious purpose to avoid learning the truth the requirement of knowledge would be satisfied, unless the defendant actually believed they were not stolen.¹⁴⁷

Similarly, in *United States v. Manriquez Arbizu*,¹⁴⁸ the Tenth Circuit Court of Appeals upheld a conviction for possession of marijuana despite the defendant's claim that he lacked the requisite knowledge. The court approved the following jury instruction as an appropriate interpretation of "knowing":

The element of knowledge may be satisfied by inferences drawn from proof that a defendant deliberately closed his eyes to what would otherwise have been obvious to him.

A finding beyond a reasonable doubt of a conscious purpose to avoid enlightenment would permit an inference of knowledge.¹⁴⁹

The requirement of only an awareness of a high probability of prohibited conduct, combined with the imputation of knowledge to one who consciously disregards or deliberately ignores information, creates a standard of knowledge considerably looser than actual knowledge. In effect, one can be deemed to have knowledge that a payment to a third party will result in an illicit payment if one consciously disregarded or deliberately ignored information that indicated a high probability that the third party would make an illicit payment. Such a standard is akin to a "recklessness" standard.¹⁵⁰ Indeed, one

Department of Justice official stated that the Department applies a standard of “reckless disregard” or “willful blindness” to the knowledge requirement.¹⁵¹ The SEC recently took a similar position in *SEC v. El Paso Corporation*,^{151.1} claiming that the company was “reckless in not knowing” of illicit payments.

It would appear, therefore, that there is little practical difference between the current “knowledge” standard and the prior “reason to know” standard. The 1988 Amendments in effect only eliminated the negligence standard as a basis for liability.¹⁵²

Accordingly, the necessity under the “reason to know” standard to inquire about and to follow up on information that comes to the attention of a U.S. company and that indicates possible wrongdoing remains unchanged.¹⁵³

When suspicious information (that is, red flags)¹⁵⁴ comes to the attention of a U.S. company regarding the activities of its foreign sales agent/distributor or other third party, the knowledge standard under the FCPA requires that it undertake a due diligence inquiry into the suspicious activity. Otherwise, it could be deemed to have consciously disregarded or deliberately ignored information that would have alerted it to the likelihood of a violation. The failure to inquire, if significant, could result in the imputation to the U.S. company of knowledge regarding the illicit conduct.

§ 1:9 Standard of Authorization

The FCPA not only prohibits the payment, offer, or promise of payment to a foreign official, but also proscribes the “authorization” of an illicit payment to be made by another.¹⁵⁵ Thus, if a U.S. company “authorizes” its sales representative, consultant, or controlled foreign subsidiary to make an illicit payment, the U.S. company will be in violation of the FCPA.¹⁵⁶

The standard for authorization is not defined in the FCPA. However, legislative history makes it clear that authorization can be either explicit or implicit.¹⁵⁷ To “authorize” conduct, in the context of the FCPA, appears to mean to manifest assent or direction, either explicitly or implicitly, to carry out the conduct.

An early Senate bill for the 1988 Amendments¹⁵⁸ contained a provision making it unlawful for a U.S. company to “direct or authorize, expressly or by a course of conduct” a third party to bribe a foreign official.¹⁵⁹ This provision was intended to replace the “reason to know” standard for payments to third parties. The Senate Committee Report indicated that the term “course of conduct” used in conjunction with the term “authorize” referred to situations in which “a company, through its words or course of conduct, has intended that a corrupt payment be made.”¹⁶⁰ The Committee Report suggested that a company’s refusal or failure to respond to an agent’s suggestion or request to make a bribe, or a company’s continuing employment of an agent known to have made corrupt payments in the previous two years, would violate the Act.¹⁶¹

The provision for authorization by course of conduct was not retained in the final bill as it emerged from the Conference Committee. Nevertheless, the Conference Committee Report does suggest that such a standard is part of the “head-in-the-sand” analysis in determining whether a person had the requisite knowledge.¹⁶²

Despite the congressional decision to strike “authorization by course of conduct” from the third-party payment provision, it is nevertheless the case that implicit authorization can be manifested through one’s course of conduct. A person authorizes an illicit payment by a course of conduct, if his actions convey his intent that an illicit payment be made.¹⁶³

It is not always easy to ascertain what constitutes implicit authorization in the complicated commercial setting of international transactions. In interpreting whether or not authorization was granted, courts generally consider all of the surrounding circumstances, such as the relationship of the parties, the business in which they are engaged, the subject matter of the authorization, and the legality or illegality of the issue.

In view of the circumstantial nature of implicit authorization, it is particularly important, when a U.S. company becomes aware of possible illicit payments made by its agent or other third party, to establish a clear record that the U.S. company did not and does not authorize such conduct. Since people ordinarily express some dissent or objection to acts done on their behalf that they did not authorize and do not approve, it is important to repudiate and, where appropriate, disassociate from such conduct.

Whether mere passive acquiescence, by itself, could constitute authorization depends upon the nature of the relationship between the U.S. company and its agent or the third party and upon the surrounding circumstances.¹⁶⁴ Acquiescence, combined with some further manifestation of assent, would likely constitute authorization. Indeed, conscious acquiescence in a series of unauthorized acts may be interpreted as a manifestation of authorization to engage in similar acts in the future.¹⁶⁵ Moreover, while mere acquiescence to an illicit activity may not be sufficient to evidence an intent and agreement to engage in the illicit conduct,¹⁶⁶ this acquiescence when combined with other overt acts could provide the basis for allegations of conspiracy to violate the FCPA.¹⁶⁷

In *Pattis v. United States*,¹⁶⁸ for example, the defendant sold materials and appliances to parties knowing that the materials would be used to make illegal liquor. The Ninth Circuit Court of Appeals held that, by making it possible for the parties to carry out the

unlawful objective of the conspiracy, the defendant became a co-conspirator.¹⁶⁹ In *Deacon v. United States*,¹⁷⁰ the defendant, even after he learned that the facilities he had provided were being used in a conspiracy to sell and transfer lottery tickets in interstate commerce, continued to permit the use of the facilities. The First Circuit Court of Appeals, in affirming the conviction, rejected the defendant's argument that it was illogical to hold that he became a conspirator by reason of his failure to withdraw from a conspiracy in which he was never a participant.¹⁷¹ The court found that the defendant's failure to disavow his connection with the conspirators within a reasonable time after becoming aware of the conspiracy and his permitting the conspirators to continue to use the facilities warranted the inference that he elected to associate himself with the criminal enterprise. The court expressed the view that the defendant was under a "duty," after learning the facts, to take some definite, decisive, and positive step to withdraw from the venture.¹⁷²

In light of the foregoing, it is important that a U.S. company not remain passive when confronted with possible illicit conduct. Rather, it should unequivocally express its disapproval and repudiation of such conduct. The nature of the relationship between the company and its agent or the third party and the surrounding circumstances will dictate the manner in which the disapproval should be voiced. The jury instruction provided by the court in *Deacon* provides a useful frame-work to consider:

[I]f the jury find[s] that [the defendant] went into this enterprise believing that it was a legal one, . . . and did not know any [illegal] enterprise was to be engaged in . . . until he was informed . . . that [an illegal enterprise] was going on, you should find the defendant not guilty as charged, if you find that at the time that he first became acquainted with or had knowledge that the illegal acts were being done that he repudiated them instantly.

. . . [W]hen one seeks to disassociate himself from an illegal enterprise, his disassociation must be full, decisive and complete. . . .¹⁷³

§ 1:10 Influencing or Inducing an Act or Decision of a Foreign Official

The scope of the FCPA is limited to a prohibition of an offer, promise, authorization or payment for purposes of:

- influencing any act or decision of a foreign official in his official capacity, or
- inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official,¹⁷⁴ or
- inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality.¹⁷⁵

Thus, the Act applies to payments designed to influence an act or decision of a foreign official (including a decision not to act) or to induce such an official to use his influence to affect a governmental act or decision.¹⁷⁶ Payments to influence the enactment or promulgation of legislation or of regulations¹⁷⁷ or to induce an official to misuse his official position¹⁷⁸ also come within the scope of this prohibition.

The 1988 Amendments added to the scope of prohibited payments the purpose of “influencing any act or decision of such foreign official in his official capacity, or inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official. . . .”¹⁷⁹ This language was intended to make the FCPA conform to the standard found in the domestic bribery statute.¹⁸⁰ Accordingly, even if a particular official is not an important decision maker, the FCPA would apply to payments made to induce the official to use his influence with other decision makers.

Finally, the 1998 Amendments added an additional improper purpose to the FCPA—“securing any improper advantage.”^{180.1} This phrase was added to conform the FCPA

to the OECD Convention. But, whereas the OECD Convention included this phrase to expand the scope of the business purpose test—to obtain or retain business “or other improper advantage” in the conduct of international business—the 1998 Amendments inserted this phrase in the quid pro quo section.

The rationale for this approach to the amendment cannot be found in the legislative history of the 1998 Amendments. Rather, one needs to look to the negotiations in the OECD Convention, and the draft of the Administration proposal to discern some rationale. The U.S. negotiators to the OECD Convention sought to add the phrase “or other improper advantage” to the phrase “obtain or retain business,” due to concern that the other OECD member countries might interpret “obtain or retain business” too narrowly, to apply to only the award of a contract. The U.S. government wanted to ensure that the OECD Convention clearly prohibited illicit payments made to carry out any existing business activity. Accordingly, the OECD Convention prohibits illicit payments to obtain or retain business “or other improper advantage”^{180.2} in the conduct of international business.

However, since the FCPA had been enforced by the Department of Justice in a manner that included the carrying out of existing business, the Department of Justice was concerned that adding this phrase to the term “obtain or retain business” might somehow suggest that the authority to prosecute illicit payments made to carry out an existing business activity had not previously existed. Accordingly, in one of the more unusual legislative drafting efforts, the Administration inserted the phrase “or other improper advantage” in the purpose section of the FCPA, under the assumption that this would not have any practical effect on the FCPA.^{180.3}

It appeared at first that the courts did not agree with this assumption. In *United States v.*

Kay,^{180.4} the Federal District Court dismissed an indictment alleging violations of the FCPA by officers of American Rice, Inc. for bribes paid to Haitian officials to reduce Customs' duties and sales taxes owed by the company. The court held that the scope of the FCPA was limited to payments made to "obtain or retain" business, and that the conduct at issue did not fall within this scope. In support of its interpretation, the court explicitly noted that Congress declined to amend the "obtain or retain business" language in the 1998 amendments to the FCPA.^{180.5} However, this case was subsequently reversed on appeal.^{180.6}

§ 1:11 Obtaining or Retaining Business or Directing Business to Any Person

The FCPA applies only to payments intended to influence an official's acts or decisions "in order to assist . . . in obtaining or retaining business for or with, or directing business to, any person."¹⁸¹

This so-called "business purpose" test is meant to limit the scope of the prohibition by requiring that the illicit payment be made with the purpose of directing business to any person, maintaining an established business relationship, or diverting a business opportunity from any person.¹⁸² It also ostensibly includes corrupt payments related to the "carrying out of existing business":¹⁸³

The Conferees wish to make clear that the reference to corrupt payments for "retaining business" . . . is not limited to the renewal of contracts or other business, but also includes a prohibition against corrupt payments related to the execution or performance of contracts or the carrying out of existing business, such as a payment to a foreign official for the purpose of obtaining more favorable tax treatment.¹⁸⁴

The 1988 Conference Report refers to the United Brands case as an example of prohibited conduct.¹⁸⁵ That case involved bribes paid by United Brands to the President of Honduras in order to obtain a lower export tax on bananas and an extension of favorable

commercial terms on its Honduran properties.¹⁸⁶ The Conference Report distinguishes these activities from lobbying or conducting other normal representations with government officials.¹⁸⁷

Under this standard, payments made to an official with the purpose of inducing the official to take an action that assists the U.S. company in carrying out its existing business would violate the FCPA, even though the payments were not related to the underlying transaction.¹⁸⁸ For instance, payments to officials to reduce or eliminate customs duties, to change the classification of a product, or to circumvent a quota or licensing system would violate the FCPA.

This more expansive understanding of “retaining business” was recently upheld in *United States v. Kay*.¹⁸⁹ The Fifth Circuit reversed the dismissal of an indictment alleging that officers of American Rice, Inc. violated the FCPA by paying bribes to Haitian officials to reduce the customs duties and sales taxes owed by the company. The court held that Congress “intended for the FCPA to apply broadly to payments intended to assist the payor, either directly or indirectly, in obtaining or retaining business,” and that the payment of bribes to foreign tax officials fell within this coverage.¹⁹⁰ The court ruled that the government must show that the bribery was intended to produce an effect (that is, tax savings) that would “assist” in obtaining a retaining business.

In rendering its decision, the court found significant the fact that the Senate’s legislative proposal, from which the final statutory language for the FCPA was drawn, prohibited the use of “payments that assist in obtaining or retaining ‘business,’ not just ‘government contracts.’”¹⁹¹ The court noted that Congress had the option of choosing the narrower language, which appeared in an SEC Report, but had elected not to do so. Also, the fact that the 1988 Amendments identified only limited exceptions to the FCPA’s coverage

suggested that Congress otherwise intended the Act to have broad application.¹⁹² The court also deferred to the 1988 House Conference Report,¹⁹³ finding that its language “reflect[ed] the concerns that initially motivated Congress to enact the FCPA.”¹⁹⁴ Finally, the court found that the 1998 insertion of “other improper advantage” into the purpose section of the Act, rather than after the “obtaining or retaining business” language, confirmed Congress’s notion that the business nexus requirement was already meant to apply broadly, and that the addition of further language would be redundant.¹⁹⁵ The Kay court’s refusal to narrow the scope of the FCPA is one of the most significant interpretations of the Act to date.¹⁹⁶

§ 1:12 Conclusion

In conclusion, the elements of the foreign payments section of the FCPA contain some limiting aspects: in its application primarily to U.S. companies, the requirement that the payment be intended as a quid pro quo, and the business purpose test. At the same time, some of the other elements of the FCPA provide a broad sweep of potential exposure: the nationality basis of jurisdiction for U.S. companies and U.S. persons, the scope of the term “anything of value,” a standard of knowledge and authorization that encompasses a standard akin to recklessness and includes implicit authorization, and the prohibition against illicit payments made through foreign intermediary third parties.

In an effort to address some of the practical commercial realities faced by U.S. companies doing business abroad, the Act contains an exception for facilitating payments; and it permits, as an affirmative defense, payments such as travel and lodging expenses for foreign officials, and payments that are lawful in a foreign country.

Section 2: Fines, Penalties and Other Sanctions

§ 2:1 Violation of FCPA

§ 2:1.1 The Accounting Provisions

The civil remedies and penalties for a violation of the accounting provisions by issuers are those available to the SEC under the general enforcement authority for a violation of the federal securities laws.¹⁹⁷ This includes authority to seek injunctive relief, cease and desist orders, and the imposition of civil fines.¹⁹⁸ The SEC also has the authority to institute administrative proceedings and to fashion remedies in administrative proceedings, including the authority to issue cease and desist orders, to impose civil penalties, and to order an accounting or disgorgement.¹⁹⁹

While all of these remedies apply to the accounting provisions, as a practical matter, an enforcement action that involves the accounting provisions will generally accompany allegations of other substantive securities violations. It is therefore impractical to assess the possible remedy for a violation of the accounting provisions in isolation from the overall conduct involved. The SEC has, in recent settlements of enforcement actions, required the disgorgement of profits plus the payment of prejudgment interest.^{199.1}

A violation of the accounting provisions may be subject to criminal sanctions under the general criminal penalty provision of the Exchange Act.²⁰⁰ Under this provision, a violation would be subject to a maximum fine of \$5 million and/or imprisonment of not more than twenty years²⁰¹ for individuals, and a maximum fine of \$25 million for organizations.

The Exchange Act's general criminal penalty provision²⁰² states in relevant part:

Any person who willfully violates any provision of this chapter . . . , or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this chapter, or any person who willfully and knowingly makes, or causes to be made,

any statement in any application, report, or document required to be filed under this chapter or any rule or regulation thereunder or any undertaking contained in a registration statement . . . , which statement was false or misleading with respect to any material fact, shall upon conviction be fined not more than \$5,000,000, or imprisoned not more than 20 years, or both, . . . ; but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation.²⁰³

Notwithstanding section 78ff(a), the 1988 Amendments provided for criminal liability for a violation of the accounting provisions where a person “knowingly circumvent[s] or knowingly fail[s] to implement a system of internal accounting controls or knowingly falsif[ies] any book, record, or account. . . .”²⁰⁴

The legislative history to the 1988 Amendments regarding the addition of the “knowingly” requirement specifies that “[i]t is not intended that the use of the term ‘knowingly’ . . . affect the general requirement that criminal violations of the 1934 Act be ‘willful.’”²⁰⁵ While this statement is less than clear, it indicates that Congress intended the standard for a criminal violation of section 13(b)(2) to therefore encompass both “willful” and “knowing” conduct.²⁰⁶

Whether the addition of the “knowingly ” requirement makes any significant substantive change is less than clear. The addition of “knowingly ” to the second clause of section 78ff(a) suggests some distinction between the meaning of the terms “willful” and “knowing,” at least in the context of the Exchange Act’s general penalty provision.²⁰⁷ A commentator, writing at the time of the Exchange Act’s enactment, suggested that the addition of “knowingly ” in the second clause of section 78ff(a) requires a finding that the alleged violator had knowledge of the precise illegality of the act in question, as opposed to a mere general awareness that he was doing a wrongful act (which would be required for

“willful” conduct).²⁰⁸ Under this definition, “knowingly” would require a finding that the defendant had actual knowledge of the false or misleading character of the statement made by him.²⁰⁹

Nevertheless, “willfully” has been interpreted to include some element of knowledge. For example, in *United States v. Peltz*,²¹⁰ the court held that the mental state that must be proved to establish a “willful” violation is:

a realization on the defendant’s part that he was doing a wrongful act . . . that the act be wrongful under the securities laws and that the knowingly wrongful act involve[d] a significant risk of effecting the violation that has occurred.²¹¹

Therefore, while it can be argued that “knowingly” requires a greater level of awareness on the part of the defendant of the wrongfulness or illegality of his conduct, the case law is far from clear on this issue.²¹²

§ 2:1.2 The Bribery Provisions

The bribery section of the FCPA is a criminal statute.²¹³ The bribery section provides maximum penalties and sanctions per each violation of the Act by individuals and corporations or other legal entities. Violation by a U.S. entity carries a maximum fine of \$2 million per violation.²¹⁴ However, where the offense results in pecuniary gain or loss, the provisions of 18 U.S.C. § 3571(d) provide an alternative statutory maximum fine: the greater of twice the gross gain or twice the gross loss. Violations by individuals carry a maximum fine of \$250,000 or up to twice the amount of the gross gain or loss that any person derived from the offense,²¹⁵ or imprisonment of not more than five years, or both.²¹⁶

Within the limitations of the statutory maximum,²¹⁷ the determination of the amount of the fine is now governed by the Federal Sentencing Guidelines.²¹⁸ These Guidelines took effect with regard to individuals on November 1, 1987, and apply to all offenses

committed by individuals on or after that date.²¹⁹ On November 1, 1991, the United States Organizational Sentencing Guidelines became effective,²²⁰ and apply to offenses committed by corporations and other organizations²²¹ on or after that date.

One effect of the application of the Guidelines is generally to raise the fines and sentences imposed for white collar crimes, including violations of the FCPA. The manner of ascertaining the penalty is also more closely aligned to the amount of the money involved in the bribe or the gain resulting from the bribe. The Sentencing Guidelines require the individual or the corporation to make restitution or take other action to remedy the harm that has occurred and to prevent future injury from the violators. In addition to restitution, the Sentencing Guidelines require that a mandatory fine be imposed upon a corporation²²² and individual.²²³

For individuals, the sanctions are determined by a variety of factors including the base offense level,²²⁴ the characteristics of the offense, including the value of the bribe or the benefit to be conferred; the individual's role in the activity; and the defendant's criminal history.²²⁵ For corporations, the sentencing factors include the base offense level; the greater of the value of the unlawful payment, the benefit to be received, or the consequential damages resulting therefrom;²²⁶ prior misconduct;²²⁷ the existence of an effective compliance program to prevent violations;²²⁸ the voluntary disclosure of the offense by the organization; the extent of cooperation in an investigation; and the acceptance of responsibility for the conduct.²²⁹

In addition to criminal penalties, the Act also authorizes civil fines. For violations by an issuer, the SEC may bring a civil action to impose a civil penalty against a corporation, or any officers, directors, employees, agents or stockholders acting on behalf of the issuer in an amount

up to \$10,000.²³⁰ The SEC can also bring a civil action to enjoin any act or practice of an issuer (or an officer, director, employee, agent, or stockholder acting on its behalf) that is or may be violative of the FCPA.²³¹ For violations by other domestic corporations, or any officer, director, employee, agent or stockholder acting on its behalf, the Department of Justice is authorized to institute a civil action for fines up to \$10,000.²³² In addition, the Department of Justice has civil injunctive and subpoena power with respect to domestic concerns.²³³

Fines imposed upon individuals, for either criminal or civil penalties, may not be paid by the corporation.²³⁴

Recent FCPA enforcement actions have seen the imposition of substantial criminal and civil penalties.^{234.1} At the same time, the Department of Justice has entered into Deferred Prosecution and Non-Prosecution Agreements with corporate defendants in several enforcement actions.^{234.2}

§ 2:2 Ineligibility for Government Programs

In addition to the possibility of criminal and civil sanctions and fines, a violation of the bribery provisions of the FCPA by a U.S. company can have serious ramifications with regard to its eligibility for certain U.S. government programs. The adverse impact on eligibility can have a far greater commercial and financial effect upon a company than the fines and penalties assessed for a violation of the FCPA. An indictment alone can lead to the suspension of export licensing privileges for defense articles or services, or the suspension of the right to participate in U.S. government procurement activity.

We summarize some of these collateral areas below.

§ 2:2.1 U.S. Government Procurement

The Federal Acquisition Regulations (FAR),²³⁵ which comprise the regulatory

framework for U.S. government procurement, provides for the suspension or debarment of a contractor or subcontractor from continuing to do business with the U.S. government if it engages in certain improper conduct. One of the grounds for suspension or debarment is the commission of bribery.²³⁶

A party can be suspended upon adequate evidence of the commission of a bribe. An indictment under the FCPA has provided the basis for such a suspension.²³⁷ Suspension is intended as a temporary exclusion from government contracting pending completion of an investigation or legal proceeding.²³⁸ A party can be debarred upon the criminal conviction of or civil judgment for the commission of bribery.

A decision to suspend or debar a company is discretionary and essentially concerns an assessment of the contractor's character and integrity. Remedial measures taken by the company and other mitigating factors will also be taken into account in making such a determination.²³⁹

It is also theoretically possible that a foreign company that engages in bribery abroad, even though it may not be subject to the FCPA, may be subject to suspension or debarment under the FAR. Since the decision to suspend a party is essentially a statement of the contractor's character/integrity, illicit payments made by a foreign company to foreign officials abroad could provide a basis for a suspension decision against the foreign company. This could be the case whether or not the bribe would be a crime under U.S. law, or even if the foreign bribe was not discovered or prosecuted by foreign authorities. A foreign bribery conviction could also provide the basis for debarment if it provided a basis to conclude that the foreign contractor lacked integrity.

The author is unaware, however, of any suspension of a foreign company for

bribery abroad. As a practical matter, such action is unlikely absent a violation of some U.S. law or regulation, or unless the matter is of such a nature as to create significant political pressure for some action.

In addition to the possible suspension or debarment from U.S. government procurement under the FAR, other government agencies also have specific provisions that provide for suspension or debarment, or other sanctions, for a violation of the FCPA. For example, the conviction for a violation of the FCPA that is related to a project supported by the Overseas Private Investment Corporation (OPIC) may result in the denial of an insurance payment and the suspension from eligibility for OPIC services.²⁴⁰ Moreover, the indictment or conviction for bribery or any offense that indicates a lack of business integrity can result in the suspension or debarment of a party for federal financial and nonfinancial assistance and benefits.²⁴¹ The suspension or debarment by one agency generally has government-wide effect.²⁴² A person debarred or suspended by any federal agency may therefore be excluded from federal financial and nonfinancial assistance and benefits by other federal agencies.²⁴³

§ 2:2.2 Export Licenses for Defense Articles

The Arms Export Control Act (AECA)²⁴⁴ authorizes the President to control the import and export of defense articles and defense services. Under the AECA, if an applicant for a license to export is subject to an indictment for a violation of the FCPA, the President may disapprove the application.²⁴⁵ If the applicant has been convicted of a violation, a license to export a defense article or defense service may not be issued, except as may be determined on a case-by-case basis.²⁴⁶

The International Traffic in Arms Regulations (ITAR)²⁴⁷ implement the AECA. The

authority under the statute has been delegated to the State Department, Office of Defense Trade Controls.²⁴⁸ The defense articles and services subject to the ITAR are set forth in the U.S. Munitions List.²⁴⁹

The ITAR²⁵⁰ provide for the suspension, revocation, amendment or denial of an export license whenever an applicant is the subject of an indictment for a violation of the FCPA, or has been convicted of a violation of the FCPA.²⁵¹

The practice of the Department of State has generally been to automatically disapprove an export license application of any company indicted under the FCPA.²⁵² In such instances, an export license application will be approved, on a case-by-case basis, only if there is an overriding foreign policy or national security reason to do so.

In some instances, the suspension may apply only to the offending division or subsidiary.²⁵³ In other instances, the suspension may be applied to the parent entity as well as the subsidiary that violated the FCPA.

While the export privileges of the company may be reinstated, this generally requires an extensive interagency review regarding the circumstances surrounding the indictment or conviction and a finding that appropriate steps have been taken to mitigate the enforcement concerns.²⁵⁴

It can, therefore, take a considerable period of time, even in the best of circumstances, to regain export licensing privileges in the event of an indictment or conviction of the FCPA. For companies that require export licenses for some or all of their business operations, the adverse commercial ramification from a loss of export licensing privileges can be far more substantial than the penalties and fines imposed under the FCPA.²⁵⁵

§ 2:3 Tax Consequences²⁵⁶

Congress was sensitive to the fact that the prohibition in the FCPA on the bribery of foreign officials would be weakened if an illicit payment could be taken as a deductible business expense or U.S. taxes otherwise could be reduced through the payment of a bribe. To address these concerns, Congress included in the Internal Revenue Code (Code) provisions to (1) deny deductions for payments to officials or employees of a foreign government if such payments are unlawful under the FCPA, and (2) require that payments made by certain foreign subsidiaries of U.S. companies be treated as taxable income to the U.S. company where such payments, if made by a U.S. corporation, would have been unlawful under the FCPA. Summarized below are the applicable tax provisions and some practical issues that may arise under them.

§ 2:3.1 Disallowance of Deductions

Code section 162²⁵⁷ generally provides that ordinary and necessary expenses incurred in operating a business are tax deductible. However, section 162(c) eliminates the deduction for a payment to a foreign government official or employee that is unlawful under the FCPA. Significantly, section 162(c) and the regulations thereunder also provide that the Internal Revenue Service (IRS) bears the burden of proving with clear and convincing evidence that a payment is unlawful under the FCPA. While this departs from the normal rule in tax cases that places the burden of proof on the taxpayer, the IRS nonetheless often requests information directly from a taxpayer that it believes may have claimed a deduction in contravention of section 162(c) or failed to include Subpart F income as described below.^{257.1}

§ 2:3.2 Inclusion of Unlawful Payments in Taxable Income

Under the “Subpart F” rules of Code sections 951 through 964,²⁵⁸ a U.S. person (which includes U.S. individuals, corporations, partnerships, trusts, and estates) having a substantial interest in a “controlled foreign corporation” (CFC) generally is required to include in taxable income its share of the CFC’s “Subpart F income” for the year.²⁵⁹ Consequently, under these rules, a U.S. parent company normally will be currently taxed on its share of its foreign subsidiary’s Subpart F income whether or not the income is currently distributed by the subsidiary to the parent.

As one means of effectuating fully Congress’s intent in enacting the FCPA, section 952(a)(4) provides that Subpart F income includes any payment by a CFC that would be unlawful under the FCPA if the CFC were a U.S. corporation. Absent this provision, foreign subsidiaries of U.S. corporations could use income not currently taxable in the United States to make illicit payments. Section 952(a)(4) treats such payments as Subpart F income, thereby subjecting them to U.S. tax in the current year. Here, too, the IRS bears the burden of proving that the payment is unlawful under the FCPA.

While the tax law clearly provides that payments unlawful under the FCPA (or that would be unlawful under the FCPA if the payor were a U.S. entity) will either be disallowed as a deduction or result in an income inclusion (in the latter case where the payor is a CFC), the practicalities of dealing with these tax law rules rarely are as clear. This stems from the fact that, in many situations, potential violations of the FCPA are discovered by a taxpayer only after its tax return is filed for the year in which the payment was made. Moreover, regardless of when a potential violation is discovered, whether a payment is in fact “unlawful” may be subject to differing views. How should the U.S. corporation’s tax returns be handled in these situations?

Could the U.S. company be charged with fraud for failing to correct returns already filed once facts are discovered indicating that an FCPA violation has or might have occurred? Might civil penalties be due?

Assuming that the taxpayer believed in good faith that its return was correct when filed, the later discovery of information regarding a possible FCPA violation generally should not subject the taxpayer to charges of criminal fraud or to civil fraud penalties, even if the taxpayer does not amend the return to disclose information discovered after the filing. However, the taxpayer may still be subject to regular civil penalties. These penalties generally are imposed at the rate of 20% of the underpaid tax where a taxpayer is found to have been negligent, to have disregarded the tax rules and regulations in computing its tax liability, or, in the case of a substantial understatement of tax,²⁶⁰ does not have substantial authority for its treatment of the item on its original return.

The regular civil penalties may be eliminated if the taxpayer is able to demonstrate that there were reasonable grounds for the position taken on the return filed originally and that the taxpayer acted in good faith in taking that position. The success of this defense likely will depend upon what the taxpayer knew or should have known about potential FCPA violations at the time its return was filed. Thus, it would be important for the taxpayer to be able to demonstrate the facts known (or not known) at the time its tax return was filed.

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ENDNOTES:

1. H.R. CONF. REP. NO. 831, at 14 (1977) [hereinafter “H.R. CONF. REP. NO. 831”]. But see discussion of issuers *infra* section 1:1.1.
- 1.1. Note that the U.S. is a signatory to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions [hereinafter “OECD Convention”], which prohibits bribery by “any person.” To conform the FCPA to the OECD Convention, the FCPA was amended in October 1998 (International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302 (1998)) to prohibit foreign persons from committing any act in furtherance of the bribery of a foreign official on U.S. territory. See discussion *infra* section 1:1.4.
2. An issuer is defined as “any person who issues or proposes to issue any security.” Section 3(a)(8) of the Exchange Act, 15 U.S.C. § 78c(a)(8) (2005).
3. 15 U.S.C. § 78dd-2 (2005).
4. *Id.*
5. 15 U.S.C. § 78m(b)(2) (2002). See 15 U.S.C. §§ 78l (2005); 78o(d) (2005)
6. 15 U.S.C. § 78l(g) (2005); 17 C.F.R. § 240.12g-1 (2005). A foreign corporation can become subject to the registration requirements of the Exchange Act without actively intending to sell or trade its securities in the United States or to U.S. residents, if such securities are widely held in the United States. Pursuant to § 12(g) of the Exchange Act and Rules 12g-1 and 12g3-2(a) thereunder, a foreign private issuer that has \$10 million or more in assets at the end of its most recent fiscal year is required to register any class of equity securities if any such class is held of record by 500 or more persons worldwide, including 300 or more in the United States. 15 U.S.C. § 78l(g) (2005); 17 C.F.R. § 240.12g-1; 240.12g3-2(a) (2005). A foreign issuer can avoid this registration requirement by applying for an exemption with the SEC under Rule 12g3-2(b) of the Exchange Act, 17 C.F.R. § 240.12g3-2(b) (2005).
7. Foreign stocks may be sold in the United States in the form of American Depository Receipts (ADRs). To facilitate trade in foreign securities, the Exchange Act provides an exemption from the registration and filing requirements for these types of foreign issuers. Exchange Act Rule 12g3-2(b), 17 C.F.R. § 240.12g3-2(b) (2005). For a listing of approximately 966 foreign companies selling ADRs in the United States under this exemption, see Exchange Act Release No. 48,063 (June 19, 2003). These foreign issuers are therefore outside the scope of the FCPA. Nevertheless, numerous foreign issuers have entered the U.S. public market directly—companies like Daimler-Chrysler, Shanghai Petrochemical, Enterprise Oil, and Alcatel Alsthom. See James R. Silkenat, Overview of U.S. Securities Markets and Foreign Issuers, 17 *FORDHAM INT’L L.J.* 4, 5 (1994). In addition, ADRs that are listed on national securities exchanges such as the New York Stock Exchange or are quoted on NASDAQ are also subject to the requirements of the Exchange Act. In such an instance, the foreign company would be subject to the application of the FCPA. For example, in proceedings brought against a Norwegian company, Statoil ASA, the SEC asserted jurisdiction over the company based on the fact that its ADRs were registered with the SEC and traded on the New York Stock Exchange. In the Matter of Statoil, ASA, Administrative Proceeding, Exchange Act Rel. No. 59,599 (Oct. 13, 2006); See also In the Matter of ABB, Ltd., Accounting and Auditing Enforcement

- Rel. No. 2049 (July 6, 2004) (asserting jurisdiction over a Swiss Corporation under like circumstances). Generally, however, any illicit payments made or authorized by the foreign company are unlikely to meet the jurisdictional requirement to make use of an instrumentality of interstate commerce in furtherance of the illicit payment. See discussion *infra* section 2.1. Nevertheless, the accounting provisions of the FCPA would be applicable to the foreign issuer. See *SEC v. Montedison, S.P.A.*, No. 1:96 CV 02631 (D.D.C. Nov. 21, 1996), *Litig. Rel. No. 16,948* (Mar. 30, 2001) (ordering an Italian company that traded ADRs on the New York Stock Exchange to pay a civil penalty of \$300,000 for falsifying its reports to disguise an estimated \$400 million in bribes to Italian officials).
8. 15 U.S.C. § 781(i) (2005).
 9. 15 U.S.C. § 78o(d) (2005). However, if an issuer, in any fiscal year subsequent to the year in which it registered its securities, has 300 or more recordholders of a class of publicly held securities during any fiscal year, such issuer is subject to the reporting requirements of § 15(d) of the Exchange Act as to that fiscal year. *Id.*
 10. 15 U.S.C. § 78dd-2(h)(1).
 11. See S. REP. NO. 114, 95th Cong., 1st Sess. 11 (1977) [hereinafter “S. REP. NO. 114”]. See also *Dooley v. United Techs. Corp.*, 803 F. Supp. 428, 439 (D.D.C. 1992). However, the legislative history makes clear that any U.S. company that engages in bribery of foreign officials “indirectly through any other person or entity” would itself be liable under the Act. H.R. CONF. REP. NO. 831, *supra* note 1, at 14.
 12. H.R. CONF. REP. NO. 831, *supra* note 1, at 14.
 13. The phrase “organized under the laws of a State” appears to refer to the state in which a company is incorporated. A foreign corporation that filed a certificate to do business in a particular state or that maintains a branch office would not be considered a corporation organized under the laws of that state for purposes of the Act.
 14. In certain instances, it may be possible for a U.S. branch office of a foreign corporation to be considered the corporation’s “principal place of business.” See *Danjaq v. Pathe Comm’ns Corp.*, 979 F.2d 772, 776 (9th Cir. 1992) (finding California is the principal place of business even though the company is incorporated in Switzerland, the site of the director and stockholder meetings are in Switzerland, and the location of all administrative records and financial transactions are in Switzerland, because every important decision for the corporation is made by the sole shareholders who live and maintain an office in California); *Jerguson v. Blue Dot Inv., Inc.*, 659 F.2d 31 (5th Cir. 1981), cert. denied, 456 U.S. 946 (1982) (determining Florida is the principal place of business despite the fact that the corporation is chartered under the laws of Panama because the golf course and surrounding residential community owned by the corporation, constituting all of the business of the corporation, are located in Florida).
 15. The employees of the branch office who are U.S. citizens or residents would be subject to the FCPA. See generally Michael R. Geroe, *Complying with U.S. Antibribery Laws*, 31 INT’L LAW. 1037 (1997). Moreover, all of the employees, including foreign nationals, may be subject to other U.S. criminal laws, such as the Travel Act, 18 U.S.C. § 1952 (2000) (Interstate and foreign travel or transportation in aid of racketeering enterprise).
 - 15.1. See discussion in section 2.1, *infra*
 16. 15 U.S.C. § 78dd-1(a) (2005); H.R. CONF. REP. NO. 831, *supra* note 1, at 4.
 17. During hearings for the 1988 amendments to the FCPA, the Department of Justice and other witnesses emphasized the importance of including foreign

national agents among the list of individuals subject to the antibribery provisions of the FCPA, as a warning to foreign agents and an effective investigative tool. See Business Accounting and Foreign Trade Simplification Act: Hearings on S. 430 before the Subcomm. on International Finance and Monetary Policy and the Subcomm. on Securities of the Senate Comm. on Banking, Housing, & Urban Affairs, 99th Cong., 2d Sess. 69–70, 134 (1986) (testimony of John C. Keeney, Deputy Assistant Attorney General, Criminal Division, Dep’t of Justice; and Malcolm Baldrige, Secretary of the Dep’t of Commerce).

18. Foreign national employees or agents were, however, subject to civil liability. 15 U.S.C. § 78dd-2(g)(2).
19. 15 U.S.C. §§ 78ff(c)(1)(B), 78dd-2(g)(2)(B). See also H.R. CONF. REP. NO. 831, supra note 1, at 14.

The phrase “otherwise subject to the jurisdiction of the United States” was neither defined in the Act nor discussed in its legislative history. The term, however, has been used in other U.S. statutes. In *United States v. Black*, 291 F. Supp. 262 (S.D.N.Y. 1968), the court construed this phrase in the context of a statute prohibiting gambling aboard vessels subject to the jurisdiction of the United States, and held that this phrase enlarged the jurisdictional scope of the statute in such a way as to make it applicable in any other instance in which the United States otherwise had jurisdiction.

Despite the application of the FCPA to foreign national employees or agents, the court in *United States v. Bodmar*, 342 F. Supp. 2d 196 (S.D.N.Y. 2004), involving a Swiss lawyer representing U.S. companies involved in alleged bribery of foreign officials, dismissed the charge of conspiracy to violate the FCPA. The court held that, prior to the 1998 Amendments, FCPA criminal penalties did not apply to non-resident foreign nationals who acted as agents of a U.S. company. In *Dooley v. United Techs., Inc.*, 803 F. Supp. 428, 439 (D.D.C. 1992), the court held that the Act does not apply to foreign corporations acting as agents of a U.S. company. But see *infra*, notes 24.10–24.14 and accompanying discussion.

20. Pub. L. No. 95-213, 91 Stat. 1494, 1496–97 (1977). See *United States v. McLean*, 738 F.2d 655, 659 (5th Cir. 1984) (construing the statute to prohibit the imposition of criminal sanctions against the employee “who acts at the bequest of and for the benefit of his employer,” unless “his employer has been convicted of similar FCPA violation”), cert. denied, 470 U.S. 1050 (1985).
21. See, e.g., *Dooley v. United Techs., Inc.*, 803 F. Supp. 428 (D.D.C. 1992).
22. *United States v. Morton*, Cr. No. 3-90-061-H (N.D. Tex. 1990), reprinted in 2 FOREIGN CORRUPT PRAC. ACT REP. (Bus. Laws, Inc.) 698.62 to .67 (Canadian agent of U.S. bus company was charged with and pleaded guilty to bribing Canadian officials to secure a bus contract).
- 22.1. See *SEC v. Cantor*, No. 03-CV-2488, 78 (S.D.N.Y. 2003) (noting that anti-bribery provisions of FCPA apply to any employee of company).
- 22.2. See Indictment, *United States v. Sapsizian*, 1:06-CR-20797-PAS (S.D. Fla. 2006) (indicting a French citizen employed by Alcatel, a French telecommunications company whose ADRs were listed on the New York Stock Exchange (jurisdiction based on use of any means of instrumentality of interstate commerce in furtherance of an

- illicit payment); see also Press Release, Department of Justice, Former Alcatel Executive Pleads Guilty to Participating in Payment of \$2.5 Million in Bribes to Senior Costa Rican Officials to Obtain a Mobile Telephone Contract (June 7, 2007). See also discussion *supra* at note 7.
23. OECD Convention, art. 4, 1.
 24. See discussion in section 1:1, *supra*.
 - 24.1. Foreign corporations may be “issuers” (e.g., ADRs listed on the New York Stock Exchange), and therefore subject to the FCPA.
 - 24.2. International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, § 4, 112 Stat. 3302, 3306 (1998).
 - 24.3. The Administration bill was passed by Congress, almost verbatim, with only minimal discussion in Congress.
 - 24.4. The above discussion is based upon the personal knowledge of the author.
 - 24.5. H. REP. NO. 105-802 to accompany H.R. 4353, International Anti-Bribery and Fair Competition Act of 1998, 21 (Oct. 8, 1998). A foreign company will be liable for acts taken on their behalf by their officers, directors, employees, agents, or stockholders in the territory of the United States, regardless of the nationality of such persons. *Id.* at 21, reprinted at www.usdoj.gov/criminal/fraud/fcpa/houser1.htm.
 - 24.6. *Id.* at 22 (1998); S. REP. NO. 105-277, at 6 (1998).
 - 24.7. *Id.* See also Response of the United States to the Phase I Questionnaire, First Self-Evaluation and Mutual Review, submitted by the U.S. government to the OECD, art. 4.1 (Oct. 30, 1999), available at www.usdoj.gov/criminal/fraud/fcpa/firstqu.htm.
 - 24.8. Comments made by Peter Clark, Deputy Chief, Fraud Division, Dep’t of Justice, at the American Bar Association Conference on the Foreign Corrupt Practices Act (Feb. 19, 1999).
 - 24.9. See Plea Agreement, *United States v. Vetco Gray UK Ltd. and Vetco Gray Controls, Ltd.*, CR H-07-004 (S.D. Tex. Feb. 6, 2007)); Plea Agreement, *United States v. Syncor Taiwan, Inc.*, No. 02-CR-1244-SVW (C.D. Cal. 2002); *United States v. ABB Vetco Gray, Inc. and ABB Vetco Gray UK Ltd.* (use No. CR H-04-279 (S.D. Tex. June 22, 2004)).
 - 24.10. *United States v. DPC (Tianjin) Co. Ltd.*, Plea Agreement (D.C.D. Cal., May 20, 2005) and Information (D.C.D. Cal. May 20, 2005). SEC also entered a cease and desist order against Diagnostics, charging Diagnostics with a violation of the FCPA, as well as the books and records and internal controls provision of the FCPA. In the Matter of Diagnostics Products Corp., Accounting and Auditing Enforcement Rel. No. 2249 (May 20, 2005).
 - 24.11. See notes 23–24.9, *supra*, and accompanying text.
 - 24.12. The prohibition of the FCPA applies to any “issuer” or “domestic concern,” and to “any officer, director, employee or agent of such [issuer or] domestic concern or any stockholder thereof acting on behalf of such [issuer or] domestic concern. . . . 15 U.S.C. § 78dd-2 (a) (2005) (emphasis added).
 - 24.13. See discussion in sections 1:1.3 and 2.1.
 - 24.14. Information, *United States v. SSI Int’l Far East, Ltd.*, 3:06-CR-00398-KI (D. Or. 2006).
 - 24.15. Press Release, Department of Justice, Schnitzer Steel Industries Inc.’s Subsidiary Pleads Guilty to Foreign Bribes and Agrees to Pay a \$7.5 Million Criminal Fine (Oct. 16, 2006).

- 24.16. The Department of Justice/Department of Commerce Brochure issued to provide guidance on the FCPA states that a “foreign company or person is now subject to the FCPA if it causes, directly or through agents, an act in furtherance of the corrupt payment to take place within the territory of the United States.” Available at www.usdoj.gov/criminal/fraud/docs/dojdocb.html.
- 24.17. U.S. v. Vetco Gray UK Limited, U.S. v. Vetco Gray Controls Limited and U.S. v. Vetco Gray Controls Inc., No. H-07-004 (S.D. Tex. Feb. 6, 2007) (Plea Agreement).
- 24.18. This was the second time that Vetco Gray UK had pled guilty to violating the FCPA On July 6, 2004, Vetco Gray UK, previously named ABB Vetco Gray UK Ltd., and an affiliate company pled guilty to violating the FCPA. ABB Vetco Gray UK Ltd. was renamed Vetco Gray UK Ltd. following its acquisition by private equality entities.
25. 15 U.S.C. §§ 78dd-1(a), 78dd-2(a).
26. Id. § 78dd-2(h)(5).
27. H.R. CONF. REP. NO. 831, *supra* note 1, at 12. The Senate bill originally contained the “in furtherance” clause. S. 305, 95th Cong., 1st Sess. (1977). The bill passed by the House required that interstate commerce be “directly used” to offer or make the prohibited payment. H.R. 3815, 95th Cong., 1st Sess. (1977). The Department of Justice expressed the view that the “directly used” language in the House bill was unduly restrictive and narrow, and recommended inclusion of the “in furtherance” clause contained in the Senate bill. See H.R. CONF. REP. NO. 640, 95th Cong., 1st Sess. 18 (1977) [hereinafter “H.R. REP. NO. 640”].
28. United States v. Draiman, 784 F.2d 248, 251 (7th Cir. 1986) (quoting United States v. Lea, 618 F.2d 426, 430 (7th Cir. 1980)), cert. denied, 449 U.S. 823 (1980). See generally KATHLEEN BRICKEY, CORPORATE CRIMINAL LIABILITY § 8.53 (2d ed. 1992) [hereinafter “Brickey”] (discussion of the use of the mails for the purpose of executing a scheme or artifice to defraud).
29. Schmuck v. United States, 489 U.S. 705, reh’g denied, 490 U.S. 1076 (1989).
30. Id. at 710–11 (quoting Badders v. United States, 240 U.S. 391, 394 (1916)). See also Pereira v. United States, 347 U.S. 1, 8 (1954) (“not necessary that the scheme contemplate the use of the mails as an essential element”).
31. Schmuck, 489 U.S. at 711–15 (referring to Kann v. United States, 323 U.S. 88 (1944); Parr v. United States, 363 U.S. 370 (1960); United States v. Maze, 414 U.S. 395 (1974)). But cf. id. at 722 (dissenting opinion).
32. Id. at 713–14. Similarly, the use of an instrumentality of interstate commerce that occurs before the inception of the crime would not meet the “in furtherance” requirement. See United States v. Beall, 126 F. Supp. 363, 366 (N.D. Cal. 1954). On the other hand, the use of an instrumentality of commerce which occurred subsequent to the criminal acts may be “in furtherance” of the scheme if it promotes the scheme, relates to acceptance of the proceeds of the scheme, or facilitates concealment of the scheme. See United States v. Rauhoff, 525 F.2d 1170, 1176 (7th Cir. 1975).
33. 489 U.S. at 715; United States v. Biesiadecki, 933 F.2d 539, 545 (7th Cir. 1991).
- 33.1. See Response of the United States, *supra* note 24.7, at art. 4.4.
- 33.2. Note that conduct that does not meet the jurisdictional requirements under the foreign payments provisions may nevertheless be subject to liability under the accounting provisions. See SEC v. Montedison, *supra* note 7.
- 33.3. While the United States has traditionally followed the territorial principle of jurisdiction

- in the application of its criminal laws, there is some limited precedent for the application of the nationality principle of jurisdiction. See, e.g., the Economic Espionage Act of 1996, 18 U.S.C. §§ 1831–39 at 1837 (the statute applies to conduct outside the United States if . . . the offender is a natural person who is a citizen or permanent resident alien of the United States, or an organization organized under the laws of the United States); Laundering of Monetary Instruments; 18 U.S.C. § 1956(f) (“There is extraterritorial jurisdiction over the conduct prohibited . . . if . . . the conduct is by a U.S. citizen. . . .”), and § 1957(d) (“the offense . . . takes place outside the United States . . . but the defendant is a United States person . . .”). See also Foreign Assets Control Regulations, 31 C.F.R. pt. 500 (2006).
- 33.4. International Anti-Bribery and Fair Competition Act of 1998, *supra* note 24.2, § 2(c). Foreign corporations that are “issuers” (i.e., that have ADRs listed on the New York Stock Exchange) would only be subject to the regular jurisdictional requirement of “use of an instrumentality of inter- state commerce.”
 - 33.5. The alternative jurisdiction applies to a “U.S. person,” which is defined as a “national” of the United States, as specified in 8 U.S.C. § 1101(a)(22). This would not include a permanent resident of the United States.
 - 33.6. International Anti-Bribery and Fair Competition Act of 1998, *supra* note 24.2, § 2(c).
 - 33.7. *Id.* § 3(d).
 - 33.8. *Id.* § 4.
 - 33.9. *Id.*
 - 33.10. See Response of the United States, *supra* note 24.7, at art. 4.2 and 4.4. A Department of Justice Press Release, dated August 4, 2006, announced that a U.S. citizen who served as a translator in Iraq pled guilty to offering a bribe to a senior Iraqi police officer to facilitate the police department’s purchase of armored vests and other equipment. Jurisdiction was based on the nationality principle.
 34. H.R. REP. NO. 640, *supra* note 27, at 7–8; S. REP. NO. 114, *supra* note 11, at 10–11. In *United States v. Liebo*, 923 F.2d 1308, 1312 (8th Cir. 1991), involving a violation of the FCPA, the court affirmed the following jury instruction of the term “corruptly”:

[T]he offer, promise to pay, payment or authorization of payment, must be intended to induce the recipient to misuse his official position or to influence someone else to do so. . . . [A]n act is corruptly done if done voluntarily and intentionally, and with a bad purpose of accomplishing either an unlawful end or result, or a lawful end or result by some unlawful method or means.
 35. H.R. REP. NO. 640, *supra* note 27, at 8; S. REP. NO. 114, *supra* note 11, at 10. See also Department of Justice Press Release (Mar. 24, 2006), wherein a U.S. citizen who served as a translator in Iraq was arrested for offering a bribe to an Iraqi police official (charge brought for an offer to bribe, though no bribe was ever executed). See Dep’t of Justice Press Release (Aug. 4, 2006), announcing a guilty plea for a violation of the FCPA.
 36. S. REP. NO. 114, *supra* note 11, at 11.
 37. See *Liebo*, 923 F.2d at 1314.

38. S. REP. NO. 114, *supra* note 11, at 10–11.
39. H.R. REP. No. 640, *supra* note 27, at 8 (the word “corruptly” connotes an evil motive or purpose such as that required under 18 U.S.C. § 201(b) which prohibits domestic bribery). See generally Gary M. Elden & Mark S. Sablemann, *Negligence Is Not Corruptive: The Scienter Requirement of the Foreign Corrupt Practices Act*, 49 GEO. WASH. L. REV. 819, 826–28 (1981) (an instructive review of cases interpreting the “corruptly” standard). Numerous other statutes also contain a “corruptly” requirement. One law review article states that there are sixty-four federal statutory provisions which contain the word “corruptly” or a variant thereof. *Id.* at 824.
40. *United States v. Traitz*, 871 F.2d 368, 396 (3d Cir.), cert. denied, 493 U.S. 821 (1989); *United States v. Johnson*, 621 F.2d 1073, 1076 (10th Cir. 1980); *United States v. Arthur*, 544 F.2d 730, 734 (4th Cir. 1976); *United States v. Brewster*, 506 F.2d 62 (D.C. Cir. 1974).
41. *Brewster*, 506 F.2d at 80–82.
42. Because of the ambiguity of the “corruptly” standard, criminal law reformers had proposed to replace this requirement in the domestic bribery statute with “as consideration for,” to emphasize the importance of the quid pro quo aspect of bribery. See OBERMAIER & MORVILLO, *WHITE COLLAR CRIME: BUSINESS & REGULATORY OFFENSES* § 3.03[1] (citing S. REP. NO. 553, 96th Cong., 2d Sess. 398 (1979)); W. VA. CODE ANN. § 61-5A-3 (1966 & Supp. 1994) (West Virginia bribery statute).
43. See *Brewster*, 506 F.2d at 71, 72.
44. *United States v. Anderson*, 509 F.2d 312, 332 (D.C. Cir. 1974), cert. denied, 420 U.S. 991 (1975). See also *United States v. Hall*, 245 F.2d 338 (2d Cir. 1957); *United States v. Troop*, 235 F.2d 123, 124–25 (7th Cir. 1956).
45. *United States v. Jannotti*, 673 F.2d 578, 601 (3d Cir.), cert. denied, 457 U.S. 1106 (1982). But cf. *United States v. Campbell*, 684 F.2d 141, 148 (D.C. Cir. 1982) (payments to any official for acts that would have been performed in any event are probably illegal gratuities rather than bribes).
46. See *United States v. Hsieh Hui Mei Chen*, 754 F.2d 817, 822 (9th Cir.), cert. denied, 471 U.S. 1139 (1985). See also WALTER S. SURREY & RICHARD A. POPKIN, *A LAWYER’S GUIDE TO INTERNATIONAL BUSINESS TRANSACTIONS: THE UNITED STATES RESPONSE TO FOREIGN CORRUPT PRACTICES* 44 (2d ed. 1982) (suggesting that a violation of foreign law meets the corrupt intent requirement).
- 46.1. While the criminal conviction of a company requires proof that the defendant acted corruptly, the criminal conviction of an individual under the FCPA requires proof that the defendant acted not only “corruptly” but also “willfully.” To obtain a criminal penalty against an individual, 15 U.S.C. § 78 dd-1 provides:

Any officer, director, employee, or agent of an issuer, or stockholder acting on behalf of such issues, who willfully violates subsection (a) or (g) of Section 78dd-f of the title shall be fined not more than \$100,000 or imprisoned not more than 5 years, or both.

In *U.S. v. Kozeny, Bourke and Pinkerston* (S.D.N.Y. June 21, 2007), the court held that

- willfulness meant that the government must prove that the defendant acted with knowledge that his conduct was unlawful, and not that the defendant in fact knew that his conduct violated the FCPA. The willfulness standard is also the subject of an appeal in *United States v. David Kay & Douglas Murphy*, Nos. 05-20604 and 05-20606 (S.D. Texas 2007), where the question is whether the willful standard for a criminal conviction of an individual requires specific intent (that is, that the defendant acted with knowledge that his conduct was unlawful) or only general intent (that is, an intent to influence a foreign official to misuse his official position).
47. 15 U.S.C. §§ 78dd-1(a), 78dd-2(a). In contrast to the FCPA, the OECD Convention does not extend to political parties or political candidates.
 48. Commercial bribery may, however, be a violation of the Travel Act, *supra*, note 15. See *Perrin v. United States*, 444 U.S. 37 (1979); *United States v. Mead*, Cr. 98-240-01 (D.N.J. 1998).
 49. In a Department of Justice Opinion Procedure Release, the Department of Justice expressed its intention not to bring enforcement proceedings against a company that sought to contribute \$25,000 directly to a local customs agency in an African nation. The company intended the contribution to be used to establish a program that would provide financial incentives to local customs officials in order to improve enforcement of anti-counterfeiting laws. Noting that the contribution went directly to the agency (and not to individual officials), that the company lacked control over the distribution of funds, and the existence of certain procedural safeguards, the DOJ implicitly concluded that the program would not contravene the FCPA. See Foreign Corrupt Practices Act Review, Opinion Procedure Rel. No. 06-01 (Oct. 16, 2006).
 50. 15 U.S.C. § 78dd-2(h)(2). Prior to the 1988 amendments to the FCPA, the term “foreign official” did not include employees of a foreign government whose duties were essentially ministerial or clerical. 91 Stat. 1498 (1977). This exclusion provided the basis for permitting so-called facilitating payments, and was replaced in the 1988 amendments by an explicit exception for facilitating payments. 15 U.S.C. §§ 78dd-1(b), 78dd-2(b).
 - 50.1. International Anti-Bribery and Fair Competition Act of 1998, *supra* note 24.2, § 2(b).
 51. Cf. *SEC v. Ashland Oil, Inc.*, 2 FOREIGN CORRUPT PRAC. ACT. REP. (Bus. Laws, Inc.) 696.95, involving an SEC civil injunctive action for a payment to an Omani official, in violation of the bribery provisions of the FCPA. In that case, the SEC referred to an Omani Decree for reference in defining a “government official” in its Complaint for Permanent Injunction (para. 10). But cf. Department of Justice Opinion Procedure Release No. 94-1 (May 13, 1994), reprinted at Appendix B (Department of Justice rejects any consideration of local law in determining whether the general director of a state-owned enterprise is a foreign official under the FCPA).
 52. 18 U.S.C. § 201(a)(1).
 53. 28 U.S.C. § 2671 et seq. The FTCA is a vehicle pursuant to which private plaintiffs may sue the United States government for injury caused by the negligent conduct of its employees.
 54. 18 U.S.C. § 201(a)(1); see also Jay M. Zitter, Annotation, Who is Public Official Within Meaning of Federal Statute Punishing Bribery of Public Official, 161 A.L.R. Fed. 491 (2000).

55. *United States v. Bordonaro*, 253 F. 477 (W.D.N.Y. 1918).
56. *Felder v. United States*, 9 F.2d 872, 873 (2d Cir. 1925), cert. denied, 270 U.S. 648 (1926).
57. *United States v. Marcus*, 166 F.2d 497, 503 (3d Cir. 1948).
58. *Id.* (citing *United States v. Germaine*, 99 U.S. 508 (1879)). See also *McGrath v. United States*, 275 F. 294 (2d Cir. 1921) (court looked to definition of officer in Constitution to determine whether income tax inspectors appointed by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury could be considered “officers” of the United States). There is also little doubt that members of the military are “officers” of the government. See *United States v. Kidd*, 734 F.2d 409 (9th Cir. 1984) (Army private); *United States v. Apex Distrib. Co.*, 148 F. Supp. 365 (D.R.I. 1957) (Naval officer). See also 28 U.S.C. § 2671.
59. “Employee” of the government under the FTCA includes . . . “employees of any federal agency, member of the military . . . forces of the United States. . . and persons acting on behalf of a federal agency in an official capacity.” See 28 U.S.C. § 2671.
60. *United States v. Orleans*, 425 U.S. 807, 815 (1976).
61. *Logue v. United States*, 412 U.S. 521, 528–29 (1973); see also *Rodriguez v. Sarabyn*, 129 F.3d 760 (5th Cir. 1997).
62. *Resendez v. United States*, 993 F.2d 884 (9th Cir. 1993).
63. *Id.* (citation omitted). The Tenth Circuit in *Woodruff v. Covington*, 389 F.3d 1117, 1126 (10th Cir. 2004), applied similar factors.
64. *Kirchmann v. United States*, 8 F.3d 1273, 1274–75 (8th Cir. 1993); see also *Cazales v. Lecon, Inc.*, 994 F. Supp. 765 (S.D. Tex. 1997).
65. *Id.* at 1275.
66. *Berkman v. United States*, 957 F.2d 108 (4th Cir. 1992).
67. *Id.* at 113–14.
68. 28 U.S.C. §§ 1602–11 (1988 & Supp. IV 1992).
69. 28 U.S.C. § 1603(b)(2). The full definition is as follows:
 - An “agency or instrumentality of a foreign state” means any entity
 - (1) which is a separate legal person, corporate or otherwise, and
 - (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
 - (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.
70. *First Nat’l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983).
71. *Id.* at 624; see also *Gabay v. Mostazafan Found.*, 968 F. Supp. 895 (S.D.N.Y. 1997), *aff’d*, 152 F.3d 918 (2d Cir.), cert. denied, 525 U.S. 1040 (1998).
72. However, often a narrower standard of government “agency or instrumentality” has been applied domestically. See, e.g., *United States v. Orleans*, 425 U.S. 807, 814 (1976) (holding that for purposes of the Federal Tort Claims Act, 28 U.S.C. § 2671, a critical element in determining whether an entity is an agency is whether the federal government has the power to “control the detailed physical performance” of the entity); *Fed. Reserve Bank v. Metrocentre Improvement Dist. #1*, 657 F.2d 183, 185 (8th Cir. 1981), *aff’d*, 455 U.S. 995 (1982) (“A governmental instrumentality is one that

- performs an important governmental function.”); *Tenn. Valley Auth. v. Kinzer*, 142 F.2d 833, 837 (6th Cir. 1944) (“Its great functions are governmental in nature, and might have been performed directly by officers of the Government. It is plainly a governmental agency or instrumentality of the United States.”).
- 72.1. See *Schnitzer Steel Indus., Inc.*, supra notes 24.14 and 24.15 (improper payments to employees of government-owned entities in China and South Korea); *United States v. Baker Hughes Servs. Int’l, Inc.*, No. H-07-129 (S.D. Texas, Apr. 11, 2007) (improper payments to employees of state-owned oil company).
73. See, e.g., *O’Connell Mach. Co. v. M.V. Americana*, 734 F.2d 115 (2d Cir.), cert. denied, 469 U.S. 1086 (1984).
74. *Ofikuru v. Nigerian Airlines Ltd.*, 670 F. Supp. 89 (S.D.N.Y. 1987).
75. H.R. REP. NO. 1487, 94th Cong., 2d Sess. 15–16 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6613–14. See *United States v. Syncor Taiwan*, supra note 24.9, involving a conviction under the FCPA for improper payments made to physicians of government-owned hospitals.
76. Department of Justice Opinion Procedure Release No. 94-1 (May 13, 1994), reprinted at Appendix B.
77. Statement of Peter B. Clark, Deputy Chief of the Fraud Section, Criminal Division, Department of Justice, in an address before the Foreign Trade Council (Apr. 21, 1994) [hereinafter “Clark comments”].
- 77.1. Cf. *Cargill Int’l S.A. v. M/T Pavel Dybenko*, 991 F.2d 1012, 1016 (2d Cir.1993) (“[A]fter the first shares are distributed [under privatization], nearly half the shares will remain with the Russian State Property Fund for a period of three years. We consider an entity at such an early stage of privatization to be sovereign under the F[oreign] S[overeign] I[mmunities] A[ct].”). The SEC seems to have partly relied on a similar rationale in a complaint filed against former executives of ITXC Corp., an international telecommunications carrier. The complaint alleges that Steven Ott and Michael Young violated the FCPA by inter alia bribing officials of Sonatel, a Senegalese telecommunications company partly owned by the Senegalese government. Complaint, *SEC v. Ott*, No. 06-4195 (D.N.J. 2006). However, at the time of the alleged bribery, the Senegalese government no longer owned a majority stake in Sonatel, having sold off 61% of the company in 1997 as part of a privatization plan. See Int’l Monetary Fund, *Senegal: Enhanced Structural Adjustment Facility Policy Framework Paper, 1998-2000* at 3-4 (Feb. 27, 1998), available at www.imf.org/external/NP/PFP/Senegal/seneg.pdf.
78. Statement of Peter Clark, American Bar Association Conference on the Foreign Corrupt Practices Act (Feb. 21, 1997).
- 78.1. Response of the United States, supra note 24.7 at Article 1.1.
- 78.2. See Department of Justice Opinion Procedure Rel. No. 94-01, supra note 51 (argument that individual employee of state-owned enterprise not regarded as government employee or public official under local law rejected by Department of Justice). But cf. *SEC v. Ashland Oil, Inc.*, Complaint for Permanent Injunction, No. 86-1904 (D.D.C. July 8, 1986), reprinted in 2 FOREIGN CORRUPT PRAC. ACT REP. (Bus. Laws, Inc.) 696.95 (SEC looked to local law to determine if individual was foreign official).
- 78.3. See *United States v. Orleans*, 425 U.S. 807, 814 (1976); *Lewis v. United States*, 680 F.2d 1239, 1240 (9th Cir. 1982).

- 78.4. Lewis, 680 F.2d at 1242 (Federal Reserve Bank was federal instrumentality for purposes of determining liability for state and local taxation, but not instrumentality under the Federal Tort Claims Act).
- 78.5. Motor Coach Indus., Inc. v. Dole, 725 F.2d 958 (4th Cir. 1984); Fed. Reserve Bank v. Metrocentre Improve Dist., 657 F.2d 183 (8th Cir. 1981), aff 'd, 455 U.S. 992 (1982).
- 78.6. See 15 C.F.R. pt. 760 (1996).
- 78.7. In contrast to the FCPA, the OECD Convention would only apply to state-owned commercial enterprises in which a government exercises, directly or indirectly, a dominant influence (i.e., holds the majority of the capital, controls the majority of voting shares, or appoints a majority of the administrative or managerial body or supervisory board). In addition, the entity will not be considered a public enterprise if it “operates on a commercial basis” without “preferential subsidies or other privileges.” Commentaries on the Convention on Combating Bribery of Officials in International Business Transactions, art. 1 available at <http://www.oecd.org> [hereinafter “Commentaries on OECD Convention”]. Unfortunately, the Administration did not adopt this more explicit, narrower standard in the 1998 Amendments.
- 78.8. The U.S. Supreme Court, in Dole Food Co. v. Patrickson, 538 U.S. 468, 474-77 (2003), held that a foreign state must itself own a majority of a corporation’s shares if the corporation is to be deemed an instrumentality of the state under the Foreign Sovereign Immunities Act. The Court found that instrumentality status turned on formal corporate ownership of shares.
79. Thompson v. Dilger, 696 F. Supp. 1071, 1074 (E.D. Va. 1988).
80. Logue v. United States, 412 U.S. 521 (1973).
81. United States v. Orleans, 425 U.S. 807, 814 (1976).
82. Guccione v. United States, 847 F.2d 1031 (2d Cir. 1988), cert. denied, 493 U.S. 1020 (1990).
83. Id. at 1037.
84. Dixson v. United States, 465 U.S. 482 (1984).
85. Id. at 496.
86. Id. at 497. Accord United States v. Strissel, 920 F.2d 1162, 1166 (4th Cir. 1990) (defendant, who was not employed by federal government, was still “public official” within meaning of domestic bribery statute because he administered federal funds in a federal program and his responsibilities were “federal” in nature).
87. United States v. Griffin, 401 F. Supp. 1222, 1230 (S.D. Ind. 1975), aff 'd mem., 541 F.2d 284 (7th Cir. 1976).
88. Id. at 1230.
89. United States v. Gelb, 881 F.2d 1155, 1163 (2d Cir.), cert. denied, 493 U.S. 994 (1989).
90. Id.
- 90.1. OECD Convention, art. 1, ¶ 4a.
- 90.2. International Anti-Bribery and Fair Competition Act of 1998, supra note 24.2, § 2(b).
- 90.3. Id.
- 90.4. See In the Matter of the Titan Corporation Litig. Rel. No. 19107 (March 1, 2005) (Titan paid an employee of the World Bank, a “foreign official” under the FCPA, to assist in obtaining local investors for a project).
91. 15 U.S.C. §§ 78dd-1(a)(2), 78dd-2(a)(2). In contrast to the FCPA, the OECD

- Convention does not apply to political parties. See George J. Wallance, Major Victory for U.S. as Foreign Corrupt Practices Act Goes Global, *BUSINESS CRIMES BULLETIN: COMPLIANCE & LITIG.* 1, 3 (Feb. 1998).
92. H.R. CONF. REP. NO. 576, 100th Cong., 2d Sess. (1988) 918–19, reprinted in 1988 U.S.C.C.A.N. 1547, 1951–52 [hereinafter “H.R. CONF. REP. NO. 576”].
 93. See 15 U.S.C. §§ 78dd-1(c)(1) and 78dd-2(c)(1).
 94. [Reserved]
 95. For example, in Nepal, which has had a democratic system for only a short period, there is no Nepalese law regulating contributions to political parties or candidates for political office. It is therefore not prohibited for companies or individuals to make such contributions.
 96. 15 U.S.C. §§ 78dd-2(a).
 97. See *United States v. Schwartz*, 785 F.2d 673, 679 (9th Cir.), cert. denied, 479 U.S. 890 (1986) (interpreting “thing of value” under 18 U.S.C. § 1954 broadly to include tangible and intangible items).
 98. *United States v. Williams*, 705 F.2d 603, 622–23 (2d Cir.), cert. denied, 464 U.S. 1007 (1983).
 99. 18 U.S.C. § 201(c).
 100. *Id.* § 201(g).
 101. *Williams*, 705 F.2d at 623.
 102. *Id.* (quoting *United States v. Girard*, 601 F.2d 69, 71 (2d Cir.), cert. denied, 444 U.S. 871 (1979)).
 103. *United States v. Gorman*, 807 F.2d 1299 (6th Cir. 1986), cert. denied, 484 U.S. 815 (1987).
 104. *Id.* at 1305.
 105. *Id.* See also *United States v. Crozier*, 987 F.2d 893, 901 (2d Cir.), cert. denied, 510 U.S. 880 (1993) (“[A]ny payment that the defendant subjectively believes has value, including a loan, constitutes a thing ‘of value’ within the meaning” of a statute prohibiting corrupt payments to officials who dispense federal funds.)
 106. *United States v. Sheker*, 618 F.2d 607, 609 (9th Cir. 1980) (information concerning location of a witness was a “thing of value” under 18 U.S.C. § 912); *Girard*, 601 F.2d at 71 (statute making it unlawful to sell without authority any record or thing of value of the United States was violated by sale of information).
 107. See *McDonald v. Alabama*, 329 So. 2d 583, 587–88 (Ala. Crim. App. 1975) (sexual intercourse, or the promise of sexual intercourse, is a thing of value under a bribery statute), cert. denied, 429 U.S. 834 (1976).
 108. *United States v. Zouras*, 497 F.2d 1115, 1121 (7th Cir. 1974) (holding the testimony of a witness to be a “thing of value” when construing 18 U.S.C. § 876 which prohibits extortion of “money or other thing of value”).
 109. *United States v. Schwartz*, 785 F.2d 673, 680–81 (9th Cir.), cert. denied, 499 U.S. 890 (1986) (holding that “thing of value” includes the intangible of providing assistance in arranging a merger when interpreting 18 U.S.C. § 1954 which prohibited offering “anything of value” with intent to influence actions of union benefit plan trustees.)
 110. MODEL PENAL CODE § 240.0 (Proposed Official Draft 1962). The Model Penal Code was approved by the American Law Institute by resolution dated May 24, 1962. Many of its provisions have been followed, in varying degrees, by numerous states.

- See Model Penal Code and Commentaries, American Law Institute (1980) [hereinafter “Model Penal Code Commentary”].
111. Id. § 240.0(1).
 112. Model Penal Code Commentary, *supra* note 110, at § 240.1 commentary at 24.
 113. Id.
 114. 18 U.S.C. § 201.
 115. Id. at § 201(b)(1). The domestic bribery law was expanded by Congress in 1962 to forbid the offer or promise of something of value from which a public official himself will not benefit but which will be of advantage to another person in whose well-being he is interested. See S. REP. NO. 2213, 87th Cong., 2d Sess. (1962), reprinted in 1962 U.S.C.C.A.N. 3852, 3857.
 - 115.1. The OECD Convention clearly proscribes payments made to a foreign official, “for that official or for a third party.” OECD Convention, art. I, ¶ 1.
 116. FCPA Review Procedure Release No. 83-01 (May 12, 1983).
 117. Id. See also FCPA Review Procedure Release No. 82-03 (Apr. 22, 1982) (no enforcement action taken where there was no expectation that any individual government official would personally benefit from arrangement where commissions were to be paid to a government-controlled trade organization).
 118. *United States v. Liebo*, 923 F.2d 1308 (8th Cir. 1991).
 119. The indictment is reprinted in 2 FOREIGN CORRUPT PRAC. ACT REP. (Bus. Laws, Inc.) 697.97.
 120. *Liebo*, 923 F.2d at 1311. See also *SEC v. BellSouth*, *supra* chapter 3, note 145.10 and accompanying text. In that case, the SEC initiated an action against BellSouth for a violation of the accounting provisions of the FCPA in part for the alleged improper payments made by its Nicaraguan subsidiary to the wife of a Nicaraguan legislator. The legislator chaired a key legislative committee responsible for the repeal of a law restricting foreign ownership of telecommunications companies. The payments to the wife were booked as consulting services. By asserting that the payments were improperly recorded, the SEC is implicitly asserting either that the payments to the wife were indirect payments made to the legislator; or that the monies provided to a person in whose well-being the official was interested (i.e., the wife) was intended as a quid pro quo for the legislator’s assistance in repealing the law restricting foreign ownership.
 121. FCPA Review Procedure Release No. 80-01 (Oct. 29, 1980).
 122. See also FCPA Review Procedure Release No. 83-02 (July 26, 1983) (Department of Justice declined to take enforcement action against a firm that was to pay the travel and lodging expenses of an official and his spouse for a proposed promotional tour).
 - 122.1. *SEC v. Schering-Plough Corp.*, Case No. 1:04CV00945 (D.D.C. June 9, 2004); In the Matter of *Schering-Plough Corp.*, Administrative Proceeding File No. 3-11517, Rel. No. 49,838 (June 9, 2004).
 123. [Reserved]
 124. 15 U.S.C. §§ 78dd-1(a)(3), 78dd-2(a)(3); S. REP. NO. 486, 99th Cong., 2d Sess. (1986) [hereinafter “S. REP. NO. 486”].
 125. 18 U.S.C. § 201. See also *supra* note 114 and accompanying text.
 126. To be liable as an accomplice, a person must act with intent that the offense be committed. See, e.g., *United States v. Medina*, 887 F.2d 528, 532 (5th Cir. 1989) (to

- be convicted of aiding and abetting, defendant must share the principal's criminal intent and engage in some affirmative conduct to aid the venture); *United States v. Pearlstein*, 576 F.2d 531, 546 (3d Cir. 1978) (“[I]t is necessary that the alleged aider and abettor associate himself with the unlawful venture and participate in it with the intent that its illegal objective be obtained.”).
127. See discussion *supra* sections 1:1 and 1:1.1.
128. 15 U.S.C. §§ 78dd-1(a)(3), 78dd-2(a)(3) (emphasis added).
129. The 1988 Amendment deleted the “reason to know” standard relating to payments to third parties. However, there is little practical difference between the current “knowledge” standard and the prior “reason to know” standard. See discussion *infra* section 7.
130. See discussion of knowledge standard, *infra* section 7.
131. [Reserved]
132. 15 U.S.C. §§ 78dd-1(a), 78dd-2(a) (prohibits “authorization of the payment of any money, or . . . authorization of the giving of anything of value”).
133. Knowledge of the illicit payment would appear to be an implicit predicate to the “authorization.” One cannot “authorize” that which one does not know about. See H. REP. NO. 640, *supra* note 27, at 8. See also discussion on authorization, *infra* section 8.
134. For example, the Harris Corporation was indicted under the FCPA for authorizing a consultant retained by the Corporation to pay a portion of his commission to a Colombian official in order to obtain government contracts. *Harris Corp.*, reprinted in 2 FOREIGN CORRUPT PRAC. ACT REP. (Bus. Laws, Inc.) 698.95. See also *SEC v. Martin*, Accounting and Auditing Enforcement Rel. No. 2572 (Mar. 6, 2007), (settlement of an SEC enforcement action brought against the individual defendant who authorized an Indonesian consulting firm to make illicit payment for the benefit of the defendant's company).
- 134.1. See, e.g., *Saybolt Int'l B.V. v. Schreiber*, 327 F.3d 173 (2d Cir. 2003).
135. See discussion *infra* section 8.
136. 91 Stat. at 1495, 1497 (1977).
137. See Business Accounting and Foreign Trade Simplification Act: Joint Hearings on S. 414 Before the Subcomm. on International Finance and Monetary Policy and the Subcomm. on Securities of the Senate Comm. on Banking, Housing, & Urban Affairs, 98th Cong., 1st Sess. (1983) (Memorandum from Deputy Attorney General Edward C. Schmults) [hereinafter “Schmults Memorandum”]. In actuality, however, the requirement that a payment be made “corruptly” made it difficult to prosecute anyone under a negligence standard. Moreover, the Department of Justice had indicated that, as a matter of enforcement policy, it would not prosecute anyone under a negligence standard. See S. REP. NO. 486, *supra* note 124, at 25.
138. H.R. CONF. REP. NO. 576, *supra* note 92, reprinted in 1988 U.S.C.C.A.N. 1949, 1952–54.
139. 15 U.S.C. §§ 78dd-1(f)(2), 78dd-2(h)(3).
140. H.R. CONF. REP. NO. 576, *supra* note 92 at 919–21, reprinted in 1988 U.S.C.C.A.N. 1953–54 (citations omitted).
141. MODEL PENAL CODE § 2.02(d)(7) contains a similar standard:
 Requirement of Knowledge Satisfied by Knowledge of High Probability. When knowledge of the existence of a particular fact is an

element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist.

However, the Code provision applies only when what is involved is a matter of an existing fact, not circumstances. Model Penal Code Commentary, *supra* note 110, at § 2.02 cmt. 9. In contrast, the FCPA would impute knowledge not just of a particular fact, but of the criminal act itself.

- 141.1. See *United States v. King*, 351 F.3d 859 (8th Cir. 2002), wherein the court gave a deliberate ignorance instruction to the jury where the defendant was on notice of possible bribery activity and deliberately declined to investigate; see also *Information, United States v. Baker Hughes Servs. Int'l, Inc.*, No. CR H-07-0219 (S.D. Tex. Apr. 11, 2007) (alleging that the defendant's conduct was "knowing" when the defendant was instructed by a foreign, state-owned oil company to retain a certain "consultant," the defendant did retain the consultant even though it performed no legitimate services, and the defendant's employee stated that if the consultant were not retained "we can say goodbye to this and future business"); *Plea Agreement, United States v. Vetco Gray UK Ltd. and Vetco Gray Controls Ltd.*, No. CR H-07-004 (S.D. Tex. Feb. 6, 2007) (alleging the defendants' conduct was "knowing" within the meaning of the FCPA when the company's employees had been informed that they did "not want to know" what a foreign agent has to do to make deliveries clear customs, and when employees admitted that payments to the agent "likely lined customs' officials pockets").
142. See, e.g., *United States v. Puente*, 982 F.2d 156 (5th Cir.), cert. denied, 508 U.S. 962 (1993) (reckless indifference shown by defendant in failing to read form was sufficient to establish scienter requirement for the crime of fraud); *United States v. White*, 765 F.2d 1469 (11th Cir. 1985); *United States v. Dick*, 744 F.2d 546 (7th Cir. 1984).
143. *United States v. Jewell*, 532 F.2d 697 (9th Cir.) (en banc), cert. denied, 426 U.S. 951 (1976); see also *United States v. Shannon*, 137 F.3d 1112, 1115 (9th Cir.), cert. denied, 524 U.S. 962 (1998) (upholding the use of a Jewell Instruction).
144. *Jewell*, 532 F.2d at 702, cited with approval in H.R. CONF. REP. NO. 576, *supra* note 92 at 920, reprinted in 1988 U.S.C.C.A.N. at 1953.
145. *Id.* at 700 (quoting GLANVILLE WILLIAMS, *CRIMINAL LAW: THE GENERAL PART* § 57 at 157, 159 (2d ed. 1961)).
146. *United States v. Jacobs*, 475 F.2d 270 (2d Cir.), cert. denied, 414 U.S. 821 (1973).
147. *Id.* at 287 note 37, quoted with approval in H.R. CONF. REP. NO. 576, *supra* note 92, at 920, reprinted in 1988 U.S.C.C.A.N. 1953.
148. *United States v. Manriquez Arbizu*, 833 F.2d 244 (10th Cir. 1987).
149. *Id.* at 248.
150. See, e.g., the definition of "recklessly" in the Model Penal Code:
A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. . . .
Section 2.02(2)(c).
151. Clark comments, *supra* note 77. But cf. H.R. REP. NO. 40, 100th Cong., 1st Sess. 76

- (1987) (indicating that reckless disregard will not give rise to a criminal prosecution under the FCPA).
- 151.1. SEC v. El Paso Corp., Civil Action No. 07CV00899 (S.D.N.Y. Feb. 7, 2007).
 152. The Department of Justice never prosecuted a company or individual under the FCPA on the basis of “reason to know.” See S. REP. NO. 486, supra note 124, at 25.
 153. Department of Justice officials have remarked that the deletion of “reason to know” has changed neither the prosecution standard nor counsel’s advice. Clark comments, supra note 77. This is in fact the case.
 154. There are no specific instances of “red flags” identified in the FCPA. Rather, the term refers to information or circumstances that come to the attention of the U.S. company and that should have alerted it to the likelihood that a third party may be engaged in illicit conduct. Examples of red flags include abnormal commission requests, requests for payment in third countries, negative reference checks, press reports of improprieties, and midstream requests for additional compensation.
 155. 15 U.S.C. §§ 78dd-1(a), 78dd-2(a) (“authorization of the payment of any money, or . . . authorization of the giving of anything of value”).
 156. SEC v. Eric L. Mattson & James W. Harris, Accounting and Auditing Enforcement Rel. No. 1,444 (Sept. 12, 2001); Exchange Act Rel. No. 44,784 (Sept. 12, 2001); Accounting and Auditing Enforcement Rel. No. 1,447 (Sept. 12, 2001) (Baker and Hughes authorized its accountant/agent to pay a \$75,000 bribe to an Indonesian tax official to reduce the tax assessment against its wholly owned Indonesian subsidiary.) See also discussion on third-party payments, supra section 6.
 157. H.R. NO. 640, supra note 27, at 8.
 158. S. REP. NO. 430, 99th Cong., 2d Sess. (1986).
 159. Id. at § 104(b).
 160. S. REP. NO. 486, supra note 124, at 11.
 161. Id. The Senate Committee Report also indicated that the mere fact of doing business in a country where corrupt payments are common, or the employment of an agent with personal relationships with government officials of that country would not constitute authorization by course of conduct. Id. at 11–12.
 162. H.R. CONF. REP. NO. 576, supra note 92, at 919–20, reprinted in 1988 U.S.C.C.A.N. 1952–53. See also discussion on knowledge, supra section 7.
 163. See Schmults Memorandum, supra note 137, at 38.
 164. The Unlawful Corporate Payments Act of 1977, adopted by the House and considered by the Conference Committee, originally contained a provision which imposed liability on officers, directors, employees or agents who knowingly and willingly “acquiesced” in an act or practice in violation of the Act. H.R. 3815, 95th Cong., 1st Sess., § 30A(c)(1) (1977), reprinted in 1977 House Hearings, at 6. During Congressional hearings, the Department of Justice and other witnesses objected to using the word “acquiesce,” stating that it was too vague a concept upon which to predicate criminal liability. Id. at 22–25 (Letter from Patricia M. Wald, Assistant Attorney General, Office of Legislative Affairs, Department of Justice); Id. at 58 (Statement of Robert B. von Mehren, Chairperson, Ad Hoc Committee on Foreign Payments, Association of the Bar of the City of New York). The reference to “acquiesce” was not included in the final bill passed by the House.

165. See *Cont'l Baking Co. v. United States*, 281 F.2d 137, 149 (6th Cir. 1960); RESTATEMENT (SECOND) OF AGENCY § 43(2) (1958) (“Acquiescence by the principal in a series of acts by the agent indicates authorization to perform similar acts in the future.”).
166. See, e.g., *United States v. Richardson*, 596 F.2d 157, 162 (6th Cir. 1979) (“mere . . . acquiescence in the object or the purpose of the conspiracy, without an intention and agreement to cooperate in the crime is not sufficient to make one a conspirator.”) (quoting *United States v. Williams*, 503 F.2d 50 (6th Cir. 1974). Accord *United States v. Rodriguez*, 585 F.2d 1234, 1245 (5th Cir. 1978).
167. See *United States v. Gillen*, 599 F.2d 541 (3d Cir.), cert. denied, 444 U.S. 866 (1979) (corporate officer convicted of price fixing where he knew of illegal conduct and took no action to prevent subordinates from carrying it out).
168. *Pattis v. United States*, 17 F.2d 562 (9th Cir.), cert. denied, 274 U.S. 750 (1927). See also *United States v. Wilson*, 59 F.2d 97 (W.D. Wash. 1932) (corporation, whose agent made sales of yeast to purchaser known to make illegal liquor, held liable for agent’s actions).
169. *Pattis*, 17 F.2d at 566.
170. *Deacon v. United States*, 124 F.2d 352 (1st Cir. 1941).
171. *Id.* at 358.
172. *Id.* at 359.
173. *Id.* at 357. See also *Hyde v. United States*, 225 U.S. 347, 369 (1911) (to sustain claim of withdrawal, defendant must show an affirmative action to disavow or defeat the purpose of the conspiracy). Accord *United States v. Chester*, 407 F.2d 53, 55 (3d Cir.), cert. denied, 394 U.S. 1020 (1969).
174. [Reserved]
175. 15 U.S.C. §§ 78dd-1(a)(1), 78dd-2(a)(2).
176. H.R. CONF. REP. NO. 831, *supra* note 1, at 11–12.
177. *Id.* at 12.
178. H.R. REP. NO. 640, *supra* note 27, at 8.
179. 15 U.S.C. §§ 78dd-1(a), 78dd-2(a).
180. H.R. CONF. REP. NO. 576, *supra* note 92, at 918, reprinted in 1988 U.S.C.C.A.N. 1951. The domestic bribery statute prohibits offering or promising anything of value to any public official or person with the intent “to influence any official act; or to influence such public official or person. . . to commit or aid in committing . . . any fraud; or to induce such public official or such person . . . to do or omit to do any act in violation of the lawful duty of such official or person.” 18 U.S.C. § 201(b).
- 180.1. International Anti-Bribery and Fair Competition Act of 1998, *supra* note 24.2, §§ 2(a) and 3(a).
- 180.2. OECD Convention, art. I, ¶ 1. The OECD Commentaries indicate that “other improper advantage” refers to “something which the company concerned was not clearly entitled, for example, an operating permit for a factory which fails to meet that statutory requirements.” OECD Commentaries, *supra* note 78.7, at ¶ 5.
- 180.3 The above discussion is based on talks between the author and officials at the Department of Justice.
- 180.4. *United States v. Kay*, 200 F. Supp. 681 (S.D. Tex. Apr. 16, 2002). Cf. *SEC v. Mattson*, Civ. A. No. H-01-3106 (S.D. Tex. Sept. 9, 2002) (adopting the Kay court’s analysis

and dismissing the SEC 's anti-bribery claims on the grounds that the alleged payments did not constitute payment intended to obtain or retain business). The SEC 's appeal of the Mattson decision is stayed pending the outcome of the appeal in the Kay decision. See discussion in section 4:11, *infra*.

- 180.5. *Id.*
- 180.6. *United States v. Kay*, 359 F.3d 738 (5th Cir. 2004). See the discussion of this reversal in section 4:11, *infra*.
181. 15 U.S.C. §§ 78dd-1(a), 78dd-2(a).
182. H.R. CONF. REP. NO. 831, *supra* note 1, at 12.
183. H.R. CONF. REP. NO. 576, *supra* note 92, at 918, reprinted in 1988 U.S.C.C.A.N. 1951.
184. *Id.* The House bill for the 1988 amendments to the FCPA contained language that made clear that the term “obtaining or retaining business” covered payments for “procurement of legislative, judicial, regulatory, or other action in seeking more favorable treatment by a foreign government.” *Id.* This language was deleted in the Conference Committee and replaced with the above quoted Conference Report language.
185. *Id.* (referring to *United States v. United Brands Co.*, *supra* note 186).
186. See *United States v. United Brands Co.*, Cr. No. 78-538 (S.D.N.Y. 1978); *SEC v. United Brands Co.*, Civil No. 75-0509 (D.D.C. 1976) (An SEC action was followed by a criminal charge from the Justice Department alleging a conspiracy to commit mail fraud); see also discussion in Foreign Corrupt Practices Report—Legislative Report (No. 20) at 20-14 (July 1992), in 1 FOREIGN CORRUPT PRAC. ACT REP. (Bus. Laws, Inc.).
187. In FCPA Opinion Procedure Rel. No. 04-01 (Jan. 6, 2004), the Justice Department declined to take enforcement action against a U.S. law firm planning to hold a comparative law seminar on labor and employment law in Beijing, China where the firm had agreed to pay the travel and accommodation costs of Chinese government officials wishing to attend the seminar. In reaching this opinion, the Justice Department relied on a number of facts, including that the firm “ha[d] no business before the entities that may send officials to the seminar ” and that it “[was] unaware of any pending or anticipated business between the clients who will be invited to the seminar and the Chinese officials who will attend.”
188. See *United States v. Saybolt, Inc.*, 98 Cr. 10266 WGY (D. Mass. 1998); *United States v. Mead* Cr. 98-240-01 (D.N.J. 1998) (plea agreement and conviction for conspiracy to violate the FCPA and violation of the FCPA arising from a payment to Panamanian officials to obtain a favorable lease in the Panama Canal Zone). See also discussion in section 9 *supra*.
189. *United States v. Kay*, 359 F.3d 738 (5th Cir. 2004).
190. *Id.* at 755.
191. *Id.* at 748 (emphasis in original).
192. *Kay*, 359 F.3d at 750.
193. See *supra* note 184.
194. *Kay*, 359 F.3d at 753.
195. See also discussion in section 9 *supra*.
196. The SEC 's appeal of a related case, *SEC v. Mattson*, Civ. A. No. H-01-3106 (S.D. Tex. Sept. 9, 2002), is still pending.

197. 15 U.S.C. § 78u (2000), amended by Act of July 30, 2002; 15 U.S.C.A. § 78u (West Supp. 2003).
198. *Id.* §§ 78u, 78u-1.
199. *Id.* §§ 78u-2, 78u-3.
- 199.1. See *In re The Titan Corp.*, Litig. Rel. No. 19,107 (Mar. 1, 2005); *SEC v. Titan Corp.*, Civil Action No. 05-0411 (D.D.C. Mar. 1, 2005) (disgorgement and prejudgment interest in the amount of \$15, 479,000); *In re GE In Vision, Inc.*, Accounting and Auditing Enforcement Rel. No. 51,199 (Feb. 14, 2005) (disgorgement and prejudgment interest in the amount of \$617,700); *In re ABB Ltd.*, Accounting and Auditing Enforcement Rel. No. 20,496 (July 6, 2004) (disgorgement and prejudgment interest in the amount of \$5,915,000); *In the Matter of Statoil, ASA*, Administrative Proceeding, Exchange Act Rel. No. 54,599 (Oct. 13, 2006) (\$10.5 million disgorgement); *Plea Agreement, United States v. Baker Hughes Servs. Int’l, Inc.*, No. CR H-07-0129 (S.D. Tex. Apr. 11, 2007) (disgorgement and prejudgment interest totaled more than \$23 million).
200. 15 U.S.C. § 78u (2000), amended by Act of July 30, 2002, Pub. L. 107-204, 15 U.S.C.A. § 78ff(a) (West Supp. 1993). 15 U.S.C. § 78ff(a). See *United States v. Baker Hughes Services. Int’l, Inc.*, Criminal No. H-07-129 (S.D. Tex. Apr. 11, 2007) (plea agreement) (defendant knowingly and willingly aided, abetted and assisted in falsification of books and records); *United States v. UNC/Lear Servs., Inc.*, Indictment and Plea Agreement, reprinted in 2 FOREIGN CORRUPT. PRAC. REC. (Bus. Laws, Inc.) 600.050 (involving a violation of § 13(b)(2)(A) for failing to keep books, records, and accounts in reasonable detail by falsely recording payments). See also *United States v. Sam P. Wallace, Inc.*, Indictment and Plea Agreement, reprinted in 2 FOREIGN CORRUPT PRAC. REC. (Bus. Laws, Inc.) 690.01–.05 (involving a violation of § 13(b)(2)(A) for causing its wholly owned subsidiary to fail to keep books, records, and accounts in reasonable detail by creating false books and fictitious purchase orders to conceal a bribe to a foreign official); *United States v. Harris Corp.*, Indictment, reprinted in 2 FOREIGN CORRUPT PRAC. ACT REP. (Bus. Laws, Inc.) 698.95 (involving a violation of § 13(b)(2)(A) for creating certain check request forms and wire transfer and expense journal entries that falsely represented that Harris paid a retainer to its consultant). See also *United States v. O’Hara*, 960 F.2d 11 (2d Cir. 1992) (aiding and abetting acts of false record keeping).
201. *Id.*
202. *Id.* Unlike the accounting provisions, the bribery section of the FCPA is a criminal statute and separately provides for penalties and sanctions for violation of the foreign payment provisions. See *infra* section 8:1.2.
203. *Id.* (emphasis added).
204. 15 U.S.C. § 78m(b)(4), (5) (2000), amended by Act of Jan. 16, 2002, and July 30, 2002, 15 U.S.C. § 78m(b)(4), (5) (West Supp. 2003).
205. S. REP. NO. 486, 99th Cong., 2d Sess. 9 (1986).
206. No corresponding change was made to SEC Rules 13b2-1 and 13b2-2. Accordingly, a criminal violation of these rules would require a finding that the defendant acted “willfully,” or in the case of a false or misleading filing, “willfully and knowingly,” under 15 U.S.C. § 78ff(a).
207. See, e.g., *In re Colonial Ltd. P ’ship Litigs.*, 854 F. Supp. 64, 106 (D. Conn. 1994); *In re*

- Crazy Eddie Secs. Litig., 812 F. Supp. 338, 351 (E.D.N.Y. 1993); *United States v. Dixon*, 536 F.2d 1388, 1396 (2d Cir. 1976); *United States v. Peltz*, 433 F.2d 48, 54 (2d Cir. 1970), cert. denied, 401 U.S. 955 (1971); William B. Herlands, *Criminal Aspects of the Securities Exchange Act*, 21 VA. L. REV. 139, 148–49 (1934) [hereinafter “Herlands”].
208. Herlands, *supra* note 11, at 148–49. See discussion *supra*, chapter 4, note 46.1 and accompanying text.
209. *Id.* at 149.
210. *United States v. Peltz*, 433 F.2d 48, 54 (2d Cir. 1970), cert. denied, 401 U.S. 955 (1971).
211. *Id.* at 54–55. See also *Metromedia Co. v. Fugazy*, 983 F.2d 350, 364 (2d Cir. 1992), cert. denied, 508 U.S. 952 (1993); *Citron v. Citron*, 539 F. Supp. 621, 626 (S.D.N.Y. 1982), *aff’d*, 722 F.2d 14 (2d Cir. 1983), cert. denied, 466 U.S. 973 (1984); *Hentzner v. State*, 613 P.2d 821, 827 (Alaska 1980); *United States v. Chiarella*, 588 F.2d 1358, 1370 (2d Cir. 1978), *rev’d on other grounds*, 445 U.S. 222 (1980); *United States v. Charnay*, 537 F.2d 341, 351–52 (9th Cir.), cert. denied, 429 U.S. 1000 (1976).
212. See, e.g., *United States v. Erickson*, 601 F.2d 296, 304 n.12 (7th Cir.) (“It is not clear whether the requirement that defendants act ‘knowingly’ adds anything at all to the requirement that they act ‘willfully.’”), cert. denied, 444 U.S. 979 (1979); KATHLEEN F. BRICKEY, *CORPORATE CRIMINAL LIABILITY: A PRIMER FOR CORPORATE COUNSEL* § 8.15, at 45 & n.239 (2d ed. rev. 1994) (“Just what, if anything, the requirement of knowledge adds to the ordinary significance of the concept of willfulness is not entirely clear.”); LOUIS LOSS & JOEL SELIGMAN, *SECURITIES REGULATION* 4691–92 (3d ed. 1993) (“the word knowingly [is] redundant when it is used together with the word willfully.”). See also Tanya Epstein et al., *Securities Fraud*, 35 AM. CRIM. L. REV. 1167, 1176 (Spring 1998); Robert F. Koets, Annotation, What Constitutes “Willfulness” for Purposes of Criminal Provisions of Federal Securities Laws, 136 A.L.R. Fed. 457 (1997).
213. A violation of the bribery provisions by an issuer is explicitly excluded from the application of the general penalty provisions of the 1934 Exchange Act. See 15 U.S.C. § 78ff(a), as amended by § 103(b)(1) of the FCPA of 1977, Pub. L. No. 95-213, § 103(b)(1) (1977).
214. 15 U.S.C. §§ 78dd-2(g)(1)(A), 78ff(c)(1)(A) (2000).
215. 15 U.S.C. §§ 78dd-2(g)(2)(A), (2)(B), 78ff(c)(2)(A), (c)(2)(B), as amended by 18 U.S.C. § 3571.
216. 15 U.S.C. §§ 78ff(c)(2)(A), 78ff(c)(2)(B), 78dd-2(g)(2)(A); 78dd-2(g)(2)(B) (2000), amended by Act of July 30, 2002, 15 U.S.C. § 78ff(c) (West Supp. 2003).
217. See United States Sentencing Commission, *GUIDELINES MANUAL* § 8C3.1 (2004) [hereinafter “GUIDELINES MANUAL”], available at www.ussc.gov/2005guid/gl2005.pdf. However, where the organization is convicted of multiple counts, the maximum fine authorized by statute will increase accordingly.
218. See *id.* § 2B4.1.
219. *Id.* at Ch. 1, Pt. A, intro. comment. However, in *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738 (2005), the Supreme Court determined that the Federal Sentencing Guidelines violated the Sixth Amendment’s guarantee to a trial by jury, as they allowed judicial (rather than jury) fact-finding to form the basis for sentencing. The

- Court therefore held that the appropriate remedy was to make the guidelines advisory rather than mandatory.
220. 18 U.S.C. app. ch. 8 (1991).
 221. “Organizations” means a person other than an individual. The term includes corporations, partnerships, associations, joint-stock companies, unions, trusts, pension funds, unincorporated organizations, governments and political subdivisions thereof, and non-profit organizations. GUIDE- LINES MANUAL, *supra* note 21, § 8A1.1.
 222. *Id.* § 2C1.1(c)(1).
 223. See *id.* §§ 2C1.1(a), 5E1.2(a), (c).
 224. A violation of the bribery provision of the FCPA is, effective November 1, 2002, placed in the same category as the domestic bribery offense, at a base level of 14. *Id.* § 2C1.1. Willful violation of the accounting provisions is placed under the fraud and deceit category at a base level of 6. *Id.* § 2B1.1.
 225. See *id.*
 226. See *id.* §§ 8C2.1, 2C1.1(c).
 227. *Id.* § 8C2.5(c).
 228. *Id.* § 8C2.5(f).
 229. *Id.* § 8C2.5(g).
 230. 15 U.S.C. § 78ff(c) (2000), amended by Act of July 30, 2002, 15 U.S.C. § 78ff(c) (West Supp. 2004).
 231. 15 U.S.C. § 78u(d) (2000), amended by Act of July 30, 2002, 15 U.S.C. § 78u(d) (West Supp. 2003). See *SEC v. Sam P. Wallace Co., Inc.*, Complaint for Permanent Injunction, Consent and Undertaking of Sam P. Wallace Company, and Consent to Entry of Final Judgment of Permanent Injunction, reprinted in 2 FOREIGN CORRUPT PRAC. ACT REP. (Bus. Laws, Inc.) 683–90; *SEC v. Ashland Oil, Inc.*, reprinted in 2 FOREIGN CORRUPT PRAC. ACT REP. (Bus. Laws, Inc.) 696.95.
 232. 15 U.S.C. § 78dd-2(g)(1)(B) (2000).
 233. *Id.* § 78dd-2(d).
 234. 15 U.S.C. § 78ff(c)(3).
 - 234.1. See *SEC v. Baker Hughes Inc.*, Accounting and Enforcement Rel. No. 2602 (Apr. 26, 2007) (combined penalties and fines for Baker Hughes and its subsidiary, Baker Hughes Services. International totaled \$44 million); *U.S. v. Vetco Gray Controls Inc., Vetco Gray Controls Ltd., Vetco Gray UK Ltd. and Abel Group Ltd.* (S.D. Tex. 2007) (combined penalties and fines totaled \$26 million). In *United States v. The Titan Corp.*, Case No. 05CR0314 (S.D. Cal. Mar. 1, 2005), *supra* note 3.1, the company paid criminal and civil penalties totaling \$28.5 million; in *In re ABB, Ltd.*, *supra* note 3.1, the penalties totaled \$16.4 million. Each of these enforcement actions arose from a voluntary disclosure when FCPA violations were uncovered during pre-acquisition due diligence.
 - 234.2. See, e.g., *United States v. Monsanto* (Deferred Prosecution Agreement dated Jan. 6, 2005, available at www.usdoj.gov/dag/cftf/chargingdocs/monsantoagreement.pdf); *Micrus Corporation* (Non-Prosecution Agreement dated Feb. 28, 2005, available at www.usdoj.gov/dag/cftf/chargingdocs/micrusagreement.pdf); *United States v. In Vision Technologies, Inc.* (Non- prosecution Agreement dated Dec. 6, 2004; press release available at www.usdoj.gov/opa/pr/2004/December/04_crm_780.htm); *United States*

- v. Schnitzer Steel Industries, Inc., Deferred Prosecution Agreement (Oct. 16, 2006); press release regarding the settlement available at www.secinfo.com/d1znFa.v22t.7.htm.
235. 48 C.F.R. Ch. 1 (2006).
236. 48 C.F.R. § 9.406-2(a)(3) (2006). The reference to “bribery ” does not refer to the violation of any specific law or regulation.
237. For example, the Harris Corporation was suspended for authorizing its consultant to pay a portion of his commission to a foreign official. See *supra* note 4.
238. If legal proceedings are not initiated within twelve months after the date of suspension notice, the suspension must be terminated except in the case of an extension (up to six months) by the Assistant Attorney General. See 48 C.F.R. § 9.407-4(b) (2006); *Frequency Elecs., Inc. v. United States Air Force*, 151 F.3d 1029 (4th Cir. 1998) (applying eighteen-month maximum debarment unless legal proceedings are initiated).
239. See 48 C.F.R. § 9.406-1(a) (2006).
240. 22 C.F.R. § 709 (2006); 22 U.S.C. § 2197(l) (2001).
241. See, e.g., 22 C.F.R. § 208.305, 208.405 (2002) (Agency for International Development).
242. See Exec. Order No. 12,549, 51 Fed. Reg. 6,370 (Feb. 18, 1986); Notice, 53 Fed. Reg. 19,160 (May 26, 1988) (implementing uniform rules for government-wide suspension or debarment action for non-procurement activities).
243. Exec. Order No. 12,549, 51 Fed. Reg. 6,370 (Feb. 18, 1986).
244. 22 U.S.C. § 2778 et seq. (2000), amended by Act of Dec. 17, 2004, 22 U.S.C. § 2778(g)(3) and (g)(1)(A)(vi) (West Supp. 2003).
245. *Id.* § 2778(g)(3) and (g)(1)(A)(vi).
246. *Id.* § 2778(g)(4) and (g)(1)(A)(vi).
247. 22 C.F.R. § 120 (2006).
248. See 22 C.F.R. § 120.1(a).
249. 22 C.F.R. § 121 (2006).
250. 22 C.F.R. § 126.7(a) (2006).
251. See 22 C.F.R. § 126.7(a)(3) and (4); § 120.27(a)(6) (2006).
252. For example, Lockheed was barred indefinitely from exporting its C-130 Hercules aircraft as a result of charges that the company bribed an Egyptian official. This had the effect of undermining its \$1.6 billion bid to supply the United Kingdom with replacement transport aircraft. See *FIN. TIMES* (Aug. 26, 1994).
253. *Id.*
254. See 22 U.S.C. § 2778(g)(4) (2000), amended by Act of Dec. 17, 2004, 22 U.S.C. § 2778(g)(4) (West Supp. 2003). The Department of State has applied this same standard to the reinstatement of export privileges for indictments.
255. See also 22 C.F.R. § 126.7(a)–(b), which provides for the disapproval of a license where any party to the export, any manufacturer of the defense article or service or any person who has a significant interest in the transaction has been debarred or suspended under the ITAR; 22 C.F.R. § 127.1(c), which prohibits a person who knows that a party is suspended or debarred under the ITAR from purchasing for export any defense article or service from such person; Contractor’s Certification and Agreement with Defense Security Assistance Agency that requires, for any defense articles or services sold under the Foreign Military Sales program, the certification

- that the contractor is not suspended or debarred from conducting business with the U.S. government, that export privileges are not suspended or revoked, and that no suspended or debarred firm will be used as a source of supplies or as a subcontractor. Guidelines for Military Financing of Direct Commercial Contracts, issued by the Defense Security Cooperation Agency (Aug. 2001).
256. Ronald S. Cohn, a former tax partner in Dechert Price & Rhoads, contributed to this section.
 257. 26 U.S.C. § 162 (2000).
 - 257.1. In *United States v. Titan Corp.*, Case No. 05CR0314 (S.D. Cal. Mar. 1, 2005), Titan pled guilty to a three-count Information for violating the FCPA. One of the counts was for the preparation and filing of a tax return which included the improper payments as a tax deduction, in violation of 26 U.S.C. § 7206(2).
 258. 26 U.S.C. §§ 951–64 (2000), amended by Act of March 9, 2002, 26 U.S.C. § 951-64 (West Supp. 2003).
 259. In general, a CFC is a foreign corporation that is majority-owned or majority-controlled by U.S. persons who hold significant interests in the foreign entity. For this purpose, a significant interest is, in general, ownership of stock in the foreign corporation representing 25% or more of the value of, or voting power in, that company. See 26 U.S.C. § 957.
 260. For most corporations, an understatement is substantial if it is more than the greater of \$10,000 or 10% of the correct tax liability.