
H. Lowell Brown*

The Foreign Corrupt Practices Act is designed to prevent American-based corporations from essentially bribing foreign officials to facilitate acts that would otherwise not occur. Due to the structure of many corporations and the power structure of foreign officials, much uncertainty exists in determining when violations of the Foreign Corrupt Practices Act occur. This article examines the elements of and defenses to a violation of the Foreign Corrupt Practices Act and where some of the boundaries between legitimate acts and foreign bribery may lie. The author then discusses affirmative steps a company can take to avoid liability and punishment under the Foreign Corrupt Practices Act.

I. INTRODUCTION

As U.S. companies face the prospect of diminishing domestic markets, many have stepped up their efforts to identify and capture markets for their products overseas. However, recent prosecutions of companies resulting from their overseas marketing activities are vivid reminders that the Foreign Corrupt Practices Act (the “FCPA”) continues to be both vital and robust and, accordingly, must be addressed whenever a company structures a foreign transaction. Additionally, the United States has spearheaded an initiative before the Organization for Economic Cooperation and Development (OECD) to adopt a code of business practice concerning bribery. All of this suggests that the government

* Assistant General Counsel, Northrop Grumman Corporation; J.D. Antioch Law School, 1976; A.B. Syracuse University, 1969. The views expressed in this article are those of the author and do not necessarily reflect those of Northrop Grumman Corporation.

2. See Andy Pasztor and Bruce Ingersoll, Buying Business: Some Weapons Makers are Said to Continue Illicit Foreign Outlays, THE WALL ST. J., Nov. 5, 1993, at A5. Indeed, in July 1994, Lockheed Corporation was indicted in the Northern District of Georgia on charges of conspiracy and violations of the Foreign Corrupt Practices Act arising from payments to a member of the Egyptian Parliament in the form of “consulting fees” for each aircraft sold to the Egyptian Government.
may become more aggressive in enforcing the FCPA against U.S. companies seeking to do business abroad.

Following the Watergate Special Prosecutor's disclosure of corrupt payments to foreign officials and overseas agents by domestic companies, the U.S. Securities and Exchange Commission (the "SEC") undertook a broad-ranging investigation of foreign bribery by U.S. companies. The results of the SEC investigation were reported to Congress in 1976, which itself held hearings concerning overseas bribery. Together, these inquiries revealed widespread incidents of international bribery by over 300 companies involving corrupt payments of hundreds of millions of dollars.

Congress enacted the FCPA in response to these corrupt practices. In general, the FCPA made bribery of foreign officials a felony. The FCPA also established record-keeping and accounting requirements for companies registered with the SEC pursuant to the Securities Exchange Act of 1934. The U.S. Department of Justice and the SEC were each given responsibility for enforcement of the anti-bribery provisions of the FCPA, although the Department of Justice has sole authority over criminal prosecutions.

The FCPA was the subject of extensive criticism in the years following its enactment, primarily because the FCPA's "reason to know" standard was so ambiguous and broad that negligent actions could fall within its scope. In response to these criticisms, Congress enacted the Omnibus Trade and Competitiveness Act of 1988 to amend the FCPA.

As amended, the anti-bribery provisions of the FCPA prohibit the direct or indirect payment of money or "anything of value" to officials of a foreign government or political party in order to obtain or retain business. Thus, the elements of a violation of the FCPA are:

8. The SEC retained its enforcement jurisdiction over issuers pursuant to 15 U.S.C. § 78u (West Supp. 1994) while the Department of Justice was given jurisdiction to bring civil actions to enjoin violations by other domestic concerns. 15 U.S.C. § 78dd-2(d) (West Supp. 1994). As part of its authority in this regard, the Department of Justice was given authority to issue civil investigative demands. 15 U.S.C. § 78dd-2(d)(2) (West Supp. 1994).
9. As originally enacted, the FCPA prohibited payments to third parties when there was "reason to know that all or a portion of such money or thing of value [would] be offered, given or promised, directly or indirectly, to any foreign official . . ." 15 U.S.C. §§ 78dd-1(a)(3), -2(a)(3) (West Supp. 1977).
12. It has been held, however, that the foreign official who accepts the corrupt payment is not subject to prosecution under the FCPA. United States v. Castle, 925 F.2d 831 (5th Cir. 1991).
Mak[ing] use of the mails or any means or instrumentality of interstate commerce;

Corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value;

To any foreign official, foreign political party, political party official or candidate for political office;

For the purpose of influencing any official act or decision (including omission to act) or to induce such official to use influence to affect any act or decision;

In order to assist in obtaining or retaining business for, with or to any person. 3

The FCPA forbids such payments directly to the foreign government or political party official or 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." 4

The penalties for violating the FCPA are substantial. Individuals who violate the Act are subject to imprisonment for up to five years and may be fined not more than $100,000. Corporations may be fined up to $2,000,000. 5 Any fine imposed on an individual may not be paid, directly or indirectly, by the corporation. 6 The Attorney General also may seek injunctive relief against "domestic concerns" 7 which violate the Act. 8 The SEC retains its investigatory and enforcement powers over "issuers." 9

15. 15 U.S.C. § 78ff(c) (West Supp. 1994). Additionally, in cases of certain willful violations, 15 U.S.C. § 78ff(a) provides that individuals may be fined up to $1,000,000 and imprisoned up to 10 years and corporations may be fined up to $2,500,000.
17. The term "domestic concern" is defined by the FCPA, 15 U.S.C. § 78dd-2(h)(i), as meaning:
(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.

The term "issuer," as used in the FCPA, is defined in the Securities Act of 1933 as meaning, subject to certain inapplicable exceptions, "every person who issues or proposes to issue any security . . ." 15 U.S.C. § 77b(4) (West Supp. 1994).
The FCPA's prohibitions apply to any "issuer" of securities registered with the SEC, as well as to any "domestic concern" together with any of the officers, directors, employees and stockholders who are acting on behalf of the corporation.\textsuperscript{20} Additionally, the FCPA's prohibitions apply to agents of the corporation.\textsuperscript{21} Persons and entities, regardless of location, who have aided and abetted, conspired, or have caused others to commit prohibited acts are likewise subject to prosecution.\textsuperscript{22} Even a foreign subsidiary of a U.S. entity may be subject to prosecution as an aider and abettor, conspirator or agent of its U.S. parent.\textsuperscript{23} These provisions were not affected by the 1988 amendments.

Although the FCPA as enacted in 1977 was narrowed by the 1988 amendments, the reach of the Act and the range of activity subject to criminal prosecution is nevertheless quite broad. Accordingly, any company considering doing business abroad must diligently avoid transactions or relationships which might transgress the FCPA's still murky boundaries. This article discusses some salient features of the FCPA and analyzes some of the gaping pitfalls into which the unwary may stumble in the pursuit of foreign markets.

reflects Congress' condemnation of bribery by imposing both civil and criminal penalties on those who make payments in violation of the Act. These penalties demand that the business community conform to a certain standard of conduct. As such, the Act's purpose is to deter bribery, not to compensate those injured by the prohibited payments.

Nevertheless, private plaintiffs have been able to assert claims based on violations of the FCPA under the civil provisions of the Racketeering Influences and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1964(c), since foreign bribery may constitute a violation of the Travel Act, 18 U.S.C. § 1952(a)(3) (prohibiting any person from "[trav-eling] in interstate or foreign commerce or [using] any facility in interstate or foreign commerce, including the mail, with intent to . . . promote, manage, establish, carry on or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity [i.e., bribery]") which is a specified racketeering activity under 18 U.S.C. § 1961(1)(B). Environmental Tectonics v. W. S. Kirkpatrick, Inc., 847 F.2d 1052 (3rd Cir. 1988), aff'd, 110 S. Ct. 701 (1990); United States v. Young & Rubicam, 741 F.Supp. 334 (D. Conn. 1990) (decided under 18 U.S.C. § 1962(c)); see also Perrin v. United States, 444 U.S. 37 (1979) (commercial bribery constitutes an "unlawful activity" under the Travel Act). Plaintiffs grounding civil RICO claims on wrongful terminations resulting from their exposure to FCPA violations have not fared as well due to lack of standing. See, e.g., Reddy v. Litton Industries, Inc., 912 F.2d 291 (9th Cir. 1990); Nodine v. Textron, Inc., 819 F.2d 347 (1st Cir. 1987). Civil damages may also be available under the federal antitrust laws. See Lamb v. Phillip Morris, Inc., 915 F.2d at 1030.

\textsuperscript{21} 15 U.S.C. § 78dd-2(g) (West Supp. 1994). The agent must be "a United States Citizen, national or resident or otherwise subject to the jurisdiction of the United States (other than an officer, director, or stockholder acting on behalf of such domestic concern)." \textit{Id.}
\textsuperscript{22} See H. Rep. No. 640, Committee on Interstate and Foreign Commerce, 95th Cong., 1st Sess. 8 (1977) ("The Committee recognizes that the proposed bill will not reach all corrupt payments overseas. . . . The Committee notes, however, that in the majority of bribery cases investigated by the SEC, some responsible official or employee of the U.S. parent company had knowledge of the bribery and either explicitly or implicitly approved the practice. Under the bill as reported, such persons could be prosecuted. The concepts of aiding and abetting and joint participation would apply to a violation under this bill in the same manner in which those concepts have always applied in both SEC civil actions and in implied private actions brought under the securities laws generally.").
\textsuperscript{23} The Committee noted that its definition of "domestic concern" was intended to include "not only all U.S. companies other than those subject to SEC jurisdiction, but also foreign subsidiaries of any U.S. corporation." The Committee explained that it was necessary to extend coverage of the Act to subsidiaries based outside the U.S. because of "the extensive use of such entities as a conduit for questionable or improper foreign payments authorized by their domestic parent." \textit{Id.}
This article also examines the anti-bribery provisions of the FCPA and steps that companies can take to protect themselves from substantial criminal and civil liability. Part II analyzes the salient elements of a violation of the FCPA. Part III examines statutory affirmative defenses and exempt transactions. Part IV discusses compliance and due diligence efforts that a company can undertake to avoid violation of the FCPA.

II.

ELEMENTS OF FCPA VIOLATIONS

A. The Requisite Intent: "Corruptly" to Influence an Official Action

As noted above, the FCPA prohibits persons from "corruptly" using the mails or other means or instrumentalities of interstate commerce in furtherance of a payment or an offer, gift or promise or authorization of payment to a foreign official.24 The FCPA does not define the term "corruptly," which sets forth the intent required to establish a violation of the anti-bribery provisions.

The FCPA’s legislative history suggests that Congress intended the use of the term “corruptly” to be analogous to the intent to influence official action under the domestic bribery statute, 18 U.S.C. § 201(b).25 However, in its report accompanying the Senate bill, the Committee on Banking, Housing and Urban Affairs explained the inclusion of the term “corruptly” in the bill as follows:

The word “corruptly” is used in order to make clear that the offer, payment, promise, or gift, must be intended to induce the recipient to misuse his official position in order to wrongfully direct business to the payer or his client, or to obtain preferential legislation or a favorable regulation. The word “corruptly” connotes an evil motive or purpose, an intent to wrongfully influence the recipient. It does not require that the act be fully consummated, or succeed in producing the desired outcome.26

The report of the Committee on Interstate and Foreign Commerce of the House of Representatives expressed a similar intention in the use of the term “corruptly,” adding that “corruptly” connoted “an evil motive or purpose such as that required under 18 U.S.C. § 201(b) which prohibits domestic bribery.”

---

24. As originally enacted, the FCPA defined the term “foreign official” as including “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 such government or department, agency or instrumentality.” 15 U.S.C. §§ 78dd-1(b), -2(d)(2) (West Supp. 1994). Specifically excluded from the definition of “foreign official” was “any employee of a foreign government or any department, agency or instrumentality thereof whose duties are essentially ministerial or clerical.” Id. The definition of “foreign official” was broadened in the 1988 amendments by eliminating the exclusion of foreign employees whose duties are ministerial or clerical. 15 U.S.C. §§ 78dd-1(f), -2(h)(2) (West Supp. 1994). Thus, under current law, “foreign official” means “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.” Id.


Under that provision, "corruptly" means "an intent or desire to wrongfully influence the recipient." 

Although the reported decisions under the FCPA are not extensive, there is support for the view that the term "corruptly" is used in the same context as in the domestic bribery statute. In Northrop Corporation v. Triad Financial Establishment, the district court observed that, "in general terms, the FCPA criminalizes foreign corporate bribery." 

Of interest is the fairly recent decision in United States v. Liebo. There, the vice president in charge of the Aerospace Division of NAPCO International, Inc. was indicted for violations of the FCPA in connection with cash payments and the gift of airline tickets to the cousin and close personal friend of the chief of maintenance of the Nigerian Air Force whose recommendation was considered essential to obtaining a contract to maintain certain aircraft for the Nigerian Air Force. Although the cousin who received the payments was himself an official of the Nigerian Government (he was the consular officer in Washington,

---

27. See H.R. Rep. No. 640, 95th Cong., 1st Sess., 7-8 (1977). ("The word 'corruptly' connotes an evil motive or purpose such as that required under 18 U.S.C. § 201(b) which prohibits domestic bribery. As in 18 U.S.C. 201(b), the word "corruptly" indicates an intent or desire wrongfully to influence the recipient. It does not require that the act be fully consummated or succeed in producing the desired outcome."). The Committee report states:

[The bribery statute] broadly prohibits transactions that are corruptly intended to induce the recipient to use his or her influence to affect any act or decision of a foreign government. The word "corruptly" is used in order to make clear that the offer, payment, promise or gift, must be intended to induce the recipient to misuse his official position; for example, wrongfully to direct business to the payor or his client, to obtain preferential legislation or regulations, or to induce a foreign official to fail to perform an official function.

18 U.S.C. § 201(b) provides, in pertinent part:

Whoever -

(1) directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent -

(a) to influence any official act; or

(b) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(c) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of the lawful duty of such official or person;

shall be fined not more than three times the monetary equivalent of the thing of value, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.

In this connection, juries in bribery cases are instructed that an act is done "corruptly":

if it is performed voluntarily and deliberately and performed with the purpose of either accomplishing an unlawful end or result or of accomplishing some otherwise lawful end or lawful result by any unlawful method or means.


29. 923 F.2d 1308 (8th Cir. 1991).

30. Id. at 1309.
D.C.) the facts are clear that he was paid in order to influence the chief of maintenance.\(^{31}\)

Liebo was acquitted of all of the counts involving cash payments to the cousin and to three “agents” (two of whom were relatives of the maintenance chief and the other of whom was the cousin’s girlfriend).\(^{32}\) However, he was convicted of one FCPA count arising from Liebo’s purchase of airline tickets for the cousin as a “gift.”\(^{33}\) On appeal, Liebo argued that because the airline tickets were a gift, there was insufficient evidence of intent to obtain or retain business and there was insufficient evidence that the gift was made corruptly. The court rejected these arguments.\(^{34}\)

With respect to the intent to obtain or retain business, the court noted that because of the recipient’s personal relationship with the maintenance chief, the jury could infer that the gift was made to “buy” the other’s help in gaining approval of the contract.\(^{35}\) The court also pointed out that the contract had been approved a few weeks after the airline tickets had been given to the cousin.\(^{36}\)

The court also found sufficient evidence to sustain the finding that the gift had been made “corruptly.”\(^{37}\) In this regard, the court noted: 1) the tickets had

\(^{31}\) Id. at 1310.
\(^{32}\) The acquittals appear to have resulted from the jury’s conclusion that the cash payments had been authorized by Liebo’s supervisor. For that reason, the court suggested that Liebo had acted at his supervisor’s direction and had not himself acted corruptly. *Liebo*, 923 F.2d at 1314 (“Indeed, we believe that the company president’s approval of the purchase of the tickets is strong evidence from which the jury could have found that Liebo acted at his supervisor’s direction and, therefore, did not act ‘corruptly’ by giving the tickets to [the official’s cousin].”) \(^{33}\) Id.
\(^{34}\) Id.
\(^{35}\) The benefit constituting the bribe does not have to be conferred on the public official directly but instead may be conferred on a third party. In *United States v. Biaggi*, 909 F.2d 662 (2d Cir. 1990), payments requested by former Congressman Biaggi to be paid to his son’s law firm were held to constitute a bribe. Similarly, in *United States v. Kelly*, 748 F.2d 691 (D.C. Cir. 1984), former Congressman Richard Kelly was convicted of bribery for agreeing to assist two FBI agents, posing as Arab sheiks, with an “immigration problem” in exchange for a cash payment to an associate of Kelly who had helped obtain honoraria for speaking engagements and whom Kelly hoped would assist in a future real estate transaction. *Id.* at 694-695. The offer of a share in the profits of a bar in exchange for the transferring of a liquor license was held to confer a sufficient benefit on the mall operator/landlord to sustain the bribery conviction of a Chairman of an Alcoholic Beverage Commission in *United States v. Lewis*, 716 F.2d 16 (D.C.Cir. 1983). Payments to political allies of the Chairman of the Republican Party Committee were also the basis of a Hobbs Act conviction in *United States v. Margiotta*, 688 F.2d 108 (2d Cir. 1982), cert. denied, 461 U.S. 913 (1983). Finally, the payment of a campaign debt owed to a third-party creditor was held to be an unlawful campaign contribution in *United States v. Chestnut*, 553 F.2d 40 (2d Cir.), cert. denied, 429 U.S. 829 (1976).

Payment to third parties have also served as the basis for bribery and extortion convictions under the Taft-Hartley Act and the Hobbs Act. In *United States v. Carlock*, 806 F.2d 535 (5th Cir. 1986), cert. denied, 480 U.S. 949 (1987), payments extorted by a union official were made in the form of equipment rental payments to a company owned by the union official’s former daughter-in-law. Similarly, in *United States v. DeBrouse*, 652 F.2d 383 (4th Cir. 1981), payments made to a friend and nominee of a union official constituted a violation of the Hobbs Act despite there being no proof that the union official benefitted from the payments. And, in *United States v. Lanni*, 466 F.2d 1102 (3d Cir. 1972), salary payments made to a union official’s girlfriend were determined to be far in excess of the value of her position and thus in violation of the Taft-Hartley Act.

\(^{36}\) 923 F.2d at 1311.
\(^{37}\) Id.
been given to the cousin shortly before the contract was approved; 2) there was "undisputed evidence concerning the close relationship" between the recipient and the maintenance chief; and 3) the recipient classified the tickets as a "commission payment" for accounting purposes. Thus, the court concluded that a reasonable jury could find that the tickets were given with the intent "to influence the Niger Government's contract approval process." Thus, Liebo is in accord with the view that the term "corruptly" connotes an intent to influence an official action.

In prosecutions for domestic bribery under 18 U.S.C. § 201(b), it has long been settled that "corruptly . . . in return for being influenced" defines the required intent "incorporating a concept of the bribe being the prime mover or producer of the official act." In contrast to the gratuities provision, 18 U.S.C. § 201(g), "the bribery section makes necessary an explicit *quid pro quo* which need not exist if only an illegal gratuity is involved; the bribe is the mover or producer of the official act. . . ." As was explained in *United States v. Johnson*:

To establish the crime of offering a bribe under § 201(b)(1), the government must show that the money was knowingly offered to an official with the intent and expectation that, in exchange for the money, some act of a public official would be influenced. The money must be given with more than some generalized hope or expectation of ultimate benefit on the part of the donor. . . . The money must be offered, in other words, with the intent and design to influence official action in exchange for the donation. (Citation omitted.)

The case law under the domestic bribery statute is consistent with Liebo that corrupt intent involves the payment or offer of something of value in order to obtain, or in exchange for, favorable official action. However, while this analysis would suggest that the subjective intent of the offeror is determinative of whether a payment, or offer, was made corruptly, in fact, the determination of intent is made after the fact, by a judge or jury, based on inferences drawn from

---

38. *Id.*
39. *Id.* at 1312. Liebo's conviction was remanded for a new trial. *Id.*
41. *Id.* at 72; *See also United States v. Strand*, 574 F.2d 993, 995 (9th Cir. 1978).
42. 621 F.2d 1073, 1076 (10th Cir. 1980).
43. As in the FCPA, the term "corruptly" is not defined in 18 U.S.C. § 201(a). The bribery statute has been upheld against a challenge on grounds of vagueness. *See United States v. Pommerening*, 500 F.2d 97, 99 (10th Cir.), *cert. denied*, 491 U.S. 1088 (1974) ("the words 'corruptly,' 'value,' and 'influence' are applied in their ordinary, everyday sense. Congress intended § 201(b) to prohibit individuals from giving government employees, while they are acting in their official capacity, compensation in return for special favors. Clearly a person of common intelligence would understand from reading § 201(b) that giving compensation to a government official in exchange for preferential treatment is not allowed.").
44. Although the case law is generally to the effect that a specific *quid pro quo* is required to prove bribery, at least one case, *United States v. Baggett*, 481 F.2d 114 (4th Cir.), *cert. denied*, 414 U.S. 1116 (1973), found that despite there being no specific *quid pro quo* shown for a specific payment, the evidence of "a course of conduct of favors and gifts," and the receipt of favorable zoning rulings apparently in return, was "ample to show Baggett's corruption by the unprincipled greed of a wealthy man and Baggett's preference for favors and gifts over his public duty," from which the jury could infer that the cash payment to Baggett "represented a payment . . . for continuing favorable zoning rulings." 481 F.2d at 115.
the surrounding circumstances. As a general matter, a criminal defendant's bald denial that the defendant's action was taken without the proscribed criminal intent will not result in acquittal. Rather, juries and judges look to the evidence of the surrounding facts and circumstances in order to draw an inference as to the defendant's state of mind at the time an alleged crime occurred.\textsuperscript{45}

For example, in the trial of former Congressman Mario Biaggi, and others, on charges of bribery and extortion in connection with various transactions involving the Wedtech Corporation, there was evidence that a $50,000 payment to Biaggi's law firm was in actuality a corrupt payment to Biaggi. The defense compensation contended that the $50,000 payment was compensation for legal services in which Biaggi shared by virtue of his and his son's relationship to the law firm.\textsuperscript{46} On appeal, the court observed that based on the evidence:

the jury was entitled to find that the $50,000 payment had two purposes. It was sought in part as compensation for legal services rendered by the law firm. But in part it was also a payment demanded by Biaggi (and directed to his son's firm) to obtain his assistance as a public official in securing favorable action from other public officials.\textsuperscript{47}

Interestingly, the court held that a valid or lawful purpose for a transaction will not "insulate participants in an unlawful transaction from criminal liability" if there is evidence from which a jury could find "that the unlawful purposes were of substance, not merely vague possibilities that might attend an otherwise legitimate transaction."\textsuperscript{48} Because a violation of the FCPA requires an intent to provide something of value in order to procure favorable governmental action, the provision of a benefit to a foreign official theoretically cannot transgress the FCPA without a \textit{quid pro quo}. It is difficult to conceive of a payment to a foreign official for the purpose of obtaining or maintaining business that would not at least support the inference of a corrupt purpose, sufficient to sustain a verdict of guilt. This is so even if there is an arguably legitimate basis for the transaction, as in Biaggi, so long as there is evidence that there was an unlawful purpose "of substance."\textsuperscript{49}

Moreover, the determination of whether a transaction was entered into with corrupt intent is made in the cold light of retrospection, based on a \textit{post hoc}
evaluation of the circumstances surrounding the transaction. If the transaction results in an economic benefit being conferred on a decision-making official (or on a close friend or family member as in *Liebo*), the inference of a corrupt purpose appears insurmountable.50

B. The Recipient of the Corrupt Payment: Any "Foreign Official"

The FCPA defines "foreign official" 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."51 The FCPA parallels the domestic bribery statute in this respect as well.52

As enacted in 1977, the term "foreign official" did not include "employees whose duties were primarily ministerial or clerical."53 This limitation was eliminated in the 1988 amendments. The U.S. Department of Justice has stated that removal of the exclusion of ministerial or clerical employees from the reach of the FCPA is consistent with the 1988 amendments' focus on the purpose of the payment rather than the position or duties of the person receiving the payment.54

The analogous term, "public official," under the domestic bribery statute, has been construed broadly. In *Dixson v. United States*,55 the United States Supreme Court held that officers of a private, nonprofit corporation that administered federal community development block grants were "public officials" notwithstanding the fact that neither the individuals nor the corporation had en-

---

50. Particularly so, because the purpose of the payment, i.e., "obtaining or retaining business," is construed broadly. The term "retaining business" was not restricted to the renewal of existing business relationships but embraced other matters pertaining to the conduct of the business. As stated in the 1988 Conference Report:

> The Conference wishes to make clear that the reference to corrupt payments for "retaining business" in present law 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.

*Id.* at 918. The Conferences added, however, that "[t]he term should not . . . be construed so broadly as to include lobbying or other normal representations to government officials." *Id.* at 918-919.


52. As defined in 18 U.S.C. § 201(a), the term "public official" includes an officer or employee or person acting for or on behalf of the Unites States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government . . . ."


> Prior to the amendment of the FCPA in 1988, the term "foreign official" *did not include* any employee of a foreign government or agency whose duties were essentially ministerial or clerical. Determining whether a given employee's duties were "essentially ministerial or clerical" was a source of ambiguity. . . . Accordingly, recent changes in the FCPA focus on the *purpose of the payment*, instead of the particular duties of the official receiving the payment, offer, or promise of payment . . . (emphasis in original).

*Id.*

tered into an agreement with the government or an agency of the United States. In the Court’s view, as expressed in *Dixson*, all that is required to qualify as a public official is that “an individual must possess some degree of official responsibility for carrying out a federal program or policy.” The Supreme Court enunciated its “test” for qualification as a “public official” as follows:

To determine whether any particular individual falls within this category, the proper inquiry is not simply whether the person had signed a contract with the United States or agreed to serve as the government’s agent, but rather whether the person occupies a position of public trust with official federal responsibilities. Persons who hold such positions are public officials within the meaning of § 201 and liable for prosecution under the Federal Bribery Statute.5

For example, private grain inspectors acting on behalf of the U.S. Department of Agriculture have been held to be public officials, as have a building service manager of a branch of the Federal Reserve Bank, an examining physician for a Selective Service Board, and an independent contractor with authority to conduct bidding for repairs of HUD properties.

The distinction between a private individual and a foreign official may blur in other cultures. Particular care must be exercised, for example, in countries in which members of the royal family may be involved in commercial enterprises or where members of the government are also owners of, or have a financial interest in, commercial entities with which the U.S. concern may contemplate doing business. In any event, it should be anticipated that prosecutors and the

---

56. Id. at 499.
57. Id. at 496.
58. See also *United States v. Kirby*, 587 F.2d 876 (7th Cir. 1978) (A milk-market administrator was also held to be a public official despite the fact that he was not a federal employee and was not paid with federal funds). *United States v. Levine*, 129 F.2d 745 (2nd Cir. 1942).
59. *United States v. Hollingshead*, 672 F.2d 751 (9th Cir. 1982).
60. *Kemmler v. United States*, 133 F.2d 235 (1st Cir. 1942).
62. The D.O.J. has recommended its opinion procedure to determine “whether a member of a royal family, a member of a legislative body, or an official of a state-owned business enterprise would be considered a ‘foreign official’.” U.S. Dept. of Justice, *supra* note 47 at 5.

The D.O.J. has issued several opinions under this procedure respecting proposed transactions with “foreign officials.” In No. 80-01, the D.O.J. stated that it did not intend to take enforcement action against a U.S. law firm in connection with a fund established to provide a U.S. education for two adopted children of an “honorary official” of a foreign country in which the law firm sought to do business. 3 FOREIGN CORRUPT PRACTICES ACT REPORTER 711 (Business Laws, Inc. 1980). It was noted that the adoptive parent’s official duties were “only ceremonial and do not involve substantive decision making responsibilities.” Similarly, the natural parents, although employed by the foreign government, were not in a position to benefit the law firm or its clients who contributed to the fund. *Id.*

In another opinion, No. 80-04, issued at the same time, the D.O.J. also stated that it would not take enforcement action against Lockheed Corporation, which proposed to join with a Saudi Arabian company in transactions with the Saudi Arabian Airlines Corporation (“Saudia”), where the chairman of the Saudi company was a director of Saudia. *Id.* at 712-713. It was noted that the director of Saudia was not deemed to be an officer of Saudia or of the Saudi Arabian government and that Saudi
courts will be expansive in their construction of "foreign official" in enforcing the FCPA.

In United States v. Young & Rubicam, Inc., a United States advertising firm was prosecuted for making payments to, among other people, a Jamaican businessman in order to obtain the advertising account of the Jamaican Tourist Board. According to the indictment, the businessman, Arnold Foote, was a consultant to the Jamaican Tourist Board with close political ties to the Jamaican Prime Minister.

Payments to officers of state-owned commercial enterprises have also been the subject of FCPA prosecutions. Goodyear International Corporation was prosecuted for payments made to officials of the Iraqi Trading Company, a state-

law did not prohibit his contemporaneous activities on behalf of Lockheed. Id. It was also noted that the business relationship with Lockheed would be disclosed and that the director would abstain from voting on matters concerning Lockheed or otherwise attempting to influence Saudia on behalf of Lockheed. Id.

In No. 82-02, the payment of a one-percent finder’s fee by a U.S. corporation (Shoup, Inc.) to a temporary employee of the Nigerian Consulate did not warrant enforcement action. Id. at 716-718. Here again, it was noted that the relationship did not violate Nigerian conflict of interest laws and that the Nigerian consultant was not in a position to influence the decision of the Nigerian customer for the benefit of Shoup, Inc. Id.

The D.O.J. also declined to take enforcement action in No. 82-4, in which a U.S. company had a commission sales representative relationship with the brother of an employee of the government to which the sale of a generator had been made. Affidavits had been submitted by both the representative and his brother “in which they pledged adherence to the antibribery provisions of the FCPA.” Id. It was also noted that the commission payments would be made in the foreign country in accordance with applicable currency control laws. Id.

A consulting agreement with a former government official for purposes of gathering information to negotiate the settlement of a claim was not deemed actionable in No. 85-2. Id. at 722.01 The consultant did not hold public office and was not an official of a political party or candidate for political office at the time of the proposed agreement. Id.

In No. 86-1, the Department of Justice stated it would take no enforcement action even though the proposed consultants were members of Parliament in their respective countries. Id. at 723. The opinion involved requests from three U.S. companies proposing to retain as consultants members of the British and Malaysian Parliaments. Id. The Department of Justice observed that: 1) none of the MPs occupied a position of special influence; 2) the compensation of the MPs was reasonable; 3) the employment relationship complied with all laws; 4) the MPs had agreed to make full disclosure of the relationship with the U.S. company; and, 5) the MPs had agreed not to vote on behalf of the U.S. companies or otherwise exercise legislative influence to benefit the U.S. companies. Id. The D.O.J. also noted that the parties had agreed to comply with all U.S. laws and that detailed records of expenditures would be kept by the U.S. companies. Id.

64. As described in the indictment, Foote was a prominent Jamaican citizen with close political ties to the Jamaican Labor Party and to the Administration of Prime Minister Edward Seaga. Foote served as executive chairman of Martin’s Travel, an instrumentality of the Government of Jamaica, and he also acted in an official capacity on behalf of the Minister of Tourism and the Jamaica Tourist Board as an advisor to the Government of Jamaica with respect to tourism, advertising and public relations matters, including the selection and retention of an advertising agency for the Jamaica Tourist Board.

2 FOREIGN CORRUPT PRACTICES ACT REPORTER at 698.38 ¶11f.

The SEC also brought a civil injunctive action under the FCPA against Ashland Oil, Inc., as a result of improper payments made to a British national who was serving as an advisor to the Sultan of Oman, a position apparently within the definition of a "government official" under Omani law. Id. 696.95-697.09.
owned trading organization through which the Iraqi government purchased tires for resale in Iraq.\footnote{65} In another case, the Sam P. Wallace Company, Inc. was

\footnote{65} Id. at 698.1601-698.22.

The D.O.J. has concluded that enforcement action was not warranted in other instances in which a U.S. company proposed making payments to commercial enterprises owned by foreign governments. In D.O.J. Opinion No. 82-03, an American company seeking to do business in Yugoslavia was informed that in order to transact business with the Yugoslav military, it was required that there be an agency agreement with the government-controlled trade organization. \footnote{Id. at 718.} Accordingly, the American company proposed to enter into a sales agent relationship with the trade organization under which the American company would pay a commission based on the contract price of the defense acquisition and a commission based on each successive equipment or spare parts contract. \footnote{Id.} The D.O.J. noted in this regard that the commission agreement and the amount of the fee would be identified in the contract and that payment would be made in Yugoslavia. \footnote{Id.} The agreement further provided that the agency relationship would be disclosed in the purchase contract. \footnote{Id.} The D.O.J. noted as well that there was "no expectation that any individual government official [would] personally benefit from the proposed agency relationship." \footnote{Id.}

A similar proposed transaction was reviewed by the D.O.J. in Opinion No. 83-01. There, a U.S. company sought to sell communications equipment in the Sudan utilizing the marketing services of a Sudanese news and communications corporation, the chief executive of which was appointed by the President of Sudan. \footnote{Id.} The Sudanese company was to receive a percentage commission based on the sales. \footnote{Id.} The D.O.J. concluded that enforcement action would not be warranted because the commission payments were to be made in the Sudan, and because the agency relationship would be disclosed in any sale contract and there was no expectation that any individual government official would benefit personally from the agency relationship. \footnote{Id.}

In a third opinion, No. 88-1, an American company was required to make payments totaling $362,000 to the financial agent of the government of Mexico as a prerequisite to qualifying to participate in a debt-equity swap program in connection with the company's construction of a manufacturing facility in Mexico. \footnote{Id. at 725.} The payments were nonrefundable and were to be made without assurance of acceptance into the program. \footnote{Id.} The D.O.J. declined enforcement action based on the company's representations that it would secure written confirmation that the payee was the authorized representative of the Mexican government and that none of the fees would be used for a purpose prohibited by the FCPA. \footnote{Id.} The company also represented that it would obtain a written opinion from Mexican counsel that the payments to the government of Mexico and its financial representative did not violate Mexican law. \footnote{Id.}

Recently, in Opinion No. 93-1, a Texas corporation proposed a joint venture agreement with a quasi-commercial entity owned by "the government of a former eastern bloc country." \footnote{Id. at 726.} It was contemplated that the U.S. company would supply management expertise and the foreign partner would provide financing. To effect the joint venture, a separate legal entity was formed in the foreign country which would be overseen by a board of directors comprised of representatives of both parties who would be paid $1000/month. \footnote{Id.} The D.O.J. concluded that the foreign partner was "an instrumentality of the foreign government for purposes of the FCPA" and thus, there was an issue of compliance with the FCPA with respect to the payment of fees to the board representatives of the foreign partner. \footnote{Id.} The U.S. company represented in this regard that the fees to the foreign directors would be reimbursed by the foreign partner either from its share of the profits or from other funds. \footnote{Id.} Based on these facts and circumstances, the Department of Justice stated that it did not intend to take enforcement action. \footnote{Id.}

In Opinion No. 93-2, the Department of Justice declined enforcement action in regard to another transaction which involved a sales agreement between a U.S. company and a foreign government-owned company which held the exclusive license to import and sell defense equipment for the country's armed forces. \footnote{Id. at 727.} In order to do business in the foreign country, the U.S. company had to agree to pay the government-owned company, which acted as the agent for the military forces, a percentage of the total contract price for the sale of equipment. \footnote{Id.} The U.S. company represented to the Department of Justice that it would enter into an agreement with the government-owned company under which the payment of the commissions would be made directly to the country's treasury, or alternatively would be deducted by the customer from the purchase price and therefore, no payments would be made directly to the government-owned company or any foreign officials. \footnote{Id.}
prosecuted for payments made to the chairman of the Trinidad and Tobago Racing Authority for obtaining contracts to construct the grandstand for the Caroni Racetrack. Similarly, various companies and individuals were prosecuted in connection with payments made to officials of Petroleous Mexicanos, an oil company owned by the Mexican government.

Accordingly, as in the domestic bribery statute, persons falling within the category of "foreign officials" are not limited strictly to government officials. That is, the term foreign official may also apply to officers and employees of state-owned enterprises and other persons (i.e. consultants) who exercise official influence over those enterprises.

C. The Medium of Payment: "Anything of Value"

The FCPA prohibits the payment, offer, gift or authorization of the giving of "anything of value." In this respect, the FCPA again parallels the domestic bribery statute. Although typically the medium of the corrupt payment is cash or a cash equivalent, the term "thing of value" is not so restricted. For exam-

66. United States v. Sam P. Wallace Co., id. at 690.01-690.04.
67. These cases arose in connection with the decision by Petroleous Mexicanos (PEMEX) to acquire approximately $600 million in turbine compression equipment systems in order to end the flaring and resulting loss of natural gas resources. In 1977, Crawford Enterprises, Inc., a seller of turbine compression equipment systems, agreed to pay several officers and employees of PEMEX the equivalent of approximately five percent of each purchase of equipment in which Crawford Enterprises participated. Thereafter, other suppliers of such equipment, including Ruston Gas Turbines, Inc., International Harvester Co. (through its subsidiary Solar Turbines International), and C.E. Miller Corp. as well as a sales representative based in the U.S., Applied Process Overseas, Inc., joined in conspiracy with Crawford to violate the FCPA. See United States v. Ruston Gas Turbines, Inc., reprinted in 2 FOREIGN CORRUPT PRACTICES ACT REPORTER at 696.38-696.41; United States v. Crawford Enterprises, Inc., id. at 696.53; United States v. International Harvester Co., id. 696.27-696.32; United States v. C.E. Miller Corp., id. at 696.42-696.45; and United States v. Applied Prod. Overseas, Inc., id. at 696.42-696.45.
69. Like the domestic bribery statute, the FCPA does not define the term "anything of value."
70. See, e.g., Kirkpatrick & Co. v. Environmental Tectonics Corp., 493 U.S. 701 (1990) (payment of 20 percent commission to Panamanian entities controlled by Nigerian sales representatives used to make corrupt payments to Nigerian officials to obtain contract for construction of aero-medical center); United States v. O'Hara, 960 F.2d 11 (2nd Cir. 1992) (payment to marketing representative for "incidental fees," which was used to pay bribes to Columbian officials to obtain telecommunications contracts); United States v. Castle, 925 F.2d 831 (5th Cir. 1991) ($50,000 payment to Canadian government officials to obtain contract to provide bus service to Saskatchewan Province); Clayco Petroleum Corp. v. Occidental Petroleum Corp., 712 F.2d 404 (9th Cir. 1983) (payment of $417,000 to petroleum minister of Umm Al Qaywayn to obtain off-shore oil concessions); Gaines v. Haughton, 645 F.2d 761 (9th Cir. 1981) (between 1961 and 1975, Lockheed paid $30-38 million directly to foreign officials in connection with foreign sales of Lockheed Aircraft); Dooley v. United Technologies Corp., 803 F.Supp. 428 (D.D.C. 1992) (payments amounting to 55% of the profits from sales to members of the Saudi royal family through a designated agent to facilitate sales of Black Hawk Helicopters); United States v. Young & Rubicam, Inc., 741 F.Supp. 334 (Conn. 1990) (five percent commission to be paid to the consultant to the Jamaican Tourist Board to "take care of" the Jamaican Minister of Tourism so that Young and Rubicam would obtain the public relations account of the Jamaican Travel Board); and Northrop Co. v. Triad Fin. Establishment, 593 F. Supp. 928 (C.D. Cal. 1984) (payment of $450,000 through sales representative to officials of the Royal Saudi Air Force to obtain contracts for the sale of aircraft and related equipment). See also, cases involving "sensitive" or "questionable" payments made prior to the enact-
ple, charitable donations, travel expenses, loans with favorable interest and repayment terms, transportation of household goods, the services of a prostitute, golf outings, sports equipment, an automobile, and a college scholarship have been held to constitute bribes under the FCPA and the bribery statute. Indeed, the term “thing of value” has been recognized as a term of art that includes both tangible and intangible objects.

Examples of cases involving such “intangibles” include the prosecution of former U.S. Senator Harrison A. Williams for violation of the domestic bribery statute. The “thing of value” offered to Senator Williams in exchange for using his legislative influence was stock in a fictitious titanium mining venture created by the FBI as part of the ABSCAM investigation. In another case, the making of a loan to an Assistant United States Attorney who was not credit-worthy constituted a “thing of value” although the loan was subsequently repaid, as did the promise of further employment in the same case. Similarly, the representation that a contribution would be made to the reelection campaign of President Nixon in exchange for not pursuing a criminal investigation was also recognized as an offer of a bribe. It has been held, therefore, that the term “thing of

\[\text{Sedco Int'l, S.A. v. Cory, 683 F.2d 1201 (8th Cir.), cert. denied, 459 U.S. 1017 (1982) (payment of $1.5 million to the brother of the Director of the Qatar Department of Petroleum Affairs in order to obtain offshore oil concession). Such a transaction was vividly described in an affidavit of one of the participants which was quoted in In Re Sealed Case, 676 F.2d 793, 798 (D.C. Cir. 1982).}\]

\[\text{Lamb v. Phillip Morris, Inc., 915 F.2d 1024 (6th Cir. 1990) (agreement to make donations totalling $12.5 million to the Children's Foundation of Caracas, whose president was the wife of the President of Venezuela, in exchange for elimination of cigarette price controls and other tax considerations).}\]

\[\text{United States v. Liebo, 923 F.2d 1308 (8th Cir. 1991); United States v. Alessio, 528 F.2d 1079 (9th Cir.), cert. denied, 426 U.S. 948 (1976) (payment of vacation expenses of prison official in exchange for favorable treatment of incarcerated father).}\]

\[\text{United States v. Hare, 618 F.2d 1085 (4th Cir. 1980).}\]

\[\text{United States v. Campbell, 684 F.2d 141 (D.C. Cir. 1982) (under the gratuity provision of 18 U.S.C. § 201(c)(3)).}\]

\[\text{United States v. Tunnell, 667 F.2d 1182 (6th Cir. 1982).}\]

\[\text{United States v. Standefer, 610 F.2d 1076 (3d Cir. 1979), aff'd, 447 U.S. 10 (1980); United States v. Niederberger, 580 F.2d 63 (3d Cir. 1978).}\]


\[\text{United States v. Pommerening, 500 F.2d 92 (10th Cir.), cert. denied, 419 U.S. 1088 (1974) (Ford Blazer given to minority enterprise representative of the Small Business Administration).}\]

\[\text{United States v. McDade, 827 F. Supp. 1153 (E.D. Pa. 1993), (corporation gave scholarship to a son of a U.S. Congressman).}\]

\[\text{See United States v. Griard, 601 F.2d 69, 71 (2nd Cir.), cert. denied, 444 U.S. 871 (1979). For example, in United States v. Kenny International Corp., (D.D.C. 1979), a U.S. company pleaded guilty to violating the FCPA as a result of having subsidized the costs of transporting supporters of the ruling political party in the Cook Islands by air from New Zealand to the Cook Islands so that they could vote in a closely contested election in order to assure renewal of the company’s exclusive right to sell Cook Island postage stamps. See 2 FOREIGN CORRUPT PRACTICES ACT REPORTER at 649-652.}\]

\[\text{United States v. Williams, 705 F.2d 603 (2d Cir.), cert. denied, 464 U.S. 1007 (1983).}\]

\[\text{United States v. Gorman, 807 F.2d 1299, 1305 (6th Cir. 1986).}\]

\[\text{United States v. Carson, 464 F.2d 424, 432 (2d Cir.), cert. denied, 409 U.S. 949 (1972). In contrast, however, it has been held that the "continuing ability to influence corrupt union practices" was not a sufficient "thing of value" to sustain a bribery conviction where the recipient of the corrupt payment in turn gave the payment to someone else and did not "realize any tangible benefit out of}\]
value" should be "broadly construed" to focus "on the value which the defendant subjectively attaches to the items received."^84 Jury instructions to that effect have been upheld.\(^85\)

A bribe in violation of the FCPA may involve giving or promising to give an intangible item whose value is solely in the perception of the public official who receives it. Therefore, it is fair to say that it is not the "thing" itself that is significant, but rather it is the corrupt intent with which the benefit is conferred that defines a violation of the FCPA.

D. Payments to Third Parties: "Knowing" the Payment Will Be Made to a Foreign Official

The FCPA also prohibits payments to third parties with the knowledge that "all or a portion" of the payment will be made, "directly or indirectly" to a foreign official.\(^86\) As noted earlier, the substitution in the 1988 amendments of "knowing" in the place of "knowing or having reason to know" was an attempt to remove the ambiguities created in the 1977 act concerning what constituted "reason to know." The 1988 amendments are only partly successful in this regard.

The FCPA defines a person's state of mind as "knowing" if either: i) the person is "aware" that he or she is engaging in the conduct; or ii) the person has a "firm belief" that a result "is substantially certain to occur."\(^87\) The FCPA further provides that where "knowledge" of a circumstance is required, such knowledge can be established "if a person is aware of a high probability of the existence of such circumstance . . . ."\(^88\) Exception is made, however, if "the person actually believes that such circumstance does not exist."\(^89\)

The House-Senate Conference made it clear that concepts of "conscious disregard" or "willful blindness" were incorporated in the FCPA's definition of knowing conduct. The U.S. Department of Justice has emphasized this point as well.\(^90\) As the Conference stated, the compromise bill encompassed the concepts of "conscious disregard" and "willful blindness."\(^91\) The Conference in-

---

^84. United States v. Gorman, 807 F.2d at 1305. As the court stated, "in order to put the underlying policy of the statute into effect, the term 'thing of value' must be broadly construed. Accordingly, the focus of the above term is to be placed on the value which the defendant subjectively attaches to the items received." Id.

^85. Williams, supra note 74, at 623 ("We think Judge Pratt correctly construed the statutes to focus on the value the defendants subjectively attached to the items received").


^89. Id.


tended that the requisite state of mind include a "conscious purpose to avoid learning the truth." Thus, according to the Conference:

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.

"[S]imple negligence" or "mere foolishness" would not be a basis for FCPA liability. Instead, the Conference made it clear that its purpose in adopting a standard of knowledge that embraced "conscious disregard," "willful blindness" or "deliberate ignorance" was to cover what the Conference termed "the head-in-the-sand problem" in order that "management officials could not take refuge from the Act's prohibitions by their unwarranted obliviousness to any action (or inaction), language or other 'signalling device' that should reasonably alert them of the 'high probability' of an FCPA violation."

In so doing, the Conference stated its agreement with the reasoning in several appellate decisions in criminal cases, none of which involved either the FCPA or domestic bribery. The Conference also underscored its view that the knowl-

92. Id.
93. Id. at 920.
94. Id.
95. Id.
96. Among the decisions cited by the Conference was United States v. Jewell, 532 F.2d 697 (9th Cir.), cert. denied, 426 U.S. 951 (1976). In Jewell, the Ninth Circuit sitting en banc held that the knowledge required for importation and possession with the intent to distribute a controlled substance under 21 U.S.C. §§ 841(a)(1), 952(a) and 960(a)(1), could be shown by evidence that the defendant had consciously avoided learning the truth. In that case, defendant said that a stranger he had met in a bar had offered him $100 to drive a car across the Mexican border. Id. at 699 n.1. The car contained 110 pounds of marijuana in a secret compartment. Id. at 698-699. Defendant admitted knowing of the secret compartment but denied knowing the contents. Id. at 699 n.1. As the en banc court noted, "[t]o act 'knowingly,' . . . is not necessarily to act only with positive knowledge, but also to act with an awareness of the high probability of the existence of the fact in question. When such awareness is present, 'positive' knowledge is not required." Id. at 700.

In reaching this conclusion the Jewell court relied on the commentary in Glanville Williams, Criminal Law: The General Part, § 57 at 157 (2nd ed. 1961), which was cited by the Conference as well. 1988 Conference Report at 920. While noting that the concept of willful blindness "is found throughout the criminal law." Williams emphasizes that the role of willful blindness is one of limited applicability reserved for situations "only where it can almost be said that the defendant actually knew." Williams at 159.

The limited applicability of the rule allowing inference of knowledge from "willful ignorance" or "conscious avoidance" has been underscored in other cases. See, e.g., United States v. Murrieta-Bejarano, 552 F.2d 1323, 1325 (9th Cir. 1977) ("The Jewell instruction should not be given in every case where a defendant claims a lack of knowledge, but only in those comparatively rare cases where, in addition, there are facts that point in the direction of deliberate ignorance."); accord United States v. Suttsiwad, 696 F.2d 645, 651 (9th Cir. 1982); United States v. Henderson, 721 F.2d 276, 278 (9th Cir. 1983). Indeed, Mr. Justice Kennedy, while a judge on the Ninth Circuit, dissented in Murrieta-Bejarano and stated that he would limit the applicability of deliberate ignorance to cases in which "the evidence can sustain a finding, beyond a reasonable doubt, that the defendant purposely contrived to avoid learning all the facts in order to have a defense in the event of being arrested and charged." United States v. Murrieta-Bejarano, 552 F.2d at 1326.
edge contemplated did not include "recklessness." Instead, what was required was "an awareness of a high probability of the existence of the circumstance."97

Therefore, the Conference emphasized that the applicable "knowing" standard in the FCPA should incorporate the inference of knowledge drawn from a defendant's deliberate ignorance when confronted with circumstances indicating a high probability of the existence of a fact, where the defendant has not established an honest but contrary belief. As the Conference stated:

The conferees intend that the knowledge requirement reflect existing law, including provision for cases of deliberate ignorance. In such cases, knowledge of a fact may be inferred where the defendant has notice of the high probability of the existence of the fact and has failed to establish an honest, contrary disbelief. The inference cannot be overcome by the defendant's "deliberate avoidance of knowledge,"98 his or her "willful blindness,"99 or his or her "conscious disregard"100 of the existence of the required circumstance or result. As such, it covers any in-

---

97. 1988 Conference Report at 920. The Conferences quoted the trial court's jury instruction in United States v. Jacobs, 475 F.2d 270 (2nd Cir.), cert. denied, 414 U.S. 821 (1973), to the effect that knowledge could be inferred from evidence that the defendant "deliberately closed his eyes to what otherwise would have been obvious to him." 1988 Conference Report at 920. Jacobs involved a scheme to negotiate stolen treasury bills in which one of the defendants arranged for the sale of some of the securities (unmatured treasury bills) despite the refusal of the putative owner (a codefendant) to certify ownership of other matured treasury bills. United States v. Jacobs, 475 F.2d at 274-275. On appeal, the trial court's jury instruction concerning "guilty knowledge" was challenged particularly with respect to the statement that "such knowledge is established if the defendant was aware of a high probability that the bills were stolen." Id. at 287. Upholding the instructions, however, the court of appeals noted that the trial court had "carefully explicated" that knowledge could not be established "by merely demonstrating negligence or even foolishness on the part of the defendant." Id. at 287. Additionally, the trial court had "emphasized the elements of deliberate closing of the eyes to what would otherwise have been obvious and reckless disregard of whether the bills were stolen ... with a conscious purpose to avoid learning the truth." Id. at 287-288. See also United States v. Glick, 710 F.2d 639 (10th Cir. 1983), cert. denied, 465 U.S. 1005 (1984) (certified public accountant who prepared financial statements which overstated the value of mineral assets of a client was held to have willfully remained ignorant despite his subjective awareness of facts indicating the fraudulent nature of his client's business).

The importance of distinguishing between negligence or recklessness and conscious avoidance of fact was underscored in United States v. Bright, 517 F.2d 584 (2nd Cir. 1975), which was also cited by the Conferences as a decision with which the Conferences agreed. 1988 Conference Report at 920. There, defendant's conviction for possession of stolen mail, 18 U.S.C. § 1708, was reversed because the trial court had blurred the distinction between reckless disregard of whether the mail matter (welfare checks) had been stolen and a conscious avoidance of learning the truth. As the court of appeals explained, "it is common ground that negligence alone will not suffice. Nor will reckless disregard of whether the bills were stolen, standing by itself. Such reckless disregard must be coupled with a conscious purpose to avoid learning the truth." Bright, 517 F.2d at 587. See also United States v. Williams, 685 F.2d 319, 321 (9th Cir. 1982) (instruction that equated reckless conduct with knowing conduct was erroneous); United States v. Hanlon, 548 F.2d 1096, 1101 (2nd Cir. 1977) (use of "reckless disregard" in instruction criticized).

98. On this point, the Conference cited United States v. Manriquez Arbizio, 833 F.2d 244 (10th Cir. 1987). 1988 Conference Report at 920. There, the defendant had been arrested after assisting a confederate in loading an automobile with trash bags filled with marijuana. Manriquez Arbizio, 833 F.2d at 246. Although there was evidence of defendant's actual knowledge that the trash bags contained marijuana, there was also evidence from which it could be inferred that if defendant did not have actual knowledge, then that lack of knowledge was due to "a conscious avoidance of the fact that the bags contained marijuana." Id. at 249. See also United States v. Masse, 816 F.2d 805, 812 (1st Cir. 1987) ("the purpose of the willful blindness theory is to impose criminal liability on people who, recognizing the likelihood of wrongdoing in actions they are facilitating, nonetheless consciously refuse to take basic investigatory steps").
stance 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.  

99. The 1988 Conference Report cited United States v. Kaplan, 832 F.2d 676 (1st Cir. 1987), as illustrating “willful blindness.” 1988 Conference Report at 920. The case involved an attorney’s participation in a scheme to defraud insurance companies by presenting claims supported by fraudulent medical bills. Kaplan, 832 F.2d at 678. Kaplan claimed that he did not know of the inaccuracy of the medical bills. Id. at 679. However, evidence that the unreasonable billing practices had been brought to Kaplan’s attention as well as the pervasiveness of the fraud itself was such that the court observed “a reasonable person should have investigated, and Kaplan failed to act as one.” Id. at 682. Accordingly, the court of appeals upheld the trial court’s instruction that the requirement of knowledge could be satisfied by proof that Kaplan “deliberately closed his eyes to what otherwise would have been obvious to him” and that “[r]efusing to investigate something that cries out for investigation may indicate that the person knows what the investigation would show.” Id. The jury was also instructed that “willful blindness” from which knowledge could be inferred would be shown if Kaplan “was aware of a high probability that particular facts existed and he did not subjectively disbelieve the facts.” Id. See also United States v. Cincotta, 689 F.2d 238, 243 n.2 (1st Cir.), cert. denied, 459 U.S. 991 (1982) (“the conscious avoidance principle means only that specific knowledge may be inferred when a person knows other facts that would induce most people to acquire the specific knowledge in question. Thus, if someone refuses to investigate an issue that cries out for investigation, we may presume he already ‘knows’ the answer an investigation would reveal, whether or not he is certain,” (referring to United States v. Jewell, 532 F.2d 697, 699-704 (9th Cir. 1976)). Similar willful blindness to the falsity of reports filed with the Immigration and Naturalization Service was found in United States v. Sarantos, 455 F.2d 877, 881 (2nd Cir. 1972) (inference of conscious avoidance is intended “to prevent an individual from circumventing criminal sanctions merely by deliberately closing his eyes to the obvious risk that he is engaging in unlawful conduct”) and United States v. Abrams, 427 F.2d 86, 91 (2nd Cir. 1970) (“although appellant may not have been specifically aware of what his client’s plans for departure were, the jury could have found from the evidence that appellant acted with reckless disregard of whether the statements made were true and with a conscious purpose to avoid learning the truth”).

100. The 1988 Conference Report also cited United States v. McAllister, 747 F.2d 1273 (9th Cir. 1984) as an example of “conscious disregard.” 1988 Conference Report at 920. There, defendant was charged with illegally transporting aliens after the truck he was driving in the early morning hours was stopped when it left the highway near an INS check point and was found to contain 31 undocumented aliens. McAllister, 747 F.2d at 1274. Defendant denied knowing that the aliens were in the truck and claimed that someone, known only as “Danny,” had paid him $25 to drive the truck from San Diego to Los Angeles. Id. Finding the evidence indicated that defendant “tried to close his eyes or ears to what was happening,” id. at 1276 (quoting United States v. Beckett, 724 F.2d 855, 856 (9th Cir. 1984)), the court of appeals said that the trial court had “correctly stated the law,” McAllister, 792 F.2d at 1275, instructing the jury that it could find “defendant’s ignorance of the presence of the illegal aliens in the vehicle was solely and entirely the result of his having made a conscious effort to disregard the nature of that which was in the vehicle, with a conscious purpose to avoid learning the truth.” Id. The trial court further instructed the jury that “[b]efore drawing an inference of guilty knowledge, [the jury] should be convinced beyond a reasonable doubt that the defendant willfully blinded himself to what he had every reason to believe were the true facts.” Id. at 1275. The trial court noted, however, that instances of deliberate ignorance were “comparatively rare” and should be reserved for those cases where defendant was aware of a “high probability of the existence of the fact in question.” Id.

101. The 1988 Conference Report quoted from United States v. Picciandra, 778 F.2d 39 (1st Cir. 1986). 1988 Conference Report at 920. There, an attorney received cash totalling $145,660 in shopping bags from his client. Picciandra, 778 F.2d at 41. In response to his questions concerning the source of the funds, the attorney was told “don’t worry, its legal.” Id. In fact, the cash resulted from the client’s sale of marijuana. Id. Although he was told that the funds were proceeds of the sale of a boat, the attorney prepared a tax return reporting only $25,000 in income. Id. The jury was instructed that knowledge of the source of the funds could be inferred from evidence that “defendant deliberately refused to enlighten or take notice of a certain fact.” Id. at 46. The court of appeals concluded that this instruction was appropriate when “the facts suggest a conscious course of delib-
Accordingly, the deletion of the reason to know standard in the 1988 amendments and the substitution of a standard of knowledge that includes the concepts of "willful ignorance" and "conscious avoidance" may not have been much of a substantive change in fact. Clearly, the amendments eliminated FCPA liability on the basis of negligence or even a reckless disregard of the facts of a transaction. It remains to be seen, however, what further evidence will be required to show either "an awareness of a high probability" of fact or the "indication of wrongdoing," of which failure to investigate will result in a finding of conscious avoidance.

In any event, both the legislative history of the 1988 amendments and the case law strongly suggest that companies doing business overseas must exercise due diligence in the selection and supervision of their representatives not only to avoid an inference of knowledge should a corrupt transaction result, but more importantly, to avoid FCPA liability in the first place.\(^{103}\)

### III. Defenses and Exempt Transactions

#### A. Exempt Transactions: "Facilitating Payments"

The FCPA provides an exception for so-called "facilitating payments" to foreign officials where the purpose of the payment is "to expedite or secure the performance of a routine governmental action by a foreign official, political party, or party officer."\(^{104}\) Although the 1977 Act did not include a specific exemption, it was understood that the prohibition of corrupt foreign payments did not extend to "grease payments."\(^{105}\) Although stated more succinctly, the Senate Committee On Banking, Housing and Urban Affairs expressed a similar view that "grease payments" were not covered by the 1977 Act.\(^{106}\)
The 1988 amendments provide further refinement and guidance as to the "routine government action" with regard to which overseas payments would not be considered violations of the FCPA. The Act defines "routine governmental action" as being those actions "ordinarily and commonly performed by a foreign official" in connection with:

(i) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country;
(ii) processing governmental papers, such as visas and work orders;
(iii) providing police protection, mail pickup and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country;
(iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or
(v) actions of a similar nature.\(^ {107} \)

The House-Senate Conference made it clear that the exception for transactions involving routine governmental action was to apply only to the subcategories enumerated in the Act.\(^ {108} \) The Conferees also emphasized that such routine action would not include any action that would involve the exercise of discretion or that were the "functional equivalent" of awarding business.\(^ {109} \) Accordingly, the FCPA further provides that:

The term "routine governmental action" does not include any decision by a foreign official whether, or on what terms, to award new business to or to continue business with a particular party, or any action taken by a foreign official involved in the decision-making process to encourage a decision to award new business to or continue business with a particular party.\(^ {110} \)

Thus, while the 1988 amendments' use of the terms "routine governmental action" adds clarification to what is meant by "facilitating payments," the scope of transactions to which the prohibitions of the FCPA do not apply remains quite limited.

**B. Statutory Affirmative Defenses**

The 1988 amendments to the FCPA recognize two affirmative defenses to liability under the Act: first, that the payment was lawful under the written laws or obtaining adequate police protection, transactions which may involve even the proper performance of duties.


109. The 1988 Conference Report states:

The Conferees wish to make clear that "ordinarily and commonly performed" actions with respect to permits or licenses would not include those governmental approvals involving an exercise of discretion by a government official where the actions are the functional equivalent of "obtaining or retaining business for or with, or directing business to, any person."

Id.

of the foreign official’s country; and second, that the payment was reasonable and bona fide and that it related to promotion of products or execution of the contract.\footnote{111}

1. **Lawful Payments**

The FCPA provides that it shall be an affirmative defense that:

The payment, gift, offer or promise of anything of value that was made, was lawful under the written laws and regulations of the foreign official’s, political party’s, party official’s, or candidate’s country .... \footnote{112}

The House-Senate Conference indicated that this was a compromise between similar provisions in the House and Senate versions in which the requirement of written laws was added.\footnote{113} The Conferees stated in this connection that:

The Conferees wish to make clear that the absence of written laws in a foreign official’s country would not by itself be sufficient to satisfy this defense. In interpreting what is “lawful under the written laws and regulations,” the Conferees intend that the normal rules of legal construction would apply.\footnote{114}

2. **Reasonable and Bona Fide Promotional Expenses**

It is also an affirmative defense to FCPA liability that:

The payment, gift, offer or promise of anything of value that was made, was a reasonable and bona fide expenditure, such as travel and lodging expenses, incurred by or on behalf of a foreign official, party, party official, or candidate and was directly related to:

(a) the promotion, demonstration, or explanation of products or services; or

(b) the execution or performance of a contract with a foreign government or agency thereof.\footnote{115}

In fashioning this provision, which was drawn from the Senate’s version since the House legislation did not contain a similar provision, the Conferees cautioned that payments of the type enumerated would not be subject to the defense if they were made corruptly in return for an official act.\footnote{116} As the Conferees stated, “If a payment or gift is corruptly made, in return for an official act or omission, then it cannot be a bona fide, good faith payment, and this defense would not be available.”\footnote{117}

\footnote{113}{1988 Conference Report at 921-922.}
\footnote{114}{Id. at 922.}
\footnote{116}{1988 Conference Report at 922.}
\footnote{117}{Id. at 922. The D.O.J. opinion procedure may provide assistance in determining whether a proposed transaction falls within the category of reasonable and bona fide promotional expenses. To date, there have been six opinions addressing such payments. In No. 81-02, the Iowa Beef Packers, Inc. requested the opinion of the D.O.J. concerning its intention of providing samples of its packaged beef products to the Soviet Ministry of Foreign Trade in an effort to promote sales in the Soviet Union. 3 FOREIGN CORRUPT PRACTICES ACT at 715. Concluding that no enforcement action was warranted, the D.O.J. noted that the items were intended for “inspection, testing and sampling, and to make [the recipients] aware of the quality of the com-}
3. Rejected Proposed Defenses: Business Courtesy and Due Diligence

The House-Senate Conference rejected several additional affirmative defenses. The Senate bill proposed the creation of an affirmative defense for "nominal" payments or gifts that were a "courtesy, a token of regard or esteem in return for hospitality." There was the further qualification that the payment or gift be of "reasonable value in the context of the type of transaction involved, local custom, and local business practices." The House bill had no similar provision, and the Senate "receded" to the House. Thus, the FCPA does not recognize "business courtesies" as a defense.

Furthermore, the House proposed that there be a "safe harbor" from vicarious liability for FCPA violations of employees or agents for companies that...
had established procedures that were "reasonabl[y] expected to prevent and de-
tect" FCPA violations. This provision would have recognized a company's
"due diligence" as a defense to liability.

Nevertheless, despite the rejection by the House-Senate Conference of due
diligence as a complete defense to liability, a company's due diligence remains
at least a partial defense to the inference of knowledge as a result of willful
blindness. Due diligence with regard to the conduct of a company's employees,
as well as its overseas agents, is also the company's best tactic for avoiding
violations of the FCPA in the first instance.

IV.
COMPLIANCE AND DUE DILLIGECE

There are a number of precautions that a company can take to avoid FCPA
liability, particularly in the selection of agents to represent the company in its
overseas marketing efforts. A company doing business or planning to do busi-
ness overseas should consider the following.

A. Written Policy

The company should adopt a written policy governing the selection and
retention of foreign sales representatives. The policy should specify the inform-
ation and documentation required to support the retention of a foreign sales
representative, which must accompany the request for authorization. The policy
should also specify the level within the company of review and approval of
requests for foreign sales representatives, including approval by the chief execu-
tive officer in appropriate cases as set forth in the policy.

The policy should also provide basic guidance concerning the requirements
and prohibitions of applicable law, particularly the FCPA. Also, the policy
should emphasize that representatives are to be selected solely on the basis of
merit, that corrupt payments to foreign officials by employees or representatives
of the company is strictly prohibited and that any proposed exempt payments
(i.e., facilitating or expediting payments or promotional expenses) should be ap-
proved in advance by the General Counsel. In this regard, the policy should also
require that officers, managers and employees who are involved in marketing
activities or who have discretion or control over company funds used for mar-
keting activities must certify, on an annual basis, compliance with company pol-
icy and the FCPA.

123. Id.
124. See, John E. Impert, A Program for Compliance with The Foreign Corrupt Practices Act
author has also had the benefit of analysis and recommendations prepared by M. Javade Chaudri,
Esq., a member of Winston & Strawn in Washington, D.C.
B. Written Agreement

The company should utilize written agreements to govern the relationship with foreign marketing representatives. Oral agreements and understandings with foreign marketing representatives should be avoided.

The agreement should specifically provide for, and be made contingent upon, compliance with U.S. laws, particularly the FCPA, as well as the laws of the country in which services are to be performed. In this connection, the agreement should contain representations and warranties of past and future compliance by the representative, including a statement that no part of the representative's compensation has been or will be used to pay any bribe or kickback in violation of U.S. or foreign law and the representative should be required to certify compliance on a periodic basis. Payments to undisclosed third parties of any part of the representative's compensation should be prohibited and all agents or employees of the representative who will be involved in representing the company must be identified. The agreement should further provide that the representative is an independent contractor without authority to bind the company in any way and that the agreement can be terminated immediately either upon violation of its terms or in the event that the agreement is found to be impermissible under U.S. or foreign law.

C. Background Investigation

The company should also conduct a thorough investigation of the representative's background and reputation in the business community. Sources of such reputation information include: the country desks at the Departments of State and Commerce; the commercial attaché in the U.S. Embassy; banks doing business in the foreign country; reporting services such as Dunn and Bradstreet; and other companies doing business in the country. The company's efforts to ascertain the reputation of the representative should be thoroughly documented.

It is also important to ascertain who in the foreign country is requesting that the representative be retained and why the request is being made. It should be determined how experienced the representative is in marketing similar products and the degree to which the representative has been successful. Finally, the representative should be interviewed personally.

D. Opinion of Counsel

An opinion of counsel should be obtained concerning applicable foreign laws. The opinion should, at a minimum, address the following issues:

- Whether local law requires, permits or prohibits the type of representation contemplated in the agreement.
- Whether the proposed representative qualifies to represent the company (i.e., whether there is a requirement that the representative be a citizen of the country or that the owners, officers or directors of the representative be citizens of the country).
FOREIGN CORRUPT PRACTICES ACT

• Whether there are registration or disclosure requirements that apply to the representative’s activities on behalf of the company.
• Whether the terms of the agreement with the representative violate local law, particularly with regard to the manner and amount of compensation (i.e., prohibitions or restrictions affecting commissions or contingent fees) and whether the contemplated compensation can be included in the contract sales price.
• Whether there are restrictions or prohibitions concerning the sharing of commissions or fees with third parties.
• Whether the method and place of payment of compensation complies with the country’s currency and tax laws.
• Whether the law of the country recognizes the representative’s independent contractor status.
• Whether there are restrictions concerning the company’s ability to terminate the representative.

Counsel can also provide information concerning local business customs and mores as well as the representative’s reputation in the community. Additionally, if an exempt payment\(^\text{125}\) is contemplated, it is advisable to have an opinion that the payment is either a “facilitating payment” or is otherwise a lawful payment under the written laws of the country or is considered a reasonable promotional expense or expense related to the execution of the contract.

E. Employee Certification

The employee within the company who is proposing retention of the representative should be required to certify to the company that the representative has been interviewed personally. The same employee should also be required, based upon this interview and the background investigation that has been conducted, to certify that there is no reason to believe that the representative has violated the FCPA in the past or that the representative will violate the FCPA in connection with future activities on behalf of the company. The employee should be required to detail: how the representative was identified, the purpose for which the representative will be engaged, the basis of selection of the representative including other candidates considered and the reasons for their rejection, the representative’s history with the company and with other companies, justification for the proposed compensation (including a comparison of the compensation of similar representatives providing similar services), any family or business ties between the representative and any foreign officials or members of their families, any third-party beneficiaries to the representative’s agreement with the company, and the estimated total duration of the relationship with the representative.\(^\text{126}\)

\(^\text{125}\) See supra, at Section II.
\(^\text{126}\) The D.O.J. has cited these due diligence activities approvingly in opinions issued under the opinion procedure. For example, in No. 81-1, the Bechtel Group, Inc. proposed entering into an agreement with a multinational management consulting firm headquartered in the Republic of the
Philippines (The SGV Group). 3 FOREIGN CORRUPT PRACTICES ACT REPORTER at 713. In concluding that enforcement action was not warranted, the D.O.J. noted the following representations by Bechtel and SGV: 1) payment would be made by check (no cash payments) directly to SGV either in the Philippines or, pursuant to written instructions, in the country in which services are rendered; 2) both Bechtel and SGV were familiar with the antibribery provision of the FCPA; 3) none of SGV's partners, owners, principals and staff members were "foreign officials" and SGV would not make any payment (and Bechtel would not request that any payment be made) that violated the laws of any jurisdiction in which services were performed; 4) SGV would obtain opinions of counsel that the proposed agreement did not violate the laws of the Philippines; notice of filing with the government was required, and that payment of travel and entertainment expenses or gifts to government officials as contemplated by the agreement did not violate the law of the Philippines (SGV would provide similar opinions with regard to all other countries in which services were to be performed); 5) SGV had no right to assign any rights to third parties and the services required would be performed by SGV or its member firms; 6) SGV would not obligate Bechtel to third parties to whom SGV may make agreement or direct payments; 7) both Bechtel and SGV could terminate the agreement at any time if they believe there has been a breach of its terms or a violation of the FCPA and SGV agreed to notify Bechtel's general counsel of any request from a Bechtel representative that could violate the FCPA; 8) SGV would make full disclosure of the agreement to any entity that Bechtel's general counsel determined had a need to know; 9) expenses for travel, entertainment and gifts would only be reimbursed by Bechtel where lawful under local law and commensurate with general custom (such reimbursements generally required prior approval by Bechtel); and 10) all compensation and expense reimbursements would be subject to audit by Bechtel particularly with respect to the amount paid in relation to total payments under the agreement, the nature of the expense, the service rendered by SGV and the potential customers with whom SGV had contact. Id. at 713-715.

The D.O.J. also noted the factors that Bechtel had considered in selecting SGV: 1) the number of years the firm had been in operation; 2) the size of the firm in terms of manpower and geographical coverage; 3) the substantial probability of continued growth; 4) the number and reputation of SGV's clients; 5) the qualifications of its staff; 6) the presence of technical experts and specialists; 7) the adequacy of support staff; and 8) familiarity and adherence to "the principles embodied in the FCPA." Id. at 715. In addition, Bechtel had represented that it had known the principles of SGV "for a number of years" and that for the previous three years SGV had served as a business consultant to Bechtel in the Philippines. Id.

Similar representations were relied upon by the D.O.J. in declining enforcement action in No. 84-1, in which an American firm proposed to engage a marketing representative in a foreign country. Id. at 721. In particular, the D.O.J. noted: 1) the marketing representative warranted that no payments would be made in violation of the FCPA; 2) the agreement would be automatically void ab initio if the marketing representative violated the FCPA and otherwise, the contract could be terminated upon 30 days' notice; 3) the marketing representative would be solely responsible for costs and expenses incurred unless specified costs or expenses were assumed in advance, in writing, by the American firm; 4) the marketing representative could not assign rights or obligate the American firm to third parties without prior written consent; and 5) the marketing representative would make full disclosure of its identity and the amount of its commission "when required." Id. As in the case of Bechtel, the D.O.J. also took notice of the factors used in selecting the marketing representative including: 1) the number of years the marketing representative had been in business; 2) the success in representing other large U.S. and foreign corporations; 3) the qualifications of the principals; and 4) the marketing representative's reputation among United States and foreign banks and businessmen. Id. at 721.

Finally, in No. 84-2, a U.S. company that planned to invest in a foreign company was informed of a foreign agent's intent "to offer a small gratuity to facilitate the transaction." Id. at 722. The D.O.J. concluded that enforcement action was not warranted based on the American company's representation that: 1) the foreign agent represented that no payments were made; 2) both the U.S. and foreign companies pledged not to violate the FCPA; 3) the American company would have only a minority stock interest in the foreign company but would have audit rights and proportional representation on the Board of Directors; 4) the American company would inform the D.O.J. if it learned of any violations of the FCPA; and 5) the American company had the right to sever its relationship with the foreign company in the event it learned of violations of the FCPA. Id.
F. Red Flags

There are also warning signs, or "red flags," of which the company should be aware, that indicate the potential for violation of the FCPA. These "red flags" include:

- The reputation of the sales representative for paying bribes.
- A refusal by the sales representative to accept contract provisions, representations and warranties or undertakings addressing past and future compliance with the FCPA.
- Shareholders, directors, officers or relatives of the sales representative who are "foreign officials."
- Requirement of an unusually high commission.\(^{127}\)
- Payments made to the sales representative outside of the country where the representative resides or where the services were performed.\(^{128}\)
- Payments to third parties or by checks payable to "cash."
- Undisclosed principals, associates or subcontractors of the sales representative with whom the representative shares fees and commissions.

The company should also be wary of any unusual "bonus" payments made to foreign employees or other sources of cash with which "off book" payments could be funded.

G. D.O.J. Opinion Procedure

Finally, the FCPA provides a mechanism under which companies may obtain an opinion from the U.S. Department of Justice whether a proposed transaction would violate the FCPA.\(^{129}\) Under the D.O.J. procedure,\(^{130}\) issuers and domestic concerns may submit a written request for an opinion "as to whether certain, specified, prospective—not hypothetical —conduct conforms with the Department's present enforcement policy regarding the anti-bribery provisions of the Foreign Corrupt Practices Act of 1977. . . ."\(^{131}\) The D.O.J. procedure

---

127. See, e.g., W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp., 493 U.S. 400, 402 (1990) (twenty-percent commission paid to sales representatives used to bribe officials of the Nigerian government); Habib v. Raytheon Company, 616 F.2d 1204, 1211 (D.C. Cir. 1980) ("It appears on the face of the record that the percentage commissions, if a trial shows they are owed to Habib, may have been related to questionable payments made to high government officials of a foreign country"). However, in No. 87-1, the D.O.J. concluded that enforcement action was not warranted where an American company, Lantana Boatyard, Inc., agreed to pay a ten-percent commission to a sales agent who, after working two years, had arranged for Lantana to sell military patrol boats to a Nigerian company for resale to the Nigerian government. 3 FOREIGN CORRUPT PRACTICES ACT REPORTER at 724. With regard to the commission payment, the D.O.J. noted that "[t]his payment is consistent with previous business practices followed by Lantana in paying fees to this organization for international sales opportunities." Id.

128. See, e.g., Decker v. Massey-Ferguson, 681 F.2d 111, 118 (2d Cir. 1982) (payments to distributors' accounts outside of their country may have assisted distributors in violating local laws).


131. 28 CFR § 80.1 (1993). The request may only be submitted by an issuer or domestic concern that is a party to the proposed transaction. 28 CFR § 80.4 (1993).
emphasizes that the transaction must be actual and not hypothetical. Also, the transaction must be prospective. Thus, “an opinion request should be made prior to the requestor’s commitment to proceed with a transaction.”

The request must be specific and must be accompanied by “all relevant and material information bearing on the conduct . . . and on the circumstances of the conduct” about which an opinion is sought. Such information includes “background information, complete copies of all operative documents, and detailed statements of all collateral or oral understandings, if any.” The request must be signed by “an appropriate senior officer with operational responsibility for the conduct that is the subject of the request” who certifies that the request represents “a true, correct and complete disclosure with respect to the proposed conduct and circumstances of the conduct.”

The opinion must be issued within thirty days of receipt of a complete request. The opinion applies only to the party submitting the request and has no collateral effect on any other agency of the United States. The opinion gives rise only to a rebuttable presumption of conformity with the Department’s current enforcement policy. The presumption may be rebutted by a preponderance of the evidence, including whether the information in the request was accurate and complete and whether the transaction was within the scope of the conduct described in the request. If the transaction is subject to the approval of any other agency, the opinion can “in no way be taken to indicate the Department of Justice’s views on the legal or factual issues that may be raised before that agency, or in an appeal from the agency’s decision.”

Although the effect of the opinions of the Department of Justice are quite limited and do not afford a complete defense to an alleged violation of the

132. 28 CFR § 80.3 (1993).
133. Id. The procedure further states in this regard that an executed contract is not a prerequisite to seeking an opinion. Id.
134. Id.
135. 28 CFR § 80.6 (1993).
136. Id.
137. Id. The D.O.J. may require that the request be signed by the chief executive officer. Id.
138. 28 CFR § 80.8 (1993). The D.O.J. may require additional information which must be submitted before the request is deemed complete. Id. The D.O.J. may also conduct its own independent investigation. 28 CFR § 80.7 (1993). The request may be withdrawn at any time prior to the issuance of the opinion. 28 CFR § 80.15 (1993). However, the Department of Justice reserves the right to retain any of the documents submitted as part of the request and “to use them for any governmental purposes . . . ” Id.
139. 28 CFR § 80.5 (1993).
140. 28 CFR § 80.11 (1993). Nevertheless, the SEC has indicated that it would not take enforcement action with respect to a transaction in regard to which an issuer had sought and obtained review by the D.O.J. and a letter stating that the D.O.J. would not take enforcement action. Statement of Commission Policy Concerning 30A of the Securities Exchange Act of 1934, SEC Release No. 34-17099, 45 Fed. Reg. 59001, 59002 (Sept. 5, 1980).
141. 28 CFR § 80.10 (1993).
FOREIGN CORRUPT PRACTICES ACT

FCPA, the opinion procedure nevertheless may provide a company with a valuable means of demonstrating due diligence in seeking to avoid liability under the FCPA.

The company's efforts at due diligence must be part of a larger compliance program directed at detecting and preventing violations of the FCPA. Although the implementation of such a program will not shield the company from liability, a comprehensive compliance program conscientiously enforced can provide substantial benefits. Quite simply, an effective compliance program can prevent violations of the FCPA in the first instance and can reveal violations, if they occur, in time to allow the company to avail itself of the benefits of voluntary disclosure.

An effective compliance program integrates certain basic elements. The company must have a written policy concerning compliance with the FCPA. The policy must be distributed to all employees who are involved in the company's marketing efforts. There must be training provided to employees concerning the requirements of the FCPA and the company's policy. There must be procedures, including annual certification of compliance by officers and employees, and review by internal audit, to ensure ongoing compliance and to detect violations of the FCPA or company policy. In cases of violations, discipline must be consistently applied to both management and employees. And finally, there must be a means for reporting and investigating alleged violations. Implementation of a comprehensive program for FCPA compliance coupled with the exercise of due diligence in the selection and supervision of foreign sales representatives, including vigilance for "red flags," should greatly reduce the risk of liability for violation of the FCPA and allow the company to pursue its real objective of selling its products and services overseas.

---

144. As noted previously, the House proposal of a "safe harbor" for companies with established procedures to prevent and detect violations was rejected by the House-Senate Conference considering the 1988 amendments. 1988 Conference Report at 922. The case law in areas other than the FCPA also supports the view that efforts at compliance do not relieve the company of criminal liability. See United States v. Twentieth Century Fox Film Corp., 882 F.2d 656, 660 (2d Cir. 1989); United States v. Automated Medical Laboratories, Inc., 770 F.2d 399, 407 (4th Cir. 1985); United States v. Hilton Hotels Corp., 467 F.2d 1000, 1007 (9th Cir. 1972), cert. denied, 409 U.S. 1125 (1973). The implementation of an effective compliance program can also go a long way in convincing prosecutors to exercise discretion and decline prosecution.

145. For example, under the Federal Sentencing Guidelines for Organizational Defendants, voluntary disclosure of an offense coupled with cooperation and recognition of responsibility will reduce the overall "culpability score" by five points. 18 U.S.C.S. app. § 8(C)(2).(5)(g) (1994). An "effective program to prevent and detect violations of law," 18 U.S.C.S. app. § (8)(A)(1).(1), application note 3(k) (1994), will reduce the culpability score by an additional three points. 18 U.S.C.S. app. § 8(C)(2).(5)(f) (1994). However, failure to make disclosure after becoming aware of a violation will foreclose the beneficial consideration in sentencing accorded to companies with an effective compliance program. Id.
Although the reported decisions of criminal prosecution of the FCPA are sparse, guidance concerning the Act's requirements can be gleaned from the legislative history and the reported decisions under the analogous provisions of the domestic bribery statute. Passage of the 1988 amendments lent some clarity to the Act, but pitfalls remain that can trap the unwary.

Where a benefit is conferred on a foreign official in order to obtain new business or maintain current business, it is almost certain that the FCPA has been violated. Such a benefit may be monetary but does not necessarily have to be so. Instead, the benefit may be intangible, conferred on a third party, the value of which is measured solely in the perception of the recipient. While certain payments may not transgress the FCPA, i.e., facilitating payments or payments that are permitted under the written law of the official's country, the scope of these exceptions is limited. Moreover, the burden lies on the company to justify the conferring of the benefit, after the fact, when the company has obtained business. Unless the benefit falls plainly within one of the statutory definitions of exempt transactions, the company's justification will in all likelihood be viewed with extreme skepticism.

Significantly, what the company does not know can hurt. The concept of knowledge of the actions of third-party agents has embedded within it the inference of actual knowledge from the conscious avoidance of awareness of the facts. However, while the test is supposed to be subjective, that is, if the individual actually believes the facts of a transaction to be innocent, knowledge will not be inferred, the individual's conduct will be viewed after the fact by investigators and prosecutors who may be quite cynical in judging whether the individual's mistaken belief of innocence was sincere.

All of this is not to say that companies should not actively seek to develop markets overseas and should not obtain the services of foreign representatives to that end. However, it is incumbent upon the company under the FCPA to exercise due diligence to ensure that the substance of the transactions entered into by its employees and agents does not violate the prohibitions of the FCPA. Tailoring that due diligence to the specific circumstances of the transaction (and documenting that due diligence should questions be raised subsequently) is the continuing challenge of compliance with the FCPA.