

BUCKLEY

BUCKLEY DESK REFERENCE

The Foreign Corrupt Practices Act

A resource on the FCPA, including an annotated version of the statute and select legislative history



About Buckley's FCPA/ Anti-Corruption Practice

Buckley's FCPA/Anti-Corruption practice counsels U.S. and international companies on developing, testing, and improving compliance programs, amid an environment of increased global anti-corruption enforcement. When potential problems arise, we conduct internal investigations and defend our clients – both corporate and individual – in criminal and civil enforcement and parallel litigation proceedings. Buckley lawyers understand that there is no one singular approach that meets the specific needs for each situation, so we help our clients make cost-effective, risk-based, and reasoned decisions about their businesses in response to anti-corruption scenarios. We pride ourselves on understanding the details of our clients' businesses, and bringing sound, practical advice to any circumstance.

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The Foreign Corrupt Practices Act

(current through Pub. L. 105-366 (November 10, 1998))

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Introduction

President Jimmy Carter signed the Foreign Corrupt Practices Act in 1977, marking the first time a nation prohibited the bribery of foreign public officials. In an effort to prohibit publicly-traded companies from hiding bribe transactions, the FCPA also required companies to keep accurate books and records, and to maintain adequate systems of internal accounting control.

Since 1977, the globalization of commerce and intensified international anti-corruption efforts have placed FCPA and anti-corruption compliance at the center of management and board agendas, for both U.S. and non-U.S. companies.

We are very pleased to offer this desk reference on the FCPA, which includes an annotated version of the statute and selected legislative history, as a starting point for characterizing and managing your risks.

The Foreign Corrupt Practices Act

(current through Pub. L. 105-366 (November 10, 1998))

Periodical and Other Reports

15 U.S.C. § 78m (Section 13 of the Securities Exchange Act of 1934)

(a) REPORTS BY ISSUER OF SECURITY; CONTENTS

Every issuer of a security registered pursuant to section 78l of this title shall file with the Commission, in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate for the proper protection of investors and to insure fair dealing in the security—

- (1) such information and documents (and such copies thereof) as the Commission shall require to keep reasonably current the information and documents required to be included in or filed with an application or registration statement filed pursuant to section 78l of this title, except that the Commission may not require the filing of any material contract wholly executed before July 1, 1962.
- (2) such annual reports (and such copies thereof), certified if required by the rules and regulations of the Commission by independent public accountants, and such quarterly reports (and such copies thereof), as the Commission may prescribe.

Every issuer of a security registered on a national securities exchange shall also file a duplicate original of such information, documents, and reports with the exchange.

In any registration statement, periodic report, or other reports to be filed with the Commission, an emerging growth company need not present selected financial data in accordance with section 229.301 of title 17, Code of Federal Regulations, for any period prior to the earliest audited period presented in connection with its first registration statement that became effective under this Act or the Securities Act of 1933 and, with respect to any such statement or reports, an emerging growth company may not be required to comply with any new or revised financial accounting standard until such date that a company that is not an issuer (as defined under section 2(a) of the Sarbanes–Oxley Act of 2002 (15 U.S.C. 7201(a))) is required to comply with such new or revised accounting standard, if such standard applies to companies that are not issuers.

(b) FORM OF REPORT; BOOKS, RECORDS, AND INTERNAL ACCOUNTING; DIRECTIVES

...

(2) Every issuer which has a class of securities registered pursuant to section 78l of this title and every issuer which is required to file reports pursuant to section 78o(d) of this title shall—

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

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

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

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

- (iii) access to assets is permitted only in accordance with management's general or specific authorization; and
 - (iv) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences; and
 - (C) notwithstanding any other provision of law, pay the allocable share of such issuer of a reasonable annual accounting support fee or fees, determined in accordance with section 109 of the Sarbanes–Oxley Act of 2002.
- (3) (A) With respect to matters concerning the national security of the United States, no duty or liability under paragraph (2) of this subsection shall be imposed upon any person acting in cooperation with the head of any Federal department or agency responsible for such matters if such act in cooperation with such head of a department or agency was done upon the specific, written directive of the head of such department or agency pursuant to Presidential authority to issue such directives. Each directive issued under this paragraph shall set forth the specific facts and circumstances with respect to which the provisions of this paragraph are to be invoked. Each such directive shall, unless renewed in writing, expire one year after the date of issuance.
- (B) Each head of a Federal department or agency of the United States who issues a directive pursuant to this paragraph shall maintain a complete file of all such directives and shall, on October 1 of each year, transmit a summary of matters covered by such directives in force at any time during the previous year to the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate.
- (4) No criminal liability shall be imposed for failing to comply with the requirements of paragraph (2) of this subsection except as provided in paragraph (5) of this subsection.

- (5) No person shall knowingly circumvent or knowingly fail to implement a system of internal accounting controls or knowingly falsify any book, record, or account described in paragraph (2).
- (6) Where an issuer which has a class of securities registered pursuant to section 78l of this title or an issuer which is required to file reports pursuant to section 78o(d) of this title holds 50 per centum or less of the voting power with respect to a domestic or foreign firm, the provisions of paragraph (2) require only that the issuer proceed in good faith to use its influence, to the extent reasonable under the issuer's circumstances, to cause such domestic or foreign firm to devise and maintain a system of internal accounting controls consistent with paragraph (2). Such circumstances include the relative degree of the issuer's ownership of the domestic or foreign firm and the laws and practices governing the business operations of the country in which such firm is located. An issuer which demonstrates good faith efforts to use such influence shall be conclusively presumed to have complied with the requirements of paragraph (2).
- (7) For the purpose of paragraph (2) of this subsection, the terms "reasonable assurances" and "reasonable detail" mean such level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs.

Prohibited Foreign Trade Practices by Issuers

15 U.S.C. § 78dd-1 (Securities Exchange Act § 30A)

(a) PROHIBITION

It shall be unlawful for any issuer which has a class of securities registered pursuant to section 78l of this title or which is required to file reports under section 78o(d) of this title, or for any officer, director, employee, or agent of such issuer or any stockholder thereof acting on behalf of such issuer, to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to—

(1) any foreign official for purposes of—

- (A) (i) influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage;¹ or
- (B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person;

(2) any foreign political party or official thereof or any candidate for foreign political office for purposes of—

- (A) (i) influencing any act or decision of such party, official, or candidate in its or his official capacity, (ii) inducing such party, official, or candidate to do or omit to do an act in violation of the lawful duty of such party, official, or candidate, or (iii) securing any improper advantage;² or

(B) inducing such party, official, or candidate to use its or his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality.

in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person; or

(3) 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, for purposes of—

(A) (i) influencing any act or decision of such foreign official, political party, party official, or candidate in his or its official capacity, (ii) inducing such foreign official, political party, party official, or candidate to do or omit to do any act in violation of the lawful duty of such foreign official, political party, party official, or candidate, or (iii) securing any improper advantage³; or

(B) inducing such foreign official, political party, party official, or candidate to use his or its influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person.

(b) EXCEPTION FOR ROUTINE GOVERNMENTAL ACTION⁴

Subsections (a) and (g) of this section shall not apply to any facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party official.

(c) AFFIRMATIVE DEFENSES⁵

It shall be an affirmative defense to actions under subsection (a) or (g) of this section that—

- (1) 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; or
- (2) 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.

(d) GUIDELINES BY ATTORNEY GENERAL⁶

Not later than one year after August 23, 1988, the Attorney General, after consultation with the Commission, the Secretary of Commerce, the United States Trade Representative, the Secretary of State, and the Secretary of the Treasury, and after obtaining the views of all interested persons through public notice and comment procedures, shall determine to what extent compliance with this section would be enhanced and the business community would be assisted by further clarification of the preceding provisions of this section and may, based on such determination and to the extent necessary and appropriate, issue—

- (1) guidelines describing specific types of conduct, associated with common types of export sales arrangements and business contracts, which for purposes of the Department of Justice's present enforcement policy, the Attorney General determines would be in conformance with the preceding provisions of this section; and

- (2) general precautionary procedures which issuers may use on a voluntary basis to conform their conduct to the Department of Justice's present enforcement policy regarding the preceding provisions of this section.

The Attorney General shall issue the guidelines and procedures referred to in the preceding sentence in accordance with the provisions of subchapter II of chapter 5 of Title 5 and those guidelines and procedures shall be subject to the provisions of chapter 7 of that title.⁷

(e) OPINIONS OF ATTORNEY GENERAL⁸

- (1) The Attorney General, after consultation with appropriate departments and agencies of the United States and after obtaining the views of all interested persons through public notice and comment procedures, shall establish a procedure to provide responses to specific inquiries by issuers concerning conformance of their conduct with the Department of Justice's present enforcement policy regarding the preceding provisions of this section. The Attorney General shall, within 30 days after receiving such a request, issue an opinion in response to that request. The opinion shall state whether or not certain specified prospective conduct would, for purposes of the Department of Justice's present enforcement policy, violate the preceding provisions of this section. Additional requests for opinions may be filed with the Attorney General regarding other specified prospective conduct that is beyond the scope of conduct specified in previous requests. In any action brought under the applicable provisions of this section, there shall be a rebuttable presumption that conduct, which is specified in a request by an issuer and for which the Attorney General has issued an opinion that such conduct is in conformity with the Department of Justice's present enforcement policy, is in compliance with the preceding provisions of this section. Such a presumption may be rebutted by a preponderance of the evidence. In considering the presumption for purposes of this paragraph, a court shall weight all relevant factors, including but not limited to whether the

information submitted to the Attorney General was accurate and complete and whether it was within the scope of the conduct specified in any request received by the Attorney General. The Attorney General shall establish the procedure required by this paragraph in accordance with the provisions of subchapter II of chapter 5 of Title 5 and that procedure shall be subject to the provisions of chapter 7 of that title.

- (2) Any document or other material which is provided to, received by, or prepared in the Department of Justice or any other department or agency of the United States in connection with a request by an issuer under the procedure established under paragraph (1), shall be exempt from disclosure under section 552 of Title 5 and shall not, except with the consent of the issuer, be made publicly available, regardless of whether the Attorney General responds to such a request or the issuer withdraws such request before receiving a response.
- (3) Any issuer who has made a request to the Attorney General under paragraph (1) may withdraw such request prior to the time the Attorney General issues an opinion in response to such request. Any request so withdrawn shall have no force or effect.
- (4) The Attorney General shall, to the maximum extent practicable, provide timely guidance concerning the Department of Justice's present enforcement policy with respect to the preceding provisions of this section to potential exporters and small businesses that are unable to obtain specialized counsel on issues pertaining to such provisions. Such guidance shall be limited to responses to requests under paragraph (1) concerning conformity of specified prospective conduct with the Department of Justice's present enforcement policy regarding the preceding provisions of this section and general explanations of compliance responsibilities and of potential liabilities under the preceding provisions of this section.

(f) DEFINITIONS

For purposes of this section:

(1) (A) The term “foreign official” means any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.⁹

(B) For purposes of subparagraph (A), the term “public international organization” means—

- (i) an organization that is designated by Executive Order pursuant to section 288 title 22 [section 1 of the International Organizations Immunities Act]; or
- (ii) any other international organization that is designated by the President by Executive order for the purposes of this section, effective as of the date of publication of such order in the Federal Register.

(2) (A)¹⁰ A person’s state of mind is “knowing” with respect to conduct, a circumstance, or a result if—

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

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

- (3) (A)¹¹ The term “routine governmental action” means only an action which is ordinarily and commonly performed by a foreign official in—
- (i) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country;
 - (ii) processing governmental papers, such as visas and work orders;
 - (iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country;
 - (iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or
 - (v) actions of a similar nature.
- (B) 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 decisionmaking process to encourage a decision to award new business to or continue business with a particular party.

(g) ALTERNATIVE JURISDICTION¹²

- (1) It shall also be unlawful for any issuer organized under the laws of the United States, or a State, territory, possession, or commonwealth of the United States or a political subdivision thereof and which has a class of securities registered pursuant to section 78l of this title or which is required to file reports under section 780(d) of this title, or for any United States person that is an officer, director, employee, or agent of such issuer or a stockholder thereof acting on behalf of such issuer, to corruptly

do any act outside the United States 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 of the persons or entities set forth in paragraphs (1), (2), and (3) of this subsection (a) of this section for the purposes set forth therein, irrespective of whether such issuer or such officer, director, employee, agent, or stockholder makes use of the mails or any means or instrumentality of interstate commerce in furtherance of such offer, gift, payment, promise, or authorization.

- (2) As used in this subsection, the term “United States person” means a national of the United States (as defined in section 1101 of title 8 [section 101 of the Immigration and Nationality Act]) or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship organized under the laws of the United States or any State, territory, possession, or commonwealth of the United States, or any political subdivision thereof.

Prohibited Foreign Trade Practices by Domestic Concerns

15 U.S.C. § 78dd-2 (not codified as part of the Securities Exchange Act of 1934)

(a) PROHIBITION

It shall be unlawful for any domestic concern, other than an issuer which is subject to section 78dd-1 of this title, or for any officer, director, employee, or agent of such domestic concern or any stockholder thereof acting on behalf of such domestic concern, to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to—

(1) any foreign official for purposes of—

- (A) (i) influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage;¹³ or
- (B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such domestic concern in obtaining or retaining business for or with, or directing business to, any person;

(2) any foreign political party or official thereof or any candidate for foreign political office for purposes of—

- (A) (i) influencing any act or decision of such party, official, or candidate in its or his official capacity, (ii) inducing such party, official, or candidate to do or omit to do an act in violation of the lawful duty of such party, official, or candidate, or (iii) securing any improper advantage;¹⁴ or

(B) inducing such party, official, or candidate to use its or his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such domestic concern in obtaining or retaining business for or with, or directing business to, any person;

(3) 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, for purposes of—

(A) (i) influencing any act or decision of such foreign official, political party, party official, or candidate in his or its official capacity, (ii) inducing such foreign official, political party, party official, or candidate to do or omit to do any act in violation of the lawful duty of such foreign official, political party, party official, or candidate, or (iii) securing any improper advantage;¹⁵ or

(B) inducing such foreign official, political party, party official, or candidate to use his or its influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such domestic concern in obtaining or retaining business for or with, or directing business to, any person.

(b) EXCEPTION FOR ROUTINE GOVERNMENTAL ACTION¹⁶

Subsections (a) and (i) of this section shall not apply to any facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party official.

(c) AFFIRMATIVE DEFENSES¹⁷

It shall be an affirmative defense to actions under subsection (a) or (i) of this section that—

- (1) 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; or
- (2) 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.

(d) INJUNCTIVE RELIEF

- (1) When it appears to the Attorney General that any domestic concern to which this section applies, or officer, director, employee, agent, or stockholder thereof, is engaged, or about to engage, in any act or practice constituting a violation of subsection (a) or (i) of this section, the Attorney General may, in his discretion, bring a civil action in an appropriate district court of the United States to enjoin such act or practice, and upon a proper showing, a permanent injunction or a temporary restraining order shall be granted without bond.
- (2) For the purpose of any civil investigation which, in the opinion of the Attorney General, is necessary and proper to enforce this section, the Attorney General or his designee are empowered to administer oaths and affirmations, subpoena witnesses, take evidence, and require the production of any books, papers, or other documents which the Attorney General deems relevant or material to such investigation. The attendance of witnesses and

the production of documentary evidence may be required from any place in the United States, or any territory, possession, or commonwealth of the United States, at any designated place of hearing.

- (3) In case of contumacy by, or refusal to obey a subpoena issued to, any person, the Attorney General may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, or other documents. Any such court may issue an order requiring such person to appear before the Attorney General or his designee, there to produce records, if so ordered, or to give testimony touching the matter under investigation. Any failure to obey such order of the court may be punished by such court as a contempt thereof.

All process in any such case may be served in the judicial district in which such person resides or may be found. The Attorney General may make such rules relating to civil investigations as may be necessary or appropriate to implement the provisions of this subsection.

(e) GUIDELINES BY ATTORNEY GENERAL¹⁸

Not later than 6 months after August 23, 1988, the Attorney General, after consultation with the Securities and Exchange Commission, the Secretary of Commerce, the United States Trade Representative, the Secretary of State, and the Secretary of the Treasury, and after obtaining the views of all interested persons through public notice and comment procedures, shall determine to what extent compliance with this section would be enhanced and the business community would be assisted by further clarification of the preceding provisions of this section and may, based on such determination and to the extent necessary and appropriate, issue—

- (1) guidelines describing specific types of conduct, associated with common types of export sales arrangements and business contracts, which for purposes of the Department of Justice's

present enforcement policy, the Attorney General determines would be in conformance with the preceding provisions of this section; and

- (2) general precautionary procedures which domestic concerns may use on a voluntary basis to conform their conduct to the Department of Justice's present enforcement policy regarding the preceding provisions of this section.

The Attorney General shall issue the guidelines and procedures referred to in the preceding sentence in accordance with the provisions of subchapter II of chapter 5 of Title 5 and those guidelines and procedures shall be subject to the provisions of chapter 7 of that title.¹⁹

(f) OPINIONS OF ATTORNEY GENERAL²⁰

- (1) The Attorney General, after consultation with appropriate departments and agencies of the United States and after obtaining the views of all interested persons through public notice and comment procedures, shall establish a procedure to provide responses to specific inquiries by domestic concerns concerning conformance of their conduct with the Department of Justice's present enforcement policy regarding the preceding provisions of this section. The Attorney General shall, within 30 days after receiving such a request, issue an opinion in response to that request. The opinion shall state whether or not certain specified prospective conduct would, for purposes of the Department of Justice's present enforcement policy, violate the preceding provisions of this section. Additional requests for opinions may be filed with the Attorney General regarding other specified prospective conduct that is beyond the scope of conduct specified in previous requests. In any action brought under the applicable provisions of this section, there shall be a rebuttable presumption that conduct, which is specified in a request by a domestic concern and for which the Attorney General has issued an opinion that such conduct is in conformity with the Department of Justice's present enforcement policy, is in compliance with the preceding provisions of this section. Such a presumption may be rebutted

by a preponderance of the evidence. In considering the presumption for purposes of this paragraph, a court shall weigh all relevant factors, including but not limited to whether the information submitted to the Attorney General was accurate and complete and whether it was within the scope of the conduct specified in any request received by the Attorney General. The Attorney General shall establish the procedure required by this paragraph in accordance with the provisions of subchapter II of chapter 5 of Title 5 and that procedure shall be subject to the provisions of chapter 7 of that title.

- (2) Any document or other material which is provided to, received by, or prepared in the Department of Justice or any other department or agency of the United States in connection with a request by a domestic concern under the procedure established under paragraph (1), shall be exempt from disclosure under section 552 of Title 5 and shall not, except with the consent of the domestic concern, be made publicly available, regardless of whether the Attorney General response to such a request or the domestic concern withdraws such request before receiving a response.
- (3) Any domestic concern who has made a request to the Attorney General under paragraph (1) may withdraw such request prior to the time the Attorney General issues an opinion in response to such request. Any request so withdrawn shall have no force or effect.
- (4) The Attorney General shall, to the maximum extent practicable, provide timely guidance concerning the Department of Justice's present enforcement policy with respect to the preceding provisions of this section to potential exporters and small businesses that are unable to obtain specialized counsel on issues pertaining to such provisions. Such guidance shall be limited to responses to requests under paragraph (1) concerning conformity of specified prospective conduct with the Department of Justice's present enforcement policy regarding the preceding provisions of this section and general explanations of compliance responsibilities and of potential liabilities under the preceding provisions of this section.

(g) PENALTIES

- (1) (A) Any domestic concern that is not a natural person and that violates subsection (a) or (i) of this section shall be fined not more than \$2,000,000.
- (B) Any domestic concern that is not a natural person and that violates subsection (a) or (i) of this section shall be subject to a civil penalty of not more than \$10,000 imposed in an action brought by the Attorney General.
- (2) (A) Any natural person that is an officer, director, employee, or agent of a domestic concern, or stockholder acting on behalf of such domestic concern, who willfully violates subsection (a) or (i) of this section shall be fined not more than \$100,000 or imprisoned not more than 5 years, or both.
- (B) Any natural person that is an officer, director, employee, or agent of a domestic concern, or stockholder acting on behalf of such domestic concern, who violates subsection (a) or (i) of this section shall be subject to a civil penalty of not more than \$10,000 imposed in an action brought by the Attorney General.
- (3) Whenever a fine is imposed under paragraph (2) upon any officer, director, employee, agent, or stockholder of a domestic concern, such fine may not be paid, directly or indirectly, by such domestic concern.

(h) DEFINITIONS

For purposes of this section:

- (1) The term “domestic concern” means—
 - (A) any individual who is a citizen, national, or resident of the United States; and
 - (B) any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business

in the United States, or which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States.

(2) (A)²¹ The term “foreign official” means any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.

(B) For purposes of subparagraph (A), the term “public international organization” means—

- (i) an organization that has been designated by Executive order pursuant to section 288 of title 22 [section 1 of the International Organizations Immunities Act] (22 U.S.C. § 288); or
- (ii) any other international organization that is designated by the President by Executive order for the purposes of this section, effective as of the date of publication of such order in the Federal Register.

(3) (A)²² A person’s state of mind is “knowing” with respect to conduct, a circumstance, or a result if—

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

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

- (4) (A)²³ The term “routine governmental action” means only an action which is ordinarily and commonly performed by a foreign official in—
- (i) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country;
 - (ii) processing governmental papers, such as visas and work orders;
 - (iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country;
 - (iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or
 - (v) actions of a similar nature.
- (B) 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.
- (5) The term “interstate commerce” means trade, commerce, transportation, or communication among the several States, or between any foreign country and any State or between any State and any place or ship outside thereof, and such term includes the intrastate use of—
- (A) a telephone or other interstate means of communication, or
 - (B) any other interstate instrumentality.

(i) ALTERNATIVE JURISDICTION²⁴

- (1) It shall also be unlawful for any United States person to corruptly do any act outside the United States 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 of the persons or entities set forth in paragraphs (1), (2), and (3) of subsection (a), for the purposes set forth therein, irrespective of whether such United States person makes use of the mails or any means or instrumentality of interstate commerce in furtherance of such offer, gift, payment, promise, or authorization.
- (2) As used in this subsection, a “United States person” means a national of the United States (as defined in section 1101 of title 8 [section 101 of the Immigration and Nationality Act]) or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship organized under the laws of the United States or any State, territory, possession, or commonwealth of the United States, or any political subdivision thereof.

Prohibited Foreign Trade Practices by Persons Other than Issuers or Domestic Concerns²⁵

15 U.S.C. § 78dd-3 (not codified as part
of the Securities Exchange Act of 1934)

(a) PROHIBITION

It shall be unlawful for any person other than an issuer that is subject to section 78dd-1 of this title or a domestic concern (as defined in section 78dd-2 of this title), or for any officer, director, employee, or agent of such person or any stockholder thereof acting on behalf of such person, while in the territory of the United States, corruptly to make use of the mails or any means or instrumentality of interstate commerce or to do any other act in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to—

(1) any foreign official for purposes of—

- (A) (i) influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage; or
- (B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such person in obtaining or retaining business for or with, or directing business to, any person;

(2) any foreign political party or official thereof or any candidate for foreign political office for purposes of—

- (A) (i) influencing any act or decision of such party, official, or candidate in its or his official capacity, (ii) inducing

such party, official, or candidate to do or omit to do an act in violation of the lawful duty of such party, official, or candidate, or (iii) securing any improper advantage; or

- (B) inducing such party, official, or candidate to use its or his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality.

in order to assist such person in obtaining or retaining business for or with, or directing business to, any person; or

- (3) 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, for purposes of—

- (A) (i) influencing any act or decision of such foreign official, political party, party official, or candidate in his or its official capacity, (ii) inducing such foreign official, political party, party official, or candidate to do or omit to do any act in violation of the lawful duty of such foreign official, political party, party official, or candidate, or (iii) securing any improper advantage; or

- (B) inducing such foreign official, political party, party official, or candidate to use his or its influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such person in obtaining or retaining business for or with, or directing business to, any person.

(b) EXCEPTION FOR ROUTINE GOVERNMENTAL ACTION

Subsection (a) of this section shall not apply to any facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party official.

(c) AFFIRMATIVE DEFENSES

It shall be an affirmative defense to actions under subsection (a) of this section that—

- (1) 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; or
- (2) 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.

(d) INJUNCTIVE RELIEF

- (1) When it appears to the Attorney General that any person to which this section applies, or officer, director, employee, agent, or stockholder thereof, is engaged, or about to engage, in any act or practice constituting a violation of subsection (a) of this section, the Attorney General may, in his discretion, bring a civil action in an appropriate district court of the United States to enjoin such act or practice, and upon a proper showing, a permanent injunction or a temporary restraining order shall be granted without bond.
- (2) For the purpose of any civil investigation which, in the opinion of the Attorney General, is necessary and proper to enforce this section, the Attorney General or his designee are empowered to administer oaths and affirmations, subpoena witnesses, take evidence, and require the production of any books, papers, or other documents which the Attorney General deems relevant or material to such investigation. The attendance of witnesses and

the production of documentary evidence may be required from any place in the United States, or any territory, possession, or commonwealth of the United States, at any designated place of hearing.

- (3) In case of contumacy by, or refusal to obey a subpoena issued to, any person, the Attorney General may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, or other documents. Any such court may issue an order requiring such person to appear before the Attorney General or his designee, there to produce records, if so ordered, or to give testimony touching the matter under investigation. Any failure to obey such order of the court may be punished by such court as a contempt thereof.
- (4) All process in any such case may be served in the judicial district in which such person resides or may be found. The Attorney General may make such rules relating to civil investigations as may be necessary or appropriate to implement the provisions of this subsection.

(e) PENALTIES

- (1) (A) Any juridical person that violates subsection (a) of this section shall be fined not more than \$2,000,000.

(B) Any juridical person that violates subsection (a) of this section shall be subject to a civil penalty of not more than \$10,000 imposed in an action brought by the Attorney General.
- (2) (A) Any natural person who willfully violates subsection (a) of this section shall be fined not more than \$100,000 or imprisoned not more than 5 years, or both.

(B) Any natural person who violates subsection (a) of this section shall be subject to a civil penalty of not more than

\$10,000 imposed in an action brought by the Attorney General.

- (3) Whenever a fine is imposed under paragraph (2) upon any officer, director, employee, agent, or stockholder of a person, such fine may not be paid, directly or indirectly, by such person.

(f) DEFINITIONS

For purposes of this section:

- (1) The term “person,” when referring to an offender, means any natural person other than a national of the United States (as defined in 8 U.S.C. § 1101) or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship organized under the law of a foreign nation or a political subdivision thereof.
- (2) (A) The term “foreign official” means any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.

For purposes of subparagraph (A), the term “public international organization” means –

- (i) an organization that has been designated by Executive Order pursuant to section 288 title 22 [section 1 of the International Organizations Immunities Act]; or
- (ii) any other international organization that is designated by the President by Executive order for the purposes of this section, effective as of the date of publication of such order in the Federal Register.
- (3) (A) A person’s state of mind is “knowing” with respect to conduct, a circumstance, or a result if—

- (i) such person is aware that such person is engaging in such conduct, that such circumstance exists, or that such result is substantially certain to occur; or
 - (ii) such person has a firm belief that such circumstance exists or that such result is substantially certain to occur.
- (B) When knowledge of the existence of a particular circumstance is required for an offense, such knowledge is established if a person is aware of a high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist.
- (4) (A) The term “routine governmental action” means only an action which is ordinarily and commonly performed by a foreign official in—
 - (i) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country;
 - (ii) processing governmental papers, such as visas and work orders;
 - (iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country;
 - (iv) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country;
 - (v) actions of a similar nature.
- (B) 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.

- (5) The term “interstate commerce” means trade, commerce, transportation, or communication among the several States, or between any foreign country and any State or between any State and any place or ship outside thereof, and such term includes the intrastate use of —
 - (A) a telephone or other interstate means of communication, or
 - (B) any other interstate instrumentality.

Penalties

15 U.S.C. § 78ff

(a) WILLFUL VIOLATIONS; FALSE AND MISLEADING STATEMENTS²⁶

Any person who willfully violates any provision of this chapter (other than section 78dd-1 of this title), or any rule or regulation thereunder the violation of which is made unlawful or the observance of which

is required under the terms of this chapter, or any person who willfully and knowingly makes, or causes to be made, any statement in any application, report, or document required to be filed under this chapter or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 78o of this title, or by any self-regulatory organization

in connection with an application for membership or participation therein or to become associated with a member thereof, which statement was false or misleading with respect to any material fact, shall upon conviction be fined not more than \$5,000,000, or imprisoned not more than 20 years, or both, except that when such person is a person other than a natural person, a fine not exceeding \$25,000,000 may be imposed; but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation.

(b) FAILURE TO FILE INFORMATION, DOCUMENTS, OR REPORTS

Any issuer which fails to file information, documents, or reports required to be filed under subsection (d) of section 78o of this title or any rule or regulation thereunder shall forfeit to the United States the sum of \$100 for each and every day such failure to file shall continue. Such forfeiture, which shall be in lieu of any criminal penalty for such failure to file which might be deemed to arise under subsection (a) of this section, shall be payable into the Treasury of the United States and shall be recoverable in a civil suit in the name of the United States.

(c)²⁷ VIOLATIONS BY ISSUERS, OFFICERS, DIRECTORS,
STOCKHOLDERS, EMPLOYEES, OR AGENTS OF ISSUERS

- (1) (A) Any issuer that violates subsection (a) or (g) of section 30A of this title [15 U.S.C. § 78dd-1] shall be fined not more than \$2,000,000.

(B) Any issuer that violates subsection (a) or (g) of section 30A of this title [15 U.S.C. § 78dd-1] shall be subject to a civil penalty of not more than \$10,000 imposed in an action brought by the Commission.
- (2) (A) Any officer, director, employee, or agent of an issuer, or stockholder acting on behalf of such issuer, who willfully violates subsection (a) or (g) of section 30A of this title [15 U.S.C. § 78dd-1] shall be fined not more than \$100,000, or imprisoned not more than 5 years, or both.

(B) Any officer, director, employee, or agent of an issuer, or stockholder acting on behalf of such issuer, who violates subsection (a) or (g) of section 30A of this title [15 U.S.C. § 78dd-1] shall be subject to a civil penalty of not more than \$10,000 imposed in an action brought by the Commission.
- (3) Whenever a fine is imposed under paragraph (2) upon any officer, director, employee, agent, or stockholder of an issuer, such fine may not be paid, directly or indirectly, by such issuer.

Alternative Fines Act

18 U.S.C § 3571

Sentence of Fine

(a) IN GENERAL

A defendant who has been found guilty of an offense may be sentenced to pay a fine.

(b) FINES FOR INDIVIDUALS

Except as provided in subsection (e) of this section, an individual who has been found guilty of an offense may be fined not more than the greatest of—

- (1) the amount specified in the law setting forth the offense;
- (2) the applicable amount under subsection (d) of this section;
- (3) for a felony, not more than \$250,000;
- (4) for a misdemeanor resulting in death, not more than \$250,000;
- (5) for a Class A misdemeanor that does not result in death, not more than \$100,000;
- (6) for a Class B or C misdemeanor that does not result in death, not more than \$5,000; or
- (7) for an infraction, not more than \$5,000.

(c) FINES FOR ORGANIZATIONS

Except as provided in subsection (e) of this section, an organization that has been found guilty of an offense may be fined not more than the greatest of—

- (1) the amount specified in the law setting forth the offense;
- (2) the applicable amount under subsection (d) of this section;
- (3) for a felony, not more than \$500,000;
- (4) for a misdemeanor resulting in death, not more than \$500,000;
- (5) for a Class A misdemeanor that does not result in death, not more than \$200,000;
- (6) for a Class B or C misdemeanor that does not result in death, not more than \$10,000; and
- (7) for an infraction, not more than \$10,000.

(d) ALTERNATIVE FINE BASED ON GAIN OR LOSS

If any person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss, unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process.

(e) SPECIAL RULE FOR LOWER FINE SPECIFIED IN SUBSTANTIVE PROVISION

If a law setting forth an offense specifies no fine or a fine that is lower than the fine otherwise applicable under this section and such law, by specific reference, exempts the offense from the applicability of the fine otherwise applicable under this section, the defendant may not be fined more than the amount specified in the law setting forth the offense.

Legislative History: 1988 Amendments (excerpts)

TRADE AND COMPETITIVENESS ACT of 1988 (P.L. 100 - 418)

Title V – Foreign Corrupt Practices Act Amendments

H.R. Conf. Rep. No. 100-576, at 919-21 (1988).

...

Anti-bribery provision—Standard of Liability for Acts of Third Parties (Agents)

HOUSE BILL

The House bill changed current law, which applies civil and criminal liability to firms and individuals who make payments to third parties “knowing or having reason to know” that the payment would be used by that third party for purposes barred under the statute.

In provisions concerned with the requisite states of mind applicable to offenses known as “third party bribery” (the furnishing of money or any other “thing of value” by an agent for the purpose of bribing foreign officials), the House bill contained state-of-mind requirements (proposed Section 30A(a)(3) and proposed Section 104(a)(3)) of “knowing or recklessly disregarding” that the money in question would be used for bribery.

Under the House bill, criminal liability would have applied for firms and individuals who made payments to third parties while “knowing” that the payment would be used by the third party for purposes barred under the statute. The House bill contained a definition (proposed Section 30A(f)(2) and proposed Section 104(h) (4)) of the “knowing” state of mind applicable in the case of the foreign corrupt practice of “third party” bribery by securities issuers and domestic concerns. “Knowing” was defined as being “aware or substantially certain” or “consciously disregarding a high probability” that a payment would be made for prohibited purposes. Civil liability would have applied if the payment were made to a third party while “recklessly disregarding” that all or a portion of the payment would be made for purposes barred under the statute. “Reckless disregard” was defined (proposed Section 30A(f)(3) and proposed Section 104(h) (5)) to include “awareness” and disregard of a “substantial risk” that a third party would transmit a prohibited payment.

SENATE AMENDMENT

The Senate bill addresses the state-of-mind requirement for third-party bribe offenses by making it unlawful “corruptly to direct or authorize, expressly or by a course of conduct” a third party to make such payments. The phrase “course of conduct” was not defined in the Senate amendment, but the Senate report stated that the standard was meant to preclude a “head-in-the-sand” approach involving willful ignorance of facts and circumstances underlying the subject transaction which would indicate the payment of a bribe.

CONFERENCE AGREEMENT

The Senate receded to the House with an amendment. The conference substitute retains the “knowing” requirement and deletes the “recklessly disregarding” requirement as those terms were defined in proposed Sections 30A(f)(2) and (3) and 104(h)(4) and (5). The compromise bill adopts a modified version of the House bill regarding these provisions and encompasses the concepts of “conscious disregard” or “willful blindness.” See generally *United States v. Bright*, 517 F.2d 584 (2d Cir. 1975); H. Rept. No. 96-1396, 96th Cong., 1st Sess., 35 (1980). The Conferees intend that the requisite “state of mind” for this category of

offense include a “conscious purpose to avoid learning the truth.” [] *United States v. Jacobs*, 475 F.2d 270, 277-88 (2d Cir. 1973). Thus the “knowing” standard adopted covers both prohibited actions that are taken with “actual knowledge” of intended results as well as other actions that, while falling short of what the law terms “positive knowledge,” nevertheless evidence a conscience disregard or deliberate ignorance of known circumstances that should reasonably alert one to the high probability of violations of the Act.

In clarifying the existing foreign anti-bribery standard of liability under the Act as passed in 1977, the Conferees agreed that “simple negligence” or “mere foolishness” should not be the basis for liability. However, the Conferees also agreed that the so called “head-in-the- sand” problem— variously described in the pertinent authorities as “conscious disregard,” “willful blindness” or “deliberate ignorance”— should be covered so that management officials could not take refuge from the act’s prohibition by their unwarranted obliviousness to any action (or inaction), language or other “signaling device” that should reasonably alert them of the “high probability” of an FCPA violation.

The “head-in-the-sand” problem is not unique to this area of criminal law and occurs in a variety of contexts, perhaps the most common being the situation where a person acquires property under “suspicious” circumstances and is charged with “knowledge” that it is stolen. Courts and commentators have considered such behavior to be “distinct from, but equally culpable as actual knowledge.” See G. Williams, *Criminal Law: The General Part*, sec. 57 at 157 (2d ed. 1961). (emphasis added)

Federal case law has discussed the carefully-drawn elements that comprise the “head-in-the-sand” state of mind in other contexts. The Conferees agree with the reasoning found in such decisions as *United States v. Jewell*, 532 F.2d 679 (9th Cir. 1976); *United States v. Bright*, 517 F.2d 584 (2d Cir. 1975); *United States v. Jacobs*, 470 F.2d 270, 287 n.37 (2d Cir.), cert. denied sub nom. *Lavelle v. United States*, 414 U.S. 821 (1973). See also H. Rept. No. 96-1396, 96th Cong., 1st Sess. 35 (1980). The knowledge requirement is not equivalent to “recklessness.” It requires an awareness of a high probability of the existence of the circumstance. As the Court stated in the *Jacobs* case:

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

“Thus, if you find that a defendant acted with reckless disregard of whether the bills were stolen and with

a conscious purpose to avoid learning the truth, the requirement of knowledge would be satisfied unless the defendant actually believed they were not stolen.

*** You should scrutinize the entire conduct of the defendant at or near the offense are [sic] alleged to have been committed.”
475 F.2d 287 n.37 (emphasis added)

[] Accordingly, 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,” *United States v. Manrique Aribizo*, 833 F.2d 244, 249 (10th Cir. 1987), his or her “willful blindness,” *United States v. Kaplan*, 832 F.2d 676, 682 (1st Cir. 1987), or his or her “conscious disregard,” *United States v. McAllister*, 747 F.2d 1273, 1275 (9th Cir. 1984), of the existence of the required circumstance or result. As such, it covers any instance where “any reasonable person would have realized” the existence of the circumstances or result and the defendant has “consciously chose[n] not to ask about what he had ‘reason to believe’ he would discover,” *United States v. Picciandra*, 788 F.2d 39, 46 (1st Cir. 1986).

Courts should, accordingly, apply the appropriate “mix” of subjective and objective standards implied in such a carefully-structured test.

Anti-bribery Provision—Exception for “Routine Governmental Action”

HOUSE BILL

The House bill created a defense for “routine governmental action,” which was defined as one “ordinarily and commonly performed” by a foreign official and explicitly including: processing governmental papers, loading and unloading cargoes; scheduling inspections associated with contract performance; and “actions of a similar nature.”

SENATE AMENDMENT

The Senate amendment created an exception for similar action, but included additional explicit categories: obtaining permits, licenses, or “other governmental approvals” to qualify a person to do business in a foreign country; and protecting perishable products or commodities from deterioration. Unlike the House bill, it did not limit actions to those “of a similar nature.”

CONFERENCE AGREEMENT

The House receded to the Senate exception, with an amended definition of “routine governmental action.” The conference substitute reflects the intent of the Conferees that the scope of the “routine governmental action” exception apply only to the listed subcategories (i)-(iv) and actions of a similar nature. 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.”

Endnotes

1. This section was amended pursuant to the International Anti-Bribery and Fair Competition Act of 1998, P.L. 105-366, Nov. 10, 1998, 112 Stat. 3303 (hereinafter “the 1998 amendments”). The 1998 amendments added the following language to subsection (a)(1)(A): “or (iii) securing any improper advantage.”
2. The 1998 amendments added the following language to subsection (a)(2)(A): “or (iii) securing any improper advantage.”
3. The 1998 amendments added the following language to subsection (a)(3)(A): “or (iii) securing any improper advantage.”
4. This subsection was added pursuant to the Foreign Corrupt Practices Act Amendments of 1988, P.L. 100-418, Aug. 23, 1988, 102 Stat. 1415 (hereinafter “the 1988 amendments”). For excerpt of relevant legislative history, see page 36 of this Desk Reference.
5. This section was added with the 1988 amendments.
6. *Id.*
7. In accordance with the mandate issued by the 1988 amendments, the U.S. Department of Justice issued a formal notice inviting all interested persons “to submit their views concerning the extent to which compliance with 15 U.S.C. 78dd-1 and 78dd-2 would be enhanced and the business community assisted by further clarification of the provisions of the anti-bribery provisions through the issuance of guidelines.” Department of Justice, Anti- Bribery Provisions of the Foreign Corrupt Practices Act, 54 Fed. Reg. 40,918 (Oct. 4, 1989).

Following the comment period, on July 12, 1990, the DOJ declined to issue guidelines on the anti-corruption provisions of the FCPA, stating:

“After consideration of the comments received, and after consultation with the appropriate agencies, the Attorney General has determined that no guidelines are necessary.... [C]ompliance with the [anti-bribery provisions] would not be enhanced nor would the business community be assisted by further clarification of these provisions through the issuance of guidelines.”

Department of Justice, Anti-Bribery Provisions, 55 Fed. Reg. 28,694 (July 12, 1990).

8. This section was added with the 1988 amendments. In accordance with this section, the DOJ developed regulations governing the process of obtaining an FCPA Opinion. See Foreign Corrupt Practices Act Opinion Procedure Regulations, 28 C.F.R Part 80.
9. The 1998 amendments added the phrase “public international organization” to this subsection.
10. This subsection was added with the 1988 amendments. For excerpt of relevant legislative history, see page 36 of this Desk Reference.
11. This subsection was added with the 1988 amendments.
12. This section, added with the 1998 amendments, expanded the basis for asserting jurisdiction under the FCPA to the so-called nationality principle.
13. The 1998 amendments added the following language to subsection (a)(1)(A): “or (iii) securing any improper advantage.”
14. The 1998 amendments added the following language to subsection (a)(2)(A): “or (iii) securing any improper advantage.”
15. The 1998 amendments added the following language to subsection (a)(3)(A): “or (iii) securing any improper advantage.”

16. *See supra*, n. 4.
17. This subsection was added with the 1988 amendments.
18. *Id.*
19. *See supra*, n. 7.
20. *See supra*, n. 8.
21. The 1998 amendments added the phrase “public international organization” to this subsection.
22. *See supra*, n. 10.
23. This subsection was added with the 1988 amendments.
24. This section, added with the 1998 amendments, expanded the basis for asserting jurisdiction under the FCPA to the so-called nationality principle.
25. This entire statutory section was added with the 1998 amendments.
26. The maximum fine and term of imprisonment potentially applicable under this section has been modified a number of times, most recently pursuant to the Sarbanes-Oxley Act of 2002, P.L. 107-204, July 30, 2002, 116 Stat. 810.
27. The 1988 amendments streamlined the language of this section and increased the penalty applicable under (c)(1)(A) from \$1,000,000.



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