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The Foreign Corrupt Practices Act Amendments of 1988

Twelve years of effort by the U.S. business community led to the inclusion of amendments to the Foreign Corrupt Practices Act in last year's Omnibus Trade and Competitiveness Act. The background leading to these changes and a discussion of the changes are provided here as a guide to multinational corporations and their counsel.

I. Introduction

Between 1974 and 1976 the Securities and Exchange Commission (SEC) undertook a broad investigation into certain American business practices abroad at the request of Congress. The SEC submitted an extensive report to Congress on "questionable" payments to foreign officials.[1] Over 400 corporations, including 117 of the top Fortune 500 admitted to making more than 300 million dollars of payments that were either questionable or illegal.[2]

The resulting proposals for passage of a bill to curb foreign bribery were strongly supported both inside and outside Congress. Some, however, opposed the scope of the proposed legislation. For example, a committee of the Association of the Bar of the City of New York pointed out that one effect could be to make criminal under U.S. law certain payments to foreign government officials that would continue to be legal in the country of payment. "The possible foreign relations impact of this is such that the wisdom of criminalization should

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1. SECURITIES AND EXCHANGE COMM'N, 94TH CONG., 2D SESS., Report on Questionable and Illegal Corporate Payments and Practices (Comm. Print 1976) [hereinafter SEC REPORT].

2. H.R. REP. NO. 640, 95TH CONG., 1ST SESS. 4 (1977) [hereinafter H.R. REP.].

be carefully considered."[3] Nonetheless as a result of the disclosures and the SEC recommendations, Congress in 1977 unanimously passed the Foreign Corrupt Practices Act of 1977 (FCPA).[4]

Congress last year included in the Omnibus Trade and Competitiveness Act of 1988 the Foreign Corrupt Practices Act Amendments of 1988, which, while maintaining the principal objectives of the FCPA, respond to many of the concerns expressed by U.S. firms engaged in foreign business.[5]

II. The FCPA

The FCPA has three operative sections. Section 102 amended section 13 of the Securities Act of 1934 (the 1934 Act) to require improvements to the accounting and record-keeping systems of those issuers of securities registered (or required to file reports) under the 1934 Act (Issuers).[6] Sections 103 and 104 each contain antibribery provisions. Section 103 prohibits bribery of foreign officials by Issuers, their officers, directors, and agents.[7] Section 104, which is substantially similar to section 103, prohibits bribery of foreign officials by "domestic concerns" other than Issuers.[8] "Domestic concerns" are broadly defined to include individuals who are citizens, nationals or residents of the United States, partnerships, associations, corporations, joint stock companies, business trusts, unincorporated associations, and sole proprietorships that are organized or have their principal place of business in the United States.[9] Domestic concerns other than Issuers are not subject to the record-keeping requirements of section 102 of the FCPA.[10]

The Department of Justice has responsibility for all criminal enforcement of the antibribery provisions of the FCPA, and for civil enforcement of those provisions contained in section 104 with respect to domestic concerns, their officers, and stockholders.[11] The SEC has responsibility for civil enforcement of the antibribery and accounting provisions of sections 102 and 103 with respect to Issuers (and their officers and directors and shareholders acting on behalf of Issuers).[12]

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3. ASS'N OF THE BAR OF THE CITY OF NEW YORK, REPORT ON QUESTIONABLE FOREIGN PAYMENTS BY CORPORATIONS: THE PROBLEM AND APPROACHES TO A SOLUTION § II.A.I (1977).

4. Pub. L. No. 95-213, 91 Stat. 1494 (1977) (codified as amended at 15 U.S.C. § 78dd-1 to -2 (1982) [hereinafter FCPA].

5. Pub. L. No. 100-418, 102 Stat. 1415 (1988) [hereinafter Amendments].

6. 15 U.S.C. § 78m(b) (1982).

7. *Id.* § 78dd-1.

8. *Id.* § 78dd-2.

9. *Id.* § 78dd-2(d).

10. *Id.* § 78dd-2(c).

11. *Id.* §§ 78dd-2(c), 78m(b).

12. *Id.* § 78ff.

A. The FCPA Accounting Provisions

The SEC found in its 1976 report that a large number of "off-the-books accounts" or "slush funds" were kept by major corporations for the making of questionable payments.[13] To make it difficult to disguise or hide illegal payments or to accumulate "slush funds," the SEC recommended and Congress amended the 1934 Act to require every Issuer with a class of securities registered pursuant to section 12 of that Act, and every Issuer required to file reports pursuant to section 15(d) of that Act, to:

> (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 issuers; and
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> (B) devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that—
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> (i) transactions are executed in accordance with management's general or specific authorization;
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> (ii) transactions are recorded as necessary;
>
> (iii) to permit preparation of financial statements in conformity with general accounting principles or any other criteria applicable to such statements, and to maintain accountability for assets;
>
> (iv) access to assets is permitted only in accordance with management's general or specific authorization; and
>
> (v) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any difference.[14]

Compliance with the reporting requirements must be considered in the light of the "records" required to be kept by Issuers under subsection (A) quoted above. "Records" are widely defined to include "accounts, correspondence, memorandums, tapes, discs, papers, books and other documents or transcribed information of any type."[15] Since passage, there has been considerable discussion and commentary on the interpretation of the record-keeping requirements of section 102. The Committee on Corporation Law and Accounting of the American Bar Association produced, in November 1978, *A Guide to the New Section 13(b)(2) Accounting Requirements* (the Guide), which considered in detail the accounting requirements of the new legislation and its suggested interpretation.[16] Subsequently, representatives of the SEC took a more restrictive position than the Guide had taken, particularly with respect to the questions of the materiality of payments, cost-effectiveness of record-keeping arrangements and what were "reasonable assurances" for purposes of subsection (B) quoted

13. SEC Report, *supra* note 1, at 23, 24; Prevention of the Concealment of Questionable or Illegal Payments, Exchange Act Release No. 13,185, II SEC Docket 1514 (1977).

14. FCPA, *supra* note 1, § 102, 15 U.S.C. § 78m(b) (1982).

15. 15 U.S.C. § 78(c)(a)(37) (1982).

16. *A Guide to the New Section 131(b)(2) Accounting Requirements of the Securities Exchange Act of 1934*, 34 Bus. Law 307 (1978).

above.[17] On January 13, 1981, SEC Chairman Williams made a formal statement before the AICPA Annual Conference in which he discussed the Commission's position on the record-keeping requirements and commented that "No system of adequate records and controls—no matter how effectively devised or conscientiously applied—could be expected to prevent all mistaken and improper dispositions of assets."[18] He stated that "The goal [of the Commission] is to allow a business, acting in good faith, to comply with the Act's accounting provisions in an innovative and cost effective way and with a better sense of its legal responsibilities."[19]

B. The FCPA Antibribery Provisions

In order to prove a criminal violation of sections 103 or 104 of the antibribery sections of the FCPA, it is necessary to establish:

(1) that the domestic firm or individual has made use of some means of interstate commerce,
(2) corruptly,
(3) in furtherance of an offer, payment, gift, promise to pay or to give, or an authorization of an offer, payment or giving of money or anything of value,
(4) to a foreign official political party or official of a foreign political party or a candidate,
(5) for the purpose of influencing any official act or inducing the official to use his influence to assist the domestic firm or individual to obtain or retain business.[20]

The FCPA specifically prohibits the proscribed payments being made through intermediaries.[21] Where the tainted payment is alleged to be made to or through an intermediary, the classes of payors and the necessary business purpose are the same as when made directly. Prior to the 1988 amendments, the prosecution was also required to show that the defendant knew or had a "reason to know" that all or a portion of the payment would ultimately go to a foreign official, political party, or official of a foreign political party or candidate.[22]

C. Enforcement of the FCPA Since Passage

In view of the admission to the SEC by 400 major U.S. corporations that they had made questionable payments, the limited number of prosecutions since

17. *PLI Seminar March 22–23, 1979*, 1 Foreign Corrupt Practices Act Reporter 131 (1979) [hereinafter FCPA Rep.].
18. Statement of Policy Concerning the Foreign Corrupt Practices Act, Exchange Act Release No. 17,500, 21 SEC Docket 1466, 1471, *reprinted in* 46 Fed. Reg. 11,544 (1988).
19. 21 SEC Docket at 1467.
20. 15 U.S.C. §§ 78dd-1, 2 (1982).
21. *Id.* §§ 78dd-1(a)(3), -2(a)(3).
22. *Id.*

passage of the FCPA suggests American concerns doing business abroad tried diligently to respond to the requirements of the FCPA. Through April 1988 the Business Laws, Inc. publication, *Foreign Corrupt Practices Act Reporter,* reported that the SEC had brought three injunctive actions to enforce the antibribery provisions, only one of which was followed by a criminal prosecution against officers of the corporation involved. The SEC had also brought 109 injunctive actions and twenty-four administrative proceedings to enforce the accounting provisions.[23]

Comparative figures for enforcement by the Department of Justice (DOJ) are not given, but from September 1, 1981, through August 1, 1983, the DOJ reported that twenty investigations were open with respect to the antibribery provisions, of which eight were being closed at the end of the two-year period. A total of eighty-three investigations had been undertaken by the DOJ in the preceding several years.[24] The DOJ indicated that almost all cases involved the payment of money and that the foreign officials involved were very senior foreign officials, such as high ministry officials, ambassadors, senior military officers, or presidents.[25] Though representatives of both the SEC and the DOJ emphasized the wide scope of the FCPA language, in practice prosecutions appear to have been limited to situations where there was clear evidence of a major infringement of the FCPA.[26]

III. The 1988 Amendments to the FCPA Antibribery Provisions

Since the FCPA was passed, there have been many proposals for its amendment. Amendments were introduced in Congress in 1980, 1981, 1983, and 1985.[27] The amendments passed by the Congress last year were previously included in the 1987 Omnibus Trade and Competitiveness Bill, which became part of the Omnibus Trade and Competitiveness Act of 1988.[28] The 1988 amendments include the following changes to the FCPA:

23. 1 FCPA REP. *supra* note 17, at 273, 274.

24. 2 *Id.* at 700.

25. Speech on the Justice Department's Enforcement Practices under the FCPA by Ass't Attorney General Philip B. Hayman, *reported in* 2 FCPA REP., *supra* note 17, at 1501.

26. *Id.*

27. S. 2763 introduced by Senator Chefee, May 23, 1980; reintroduced by S. 708 on Mar. 12, 1981; on Feb. 3, 1983, S. 414 was introduced by Senator Heinz and co-sponsored by Mr. Chefee; on Mar. 16, 1983, Representative Mica introduced H.R. 2157; on Feb. 7, 1985, Senator Heinz introduced S. 430, which was identified in substance to S. 708 and S. 414; on Oct. 8, 1985, a group of Representatives led by Congressman Robert Michel introduced H.R. 3522, of which title 14 proposed amendments to the FCPA; on Mar. 12, 1986, Representative Mica introduced H.R. 4389 to replace the FCPA, portions of which were incorporated into H.R. 4800, the Omnibus Trade Package of 1986, and subsequently into H.R. 3, introduced Jan. 6, 1987; H.R. 15, introduced Jan. 6, 1987, was similar to S. 708, S. 414, and S. 430.

28. H.R. 576, 100th Cong., 2d Sess. (1988).

A. "Reason to Know"

Congress has changed those sections of the FCPA that apply criminal and civil liability to firms and individuals who make payments to third parties "knowing or having a reason to know" that the payments would be used by the third party for purposes prohibited by the FCPA.[29] The "reason to know" standard, designed to prevent a defendant from avoiding criminal liability by ignoring indications that an intermediary may be engaged in the prohibited criminal practice, has been omitted.[30]

There appeared to be a conflict between the FCPA requirement that the defendant be acting "corruptly" with its criminal connotations, and the lesser requirement that there be a "reason to know," rather than actual knowledge of the use of the payments.[31] The Department of Justice had testified before the Senate Banking Committee that it has been the policy only to prosecute those cases where "the evidence of awareness—whether direct or circumstantial—was so clear as to constitute actual knowledge of the bribe scheme."[32] This policy was only of limited comfort to those corporate counsel who advise on which payments are permissible and which are not. The new language retains the "knowing" requirement but drops the "or having reason to know," and provides that it shall be:

> unlawful . . . to make use of the mails or any instrumentality of interstate commerce, corruptly in furtherance of an offer, payment, promise to pay or authorization of the payment of any money or offer, give, promise to give or authorization of the giving of anything of value to:—....(3) any person *while knowing* that all or a portion of such money or thing will be offered or given, or promised, directly or indirectly, to any foreign official, to any foreign candidate for political office for purposes of—(a) influencing any act or decision of such foreign official. . . .[33]

The 1988 amendments include a definition of knowing:

> (2)(A) A person's state of mind is "knowing" with respect to conduct, or circumstances or 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 is substantially certain to occur.
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> (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 the high probability of the existence of such circumstance, unless the person actually believes that the circumstance does not exist.

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29. 15 U.S.C. § 78dd-2(a)(3) (1982).

30. Report of the Senate Comm. on Banking, Housing and Urban Affairs, S. Rep. No. 114, 95th Cong., 1st Sess. 10 (1977) [hereinafter S. Rep.].

31. *Foreign Corrupt Practices Act of 1977 and the Regulation of Questionable Payments*, 34 Bus. Law. 623, 640-41 (1978).

32. *Senate Subcomm. on Securities and on International Finance and Monetary Policy*, 99th Cong., 2d Sess. (June 10, 1986).

33. 15 U.S.C. § 78dd-2(2), (4) (1982) (emphasis added).

The changes to this section were strongly opposed by Senator William Proxmire (D-Wis.). Senators Proxmire and Harrison Williams (R-N.J.) were the original authors of the bill that was ultimately enacted as the FCPA.[34] Other opposition is typified by an op-ed article that appeared in the *New York Times* on March 22, 1988, while Congress was considering the 1988 amendments. The article included the following comment, critical of the proposed deletion from the FCPA of the "reason to know" provision:

> Consider the following scenario: A corporation desperately wants a big contract. It hires a middleman well known for bribery, pays him money up front and writes: "We want the contract. Don't pay any bribes, of course. But get the job done." A week later, he cables, "Send more money." The firm, asking no questions, sends the cash. It gets the contract. Under the Senate bill, the company would not be liable, since it never authorized a payoff.[35]

The Conference Report on the FCPA indicates that the new language encompasses the concepts of "conscious disregard" or "wilful blindness" and that the requisite state of mind for this category of offense includes a "conscious purpose to avoid learning the truth."[36] The standard adopted covers both prohibited actions taken with "actual knowledge" of intended results, as well as other actions that fall short of what the law terms "positive knowledge." The Conference Report went on to say "the knowledge required is not equivalent to recklessness; it requires an awareness of high probability of existence of the circumstances" and that:

> the Conferees intend that the knowledge required reflect existing law, including provision for cases of deliberate ignorance. In such cases knowledge of the facts may be inferred where the defendant has notice of the high probability of the existence of fact and has failed to establish an honest, contrary disbelief.

The conferees also noted that the inference cannot be overcome by the defendant's "deliberate avoidance of knowledge."[37]

The language in the Conference Report suggests that the conferees may have tried in the concept of "conscious disregard or wilful blindness" to provide a compromise acceptable to both proponents and opponents of the amendment and to provide a resolution to the scenario in the op-ed article quoted above.[38]

B. Routine Governmental Action

Prior to the 1988 amendments, the FCPA excluded from the definition of "foreign official" those governmental employees whose duties were essentially ministerial or clerical.[39] The purpose was to allow those minor "facilitating" or

34. S. Rep., *supra* note 30, 2.

35. By Michael Waldbaum, director of Public Citizen's Congress Watch, a consumer advocacy organization.

36. H.R. Conf. Rep. No. 576, 100th Cong., 2d Sess. 919, *reprinted in* 1988 U.S. Code Cong. & Admin. News 1547, 1952 [hereinafter Conf. Rep.].

37. *Id.* at 920.

38. *Id.*

39. 15 U.S.C. § 78dd-2(d)(2) (1982).

"grease" payments, which are described in the legislative history in the following way:

> For example, a gratuity paid to a customs official to speed the processing of a customs document would not be reached by the bill. Nor would it reach payments made to secure permits, licenses, or the expeditious performance of similar duties of an essentially ministerial or clerical nature which must of necessity be performed in any event.[40]

This exclusion has been replaced in the amendments by an exclusion for payments to procure certain routine governmental actions by *any foreign official,* rather than by limiting the exclusion to minor payments to a certain category of official.[41] Under the 1988 amendments, payment for routine governmental action is excluded, with no consideration given to the status of the official who performs the action. By definition, 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 government 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.[42]

The Conference Report commented that the scope of the exclusion applies only to the listed subcategories (i)-(iv) and actions of similar nature. The conferees expressly made it 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 governmental official when the actions are the functional equivalent of "obtaining or retaining business for or with or directing business to any person."[43] An example of a payment falling outside the exclusion would be a payment to a ministry official who was responsible for authorizing increases in the prices of pharmaceutical products controlled by the ministry. As the grant of an increase involves the exercise of discretion, the action of the official would not be within the listed exclusions and could be the functional equivalent of "obtaining or retaining business for or with or directing business to any person."

C. Payments That Are Permitted Under Foreign Law

The 1988 amendments provide that it shall be an affirmative defense to a charged offense under the FCPA that "the payment of a gift, offer or promise of

40. H. Rep., *supra* note 2, at 8.
41. Amendments, *supra* note 5, § 5003(f)(3)(A)-(B).
42. *Id.* (amending 15 U.S.C. §§ 78dd-1, -2).
43. Conf. Rep., *supra* note 36, at 921.

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."[44] This change is responsive to the comments of the committee of the Association of the Bar of the City of New York quoted above.[45]

D. Reasonable and Bona Fide Expenditures

The 1988 amendments also provide an affirmative defense that

> the payment, gift, offer or promise of value that was made was a reasonable and bona fide expenditure, such as travel and lodging expenses . . . directly related to—
> (A) the promotion, demonstration or explanation of products of services; or
> (B) the execution or performance of a contract with a foreign government or agency thereof.[46]

The Conference Committee noted with reference to payment for such expenses, that 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 of a reasonable and bona fide expense would not be available.[47]

E. Conformation to Domestic Bribery Standard

Included within the prohibited payments under the 1988 amendments are those made to a foreign official to induce him to do any act "in violation of the lawful duty of such officials." This language change conforms the foreign bribery standard to the domestic bribery standard in 18 U.S.C. section 201.[48]

F. The Attorney General's Guidelines

In 1980 the DOJ set up a review procedure under which the Department agreed to advise its enforcement intentions concerning the FCPA on a set of specific circumstances. Subsequently, the SEC in Release 34-17,099 had stated that as a matter of discretion it would take no enforcement action with respect to possible violations of the FCPA in any case where an Issuer obtained a review letter from the DOJ prior to June 1981. The SEC had proposed to reconsider the June 1981 date based on a review of subsequent DOJ rulings.[49] To date, however, there have been only nineteen reported DOJ review letters, and the SEC has not updated its original release.[50]

The review procedure appears to have been of particular benefit where the transaction in question is of a public nature. The Olayan Group of Saudi Arabia

44. Amendments, *supra* note 5, § 5003(C)(1).
45. *See supra* note 3.
46. Amendments, *supra* note 5, § 5003(C)(2).
47. Conf. Rep., *supra* note 36, at 922.
48. Amendments, *supra* note 5, § 5003(a)(c).
49. Improving Government Regulations, Semiannual Agenda, 45 Fed. Reg. 59,061, 59,065.
50. 2 FCPA Rep., *supra* note 17, at 700.

and the Lockheed Corporation, for example, sought a review letter regarding proposed agreements with each other for the purpose of joint transactions with the Saudi Arabian Airlines Corporation (Saudia) and the Kingdom of Saudi Arabia. Sheik Suleiman Olayan, Chairman of the Olayan Group, was also a member of the Board of Directors of Saudia, circumstances so public that there was a distinct likelihood of their coming to the notice of the DOJ even without the request for a review letter.[51] In this case, the DOJ indicated that it did not intend to take any enforcement action on the basis of the agreements between Lockheed and Saudia.

The 1988 amendments establish procedures under which the Attorney General is required within six months of the date of enactment (August 23, 1988) to decide whether compliance would be enhanced and the business community would be assisted by further clarification of the provisions of the 1988 amendments. If so, the Attorney General may issue (i) guidelines regarding activities that conform with the Justice Department's enforcement policy regarding the FCPA, and (ii) "general precautionary procedures" to enable domestic concerns to conform their conduct to the Department's enforcement policy. The Attorney General is also required to establish procedures to provide opinions in response to specific inquiries from domestic concerning conformance of their conduct with the Department's enforcement policy.[52] In addition, the Department is required, to the extent possible, to provide timely guidance with respect to the FCPA to exporters and small businesses unable to obtain specialized counsel.[53]

G. International Agreement

The 1988 amendments charge the President with pursuing an international agreement among OECD countries[54] concerning acts prohibited under the FCPA as amended by the 1988 Amendments. They also require the President to report to Congress within one year of passage on the progress of these negotiations.[55] It appears that the purpose of this requirement is to respond to the concern that other nations do not have the same standards Congress has enshrined in the FCPA. If not, American corporations will continue to be at a competitive disadvantage. Some commentators have suggested that, should such negotiations fail, the bribery provisions of the FCPA may be completely eliminated from U.S. law.[56]

51. U.S. Department of Justice, FCPA & Review Procedure No. 80-04, October 29, 1980.
52. Amendments, *supra* note 5, § 5003(a) (amending 15 U.S.C. § 78dd-1).
53. *Id.*
54. OECD countries include the United States, Canada, Japan, Australia, New Zealand, Turkey, and 19 European countries.
55. *Id.*
56. *See* Corporate Counsel's International Adviser, Special Report, Oct. 1988, at 4 (comments of Eric Hirschhorn).

IV. The 1988 Amendments to the Accounting Provisions of the FCPA

Much criticism has focused on the costs and time required to comply with the accounting sections of section 13(b) of the 1934 Act and the difficulty of ensuring full compliance. The 1988 amendments made changes to three principal areas of these accounting rules and appear to accord with the SEC's interpretive position, as expressed in the January 13, 1981, SEC policy statement quoted above.

A. "KNOWINGLY"

The amendments limit criminal liability for violations of accounting standards to those who "knowingly circumvent" a system of internal accounting controls or who "knowingly falsify" records kept pursuant to accounting requirements.[57] The conferees noted that they intend to modify current SEC enforcement policy "that penalties not be imposed for insignificant or technical infractions or inadvertent conduct."[58]

B. " REASONABLE DETAIL" AND "REASONABLE ASSURANCES"

The amendments define the "reasonable detail" in which companies must keep books, records, and accounts and the "reasonable assurance" of management control over corporate assets as follows: "such level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs having in mind a comparison between benefits to be obtained and costs to be incurred in obtaining such benefits."[59] The Conference Report noted that the Conference Committee adopted the prudent-man qualification "in order to clarify that the current standard does not connote an unrealistic degree of exactitude or precision."

C. FOREIGN SUBSIDIARIES

Prior to passage of the 1988 amendments, the SEC had taken the position in Release 17500 that if there was between 20 percent and 50 percent ownership, compliance would be expected subject to some demonstration by the Issuer that this percentage of ownership did not amount to control. Below the 20 percent level, the SEC undertook to shoulder the burden of showing control.

The 1988 amendments clarify the position to the effect that the responsibilities of an Issuer for the accounting practices of a foreign subsidiary that is less than 50 percent owned are met if the Issuer proceeds in good faith to use its influence

57. Amendments, *supra* note 5, § 5002 (amending 15 U.S.C. § 78m(b)).
58. CONF. REP., *supra* note 36, at 916.
59. *Id.* at 917.

to cause the subsidiary to comply with the requirements of section 13(b)(2).[60] The conferees commented that

> [t]he amendment recognizes that it is unrealistic to expect a minority owner to exert a disproportionate influence over the accounting practices of a subsidiary. While the relative degree of ownership is obviously one factor, other factors may be important in determining whether an issuer has demonstrated good faith efforts to use its influence.[61]

In addition to these amendments to the record-keeping requirements imposed by the FCPA, the SEC has also announced, on July 26, 1988, proposed new rules requiring annual reports distributed to shareholders and certain reports filed with the SEC to contain a statement by management of its responsibilities for the preparation of the reporting company's financial information and for establishing and maintaining a system of internal controls relating to the financial reporting. In addition, the proposed rule requires the reports to include management's assessment of the effectiveness of the internal control system and a statement as to how management has responded to recommendations by the reporting company's accountant relating to the management's statement. The SEC considers that the reporting company's independent accountant would, in turn, be obliged, under generally accepted auditing standards, to consider whether management's statement included a material misstatement and if so, to take actions resulting in appropriate disclosure.[62]

D. Increased Penalties for Violation of the FCPA

The penalties for violation of the FCPA have been increased by the 1988 amendments and are severe. Under the antibribery provisions, any Issuer or any domestic concern (including individuals in a business capacity) may be fined for criminal violations up to $2,000,000 (an increase of $1,000,000), or subject to a civil penalty of up to $10,000 in an action brought by the Commission.[63] Any director, officer, stockholder, employee, or agent of an Issuer or domestic concern acting on its behalf who willfully violates the FCPA may be fined up to $100,000 or be imprisoned for up to five years, or both, or under the amendments subject to civil penalty of up to $10,000 (an increase of $5,000) in an action brought by the Commission. The 1988 amendments have increased the maximum fine under section 32(c) of the 1934 Act, which imposes penalties for violations, including violations of the record-keeping requirements, from $1,000,000 to $2,000,000. The 1988 amendments repealed the "Eckhart Amendment," which did not allow prosecution of an employee or agent unless the party on whose behalf they acted was found to

60. Amendments, *supra* note 5, § 5002 (amending U.S.C. § 78m(b)).
61. Conf. Rep., *supra* note 36, at 917.
62. Report of Management's Responsibilities, 53 Fed. Reg. 28,009 (1988).
63. FCPA, *supra* note 4, § 104(g).

have violated the FCPA.[64] Any fine imposed on an individual may not be paid by the Issuer or domestic concern on whose behalf the individual acted.[65] Individuals who aid, abet, counsel, or induce others to act or who conspire with them to violate the provisions of the FCPA may be guilty of an offense under 18 U.S.C. sections 2 and 21.

V. Conclusions

Domestic concerns engaged in foreign business appear to have obtained in the 1988 amendments a modicum of relief from the more onerous of the antibribery provisions of the FCPA. Congress appears to have accepted the SEC viewpoint with respect to the amendments to the accounting provisions, and to have kept those amendments in line with the expressed enforcement policy of the SEC. Where bribery by foreign concerns is involved, it may not be possible to provide legislative assistance in a manner satisfactory to domestic concerns.

64. Amendments, *supra* note 5, §§ 5002, 5003 (amending 15 U.S.C. § 78ff).
65. *Id.* § 5002(b) (amending 15 U.S.C. § 78ff).