JOHN E. IMPERT*

A Program for Compliance with the Foreign Corrupt Practices Act and Foreign Law Restrictions on the Use of Sales Agents **

In this period of vast trade deficits the importance of exports to the American economy has been increasingly recognized. How should U.S. exporters conduct sales efforts abroad to comply with the Foreign Corrupt Practices Act (FCPA)[1] and related local laws, yet still compete effectively with exporters from other countries? The United States is the only industrialized nation whose laws forbid improper payments both at home and in other jurisdictions.[2] United States exporters, therefore, face unique hurdles in complying with the laws of the country to which an export is directed *and* with U.S. legal constraints on their manner of selling.

The FCPA was enacted to fight bribery. A few commentators have attempted to analyze the effect of the FCPA's bribery prohibitions on U.S. exports.[3] Given the sensitive nature of the subject matter, however, no convincing conclusions have been reached. Since its enactment in 1977, the FCPA has been criticized, praised, and finally revised in the Omnibus Trade and Competitiveness Act of

*Assistant General Counsel, The Boeing Company, Seattle, Washington.

**The Editorial Reviewer for this article was Kevin M. Harris.

1. 15 U.S.C. §§ 78dd-1, 78dd-2 (1988).

2. *See* Gevurtz, *Using the Antitrust Laws to Combat Overseas Bribery by Foreign Companies: A Step to Even the Odds in International Trade*, 27 VA. J. INT'L L. 211, 212 (1987) and sources collected in n.4; Longobardi, *Reviewing the Situation: What Is to Be Done with the FCPA*, 20 VAND. J. TRANSNAT'L L. 431, 446 (1987).

3. *See, e.g.*, G. GREANIAS & D. WINDSOR, THE FOREIGN CORRUPT PRACTICE ACT: ANATOMY OF A STATUTE 122, 123 (1982); Longobardi, *supra* note 2, at 447; Comment, *The FCPA of 1977: A Solution or a Problem*, 11 CAL. W. INT'L L.J. 111, 113 (1981); Note, *The Antibribery Provisions of the FCPA of 1977: Are They Really as Valuable as We Think They Are?*, 10 DEL. J. CORP. L. 71, 82 (1985); THE ECONOMIST, Nov. 19, 1988, at 22. In his preliminary comments to a bibliography on the FCPA, Steven Perkins notes that "[f]ew articles have been written on the bribery provisions." Perkins, *Bibliography on the FCPA of 1977*, 14 W. ST. U. L. REV. 491 (1987).

1988.[4] This article, after preliminary remarks on the phenomenon of bribery, describes the prohibitions of the FCPA and the effect, if any, of the recent amendments. It then surveys legal prohibitions outside of the United States that are applicable to the sales activities of U.S. exporters and describes strategies for compliance with all such laws and regulations.

I. Bribery

Bribes and kickbacks are said to have been inseparable from human commerce since recorded time.[5] In the view of *The Economist,* however, rapid economic growth and the emergence of a strong middle class in the nineteenth century have led to a relatively effective legal prohibition of bribery in many industrialized countries.[6] The middle class's devotion to hard work as the route to success has been seen as antithetical to the widespread corruption that earlier reigned. Today bribery tends to be a pervasive part of the culture only of poor countries. Skeptical of the effectiveness of attempts such as the FCPA's to export the morality of industrialized countries, yet concerned about Europeans' inattention to the problem, *The Economist* concludes that "[t]he Europeans . . . hurt themselves by their complacency, but they hurt developing countries more. In the end it is up to poor countries to defend themselves from foreigners' corruption—as well as from their own."[7] In short, demands and opportunities for commercial bribery remain,[8] and legal and business strategies are required to deal with them.

II. The Enactment of the FCPA in 1977

As an outgrowth of the initial Watergate investigation of the mid-1970s, the special prosecutor's report revealed that payments had been made to foreign agents, some part of which were returned to U.S. exporters to augment domestic political slush funds.[9] Yet, most funds remained with the foreign agents, and some of those funds were shown to have been used as bribes to obtain foreign business. The initial bribery revelations were pursued by the Securities and Exchange Commission (SEC) as disclosure violations. The aggregate amount of payments was impressive. The largest disclosed were payments by Exxon of $56.7 million, by Northrup of $30.7 million, and by Lockheed of $25 million.[10]

4. Pub. L. 100–418, § 5003; 15 U.S.C. §§ 78dd-1, 78dd-2 (1988).

5. *See* S. MACMULLEN, CORRUPTION AND THE DECLINE OF ROME (1988); J. NOONAN, BRIBES 839 (1984).

6. THE ECONOMIST, *supra* note 3.

7. *Id.*

8. For a description of the reputed official French system of bribery in less-developed countries, see Krop, *L'Argent Noir de la France,* L'Evénement du Jeudi, Sept. 29, 1988, at 51.

9. Timmeny, An Overview of the FCPA, 9 SYRACUSE J. INT'L L. & COM. 235 (1982); *see also* Brickey, *Corporate Criminal Liability: A Primer for Corporate Counsel,* 40 BUS. LAW. 129 (1984).

10. G. GREANIAS & D. WINDSOR, *supra* note 3, at 20–22.

After an abortive attempt at a legislative response during the Ford administration to what was believed to be widespread American business bribery, the FCPA was enacted in the moralistic climate of the early Carter administration. It prohibited bribery of foreign government officials, granted enforcement responsibilities jointly to the SEC and the Department of Justice, and added some very general accounting rules. The FCPA has been described as a "hodgepodge of conflicting ends and means. . . . Originally envisioned strictly as a disclosure statute, . . . the act was finally transformed into a prohibitory criminal statute; nevertheless, the ties to the securities laws were maintained."[11]

After more than ten years' experience, the effect of the FCPA on American business and its sales practices abroad remains largely unknowable. *The Economist,* comparing the U.S. share of exports in countries it considers to be corrupt versus the share in noncorrupt countries, concludes that the share has increased by a roughly equivalent percentage in both categories of countries.[12] The implication is that no business has been lost on an aggregate basis. Such categories are highly subjective, however, and within each category, countries have experienced quite different rates of growth, so perhaps, but for the FCPA, total U.S. exports would have increased more. There are no documented answers.

Legal commentators, who may be relatively unconstrained by facts, have speculated freely. Contrast, respectively, these claims of victory over bribery, laments of lost business, and the certainty that the FCPA's uncertainty is the root of the problem: "[T]he FCPA has succeeded in preventing bribery by U.S. agents in foreign countries. . . ."[13] "Members from each sector of the business community found that their profits were decreasing from lost foreign business."[14] "[T]he Act is causing corporations to be overcautious and turn down legitimate business opportunities because they are unsure whether a proposed transaction will violate the FCPA."[15]

In the end the effect of the FCPA is unknowable in individual cases of lost business because successful bribery by the winning competitor, if it has actually occurred, can almost never be proved. Short of proof "beyond a reasonable doubt," sellers realize they have little choice but to keep quiet. Public speculation by the losing bidder that the winner paid a bribe is likely to earn the enmity of the public officials who are the target of the complaint. While the loser may gain some psychic satisfaction, the loser is unlikely to gain any future business. Thus, it is unrealistic to expect, as one commentator has suggested, that "[i]f a company is harmed by a competitor's bribe to a foreign government official, the damaged company is likely to provide helpful information to the SEC or the

11. *Id.* at 5.
12. THE ECONOMIST, *supra* note 3, at 21.
13. Note, *supra* note 3, at 82.
14. *Id.*
15. Longobardi, *supra* note 2, at 447.

Department of Justice. . . .''[16] On the contrary, the loser will gripe privately and perhaps give up on that particular market.

A. The Bribery Provisions

As enacted in 1977, and assuming a use of the mails or other instrumentality of interstate commerce, a violation of the bribery provisions of the FCPA occurred when the four following elements were met: (1) a corrupt payment or offer to pay anything of value was made; (2) to (a) a foreign official; (b) a foreign political party, party official, or candidate; or (c) an intermediary for any such person; (3) while knowing or having reason to know that the purpose of the payment was to influence any official act or decision of the foreign official, party, or candidate (including a decision not to perform a function or to use influence); and (4) the payment was made to assist an issuer or domestic concern in obtaining or retaining business or directing business to any person.[17] The 1977 FCPA covered both issuers whose securities were registered with the SEC and all other forms of domestic business concerns, whether carried on by individuals or in corporate or partnership form. The most crucial element, particularly when an intermediary was used, was the requirement of knowledge or ''reason to know'' of the corrupt payment and purposes. An exception was made, however, for facilitating or ''grease'' payments to foreign government employees whose duties were essentially ministerial or clerical.

The SEC and the Department of Justice were given shared responsibility for investigation and enforcement of the FCPA bribery provisions. The SEC could seek injunctions of civil violations by SEC reporting companies and their officers, directors, employees, agents, and stockholders. The Department of Justice had similar authority for violations of other domestic concerns. However, the Department of Justice alone was responsible for criminal prosecutions under the Act.

The FCPA also included accounting provisions intended to deter bribery through increased public scrutiny of corporate practices. Every SEC reporting company was required to make and keep books and records that, in reasonable detail, accurately and fairly reflected the disposition of the issuer's assets, and to devise and maintain a system of internal accounting controls.[18] The implementation of the accounting provisions of the FCPA was generally left in practice to the accounting profession. As primarily an accounting concern and secondarily a line of defense to bribery, the accounting provisions are not discussed in detail in this article.

16. Note, *Clayco Petroleum Corp. v. Occidental Petroleum Corp.: Should There Be a Bribery Exception to the Act of State Doctrine?*, 17 Cornell Int'l L.J. 407, 422 (1984).

17. 15 U.S.C. §§ 78dd-1, 78dd-2 (1977).

18. *Id.*

III. 1988 Amendments to Foreign Corrupt Practices Act

On August 23, 1988, the Omnibus Trade and Competitiveness Act amended the FCPA provisions concerning knowledge of illegal conduct and the definition of facilitating or grease payments and also added several affirmative defenses.[19] The primary reason for the amendments was the perceived concern of the business community and Congress that the scope of the FCPA's prohibitions, particularly as to "reason to know," was too uncertain and was leading unnecessarily to lost sales by U.S. exporters.[20]

A. Reason to Know

The FCPA originally prohibited any payment to a third party "while knowing or having reason to know that all or a portion" of the payment would be used to bribe foreign officials.[21] As many companies engage the services of third parties abroad to assist in marketing their products, most commonly on a commission basis, this section was primarily intended to prohibit the use of such intermediaries as a conduit for the payment of bribes.

Apart from the perceived evil of serving to disguise an illegal payment, foreign agents or intermediaries serve a multitude of legitimate purposes in foreign sales efforts. Export sales are inherently uncertain, particularly for "big ticket" items, and marketing efforts over several years may be needed to effect a single sale. The cost of maintaining a U.S. expatriate employee in a foreign country over such an extended period could be prohibitive, and for that reason many companies prefer to use local "reps" who receive a fee contingent upon the sale. Third parties who are so engaged are often called sales agents, sales representatives, or sales consultants. For the purposes of this article, all will be referred to as sales agents or intermediaries. While the amount of the fee received by the sales agent could be very large, even as a small percentage of the cost of an expensive product, the sales agent also runs the risk of expending many years of futile effort on a particular project and receiving nothing at all.

If "reason to know" was construed broadly under the FCPA as originally enacted, a question arose as to whether the engagement of any sales agent would be suspect in a country thought to be corrupt. Another question was the extent legitimate reasons for engaging a sales agent negated "reason to know" if the

19. 15 U.S.C. §§ 78dd-1, 78dd-2 (1988).

20. H. R. Conf. Rep. on H.R. 3, Omnibus Trade and Competitiveness Act of 1988, 100th Cong., 2d Sess. 916 (1988) [hereinafter Conf. Rep.]; *see also* Brickey, *The Foreign Corrupt Practices Act Amendment of 1988*, 2 Corp. Crim. Liability, No. 4, at 1, 3 (1989), Bliss & Spak, *The Foreign Corrupt Practices Act of 1988: Clarification or Evisceration?*, 20 Law & Pol'y Int'l Bus. 441, 451 (1989); Roberts, *Revision of the Foreign Corrupt Practices Act by the 1988 Omnibus Trade Bill: Will It Reduce the Compliance Burdens and Anticompetitive Impact?*, 1989 B.Y.U.L. Rev. 491, 495, Turza, *Corrupt Practices Act: How Far Have We Come?*, N.Y.L.J., Apr. 5, 1990, at 5.

21. 15 U.S.C. § 78dd-1(a)(3) (1977).

sales agent later did engage in bribery. In the minds of commentators, "hazy prohibitions" in the 1977 FCPA such as "reason to know" were seen to have curtailed legitimate promotional efforts and to have "deterred many American businesses from making any payment, legal or not, to secure business."[22]

The 1988 amendments deleted "reason to know" and imposed liability for an illicit payment only if it was made with "knowledge" that all or a part of the payment would be used for bribery. "Knowledge," however, was then defined as follows:

> (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.[23] In short, "reason to know" has simply been redefined as a "high probability" of knowledge of a fact or that a result is "substantially certain" to occur.

By way of background, the new definitions set forth in the amendments are derived from the Model Penal Code and have been interpreted in the courts under several criminal statutes. As explained in the Conference Report on the 1988 FCPA amendments, knowledge of a criminal act encompasses such phrases as "deliberate avoidance of knowledge," "willful blindness," "conscious disregard of the facts," or "a head in the sand."[24] The basic difficulty with such metaphors is that once a bribe has occurred, the hindsight which is thereby gained means to many people that, in retrospect, it was highly probable that a bribe would (and in fact did) occur.

The most practical way to try to protect against the application of such retrospective analysis is to conduct a "due diligence" investigation at the time the sales agent is retained. The exporter's records can then demonstrate that, at all relevant times, there were no facts indicating any probability of an illicit payment.

Cases that have applied the "willful disregard" test in interpreting other criminal statutes have underlined this duty to investigate. For example, in *United States v. Kaplan*[25] an attorney was convicted of defrauding insurance companies through submitting false medical bills. The defendant argued that he did not know that the bills forwarded to him were false. The conviction was upheld because clients and insurance companies had asserted in the past that the bills

22. G. GREANIAS & D. WINDSOR, *supra* note 3, at 122.
23. 15 U.S.C. & 78dd-2(h)(3) (1988).
24. CONF. REP., *supra* note 20, at 920–21.
25. 832 F.2d 676 (1st Cir. 1987).

were too high, and despite these warnings, the attorney had made no effort to investigate.

In the abstract, the new definition is certainly narrower than an undefined "reason to know." However, the limited number of cases that have been prosecuted under the bribery provisions of the FCPA all have involved sets of facts with no ambiguity at all as to the intended purpose of the illicit payments.[26] Thus, the practice of the SEC and the Department of Justice has been to concentrate upon clear violations, and the most that can be expected from this portion of the amendments is to help ensure that such practice will continue.

B. Grease Payments

The definition of facilitating, or grease payments, which were permitted in the original 1977 FCPA, depended upon the identity or status of the foreign official who was the ultimate payee. Foreign officials to whom payments were legal consisted of those whose duties were "essentially ministerial or clerical."[27] Thus, in order to benefit from the exemption for grease payments to minor foreign officials, it was necessary to determine whether their duties were ministerial or clerical as opposed to policy-making. This distinction was not always evident, particularly in unfamiliar cultures, and might have required a local administrative law opinion from counsel.

The 1988 amendments eliminated this status test in favor of a straightforward exception for payments made to secure "routine governmental action."[28] The focus was thus changed from the status of the payee to the purpose for which payment was made. The statute defined "routine governmental action" in terms of a laundry list of petty bureaucratic tasks such as issuing permits and licenses and processing visas. However, to make clear that the exception was not to swallow up the rule, the definition of "routine governmental action" did not include "any decision by a foreign official . . . to award new business or to continue business with a particular party. . . ."[29]

In practice it may be surmised that few U.S. or foreign legal opinions have ever been sought on making grease payments. Such payments are likely to be made, if at all, by local freight forwarders, customs agents, or other local service organizations in the foreign country whose modest fees encompass even more modest tips or grease payments to local officials to speed up administrative actions, all without the knowledge of the U.S. client.

---

26. *See* enforcement actions and review releases collected in FOREIGN CORRUPT PRACTICES ACT REPORTER 110–25 (1979) [hereinafter FCPA REP.] and particularly Department of Justice cases at 125. "To date, the SEC enforcement actions can be characterized as conservative in that they have used the FCPA only as an added count in cases they would have brought anyway." *Id.* at 110.

27. 15 U.S.C. § 78dd-2(d)(2) (1977).

28. 15 U.S.C. § 78dd-2(h)(4)(A) (1988).

29. *Id.*

C. Affirmative Defenses

The 1988 FCPA amendments added two affirmative defenses for certain categories of expenditures. First, it is now an affirmative defense that the payment was "lawful under the written laws and regulations of the foreign official's . . . country."[30] It is hard to imagine any payment that an overzealous U.S. prosecutor would claim to be a bribe that would nonetheless be explicitly permitted by the laws of a foreign country. So, again a theoretical clarification without much practical significance has occurred. Second, it is an affirmative defense that the payment was a reasonable expenditure on behalf of a foreign official directly related to the promotion, demonstration, or explanation of products or services or the execution or performance of a contract with a foreign government or agency.[31] This second affirmative defense simply reflects an existing Department of Justice enforcement policy that payments to reimburse foreign officials for visits to product demonstrations or tours of manufacturing facilities are not venal and should not be classified as corrupt.[32] Once again, no change of significance has occurred.

Although, as noted earlier, this article does not cover matters primarily within the province of accountants, one of the 1988 amendments to the provisions on accounting records and internal audit controls is of interest to lawyers. A corporation's FCPA responsibility for keeping records and for internal accounting controls of its subsidiaries has been clarified. If the corporation owns less than a majority of the shares of the foreign company, its compliance with the FCPA as to such company is presumed whenever good faith efforts have been demonstrated to influence the company "to the extent reasonable under the . . . circumstances" to comply with the recordkeeping and internal accounting control requirements.[33] Whether or not such good faith efforts were reasonable will be determined by such factors as "the relative degree of . . . ownership . . . and the laws and practices governing the business operations of the country in which such firm is located."[34]

As a planning matter, therefore, whenever a U.S. corporation holds a significant minority shareholding in a foreign company as more than a passive investor, the subject of proper recordkeeping and internal accounting controls should be made an agenda item at an early board meeting. If the foreign majority owners object to the scope of the recordkeeping and internal accounting controls proposed by the representative of the U.S. minority shareholder, perhaps because of the costs involved, the representative can at least propose a resolution to adopt the degree of auditing that the representative believes is appropriate. If the

30. *Id.* § 78dd-1(c)(1).
31. *Id.* § 78dd-1(c)(2).
32. FCPA Rep., *supra* note 26.
33. 15 U.S.C. § 78m(b)(6) (1988).
34. *Id.*

resolution is voted down by representatives of the majority shareholders, then sufficient efforts at compliance would seem to have been made, and the U.S. shareholder's obligations under the accounting provisions of the FCPA would seem to have been satisfied.

D. PENALTIES

As a last matter, in addition to modifying the requirements for a violation of the FCPA, the 1988 amendments increased the penalties. The maximum fine for a corporation has been increased from $1 million to $2 million, while the maximum penalty for an individual has been increased from $10 thousand to $100 thousand. The possibility of imprisonment for up to five years remains unchanged. In addition, a new civil penalty of $10 thousand per violation may be imposed on corporations and individuals by the SEC or the Department of Justice. Finally, individual corporate employees may now be convicted even if the corporation has not been found to have violated the FCPA.[35]

IV. A Program for FCPA Compliance

As has been implied, these relatively minor 1988 amendments to the FCPA are unlikely to change the way a U.S. corporation makes sales abroad. In a close case, conviction under the FCPA may now be more difficult. However, U.S. corporations and their employees will never wish to be put in a position of relying upon the marginal impact of the 1988 amendments. Wherever the line is drawn in any particular case between permissible and impermissible behavior, people will wish to be comfortably within the permissible zone. In practice this means that U.S. corporations and their employees must continue to exercise "due diligence" to ensure that any violation of the FCPA that may occur has not been authorized and has happened without the knowledge of anyone subject to the Act.

As noted earlier, a duty to investigate is an inherent aspect of the "willful disregard" test in cases that have applied the "knowledge" concept in other criminal statutes.[36] It is true that Congress rejected a proposed due diligence defense to the FCPA under which a corporation could escape liability for the unauthorized actions of its employees if it demonstrated that it had established procedures reasonably expected to prevent and detect such violations.[37] However, even without a statutory exemption, due diligence will continue to be an implicit defense in establishing the absence of the requisite degree of knowledge.[38]

35. *Id.* § 78dd-2(g).

36. *See supra* notes 24–25 and accompanying text.

37. CONF. REP., *supra* note 20, at 922.

38. For a contrary view, see Comment, *The FCPA and Other Arguments Against a Due Diligence Defense to Corporate Criminal Liability*, 29 UCLA L. REV. 447, 449 (1982).

In achieving an adequate level of due diligence, procedures should be adopted that govern how a foreign sales agent is retained. An awareness must exist of "red flags," which could indicate the possibility of a corrupt payment. Among such warning signs are a request for a commission at a level substantially above the going rate for agency work in a particular country. An excessively large commission could suggest that part of the commission has been earmarked for a corrupt payment to a government official. Family or business ties with government officials should be disclosed and examined to determine if a relationship exists that could suggest an illicit payment. A request that the commission be paid in a third country could imply a shared scheme for the avoidance of local exchange controls or income taxes or a plan to divide the commission in the third country with a proscribed payee. An answer to this latter problem is to refuse to make payments of commissions in any third country.

Procedures for the appointment of sales agents should be tailored to the business operations of the U.S. exporter.[39] A written policy should cover an appropriate level of internal approvals, including, perhaps, the chief executive in major appointments. Typical information to accompany a request for an appointment of a sales agent should include an application by the candidate setting forth relevant business information, as well as detailing any family or business ties to government officials and prior positions held in government by the candidate. The request should also include a report on the applicant's character by those persons in the exporter's organization who have met the applicant, along with the results of reference checks. The absence of any prohibited government relationship can sometimes be confirmed by the United States Consulate in the foreign country. If the U.S. exporter has a matrix-type organization with an international staff independent of the division or subsidiary that seeks to make the sale, then internal checks and balances can be introduced by requiring sign-offs from both the selling unit's personnel and personnel of the separate international sales staff.

Once an adequate record has been established to demonstrate a bona fide business reason for the appointment, a written agreement is needed to govern the relationship between the sales agent and the exporter and to set forth representations and warranties by the sales agent. First, the agreement should contain such usual provisions that the sales agent is an independent contractor with no authority to commit the exporter, that the terms of the agreement may be disclosed if required by any relevant authority, and that the agent shall comply with all laws and regulations of the United States and the country of sale.[40] In addi-

39. For an example of ITT Corp.'s early policy on retaining sales agents, see App. III to Symposium, *The FCPA: Domestic and International Implications*, 9 SYRACUSE J. INT'L L. & COM. 234, 376 (1982).

40. For a comprehensive discussion of dealer agreements, see Herold & Knoll, *Negotiating and Drafting International Distribution, Agency, and Representative Agreements: The United States Exporter's Perspective*, 21 INT'L LAW. 939 (1987), and Saltoun & Spudis, *International Distribution and Sales Agency Agreements: Practical Guidelines for U.S. Exporters*, 38 BUS. LAW. 883 (1983).

tion, the agreement should contain FCPA-oriented clauses such as representations that the agent is not an employee, officer, or representative of any government, or agency or instrumentality of any government, or of a political party, and is not a candidate for political office. The agreement should include an obligation to inform the U.S. exporter promptly of any change in any representation. The agent should undertake not to use any portion of its commission to make any payment or gift directly or indirectly to any employee, officer, or representative of the foreign government under circumstances where such payment would constitute a bribe, kickback, or illegal payment under U.S. or applicable foreign laws. Finally, the U.S. exporter should be excused from performance, or empowered to terminate the agreement, either upon a violation of its terms and conditions or if the agreement itself is found to be impermissible under the laws of the United States or the foreign country. Although the FCPA encompasses only illicit payments to government officials and politicians, U.S. exporters should also forbid payments to commercial customer representatives and kickbacks to its own personnel.

The American penchant for disclosure suggests a last precaution, that of formally notifying the customer of the appointment after the due diligence process has been completed and the agreement signed. If there is no notification, embarrassment could occur if a government official expresses surprise that some person has recommended an exporter's product without disclosing that he or she stood to gain by a sale. Worse yet, if an illicit payment is later proved, the fact that the relationship was a secret might intimate some knowledge of the bribe. Thus, once the appointment is completed, the U.S. exporter should send a letter to the chief executive of the customer or the head of the government department giving notice of the appointment and any related limitations on its scope, such as a lack of authorization to commit the U.S. exporter. Of course, if many potential customers are located in the country, it may be impractical to identify and notify them in advance. At a minimum, however, the contract with the sales agent could require notification of each customer orally at the first meeting.

V. Local Law Survey

The initial focus of this article has been U.S. legal restraints on selling activities abroad. The other half of the equation is local law restraints in the targeted foreign country of sale. To what extent should the U.S. exporter familiarize itself with relevant foreign restrictions, both anticorruption laws analogous to the FCPA and other laws and regulations that might constrain selling activities or regulate the legal relationship with the sales agent?

In any decision to appoint a foreign sales agent, the U.S. exporter should have information on local law restrictions covering: (i) the use of intermediaries in government or military sales; (ii) any limits on the method or amount of compensation; and (iii) any nationality requirements for the sales agent. If the appointment itself is

permissible, the U.S. exporter should know if the appointment must be disclosed or if the sales agent must register the fact of the appointment or the terms of the agreement. Finally, dealer protection laws are common in many parts of the world, particularly in Europe and South America, and the U.S. exporter should be aware of the potential cost of termination or of failure to renew the agreement.[41]

In some cases it may be feasible to rely on the proposed foreign sales agent as a source of such information. As the agent is likely to be a national or a resident of the targeted country of sale, he or she should know what laws or regulations apply to sales activities. However, the agent will not be a reliable source of information on dealer protection laws, including termination indemnities to which the agent could be entitled and legal techniques to avoid such liabilities. Even if the agent is aware of formal or informal restrictions on the use of agents in government sales, he or she might ignore the restrictions, hoping they will not be applied. On a worst case basis, if the customer later attempts to forbid payment of a commission in the ultimate sales contract, the U.S. exporter might have to choose between losing the sale or incurring a lawsuit by the customer or the unpaid agent. The most prudent course for the U.S. exporter is therefore to understand the foreign legal environment.

An appendix to this article sets forth a number of charts of foreign restrictions on the appointment of sales agents in a series of countries in Africa, the Asia Pacific region, the Caribbean and Latin America, Europe, and the Middle East. The charts have been derived from legal surveys that the Boeing Company has obtained for the countries involved.[42]

Some generalizations can be made about the types of restrictions likely to be encountered in each geographic area. In Africa and Europe there are few restrictions on the appointment of sales agents. Some European countries do have limitations on termination of the sales agency agreement, however, and it may be costly to terminate or fail to renew such an agreement after it has been in effect for a few years. In the Asia Pacific region, the governments of Korea, Pakistan, Taiwan, and Thailand have announced restrictions on the use of sales agents in military or government sales. India can be added to this list, as restrictions have at times been applied on an ad hoc basis, seemingly correlated with anticorruption campaigns in the local press.

41. *See* Herold & Knoll, *supra* note 40, at 965; Saltoun & Spudis, *supra* note 40.

42. Using a Chicago-based international law firm, the Boeing Company has obtained written legal surveys on the laws of numerous foreign countries covering those sales agent issues, among others, enumerated in the charts. Pursuant to a practice established by Douglas P. Beighle, Senior Vice President and Secretary, the opinions are updated on a regular basis. Other, less costly, written sources of such information include legal news updates in Middle East Executive Reports and East Asian Executive Reports. In the event counsel decides to research such issues directly, basic guidance on foreign legal research is found in Janis, *The Lawyer's Responsibility for Foreign Law and Foreign Lawyers*, 16 INT'L LAW. 693 (1982). For thoughts on factors in the choice of foreign counsel, see Impert, *Relations with Outside Counsel in Asia Pacific*, 19 INT'L LAW. 29 (1985) and *Selecting and Managing Foreign Litigation Counsel*, 1 INT'L Q., No. 3, at 1 (1989).

If the foreign country purports to limit the use of sales agents in government sales, one legally permissible solution may be to engage the agent on a retainer basis unconnected with the level of sales, thereby permitting a certification that no commission will be paid that is contingent upon the sale. Of course from a purely business viewpoint, a retainer represents a fixed expense that may never be recouped from a successful sale. Thus, exporters are likely to resist retainer relationships.

In the Caribbean and Latin America, restrictions on the termination of the agreements of sales intermediaries are found in Central America, Brazil, Colombia, Ecuador, and Peru. In some countries this exposure may be mitigated by retaining a sales agent who is incorporated, thereby avoiding what local courts could otherwise characterize as an employment relationship. A few nationality requirements also exist for sales agents, which appear, however, to be rarely enforced.

In the Middle East and North Africa legal restrictions on the use of sales agents are widespread. Limitations on the use of agents in military sales are found nearly everywhere. Registration requirements are common, including, on occasion, an obligation to file the contract in some public registry. With regard to restrictions on termination of the agreement, in contrast to Europe and Latin America where money damages are likely, in the Middle East the local authorities may not permit the appointment of a new agent until the foreign exporter settles amicably with the agent to be terminated. Under such circumstances, the departing agent holds considerable bargaining power. Local law restrictions on termination of the agreement, other than in the Middle East, can sometimes be avoided by making the agreement subject to the laws of a state in the United States. However, such restrictions can be viewed as a matter of public policy in the foreign country, and a contractual agreement on the application of U.S. law may be ignored by local tribunals.[43]

The foreign law charts in the appendix are intended as a guide to further research rather than as a definitive statement of local law and policy. For a start, further inquiry is required to determine the scope of any restriction. Kuwait, for example, requires the appointment of a local agent in most sales, while Saudi Arabia requires local agents (called service agents) only in government sales. Once local law has been researched, a judgment must sometimes be made as to whether a local regulation is seriously intended to be enforced. Nationality requirements are examples that are not infrequently ignored in practice.

Although the charts refer mostly to local laws and regulations, customer policies can be equally important. If the customer is likely to require the U.S. exporter to certify that it has not used a sales agent, the fact that such requirement is a customer policy rather than a statute may make little difference. Apart

43. *See* Saltoun & Spudis, *supra* note 40, at 894.

from the bad customer relations that could arise from a false certification, the foreign country may have a criminal false statement statute that could apply to a certification to a government customer. If the sale is to be financed by Exim Bank or by Foreign Military Sales credits, a U.S. mail or wire fraud violation could arise from a false certification in the United States.[44] Information on customer policy is sometimes included in requests for proposals or may be learned through inquiries of the customer and others in the industry.

Foreign registration requirements are most pertinent when they focus on the particular activities of the agent rather than on something as innocuous as doing business requirements. If sales agents must be listed in a special registry, the bona fides of an agent will be questionable if the agent is not registered. Once again a danger exists, that in hindsight, the U.S. exporter will be judged to have had knowledge of an illegal payment if its local agent operated illegally or in secrecy.

The charts in the appendix do not cover currency exchange controls and local "revolving door" laws for military or government personnel. Currency exchange controls are unlikely to affect the U.S. exporter directly because in most cases it would not be a legal resident of the foreign country. Nevertheless, public disclosure of a violation by the agent of exchange controls or local income tax laws is bound to result in bad publicity for the U.S. exporter, as well as for the agent. Responses to this area of risk can include a requirement for a certificate from the agent that the agent will comply with local tax and exchange control requirements, a refusal by the U.S. exporter to make payment to any third country, and a policy against making payment to any account identified only by a number.

"Revolving door" laws are common in many foreign countries. They typically prohibit former or retired government employees from working as sales agents to their former departments for a year or two after leaving government service. The possibility that such a prohibition would apply can be gleaned from the application prepared by the prospective foreign sales agent. If the individual has left government service very recently, a specific inquiry can be made as to the existence and applicability of such restrictions.

VI. Summary

The FCPA remains a formidable danger for any U.S. exporter engaged in foreign selling activities. While the U.S. exporter's own employees, particularly U.S. citizens or residents subject to the FCPA, are unlikely to violate its prohibitions, regular legal and ethics training is advisable. The primary danger of a violation of the FCPA remains in the activities of a foreign sales agent or an

44. 18 U.S.C. §§ 1341, 1343 (1988).

intermediary steeped in another culture, particularly in a country where illicit payments may be prevalent.

This article, having outlined the FCPA and the minimal effects of the 1988 amendments, has focused on a practical program of compliance with its prohibitions. A self-regulated process of selection and appointment of foreign sales agents can ensure that individuals of impeccable reputation are chosen and indoctrinated in U.S. legal requirements. A record of this process should document that at all relevant times the U.S. exporter not only had no knowledge of any illicit payment, but affirmatively strived to ensure that none would be made. This "due diligence" investigative process, while not an explicit affirmative defense to an FCPA charge, remains an implicit defense by demonstrating a lack of the requisite knowledge of a corrupt payment.

Yet U.S. legal prohibitions remain only half of the equation. Compliance with applicable foreign law is also required. With a focus once again on the use of sales intermediaries, this article has surveyed foreign restrictions on their appointment and activities and suggested strategies for compliance. Payment in-country, use of retainers as opposed to commissions, disclosure to the customer of the appointment, and choice of U.S. law have all been discussed. While some reliance can be placed in the contractual representations of the foreign sales agent, U.S. counsel must play an active role in researching foreign law and finding an appropriate solution to any problems presented.

APPENDIX
APPOINTMENT OF SALES INTERMEDIARIES

Africa

	Restrict Termination*	Restrict Military Sales*	Restrict Govt. Sales*	Registration*	% Limits*	Nationality*
Angola				X		
Botswana						
Cameroon						
Ghana						X
Kenya						
Malawi				X		
Mozambique				X		
Nigeria						X
Somalia						
S. Africa						
Sudan				X		
Uganda						
Zaire						X
Zimbabwe						
Zambia						

*In this and subsequent charts, the headings have the following meanings:

"Restrict Termination" means that local law provides for payment of compensation upon termination or expiration of a sales agency agreement or prohibits appointment of a new agent until a settlement is made with the existing agent.

"Restrict Military Sales" and "Restrict Government Sales" means that certain sales intermediaries are not permitted with these types of customers.

"Registration" means that a local requirement exists for listing in some special registry.

"% Limits" means that the amount of compensation to be paid to the sales agent is regulated.

"Nationality" means that only nationals of the country may act as sales agents.

APPENDIX
APPOINTMENT OF SALES INTERMEDIARIES

Asia Pacific

	Restrict Termination	Restrict Military Sales	Restrict Govt. Sales	Registration	% Limits	Nationality
Australia				X		
Bangladesh				X		
Brunei		X*				
China (PRC)						
Hong Kong						
India		Policy**	Policy			X
Indonesia						
Japan						
Korea		Policy		X	X	X
Macao						
Malaysia						
Nepal						
New Zealand						
Pakistan		Policy	Policy			
Philippines						
Seychelles						
Singapore		Policy				
Sri Lanka						
Taiwan		Policy			X	X
Thailand		Policy				X

*Use of a government-owned agency as sales consultant is required by law. An analogous case in Yugoslavia was cleared by the Department of Justice.[45]
**"Policy" means that restrictions in the use of intermediaries in sales to the military or government are grounded in policies of the customer rather than laws or regulations.

45. Department of Justice Review Procedure Release No. 82–03, FCPA REP. 718 (1982).

APPENDIX
APPOINTMENT OF SALES INTERMEDIARIES

Caribbean and Latin America

	Restrict Termination	Restrict Military Sales	Restrict Govt. Sales	Registration	% Limits	Nationality
Antigua						
Argentina						
Bahamas						
Barbados						
Belize						
Bolivia				X		
Brazil	X			X		
Chile						
Colombia	X			X		
Costa Rica	X			X		X
Dominican Rep.	X					
Ecuador	X					
El Salvador	X					
Grenada						
Guatemala	X					X
Mexico						
Panama	X					X
Paraguay						
Peru	X					
Suriname						
Trinidad				X		
Uruguay						
Venezuela						

APPENDIX
APPOINTMENT OF SALES INTERMEDIARIES

Europe

	Restrict Termination	Restrict Military Sales	Restrict Govt. Sales	Registration	% Limits	Nationality
Belgium		Policy				
Cyprus				X		
Denmark						
Finland						
France	X					
Greece				X		X
Iceland						X
Italy	X			X		X
Netherlands	X					
Norway	X					
Portugal						
Spain	X					
Sweden	X					
Turkey		Policy	Policy	X		
U.K.						
Yugoslavia[46]		X	X	X		X

46. *Id.*

APPENDIX
APPOINTMENT OF SALES INTERMEDIARIES

Middle East and North Africa

	Restrict Termination	Restrict Military Sales	Restrict Govt. Sales	Registration	% Limits	Nationality
Abu Dhabi	X	Policy		X	X	X
Bahrain	X	Policy		X		X
Dubai	X	Policy		X		X
Egypt		Policy				X
Iraq				X		X
Iran		Policy	Policy			
Israel		X			X	
Jordan		X		X		X
Kuwait	X	Policy		X		X
Oman	X			X		X
Qatar	X			X		X
Saudi Arabia	X	X		X	X	X
Sharjah	X	Policy		X		X
Tunesia		Policy	Policy	X		
Yemen (North)	X	Policy	Policy	X		X