Defending SEC and DOJ FCPA Investigations and Conducting Related Corporate Internal Investigations: The Triton Energy/Indonesia SEC Consent Decree Settlements

Arthur F. Mathews
Defending SEC and DOJ FCPA Investigations and Conducting Related Corporate Internal Investigations: The Triton Energy/Indonesia SEC Consent Decree Settlements

Arthur F. Mathews*

I. INTRODUCTION ................................................................. 305

II. SCOPE OF THE FCPA .......................................................... 312

III. FCPA BRIBERY PROVISIONS ........................................... 312

IV. "GREASE," "FACILITATING," OR "EXPEDITING" PAYMENT EXCEPTION: "ROUTINE GOVERNMENT ACTION" ..................... 313

V. STATUTORY AFFIRMATIVE DEFENSES .................................. 316

A. Legal Under Local Law ..................................................... 316

B. Reasonable and Bona Fide Expenditures ............................. 317

VI. STATUTE OF LIMITATIONS ............................................... 318

VII. DEFENDING ON THE MERITS: REFUTING THE NECESSARY ELEMENTS OF AN FCPA CIVIL OR CRIMINAL VIOLATION ........... 322

A. Any U.S. Person or Entity, "Issuers" and "Domestic Concerns" and Their Officers, Directors, Employees, Agents or Stockholders Even if Foreigners ................................................. 322

1. Repeal of Eckhardt Amendment Defense ............................... 322

* Mr. Mathews was a senior partner at Wilmer, Cutler & Pickering, Washington, D.C., and an Adjunct Professor at Georgetown Law Center.

Sadly, Mr. Mathews passed away on May 24, 1998. At that time, the editorial work on this article was not yet completed. With assistance from Wilmer, Cutler & Pickering, the Editorial Board of the Northwestern Journal of International Law & Business has endeavored to make final editing and fact-checking changes in Mr. Mathews' absence. Readers should note, however, that we were unable to locate certain sources, in particular, the press releases issued by the Southern District of New York U.S. Attorney's office, but have included these sources as originally cited by Mr. Mathews.
B. Use of Jurisdictional Facilities “In Furtherance of” .......................... 323
C. Corruptly .................................................................................. 325
D. Payment of Anything of Value .................................................. 327
E. Authorization of Payment to a Third Party Agent or Consultant While Knowing that All or a Portion Will be Offered or Given to a Foreign Government Official.................. 328
1. Knowing Authorization of Corrupt Payments by Agents .......... 328
2. Foreign Government Official ...................................................... 330
F. For the Purpose of Influencing Any Official Act or Decision .... 333
G. Obtaining or Retaining Business ............................................... 333

VIII. OTHER DEFENSE CONSIDERATIONS ........................................ 338
A. “Due Diligence”: Not a Defense, But a Strong Mitigation Element ................................................................. 338
B. The “Act of State Doctrine” ...................................................... 341
C. National Security Exemption ..................................................... 346
D. The Possibility of “Cultural Defenses” When A Foreign Agent or Consultant Is Involved in an FCPA Case......................... 347

IX. FCPA BOOKS AND RECORDS AND INTERNAL ACCOUNTING
    CONTROLS PROVISIONS ......................................................... 349
A. New Section 10A of the 1934 Act and SEC Rule 10A-1 ............. 355

X. THE TRITON ENERGY/INDONESIA CASE .................................. 357
A. The “Questionable” Payments ................................................... 360
  1. May 1989 Tax Audit .............................................................. 360
  4. 1989 Corporate Tax Refund .................................................. 362
  5. Refund of Value Added Tax ................................................... 363
  6. Pipeline Tariff Payment .......................................................... 364
B. SEC Civil Injunctive and Civil Penalty Enforcement Action .. 365
C. Companion SEC Administrative Cease-And-Desist
    Proceedings ................................................................. 367

XI. WHAT DEFENSES MAY HAVE BEEN EXPLORED IF TRITON
    ENERGY HAD LITIGATED THE SEC CIVIL ENFORCEMENT ACTION?
    OR WHAT DEFENSES MIGHT BE WORTHY OF CONSIDERATION
    IF A COMPARABLE FCPA CORRUPT FOREIGN PAYMENTS CASE
    WERE FULLY LITIGATED? ..................................................... 372
A. Statute of Limitations/Laches .................................................. 374
B. Lack of Equity ........................................................................ 376
C. Lack of Use of United States “Jurisdictional Means”
   “in Furtherance of” the Allegedly Improper Payments ............. 378
D. Lack of “Corrupt” Intent .......................................................... 379
E. Lawful Grease or Facilitating Payments ................................... 381
F. Not for the Purpose of “Obtaining or Retaining Business” ....... 383

XII. REQUIRED PUBLIC DISCLOSURE .............................................. 387
A. “Materiality” Under the Federal Securities Laws ....................... 387

304
Defending SEC & DOJ FCPA Investigations

B. The Crop Growers Case............................................. 389
C. Other Related Governmental Disclosure Obligations........... 393

XIII. DEFENDING AN SEC INVESTIGATION OR A DOJ/GRAND JURY INQUIRY AND CONDUCTING A RELATED CORPORATE INTERNAL INVESTIGATION.................................................. 395
A. Defense of the SEC Investigation.................................. 395
1. Strategies in Defending an SEC Investigation May Differ From Defending a DOJ/Grand Jury Inquiry Into the Same Activities ............................................. 395
2. AFM Rules of Thumb in Defending SEC Investigations... 398
3. When, If Ever, Must a Private Formal SEC Investigation Be Publicly Disclosed?.................................................. 410
4. "Wells Submission" Considerations................................ 412
5. International Aspects of SEC Investigations.................... 414
B. Defending A DOJ/Grand Jury Inquiry............................ 416
1. Informal and Formal Stages of the Inquiry ...................... 416
2. The Changing Climate: "Cooperating" rather than "Defending" the Company .................................................... 417
3. Defending the Corporation Before the Grand Jury .......... 443
C. Conducting An Internal Corporate Investigation.............. 445

XIV. Conclusion.................................................................. 455

I. INTRODUCTION

After a prolonged lull in the Reagan and Bush Administrations, the Securities and Exchange Commission (SEC or Commission) and the Department of Justice (DOJ) renewed prosecutorial interest in civil and criminal enforcement of the foreign bribery/corrupt foreign payments provisions of the Foreign Corrupt Practices Act (FCPA).1 In the February 1997 case SEC v. Triton Energy Corp.,2 the SEC brought its first FCPA corrupt foreign payments civil enforcement action in over a decade.3 SEC v. Triton Energy

---


Prior to and shortly after the passage of the FCPA, during the 1970s, the SEC had litigated over 40 domestic and foreign bribery civil enforcement actions involving pre-FCPA
Corp. involved payments made to a foreign agent in Indonesia in connection with an oil and gas concession operated and developed by Triton Energy's subsidiary, Triton Indonesia, and an Indonesian government agency. The SEC alleged that payments were illegally passed on to Indonesian government employees/officials, and concealed by misbookings in the books, records and accounts of Triton Indonesia. A few months earlier, in SEC v. Montedison S.P.A., the SEC, lacking jurisdiction for an FCPA bribery charge, brought a civil injunctive enforcement action against an Italian cor-


poration alleging violations of the FCPA's books and records and internal accounting controls provisions, as well as Rule 10b-5 fraud, in connection with bribes paid to Italian politicians and government officials. In January 1995, the DOJ obtained a guilty plea by Lockheed Corporation to charges of conspiring to violate both the bribery and books and records/internal accounting controls provisions of the FCPA in connection with bribes paid for business in Egypt. And in February 1998, the DOJ charged the CEO of Saybolt, Inc. with FCPA bribery crimes relating to an alleged bribe of government officials in Panama to secure valuable Panamanian government concessions.

DOJ officials have acknowledged the existence of a number of current grand jury investigations involving potential FCPA bribery violations.


6 See Federal Officials Charge Texas Executive With Paying Cash Bribe To Panamanian Officials, 12 CORP. CRIME REP., Feb. 9, 1998, at 1; see also Ralph Ranalli, CEO Charged With Allegedly Bribing Panama Official, BOSTON HERALD, Feb. 3, 1998, at 13, available in 1998 WL 7336432. David H. Mead, the president and chief executive officer of Saybolt, Inc. was arrested on FCPA bribery, conspiracy, and racketeering enterprise charges. Saybolt and Mead allegedly paid a $50,000 bribe to Panama's Minister of Mines and Minerals in return for the award of new business with the government of Panama, substantial tax breaks and a coveted lease of land along the Panama Canal.

7 See Wendy C. Schmidt & Jonny J. Frank, FCPA Demands Due Diligence in Global Dealings, Nat. L. J., Mar. 3, 1997, at B16:

Until recently, only a few prosecutors in the Criminal Division of the DOJ's Fraud Section had responsibility for FCPA cases. Now all of them, as well as prosecutors in field offices of the U.S. Attorney, are authorized to investigate potential FCPA violations. DOJ sources indicate that at least 75 cases are under investigation, and it is anticipated that this number will increase significantly by the end of the decade.

... The DOJ, moreover, is using far more aggressive tactics to investigate potential FCPA violations, including consensually monitored telephone conversations and
Elsewhere, in the past two years, government bribery allegations have been published in one form or another in Argentina, Canada, Mexico, Italy, Germany, South Korea, Pakistan, Brazil, Japan, Israel, the Bahamas, Belgium, India, Ireland, Indonesia, Russia and China.¹

Search warrants. More investigations, and these kinds of techniques, can be expected as U.S. businesses expand overseas.

Id.

The SEC's FCPA enforcement investigations are also increasing in number. See SEC Enforcement: SEC Official Predicts More FCPA Cases in Near Future, 29 Sec. Reg. & L. Rep. (BNA) 607-8 (May 2, 1997) (Mary Keefe, Director of the SEC's Midwest Regional Office stated: "as globalization of the economy increases, we at the commission are beginning to see what we think is a resurgence of [FCPA] cases. . . . [The] number of emerging markets in which American companies are trying to gain footholds may be a factor in the increased number of investigations the commission's enforcement staff has into questionable foreign payments by public companies. We have a number of these cases under investigation....")

¹See, e.g., Andy Pasztor, Occidental Petroleum Conducts Inquiry Into Overseas Financial Transactions, WALL ST. J., May 12, 1997, at A3 (possibility of questionable payments in Congo, Qatar, Bangladesh, Yemen, Malaysia and Russia); Italy Convicts Fiat Chairman; Bars Him From Corporate Posts, N.Y. TIMES, Apr. 10, 1997, at D5 (illegal political donations in Italy); Brandon Mitchener, Germany Says Business Bribes on the Rise: Probe of Alleged VW Kickbacks Spotlights U.S. Complaints, WALL ST. J., Apr. 14, 1997, at A12 (reporting business bribes in Germany); Michael Schulman, Corruption in South Korea Isn't Gone Yet: Hanbo Scandal Shows Kim's Reform Falls Shy of Goals, WALL ST. J., Feb. 24, 1997, at A18 (describing bribes-for-loans scandal in South Korea); John Mintz, Korean Legislator Alleges Bribery in Sale of F-16s: General Dynamics Denies Paying Ex-President Roh $100 Million, WASH. POST, Oct. 26, 1995, at D11; Steve Blain, South Koreans Say Bribes Are Part of Life: Probe of Ex-President Doesn't Touch Systematic Graft, WALL ST. J., Nov. 21, 1995, at A13 (noting that bribery is so prevalent in South Korea that companies keep three sets of books — one for the accountants, one for the banks, and one for the chairman's office); Gabriel Escobar, Ex-Officials of IBM Argentina Are Indicted in Payoff Probe, WASH. POST, Apr. 3, 1996, at A1 (reporting that the DOJ and the SEC are investigating whether IBM Argentina violated the FCPA by paying bribes to obtain a $250 million contract to modernize computer systems of Banco de la Nacion, a large Argentine state-owned bank); Jonathan Friedland, Did IBM Unit Bribe Officials in Argentina to Land a Contract? WALL ST. J., Dec. 11, 1995, at A1; Matt Moffett & Jonathan Friedland, New Latin America Faces Devil of Old: Rampant Corruption, WALL ST. J., July 1, 1996, at A1 ("A dozen Argentine officials have been indicted on charges of committing a multimillion-dollar fraud in connection with an International Business Machines contract"); Paul Lewis, A World Fed Up With Bribes: Nations Begin Following U.S. Curbs on Corruption, N.Y. TIMES, Nov. 28, 1996, at D1 (noting corruption scandals involving Benazir Bhutto, Prime Minister of Pakistan; Silvio Berlusconi, Prime Minister of Italy; Fernando Collor De Mello, President of Brazil; Chun Doo Hwan and Rho Tae Woo, former Presidents of South Korea; Prime Minister Morihiro Hosokawa of Japan; Prime Minister Charles Haughey of Ireland; also noting that in a 1995 report then-U.S. Trade Representative Mickey Kantor said American companies lost $45 billion of overseas contracts the previous year due to foreign bribery by competitors; and stressing that "[b]ribery and kickbacks have become common in former communist countries as they embrace free enterprise. The spread of democracy can create new incentives for corruption as competing political parties seek campaign contributions."); Neil King Jr., Momentum Builds for Corporate Bribery Ban, WALL ST. J., Sept. 23, 1997, at A16 ("German companies alone spend as much as 10 billion marks ($5.6 billion) a year on bribes to foreign officials, most of it added to the contract price and then written off on their
Defending SEC & DOJ FCPA Investigations

taxes.
UTC’s Pratt & Whitney To Pay $14.8 Million To Settle Israeli Slush Fund Claim, 11 CORP. CRIME REP., May 26, 1997, at 5 (reporting that Pratt & Whitney Group of United Technologies Corporation agrees to pay United States “$14.8 million for allegedly conspiring to divert $10 million in United States military aid into a slush fund subject to the exclusive control of an Israeli Air Force officer” Rami Dotan); Boeing Under FBI Scrutiny For Involvement In Bahamian Bribe Scheme, Paper Reports, 10 CORP. CRIME REP., May 20, 1996, at 1; Boeing Unit Paid Bribes To Bahamian Politicians To Secure Plane Contract, CBC Reports, 8 CORP. CRIME REP., Oct. 17, 1994, at 40(I) (reporting that Bahaman Commission of Inquiry concluded that Boeing’s former Canadian subsidiary de Havilland, Inc. paid more than $1 million in bribes to secure airplane contract with Bahamas Air); John Urquhart, Canadian Police Probe Alleged Bribes by Former Boeing Unit to Win Order, WALL ST. J., Feb. 14, 1996, at A4; U.S. Is Investigating If an Ex-Boeing Unit Paid Bribes for a Job, WALL ST. J., May 14, 1996, at A8; Anne Swardson, Canada Alleges Mulroney Bribery Role: Former Prime Minister Denies Accusations, Will Sue, WASH. POST, Nov. 19, 1995, at A1 (reporting that former Canadian Prime Minister Brian Mulroney accepted a bribe from Airbus Industries); John Urquhart, Former Premier Sues Canada for Libel in Probe of Alleged Airbus Kickbacks, WALL ST. J., Nov. 21, 1995, at A13; Martin DuBois & Mark M. Nelson, Belgium Pursues Corruption Probe Involving Dassault, WALL ST. J., May 13, 1996, at A16 (“Belgian investigators said they are pursuing strong evidence of corruption involving French aircraft maker Dassault Aviation SA in a scandal that last year prompted the resignation of Willy Claes as secretary general of the North American Treaty Organization”); Julia Preston, Despite Scandals, Brazil Exudes Political Health: Nascent Democracy Stable, Public Irked by Corruption, WASH. POST, Aug. 2, 1992, at A30 (“Government contractors routinely expected to pay 2 percent commission to any bureaucrat who helped them land a job. But businessman say that associates of Farias, who is accused of masterminding a vast kickback network within the government, demanded as much as 30 percent.”); Miriam Jordan, India’s Growing Bribery Scandal Snares Four More Ministers, Threatens Reform, WALL ST. J., Feb. 23, 1996, at A8 (reporting that twenty-four politicians in India charged with taking bribes including four ministers, one the chief of urban affairs and another the chief of textiles); Miriam Jordan, Court Orders Arrest of 3 Ex-Cabinet Ministers, Politicians Charged in India’s Bribery Scandal, WALL ST. J., Mar. 1, 1996, at A10; Edward A. Gargan, Family Ties That Bind Growth: Corrupt Leaders in Indonesia Threaten Its Future, N.Y. TIMES, Apr. 9, 1996, at D1 (“Some things never seem to change in Indonesia, where nepotism, favoritism and corruption long have been ubiquitous. . . . Indonesia is, in the view of Transparency International, a Berlin-based watchdog organization, the most corrupt country on earth.”) Whitacre Told FBI of Wide Range of Alleged Illegal Activity by ADM and Executives, Document Shows, 11 CORP. CRIME REP., Oct. 6, 1997, at 1, 3 (reporting that FBI affidavit filed in federal court in the Archer Daniels Midland (ADM) criminal anti-trust case alleges that government informant Mark Whitacre reported to the FBI that: (i) ADM executives paid politicians in Russia “to facilitate ADM’s business ventures in that country;” (ii) “illegal kickbacks were part and parcel of ADM’s corporate culture;” (iii) “ADM engaged in other irregularities including “payment of hundreds of thousands of dollars in cash to various political candidates and political action committees;” and (iv) “Whitacre was aware of payoffs to Indonesian politicians — “the payments represented compensation in exchange for the non-Payment of taxes” and to help “procure environmental permits.”);” Michael R. Gordon, Russia’s Former Head of Privatization Faces Bribery Charge, N.Y. TIMES, Oct. 2, 1997, at A7 (question whether $100,000 “book advance” was a “bribe” paid by Uneximbank through a Swiss intermediary in return for Uneximbank winning auction to purchase 25% of Russia’s state telecommunications monopoly). See also JEFFREY P. BIHOLS & GREGORY HUSISIAN, THE FOREIGN CORRUPT PRACTICES ACT: COPING WITH CORRUPTION IN TRANSITIONAL ECONOMIES 9-11 (1996):

The corrupt payment issue is not confined to a few countries. In just the last few years, major corruption investigations, often involving foreign companies, have arisen in every corner of the world, ranging from Germany, England, Italy, France, Canada,
In light of these suggestions of continuing corruption in international business transactions, U.S. multi-national corporations must be prepared to effectively defend SEC or DOJ/grand jury FCPA investigations, and to conduct related corporate internal investigations in a manner that best achieves compliance with the law while simultaneously serving appropriate shareholder and corporate business interests.9

Belgium, and Spain in the West, to Mexico, Argentina, Brazil, and South Africa in the South, and to South Korea, the Philippines, Taiwan, India, Indonesia, Singapore, and Japan in the East.

Id. (citations omitted).

[The] corruption problem is most prevalent in the world’s transitional economies . . . . the demand for illicit payments has significantly increased in recent years as these markets have opened their doors to foreign investment and procurement. From Russia to Eastern Europe to China, western businessmen are seeking to participate in these growth markets, thus creating significant opportunities for payments.

Id. at 12-13 (citations omitted).

The problem is perhaps most acute in post-communist societies . . . .

There have been reports of corruption throughout Central Europe and the former Soviet Union, including Hungary, Poland, the Ukraine, Uzbekistan, Latvia, and the former Czechoslovakia, as well as other transitional economies such as India, Vietnam, and numerous countries in Africa . . . . The problem remains particularly acute, however, in two of the biggest transitional economies: China and Russia.

Id. at 13-15 (citations omitted).

9The establishment and continuing implementation of adequate corporate compliance programs are an indispensable element of proper corporate stewardship at the board of directors level. See, e.g., AMERICAN LAW INST., PRINCIPLES OF CORPORATE GOVERNANCE § 4.01 (a)(1)-(2) cmt. c, (b) cmt. b. (1994); American Bar Association, Section of Business Law, Corporate Director’s Handbook, 49 BUS. LAW. 1243, 1267 (rev. ed. 1994); Statement of the Business Roundtable, the Role and Composition of the Board of Directors of the Large Publicly Owned Corporation, 33 BUS. LAW. 2083, 2101 (1978). James L. Griffith, Jr., Director Oversight Liability: Twenty-First Century Standards and Legislative Controls on Liability, 20 DEL. J. CORP. L. 653 (1995); Charles Hanson, The Duty of Care, the Business Judgment Rule, and the American Law Institute Corporate Governance Project, 48 BUS. LAW. 1355, 1359-60 (1993). The adoption of the federal corporate and organizational sentencing guidelines, which encourage internal corporate compliance programs, see, e.g., U.S. SENTENCING GUIDELINES MANUAL § 8C2.5 & § 8A1.2 application note 3(k), is causing courts to pay significant attention to the efficacy of compliance programs in assessing private damages liability of corporate directors for injuries caused by corporate torts and crimes. For example, in In re Caremark International Inc. Derivative Litigation, the Delaware Court of Chancery in approving the settlement of shareholder claims, analyzed the obligations of corporate directors to monitor corporate operations. 698 A.2d 959 (Del. Ch. 1996). Analogizing to the federal corporate sentencing guidelines, the Chancery Court held that directors of Delaware corporations may incur personal liability for losses arising out of employee misconduct if the directors fail “to attempt in good faith to assure that a corporate information and reporting system [aimed at detecting misconduct], which the board concludes is adequate, exists...” Id. at 970. In Caremark, the company had pled guilty to criminal mail fraud charges and paid $250 million in fines and restitution in a federal criminal prosecution and related civil enforcement actions encompassing Medicare and Medicaid fraud. The shareholder lawsuits sought to recover these corporate losses from the directors, alleging they breached their duty of care by failing to actively monitor corporate performance and properly supervise corporate employees. Chancellor Allen agreed that plaintiff’s theory would warrant recoveries from corporate directors in some cases. The court refused to find that the 1963 Delaware Supreme Court precedent in Graham v. Allis-Chalmers
This article will summarize the foreign bribery/corrupt foreign payments provisions of the FCPA, briefly survey the related books and records and internal accounting controls provisions, analyze available defenses to civil and criminal FCPA charges, and explore sensitive substantive and strategic issues that arise in the defense of SEC and DOJ/grand jury investigations and in the conduct of related corporate internal investigations. This article will also analyze the recent SEC consent decree settlements in the Triton Energy/Indonesia case, and explore the types of defenses that might be pursued if an FCPA foreign payments case like Triton were litigated rather than resolved by settlement.

Manufacturing, Co., automatically precluded potential director liability. Id. The Graham Court had stated that "absent cause for suspicion there is no duty upon the directors to install and operate a corporate system of espionage to ferret out wrongdoing which they have no reason to suspect exists." 188 A.2d 125, 130 (Del. 1963). But Chancellor Allen in Caremark narrowly construed this language:

A broader interpretation of Graham v. Allis-Chalmers — that it means that a corporate board has no responsibility to assure that appropriate information and reporting systems are established by management — would not. . . . be accepted by the Delaware Supreme Court in 1996, in my opinion. . . . I start with the recognition that in recent years the Delaware Supreme Court has made it clear. . . . the seriousness with which the corporation law views the role of the corporate board. Secondly, I note the elementary fact that relevant and timely information is an essential predicate for satisfaction of the board's supervisory and monitoring role under Section 141 of the Delaware General Corporation Law. Thirdly, I note the potential impact of the federal organizational sentencing guidelines on any business organization. Any rational person attempting in good faith to meet an organizational governance responsibility would be bound to take into account this development and the enhanced penalties and the opportunities for reduced sanctions that it offers.

In light of these developments, it would, in my opinion, be a mistake to conclude that our Supreme Court's statement in Graham concerning "espionage" means that corporate boards may satisfy their obligation to be reasonably informed concerning the corporation, without assuring themselves that information and reporting systems exist in the organization that are reasonably designed to provide to senior management and to the board itself timely, accurate information sufficient to allow management and the board, each within its scope, to reach informed judgments concerning both the corporation's compliance with law and its business performance.

Caremark, 698 A.2d at 969-70.

Chancellor Allen made it clear that if a plaintiff can establish a "sustained or systematic failure. . . . to exercise reasonable oversight," id. at 971, then good faith is lacking and a director may have personal liability. After analyzing the discovery record in Caremark, Chancellor Allen accepted a settlement that dismissed the directors from personal liability, finding that the directors had paid some attention to Caremark's law compliance responsibilities prior to the company's unlawful conduct and had reacted promptly to improve compliance practices and procedures once the company's misconduct was revealed. Id.; see also Carole L. Basri et al., Corporate Compliance After Caremark, in Practicing Law Institute, Corporate Law and Practice, Course Handbook Series No. B-995 (1997).
II. SCOPE OF THE FCPA\textsuperscript{10}

The FCPA regulates the business conduct of American corporations in two significant respects: First, it proscribes bribery of foreign government or political officials, and related corrupt foreign payments, for the purpose of obtaining or retaining business.\textsuperscript{11} Second, it requires SEC-registered or reporting issuers, \textit{i.e.}, most public companies, to make and maintain accurate books and records and to implement adequate internal accounting controls.\textsuperscript{12} The bribery provisions apply solely to foreign business activities that implicate corrupt payments to foreign government or political officials. The books and records and internal accounting controls provisions are much broader. They extend to all of a company’s business, domestic as well as foreign, legitimate as well as corrupt; they are not limited to accounting for corrupt foreign payments.\textsuperscript{13} The DOJ can prosecute criminally any person or company for violations of either the bribery provisions or the books and records and internal accounting controls provisions. Since the 1988 amendments to the FCPA, the DOJ can also pursue civil injunctive and/or penalty actions against “domestic concerns” for FCPA bribery violations.\textsuperscript{14} The SEC can pursue civil and administrative enforcement actions for violations of both the bribery and corrupt foreign payments provisions and the books and records and internal accounting controls provisions against issuers, but has no jurisdiction whatsoever over criminal prosecutions, or over domestic concerns. This split of enforcement authority between the DOJ and the SEC leads to parallel and overlapping SEC and DOJ/Grand Jury investigations of corporate FCPA compliance.

III. FCPA BRIBERY PROVISIONS

In planning the defense of an FCPA investigation, it is helpful to review carefully each element of a civil or criminal violation of the FCPA

\textsuperscript{10}FCPA, \textit{supra} note 1. Prior to the passage of the statute in 1977, the SEC civilly, and the DOJ criminally, pursued a number of enforcement actions involving foreign bribery allegations pursuant to Sections (10)(b), 12, 13 and 14 of the 1934 Act and Rule 10b-5 thereunder, 15 U.S.C. §§ 78j(b), 781, 78m, 78n (1994), as well as the federal mail and wire fraud statutes, 18 U.S.C §§ 1341, 1343 (1994). See SEC REPORT, \textit{supra} note 3.


\textsuperscript{12}Section 13(b)(2) of the 1934 Act, 15 U.S.C. §78m(b)(2) (1994).

\textsuperscript{13}See, \textit{e.g.}, \textsc{Stephen F. Black & Roger M. Witten}, \textsc{Complying With the Foreign Corrupt Practices Act}, chs. 5, 6 (1997); \textsc{Don Zarin}, \textsc{Doing Business under the Foreign Corrupt Practices Act}, ch. 3 (1995); \textsc{Donald R. Cruver}, \textsc{Complying With The Foreign Corrupt Practices Act}, 1994 A.B.A. SEC. BUS. LAW. 20; \textsc{A. B. Levenson et al.}, \textsc{The Foreign Corrupt Practices Act of 1977: DO YOU KNOW THIS ACT COVERS DOMESTIC BUSINESS ACTIVITIES?} (1978) [hereinafter \textsc{The Foreign Corrupt Practices Act of 1977}].

Defending SEC & DOJ FCPA Investigations

corrupt foreign payments provisions. The government must establish the following seven elements to prove an FCPA bribery violation:

(i) any U.S. person or entity, including "issuers" and "domestic concerns," and any officer, director, employee, agent or stockholder of an issuer or a domestic concern even if a foreigner;

(ii) through use of the mails or means or instrumentalities of interstate commerce in furtherance of;

(iii) corruptly;

(iv) making an offer, payment, promise to pay, or authorization of payment, or gift of money or anything of value;

(v) to a foreign government official, or a foreign political party, or official of a foreign political party or a candidate for foreign political office, or to any person (i.e., a foreign agent) while knowing that all or a portion of such money or thing of value will be offered or given to a foreign government official, foreign political party, or official thereof, or a foreign political candidate;

(vi) for the purpose of influencing any official act or decision, or inducing such foreign official, political party, party official, or candidate to do or omit any act in violation of his lawful duty, or to induce the foreign official to use his influence to affect or influence a foreign government act or decision;

(vii) to assist the issuer or domestic concern in obtaining or retaining business or in directing business to any person.

IV. "GREASE," "FACILITATING," OR "EXPEDITING" PAYMENT EXCEPTION: "ROUTINE GOVERNMENT ACTION"

The bribery proscription does 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 routine government action by a foreign official, political party, or party official."
A "grease" or "facilitating" payment is meant to embrace payments that "merely move a particular matter toward an eventual act or decision."

The grease payment exception "permits U.S. companies to make modest payments to low-ranking government officials, to speed up or secure the performance of something that the party is already entitled to obtain. The typical example of a facilitating payment is a modest payment to a customs official to speed up the processing of entry papers." There are to date no judicial precedents interpreting the grease or facilitating payment exception.

"Routine government action" is defined in the statute as:

[A]n 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.

For the purpose of determining the legality of a grease payment, the term routine governmental action does not include any decision by a foreign

---

**ACT ANTIBRIBERY PROVISIONS (Feb. 1992) at 5 [hereinafter DOJ & Dep't of Commerce brochure].**

Determining whether a given employee's duties were "essentially ministerial or clerical" was a source of ambiguity, and it was not clear whether the Act prohibited certain "grease" payments, such as those for expediting shipments through customs or placing a transatlantic telephone call, securing required permits, or obtaining adequate police protection. Accordingly, recent changes in the FCPA focus on the purpose of the payment, instead of the particular duties of the official receiving the payment, offer, or promise of payment, and there are exceptions to the antibribery provision for "facilitating payments for routine governmental action."

*Id.*


19 ZARIN, *supra* note 13, §5.1, at 5-3:

The facilitating payments exception is intended to permit modest payments to officials to speed up or secure the performance of essentially clerical activities, which do not involve the exercise of discretion. . . .

[A] payment to a customs official to come in to work over the weekend to process custom documents for a company (i.e., to do what he would otherwise be required to do on Monday) would not be prohibited under the FCPA. On the other hand, permissible facilitating payments would not include payments to customs officials for a reduction in tariffs, since that would involve the exercise of discretion by a governmental official.

official to award new business to, or to continue business with, a particular party.\footnote{See 15 U.S.C. § 78dd-l(f)(3)(B), 2(h)(4)(B); see also DOJ & Dep’t of Commerce brochure, supra note 17, at 3.}

There is no monetary cap on the amount of a lawful grease or facilitating payment. However, such facilitating payments are customarily quite small, i.e., amounts less than $1,000. The larger the amount of the payment, the more likely the DOJ or the SEC will contend it is an unlawful bribe rather than a lawful facilitating payment. For example, it is doubtful whether a $50,000 payment, or even a $10,000 payment, would ever be viewed by the DOJ or the SEC as a lawful grease payment.\footnote{In opining that a $15,000 payment is probably too large to be a lawful “facilitating payment,” Black & Witten state: While the FCPA’s facilitating payments exception contains no \textit{per se} limit on the amount of a payment, focusing instead on the intent of the payor and the purpose of the payment, many practitioners believe it permits only relatively small payments to help push a ministerial act along. The $15,000 amount . . . seems too large. BLACK & WITTEN, supra note 13, § 4:08, at 4-9 to 4-10 (citation omitted).}

One commentator points out:

\begin{quote}
[A]t a conference on the FCPA held in Washington, D.C. on April 10, 1995, a Justice Department official was asked about the situation where a foreign government official offered to expedite the processing of VAT refunds, for a percentage of each refund. Under the local law, the U.S. company was entitled to the refunds, but there was substantial delay in processing the paperwork. The payment to the official was intended only to expedite the processing of what the company was legally entitled to. Despite the fact that the payment appears on its face to meet the requirements of the facilitating payments provision, the Justice Department official responded that such payments would attract the Department’s attention and would be unlikely to be viewed as facilitating payments. The apparent rationale is that the official is exercising discretion in deciding whose application to process first. Yet, to some extent, such an action is inherent in expediting the processing of any government papers. While the determination of a facilitating payment does not turn on the amount of the payment, the substantial amounts being paid and the continuing nature of the payment were clearly of concern to the official. Also, the Justice Department official viewed this situation as involving a decision by a foreign official concerning the retaining of business, and therefore outside the purview of the exception for facilitating payments.\footnote{Prior to the 1988 Amendments, one Congressman (Howard Berman) suggested the grease/facilitating payment exception ought to be framed in terms of the size of the payment. Congress failed to adopt that approach. See \textit{The Foreign Trade Practices Act: Hearings on H.R. 2157 Before the Subcomm. on Int’l Econ. Policy and Trade of the House Comm. on Foreign Affairs}, 98th Cong. 285 (1983) (statement of Congressman Berman: “What is the reaction to the idea . . . of forgetting the level of official and the purpose of the money, and instead just saying . . . [b]y definition, if you pay less than $10,000 or $5,000, it is not a bribe. If you pay more, it is.”).}
\end{quote}
The DOJ clearly takes the position that a payment to a foreign government official to secure and expedite payment to the issuer of an undisputed debt due and owing by the foreign government to the issuer pursuant to an existing or completed contract, is not a lawful grease payment. Thus, in United States v. Vitusa Corp., the DOJ successfully prosecuted the Vitusa Corporation and its president, Denny J. Herzberg, for FCPA bribery when they paid, or promised to pay, $50,000 to a government official of the Dominican Republic to obtain payment by the Dominican Republic government of a business debt due and owing to Vitusa Corporation.24

Even though the debt was undisputed and the money was intended to expedite and secure payment, the Justice Department treated the $50,000 as an unlawful payment to induce an official to use his influence to obtain or retain business (i.e., the full amount of the debt). Accordingly, the payment to a foreign official to collect on monies due and owing to a U.S. company by a government entity would be viewed by enforcement authorities as an illicit bribe, even though it was only for the collection of monies due and owing. The collection of money is part of obtaining or retaining business, and a payment to achieve that end is not a facilitating payment.25

The author disagrees with this analysis. The Vitusa Corporation payment should not have been deemed to be for the purpose of “obtaining or retaining business,” and instead should have been treated as an acceptable grease payment.

One further caveat about grease or facilitating payments is appropriate. While lawful under the FCPA, particular grease or facilitating payments may or may not be lawful under applicable local foreign law, and may or may not be customarily prosecuted when unlawful, by foreign prosecutorial officials.26

V. STATUTORY AFFIRMATIVE DEFENSES

The 1988 Amendments added two explicit affirmative defenses to the FCPA bribery provisions, namely: (i) legal under local law, and (ii) reasonable and bona fide expenditures. To date there are no judicial precedents interpreting either of these two affirmative defenses.

A. Legal Under Local Law

It is an affirmative defense to a civil or criminal corrupt foreign payment charge if “the payment, gift, offer, or promise, of anything of value

---

25 ZARIN, supra note 13, § 5.1, at 5-4 to 5-5.
26 See, e.g., ZARIN, supra note 13, § 5.1, at 5-5 n.10: “[I]n such countries as Indonesia, India, Thailand, Taiwan, and the Philippines, facilitating payments are technically unlawful but the rules are rarely enforced. On the other hand, in Singapore facilitating payments are unlawful and enforcement is strict.”
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. 27

The “normal rules of legal construction would apply” in interpreting which payments are lawful in a particular foreign country. 28 This affirmative defense is not available in countries without written laws. 29 A formal legal opinion of local foreign counsel is helpful evidence to establish this defense. 30

B. Reasonable and Bona Fide Expenditures

It is also an affirmative defense to a civil or criminal corrupt foreign payment charge if:

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. 31

This affirmative defense would apply to paying the travel and lodging expenses to bring foreign officials to the United States to inspect domestic plants and interview management before approving the building of a plant in the foreign country by the U.S. issuer. 32 Pursuant to this affirmative defense, the DOJ has approved annual training costs of $250,000 as “necessary and reasonable” when a U.S. petroleum exploration and production company was providing technical and management training to employees of a foreign government pursuant to a foreign local law provision requiring the

30 See DOJ FCPA Rev. Proc. Release Nos. 80-02 (Oct. 29, 1980), 88-1 (May 12, 1988) and 93-2 (May 11, 1993); see also DOJ & Dep’t of Commerce brochure, supra note 17, at 7:

Whether a payment was lawful under the written laws of the foreign country may be difficult to determine. You should consider seeking the advice of counsel or utilizing the Department of Justice’s Foreign Corrupt Practices Act Opinion Procedure review procedure for such issues as (a) the issuance of an advisory opinion by a foreign government agency; (b) the issuance of regulations by a unit of local government; and (c) a course of conduct of a foreign government or government agency indicating that the payment is legal.

company to provide such training. The DOJ appears to concede that bona
fide promotional expenses may include reasonable reimbursement of inci-
dental entertainment expenses.

VI. STATUTE OF LIMITATIONS

The general federal criminal five-year statute of limitations contained
in 18 U.S.C. § 3282 applies to FCPA criminal prosecutions. However, by
virtue of 18 U.S.C. § 3292, the DOJ can seek a court order suspending the
running of the statute of limitations for three years when necessary evidence
for a criminal prosecution is in the process of being obtained from a foreign
country. Thus, in some cases the five-year statute of limitations can be
stretched to eight years. Section 3292 only applies in instances in which a
federal grand jury has been impaneled but has not yet returned an indict-
ment. The DOJ must file its extension request in “the district court before
which a grand jury is impaneled,” and the court may grant the request if it
“finds by a preponderance of the evidence” that; (i) “an official request has
been made for such evidence,” and (ii) “it reasonably appears, or reasonably
appeared at the time the request was made, that such evidence is, or was, in
such foreign country.”

It is unclear what statute of limitations applies to an SEC civil injunc-
tive and/or penalty action for FCPA bribery allegations. The SEC seeks
both injunctive relief and civil monetary penalties in these cases. Courts
likely will hold that a five-year statute of limitations applies to the civil
monetary penalty aspect of an FCPA case, but to date courts have held that
no fixed limitations period applies to the SEC’s request for injunctive re-

34 See DOJ FCPA Rev. Proc. Release Nos. 82-1 (Jan. 27, 1982) (payment of travel,
lodging, meals, and entertainment expenses of 10 foreign officials); 83-2 (July 26, 1983)
(payment of travel, lodging, meals, and entertainment expenses of foreign official and his
wife); 83-3 (July 26, 1983) (payment of travel, lodging, meals, and entertainment expenses
of foreign official).
35 See BLACK & WITTEN, supra note 13, § 2.11.
37 In the most recent SEC civil injunctive/penalty action involving FCPA bribery allega-
(D.D.C. June 26, 1997), the matter was resolved by settlement; consequently any statute of limitations questions were not litigated. For an analysis
of the SEC’s enforcement actions seeking civil monetary penalties, see generally Arthur B.
Laby & Hardy Callcott, Patterns of SEC Enforcement Under the 1990 Remedies Act: Civil
38 See, e.g., SEC v. Lorin, 869 F. Supp. 1117 (S.D.N.Y. 1994); SEC v. Williams, 884 F.
Supp. 28 (D. Mass. 1995); SEC v. Rind, 991 F.2d 1486 (9th Cir. 1993); SEC v. Toomey,
ought to be subject to the equity doctrine of laches, but many lower courts have held that not even laches can be a time bar defense in an SEC civil injunctive enforcement action, including one seeking the additional ancillary relief of disgorgement.39

The Securities Exchange Act of 1934 (Exchange Act) does not contain any express statute of limitations generally governing SEC civil enforcement actions whether the relief sought is injunctive or a civil fine.40 However, all federal civil enforcement actions seeking “penalties, fines or forfeitures” are barred by a general five-year statute of limitations contained in 28 U.S.C. § 2462 if the particular statute authorizing the relief does not contain a specific limitations bar.41 This five-year limitations period would clearly apply to an SEC civil enforcement action seeking civil monetary penalties for an FCPA bribery violation.42 It is unclear whether section

---

See also Elizabeth S. Stong, Basics of the SEC’s Disgorgement Remedy, 43 PRAC. LAW. 67 (1997); Christopher R. Dollase, The Appeal of Rind: Limitations of Actions in Securities and Exchange Commission Civil Enforcement Actions,” 49 BUS. LAW. 1793, 1798 (1994). However, none of these decisions deal with a claim by the SEC for civil monetary penalties in a civil injunctive enforcement action. The Insider Trading Sanctions Act of 1988, Pub. L. No. 100-704, 102 Sat. 4677 (1988), added Section 21 A(d)(5) to the 1934 Act, 15 U.S. C. § 78u-1(d)(5) (1994), which specifically provides that a five-year statute of limitations is applicable to SEC enforcement actions for penalties against insider-trading violations. See SEC v. Willis, 777 F. Supp. 1165, 1174 (S.D.N.Y. 1991) (dismissing SEC enforcement action for civil monetary penalties against insider-trading violations on basis of five-year time bar of Section 21A(d)(5)). Apart from insider-trading civil penalty cases, the Exchange Act does not contain any specific time bar provisions as to other civil monetary penalty cases.


41See, e.g., 3M Co. v. Browner, 17 F.2d 1453 (D.C. Cir. 1994).

42Cf. Catherine A. Maxson, The Applicability of Section 2462’s Statute of Limitations to SEC Enforcement Suits in Light of the Remedies Act of 1990, 94 Mich. L. Rev. 512 (1995). Indeed, some commentators argue that SEC civil injunctive enforcement actions should also be barred by the five-year statute of limitations in 28 U.S.C. § 2462. This view assumes that the injunctive remedy is really “punitive,” not merely “remedial,” due to the severe direct and indirect adverse collateral consequences stemming from imposition of an injunction against a regulated person or entity. For an analysis of such adverse collateral consequences, see Thomas J. Andre, The Collateral Consequences of SEC Injunctive Relief: Mild Prophylactic or Perpetual Hazard, U. ILL. L. REV. 625 (1981). This view is strengthened by a recent D.C. Court of Appeals decision, Johnson v. SEC, 87 F.3d 484 (D.C. Cir. 1996), where the D.C. Circuit applied the five-year statute of limitations of 28 U.S.C. § 2462 to an SEC broker-dealer administrative disciplinary proceeding in which the SEC had suspended a branch manager from association with a broker-dealer for six months based upon failure to supervise charges.

319

[T]he defense bar can be expected to use Johnson to argue that any sanction, even an injunction, imposed more than five years after the underlying conduct occurred may be punitive and therefore barred by Section 2462.

...Federal courts in the election and environmental area have begun to apply Section 2462 to injunctive actions, though not based on the "penalty" reasoning of Johnson. See Federal Election Comm'n v. National Right to Work Comm., 916 F. Supp. 10, 14-15 (D.D.C. 1996) (holding that § 2462 bars not only Federal Election Commission (FEC) action seeking civil penalties for conduct occurring more than five years previously, but also actions seeking merely declaratory and injunctive relief); United States v. Telluride Co., 884 F. Supp. 404, 409-10 (D. Colo. 1995) (§ 2462 limitations period barred injunctive relief in Clean Water Act enforcement action); United States v. Windward Properties, Inc., 831 F. Supp. 690, 695 (N.D. Ga. 1993) (same); but see Federal Election Comm'n v. National Republican Senatorial Comm., 877 F. Supp. 15, 20-21 (D.D.C. 1995) (holding that § 2462 barred FEC action for civil penalty, but not for declaratory/injunctive relief). The three decisions applying section 2462 to injunctive actions rely on a 1947 Supreme Court decision holding that "when legal and equitable relief are available concurrently, equity will withhold its relief... where the applicable statute of limitations would bar the concurrent legal remedy." National Right to Work Comm., 916 F. Supp. at 14-15 (citing Cape v. Anderson 331 U.S. 461, 464 (1947)). The Johnson decision, holding that enforcement actions based on stale conduct are presumptively punitive, provides an additional argument for applying Section 2462 to SEC injunctive actions. (citations omitted.)


Certainly, there have been a limited number of decisions holding that a civil action for an injunction and disgorgement are not subject to § 2462, or that a civil action seeking an injunction alone is not subject to § 2462. The D.C. Circuit [in Johnson], however, cited only one of these cases (SEC v. Lorin) and only for the proposition that an action for disgorgement is not subject to § 2462. This suggests that the D.C. Circuit is uncomfortable with the notion that a civil injunctive action will, in all cases, be outside the purview of § 2462 (citations omitted.).

...Of course, an injunction by its very nature is based, in part, on a finding that there is a likelihood a person will further violate the securities laws. Nevertheless, when an injunction is supported by nothing more than activity that is more than five years old and the defendant is still in the securities business, Johnson suggests that such an action is prohibited by § 2462.

A court asked to enter such an injunction may look to the same factors Johnson found persuasive with respect to an administrative sanction. As an initial matter, a court may make the same inquiry the D.C. Circuit did in Johnson — how a person could pose a "current risk" when it took the Commission over five years to file a proceeding. Moreover, a court may consider the severe collateral consequences that visit any person enjoined. As a former Chief Justice of the Supreme Court, and a number of lower courts have recognized, an injunction has serious collateral consequences for a defendant in the securities industry that make it a 'drastic remedy'. An injunction can lead to license revocation by the states; it automatically requires the defendant to forfeit an exemption from registration under Regulation A of the Securities Act of 1933 in cases in which the broker is an underwriter; and it results in an automatic disqualification under Section 9(a)(2) of the Investment Company Act of 1940. These consequences suggest that an injunction is more than 'remedial' and thus provides a substantial argument, consistent with the rationale in Johnson, that an injunction should be governed by § 2462 when it is based on conduct that occurred more than five years before the case was initiated. (citations omitted.)

See also E. Brodsky & S. A. Eggers, The Statute of Limitations in SEC Civil Enforcement Actions, 23 SEC. REG. L.J. 123 (1995); C. R. Dollase, Comment, The Appeal of Rind, Limi-
2462’s five-year bar would be applied by the SEC or the courts to an SEC administrative cease and desist proceeding, a type of enforcement remedy sometimes sought by the SEC in FCPA cases.43 Since the SEC cannot impose civil monetary penalties in administrative cease and desist proceedings,44 the issue of whether section 2462’s five-year time bar applies turns on whether a cease and desist order is “punitive” rather than “remedial.”45


For articles analyzing the issues posed by the Johnson decision, see Jonathan N. Eisenberg & Benjamin J. Haskin, Statute of Limitations Made Applicable to SEC Actions, 8 INSIGHTS 4 (1994); Sturc & Yoch, supra at 12;

44See Lang & Lipton, supra note 43, at 262 n.98.
45Id. at 256 n.74; see also Jeffrey B. Maletta, Litigating SEC Injunctive Actions: The SEC’s Traditional Enforcement Action, in KIRKPATRICK & LOCKHART, supra note 43, 201, 222-23:

The Johnson decision has opened the door to challenges of injunctive actions, as well as other enforcement actions, based on stale claims, although the standards to be applied are far from clear. As Johnson illustrates, the application of § 2462 will depend on whether the sanction sought by the Commission is remedial or punitive. . . .

An injunction by itself may be characterized as ‘punitive’ because of the severe collateral consequences it produces. This suggests that an injunctive action may be subject to § 2462 under the Johnson rationale at least under circumstances in which the collateral consequences of the injunction outweigh its remedial benefits. On the other hand, an injunction may be deemed remedial because of its purpose in preventing the defendant from committing future violations of the securities laws. . . . (citations omitted).

See also Kansas v. Hendricks, 117 S. Ct. 2072, 2082 (1997) (exploring distinctions between different categories of sanctions — punitive versus remedial, and civil versus criminal).
VII. DEFENDING ON THE MERITS: REFUTING THE NECESSARY ELEMENTS OF AN FCPA CIVIL OR CRIMINAL VIOLATION

The successful defense of an FCPA investigation by the DOJ or the SEC, or of an ensuing civil enforcement action or criminal prosecution requires defense counsel to closely scrutinize each legal element of an FCPA bribery violation and to meticulously develop appropriate facts in an attempt to refute each necessary element.

A. Any U.S. Person or Entity, “Issuers” and “Domestic Concerns” and Their Officers, Directors, Employees, Agents or Stockholders Even if Foreigners

The FCPA anti-bribery provisions apply to U.S. “issuers,” any officer, director, employee, or agent (including foreign agents) of such issuer, or any stockholder acting on behalf of such issuer, and to “domestic concerns.” An “issuer” is a publicly held company that is subject to either the registration or reporting provisions of the Exchange Act. A “domestic concern” is any business with its principal place of business in the United States or that is organized under the laws of the United States, its territories, possessions, states, or commonwealth, and any individual who is a citizen, national or resident of the United States.

While the FCPA applies to foreign agents of an issuer or domestic concern, it does not apply to a foreign official who is bribed. Nor can the foreign official be prosecuted for conspiracy to violate the FCPA.

1. Repeal of Eckhardt Amendment Defense

As a result of the so-called “Eckhardt Amendment,” the original FCPA as enacted in 1977 prohibited the civil or criminal prosecution of low-level employees or agents of issuers or domestic concerns unless the issuer or domestic concern itself was found to have violated the foreign bribery prescription. The original 1977 Act did allow prosecution of officers, directors and other persons in corporate policy-making positions, without prior or contemporaneous prosecution of the issuer or domestic concern. Thus, a person acting in his or her role solely as a nonmanaging employee or agent of an issuer or domestic concern could not be prosecuted if the employer-

---

46 See Black & Witten, supra note 13, § 2.02.
49 For an example of an individual who was indicted and criminally prosecuted as a domestic concern, see United States v. Liebo, 923 F.2d 1308 (8th Cir. 1991).
business was not also prosecuted. The purpose of this provision was "to prevent businesses from scapegoating employees who violated the FCPA while carrying out the company's mission." This defense was repealed in the 1988 Amendments. Thus, low-level agents and employees can now be prosecuted for FCPA bribery even though the government does not prosecute the involved issuer or domestic concern employer.

A foreign corporation, even if it is a subsidiary of a U.S. parent corporation, is not directly subject to the FCPA, unless the corporation is a U.S. "issuer" or has its principal place of business in the United States. However, U.S. issuers and domestic concerns may be vicariously liable for the acts of foreign corporations and subsidiaries if they are used as conduits to make proscribed foreign bribes. Not only may foreign individuals who act as agents for U.S. issuers and domestic concerns be subject to the FCPA's bribery provisions. In addition, "U.S. citizens or residents who act in violation of the FCPA on behalf of foreign corporations may be liable as domestic concerns." 57

B. Use of Jurisdictional Facilities "In Furtherance of"

Unless it is entirely outside the United States, virtually any use of the mails, telephone, fax, wire communications or methods of interstate transportation will trigger application of the FCPA. However, the use of jurisdictional facilities must be "in furtherance of" an illegal offer or payment.

There are no litigated cases interpreting the "in furtherance of" language of the FCPA, and the legislative history merely reiterates the language of the provision. The "in furtherance of" language stands in stark contrast to the broad jurisdictional grants contained in other provisions of the various federal securities statutes. "In furtherance of" logically presupposes a temporal progression. The jurisdictional means must be used before the proscribed conduct is complete and irrevocable in order to be "in furtherance of" that conduct.

53 See United States v. McLean, 738 F.2d 655 (5th Cir. 1984).
54 BLACK & WITTEN, supra note 13, § 2.02, at 2-2 n.5.
56 123 CONG. REC. 38,779 (1977) (statement of Rep. Eckhardt) ("The scope of the bill is sufficient to reach any U.S. company which uses its foreign subsidiary as a conduit for such [corrupt] payments.").
57 BLACK & WITTEN, supra note 13, § 2.02, at 2-2; see also id. § 3.02; H.R. CONF. REP. No. 95-831, at 14 (1977), reprinted in 1977 U.S.C.C.A.N. 4098, 4126.
58 See BLACK & WITTEN, supra note 13, § 2.08.
59 H.R. CONF. REP. No. 95-831, at 12 (1977) reprinted in 1977 U.S.C.C.A.N. at 4124 ("use of interstate commerce need only be in furtherance of making the corrupt payment").
This reading is consistent with the interpretation that the Supreme Court has accorded to the language of this requirement's closest statutory analog, the jurisdictional grant in the federal mail fraud statute. The mail fraud statute proscribes use of the mails "for the purpose of executing" a scheme or artifice to defraud. The Supreme Court has held that this language requires that the use of the mails be "part of the execution of the scheme," "incident to an essential part of the scheme," or "a step in [the] plot," and has made clear that mailings unnecessary to the execution of the fraud are insufficient to confer federal jurisdiction. Thus, while use of jurisdictional means to authorize payment, to transmit payment instructions or to transfer money to make a payment all would be "in furtherance of" a payment, after the fact discussion that a payment had been made would not and could not be in furtherance of that payment.

The SEC recently was very innovative in pursuing a civil enforcement action embracing foreign bribes in a case where the SEC could not directly charge a substantive violation of the FCPA’s foreign bribery provisions because it could not establish sufficient use of U.S. jurisdictional facilities in furtherance of the allegedly corrupt foreign payments. In SEC v. Montedison, S.P.A., the SEC did not have a jurisdictional basis to sue an Italian company for FCPA bribery violations because the numerous payments to bribe Italian government officials or politicians were made either in Italy or through off-shore companies, with no funds or instructions emanating directly or indirectly from the United States. Nevertheless, the SEC sued Montedison for FCPA books and records and internal accounting controls violations based upon the fact that American Depository Receipts (ADRs) of Montedison were traded on the New York Stock Exchange (NYSE).


64 Since the ADRs were registered pursuant to Section 12(b) of the Exchange Act, Montedison was required to, and did, file annual reports on Form 20-F with the SEC pursuant to Section 13(a). The SEC’s civil complaint charged that Montedison violated the antifraud provisions of Rule 10b-5 by engaging in a fraudulent scheme to materially misstate its financial condition and results of operations on its books and records and in its SEC-filed reports. The scheme allegedly concealed hundreds of millions of dollars of payments from 1988 to 1993 that were used to bribe politicians and government officials in Italy. As a result of the scheme, Montedison’s assets were allegedly overstated on its books and records.
Thus, in addition to charging Rule 10b-5 violations, the SEC complaint alleges violations of Section 13(a), 13(b)(2)(A), 13(b)(2)(B) and Rules 12b-20 and 13-1, and seeks civil monetary penalties against Montedison pursuant to Section 21(d)(3) of the Exchange Act. The Montedison litigation is pending in the U.S. District Court for the District of Columbia and has not yet been resolved.

C. Corruptly

The use of facilities of interstate commerce in furtherance of a payment to a foreign official is an FCPA violation only if done “corruptly.” From the defense attorney’s perspective, the “corrupt” requirement is the most important element of an FCPA bribery violation. Both the SEC in civil enforcement actions and the DOJ in criminal prosecutions must prove corrupt intent.

The FCPA does not define “corruptly.” However, the legislative history of the statute, as well as case law precedent relating to domestic bribery crimes, provide helpful guidance.

"In general terms, the FCPA criminalizes foreign corporate bribery." Thus, the requisite intent for an FCPA corrupt foreign payments violation is the same as under domestic bribery law:

The word “corruptly” connotes an evil motive or purpose such as that required under 18 U.S.C. 201(b) which prohibits domestic bribery. As in 18 U.S.C. 201(b), the word “corruptly” indicates an intent or desire wrongfully to influence the recipient. It does not require that the act he [sic] fully consummated or succeed in producing the desired outcome.


The SEC complaint alleged two examples of Montedison’s fraudulent conduct: the “Exilar Loan” and the “ENIMONT Affair.” The Exilar Loan was allegedly a fraudulent accounting entry used to disguise and aggregate as an asset on the company’s balance sheet numerous questionable payments or bribes made from 1988 through May 1993. In late 1993, Montedison “determined” that the Exilar Loan was uncollectible, and took a write-down of 435 billion lire (approximately $272 million, at $1 equals 1,600 lire) for fiscal 1992. The ENIMONT Affair involved fraudulent accounting entries relating overstated real estate values to disguise numerous bribes on the company’s books and records during 1990 to 1992. The fraudulent entries resulted in a write-down on the company’s 1993 financial statements of 202 billion lire (approximately $126,250,000).


A payment is made "corruptly" if the payor specifically intends to influence the recipient in the performance of an official act. As the Fifth Circuit has stated, for a finding of "corrupt intent" there must be an element of quid pro quo, and establishment that the payment is "the prime mover or producer of the official act." There appears to be only one reported judicial decision analyzing evidence sufficient to satisfy the corrupt intent element of the FCPA. In Liebo: a corporate vice-president was found guilty of violating [the] FCPA when he supplied air travel valued at $2,028.00 to a representative of a foreign government for a honeymoon vacation. On appeal, the defendant argued that there was not sufficient evidence to prove that he acted "corruptly." The Eighth Circuit disagreed because (i) the defendant’s company won a contract shortly after the honeymoon took place and (ii) the defendant concealed the true nature of the gift by accounting for it as a "commission payment." The Eighth Circuit nevertheless reversed the conviction based upon a claim of newly discovered evidence that the corporation, and not the defendant, had actually paid the airfare.

On retrial, Liebo was convicted, but upon much broader charges including causing over $130,000 in bribes to be paid to two officials of the government of Niger.

When a payment is made openly and notoriously, (i.e., with appropriate notice to foreign governmental and regulatory authorities, and perhaps notice as well to the United States embassy or consulate), rather than in a

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

Sections 103 and 104 cover payments and gifts intended to influence the recipient, regardless of who first suggested the payment or gift. The defense that the payment was demanded on the part of a government official as a price for gaining entry into a market or to obtain a contract would not suffice since at some point the U.S. company would make a conscious decision whether or not to pay a bribe. That the payment may have been first proposed by the recipient rather than the U.S. company does not alter the corrupt purpose on the part of the person paying the bribe. On the other hand true extortion situations would not be covered by this provision since a payment to an official to keep an oil rig from being dynamited should not be held to be made with the requisite corrupt purpose. Thus, while physical extortion rebuts corrupt intent, it appears that mere economic extortion would not do so.

71 See United States v. Tomblin, 46 F.3d 1369 (5th Cir. 1995). See also United States v. Liebo, 923 F.2d 1308, 1311 (8th Cir. 1991) (finding success of payment in influencing official’s decision is evidence of payor’s corrupt intent).
72 United States v. Liebo, 923 F.2d 1308 (8th Cir. 1991).
73 Obermaier & Morvillo, supra note 67, § 16.01[3][b], at 16-7.
74 Id. at 16-7 n.11; see also 2 FCPA Rep. 677.97-698.16.
concealed, clandestine manner, such disclosure should constitute strong
evidence of a lack of corrupt intent.75

D. Payment of Anything of Value76

In addition to cash or cash equivalents, a bribe may take the form of a
potpourri of gifts or expense reimbursement.77 Some things of value that
have supported domestic or foreign bribery prosecutions include charitable
donations,78 travel expenses,79 loans with favorable terms,80 transportation
of household goods,81 services of a prostitute,82 golf outings,83 sports
equipment,84 automobiles,85 and college scholarships.86

The provision of a mere "intangible benefit" may constitute sufficient
payment of "anything of value" to constitute an FCPA bribery violation.87
For example,

75See, e.g., Martin J. Weinstein, A Primer On Corrupt Intent as an Element of the For-
eign Corrupt Practices Act, in CONFERENCE MATERI-
ALS, FOREIGN CORRUPT PRACTICES ACT:
"[F]ull disclosure can be incompatible 
with corrupt intent to violate the FCPA. More simply, intent to misuse public office is less
likely where the business relationship is public, approved by both governments, and subject
to monitoring." Id. at 9; see also DOJ FCPA Rev. Pro. Release No. 86-1 (July 18, 1986):
WEINSTEIN, supra at 10-11: "The primary indication of corrupt intent, as with specific in-
tent, is an affirmative effort to hide the business relationship. No evidence is more trouble-
some and inconsistent with good faith than secrecy and the inevitably false documents that
follow."
76ZARIN, supra note 13, § 4.6.
77See, e.g., H. Lowell Brown, The Foreign Corrupt Practices Act Redux: The Anti-
Bribery Provisions of the Foreign Corrupt Practices Act, 12 INT'L TAX & BUS. LAW 260,
78See Lamb v. Phillip Morris, Inc., 915 F.2d 1024 (6th Cir. 1990) (finding that bribe con-
sisted of an agreement to make donations totaling $12.5 million to the Children's Foundation
of Caracas, whose president was the wife of the President of Venezuela in exchange for
elimination of cigarette price controls and other tax considerations).
79See United States v. Liebo, 923 F.2d 1308 (8th Cir. 1991); United States v. Alessio,
528 F.2d 1079 (9th Cir. 1976).
80United States v. Hare, 618 F.2d 1085 (4th Cir. 1980).
81United States v. Campbell, 684 F.2d 141 (D.C. Cir. 1982).
82United States v. Tunnell, 667 F.2d 1182 (5th Cir. 1982); see also United States v. Peltz,
433 F.2d 48 (2d Cir. 1970), (alleging bribery of SEC employee with services of prostitutes in
return for revealing non-public "inside" information regarding a forthcoming SEC civil in-
junctive enforcement action against Georgia Pacific Corporation). For the perjury prosecu-
tion of the SEC employee, see United States v. Weiner, SEC Lit. Release No. 4275
(S.D.N.Y. Apr. 7, 1969), and for the parallel prosecution of another co-conspirator, see
United States v. Mandel, 296 F. Supp 1038 (S.D.N.Y. 1969)).
83United States v. Standefer, 610 F.2d 1076 (3d Cir. 1979), aff'd, United States v.
Niederberger, 580 F.2d 63 (3d Cir. 1978).
85United States v. Pommerening, 500 F.2d 92 (10th Cir. 1974).
87United States v. Girard, 601 F.2d 69, 71 (2d Cir. 1979) (holding phrase "thing of
value" includes "intangible items"under domestic bribery statute, 18 U.S.C. § 641).
Kenny International Corporation pleaded guilty to charges that it had violated the FCPA where, arguably, its only misconduct was to help provide transportation to residents of Cook Island seeking to vote in a hotly contested Cook Island election. The Cook Islanders, whose travel costs Kenny International helped subsidize, were stranded in New Zealand. The indictment alleged that Kenny International helped them get home to Cook Island so that, if the ruling party were reelected, Kenny International would be assured of maintaining its exclusive right to sell Cook Island postage stamps. In the first plea bargain ever reached under the FCPA, Kenny International agreed to pay a $50,000 criminal fine and restitution equivalent to the travel costs involved.88

E. Authorization of Payment to a Third Party Agent or Consultant While Knowing that All or a Portion Will be Offered or Given to a Foreign Government Official89

1. Knowing Authorization of Corrupt Payments by Agents

Direct payments of money or property to a foreign official by an issuer or a domestic concern seldom occur. Possible FCPA bribery violations usually arise in the context of an issuer’s vicarious liability for payments made by its foreign agents or consultants. An issuer violates the FCPA when it authorizes or ratifies a proscribed foreign payment made by its third party agent or consultant:

Authorization can be explicit or implicit. Implicit authorization occurs when an issuer or domestic concern makes a payment to an agent “knowing” that all or part may be used in violation of the FCPA. U.S. individuals may also be liable for authorizing corrupt acts. In addition to knowing approval, authorization may encompass knowing acquiescence or tacit approval by persons who

88 Gary P. Naftalis, The Foreign Corrupt Practices Act, 11 WHITE-COLLAR CRIME REP. 1, at 2-3 (1997); see also United States v. Kenny Int’l Corp., 2 FCPA Rep 649 (D.D.C. Aug. 2, 1979). Kenny International’s plea agreement also required Finbar B. Kenny, the company’s CEO and President, a U.S. resident, in lieu of extradition to the United States, to voluntarily appear in the High Court of Cook Islands and enter a guilty plea in his individual capacity to a Cook Islands criminal charge embracing “his participating in a scheme whereby money payable to Her Majesty the Queen was fraudulently used for private purposes, namely to finance the charter of aircraft.” Id. at 656. Finbar Kenny was also required to voluntarily travel at his own expense to the Cook Islands to cooperate with Cook Island and New Zealand prosecutors, and to give testimony in any civil or criminal proceedings related to payments made in connection with the March 1978 Cook Islands election. Id. The Cook Islands is an independent South Pacific nation of 18,000 persons freely associated with New Zealand for purposes of external affairs and defense. Id. at 649; see United States v. Finbar B. Kenny & Kenny Int’l Corp., 2 FCPA Rep. at 656-60 (D.D.C. 1979). The plea agreement also required Cook Islands Development Co., Ltd., a Cook Islands corporation which does business in Rarotonga in the Cook Islands as the Cook Islands Philatelic Bureau and which was controlled by Finbar Kenny, to plead guilty to a Cook Islands criminal charge identical to Finbar Kenny’s guilty plea. See Kenney, 2 FCPA Rep., at 657.

89 BLACK & WITTEN, supra note 13, § 2.04, § 2.05.
could have prevented the course of conduct. Ratification of corrupt practices may also lead to liability.\(^9\)

When originally passed in 1977, the FCPA proscribed payments to intermediaries, i.e., third party agents or consultants, by the U.S. person or issuer while "knowing" or "having reason to know" that the agent would use the monies in whole or in part to bribe a foreign official. The statute, as originally enacted, did not define "knowing" or "reason to know." U.S. issuers and their management were fearful that the "reason to know" language could exposes them to FCPA criminal liability for mere negligence. For this reason, in the 1988 Amendments, Congress deleted the phrase "reason to know," and added a definition of "knowing."\(^9\)

A person's state of mind "is knowing" with respect to a proscribed payment by an agent or other intermediary if such person:

(i) "is aware" that the payment is being made, or that the payment "is substantially certain to occur;" or

(ii) has "a firm belief" that the payment is being made, or "is substantially certain to occur;" or

(iii) "is aware" of "a high probability" that the payment is being made, or will occur.\(^9\)

"Knowing" is thus broader than actual knowledge. It encompasses "conscious disregard," "willful blindness," and "deliberate ignorance," but does not encompass "simple negligence" or "mere foolishness."\(^9\)

Two commentators (the author's law partners) list the following "red flags" that, in combination, might put an issuer on notice that an agent is bribing a foreign official:

- **Country:** the country involved has a history of widespread corruption, bribery, and/or FCPA violations.
- **Industry:** the industry involved has a history of FCPA violations. For example: defense, aircraft, oil, and construction.
- **Refusal of certification:** an agent refuses to certify that he will abide by the FCPA.
- **Ties to government:** an agent has family or business ties to a government official.
- **Anonymity:** an agent insists that his identity not be disclosed.
- **Recommendation by customer:** a potential foreign government customer recommends the agent.
- **Lack of capability:** an agent lacks the staff or facility to perform his services.

---

9. Id. § 2.04, at 2-4 (citations omitted); see also H.R. REP. No. 95-640, at 8 (1977).
Agency is illegal: it is illegal under local law for the agent to act as an agent.

Statement by agent: the agent has stated that a particular amount of money is needed for him to "get the business" or "make the necessary arrangements."

Size of payment or commission: an agent requests a payment or commission substantially above the going rate or requests a substantial up-front payment.

Method of payment: an agent requests that payment be made through some indirect means; requests that the payment be in cash or that checks be made to cash or bearer; requests that the company prepare false invoices or other false documents; requests that payments be made in a third country.94

If an issuer is able to establish adequate "due diligence" procedures in hiring and retaining foreign agents and consultants, and in monitoring the on-going conduct of such intermediaries, it will make it much less likely that "guilty knowledge" on behalf of the issuer and its management will be inferred when the foreign agent breaches his trust and makes a foreign bribe.95

2. Foreign Government Official96

In 15 U.S.C. § 78dd-2(h)(2), "foreign official" is defined as "any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or any person acting in an official capacity for or on behalf of any such government or department, agency or instrumentality." State-owned entities are included in this definition. Indeed, the DOJ takes the position that employees of a state-owned business are government officials even if local foreign law provides to the contrary.97 However, capital contributions to, or reimbursement of, expenses of foreign joint ventures with state-owned enterprises may not constitute corrupt foreign payments under the statute.98

94BLACK & WITTEN, supra note 13, § 2.05, at 2-5 to 2-6; see also SEC REPORT, supra note 3; Speech of Assistant Attorney General Philip B. Heyman, The Justice Department's Proposed Program to Provide Advice to Businesses in Connection with Foreign Payments (Nov. 8, 1979), reprinted in FOREIGN CORRUPT PRACTICES, supra note 3.

95For discussion of relevant "due diligence" procedures, see John E. Impert, A Program for Compliance with the Foreign Corrupt Practices Act and the Foreign Law Restrictions on the Use of Sales Agents, 24 INT'L LAW. 1009 (1990); BLACK & WITTEN, supra note 13, § 3.01[2][a], [b], and ch. 7. For suggestions involving an FCPA compliance program, see BLACK & WITTEN, supra note 13, ch. 7; ZARIN, supra note 13, ch. 10; Joseph E. Murphy, Reducing Foreign Corrupt Practices Act Risk: An Effective Self-Policing Program, in CORPORATE COMPLIANCE: HOW TO BE A GOOD CITIZEN CORPORATION THROUGH SELF-POLICING (1996); BASRI ET AL., supra note 9, § 28, at 563.

96BLACK & WITTEN, supra note 13, § 2.03.


Defending SEC & DOJ FCPA Investigations

Prior to the 1988 Amendments to the FCPA, if a foreign governmental employee’s duties were solely “ministerial or clerical,” the employee did not fall within the definition of “foreign official,” and, consequently, payments to such ministerial or clerical employees were not proscribed. Since the 1988 Amendments, even government employees who perform only ministerial or clerical functions may be considered “foreign officials” for purposes of applying the FCPA’s anti-bribery provisions. The amended statute clearly states that “[a]ny” employee may be considered a “foreign official” when “acting in an official capacity for or on behalf of” the government or a state-owned company.

That the DOJ regards officers and employees of foreign state-owned companies as “foreign officials” is clear. For example, Goodyear International Corporation “pleaded guilty and paid a $250,000 fine pursuant to an information alleging that it had used the United States mail in furtherance of a plan to bribe officers of a state-owned company in Iraq through which the Iraqi government purchased tires for resale.”

Payments to relatives of foreign officials, hired as consultants or agents, may, or may not, violate the FCPA, depending upon the particular circumstances of each case. For example, two DOJ FCPA Review Releases sanctioned the hiring of relatives as agents of foreign government of-

---

99 See DOJ and Dep’t of Commerce brochure, supra note 17, at 5.
100 See Naftalis, supra note 88, at 5.

102 See BLACK & WITTEN, supra note 13, § 2.03, at 2-3:
[Payments to employees of a foreign joint venture partner in joint ventures between U.S. companies and state-owned enterprises are not necessarily FCPA violations. In a number of instances, DOJ has approved such arrangements. In 1993, for example, DOJ considered a proposed joint venture between a U.S. company and a wholly state-owned enterprise. Under the proposed agreement, the U.S. partner would contribute management expertise, while the foreign partner would finance the venture. The parties would share the profits. The U.S. partner would pay the foreign directors’ fees but undertook to educate the foreign directors regarding FCPA compliance. DOJ approved the proposal. See DOJ FCPA Rev. Proc. Release No. 93-1 (Apr. 20, 1993).
ficials. On the other hand, in *United States v. Liebo*, the DOJ successfully prosecuted the vice-president of a U.S. company for giving a gift to the cousin and close friend of a foreign official. The Eighth Circuit held that the close relationship between the cousin and the official "could have allowed a reasonable jury to infer that [the defendant] made the gift to [the cousin] intending to buy [the official’s] help in getting the contracts approved." In fact, the president of the foreign country approved the contract a few weeks after the official’s cousin received the gift.

In *United States v. Lockheed Corp.*, Lockheed was prosecuted for continuing to pay consulting fees to its foreign agent, Dr. Leila I. Takla, after she became a member of the Parliament of Egypt. The continuing payments, and an eventual termination fee, were paid to a corporation controlled by Takla’s husband, Abdelkerim Darwish, who supposedly had become Lockheed’s successor consultant. This recent *Lockheed* criminal prosecution highlights the importance of continually monitoring the status of all foreign agents or consultants. A perfectly legal agency or consultancy relationship may automatically become corrupt when the agent or consultant thereafter becomes a government official.

103 DOJ FCPA Rev. Proc. Release No. 84-1 (Aug. 16, 1984) (company hired relative of foreign head of state as agent; contract between relative/agent and company contained sufficient precautions); DOJ FCPA Rev. Proc. Release No. 82-4 (Nov. 11, 1982) (after completion of sale to foreign government, company learned that its agent was the brother of a government official).

104 United States v. Liebo, 923 F.2d 1308 (8th Cir. 1991).

105 Id. at 1311.


F. For the Purpose of Influencing Any Official Act or Decision

For there to be an FCPA bribery violation, the corrupt foreign payment must be for the purposes of either:

(1) influencing any act or decision of a foreign official in his official capacity; or

(2) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official; or

(3) 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.

Payments to influence the enactment or promulgation of legislation or regulations fall within the scope of this prohibition, but such legislation or regulations must be tied into the further required element of the bribery provisions, i.e., “obtaining or retaining business for or with or directing business to any person.”

The 1988 Amendments, in order to conform the FCPA to the standards contained in domestic bribery statutes, added the proscription of “influencing any act or decision of such foreign official in his official capacity, or inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official.” One commentator has noted that “even if a particular official is not an important decision maker, the FCPA would apply to payments made to induce the official to use his influence with other decision makers.”

G. Obtaining or Retaining Business

The FCPA foreign bribery proscription has a specific “business purpose” requirement: the payment is illegal only if it was made “in order to assist [the issuer or domestic concern] in obtaining or retaining business for or with, or directing business to, any person.”

Black and Witten state that the “desired business need not be with the foreign government or with the company making the payments.” There are no litigated cases interpreting this element.

This business purpose element is clearly satisfied when a payment is made to a government official to induce that official to grant an award of a

---

108 ZARIN, supra note 13, § 4.10.
113 ZARIN, supra note 13, § 4.10, at 4-38.
114 See, e.g., BLACK & WITTEN, supra note 13, § 2.06, at 2-6.
116 BLACK & WITTEN, supra note 13, § 2.06.
contract or concession to the paying issuer or to secure the maintenance or renewal of any such contract or concession. It is unclear whether bribes to influence other types of governmental decisions would satisfy the business purpose element. For example, does a bribe to a foreign legislator to secure votes in favor of tax legislation beneficial to the issuer, violate the FCPA? Probably not! This was the type of conduct involved in the United Brands case, a matter pursued by both the SEC and the DOJ prior to the passage of the FCPA.117

United Brands had paid bribes to the President of Honduras and to other government officials in order to obtain a lower export tax on bananas. In 1976, after an investigation stimulated by the suicide of the CEO of the company, the SEC obtained a consent injunction from United Brands alleging Rule 10(b)(5) violations based upon the failure of United Brands to disclose the bribes in its SEC reports.118 The DOJ followed up with a criminal prosecution of United Brands charging conspiracy to commit mail fraud. United Brands pled guilty to the criminal charge.119

The legislative history of the FCPA as passed in 1977 indicates that the United Brands bribe would not violate the FCPA because it did not relate to "obtaining or retaining business."120 Congress imposed the "obtain or retain

---

120 See BLACK & WITTEN, supra note 13, § 2.06, at 2-7:

Despite the United Brands precedent, both the House and Senate rejected bills that would have explicitly prohibited corrupt payments unrelated to the award, maintenance, or renewal of business. The House bill would have prohibited all payments to "influence[e] any act or decision" of a foreign official or government. While the Senate's final bill, S.505, contained the ultimately enacted "business purpose" requirement as embodied in the "obtaining or retaining business" language, it also expressly proscribed payments for the purpose of "influencing legislation or regulations." The Conference Committee reconciling the two bills adopted the Senate's "obtaining or retaining" business requirements, but not its additional proscription of payments to influence laws and regulations. In so doing, the Conference Committee explained:

[The purpose of the payment must be to influence any act or decision of a foreign official (including a decision not to act) or to induce such official to use his influence to affect a government decision so as to assist an issuer in obtaining, retaining or directing business to any person.

Because Congress specifically considered and rejected the broader prohibitions contained in both the House and Senate bills, there is a good argument that Congress deliberately limited the FCPA's prohibitions to payments intended to influence decisions about the award or direction of business, and that it did not intend the prohibition to reach payments to influence other governmental decisions. (citations omitted.)

See also The Foreign Trade Practices Act: Hearings on H.R. 2157 Before the Subcomm. on Int'l Econ. Policy & Trade of the House Comm. on Foreign Affairs, 98th Cong. 284-85 (1983) (discussing United Brands case as not violating FCPA); Lucinda A. Law & John E. Davis, The FCPA In Investment Transactions: The Next Generation of Issues, 1 FCPA Rep. 106.01, at 106.014 (1997) ("There is an argument that an attempt to influence general legislation is...too removed from the obtaining of business to be covered by the FCPA. The oft-cited example is the United Brands case. . . .").
business” limitation on the FCPA’s proscribed foreign payments in order to address jurisdictional principles regarding the reach of domestic legislation over extra-territorial conduct and to provide comity at the international level to the sovereignty of foreign nations. It was acknowledged at the time of passage of the FCPA in 1977, that the new statute would not reach the United Brands type of case; i.e., a bribe of a foreign government official to obtain favorable tax legislation. Those cases were left to prosecution by the foreign country under its local bribery laws and customs.

That the FCPA did not cover United Brands is made clear in the legislative history of the 1988 Amendments to the FCPA. Indeed, this author testified before Congress that the FCPA should be amended to proscribe bribes to secure favorable foreign tax legislation. Congress, however, chose not to include this provision in the 1988 Amendments; it retained the “obtain or retain business” limitation on proscribed foreign payments.

Nevertheless, commentators presently disagree as to whether the 1988 Amendments to the FCPA broadened the statute enough to proscribe the United Brands type of bribe, or clarified the meaning of the statute so as to embrace the prohibition of corrupt payments related solely to the carrying out of existing business. In 1987, the House version of what became the 1988 Amendments contained a broad prohibition on all corrupt payments to foreign officials, devoid of any “obtaining or retaining business” limita-

---


Congressman Howard Berman: I wanted to get into this whole notion of why is all this restricted to obtaining and retaining business? What about that? Should you be able to — we seem to have a general consensus that you shouldn’t be able to pay money, bribe, to obtain or retain business and a general consensus that we should be able to pay money to get routine things which should happen anyway . . . , to get the goods off the dock and into the stream of commerce, or whatever the right term for all that is.

Should you be able to pay money to get a tax break in foreign countries, to get a judge to rule your way, to get a foreign parliament or whatever lawmaking process it is to pass a certain law that makes your profit, some aspect of your business interest that is other than getting the business or retaining the business? Should that be allowed?

Mr. Mathews: I would say definitely not.

Mr. Berman: Does the present law allow that, by the way?

Mr. Mathews: It is debatable. I think it does. I think the United Brands case would not be a violation under present law. I think the United Brands type case ought to be covered if there are changes.

Mr. Berman: Does anybody disagree with that? Mr. Feldman?

Mr. Feldman [formerly with the State Department]: I don’t want to say that I disagree with that particular example, but I do think that it was very deliberate that Congress did not extend the extraterritorial reach of U.S. criminal law beyond the issue of competition and award of business.

Once you start getting into the internal life [ ] of a country you have problems. Those companies who are resident in a foreign country have to deal day in and day out with every level of a bureaucracy. Should U.S. law apply to their relations? From a foreign policy point of view, whatever benefits the FCPA has obtained, and I think there are many in terms of corporate governance, every time the United States investigates a payment overseas, it is investigating the foreign official. That is terribly intrusive and terribly damaging to American foreign policy.
tion. That version was rejected, and the 1988 Amendments, as ultimately adopted, made no change to the business purpose requirement. Nevertheless, the House Conference Report on the 1988 Amendments states:

[C]orrupt payments for 'retaining business' in present law is not limited to the renewal of contracts or other business, but also includes a prohibition against corrupt payments related to the execution or performance of contracts or the carrying out of existing business, such as a payment to a foreign official for the purpose of obtaining more favorable tax treatment.

As a result of this language, some commentators believe both a United Brands type bribe to obtain favorable legislation, and corrupt payments related to the "carrying out of existing business" are proscribed, so long as normal lobbying activities are not criminalized. Don Zarin states:

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

On the other hand, Black and Witten have the opposite view: "This part of the Conference Report would appear to conflict with the language of the statute and with the actual history of the 1988 Amendments. Accordingly, the legislative history is of questionable authority." To the extent that the phrase "obtain, retain or direct business to any person" is deemed to be ambiguous, it is clear that unless and until courts

122 See H.R. 3, 100th Cong. § 701(a) (1987).
124 ZARIN, supra note 13, § 4.11, at 4-38 to 4-39.
125 Id. at 4.39 to 4-40.
126 BLACK & WITTEN, supra note 13, § 2.06, at 2-7. The 1988 Amendments did not alter the "obtaining or retaining business" language, and it is basic that Congress (much less a single house or legislator) cannot amend a statute through legislative history. Central Bank v. First Interstate Bank, 511 U.S. 164, 186 (1994) ("the interpretation given by one Congress (or a committee or member thereof) to an earlier statute is of little assistance in discerning the meaning of that statute" (citations omitted)); Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 114 (1989) (views of subsequent Congress "form a hazardous basis for inferring the intent of an earlier one," (quoting United States v. Price, 361 U.S. 304, 313 (1960)); Russello v. United States, 464 U.S. 16, 26 (1983); Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 118 n.13 (1980) ("subsequent legislative history will rarely override a reasonable interpretation of a statute that can be gleaned from its language and legislative history prior to its enactment").
127 See Law & Davis, supra note 120, at 106.014 to 106.015:

Congress focused on this ambiguity in its debate of the 1988 FCPA amendments. The final legislation specifically rejected a House proposal that would have prohibited payments to procure 'legislative, judicial, regulatory or other action in seeking more favorable treatment by a foreign government.' While the conference report stated that the FCPA prohibits corrupt payments for the 'carrying out of existing business, such as for . . . obtaining more favorable tax treatment (the United Brands context),' it also makes clear that 'retaining business' should not be construed so broadly as to prohibit companies from lobbying or other 'normal representations to government officials.'
Defending SEC & DOJ FCPA Investigations

hold otherwise, both the SEC and the DOJ will pursue civil, administrative
and criminal enforcement actions interpreting the statute broadly to pro-
scribe any corrupt payments intended to influence any governmental deci-
sions that would favorably affect an issuer's business in any regard,
including payments to obtain more favorable tax treatment.\textsuperscript{128} This aggressive
interpretation is inconsistent with the canon of statutory construction
that criminal laws are to be strictly construed against the government, and
any ambiguities are to be resolved in favor of the defendant, \textit{i.e.}, the "rule
of lenity."\textsuperscript{129}

Thus, in the \textit{Triton Energy/Indonesia} case the SEC alleged violations
of the antibribery provisions even though the allegedly illegal payments
were made to obtain benefits from the Indonesian government other than
"obtaining or retaining business" in the strict sense. The payments were
made to change a tax audit, to get recoverable costs certified in cost audits,
to obtain tax refunds, and to obtain an adjustment in pipeline tariff rates.\textsuperscript{130}
And in 1994, the DOJ criminally prosecuted, and obtained guilty pleas from
Vitusa Corporation and its president and sole shareholder, Denny J. Her-
zberg, for payments made to a government official of the Dominican Re-
public for the purpose of expediting the release of the final payment
required under an existing contract for delivering milk powder that had al-
ready been fully performed by Vitusa Corporation.\textsuperscript{131}

\footnotesize{(citing H.R. CONF. REP. No. 576, 100th Cong., 918-919 (1988) (footnote omitted)).

Whether a payment is merely part of legitimate lobbying or is violative of the FCPA is
ultimately a factual question. The risk of liability may be greater, for example, if the sought-
after legislation is a private bill rather than general legislation.

\textsuperscript{128}BLACK & WITTEN, supra note 13, \S 4.10[2], at 4-11:

DOJ and the SEC have made clear that they interpret the business purpose require-
ment more broadly — as proscribing payments intended to influence any discretionary
governmental decisions favorable to an issuer's or a domestic concern's
business, including payments [to secure favorable tax relief]. Representatives of
both DOJ and the SEC have indicated that they intend to initiate and conduct inves-
tigations consistent with their interpretation until the issue is resolved adversely to
the government in a litigated proceeding. (citations omitted.)

\textsuperscript{129}See, \textit{e.g.}, Crandon v. United States, 494 U.S. 152, 158 (1990); Rewis v. United States,
United States, 272 U.S. 620, 629 (1926). \textit{See also} Antonin Scalia, \textit{Assorted Canards of
Contemporary Legal Analysis}, 40 CASE W. RES. L. REV. 581 (1990); \textit{Note, The Mercy of
Scalia: Statutory Construction and the Rule of Lenity}, 29 HARV. CIV. RTS-CIV. L. REV.
197 (1994); William N. Eskridge, Jr., & Philip P. Frickey, \textit{Quasi-Constitutional Law: Clear
Statement Rules as Constitutional Lawmaking}, 45 VAND. L. REV. 593 (1992); Richard A.

(CCH) ¶ 74,405 (D.D.C. Feb. 27, 1997); \textit{see also} In \textit{re} David Gore, [1996-1997 Transfer

\textsuperscript{131}United States v. Vitusa Corp., Cr. No. 93-253 (D.N.J. 1994), 3 FCPA REP. 699.158
(1994) (criminal information); \textit{Id.} at 699.155 (plea agreement with Vitusa Corporation);
VIII. OTHER DEFENSE CONSIDERATIONS

A. "Due Diligence": Not a Defense, But a Strong Mitigation Element

Under general federal criminal law principles, a corporation is vicariously liable at the criminal level for the crimes of its employees and agents committed in the course of their employment so long as the agents intended to benefit the corporation. Thus, corporate "due diligence" generally has

United States v. Herzberg, Id. at 699.165 (plea agreement with president of Vitusa Corporation). See BLACK & WITTEN, supra note 13, § 2.06, at 2-8:

Vitusa's obligations under the contract were completed and there was no prospect of future business with the Dominican Republic. The payment, therefore, does not appear to have been for the purpose of "obtaining or retaining business with" or "directing business to" any person. Nonetheless, the defendants pleaded guilty. The Justice Department and the SEC rely on this plea as "precedent" to support their position, although the defendants did not raise the defense and the issue was not litigated.

However, absent adjudication by a court in contested litigation, SEC civil consent decrees like those entered in the Triton case, and DOJ guilty pleas like those entered in the Vitusa Corporation criminal prosecution, are not precedent, and should not dictate what the appropriate statutory interpretation really is. See, e.g., United States v. Van de Carr, 343 F. Supp. 993, 1008 (N.D. Cal. 1972) (dismissing criminal charges where government's theory of liability rested on uncontested settlement with the SEC); Lipsky v. Commonwealth United Corp., 551 F. 2d 887, 893 (2d Cir. 1976); Report of the Task Force on SEC Settlements, 47 Bus. Law. 1083, 1141-48 (1992); In the Matter of Carl L. Shipley, 4 SEC Doc. (CCH) 476, 479-80 (June 21, 1974) ("Such orders are of little, if any, precedential weight."); In the Matter of Bruce I. Newberg, 54 SEC Doc. (CCH) 1972, 1978 (Sept. 1, 1993) (SEC Administrative Law Judge rejecting argument of SEC Staff that respondent should be barred from securities business by virtue of agency's construction developed through settlement rather than litigation.); Northrop Corp. v. Triad Fin. Establishment, 593 F. Supp. 928, 941 n.26 (C.D. Cal. 1984) (finding SEC civil injunctive consent decree "does not have precedential value for the purposes of applying the FCPA to the Northrop Triad Agreement"); United States v. ITT Continental Baking Co., 420 U.S. 223, 236-37 (1975) (stating consent decrees should be construed "basically as contracts, without reference to the legislation the Government originally sought to enforce but never proved applicable through litigation").


Today, corporations are subject to what is in essence strict liability for the criminal acts of employees who were acting within the scope of their employment and who were motivated, at least in part, by an intent to benefit the corporation. Although this has been the law for the better part of this century, corporate counsel and their clients are often stumped and dismayed when confronted with the prospect of a criminal prosecution of the corporation resulting from the acts of relatively low level employees.

Defending SEC & DOJ FCPA Investigations

not been a defense to corporate criminal liability at the federal level,\(^{133}\) in part because of strict concepts of “imputed intent” and “collective knowledge.”\(^{134}\)

Thus, “due diligence” per se has not been a defense to an FCPA corrupt foreign payments/bribery charge.\(^{135}\) In the legislative consideration of the 1988 Amendments to the FCPA, the House bill initially provided for establishment of a new “safe harbor”/“due diligence” defense against both civil and criminal liability of issuers and domestic concerns for FCPA violations by their employees or agents.

[A] firm could not be held vicariously liable for . . . violations [of the FCPA by its employees or agents] if it had established procedures “reasonable [sic] expected to prevent and detect” any such violation, and the officer and employee


\(^{133}\) At the state level, the Model Penal Code has a limited “due diligence” defense against corporate criminal liability: If the high managerial agent having supervisory responsibility over the subject matter of the offense exercises due diligence to prevent its commission then the corporation will not have criminal liability so long as the offense is not a “strict liability” offense or an offense specifically defined in the Model Penal Code. MODEL PENAL CODE §§ 2.07(5), 2.07(1)(1) (Official Draft and Revised Comments 1980). \(\text{See 1 Kathleen F. Brickey, Corporate Criminal Liability } \text{§ 3.08, at 108-09 (1992)}; \text{Holland Furnace Co. v. United States, 158 F.2d 2 (6th Cir. 1946). The clear weight of federal authority today is to the contrary. See 1 Brickey, supra, § 3.08, at 111-12; Dollar S. S. Co. v. United States, 101 F.2d 638 (9th Cir. 1939); United States v. Hilton Hotels Corp., 467 F.2d 1000 (9th Cir. 1972); see also Charles J. Walsh & Alissa Pyrich, Corporate Compliance Programs As a Defense To Criminal Liability: Can A Corporation Save Its Soul? 47 RUTGERS L. REV. 605 (1995). See Brown, supra note 132, at 308-09:

A corporation’s compliance efforts, including its policies and instructions to employees, should be relevant to a determination whether an employee’s actions were within the scope of employment or whether the employee was acting to benefit the corporation. However, under the current state of the law, the relevance of corporate policies and compliance programs to the ultimate questions of liability is by no means clear. While there is precedent to the effect that a corporation should not be vicariously liable for the actions of an employee who violates corporate policy or who contravenes an express instruction, the prevailing view is that compliance programs and policies are not a defense to vicarious liability. (emphasis added.)

The Model Penal Code, proposed by the American Law Institute in 1962, contained a corporate “due diligence” defense where a corporation established that “the high managerial agent having supervisory responsibility over the subject matter of the offense employed due diligence to prevent its commission.” MODEL PENAL CODE § 2.07(5) (Proposed Official Draft 1962).

\(^{134}\) See, e.g., 1 Brickey, supra note 133, § 4.05; see also Apex Oil Co. v. United States, 530 F.2d 1291, 1295 (8th Cir. 1976) (“the knowledge of the employee is the knowledge of the corporation”); United States v. Bank of New England, 821 F.2d 844, 856 (1st Cir. 1987), (collective knowledge as “[c]orporations compartmentalize knowledge, subdividing the elements of specific duties and operations into smaller components. The aggregate of those components constitutes the corporation’s knowledge of a particular operation. It is irrelevant whether employees administering one component of an operation know the specific activities of employees administering another aspect of the operation. . . .”).

with supervisory responsibility for the offending employee's or agent's conduct used "due diligence" to prevent the violation.\(^{136}\)

This provision was deleted when the 1988 Amendments were ultimately enacted.

Nevertheless, the due diligence incident to the establishment and maintenance of an effective corporate compliance program may be a principal factor that enables a corporation to avoid criminal prosecution. It may constitute the key mitigation factor that leads a federal prosecutor to exercise prosecutorial discretion not to indict the corporation, and instead to pursue criminally solely the individual malefactors.\(^{137}\)

Even if corporate criminal prosecution is pursued, the "due diligence" evidenced by a satisfactory corporate compliance program will be a strong mitigating factor under the federal organizational sentencing guidelines in assessing the severity of the criminal fine and other criminal sanctions imposed against the corporation.\(^{138}\)


B. The "Act of State Doctrine"

The "act of state doctrine" has been defined as one of judicial abstention from an inquiry into the validity of an act by a foreign government within the scope of its sovereignty. Since the bribery of a foreign governmental official usually affects an act (or inaction) by a foreign government within the scope of its sovereignty, the question arises whether the act of state doctrine would be a defense against an FCPA prosecution of the briber. To date, this defense has never been interposed in an FCPA criminal prosecution. It has been litigated, however, in parallel private litigation in a case where the bribers pleaded guilty to the companion FCPA criminal prosecution:

In 1981, Harry Carpenter, who was then chairman of the board and chief executive officer of W. S. Kirkpatrick & Co., Inc. (Kirkpatrick), learned that the Republic of Nigeria was interested in contracting for the construction and equipment of an aero medical center at Kaduna Air Force Base in Nigeria. He made arrangements with Benson 'Tunde' Akindale, a Nigerian citizen, whereby Akindale would endeavor to secure the contract for Kirkpatrick. It was agreed that, in the event the contract was awarded to Kirkpatrick, Kirkpatrick would pay to two Panamanian entities controlled by Akindale a 'commission' equal to 20% of the contract price, which would in turn be given as a bribe to officials of the Nigerian Government. In accordance with this plan, the contract was awarded to W. S. Kirkpatrick & Co., International (Kirkpatrick International), a wholly owned subsidiary of Kirkpatrick; Kirkpatrick paid the promised 'commission' to the appointed Panamanian entities; and those funds were disbursed as bribes. Nigerian law prohibits both the

---


Although earlier formulations of the doctrine were grounded in notions of comity among sister states, the core concern of modern act of state jurisprudence is preserving the separation of powers between the federal judiciary and the political branches of our government — especially, the executive branch, where primary responsibility for the conduct of foreign affairs is lodged. As explained by the Supreme Court in Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398... (1964), the doctrine "expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere." Id. at 423. Thus, courts are required to decline to exercise jurisdiction over cases that may embarrass or impede the political branches of government in their conduct of foreign affairs. See First Nat. City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 765-68 ...(1972). (citation omitted).

payment and the receipt of bribes in connection with the award of a government contract.\textsuperscript{141}

Carpenter and Kirkpatrick both pleaded guilty thereafter to FCPA criminal charges.\textsuperscript{142}

Environmental Tectonics Corporation, International (Environmental Tectonics), an unsuccessful bidder for the Kaduna contract, sued the Kirkpatrick company, Carpenter, Akindale and others for damages. There exists neither an express nor an implied private civil damages cause of action for FCPA violations.\textsuperscript{143} However, Environmental Tectonics alleged causes of action pursuant to civil RICO,\textsuperscript{144} the Robinson-Patman Act,\textsuperscript{145} and the New Jersey Anti-Racketeering Act.\textsuperscript{146} All the defendants moved to dismiss the complaint on the ground that the action was barred by the act of state doctrine.\textsuperscript{147}

The District Court solicited a letter from the Department of State expressing its views as to the applicability of the act of state doctrine to the case. Abraham D. Sofaer, the Legal Adviser to the Department of State, advised the court:

In recent years, the United States Executive Branch has addressed the question of whether the act of state doctrine requires dismissal of proceedings that may call for judicial inquiry into the motivations (as opposed to the legal validity) of the public acts of foreign states. Specifically, as the United States stated in an amicus curiae brief before the United States Supreme Court:

"[W]hile judicial examination of purpose may on occasion implicate some of the concerns underlying the act of state doctrine, that doctrine only precludes judicial-questioning of the validity or legality of foreign government actions. . . . None of this Court's decisions suggest that the act of state doctrine precludes all judicial inquiries that may embarrass a foreign state or affect the political branches' conduct of foreign relations. Rather, the act of state doctrine is based on the need to avoid unprincipled decisions resulting from the absence of legal standards, and the unique embarrassment, and the particular interference with the conduct of foreign affairs, that may result from the judicial de-

\textsuperscript{141} Id. at 401-02.
\textsuperscript{142} See United States v. Harry Carpenter, Cr. No. 85-353 (D.N.J. Oct. 1985). The Kirkpatrick company was fined $75,000. Carpenter was fined $10,000 and sentenced to three years probation. The bribe payments totaled approximately $1.7 million, 20% of the $10.8 million contract. The middleman, Akindele, allegedly dispersed $1.7 million in bribes as follows: 2.5% for himself; 5% for the Nigerian Air Force; 2.5% for the Nigerian Medical Group; 5% for the ruling political Party in Nigeria; 2.5% for the involved Nigerian government Minister; and 2.5% for key Nigerian defense members. See William F. Pendergast, \textit{Foreign Corrupt Practices Act: An Overview of Almost Twenty Years Of Foreign Bribery Prosecutions} 11 (1997), reprinted in A.B. LEVENSON ET AL., \textit{CORPORATE COMPLIANCE AND THE FCPA} 265, at 277 (1997); see also W. S. Kirkpatrick, & Co. v. Envtl. Tectonics Corp., Int'l, 847 F.2d 1052, at 1055 n.3 (3d Cir. 1988).
\textsuperscript{143} See, e.g., Lamb v. Phillip Morris, Inc., 915 F.2d 1024 (6th Cir. 1990).
\textsuperscript{144} 18 U.S.C. § 1961 et seq.
\textsuperscript{145} 15 U.S.C. § 13 et seq.
\textsuperscript{146} N. J. STAT. ANN. § 2C: 41-2 et seq. (West 1995).
termination that a foreign sovereign's acts are invalid. Judicial inquiry into the purpose of a foreign sovereign's acts would not require a court to rule on the legality of those acts, and a finding concerning purpose would not entail the particular kind of harm that the act of state doctrine is designed to avoid. Dismissal of a complaint before the development of evidence, merely because adjudication raises the bare possibility of embarrassment, constitutes an unwarranted expansion of the act of state doctrine and is contrary to the flexibility with which that doctrine should be applied."\textsuperscript{148}

These statements represent our views. As the Department understands the allegations in the instant suit, the validity of the Nigerian Government's decision to award the contract in question is not in question. If the adjudication of this suit were to involve a judicial inquiry into the motivations of the Government of Nigeria's decision to award the contract, the Department does not believe the act of state doctrine would bar the Court from adjudicating this dispute.

..., Apart from the act of state question, however, inquiries into the motivation and validity of foreign states' actions and discovery against foreign government officials may seriously affect United States foreign relations. These concerns, in the context of this litigation, counsel that caution and due regard for foreign sovereign sensibilities be exercised at each relevant state in the proceedings. Moreover, the court should endeavor to assure that no unnecessary inquiries are made, or allegations tested, during the course of discovery or trial.\textsuperscript{149}

In considering the Department of State's views, as well as two precedent cases — \textit{Clayco Petroleum Corp. v. Occidental Petroleum Corp.}\textsuperscript{150}


\textsuperscript{150}In \textit{Clayco Petroleum Corp. v. Occidental Petroleum Corp.}, the Ninth Circuit affirmed dismissal of an FCPA private civil damages action based upon the act of state doctrine defense; the Court did not address whether an implied private damages cause of action should be recognized under the FCPA. 712 F.2d 404 (9th Cir. 1983). The SEC, prior to the passage of the FCPA, had sued Occidental Petroleum in a civil injunctive action under the Exchange Act alleging illegal or questionable foreign payments. Occidental consented to a permanent injunction and agreed to conduct an internal corporate investigation of the alleged illegal payments and to prepare and file with the SEC a special report describing such payments. \textit{See} SEC v. Occidental Petroleum Corporation, SEC Lit. Release No. 8121 (D.D.C. May 8, 1977). On April 17, 1978, the Payments Report (Report of the Special Committee of the Board of Directors of Occidental Petroleum Corporation, Investigated Payments and Accounting Practices of Occidental Petroleum Corporation) was publicized. The Report and its annexed Source Memorandum disclosed a $200,000 payment in Switzerland of "uncertain legality" which was inaccurately described in Occidental's books and records. This $200,000 plus an additional $217,000 were allegedly bribes to Sheikh Sultan bin Ahmed Muallah (Sultan), the Petroleum Minister of Umm Al Qaywayn, and his son, Sheikh Ahmed al Mualla (Ahmed), in return for a valuable off-shore oil concession. The country of Umm
and *Timberlane Lumber Co. v. Bank of America*\(^{151}\) — the District Court stated:

[I]f the inquiry presented for judicial determination includes the motivation of a sovereign act which would result in embarrassment to the sovereign or constitute interference in the conduct of foreign policy of the United States, inquiry is foreclosed by the act of state doctrine. . . . This has been held to be equally true of judicial inquiries which would impugn or question the nobility of a foreign nation's motivations.\(^{152}\)

This District Court, relying on *Clayco Petroleum* rejected the argument that the FCPA was intended to be an exception to the act of state doctrine,\(^{153}\) while the doctrine might well not apply to governmental FCPA enforcement actions, it surely was relevant to private damages actions embracing foreign bribery. The District Court also found that “the suggestion of the State Department is neither practical nor constitutional.”\(^{154}\) The court felt the State Department’s views violated basic “separation of powers” principles, and would require the Court, in policing discovery efforts in the case, to exercise executive authority relating to the conduct of the foreign affairs of the United States: “There is a notable absence of Constitutional authority for a court to assume responsibility for the conduct of a segment of foreign policy, which is what the State Department suggests.”\(^{155}\)

---

\(^{151}\) See *Clayco Petroleum*, 712 F.2d at 405-06. The Ninth Circuit had previously held that the Umm Al Qaywayn nation is a foreign sovereign for purposes of the act of state doctrine. *Id.* Clayco Petroleum Corp. sued Occidental in a federal antitrust action, alleging that it (Clayco) was about to receive the concession, but lost it to Occidental as a result of Occidental’s bribes. *Id.* The Ninth Circuit affirmed dismissal of the complaint based on the act of state doctrine defense. *Id.* The Court specifically rejected Clayco’s argument that in enacting the FCPA, Congress intended to abrogate the act of state doctrine in private suits based on foreign payments. 712 F.2d at 409.

\(^{152}\) *Timberland Lumber Co. v. Bank of America*, 549 F.2d 597, 607 (9th Cir. 1976).


\(^{154}\) *Id.* at 1398.

\(^{155}\) *Id.*
The District Court dismissed the complaint, based upon act of state doctrine considerations, finding that in order to prevail the plaintiff would have to establish that:

the defendants or certain of them intended to wrongfully influence the decision to award the Nigerian Contract by payment of a bribe, that the Government of Nigeria, its officials or other representatives knew of the offered consideration for awarding the Nigerian Contract to Kirkpatrick, that the bribe was actually received or anticipated and that 'but for' the payment or anticipation of the payment of the bribe, ETC would have been awarded the Nigerian Contract.  

In reaching its decision to credit the act of state doctrine defense, the court was particularly influenced by statements the prosecutor had made at the criminal sentencing of Kirkpatrick that demonstrated the political sensitivities of the case in Nigeria.  

The Third Circuit reversed the district court's dismissal of the case. The Circuit Court agreed that “the award of a military procurement contract can be, in certain circumstances, a sufficiently formal expression of a government’s public interests to trigger application” of the act of state doctrine. However, on the facts of the case, the Court held the act of state doctrine should not be applied. The Court relied primarily on the letter to the District Court from the Legal Adviser to the State Department. While not controlling, the Circuit Court found persuasive that the Executive Branch had spoken through the State Department and had declared that litigation of the case would not harm the Executive Branch’s foreign affairs responsibilities.

The Supreme Court affirmed the Third Circuit and allowed the litigation to proceed. The Supreme Court squarely held that “the factual predicate for application of the act of state doctrine does not exist. Nothing in

---

155 Id. at 1393 (citation omitted).
156 Assistant U.S. Attorney Steven Levy had made the following representations to the court at the Jan. 6, 1986 sentencing of Kirkpatrick:

Your Honor, I guess I would also like to say that the political impact of this case...cannot be underestimated...I can say that the government of Nigeria as well as the State Department [of the United States] have shown a vital interest in this case. In fact, the State Department has been very concerned about the possible political impact upon the Government of Nigeria if the Grand Jury disclosed certain information about who possibly received the payments which are set forth in the memorandum that Mr. Carpenter wrote to other senior officers of the corporation. I have as attorney for the Government [of the United States], your Honor, been resisting attempts by the Nigerian government to find out this information because I have not had a disclosure order and the State [D]epartment has its concerns about what would happen if the government of Nigeria actually knew who was involved in this scheme to sort of rip off money from this Nigerian contract. This is not a case where there is not a victim. Shagari, who was the president of Nigeria at the time of this contract[,] is now under house arrest. Some of these other individuals [,] and I can name them if the court is interested, are very prominent military figures who are still in power in Nigeria. The Nigerian government would certainly like to have their names....

Id. at 1387.
158 Id. at 1058.
the present suit requires the Court to declare invalid... the official act of a foreign sovereign." 616 The Court explained that "[t]he act of state doctrine is not some vague doctrine of abstention" but instead is a "principle of decision binding on federal and state courts alike" which assures that "the act within its own boundaries of one sovereign state... becomes... a rule of decision for the courts of this country." 62 Since the present litigation did not require the court to declare illegal the contract between Nigeria and Kirkpatrick, there was no occasion to apply the act of state doctrine as a defense to continued litigation of the claims. 63

The Court distilled its holding in the following conclusion:

The short of the matter is this: Courts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them. The act of state doctrine does not establish an exception for cases and controversies that may embarrass foreign governments, but merely requires that, in the process of deciding, the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid. That doctrine has no application to the present case because the validity of no foreign sovereign act is at issue. 64

In light of the Supreme Court’s holding in Kirkpatrick, it is difficult to imagine a factual scenario in which the act of state doctrine would be a viable defense in a civil or criminal FCPA enforcement action pursued by the DOJ or the SEC. 65

C. National Security Exemption

There is a “national security exemption” from the books and records and internal accounting controls provisions of Section 13(b)(2) of the Exchange Act. This exemption does not apply, however, to the anti-bribery provisions of the FCPA. 66 The exemption may be invoked only when the person claiming its benefit is acting in cooperation with the head of a federal department or agency responsible for national security matters and when the cooperative act is performed pursuant to a specific, written directive of an agency or department head authorized by the President to issue such directives. Any directive that triggers the national security exemption

---

161 Id. at 405.
162 Id. at 406 (quoting Ricaud v. American Metal Co., 246 U.S. 304, 310 (1918)).
163 Id.: Act of state issues only arise when a court must decide — that is, when the outcome of the case turns upon — the effect of official action by a foreign sovereign. When that question is not in the case, neither is the act of state doctrine. That is the situation here. Regardless of what the court’s factual findings may suggest as to the legality of the Nigerian contract, its legality is simply not a question to be decided in the present suit, and there is thus no occasion to apply the rule of decision that the act of state doctrine requires. (emphasis in the original).
164 Id. at 409-10.
from the recordkeeping and accounting provisions expires one year after it has been issued unless it is renewed in writing.

The Conference Committee Report discussing the national security exemption demonstrates that it is very narrow in scope: A person or entity is exempt from compliance obligations only with respect to matters that "would result, or would be likely to result, in the disclosure of information which has been classified by the appropriate department or agency for protection in the interests of the national security and then only to the extent that such information is specifically related to the person's lawful cooperation." Any department or agency head must submit an annual summary of all such directives to designated congressional oversight committees.\(^{166}\)

Since SEC enforcement actions, as well as DOJ or Independent Counsel criminal prosecutions sometimes involve CIA activity or other national security matters, the national security exemption might be implicated in an FCPA investigation sometime in the future.

D. The Possibility of "Cultural Defenses" When A Foreign Agent or Consultant Is Involved in an FCPA Case

Foreign nationals and recent immigrants have from time to time attempted to use various "cultural defenses" to excuse or justify criminal acts.\(^{169}\) A cultural defense is an argument that a defendant's allegedly criminal conduct was justified or should be excused because the conduct is acceptable and legal in the defendant's native country or culture.\(^{170}\) Even if a cultural defense does not achieve an acquittal at trial,\(^{171}\) it might influence


\(^{171}\)See Tomao, supra note 169, at 242; Goldstein, supra note 169, at 155.

\(^{169}\)See Anatomy Of An Acquittal, supra note 169.
prosecutorial discretion,\textsuperscript{172} or might be a factor in mitigation at sentencing.\textsuperscript{173}

When a foreign agent or consultant is involved in an FCPA case, counsel should explore whether some type of cultural defense might be pursued, particularly if the defense would defeat establishment of the "corrupt" \textit{mens rea} required for FCPA bribery offenses:\textsuperscript{174}

In White Collar cases a frequent example of where cultural differences are raised as a defense is in response to bribery allegations against foreign nationals who attempt bribes. In these situations individuals have urged that in their homeland, for example Nigeria, it is necessary to bribe officials to have them do their duties. Indeed, even United States law recognizes the need to make 'grease' payments to foreign officials in certain countries to ensure routine government actions are performed. . . . In addition, in other countries, such as Turkey, receiving a bribe is illegal but making an offer to bribe is not. The argument that based on the culture of the bribe offeror's country he believed the American bribe was necessary or not illegal is best made in an attempt to convince the prosecutor not to bring the charge. However, absent that, it may be admissible at trial to establish the defendant did not have the intent to violate the statute.\textsuperscript{175}

\begin{footnotesize}
\begin{enumerate}
\item See \textit{The Use of Cultural Defenses, supra} note 169, at E-3 and 4 (citing examples of cases in which cultural evidence caused prosecutor to charge a reduced crime); see also Goldstein, \textit{supra} note 169, at 147-149 (discussing \textit{People v. Kimura}, No. A-091133 (Cal. Super. Ct. Nov. 21, 1985)); Matsumoto, \textit{supra} note 169.
\item Cf. \textit{Tomao, supra} note 169, at 244:

[\textit{Where the subjective state of mind is an element of the crime, the prosecution is required to establish the defendant had a particular mindset at the time she committed the wrongful act. Such state of mind must generally be inferred from the words and the conduct of the defendant. Where the prosecution tries to create an inference of criminal intent, the defense counsel is invited to introduce evidence of extenuating circumstances, such as the extent to which the defendant's cultural identity influenced her actions. if the defendant could demonstrate the inference is improper given her cultural differences, the prosecution will fail to prove the requisite \textit{mens rea}.}]
\end{enumerate}
\end{footnotesize}
IX. FCPA BOOKS AND RECORDS AND INTERNAL ACCOUNTING CONTROLS PROVISIONS

The defense of an FCPA investigation often extends beyond the foreign bribery provisions and embraces the statute’s books and records and internal accounting controls provisions that are contained in section 13(b)(2)-(7) of the 1934 Act. The bookkeeping and accounting provisions only apply to “issuers,” not to “domestic concerns.” But they apply to all of an issuer’s business activities — domestic as well as foreign — and include all payments, transactions and dispositions of assets, not solely foreign or domestic bribes or other corrupt payments.

Section 13(b)(2)(A) requires every SEC registered or reporting issuer to “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.” Violation of this bookkeeping provision does not require proof of “materiality” or proof of “scienter.” The “in reasonable

---


178 2 BRICKEY, supra note 133, § 9:20, at 279:

Indeed, the recordkeeping and accounting requirements imposed by the Act apply to domestic corporations that conduct no business abroad and conduct no business with foreign entities here in the United States. The accounting control requirements thus may operate independently of the antibribery provisions and of the concerns that led to their enactment.

detail" phrase substitutes for materiality, and has as its purpose "to effectively prevent off-the-books slush funds and payments of bribes" through the requirement of the establishment and maintenance of a system of recording financial transactions in accordance with accepted accounting and auditing methods.

Section 13(b)(2)(B) requires SEC registered or reporting issuers to: 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.

In the 1988 Amendments to the FCPA, Congress clarified the "reasonable detail" phrase in Section 13(b)(2)(A), and the "reasonable assurances" phrase in Section 13(b)(2)(B), by stating in newly added Section 13(b)(7) that if the degree of detail or assurance "would satisfy prudent officials in the conduct of their own affairs," then it is "reasonable." Congress also provided in the 1988 Amendments that criminal liability may not be imposed for violating the recordkeeping provisions of Section 13(b)(2)(A) or the internal accounting provisions of Section 13(b)(2)(B) unless the violator "knowingly" falsifies any book, record or account required to be kept, or "knowingly" circumvents or "knowingly" fails to implement the required system of internal accounting controls. The addition of the knowledge requirement for criminal enforcement was intended to provide a means of preventing the imposition of criminal misdemeanor or felony penalties for "insignificant or technical infractions or inadvertent conduct." Section 13(b)(2)(A) and (B) impose the bookkeeping and internal accounting requirements solely on "issuers." However, Section 13(b)(5), added to the statute in the 1988 Amendments, provides: "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

---

181 See H.R. Conf. Rep. No. 95-831, at 10, reprinted in 1977 U.S.C.C.A.N. 4121, 4122 (adding the "in reasonable detail" qualification "in light of the concern that such a standard, if unqualified, might connote a degree of exactitude and precision which is unrealistic.").

182 Id.


186 15 U.S.C. § 78m(b)(7) (1994); see also 15 U.S.C. § 78m(b)(4)-(5) (1994); 134 Cong. Rec. H2115 (1988). This provision was also intended to assure that criminal penalties would be imposed for deliberate efforts to evade the accounting provisions. Id.
By reason of this provision, officers, directors, employees, agents of the issuer, and other natural persons, can be criminally prosecuted for Section 13(b)(2) violations. The SEC has consistently taken the position that it can bring civil and administrative enforcement actions against individuals who “cause” an issuer to violate Section 13(b)(2).188

Section 13(b)(6) of the 1934 Act, added to the statute in the 1988 Amendments, clarifies the responsibilities of issuers for Section 13(b)(2) compliance by their subsidiaries and joint venture partners.189 It has always been assumed that an issuer is liable for Section 13(b)(2) compliance by its controlled (i.e., over fifty percent ownership) subsidiaries.190 However, during the first decade of the administration of the FCPA, it was unclear whether, and if so, when an issuer would be liable for Section 13(b)(2) violations by a subsidiary or a joint venture partner that the issuer did not control.191 Section 13(b)(6) provides that where an issuer holds fifty percent or less of the voting power with respect to a domestic or foreign firm (i.e., a noncontrolled subsidiary or joint venture partner), Section 13(b)(2) (encompassing both the bookkeeping and internal accounting controls provisions) require[s] 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 [Section 13(b)(2)].192

Section 13(b)(6) further provides that the reasonableness of the issuer’s good faith efforts include consideration of such circumstances as:
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 [Section 13(b)(2)].193

The SEC has promulgated two 1934 Act rules to effectuate the bookkeeping provisions of Section 13(b)(2)(A), and has publicly identified “five conceptual elements” that an issuer and its management and auditors should take into account in evaluating whether an internal accounting controls system satisfies Section 13(b)(2)(B).194

---

190 See, e.g., ABA, Practical Implications, supra note 176, at 1726-30.
191 BLACK & WITTEN, supra note 13, § 6.02[2], at 6-4 to 6-6.
193 Id.
194 See 2 BRICKEY, supra note 133, § 9:20, at 278.
SEC 1934 Act Rule 13b2-1 provides: "No person shall directly or indirectly, falsify or cause to be falsified, any book, record or account subject to section 13(b)(2)(A). . ." Since Rule 13b 2-1 applies to any person, its proscription is not limited to persons "inside" the corporate issuer, i.e., officers, directors and employees or agents; consequently, the rule has been used by the SEC as a basis for enforcement action against such "outsiders" as customers and suppliers.

SEC 1934 Act Rule 13b 2-2 seeks to ensure the integrity of the audit process. It provides:

No director or officer of an issuer shall, directly or indirectly, (a) Make or cause to be made a materially false or misleading statement, or (b) Omit to state, or cause another person to omit to state, any material fact necessary in order to make statements made, in the light of the circumstances under which such statements were made, not misleading, to an accountant in connection with (1) any audit or examination of the financial statements of the issuer required to be made pursuant to this subpart or (2) the preparation or filing of any document or report required to be filed with the Commission pursuant to this subpart or otherwise.

Rule 13b 2-2 applies to both oral and written statements made or submitted to an auditor. Thus, oral misrepresentations by an officer or director during the course of the issuer's annual audit will violate the Rule, if the materiality element is satisfied, and will be a criminal felony if the knowledge/intent element is proven.

In determining whether an issuer's system of internal accounting controls satisfies Section 13(b)(2)(B), the SEC has identified the following five conceptual elements:

- First, evaluation of the overall control environment;
- Second, translation of the broad objectives of internal accounting control into specific control objectives applicable to the particular business, organizational and other characteristics of the individual company;
- Third, consideration of the specific control procedures and individual environment factors which should contribute to achievement of the specific control objectives;

195 17 C.F.R. § 240.13b-1 (1997); see also Promotion of the Reliability of Information and the Prevention of the Concealment of Questionable or Illegal Corporate Payments or Practices, Exchange Act Release No. 15,570, 1979 SEC LEXIS 2141 (Feb. 15, 1979); Zarin, supra note 13, § 3.1[D][11], at 3-11.


Fourth, monitoring of control procedures and consideration of whether they are functioning as intended; and

Finally, consideration of the benefits (consisting of reductions in the risk of failing to achieve the objectives) and costs of additional or alternative controls.\(^\text{199}\)

To satisfy the FCPA, an issuer's system of internal accounting controls "may require incorporation of factors defined in auditing literature as 'administrative controls,' which not infrequently overlap with 'accounting controls.'"\(^\text{200}\)

Two important issues under Section 13(b)(2) that remain unclear are (i) what precisely is embraced by an issuer's "books, records, and accounts,"\(^\text{201}\) and (ii) what level of detail will constitute "reasonable detail" to accurately and fairly reflect transactions and disposition of assets of the issuer.\(^\text{202}\)

The FCPA does not define "books, records, and accounts." However, Section 3(a)(37) of the 1934 Act, added to the statute in 1975 — two years prior to passage of the FCPA — defines "records" to include "accounts, correspondence, memorandums, tapes, discs, papers, books, and other documents or transcribed information of any type, whether expressed in ordinary or machine language."\(^\text{203}\) The SEC, the accounting profession, and the private bar have never clearly agreed on whether Section 3(a)(37) governs Section 13(b)(2), or whether some more narrow definition applies to the FCPA's internal accounting controls provision.\(^\text{204}\) The accounting profession and the bar advocated that Section 13(b)(2)(A)'s "books, records, and accounts" should only apply to records that are relevant to the preparation of financial statements.\(^\text{205}\) The SEC initially disagreed,\(^\text{206}\) but thereafter "retreated and took a stance closer to that advocated by the private bar and accountants."\(^\text{207}\)

SEC Chairman Harold Williams stated that "we believe that records which are not relevant to accomplishing the objectives specified in the statute for the system of internal controls are not within the purview of the recordkeeping provision."\(^\text{208}\)


\(^{200}\) BRICKLEY, supra note 133, § 9:20, at 279.

\(^{201}\) See BLACK & WITTEN, supra note 13, § 6.03[1].

\(^{202}\) See id. § 6.03[2].


\(^{204}\) See BLACK & WITTEN, supra note 13, § 6.03[1].

\(^{205}\) See, e.g., ABA, Guide to Section 13(b)(2), supra note 176, at 313.


\(^{207}\) BLACK & WITTEN, supra note 13, § 6.03[1], at 6-7.

\(^{208}\) Id. For an analysis of the evolution of the SEC's interpretation of the accounting standards provision of Section 13(b)(2)(B), see Siedel, Internal Accounting Controls Under the Foreign Corrupt Practices Act: A Federal Law of Corporations? 18 AM. BUS. L.J. 444,
Black and Witten advocate a middle position:  

As a practical matter, neither [the SEC nor the accounting profession/bar] approach is entirely satisfactory. Limiting the provision's applicability to records necessary to permit the preparation of financial statements arguably would mean, for example, that Section 13(b)(2)(A) did not prohibit the forging of board minutes to reflect falsely the authorization of an expenditure. Such a falsification of corporate records is arguably well within the intent of the accounting provisions. On the other hand, expanding the provision's applicability to every scrap of paper or electronic bit of information that enters a public company, as the SEC Staff has suggested, imposes an obligation far broader than Congress could have intended and compliance with which may well be impossible.

The best interpretation, and the one that provides useful guidance for the vast majority of situations, is that Section 13(b)(2)(A) requires issuers to maintain accounting and other records that reflect accurately the economic events and activities of the corporation. This definition encompasses within "books, records, and accounts" those accounting records necessary to prepare financial statements in accord with Generally Accepted Accounting Principles. Thus, not only internal corporate records, such as ledgers and journal entries, but also records of corporate transactions with third parties, such as agreements with third party vendors, would be covered. It also encompasses other corporate records and documents relating to the official business of the corporation, including for example, minutes of board meetings and board resolutions. It would not, however, cover every memorandum or note taken by an employee relating to any business matter.

The "in reasonable detail" language of the books and records provision is not intended to impose upon issuers an unreasonable duty of care; rather, it is intended to "make[ ] clear that the issuer's records should reflect transactions in conformity with accepted methods of recording economic events and effectively prevent off-the-books slush funds and payments of bribes." In the 1988 Amendments to the FCPA, Congress defined "reasonable detail" to mean "such level of detail... as would satisfy prudent officials in the conduct of their own affairs." Congress specifically declined to include a cost-benefit analysis in the definition of "reasonable detail."
The FCPA’s accounting provisions have provided the basis for a broad array of administrative, civil and criminal enforcement actions by the SEC and the DOJ. Section 13(b)(2) violations were alleged as a principal part of the SEC’s recent civil and administrative enforcement actions in the Triton Energy/Indonesia case.

A. New Section 10A of the 1934 Act and SEC Rule 10A-1

The importance of the books and records and internal accounting controls provisions of Section 13(b)(2) is highlighted by new Section 10A of the 1934 Act, added to the statute as part of the Private Securities Litigation increasing concern about audit failures and financial fraud and resultant recommendations by experts for stronger accounting practices and audit standards. See also the October 1987 “Treadway Commission” Report: NATIONAL COMMISSION ON FRAUDULENT FINANCIAL REPORTING, AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS, REPORT OF THE NATIONAL COMMISSION ON FRAUDULENT FINANCIAL REPORTING (1987). For a synopsis of what constitutes “internal accounting controls,” and what controls the statute requires, see BLACK & WITTEN, supra note 13, § 6.04[1] & [2].


214 See infra Parts X.A.2 and X.C.

Reform Act of 1995. Section 10A requires that each audit under the 1934 Act shall include:

(1) procedures designed to provide reasonable assurance of detecting illegal acts that would have a direct and material effect on the determination of financial statement amounts; (2) procedures designed to identify related party transactions that are material to the financial statements or otherwise require disclosure therein; and (3) an evaluation of whether there is substantial doubt about the ability of the issuer to continue as a going concern during the ensuing fiscal year.

Section 10A also imposes expanded obligations on auditors to report in a timely manner certain uncorrected illegal acts to an issuer's audit committee or board of directors, and requires the issuer, or if the issuer fails to do so then the auditor, to provide information regarding the illegal act to the SEC.

---

217 Section 10A(f) defines "illegal act" as "an act or omission that violates any law, or any rule or regulation having the force of law." Id.; see also CODIFICATION OF ACCOUNTING STANDARDS AND PROCEDURES, Statement on Auditing Standards No. 54, § 317.02 (American Inst. of Certified Pub. Accountants 1989) ("the term illegal acts . . . refers to violations of laws or governmental regulations.").

Under Section 10A(b), if, while conducting the audit of the issuer's financial statements, the auditor becomes aware of information indicating that an illegal act (whether or not material to the financial statement) has occurred or may have occurred, then the auditor would be required, in accordance with GAAS . . . to determine whether it is 'likely' that an illegal act has occurred and, if so, its possible effect on the financial statements (including any contingent monetary effects, such as fines, penalties, and damages). The auditor would be required to inform the issuer's management of the illegal act 'as soon as practicable.' In addition, the auditor must assure him/herself that the issuer's board of directors is adequately informed, by management or otherwise, of any detected illegal act. (citations omitted.)
219 Id. at 134:

The three conclusions set forth in Section 10A(b)(2) that trigger the auditor's obligation to report to the board are that: 1. the illegal act has a material effect on the issuer's financial statements, 2. senior management has not taken, and the board of directors has not caused senior management to take, timely and appropriate remedial actions with respect to the illegal act, and 3. the failure to take remedial action is reasonably expected to warrant either a departure from the auditors'standard audit report, when made, or the auditor's resignation from the audit engagement.

If the board of directors receives a report that the auditor has reached these conclusions, then the board has one business day to notify the Commission that it received such a report. If the auditor does not receive a copy of the board's notice to the Commission within that one business day period, then by the end of the next business day the auditor is required to furnish directly to the Commission a copy of the report given to the board (or the documentation of any oral report). The auditor's resignation from the audit engagement does not engage the auditor's obligation to furnish his or her report to the Commission in these circumstances.

(citations omitted.)
The SEC cautions that "[t]he auditor should consider both the quantitative and qualitative materiality of the act, including contingent liabilities that might be created by the illegal act." Id. at 134 n.13. See also SAS 54, ¶ 13, AU 317.13 and SAD 47, Audit Risk and Materiality in Conducting an Audit, ¶ 6 (June 30, 1984), AU § 312.06.
Since one of the purposes of Section 10A's requirement of reporting to the SEC is to facilitate the SEC's timely conduct of enforcement recommendations, the SEC promulgated 1934 Act Rule 10A-1 to provide effective implementation of Section 10A. Rule 10A-1 provides (i) that Section 10A notices be provided to the SEC's Office of the Chief Accountant, (ii) that the notice be in writing, and contain certain prescribed information about the issuer, the auditor, and the likely illegal act and its possible effect on the issuer's financial statements, (iii) that the auditor shall have a "safe harbor" from civil liability respecting Section 10A notices to the issuer and to the SEC, (iv) that providing a Section 10A notice or report to the issuer or the SEC does not, in any way, affect the obligations of the issuer or the auditor to file and make all applicable public disclosures otherwise required by SEC rules, and (v) that the Section 10A report filed with the SEC shall be deemed to be an investigative record and shall be non-public and exempt from disclosure pursuant to the Freedom of Information Act to the same extent and for the same periods of time that the Commission's investigative records are non-public and exempt from disclosure under, among other applicable provisions, 5 U.S.C. 552(b)(7) and § 200.80(b)(7) of this chapter.

X. THE TRITON ENERGY/INDONESIA CASE

The recent SEC civil injunctive/enforcement action against Triton Energy Corporation, a Dallas, Texas-based U.S. multinational issuer, and two former senior officers of Triton Indonesia, Inc., a wholly-owned subsidiary of Triton Energy, and the related SEC administrative cease-and-desist proceedings against two former executives of Triton Energy and two former managers of Triton Indonesia highlight the FCPA exposure of U.S. companies utilizing the services of third party foreign agents. The SEC Complaint and related administrative order/opinion alleged that in 1989 and 1990, two senior officers of Triton Indonesia, McAdoo and Keever,
authorized certain improper payments to Triton Indonesia’s foreign business agent, Roland Siouffi.\textsuperscript{224} Siouffi served as an intermediary between Triton Indonesia and several Indonesian government agencies with regulatory authority over an oil and gas recovery project being developed and operated pursuant to a contract between a Triton Indonesia joint venture and Pertamina, a national oil company owned by the Republic of Indonesia.\textsuperscript{225} Triton Indonesia can be described fairly as a “domestic/foreign” subsidiary. It was incorporated in Delaware, but all of its personnel (including executives, employees and agents), offices, facilities, assets, and business activities were located in Indonesia.

The SEC Complaint further alleged that both McAdoo and Keever authorized the payments to Siouffi “knowing or recklessly disregarding the high probability that Siouffi either had or would pass such payments along to Indonesian government employees for the purpose of influencing their decisions affecting the business of Triton Indonesia,” thereby violating the corrupt foreign payments proscriptions of the FCPA.\textsuperscript{226} The Complaint also alleged that McAdoo, Keever and other Triton Indonesia employees concealed the nature of the payments “by falsely documenting and recording the transactions as routine business expenditures.”\textsuperscript{227}

The SEC explicitly acknowledged in its Complaint that “Triton Energy did not expressly authorize or direct these improper payments and misbookings.”

The allegedly illegal payments in Triton were not made for the purpose of obtaining the oil and gas joint venture contract or any related oil and gas concessions. Triton Indonesia had purchased its interest in the joint venture in 1988 from the predecessor owner, Nordell International Resources Ltd., a Canadian corporation. Pursuant to the joint venture, Triton Indonesia be-

\textsuperscript{225} Id.
\textsuperscript{226} Id.
\textsuperscript{227} Id.
\textsuperscript{228} Id. In the companion administrative cease-and-desist order/opinion, the SEC stressed the interrelated importance of the foreign bribery and corrupt foreign payment provisions of Section 30A(a) of the 1934 Act, on the one hand, and the books and records and internal accounting controls provisions of Section 13(b)(2) of the 1934 Act, on the other.

Section 13(b)(2) of the Exchange Act is comprised of two accounting provisions referred to as the “books and records” and “internal controls” provisions. These accounting provisions were enacted as part of the FCPA to strengthen the accuracy of records and to “promote the reliability and completeness of financial information that issuers are required to file with the Commission or disseminate to investors pursuant to the Exchange Act.” SEC v. World-Wide Coins Inv. Ltd., 567 F. Supp. 724, 747 (N.D. Ga. 1983). The accounting provisions were enacted by Congress along with the anti-bribery provisions [Section 30A(a)] because Congress concluded that almost all bribery of foreign officials by American corporations was covered up in the corporations’ books and that the requirement for accurate records and adequate internal controls would deter bribery. Lewis v. Sporck, 612 F. Supp. 1316, 1333 (N.D. Cal. 1985).
came the operator of the Enim Project, an oil and gas recovery project embracing oilfields on the island of Sumatra in the Republic of Indonesia. As part of the joint venture, Triton Indonesia became party to a Rehabilitation and Secondary Contract ("RSRC contract") with the Pertamina national oil company. The RSRC contract governed the sale of crude oil to Pertamina, reimbursement of costs by Pertamina to Triton Indonesia and related payments between the contracting parties.229

The Enim Project was subject to taxation by the Indonesian Ministry of Finance. Tax liability was determined by auditors from the audit branch of the Ministry of Finance, known by the acronym BPKP. As a result of joint Pertamina/BPKP audits, both the tax liability and cost recovery entitlement of Triton Indonesia were determined and adjusted.230

The Pertamina/BPKP auditors, at exit meetings, presented Triton Indonesia with written preliminary audit findings, which identified problems that might have led to reductions in cost recovery. Triton Indonesia prepared written responses to the preliminary audit exceptions. Thereafter, Triton Indonesia representatives and the Pertamina/BPKP auditors entered into negotiations concerning the content of the final audit reports. "The Pertamina/BPKP auditors had discretion to make a determination as to whether audit exceptions would be included in their audit report or withdrawn."231 The SEC alleged in its Complaint and its related administrative order/opinion that several payments Triton Indonesia’s agent and consultant


The RSRC contract required that all oil recovered from the project be delivered to Pertamina through a pipeline owned and controlled by Pertamina. Triton Indonesia paid a tariff to Pertamina for use of the pipeline. The RSRC contract obligated Pertamina to reimburse Triton Indonesia for certain costs incurred by the company during oil exploration and recovery. Triton Indonesia submitted monthly crude oil invoices to Pertamina that documented, among other things, the volume of oil delivered through the pipeline at agreed-upon rates, the pipeline fee, and a calculation of Triton Indonesia’s reimbursable monthly operating costs. After Pertamina reviewed the documents and determined that all documentation was complete and accurate, it paid the joint venture the invoiced amount.

230Id. at 63,470:

Pertamina/BPKP auditors performed joint annual audits of the Enim Project. During these audits, Pertamina and BPKP auditors reviewed the books and records of Triton Indonesia, as well as those of its parent, Triton Energy. Pertamina auditors determined, after reviewing documentation submitted by Triton Indonesia and examining the company’s books and records, whether costs were properly claimed as recoverable costs. BPKP auditors determined, after reviewing periodic corporate tax returns submitted by Triton Indonesia and Nordell, and examining the Enim Project’s books and records, whether Triton Indonesia had paid the proper amount of corporate taxes. The annual Pertamina/BPKP audits of the Enim Project determined the amount of recoverable costs associated with the operation. Because the Enim Project never generated sufficient oil production in relation to costs incurred, the pool of unrecovered costs increased each year. In the annual audit for the fiscal year ending March 31, 1987, the unrecovered cost pool was approximately $10 million. In the annual audit for the fiscal year ending March 31, 1988, the unrecovered cost pool stood at more than $16 million. By the March 31, 1989 audit, the unrecovered cost pool had grown to more than $21 million.

231Id.
Siouffi made to the auditors on behalf of Triton Indonesia violated the corrupt foreign payments provisions of the FCPA.\footnote{232}

A. The "Questionable" Payments

1. May 1989 Tax Audit

In their preliminary May 1989 tax audit findings the Pertamina/BPKP auditors determined that Nordell had failed to pay certain withholding taxes due in connection with payments to it for technical services and interest on funding. The auditors preliminarily assessed approximately $385,000 in additional taxes relating to technical services payments, and approximately $233,000 in additional taxes relating to interest for intercorporate funding. In early August 1989, "Triton Indonesia agreed to pay Siouffi $165,000 for the purpose of obtaining a favorable decision from Indonesian government officials on the tax issue relating to technical service fees."\footnote{233} The SEC alleged that during the period July through October 1989, Siouffi paid one of the auditors $120,000, and paid $40,000 to other officials/employees at Pertamina.

On August 15, 1989, Keever wrote a two-page letter to the Pertamina/BPKP auditors presenting Triton Indonesia’s position that it should not be liable for withholding tax on technical service fees. On August 18, 1989, the Indonesian auditing board responded by accepting Triton Indonesia’s position that the company was not liable for any additional taxes on technical services fees. On

\footnote{232 Id.:

In 1988, Triton Indonesia agreed with Nordell to retain Roland Siouffi as its business agent for the purpose of acting as an intermediary between Triton Indonesia and Indonesian government agencies, including Pertamina and the Ministry of Finance. Siouffi, a French citizen who had resided in Indonesia for twenty-five years, had been a director and chief executive officer of Nordell at the time Triton Indonesia took over the Enim Project.

Upon entering into the joint venture agreement, Triton Indonesia adopted existing contracts between Nordell and entities controlled by Siouffi, and later entered additional contracts with the same entities. These entities included Development Engineering and Rehabilitation Company S. A. ("Derco"), Orix Resources, Inc. ("Orix"), Sumgait Resources Ltd. ("Sumgait"), and P. T. Windusari Danuta ("Windusari") . . . . During 1989 and 1990, McAdoo and Keever authorized a number of improper payments to Siouffi entities for the purpose of influencing specific actions by various Indonesian government agencies.


[D]uring the years 1989 and 1990, McAdoo and Keever authorized numerous improper payments to Roland Siouffi, Triton Indonesia's business agent acting as an intermediary between Triton Indonesia and Indonesian government agencies, knowing or recklessly disregarding the high probability that Siouffi either had or would pass such payments along to Indonesian government employees for the purpose of influencing their decisions affecting the business of Triton Indonesia. . . . [T]hese payments were made in violation of the Foreign Corrupt Practices Act.

or about October 17, 1989, Siouffi told Keever that $120,000 had been paid to
one of the auditors and $40,000 to others at Pertamina.\(^{234}\)

The SEC further alleged that the $165,000 paid to Siouffi was falsely
recorded in Triton Indonesia's books and records as payments to Orix, a
Siouffi company, "for the purchase of seismic data," a fictitious transac-
tion.\(^{235}\) The issue regarding interest on intercorporate funding remained un-
resolved.

In its reply to Keever's August 15, 1989 letter, the Indonesian govern-
ment auditing board reiterated that Triton Indonesia still owed $233,134 in
withholding tax relating to interest charges. In October 1989, Triton Indonesia
management began to discuss with Siouffi how to reduce its tax liability for the
interest charges. By November 1989, these discussions had evolved into a
plan to make a payment to obtain a favorable decision reducing the tax rate on
the interest charges. Siouffi told Keever that reducing the tax rate on interest
would cost Triton Indonesia approximately $20,000.\(^{236}\)

Following Siouffi’s instructions, McAdoo wrote a letter to the Indone-
sia auditing board concerning the withholding rate on interest charges,
agreeing to pay $155,423 rather than $233,144 (i.e., a reduction of approxi-
ately $80,000). "On December 12, 1989, Siouffi told Keever that a
BPKP auditor would be paid $20,000 in connection with obtaining this
decision to reduce taxes on interest."\(^{237}\) Thereafter, the Indonesian government
accepted McAdoo's proposal, and lowered the tax liability to $155,423.
The SEC alleged that Triton Indonesia on January 4, 1990 "paid Siouffi
$22,500 for the reduction which had been obtained in the tax rate on inter-
est charges," by entering "into a sham $22,500 transaction with Windusari,
a Siouffi company."\(^{238}\)

Murphy signed fabricated documentation relating to this payment and partici-
pated in recording falsely the expenditure as a payment for repairs of equip-
ment in the Enim oilfields. On January 6, 1990, Siouffi told Keever that the
BPKP auditor had been paid in connection with the decision on the tax audit
issue concerning the tax rate on interest payments.\(^{239}\)


The Pertamina/BPKP auditors in January-February 1989 concluded
their field work for the annual audit for the fiscal year ending March 31,
1988. In April 1989, Siouffi informed Keever and McAdoo that a payment
of $21,000 would be required to obtain a final audit report with certification
of the full cost pool. The SEC complaint and the companion SEC adminis-
trative cease-and-desist opinion do not clearly specify whether the payment
was intended solely for Siouffi, or whether Siouffi represented he would, or

\(^{234}\) Id.
\(^{235}\) Id.
\(^{236}\) Id.
\(^{237}\) Id.
\(^{238}\) Id.
\(^{239}\) Id.
Triton Indonesia authorized him to pass the payment on to the Pertamina/BPKP auditors. Nor does the SEC allege whether the auditors or any other government officials ever received all or a portion of the allegedly improper payment. The SEC does allege, however, that the payment (regardless of whom was or were the ultimate recipient(s)), was falsely recorded in the company’s books and records.

Triton Indonesia paid Siouffi $21,000 for obtaining from the auditors a favorable final report and cost certification. In September 1989, Triton Indonesia entered into a fictitious $21,000 transaction with Windusari. Murphy signed fabricated documentation relating to this payment and participated in recording falsely the expenditure as a payment for service and repair to equipment in the Enim oilfield. The auditors allowed all but $139,547 of over $8 million in unrecovered costs.²⁴⁰


The Pertamina/BPKP auditors in November 1989 through January 1990 performed their field work for the annual audit for the fiscal year ending March 31, 1989. The SEC specifically alleged that Triton Indonesia management and Siouffi discussed “a payment to Indonesian officials” respecting this audit. In December 1989, “Siouffi informed Keever that obtaining a final [audit] report with full cost certification would require a payment of $35,000 of which $28,000 would be allocated to BPKP and $7,000 to Pertamina.”²⁴¹ The SEC further alleged that these improper payments were concealed and falsely booked in the company’s books and records in the guise of a $38,500 payment to Windusari, a Siouffi company, supposedly for equipment repairs in the Enim oilfields.²⁴² On March 8, 1990, Triton Indonesia received a favorable final audit report: “The auditors made only $275,751 in reductions, while certifying over $8 million in costs.”²⁴³

4. 1989 Corporate Tax Refund

In late 1988, Triton Indonesia engaged Siouffi to negotiate with Indonesian government officials for a finding that the Enim Project should be exempt from corporate tax, and that the company should receive a tax refund for corporate taxes previously paid by Nordell. Siouffi stated that “a payment would be necessary” to obtain the desired governmental deci-

²⁴⁰ Id. at 63,471-72.
²⁴¹ Id. at 63,472.
²⁴² Id.
²⁴³ Id.:
In response to a December 1988 letter from McAdoo, the Monetary Directorate of the Indonesian Ministry of Finance, the government agency responsible for tax collections, stated in a March 11, 1989 letter ruling: "Triton Indonesia would not be obligated to pay corporate taxes as long as it did not earn a profit from the operation of the Enim Project."\textsuperscript{245}

In March and May 1989, Keever argued in letters to the Monetary Directorate that Triton Indonesia was entitled to a $94,000 refund of corporate taxes erroneously paid by its joint venture predecessor Nordell. Siouffi informed Keever and Triton's former finance manager "that obtaining a favorable decision concerning the refund would require a payment of $7,000."\textsuperscript{246} McAdoo and Keever discussed Siouffi's proposal and agreed to make the payment.\textsuperscript{247} Triton Indonesia eventually received the full $94,000 refund from the Ministry of Finance. Neither the SEC complaint nor the companion SEC administrative cease-and-desist order/opinion clearly specifies whether the payments for the corporate tax exemption or refund was intended solely for Siouffi, or whether Siouffi represented he would, or Triton Indonesia authorized him to, pass the payments on to government officials. Nor does the SEC specifically allege whether any government official received all or a portion of the payments actually made to Siouffi in this regard. The SEC does allege, however, that payments were made to Siouffi, and were falsely recorded in the company's books and records.\textsuperscript{248}

5. Refund of Value Added Tax

Triton Indonesia was required to collect and pay a ten percent value added tax ("VAT"), but was permitted to seek appropriate reimbursement of bona fide overpayments by submitting appropriate documentation for review by Pertamina. In 1989 Triton Indonesia submitted to Pertamina invoices and other documents relating to $119,000 VAT paid, asking Pertamina to determine whether a refund of any amount was due.\textsuperscript{249} Thereafter, "Siouffi informed McAdoo and Keever that obtaining a favorable decision on the VAT refund would require a payment of $22,500."\textsuperscript{250} Siouffi was paid $23,000 in October 1989, and in November 1989 Pertamina re-

\footnotesize{\textsuperscript{244} Id.  
\textsuperscript{245} Id.  
\textsuperscript{246} Id.  
\textsuperscript{247} Id.  
\textsuperscript{248} Id.  
\textsuperscript{249} Id.  
\textsuperscript{250} Id. at 63,472-73.}
funded approximately $109,000 to the company as a VAT overpayment. Neither the SEC complaint nor the companion SEC administrative cease-and-desist order/opinion clearly specifies whether the payment was intended solely for Siouffi, or whether Siouffi represented he would, or Triton Indonesia authorized him to, pass the payment on to government officials. Nor does the SEC specifically allege whether any Government official received all or a portion of the payment actually made to Siouffi in this regard. The SEC does allege, however, that a $23,000 payment was made to Siouffi, and was falsely recorded in the company’s books and records.

6. Pipeline Tariff Payment

The RSRC contract required the Enim Project to reimburse Pertamina for use of Pertamina’s pipeline pursuant to a Pipeline Transportation Agreement that incorporated the Consumer Price Index (“CPI”) for determining the appropriate pipeline fee. In early 1990, Triton Indonesia and Pertamina had a difference of opinion as to whether Pertamina had used the proper CPI figures in determining the pipeline fees paid by the company. Siouffi offered help. “Siouffi contacted Keever and offered to assist Triton Indonesia in obtaining a refund of the purported overcharge from Pertamina. Siouffi stated that obtaining a favorable decision to revise the pipeline rates and procure a refund of the purported overpayment would require a payment of approximately $10,000.”

At the request of Keever, in June 1990 Pertamina recalculated the company’s pipeline fee obligation using a different CPI and reimbursed to Triton Indonesia the purported overpayment. Triton Indonesia paid Siouffi $10,000 regarding this pipeline fee recalculation and refund. Neither the SEC Complaint nor the companion SEC administrative cease-and-desist order/opinion clearly specifies whether the payment was intended solely for Siouffi, or whether Siouffi represented he would, or Triton Indonesia authorized him to, pass the payment on to government officials. Nor does the SEC specifically allege whether any Pertamina official received all or a portion of the $10,000 payment made to Siouffi in this regard. The SEC does allege, however, that the payment was falsely recorded in the company’s books and records.

251 Id. at 63,473:

Beginning on October 25, 1989, Triton Indonesia paid Siouffi $23,000 for the purpose of obtaining a favorable decision on the VAT tax reimbursement. At the same time, Triton Indonesia entered into a $23,000 transaction with Derco, a Siouffi company. Murphy signed fabricated documentation relating to this payment and participated in recording falsely the expenditure as a payment for the acquisition and interpretation of seismic data. On November 6, 1989, Pertamina reimbursed Triton Indonesia in the amount of approximately $109,000.

252 Id.

253 Id.;

Between May 29 and June 7, 1990, Triton Indonesia paid Siouffi $10,000 for the purpose of obtaining a favorable decision on the pipeline fee reimbursement. During the same time, Triton Indonesia entered into a fictitious transaction in approximately

Triton Indonesia and its predecessor in the late 1980s had been making a total of approximately $1,000 per month of "grease" or "expediting" payments to low-level clerical employees of Pertamina to assure the timely processing of monthly crude oil invoices. These grease payments were falsely booked in the Company's books and records. The SEC did not charge that these payments violated the FCPA’s corrupt foreign payments provisions, but did charge their misbookings as violations of the books and records and internal accounting controls provisions of Section 13(b)(2) of the Exchange Act. Three other payments made in 1989 and 1990 — none of them specifically alleged to have been made to government officials — were also charged as having been misbooked in Triton Indonesia’s books and records, and therefore constituted Section 13(b)(2) violations.

B. SEC Civil Injunctive and Civil Penalty Enforcement Action

After completion of a private SEC investigation that extended over several years, on February 27, 1997 the SEC filed a civil injunctive and civil monetary penalty enforcement action against Triton Energy, Keever and McAdoo alleging violations of both the bribery and corrupt foreign payments provisions and the books and records and internal accounting
controls provisions of the FCPA. Neither Triton Indonesia nor Roland Siouffi were named as defendants.\textsuperscript{257} The allegedly corrupt payments, described above, had been made in 1989 and 1990, but the enforcement action was not filed until 1997, well over six years after the last allegedly illegal payment.\textsuperscript{258}

It is interesting to note that Triton Energy, the parent corporation was charged directly with the books and records and internal accounting controls lapses of its wholly owned "domestic/foreign" subsidiary, Triton Indonesia.

[T]he complaint alleges, Triton Energy failed to devise and maintain an adequate system of internal accounting controls to detect and prevent improper payments by Triton Indonesia to government officials and to provide reasonable assurance that transactions were recorded as necessary to permit preparation of financial statements in conformity with generally accepted accounting principles.\textsuperscript{259}

The SEC's complaint sought both permanent injunctive relief and civil monetary penalties against all three defendants.

Simultaneously with the filing of the Complaint, Triton Energy and Keever, without admitting or denying the allegations,\textsuperscript{260} consented to permanent injunctive relief and the imposition of civil monetary penalties.\textsuperscript{261} Keever paid a $50,000 civil fine, and consented to a permanent injunction embracing both the corrupt foreign payments provisions and the books and records and internal accounting controls provisions of the Exchange Act. Triton Energy paid a $300,000 civil fine, but consented to an injunction that embraced solely the books and records and internal accounting controls provisions. The permanent injunction against Triton Energy does not directly embrace the foreign bribery and corrupt foreign payments provisions of the FCPA. This settlement concession by the SEC reflects, in part, strong mitigation evidence presented on Triton Energy's behalf in the underlying investigation. Indeed, the official SEC Litigation Release specifically acknowledged:

The complaint states that Triton Energy did not expressly authorize or direct these improper payments and misbookings.

\textldots{}

In accepting the settlement, the Commission has considered the fact that the violations occurred under former management and that certain remedial actions

\textsuperscript{257}Triton Indonesia was a "domestic concern" over which the SEC had no jurisdiction to pursue an enforcement action. Roland Siouffi is a nonresident alien, living in Indonesia, over whom the SEC presumably would never achieve effective service of process.


\textsuperscript{259}Id. at 63,477.

\textsuperscript{260}Id. at 63,476-77.

\textsuperscript{261}Id. at 63,477.
have been implemented by the current board of directors and senior management.\textsuperscript{262}

McAdoo, without admitting or denying the allegations, on June 26, 1997, consented to permanent injunctive relief embracing both the corrupt foreign payments provisions and the books and records and internal accounting controls provisions of the 1934 Act. McAdoo also paid a $35,000 civil fine.\textsuperscript{263}

C. Companion SEC Administrative Cease-And-Desist Proceedings

Simultaneously with the filing of the civil injunctive and civil penalty action in federal district court, the SEC instituted companion administrative cease-and-desist proceedings against two former managers/officers of Triton Indonesia (William McClure and Robert P. Murphy) and two former executives of Triton Energy (David Gore and Robert Puetz).\textsuperscript{264} McClure had been a contract auditor for, and then Commercial Manager of, Triton Indonesia in 1990. Murphy, a certified public accountant (CPA), had been Controller of Triton Indonesia in 1989 and 1990. Both McClure and Murphy worked at Triton Indonesia's facilities in the Republic of Indonesia.

As Commercial Manager, McClure assumed direct supervisory authority over the accounting function at Triton Indonesia. McClure was required to review and initial documents to authorize certain expenditures. These documents contained the descriptions of expenditures that determined how expenses were recorded in Triton Indonesia’s books and records. As Controller, Murphy had direct responsibility for preparing entries in Triton Indonesia’s books and records. McClure supervised Murphy’s preparation of entries for the books and records of Triton Indonesia. Murphy was responsible for determining that all underlying documentation was present when a bank voucher was issued and initialing the voucher to signify that all required documents were present.\textsuperscript{265}

McClure and Murphy were charged with directly violating SEC 1934 Act Rule 13b2-1 and with causing Triton Energy to violate Section 13(b)(2)(A) of the 1934 Act. Section 13(b)(2)(A) is the principal books and records provision of the FCPA: it requires issuers to make and keep books, records, and accounts that accurately and fairly reflect the transactions and dispositions of their assets. Rule 13b2-1 prohibits any person from, directly or indirectly, falsifying or causing the falsification of any books, records, or accounts subject to Section 13(b)(2)(A). The SEC has always contended, and did so here, that a parent issuer (\textit{i.e.,} Triton Energy) has Section 13(b)(2) liability for the books and records and internal accounting controls

\textsuperscript{262} Id. at 63,476-77.
\textsuperscript{264} In re Gore, Fed. Sec. L. Rep. (CCH) ¶ 74,404, at 63,468 (D.D.C. Feb. 27, 1997).
\textsuperscript{265} Id. at 63,470. (citation omitted).
of its wholly owned or controlled domestic and foreign subsidiaries (i.e., Triton Indonesia).\textsuperscript{266}

The allegedly corrupt foreign payments and the misbooked grease or facilitating payments in the Triton case did not appear to be material to Triton Energy. They totaled approximately $400,000 in a two-year period. However, Section 13(b)(2) books and records and internal accounting controls violations do \textit{not} require proof of "materiality."\textsuperscript{267} And a civil or administrative violation of Section 13(b)(2) does \textit{not} require proof of scienter or guilty knowledge; a negligence standard suffices.\textsuperscript{268} The SEC, never-

\textsuperscript{266}Thus, the SEC stated flatly: "Triton Indonesia maintained books and records that did not accurately or fairly reflect the underlying disposition of assets. Accordingly, Triton Energy violated Section 13(b)(2)(a) of the Exchange Act." \textit{Id.} at 63,475. \textit{See e.g., BLACK \& WITTEN, supra note 13, § 6.02[2]; Foreign Corrupt Practices Act of 1977, Fed. Sec. L. Rep. (CCH) ¶ 23,632H (Jan. 29, 1981) (speech of SEC Chairman Harold Williams); ABA, Practical Implications, \textit{supra} note 176, at 1726-30 (comments of Edward D. Herlihy, Assistant Director, SEC Division of Enforcement). The 1988 Amendments to the FCPA appear to assume that parent issuers have Section 13(b)(2) liability for wholly-owned or majority-controlled subsidiaries. The Amendments added new Section 13(b)(6) to the 1934 Act, providing that where an issuer holds 50% or less of the "voting power" of a domestic or foreign subsidiary Section 13(b)(2) "require[s] only that the issuer proceed in good faith to use its influence, to the extent reasonable under the circumstances, to cause such domestic or foreign firm to devise and maintain a system of internal accounting controls consistent with [Section 13(b)(2)]." 15 U.S.C. § 78m(b)(6). Thus, an issuer has an affirmative defense of "good faith" to any Section 13(b)(2) charge relating to a noncontrolled subsidiary.


\textsuperscript{268}See BLACK \& WITTEN, \textit{supra} note 13, § 6.03; \textit{see also} SEC v. World-Wide Coin Inv., Ltd., 567 F. Supp. 724, 749 (N.D. Ga. 1983); SEC 1981 Policy Statement, 46 Fed. Reg. at 11,547. In the 1988 Amendments to the FCPA, Congress added §13(b)(6) to the 1934 Act, providing in substance that "no criminal liability shall be imposed for failing to comply with the FCPA's books and records or accounting controls provisions unless a person \textit{knowingly} circumvents a system of internal accounting controls or \textit{knowingly} falsifies books, records, or accounts kept pursuant to Section 13(b)(2) of the Exchange Act." \textit{Id.} at 916-17, \textit{reprinted in} U.S.C.C.A.N at 1949-50.
Nevertheless, did charge Murphy with "knowing" misconduct, but appeared to charge McClure on a negligence standard.\(^{269}\) Simultaneously with the issuance of the administrative order, without admitting or denying the charges or the matters set forth in the opinion, McClure and Murphy consented to the issuance of the administrative order/opinion. The only sanctions imposed against McClure and Murphy were administrative cease-and-desist orders prohibiting them from committing or causing any violations of 1934 Act Rule 13b2-1 and Section 13(b)(2)(A) of the 1934 Act. No civil or administrative monetary penalties were imposed against either of them, because the SEC has no jurisdiction to impose civil monetary penalties in an administrative proceeding against individuals who are not associated with a broker-dealer or investment adviser.

David E. Gore was a director and President of Triton Energy from 1988 until his resignation in August 1992. Robert W. Puetz became Triton Energy’s Vice President of Finance and Chief Financial Officer (CFO) in 1982 and was Senior Vice President of Finance and CFO from August 1989 until his resignation in April 1993. Both Gore and Puetz worked at the headquarters offices of Triton Energy in Dallas, Texas.\(^{270}\)

Gore and Puetz were each members of Triton Energy senior management who had significant responsibility for the operations of both Triton Energy and Triton Indonesia. As president of Triton Energy, Gore was responsible for all Triton Energy production and exploration operations worldwide. Puetz, senior vice president and CFO of Triton Energy, had oversight for preparation of financial statements for all foreign operations.\(^{271}\)

Members of Triton Energy’s senior management, including Gore and Puetz, were aware that Siouffi’s role as Triton Indonesia’s agent and consultant in Indonesia included exerting influence with the Indonesian government, were aware of the contracts with Siouffi entities, and were aware that “some Triton Energy officers and managers had concerns about the relationship with Siouffi, including concerns about the vagueness of his contractual duties, the large amounts of money he was receiving, how he might be using that money, and his honesty.”\(^{272}\)

---


As Triton Indonesia’s Controller, Murphy knowingly participated in creating and recording false entries in Triton Indonesia’s books and records. As Triton Indonesia’s Commercial Manager, McClure failed to assure that the entries prepared by Murphy accurately reflected the underlying transactions. Keever informed both McClure and Murphy that the payments were for a purpose other than what was indicated in documents presented for their signatures. Nevertheless, Murphy signed documents authorizing the expenditures and mischaracterizing them as legitimate business expenses. In addition, Keever informed Murphy about the false characterization of payments which Murphy did not have any role in authorizing. Thereafter, Murphy participated in making false entries in Triton Indonesia’s books and records characterizing the payments as expenses incurred for the purpose indicated in fabricated documentation.

\(^{270}\) *Id.* at 63,469, 63,473.

\(^{271}\) *Id.* at 63,473.

\(^{272}\) *Id.* at 63,469. Some Triton Energy officers and managers had related concerns about an Indonesian finance manager for Triton Indonesia who was making cash payments to Per-
The SEC alleged that during 1989 and 1990 Keever briefed Gore and Puetz about certain of the Siouffi payments and related false books and records: "The Triton Energy officers expressed concern about such practices which they had neither directed nor authorized, but failed to require Triton Indonesia to discontinue these practices." 273

The anchor of the SEC’s charges against Gore and Puetz related to their actions and inactions regarding a Confidential Memorandum from Triton Energy’s then new Internal Auditor in September 1989. The new Internal Auditor (Calloway) had recently visited Triton Indonesia’s facilities in Jakarta, Indonesia as part of a worldwide introductory tour. After reviewing accounting documents there, and after discussions with McAdoo, Keever and other Triton Indonesia personnel, Calloway had significant FCPA compliance and other concerns. He wrote a September 1989 Confidential Memorandum to Triton Energy’s then management describing his concerns which embraced:

1. potentially improper payments by Triton Indonesia to Indonesian government officials;
2. his view that Indonesia was a "country of state supported corruption;"
3. his understanding that Triton Indonesia "pay[s] BPKP auditors working on the audit of our records to determine what is cost recoverable;"
4. "what is worse, and this is extremely confidential, is that we paid the auditors in order to have their audit exceptions taken care of;" and
5. the suspect payments were then documented in a "creative way" to make them cost recoverable. 274

The Auditor’s Memorandum was distributed to Gore and Puetz, among other members of Triton Energy’s then senior management. "In October 1989, Gore, after reading the Internal Auditor’s Memorandum in the internal auditor’s presence, ordered the internal auditor to collect all copies of the memorandum and destroy them." 275

273 Id.
274 Id.
275 Id. At least one copy of the Auditor’s Memorandum was not destroyed, and ultimately was provided to the SEC and the DOJ, as well as to Triton Energy’s outside auditors.
The SEC criticized Gore and Puetz for failing to determine whether the Auditor’s allegations were supported by facts, for dismissing the allegations because they emanated solely from Triton Indonesia officers and personnel, (i.e., for treating them as mere rumors and innuendo), and for failing to conduct an investigation or to revise any corporate policies or procedures to address the Auditor’s concerns. The SEC implied that Gore and Puetz had a heightened responsibility to follow-up on the Auditor’s Memorandum because Keever had personally alerted Gore (in September 1989) and Puetz (in January 1990) about certain of the questionable payments and concomitant misbookings.

After receiving such information, Gore and Puetz failed to investigate the potentially unlawful conduct. Instead, as the senior management of Triton Energy, Gore and Puetz simply acknowledged the existence of such practices and treated them as a cost of doing business in a foreign jurisdiction. The toleration of such practices is inimical to a fair business environment and undermines public confidence in the integrity of public corporations. Accordingly, Gore and Puetz caused Triton Energy to violate Sections 30A(a) and 13(b)(2)(A) of the Exchange Act.

Simultaneously with the issuance of the administrative order/opinion, without admitting or denying the charges or the matters set forth in the opinion, Gore and Puetz consented to the issuance of the administrative order/opinion. The only sanctions imposed against Gore and Puetz were administrative cease-and-desist orders prohibiting them from committing or causing any violations of Sections 13(b)(2)(A) and 30A(a) of the 1934 Act. No civil or administrative monetary penalties were imposed against either of them, because the SEC had no jurisdiction to do so in the administrative forum.

---

276 Id. When Triton Energy’s outside independent auditors in their 1991 fiscal year audit became aware of the Internal Auditor’s Confidential Memorandum, the SEC alleged that Triton Energy’s then management made only “a partial disclosure [to the outside auditors], omitting most of the improper payments and most of the false books and records,” and that “[a]t a meeting with the auditors, Keever, among others, represented that there was no evidence that money was paid to Indonesian auditors.” Id.

277 Id. at 63,474-75:

In September 1989, shortly before Gore received the Internal Auditor’s Memorandum, Keever informed Gore that Triton Indonesia was making payments to Siouffe in connection with decisions by the Indonesian government and told Gore that money may have been paid to Indonesian auditors, including payments in connection with the predecessor’s tax audit, and the corporate tax refund. Keever also told Gore that the payments were recorded inaccurately in Triton Indonesia’s books and records. Gore responded that he had worked in another foreign country and understood that such things had to be done in certain environments.

278 Id. at 63,475 (“In January 1990, Keever also informed Puetz about the $23,000 predecessor tax audit payment and the false entry in Triton Indonesia’s books and records.”).

279 Id. at 63,476.

280 Id.
XI. WHAT DEFENSES MAY HAVE BEEN EXPLORED IF TRITON ENERGY HAD LITIGATED THE SEC CIVIL ENFORCEMENT ACTION? OR WHAT DEFENSES MIGHT BE WORTHY OF CONSIDERATION IF A COMPARABLE FCPA CORRUPT FOREIGN PAYMENTS CASE WERE FULLY LITIGATED?

Triton Energy and its former executives and managers consented to the SEC civil injunctive/penalty and administrative cease-and-desist enforcement actions “without admitting or denying” the allegations in the pleadings, orders and SEC opinion.\(^2\) Had either Triton Energy, or any of the

---

\(^2\)The “without admitting or denying” language is required in all SEC settlements by virtue of 17 C.F.R. § 202(e). No comments in this article are intended to be statements by Triton Energy, its executives/managers who were defendants/respondents in the civil injunctive/penalty settlement or the administrative cease and desist settlement, or their attorneys, either admitting or denying any of the SEC’s allegations. When the SEC believes a settling defendant or respondent has made subsequent public statements actually denying the allegations in the settlement pleadings, contrary to the “without admitting or denying” stipulation that is incorporated in the settlement orders, the SEC believes it has a basis to pursue additional litigation to set aside the settlement. See, e.g., SEC v. Angelos, SEC Litig. Release No. 14886 (Apr. 22, 1996); SEC Enforcement: SEC Withdraws Unusual Motion to Vacate Insider Suit Settlement, 28 Sec. Reg. & L. Rep. (BNA) 547 (Apr. 26, 1996); SEC v. Tyson, SEC Lit. Release No. 15115 (Oct. 9, 1996); SEC Enforcement: SEC Accepts Statement By Alleged Tippee Who Settled Action, 28 Sec. Reg. & L. Rep. (BNA) 1279 (Oct. 18, 1996); SEC v. Fashion Two-Twenty, SEC Lit. Release No. 8725 (Apr. 18, 1979); see also Wilmer, Cutler & Pickering Client Memorandum, Denying Misconduct Publicly Can Kill an SEC Settlement (May 16, 1996); Milo Geyelin, SEC Cracks Down on Improper Denials, WALL ST. J., Nov. 8, 1993, at B2. SEC Enforcement Director William R. McLucas has stated:

There has been a marked and noticed increase in the number of individuals and attorneys who are issuing public denials of liability. It is our view that the terms of a settlement are clear and, in the future, we will not hesitate to seek to vacate a settled proceeding if the terms of the settlement are breached by the defendant or counsel.


Triton Energy and its counsel acknowledge that the terms of Triton Energy’s settlement with the SEC are accurately described in the following March 6, 1977 letter from William R. McLucas, Director of the SEC’s Division of Enforcement, to Triton’s counsel Robert P. Holland III (Triton’s General Counsel) and Arthur F. Mathews (Wilmer, Cutler & Pickering):

The United States Securities and Exchange Commission ("SEC") filed and settled a civil enforcement action on February 27, 1977 against Triton Energy Corporation ("Triton") in which Triton agreed to the entry of a consent civil injunction decree in the United States District Court for the District of Columbia as reflected in the attached official SEC Litigation Release No. 15266. Pursuant to the Consent Decree, Triton has been ordered by the Court to comply with the books and records and internal accounting controls provisions of Section 13 of the Securities Exchange Act of 1934, and the rules and regulations promulgated thereunder, and to pay a civil penalty of $300,000. This action was a civil enforcement action, not a criminal prosecution. [Footnote 1: The SEC does not have authority to pursue criminal prosecutions. Criminal prosecutorial authority is exercised by the U.S. Department of Justice. The SEC Staff understands that Triton has been advised by the Department of Justice that the Department has determined it will not seek criminal prosecution of Triton based on facts arising out of the SEC’s investigation.]

The Settlement arises from the SEC staff’s investigation into the activities of Triton and Triton Indonesia ("TI"), a wholly-owned subsidiary of Triton. The investigation concerned matters related to TI’s operation of an oil concession in Indonesia, which
officer or manager defendants or respondents determined to litigate, rather than settle, either the civil injunctive, penalty or administrative cease and desist enforcement proceedings, which lines of defense explored hereto-

Triton had acquired in 1988 through a joint venture with the concession’s prior operator. The SEC staff and Triton had significant disagreements over a number of legal and factual issues arising from the investigation.

The SEC and Triton negotiated the Consent Decree in order to resolve the issues arising from this investigation by way of a non-adjudicated civil settlement. A consent settlement is a common means of resolving issues arising from investigations conducted by the SEC’s staff. Pursuant to the settlement, Triton agreed to consent to an order of the court without admitting or denying any of the allegations of fact or conclusions of law set forth by the SEC in its complaint, and without any evidence having been presented to the court. Neither the SEC’s complaint, Triton’s consent, nor the court’s order constitute a finding of fact, a conclusion of law or a conviction under United States law.

By letter dated March 28, 1996 from Christopher L. Varner, Attorney, U.S. Department of Justice, Criminal Division, to Arthur F. Mathews and Roger M. Witten, Wilmer, Cutler & Pickering, counsel to Triton Energy, the DOJ advised that Triton Energy Corporation, Triton Indonesia, Inc., David E. Gore, Philip W. Keever, William L. McClure, Robert P. Murphy, Jr., and two other Triton-related individuals had been investigated for possible violations of the Foreign Corrupt Practices Act of 1977, as amended, (15 U.S.C. § 78dd), and other federal statutes, arising from the operation of Triton Indonesia Inc.’s Enim oil project from 1988 through 1992. As to these entities and individuals, the Department of Justice will take no further investigative or prosecutive steps, and the criminal investigation is closed.

By virtue of the “without admitting or denying” stipulation in the SEC Consent Decree settlement, the Consent Injunction can have no collateral estoppel effect against Triton Energy in any related or unrelated private litigation or government litigation other than its res judicata effect solely in the SEC civil injunctive/penalty enforcement action or related proceedings brought by the SEC. See, e.g., Arthur F. Mathews, Parallel Proceedings Problems In Securities Enforcement Matters, in ARTHUR F. MATHEWS & JUDAH BEST, SEC ENFORCEMENT AND WHITE COLLAR CRIMES-1981 829, 847 (1981) (“A consent injunctive decree, containing ‘without admitting or denying’ language, will not be res judicata or collateral estoppel in a parallel civil case, but might be admissible into evidence under Rule 404(b) of the Federal Rules of Evidence in a subsequent civil or criminal case.”); Lipsky v. Commonwealth United Corp., 551 F.2d 887 (2d. Cir. 1976); United States v. Cook, 557 F.2d 1149 (5th Cir. 1977); Marvin G. Pickholz, Parallel Enforcement Proceedings: Guidelines for the Corporate Lawyer, 7 SEC. REG. L.J. 99, (1979); Marvin G. Pickholz & Richard E. Brodsky, An Assessment of Collateral Estoppel in SEC Enforcement Proceedings After Parklane Hosiery Co. v. Shore, 28 AM. U.L. REV. 29 (1979).

For a public corporation like Triton Energy, whether to litigate with the SEC, the DOJ or any other government department/agency/regulator, or whether to settle, is a matter of business judgment for management and the board of directors, hopefully after informed consideration of the advice of both inside and outside counsel. See generally NEGOTIATING SEC CONSENT DECREEs: TARGETS & TACTICS FOR SETTLING CIVIL INJUNCTIVE ACTIONS (Arthur F. Mathews ed., 1979).

The corporate attorney-client privilege and related work-product protection of Triton Energy was not waived as a part of the SEC investigation or settlements or as a part of the DOJ inquiry and related nonprosecution decision. Nor have such corporate privileges ever been waived in any related private litigation, or in any other context. There is a contrary trend gradually arising in both DOJ and SEC enforcement actions over the past decade or two.

Apart from privilege-protected information, any disinterested observer can determine from public information and filings several cogent reasons why a public company like Triton Energy would choose to settle, rather than litigate, the SEC enforcement action:
fore may have been considered or could have been explored hypothetically as possible defense lines of pursuit in the subsequent litigation/trials? And what types of defenses might be worthy of consideration if an FCPA corrupt foreign payments civil, administrative or criminal enforcement action is pursued by the SEC and/or the DOJ against an entity and/or related individuals involving facts or allegations comparable to the Triton case, and the defendants/respondents choose to litigate rather than negotiating a consent decree settlement?

A. Statute of Limitations/Laches

In the Triton case, the last allegedly corrupt payment embraced in the SEC proceeding was a so-called “pipeline tariff” payment in May and June

(1) The Consent Injunction imposed against Triton contained no findings of fact or findings or conclusions of violations of law. All such findings and conclusions were waived by both the SEC and Triton Energy in the civil injunctive/penalty action filed against the company.

(2) The Consent Injunction against Triton Energy enjoins the company solely from further violations of the FCPA’s books and records and internal accounting controls provisions (Sections 13(b)(2)(A) and (B)). It does not specifically enjoin the company from violations of the bribery/corrupt foreign payments provisions of the FCPA (Section 30A(a)). Obviously, for an international oil and gas company doing exploration and production in a host of foreign countries around the world, a bribery/corrupt foreign payments injunction could potentially raise much more serious collateral consequences under applicable foreign law or regulations with regard to foreign oil and gas concessions and could raise much more serious competitive concerns, than the much more bland books and records/internal accounting controls Consent Injunction actually imposed, and then, on a “without admitting or denying” basis.

(3) The DOJ had declined criminal prosecution of Triton Energy and its personnel, leaving to the SEC its civil and administrative enforcement remedies to protect the public interest to the extent the SEC deemed appropriate.

(4) The SEC did not name as defendants or respondents any current officers, directors, managers or employees of either Triton Energy or Triton Indonesia. In addition, the SEC Complaint and related Press Release specifically stated: “Triton Energy did not expressly authorize or direct these improper payments and misbookings....The Commission has considered the fact that the violations occurred under former management and that certain remedial actions have been implemented by the current board of directors and senior management.”

(5) The civil penalties paid by Triton Energy ($300,000), Keever ($50,000) and McAdoo ($35,000) far dwarfed the amounts that would have been required to be paid for attorneys fees and related costs if the matters had been litigated through trial.

(6) Triton Energy had a restructured board of directors with several new members, a new CEO/President, a new General Counsel, none of whom were affiliated with the company when the underlying events transpired. (See Triton Press Release)

(7) The related private class actions for damages and derivative actions had all been either settled and/or dismissed prior to the SEC settlement.

(8) Avoiding the continual internal corporate disruption of litigating with the federal government for several years, in addition to “achieving peace” with a public company’s principal federal regulator, can be a very positive goal in responsible corporate governance and stewardship. This Triton Energy achieved!
The SEC Complaint was filed on February 27, 1997, over six years after the last alleged payment. Thus, an argument could have been made that the SEC's attempt to seek civil monetary penalties for any of the alleged payments was barred by the five-year statute of limitations of section 2462.284

To the extent that the SEC may have alleged that the books and records violations were not corrected or cured completely and satisfactorily until less than five years prior to February 27, 1997, or if the SEC pursued civil penalties for the books and records, as opposed to payments violations, it is pertinent to note that the SEC did not have authority to seek civil monetary penalties for Section 13(b)(2) books and records and internal accounting controls violations until the effective date of the Securities Enforcement Remedies and Penny Stock Reform Act of 1990, October 15, 1990.285 Prior to the Remedies Act, the SEC did have authority pursuant to Section 32(c)(1)(B) of the 1934 Act to seek civil monetary penalties for corrupt foreign payments violations of the FCPA. It is interesting to note, however, that prior to the Triton Energy/Indonesia case the SEC had never sought such civil monetary penalties in an FCPA corrupt payments case.

Apart from civil penalties, in litigation the SEC would have argued that neither the five-year statute of limitations, nor, indeed, any statute of limitations whatsoever, applies to the civil injunctive remedy it was seeking. A defense counter to that argument in any litigated case likely would be two-fold: First, the requested injunction would serve as a "penalty" and should be barred by the five-year statute of limitations. Concededly, defense counsel would have to convince the court to plow new ground to adopt such a defense. But so, too, had the defendant in the Johnson case been required to convince the D. C. Circuit to plow new ground against the SEC in determining that a six month broker-dealer supervisory suspension was sufficiently a "penalty" to trigger the five-year statute of limitations. Second, even though no statute of limitations may apply to the equitable remedy of injunctive relief, depending upon the nature of the government's delay and the circumstance of a particular case, a court might be persuaded that laches does apply directly, or at least indirectly, as an element of "a


284 28 U.S.C. § 2462 (1988) ("an action ... for the enforcement of any civil ... penalty ... shall not be entertained unless commenced within five years from the date when the claim first accrued"); see also Johnson v. SEC, 87 F.3d 484 (D.C. Cir. 1996); cf., 3M Co. v. Browner, 17 F.3d 1453, 1461 (D.C. Cir. 1994). For a discussion of the use of the statute of limitations defense, see supra Part VI.


lack of equity."\(^{288}\) And the five to six year governmental delay in filing the case against Triton Energy or a comparable delay in a future case may have supported or may support a 'laches or "lack of equity'" defense.\(^{289}\) It should be noted, however, that in response to any time bar defense in any case like the Triton matter, the SEC could be expected to argue an "equitable tolling" principle claiming that by virtue of the defendants’ concealment activities — i.e., misbookings of payments, etc. — any statute of limitations or laches time period should be tolled, thereby allowing the SEC to proceed with its enforcement action.

**B. Lack of Equity**

When the SEC seeks equitable relief in the form of an injunctive remedy in a civil enforcement action in federal district court, it has the burden of proof by a preponderance of the evidence of two matters.\(^{290}\) First, that the defendant has directly violated one of the federal securities statutes or the rules and regulations thereunder (i.e., a "primary" violator), or has indirect responsibility for the primary violator's violation by virtue of some theory of secondary liability, usually "aiding and abetting" (i.e., a "secondary" violator or "aider and abettor").\(^{291}\) Second, that apart from responsibility for a statutory violation, there is "equity" for an injunction, i.e., that absent imposition of the requested injunctive relief there is a "reasonable likelihood" or "cognizable danger" that the defendant will commit or aid and abet further violations in the future.\(^{292}\)

\(^{288}\) See, e.g., SEC v. Rind, 991 F.2d 1485, 1492 (9th Cir. 1993) ("we hasten to add that our holding here will not open the door to the prosecution of stale claims. A court can and should consider the remoteness of the defendant’s past violations in deciding whether to grant the requested equitable relief. . . . Although no fixed period of limitations governs Commission actions, a court may exercise its discretion to limit the Commission’s power to seek relief."); see also SEC v. Willis, 777 F. Supp. 1165, 1174 (S.D.N.Y. 1991) (a long time interval between the violation and the suit may lead a court not to grant an injunction or to issue a milder one).

\(^{289}\) See e.g., SEC v. Price Waterhouse, 797 F. Supp. 1217, 1244 (S.D.N.Y. 1992) (long delay — five years to file complaint and six more years to proceed to trial, listed as factors in court denying SEC requested injunctive relief).

\(^{290}\) See generally Arthur F. Mathews, S.E.C. Civil Injunctive Actions (pts 1 & 2), 5 REV. SEC. REG. 969, 949 (1972); 1 MARC I STEINBERG & RALPH C. FERRARA, SECURITIES PRACTICE FEDERAL AND STATE ENFORCEMENT § 5.05 (1996).


\(^{292}\) See SEC Civil Injunctive Actions, 30 BUS. LAW. 1303, 1305 n.4 (July 1975) (Remarks of Arthur Mathews) ("The SEC must prove at trial by a preponderance of the evidence that a statutory violation has been or is about to be committed and that 'there is a reasonable expectation that the defendants will thwart the policy of the Act by engaging in activities proscribed thereby'; i.e., a 'cognizable danger' or threat of future statutory violations."); see also SEC v. Culpepper, 270 F.2d 241, 249 (2d Cir. 1959); SEC v. Texas Gulf Sulphur Co., 312 F. Supp. 77, 87-88 (S.D.N.Y. 1970), aff'd after remand, 446 F.2d 1301 (2d Cir. 1971); SEC v. Manor Nursing Ctrs., Inc., 458 F.2d 1082 (2d Cir. 1972); SEC v. Bangor Punta Corp., 331 F. Supp. 1154 (S.D.N.Y. 1971), aff'd in part and rev'd in part, Chris-Craft In-
Triton Energy could have attempted to pursue a “lack of equity” defense if the litigation had not been settled. Not only were the charges over five years stale when filed, but in the interim, Triton Energy had undergone a nearly complete management transformation. The company appointed a new CEO, a new CFO, a new General Counsel, and a new Controller, among others. None of these officers were implicated in the alleged violative conduct. The company installed several new members on its board of directors; no inside management director of the old regime was retained. The new Board was comprised of a majority of independent directors (at least half of whom were not on the Board at the time of events in question). The company also appointed new outside auditors, and installed rigorous new FCPA compliance procedures and extensive new internal accounting controls.\(^{239}\)

The new management hired outside counsel to conduct an extensive internal corporate investigation, and cooperated fully with the DOJ and the SEC in their respective investigations of the Indonesian payments. Additionally, all individuals named as defendants or respondents in the SEC’s civil and administrative enforcement actions were no longer in the company’s employ.\(^{244}\)


\(^{244}\) Id.
All of these factors are the types of matters that courts historically have found support "lack of equity" as a defense in an SEC civil injunctive enforcement action.295

C. Lack of Use of United States "Jurisdictional Means" "in Furtherance of" the Allegedly Improper Payments

A violation of the corrupt foreign payments provisions of Section 30A(a) requires proof that the violator made “use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of” a proscribed payment.296 Payments that make no use of the U.S. mails or other jurisdictional means do not violate the FCPA’s antibribery provisions.297

The SEC’s injunctive complaint and cease-and-desist order/opinion in Triton Energy embrace payments made outside the United States, in Indonesia, and allege that the negotiations with Siouffi concerning the payments also took place outside the United States, in Indonesia. The payments were made by the subsidiary, Triton Indonesia. The SEC acknowledged that parent Triton Energy’s management in the United States did not have advance knowledge of the payments and that “Triton Energy did not expressly authorize or direct these improper payments and misbookings.”298

Depending upon the nature of proof at trial, lack of use of U.S. “jurisdictional means” “in furtherance of” the proscribed payments, may have served as a viable defense. An important issue that the court may have had to resolve is whether the mere general funding of Triton Indonesia’s operations by its parent Triton Energy through use of U.S. jurisdictional facilities, i.e., mails, wire transfers, etc., or any specific Triton Energy fundings of Triton Indonesia “cash calls,” would provide a sufficient nexus to a challenged payment to satisfy the FCPA’s strict “jurisdictional means” requirements.299 Or would travel to Dallas, Texas by the Pertamina/BPKP

---

297 Cf. Kann v. United States, 323 U.S. 88, 95 (1944) (“federal mail fraud statute does not purport to reach all frauds, but only those limited instances in which the use of the mails is a part of the execution of the fraud . . . .”)
299 To hold that the mere general funding of a subsidiary’s foreign operations by a domestic parent company will satisfy Section 30A(a)’s jurisdictional means element would be a strained interpretation of the FCPA. Mere funding without knowledge of the corrupt payments would provide a basis to hold domestic parent companies strictly liable for their money-losing subsidiaries’ unlawful foreign payments, a result Congress clearly did not intend. Such a basis for an assertion of jurisdiction would have the odd result of conferring jurisdiction over parent corporations when money-losing subsidiaries pay bribes, but not when profitable subsidiaries do so.
Defending SEC & DOJ FCPA Investigations

Auditors to review the records of parent Triton Energy have triggered sufficient use of jurisdictional means?

However, the lack of jurisdictional means defense would not have been a complete defense for Triton Energy even if accepted by the court. It applies only to the corrupt foreign payments charges pursuant to Section 30A; it is not an available defense to the books and records/internal accounting controls charges pursuant to Sections 13(b)(2) and (5).

D. Lack of "Corrupt" Intent

If the Triton Energy case had been litigated it is likely that one of the principal defenses that would have been pursued was that Triton Energy did not act "corruptly." Absent proof of "corrupt" intent there cannot be an FCPA bribery violation.

The SEC complaint alleged that defendants McAdoo and Keever, managing agents of the subsidiary Triton Indonesia authorized numerous improper payments to Roland Siouffi, Triton Indonesia's business agent acting as an intermediary between Triton Indonesia and Indonesian government agencies, knowing or recklessly disregarding the high probability that Siouffi either had or would pass such payments along to Indonesian government employees for the purpose of influencing their decisions affecting the business of Triton Indonesia. . . . McAdoo and Keever, together with other Triton Indonesian employees, also concealed these payments by falsely documenting and recording the transactions as routine business expenditures.

The Complaint further acknowledged that "Triton Energy did not expressly authorize or direct these improper payments and misbookings." Under general federal criminal law principles of respondent superior and corporate responsibility, a corporation is liable for the criminal acts of its managing agents and supervisors so long as the agents acted within the scope of their employment and intended to benefit the corporation. A corporation may be similarly criminally liable for the crimes of its outside agents or consultants. Thus, assuming Siouffi passed on all or a portion

---

302 Id.
304 1 BRICKLEY, supra note 133, § 3.05.
of the payments to Indonesian government officials, any corrupt intent of Siouffi, McAdoo or Keever would be imputed to Triton Indonesia. Whether such corrupt intent could be imputed upstream from the subsidiary Triton Indonesia to the parent Triton Energy is uncertain. Federal criminal law respondent superior principles "remove any theoretical obstacles to imposing liability on a parent corporation for the criminal conduct of its subsidiaries. . . . Subsidiaries may act as agents of the parent company just as their human agents may act as subagents."\(^3\)

But whether such imputation will be made upstream from subsidiary to parent is a judge/jury question that will be factually driven in every case.

If, hypothetically, McAdoo and Keever had testified at a trial that each of them in good faith believed that the payments to Siouffi (and presumably these payments were passed on in whole or in part to Indonesian government officials or employees) were legally acceptable grease or facilitating payments and were not for the purpose of "obtaining or retaining business," but instead were made solely to cause the government officials and employees to do their lawful duty in a more timely manner and to reach decisions and conclusions as to which Triton Indonesia was lawfully entitled in each instance, then a judge or a jury could have found there existed no corrupt intent. If the purpose of the payments solely was to cause government officials to properly perform their lawful duties, then the corrupt element evaporates because a finding of corrupt intent requires proof that the actor intended "to induce the recipient to misuse his official position."\(^3\)

To counteract a profession of good faith by McAdoo and Keever, and to attempt to satisfy the "corrupt" hurdle, the SEC surely at trial would have stressed the misbookings of the payments. Concealment through falsification of books and records can be strong evidence from which corrupt intent can be inferred.\(^3\)


\(^3\) See United States v. Liebo, 923 F.2d 1308, 1312 (8th Cir. 1991); S. Rep. No. 95-114, at 10 (1977) (payment "must be intended to induce the recipient to misuse his official position in order to wrongfully direct business. . . ."); H.R. Rep. No. 95-640, at 7-8 (1977) (same); DOJ and Dep't of Commerce brochure, supra note 17, at 5 ("T[he] payment must be intended to induce the recipient to misuse his official position in order wrongfully to direct business to the payor.") (emphasis in original).

\(^3\) See, e.g., United States v. Liebo, 923 F.2d 1308, 1312 (8th Cir. 1991) (upholding jury's finding that gift of airline ticket was made to government official "corruptly," the court relied in part on evidence that defendant booked the cost of the ticket for accounting purposes as a "commission payment.".).
E. Lawful Grease or Facilitating Payments

Since there is no statutory cap on the amount of a lawful facilitating or grease payment,\(^{308}\) each of the payments in the Triton Energy case was hypothetically susceptible to being defended as such.

Facilitating or grease payments are made to persuade a government servant to do rightful, not wrongful acts; i.e., to perform the government service to which the issuer is lawfully entitled to receive. As one of the 1977 House reports explained:

In using the word “corruptly”, the committee intends to distinguish between payments which cause an official to exercise other than his free will in acting or deciding or influencing an act or decision and those payments which merely move a particular matter toward an eventual act or decision or which do not involve any discretionary action.

While payments made to assure or to speed the proper performance of a foreign official’s duties may be reprehensible in the United States, the committee recognizes that they are not necessarily so viewed elsewhere in the world.\(^{309}\) As a result, the committee has not attempted to reach such payments.

When Congress amended the FCPA in 1988 to codify the “grease” payment exception, it likewise focused on the purpose of the payment as the key issue.\(^{310}\) Congress, in 1988, did not define the terms “facilitating or expediting payment,” and instead enumerated examples of the kinds of “routine governmental action” that such payments permissibly could influence.\(^{311}\) Significantly, Congress placed no numerical limit on the lawful size of facilitating or expediting payments: The FCPA nowhere contains such a limit, and none of the conference or committee reports or any bills introduced in the eleven-year period between enactment of the FCPA in 1977 and its amendment in 1988 suggest that any numerical limitation was contemplated.

It is on this basis that courts have distinguished corrupt payments to government officials under the domestic bribery statute from payments to government officials that, though not corruptly motivated, are nonetheless proscribed under that statute as illegal gratuities.\(^{312}\) The FCPA, of course,

---

\(^{308}\) See supra Part IV.

\(^{309}\) H.R. REP. No. 95-640, at 8 (1977); S. REP. No. 95-114 at 10 (1977) (statute does not “cover so-called ‘grease payments’ . . . which may involve even the proper performance of duties.”); cf. S. REP. No. 94-1031, at 7 (1976) (bill would not reach payments to expedite proper performance of duties).

\(^{310}\) 15 U.S.C. §§ 78dd-1(b) and 78dd-2(b) (1988) (FCPA “shall not apply to any facilitating or expediting payment . . . the purpose of which is to expedite or to secure the performance of a routine governmental action.”) (emphasis added).


\(^{312}\) 18 U.S.C. § 201(e) (1988). See United States v. Campbell, 684 F.2d 141, 148 (D.C. Cir. 1982) (“Payments to a public official for acts that would have been performed in any event . . . are probably illegal gratuities rather than bribes.”); United States v. Muldoon, 931
proscribes only corrupt payments, and not gratuities or payments to induce officials to perform properly their duties.\textsuperscript{313} \textsuperscript{313}

The SEC specified five separate series of payments totaling approximately $280,000 as the “improper payments” authorized by McAdoo and Keever in 1989 and 1990,\textsuperscript{314} and other additional payments totaling approximately $170,000 as improperly recorded grease or facilitating payments.\textsuperscript{315} With regard to the 1989 Tax Audit payments of approximately $180,000, the auditors agreed to Triton’s contentions (i) that Triton’s predecessor Nordell should not have been liable for withholding tax on technical service fees, and (ii) that a lower tax rate on interest charges for interest on funding was appropriate. If the initial tax assessments were incorrect under applicable Indonesian tax law, and the payments were made solely to correct erroneous tax assessments, then despite the size of the payments — $280,000 — a judge or a jury adjudicating the case could have found the payments to be lawful grease or facilitating payments — \textit{i.e.}, made solely for the purpose of getting the tax auditors to correctly and timely perform their lawful duties to Triton Indonesia. If Triton Indonesia was lawfully entitled to the amount of the refunds eventually approved, then the payments made to achieve that result would not have been “corrupt.” The SEC presumably believed it could have proved otherwise at trial. And in settling the case, Triton Energy agreed not to deny, or to admit, the SEC’s allegation.

With regard to approximately $59,000 in payments in connection with the Fiscal 1988 and 1989 Annual Pertamina/BPKP Audits, the auditors agreed essentially to Triton’s claimed amounts for the certified cost pools for both years. So long as Triton was lawfully entitled to the amounts of cost pools actually certified under applicable Indonesian law, regulations and contractual provisions, then payments to get auditors to timely complete audits containing proper results would not be “corrupt”; rather they

\textsuperscript{313} Cf. United States v. Crozier, 987 F.2d 893, 998-900 (2d Cir. 1993) (despite acquittal on bribery count, conviction on gratuities count upheld where payment made was $30,000).


1. 1989 Tax Audit — a total of approximately $180,000.
4. 1989 VAT Refund — approximately $23,000.
5. 1990 Pipeline Tariff — approximately $10,000.

\textsuperscript{315} See id. at “G. Triton Indonesia Recorded Other False Entries In Its Books And Records.”

382
Defending SEC & DOJ FCPA Investigations

would be acceptable grease or facilitating payments. Proof of corrupt intent would have required evidence that in return for the payments, the auditors certified cost pools in amounts in excess of what Triton was legally entitled to receive. This, presumably, is what the SEC believed it could prove at trial.

The same criteria apply to the 1989 Corporate Tax Refund payment of approximately $7,500, the 1989 VAT Refund payment of approximately $23,000, and the 1990 Pipeline Tariff payment of approximately $10,000. If under applicable Indonesian law, regulations, and contractual provisions, Triton was lawfully entitled to the corporate tax refund and the VAT refunds in the amounts ultimately determined, and to the lower Pipeline Tariff rate ultimately approved, then the payments could qualify as acceptable grease or facilitating payments. So long as Triton Energy could have convinced an adjudicator that these payments were made in good faith to induce the auditors to timely take the actions Triton Indonesia lawfully was entitled to, rather than being made with the intention to induce such officials to misuse their positions or to induce them to grant Triton Indonesia something to which the company was not already lawfully entitled, the payments would not have been corrupt; they would have been grease. Presumably the SEC believed that at trial it could wipe away or penetrate through the grease, and establish a corrupt motive. And, in settling the case, Triton Energy agreed to neither admit nor deny the SEC’s allegations.

F. Not for the Purpose of “Obtaining or Retaining Business”

The SEC Complaint does not specifically allege that the improper payments were made by Triton Indonesia or on behalf of Triton Energy “in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person.” Rather, the Complaint charges that the payments were made:

(1) “to Indonesian government employees for the purpose of influencing their decisions affecting the business of Triton Indonesia;” and

(2) “to Indonesian government officials to obtain favorable decisions.”

In litigation, Triton Energy may have chosen to attempt to defend the payments against the FCPA bribery charges, by arguing that none of the allegedly improper payments were made for the purpose of “obtaining or retaining business.” This so-called “business purpose” element of the FCPA’s corrupt payments proscriptions has never been interpreted by any

318 Complaint, ¶ 53. (emphasis added).

383
court in a litigated case. The plain language of the statute suggests that it only prohibits payments intended to influence decisions about to whom to award contracts or direct business and with whom to renew such contracts or other business. Payments to influence other decisions for other purposes, while suspect or immoral, do not appear to be forbidden by the letter or spirit of the FCPA. In the context of Triton Indonesia's business, a lay person might very well understand the statutory language to mean that Triton Indonesia could not pay an Indonesian government official to influence his discretion in making an official decision that would award the company a new concession, or expand the company's existing concession.

Such a construction appears to be supported by the legislative history, which shows that Congress rejected broader prohibitions. Both the Senate and House bills originally contained much broader prohibitions. The Senate's final bill, contained the enacted "business purpose" requirement embodied in the obtaining or retaining business language, and also would have proscribed payments for the purpose of "influencing legislation or regulations." The House bill broadly prohibited all payments to "influence[e] any act or decision" of a foreign official or government. The Conference Committee reconciling the two bills adopted the Senate's "obtaining or retaining" business purpose requirement, but not its broader proscription of payments to influence laws and regulations. In doing so, the Conference Committee explained:

[The purpose of the payment must be to influence any act or decision of a foreign official (including a decision not to act) to induce such official to use his influence to affect a government act or decision so as to assist an issuer in obtaining, retaining or directing business to any person.]

Congress thus rejected the broader prohibitions contained in both bills and limited the prohibition to payments intended to influence decisions about to whom to award or direct business and with whom to renew business.

Some determined House legislators tried unsuccessfully to enact a variation of the defeated 1977 House bill as part of the 1988 Amendments

---

320 S. REP. No. 95-114, at 17 (1977); 123 CONG. REC. 13816 (1977).
321 123 CONG. REC. 36303 (1977); see also H.R. REP. No. 95-640, at 8 (1977) (House bill would have prohibited payments "to influence the passage of law, regulations, the placement of government contracts, the formulation of policy, or other discretionary governmental functions.").
323 Id. at 12 (emphasis added), reprinted in 1977 U.S.C.C.A.N at 4124-25.
324 Although the SEC's highly publicized consent judgment in the United Brands case in 1976 was one of the enforcement matters that led to legislative consideration of the FCPA, paradoxically, as this legislative history demonstrates, the enacted FCPA did not and does not proscribe the type of conduct underlying United Brands, i.e., bribing a foreign official to effect foreign tax or export legislation that would result in increased profits to the American corporation. See SEC v. United Brands Co., [1975-1976 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 95,420 (D.D.C. Jan. 27, 1976).
to the FCPA. That failing, they resorted to including the spirit of their un-
enacted bill in the legislative history to the Amendments.\textsuperscript{325} This 1988 statement is simply not relevant to interpreting the “obtaining or retaining business” language adopted in 1977. The express statutory language of the 1988 Amendments did not alter the “obtaining or retaining business” requirement, and it is basic that Congress (much less a single house or legislator) cannot amend a statute through subsequent legislative history.\textsuperscript{326}

Regardless, to the extent the lone statement in the 1988 legislative history suggests an interpretation broader than the statutory language and legislative history when that language was enacted, the interpretation is refuted by the changes Congress actually made. In the 1988 Amendments, Congress created the safe harbor for “facilitating” or “grease” payments “the purpose of which is to expedite or secure the performance of a routine governmental action.”\textsuperscript{327} In defining “routine governmental action,” Congress focused, as it did in 1977, on decisions to award new business, renew existing business, and improper influence in directing business. It did so in part by excluding from the safe harbor payments to influence any decision by a foreign official 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.\textsuperscript{328}

Thus, regardless of the erroneous statement in the 1988 report, Congress as a whole did not intend that the scope of the prohibition be expanded. The “rule of lenity” should also prevent application in a criminal prosecution of the broad, expansive interpretation proffered by a few House legislators.\textsuperscript{329}

Since none of the payments embraced by the SEC Complaint (even assuming Siouffi passed all or a portion of them on to Indonesian government

\textsuperscript{325}See H.R. CONF. REP. No.100-576, at 918 (1988), \textit{reprinted in} 1977 U.S.C.C.A.N. at 1951 (stating that “‘retaining business’... includes... corrupt payments related to the execution or performance of contracts, or the carrying out of existing business, such as a payment... for the purpose of obtaining more favorable tax treatment.”). This was an obvious effort to suggest that the \textit{United Brands} type conduct was proscribed, see H.R. CONF. REP. No. 100-576, at 918 (1988)(citing \textit{United Brands}), but the 1977 legislative history makes clear it was not and is not proscribed. \textit{See also supra} note 120 and accompanying text.

\textsuperscript{326}Central Bank v. First Interstate Bank, 511 U.S. 164, 185 (1994) (“the interpretation given by one Congress (or a committee or Member thereof) to an earlier statute is of little assistance in discerning the meaning of that statute”) (citations omitted); Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 114 (1989) (views of subsequent Congress “form a hazardous basis for inferring the intent of an earlier one”) (citations omitted); see also Russell v. United States, 464 U.S. 16, 26 (1983); Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc., 447 U.S. 102, 118 n.13 (1980) (“[S]ubsequent legislative history will rarely override a reasonable interpretation of a statute that can be gleaned from its language and legislative history prior to its enactment.”).

\textsuperscript{327}15 U.S.C. §§ 78dd-1(b) and 78dd-2(b) (1988).


\textsuperscript{329}See cases and articles cited \textit{supra} note 120.
officials) appear to have been to influence a decision to award new business to or to continue or renew an existing business relationship with Triton Indonesia, the defense of lack of purpose to obtain or retain business likely would have been subject to litigation had the case not settled.

The SEC appears to believe that any payment intended to influence a foreign government official to exercise discretion favorably on a matter “affecting the business” of an issuer satisfies the business purpose requirement. Thus, the SEC Complaint alleges that the payments to Siouffi (and likely passed on to government officials) “to obtain favorable decisions and “for the purpose of influencing specific actions” like reducing tax liability in a tax audit, obtaining audit reports certifying a favorable unrecovered cost pool, obtaining a corporate tax refund, obtaining VAT refunds, and obtaining a reduction in a pipeline tariff, all violated Section 30A(a).

The DOJ appears to concur with the SEC’s broad, elastic reading of the business purpose requirement. Both the DOJ and the SEC point to the criminal plea bargains obtained by the DOJ in United States v. Vitusa Corp. and United States v. Herzberg, in both of which the corporate and individual defendants each pleaded guilty to a Section 30B(a) felony in circumstances where the payment made to the foreign government official was made solely for the purpose of collecting moneys due and owing on a completed contract, with no prospect for continuing or new business. A court interpreting the “obtaining or retaining business” element of the FCPA likely would give little weight to uncontested consent settlements such as the Vitusa Corporation and Herzberg criminal plea bargains.

Nevertheless, Triton Energy chose to settle the case, and agreed to neither admit nor deny the SEC’s allegations. The DOJ and the SEC can be expected to argue the Triton Energy case as well as the Vitusa Corporation

331 Id. ¶ 53.
332 Id. ¶¶ 21 to 26.
333 Id. ¶¶ 27 to 32.
334 Id. ¶¶ 33 to 36.
335 Id. ¶¶ 37 to 39.
336 Id. ¶¶ 40 to 43.
337 Id. ¶ 54.
339 See id.
340 See supra notes 24-25 and accompanying text.
341 These cases have little precedential value because they are not litigated dispositions. There are many reasons why a defendant facing potential charges on a variety of grounds might negotiate a guilty plea to one charge, even if an element of that charge might be legally contestable. See e.g., United States v. Van de Carr, 343 F. Supp. 993, 1008 (D. Cal. 1972) (dismissing criminal charges where government’s theory of liability rested on uncontested settlement with the SEC); Committee on Federal Regulation of Securities, Report of the Task Force on SEC Settlements, 47 Bus. Law. 1083, 1141-48 (1992).
and Herzberg cases as “precedent” to bolster their views in future civil, administrative and criminal FCPA enforcement actions that the “business purpose” test should be construed broadly and liberally in favor of the government. Defense counsel must be prepared to argue, particularly in a criminal prosecution, that the “rule of lenity” trumps the precedential value of a non-litigated consent decree.342

XII. REQUIRED PUBLIC DISCLOSURE343

A. “Materiality” Under the Federal Securities Laws

Apart from the books and records and internal accounting controls provisions, the FCPA does not contain any public disclosure requirements.344 Thus, whether an issuer must publicly disclose an unadjudicated foreign bribe turns on the same “materiality” determination that would apply to a domestic bribe or any other unadjudicated misconduct.

Under well-established standards, a public company must disclose an unadjudicated FCPA violation if it is financially material — that is, if there is a reasonable likelihood that the corrupt payment will have a material effect on earnings, assets, or liabilities. Even if the payment is not itself significant in amount, disclosure may also be required when there is a material amount of business dependent on the illegal conduct or when there is a reasonable possibility that discovery of the illegal conduct will result in expropriation of a material amount of assets or imposition of material criminal fines or civil damages. Traditional disclosure standards will also require disclosure of corrupt foreign payments if they somehow involve self-dealing by the U.S. company’s directors or senior management.345

Two commentators posit four different ways that a corrupt payment may cross the “materiality” threshold:346

(1) the “sheer size” of the payment itself;347

343 See BLACK & WITTEN, supra note 13, § 3.04; see also BIALOS & HUSISIAN, supra note 8, at 127-29.
344 BLACK & WITTEN, supra note 13, § 3.04, at 3-13:
The FCPA contains no disclosure requirements. Although the SEC brought to light the issue of improper or questionable foreign payments through creative and aggressive interpretations of the disclosure requirements of the federal securities laws, Congress made a conscious choice to address the issue substantively rather than altering traditional disclosure requirements.
(citing H.R. REP. No. 95-640, at 6 (1977); S. REP. No. 94-1031, at 7 (1976)).
346 BIALOS & HUSISIAN, supra note 8, at 127-28.
(2) "the amount of business ... secured by the bribe is itself ma-

(3) "an otherwise nonmaterial bribe could become material if it be-

The prevailing judicial view, however, is that undisclosed payments, while

347 Id. at 127 n.44 ("A million-dollar payment like that made by the Lockheed Corporation to secure the sales of its aircraft to Egypt, for example, is large enough to require disclosure for most, if not all, issuers.")

348 Id. at 128.

349 Id. (citing Decker v. Massey-Ferguson Ltd., 534 F. Supp. 873 (S.D.N.Y. 1981) aff'd and rev'd on other grounds, 681 F.2d 111 (2d Cir. 1982) (denying motion to dismiss a plaintiff's claim under section 10(b) of the 1934 Act where the company failed to disclose an illicit payment made in a foreign county and disclosure of the payment would render affected sales and earnings from that country vulnerable to termination); CODIFICATION OF ACCOUNTING STANDARDS AND PROCEDURES, Statement on Auditing Standards No. 54, § 17.13 ( American Inst. of Certified Pub. Accountants 1988) (stating that an illegal payment of even an immaterial amount could be material if it could reasonably be construed as leading to a potentially material liability or loss of income)).

350 Id. at 128-129 (citing Roeder v. Alpha Indus., Inc., 814 F.2d 22, 25 (1st Cir. 1987) (stating that management is required to disclose allegations that bribery has occurred because "we do not think it is necessarily true that information about bribery is not material until it becomes the subject of an indictment" since "[m]anagement's willingness to engage in practices that probably or obviously are illegal, and its decision to put the corporation at risk by doing so, may be critically important factors to investors"); Berman v. Gerber Prods. Co., 454 F. Supp. 1310, 1323 (W.D. Mich. 1978) (requiring disclosure of foreign payments by offeror's management because "[i]n circumstances where actions by some members of corporate management have been challenged as being questionable, if not outright illegal, and such actions have indeed been acknowledged by the corporation itself, it is certainly necessary that stockholders have knowledge of the individuals involved and the activities which transpired in order that they may have a full opportunity to appraise those activities and the participants. Such activities bear the closest relationship to the integrity of management."). It should be noted, however, that in the Roeder v. Alpha Indus. Inc. case, even though the First Circuit found the bribes to be "material" prior to indictment or conviction, the court dismissed the complaint finding the defendant corporation had "no duty to disclose" the otherwise "material" bribes.

351 Id. (citing Gaines v. Haughton, 645 F.2d 761, 778-79 (9th Cir. 1981), cert. denied, 454 U.S. 1145 (1982) (Alleging that Lockheed violated corporate reporting and proxy requirements of Sections 13(a) and 14(a) of 1934 Act by failing to disclose questionable foreign payments. The court acknowledged that foreign bribes can be "unethical" or "immoral."

However, "[a]bsent credible allegations of self-dealing by the directors or dishonesty or deceit which injures to the direct, personal benefit of the directors — a fact that demonstrates a
Defending SEC & DOJ FCPA Investigations

There is little remaining judicial support for the early SEC enforcement position that all bribes, foreign or domestic, no matter what amount, must be disclosed on an “integrity of management” theory of materiality. The SEC Enforcement Division itself abandoned that broad contention in 1982.

B. The Crop Growers Case

A recent criminal prosecution brought by Independent Counsel Donald Smaltz in the investigation of former Secretary of Agriculture Michael Espy, deals squarely with the application of the books and records and internal accounting controls provisions of the FCPA as they relate to undis-
closed illegal domestic campaign contributions, and with the question of whether a corporation has a duty to disclose publicly unadjudicated charges of such illegal payments.\footnote{See United States v. Crop Growers Corp., 954 F. Supp. 335 (D.D.C. 1997).} Defendant Crop Growers Corporation was indicted for conspiring to make illegal campaign contributions of approximately $46,000 to Secretary Espy’s brother, Henry, when Henry was running for Congress, and for concealing such contributions from the Federal Election Commission, the SEC, and the public. In companion substantive counts, Crop Growers was charged with:

(i) making and keeping false records and accounts;
(ii) failing to disclose material facts in various SEC filings;
(iii) failing to disclose to potential investors the false information; and
(iv) individual defendants were charged with failing to disclose to Crop Grower’s outside independent auditors the potentially illegal conduct involving the making and false booking of the campaign contributions.

Many of the counts in the indictment charged false statements to the SEC as 18 U.S.C. § 1001 false statement felonies.

The Indictment specifically alleges ten different SEC filings from which material facts were allegedly omitted. These material facts are: (a) that Crop growers violated FECA by making illegal campaign contributions; (b) that a material contingent liability existed for potential criminal and civil fines because of said violations; (c) that Crop Growers’ financial statements were misleading; (d) that Crop Growers maintained false books and records; and, (e) that Crop Growers, its subsidiaries, and their key officers faced criminal and civil sanctions under provisions other than FECA and that their ability to operate could be severely affected as a result.\footnote{Id. at 344.}

To the extent that the 18 U.S.C. § 1001 false statement counts were based on a “concealment” theory, the court dismissed the counts because it found that Crop Growers and the individual defendants did not have a legal duty to disclose the alleged facts at the time of the alleged concealment.\footnote{See United States v. Curran, 20 F.3d 560, 566 (3d Cir. 1994) (violation of Section 1001 predicated on concealment requires that the defendant must have had a legal duty to disclose the facts at the time of the alleged concealment); United States v. Zalman, 870 F.2d 1047, 1055 (6th Cir. 1989) (same); United States v. Nersesian, 824 F.2d 958 (1987) (same); United States v. Murphy, 809 F.2d 1427, 1429 (9th Cir. 1987) (same); United States v. Hernandez Ospina, 798 F.2d 1570 (11th Cir. 1986) (same); United States v. Larson, 796 F.2d 244, 246 (8th Cir. 1986) (same); United States v. Anzalone, 766 F.2d 676, 683 (1st Cir. 1985) (same); United States v. Irwin, 654 F.2d 671, 678-79 (10th Cir. 1981) (same); see also United States v. Dale, 782 F. Supp. 615, 626 (D.D.C. 1991).} The court found that Crop Growers and its officers had no duty to disclose that the company had made illegal campaign contributions or had illegally maintained false books and records, relying on United States v. Matthews.\footnote{United States v. Matthews, 787 F.2d 38 (2d Cir. 1986) (no duty to disclose uncharged criminal conduct). The \textit{Crop Growers} court observed: [T]he SEC itself has, in conjunction with the proxy statement provisions of the securi-
disclosure in SEC filings of any "material pending legal proceedings" or "any such proceedings known to be contemplated by governmental authorities," did not require disclosure of the facts alleged in the indictment.\(^{358}\) The court also rejected two further disclosure theories proffered by the Independent Counsel: First, 17 C.F.R. § 229.303, which requires an issuer to disclose "any known trend or uncertainty" likely to influence the registrant's liquidity or operational results. Second, 17 C.F.R. § 229.503, which requires a registrant to disclose in Form S-1 "the principal factors that make the offering speculative or one of high risk."

To the extent the Independent Counsel argued that the 18 U.S.C. § 1001 charges should proceed on a "false representation" as opposed to a "concealment" theory, the court dismissed the counts finding "[t]he Indictment does not assert that there are any affirmatively false statements in the SEC filings."\(^{359}\)

One count in the indictment (Count Sixteen) charged the defendants with a fraud felony pursuant to the anti-fraud provision of the 1933 Act,\(^{360}\) on the theory that the defendants wilfully failed to disclose the allegedly

\(^{358}\) 954 F. Supp. at 346 (emphasis added).

Applying the Matthews holding, the court specifically held that 17 C.F.R. § 229.401, the general SEC disclosure provisions relating to directors and executive officers on Form S-1 and proxy statements, did not require disclosure of the uncharged misconduct here. \(\text{Id. at 347.}\)

\(^{359}\) Id. at 349.

\(^{360}\) Section 17(a), 15 U.S.C. §§ 77q(a) and 77x (1997).
Four of the charges in the indictment relating to keeping false books and records and falsifying related accounting records, making false statements and failing to disclose material facts to auditors were dismissed on venue grounds; the indictment did not allege a basis for criminal venue in the District of Columbia. The court did engage in some interesting dicta, however, regarding an issuer’s exposure under the books and records and internal accounting controls provisions of the FCPA. The court stated that even though these provisions apply only to SEC registered or reporting issuers, the provisions may be violated if a company maintains false books and records during the two-year period prior to first becoming registered with the SEC. Thus, a “private” company that later (within two years) becomes a public company, can, by falsifying its “private” books and records, trigger a subsequent criminal prosecution of the “public” company for false books and records. The court also stated that an issuer’s “financial statements” constitute “books and records” for the purposes of Sections 13(b)(2) and (5). The defendants, relying upon World-Wide Coin Investments, Ltd., argued that the statute requires that “books, records, and accounts” be accurately kept so that financial statements can be prepared, and that the difference between “books and records” and “financial statements” is clear and well-defined. The Independent Counsel argued that the American Institute of Certified Public Accountants’ (AICPA) Statement on Accounting Standards No. 62 establishes no clear separation between “books and records,” on the one hand, and “financial statements” on the other (a financial statement is “[a] presentation of financial data, including

---

361 United States v. Crop Growers Corp., 954 F. Supp. at 350 (citing Chiarella v. United States, 445 U.S. 222, 235 (1980) ("[w]hen an allegation of fraud is based upon nondisclosure, there can be no fraud absent a duty to speak."); Dirks v. S.E.C., 681 F.2d 824, 837 (D.C. Cir. 1982), rev’d on other grounds, 463 U.S. 646 (1983) (A duty to disclose attaches “only when a party has legal obligations other than a mere duty to comply with the general antifraud proscriptions in the federal securities laws.").)  
366 Sections 13(b)(2)(A) and 13(b)(5) of the 1934 Act, 15 U.S.C. §§ 78 m(b)(2)(A) and m(b)(5), and Rule 13b2-1 thereunder, 17 C.F.R. § 240.13b2-1.  
accompanying notes, derived from accounting records and intended to communicate an entity’s economic resources or obligations at a point in time.” 371). The court sided with the Independent Counsel:

No case law squarely addresses this issue. However, a common sense reading of the statute suggests that financial statements and records are not sufficiently distinct to warrant differential treatment. When Congress has provided no definition for a particular term, the ordinary meaning associated with that term applies... The Court concludes that financial statements are books and records under the securities laws.372

C. Other Related Governmental Disclosure Obligations

Even if an issuer determines that a foreign bribe is not “material” and therefore need not be publicly disclosed in SEC filings, that doesn’t mean that the issuer may not have other related governmental disclosure obligations.

Disclosure may be required under other laws, however, to cure false, misleading, or inaccurate statements made to federal departments and agencies. For example, where a party has submitted statements to the Department of Commerce in connection with export licensing, such representations, statements, and certifications are deemed to be continuing in effect and the submitting party is under a duty to report new material information or changes in previously reported facts.373

Banks and other financial institutions have strict reporting obligations regarding potential criminal conduct to the Board of Governors of the Federal Reserve System, the Office of Thrift Supervision, the Federal Deposit Insurance Corporation, and the Office of the Comptroller of the Currency.374 Government bond dealers must report potential criminal conduct

372 Id. at 356-57.
373 BIALOS & HUSISIAN, supra note 8, at 127 n.42; see 15 C.F.R. § 787.5(a)(3) (1997).
374 See, e.g., 12 C.F.R. § 208.20 (Federal Reserve System requirements of reporting of possible criminal misconduct by member banks, Edge Act corporations, foreign banks operating in the United States, and bank holding companies); 12 C.F.R. § 563.180 (Office of Thrift Supervision requirements of reporting possible criminal misconduct by savings associations and service corporations); 12 C.F.R. § 353 (Federal Deposit Insurance Corporation (FDIC) requirements of reporting of possible criminal misconduct by insured nonmember banks); 12 C.F.R. § 21.11 (Office of Controller of the Currency requirements of reporting of possible criminal misconduct by national banks). For a synopsis of these requirements, see Gary G. Lynch & Douglas M. Fuchs, Conducting Internal Investigations of Possible Corporate Wrongdoing, in CORPORATE COMPLIANCE: HOW TO BE A GOOD CITIZEN CORPORATION THROUGH SELF-POLICING at 615, 637-40 (1996). The importance of these provisions was highlighted by the recent Daiwa Bank prosecution in the S.D.N.Y. Daiwa Bank was charged with, among other crimes, misprision of a felony under 18 U.S.C. § 4, for failing to timely file with the Federal Reserve System a criminal referral form as required by 12 C.F.R. §§ 208.20 and 211.24 with regard to the misconduct by its “rogue trader” Toshide Iguchi. The draconian nature of criminal exposure in this regard is highlighted by the fact that Daiwa Bank did inform the Federal Reserve of the misconduct approximately one-month after the manager of Daiwa’s New York office was informed by two Daiwa employees that it was

393
to the Department of the Treasury. Broker-dealers have reporting obligations to such self-regulating organizations (SROs) as the New York Stock Exchange (NYSE) and the National Association of Securities Dealers (NASD) that may require the disclosure of bribes. Defense contractors and other companies making foreign military sales have onerous reporting and certification requirements that may require disclosure of corrupt foreign payments. U.S. suppliers of goods sold to foreign purchasers with U.S. Export-Import Bank financing must also file a Supplier’s Certification that affirms disclosure of all payments.


See \textit{NYSE Rules 351(a)(1)} (Form RE-3 must be filed when employee “has violated any provision of any securities law or regulation, or any agreement with or rule or standards of conduct of any governmental agency, self-regulatory organization, or business or professional organization . . . .”); Rule 351(a)(10) (requires disclosure of any disciplinary action taken against an employee “involving suspension, termination, the withholding of commissions or imposition of fines in excess of $2,500, or any other significant limitation on activities.”); NASD Conduct Rule 3070 (reporting of disciplinary actions); NASD Forms U-4 and U-5 (requires reporting if any employee is the “subject of any complaint, investigation or proceeding” that could result in a finding of violation or a reportable event.).

See \textit{BLACK & WITTEN, supra note 13, § 8.01[2] & [3]; The Arms Export Control Act, 22 U.S.C. §§ 2751-2796d}; International Traffic in Arms Regulations (“ITAR”), 22 C.F.R. §§ 120.1-130.17, 22 C.F.R. § 123.1(c)(6) (export license applications when articles or services are valued at $500,000 or more, must include disclosure of payment of political contributions, fees, and commissions); 22 C.F.R. § 130.9(a)(1) (statement must disclose “whether the applicant or its vendors have paid, or offered or agreed to pay, in respect of any sale for which a license or approval is requested . . . [p]olitical contributions in an aggregate amount of $5,000 or more, or . . . [f]ees or commissions in an aggregate amount of $100,000 or more.”). Defense Security Assistance Agency financing through Foreign Military Financing, pursuant to DOD Manual, 5105.38-M, at 902-60 (Jan. 1996), requires certification by suppliers that “no bribes, rebates, gifts, kickbacks or gratuities, which are intended to secure the Purchase Agreement or favorable treatment under the Purchase Agreement or for any other purpose relating to the Purchase Agreement, have been or will be directly or indirectly offered or given contrary to United States law, or have been or will be arranged contrary to United States law with, officers, officials, or employees of the purchaser by the Contractor, its employees or agents.”

The U.S. Export-Import Bank requires certification “that, in connection with the sale, the supplier has not ‘directly or indirectly granted or paid, agreed or offered to grant or pay, or arranged for, any discount, allowance, rebate, commission, fee or other payment’ other
XIII. DEFENDING AN SEC INVESTIGATION OR A DOJ/GRAND JURY INQUIRY AND CONDUCTING A RELATED CORPORATE INTERNAL INVESTIGATION

A public corporation, like Triton Energy, which becomes involved with a "questionable" foreign payments problem that may implicate the corrupt foreign payments provisions of the FCPA, is likely to need outside legal counsel to represent and assist the company in conducting or defending three simultaneous or parallel investigations or inquiries, namely (i) the defense of an SEC investigation, (ii) the defense of a DOJ/federal grand jury inquiry, and (iii) the conduct of an internal corporate investigation. Any or all of these inquiries may be followed by major governmental criminal, civil or administrative enforcement litigation against the company and its officers, employees or agents, or by major private damages litigation by shareholders or other victims, and companion derivative litigation. The role of counsel, and pertinent strategic considerations, may differ significantly in each of these three contexts. The following discussion is intended to illuminate some key issues that arise in the development of most cases, even though the public corporation ordinarily cannot affect the temporal order in which specific government investigations or inquiries arise or are pursued.

A. Defense of the SEC Investigation

1. Strategies in Defending an SEC Investigation May Differ From Defending a DOJ/Grand Jury Inquiry Into the Same Activities

The defense of an SEC investigation, while sharing many similarities to the defense of a DOJ/grand jury inquiry, is different in several crucial respects. Counsel cannot appear with the client before a federal grand jury when the client is questioned under oath by the prosecutor. Thus, defense counsel has little ability to shape the development of the investigative record being compiled by the prosecutor with the grand jury's assistance. On the other hand, in an SEC investigation involving the same facts, counsel can appear with his client during the SEC investigative testimony, and has significant opportunities to influence the development of the underlying SEC investigative record. This is one of the principal reasons why a per-
son may determine to testify in an SEC investigation, but may decline to appear before and give testimony to the grand jury, even though the areas of inquiry are identical in both investigations. Another reason is that a Fifth Amendment plea to avoid grand jury testimony cannot be used against a defendant in a subsequent criminal prosecution; however, a Fifth Amendment plea to avoid SEC investigative testimony can be used as a basis to draw adverse inferences against a nontestifying defendant or respondent in subsequent SEC civil or administrative enforcement proceedings.381

Multiple representation occurs much more frequently in the defense of SEC investigations than it does in parallel DOJ/grand jury inquiries.382 The SEC does not name "targets" in its investigations,383 and does not have authority to grant immunity; the SEC must request the DOJ to seek court-approved immunity to accommodate an immunity request in an SEC inves-

---

[The witness has the right to have an attorney present with him during any formal investigative proceeding and to have this attorney (1) advise such person before, during and after the conclusion of such examination, (2) question such person briefly at the conclusion of the examination to clarify any of the answers such person has given, and (3) make summary notes during such examination solely for the use of such person.

*Id.*


382 *See Effective Defense, supra* note 379, at 572-84.

383 *See A Practitioner's Guide, supra* note 379, at 94 ("Unlike the grand jury process where 'targets' of an investigation are often identified, the Commission investigative process does not have 'targets.' Thus, the Commission is not required to provide any type of 'target' notification when it issues subpoenas to 'third parties' for testimony or documents."). *But see* Richard M. Phillips et al., *SEC Investigations: The Heart of SEC Enforcement Practice*, *in* KIRKPATRICK & LOCKHART, *supra* note 43, 27. The SEC avoids the use of the term "target" in connection with its investigations. It has long maintained that its investigations are merely fact finding exercises in which no conclusions are reached until after completion of the investigation. *See, e.g., White Weld & Co.*, 1 S.E.C. 574, 575 (1936) (contending that an investigation "is not a hearing. It is not in any sense an adversary proceeding. There are no parties. There are no issues."). In fact, investigations by necessity quickly become focused, and a primary issue facing defense counsel is to assess the likelihood of his or her client becoming a 'target.' Richard M. Phillips et al., *SEC Investigations: The Heart of SEC Enforcement Practice*, *in* KIRKPATRICK & LOCKHART, *supra* note 43, 29 n.3.
Supposedly, everyone subpoenaed for SEC testimony is at that time merely a "witness" or a "subject.”

That subpoenaed person is entitled to counsel, who may be present at the investigative deposition, but other counsel representing someone else may not be present. Thus, the corporation’s counsel may not be present when any corporate officer, director, employee or agent testifies, unless the corporation’s counsel also represents as counsel or co-counsel the individual giving testimony. If the corporation’s counsel strategically wants the continuing opportunity to influence and shape the development of the SEC investigative record, counsel must become involved in representing multiple clients. Such multiple representation, absent a conflict of interest, is not unusual in the defense of SEC investigations, including FCPA investigations.

On the other hand, such multiple representation seldom occurs in the defense of DOJ/grand jury inquiries. The DOJ identifies “targets,” and has the authority to grant immunity. Therefore, it is much more likely that representing multiple clients in a DOJ/federal grand jury inquiry may trigger insoluble conflicts of interest. Consequently, although possible and even desirable in unique circumstances, it is fairly unusual for corporate counsel to represent any client other than the corporation itself in the DOJ/federal grand jury inquiry.

Following is an updated version of the author’s Rules of Thumb in Defending SEC Investigations. They all merit consideration in the defense

---


385 Rule 7(b) of the SEC’s Rules Relating to Investigations states:

[A]ll witnesses shall be sequestered, and unless permitted in the discretion of the officer conducting the investigation no witness or counsel accompanying any such witness shall be permitted to be present during the examination of any other witness called in such proceeding.

17 C.F.R. § 203.7(b) (1997).

386 For example, in the underlying SEC investigation in the Triton Energy/Indonesia case, Wilmer, Cutler & Pickering represented Triton Energy, Triton Indonesia, Phillip W. Keever, David Gore, Robert Puetz, William McClure, Robert P. Murphy, and several other officers/employees who were not named as defendants or respondents in the SEC enforcement action.


388 See Arthur F. Mathews, Defensive Corporate Tactics For Dealing With SEC Investigations: The Role of Outside Counsel, 61 N.C. L. REV. 483, 501-504 (1983); Outline of Ar
of a public corporation that is being investigated by the SEC in an FCPA "questionable" foreign payments matter:

2. **AFM Rules of Thumb in Defending SEC Investigations**

*Rule One:* Read the appropriate literature and case law precedent to assure proper consideration of all the legal pitfalls as well as available strategic options.

- Review the statutes, rules and particularly the SEC Rules Relating To Investigations.
- The literature and case law precedent relating to civil injunctive/penalty actions, administrative disciplinary and cease-and-desist proceedings, and criminal prosecutions and grand jury in-


389 17 C.F.R. § 203.1 *et seq.* (1996); *see also* Rule 102(e) of the SEC Rules of Practice, 17 C.F.R. §201.102(e) (1997), which authorizes the SEC to impose administrative disciplinary sanctions against attorneys who engage in contumacious or other misconduct in an SEC investigation. Rule 7(e) of the SEC Rules Relating to Investigations states:

The officer conducting the investigation may report to the Commission any instances where any witness or counsel has been guilty of dilatory, obstructionist or contumacious conduct during the course of an investigation or any other instance of violation of these rules. The Commission will thereupon take such further action as the circumstances may warrant, including suspension or disbarment of counsel from further appearance or practice before it, in accordance with [Rule 102(e)] of the Commission’s rules of practice or exclusion from further participation in the particular investigation.


Defending SEC & DOJ FCPA Investigations

inquiring, parallel proceedings problems, and Foreign Corrupt Practices Act issues may be just as important as materials that relate solely to SEC investigations.

Although SEC investigatory powers resemble the powers of a federal grand jury, the strategies in defending an SEC investigation may be quite different from the strategies in defending a grand jury inquiry embracing the same activities. The fact that defense counsel cannot be present in the grand jury room when witnesses testify, but may be present at the SEC interrogation of the witnesses into the same activities, means that defense counsel has a substantially greater opportunity to influence and control the content of the SEC investigative record, as opposed to the grand jury record.

**Rule Two:** Take as much control over the investigation as possible — get the SEC out as quickly as possible.

Obviously, neither defense counsel nor his or her clients should engage in sharp tactics that smack of contumacious conduct or obstruction of justice, but within acceptable legal, ethical and professional bounds, counsel should influence as much as possible the speed and scope of the investigation.

---


399
If necessary, have the client offer to investigate itself, *i.e.*, an internal corporate investigation, perhaps conducted by uninvolved outside counsel. The goal is to have a non-prosecutorial person, rather than a government enforcement agency, conduct as much of the investigation as possible.

**Rule Three:** Consistent with an attorney’s duty to avoid conflicts of interests, when representing the corporate entity, also represent as many individuals (officers, directors, and employees) as is tactically and practically possible and ethically appropriate. Otherwise, the record may not adequately contain all mitigation evidence on behalf of the entity or particular individuals.

Principal wrongdoers will virtually always require separate counsel. Be careful to assure that the representation of any one individual will not raise a significant risk of a future conflict of interest that will require you to withdraw from representing the corporation or other particular individuals in the SEC investigation or in related governmental investigations or litigation.

Finally, explain potential conflicts of interest to each prospective

---


397 See McLucas Says Proper Corporate Culture Must Underlie Codes of Conduct, SEC TODAY, Nov. 17, 1977, at 1 (referring to SEC Enforcement Director William R. McLucas):

> The Enforcement Division is more inclined to wait for a company to conduct its own investigation if it hires outside counsel to handle the inquiries. More importantly, the SEC must get full and adequate disclosure at the end of the investigation. McLucas advised that the SEC is more likely to postpone its inquiries if it will be allowed to see all notes and are records compiled during the internal investigation. “The more we get to see, the more we are willing to wait,” he said.


One issue that merits consideration is whether the SEC Staff *ex parte* can contact corporate employees in an informal or formal investigation, when corporate counsel has advised the Staff that corporate counsel also intends to represent any employees the Staff wishes to interview. Compare Kenneth B. Winer & Samuel J. Winer, *Ex Parte Contacts with Officers and Employees of Corporations in SEC Investigations*, INSIGHTS, Nov. 1994, at 13 with William R. McLucas, Contacts with Corporate Officers and Employees in SEC Investigations,
client in advance, and have a written retention letter dealing with potential conflicts.

**Rule Four:** Give appropriate consideration to existing and potential “parallel proceedings” problems and to “joint defense” issues.

**Rule Five:** Avoid subpoenas by voluntarily offering to produce documents or witnesses for testimony. Grant access and inspection, rather than produce originals or copies whenever possible.

---

Insights, Mar. 1995, at 2. Obviously, the SEC Staff will seek to preserve ex parte opportunities to interview corporate “whistle-blowers” outside the presence of corporate counsel.

399 A leading case dealing with “parallel proceedings” problems in an SEC investigation is SEC v. Dresser Industries, 628 F.2d 1368 (D.C. Cir. 1980) cert. denied, 449 U.S. 993 (1980). In addition to SEC investigations, grand jury inquiries, civil injunctive or penalty actions, administrative disciplinary or cease and desist proceedings and criminal prosecutions, “parallel proceedings” problems may embrace bankruptcy or corporate reorganization proceedings, SIPC actions, private damage actions (including class or derivative actions), as well as NASD, NYSE, American Stock Exchange (AMEX) and other SRO proceedings, and various types of state proceedings. See, e.g. Pickholz, supra note 392, ch. 3; Parallel Proceedings, supra note 394, at 527; Note, Concurrent Civil and Criminal Proceedings, 67 Colum. L. Rev. 1277 (1967); F. Lee Ruck & Eric Youngquist, Comment, Commingled Civil and Criminal Proceedings: A Peek at Constitutional Limitations and a Poke at the SEC, 34 Geo. Wash. L. Rev. 527 (1966).

400 Counsel to a corporation must carefully weigh the pros and cons of entering into “joint defense” agreements with officers, directors, employees, agents or third parties involved in the investigation. While such agreements will allow various counsel and their clients to share privileged information in pursuit of a common defense without waiving the applicable attorney-client privileges or work-product protections, there are a host of problems that may arise in connection with joint defense agreements. The most common problem is the instance when one member of a joint defense group withdraws from the arrangement, and makes a deal with the government to assist in building a case against the other members of the joint defense arrangement. See, e.g. FDIC v. Cheng, [1992-1993 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 97,211 (N.D. Tex. 1992). In addition, counsel to a public company should assure that provisions of a particular joint defense agreement do not preclude the corporation from making public disclosure of any material facts required to be disclosed by federal securities laws or other statutes or regulations, or to make required reports to a governmental regulatory agency, even though the corporation has gained access to the information in a privileged communication from another member of the joint defense group. See generally Deborah Bartel, Reconceptualizing The Joint Defense Doctrine, 65 Fordham L. Rev. 871 (1996); Committee on Professional Responsibility, Ass’n of the Bar of the City of New York, Ethical Implications of Joint Defense/Common Interest Agreements, in Report of the Committee on Professional Responsibility (1996); William F. Pendergast & Mark S. Gold, Surviving Self-Governance: Common Interests Approach to Protecting Privileges Under the DOD Voluntary Disclosure Program, 22 Pub. Cont. L.J. 195 (1993); Marc I. Steinberg & Daniel R. Rogers, The Joint Defense in Federal Securities Litigation, 18 Sec. Reg. L.J. 339 (1991); Patricia Welles, A Survey of Attorney-Client Privilege in Joint Defense, 35 U. Miami L. Rev. 321 (1981); Matthew D. Forsgren, Note, The Outer Edge of the Envelope: Disqualification of White Collar Criminal Defense Attorneys Under the Joint Defense Doctrine, 78 Minn. L. Rev. 1219 (1994); Susan K. Rushing, Comment, Separating the Joint Defense Doctrine from the Attorney-Client Privilege, 68 Tex. L. Rev. 1273 (1990); Michael W. Tankersley, Comment, The Corporate Attorney-Client Privilege: Culpable Employees, Attorney Ethics and the Joint Defense Doctrine, 58 Tex. L. Rev. 804 (1980).
Ask for return of all documents when the government inquiry is completed.

Be particularly careful in responding to an SEC Staff request for the "creation" of evidence, i.e., the preparation of a detailed "chronology" of past events from the corporation's perspective and records. The SEC Staff cannot legally compel the creation of evidence. It may be appropriate to decline to produce a formal detailed chronology, and instead to informally apprise the Staff of the flow of relevant events including granting access to relevant corporate records. While any chronology created and provided to the Staff must be meticulously accurate, it will usually be appropriate to adopt a presentation that will avoid documenting damaging admissions against interest.

**Rule Six:** Conduct as detailed a preparatory investigation as time and circumstances permit, to assure that counsel and investigatees or witnesses will be prepared for all significant issues that may arise.

* Study the SEC "formal order of investigation" in advance.
* Review all documents before authorizing inspection or copying by the SEC Staff.
* Interview as many persons as possible in advance, and obtain access to, and review as many investigative transcripts of testimony of other witnesses in the investigation as is allowed by other witnesses and their counsel.
* Spend adequate time preparing the witness for testimony.

**Rule Seven:** Conduct as much testimony as possible off-the-record.

---

401 For example, in SEC v. First City Financial Corp., Ltd., 688 F. Supp. 705 (D.D.C. 1988), aff'd, 890 F.2d 1215 (D.C. Cir. 1989), the voluntary chronology submitted on behalf of the broker-dealer Bear, Steams in the underlying investigation was received into evidence at the subsequent trial, containing damaging admissions against the interests of Bear, Steams' clients, First City Financial Corp. and Marc Belzberg, that led the Court to conclude that defendants First City Financial Corp. and Belzberg had an illegal "parking" arrangement with Bear, Steams to accumulate a large position in the securities of Ashland Oil Corp.

402 See 4 Bromberg & Lowenfels, supra note 292, § 13.2(1100); Effective Defense, supra note 379, at 584-88.

403 Rule 7(a) of the SEC Rules Relating To Investigations grants an investigatee (and thereby his counsel) the right to inspect a copy of the formal order of investigation. SEC Rules Relating To Investigations, 17 C.F.R. § 203.7(a) (1997). Much intelligence can be gleaned therefrom. See 4 Bromberg & Lowenfels, supra note 292, §13.2(800-850); Effective Defense, supra note 379, 584-85.


405 At some point in the future, it is inevitable that either under the Freedom of Information Act (FOIA) or pursuant to civil discovery, a corporation's litigation adversaries will obtain copies of the transcripts of sworn on-the-record SEC testimony of the corporation's officers, directors, employees and agents. See, e.g., Lamorte v. Mansfield, 438 F.2d 448 (2d
Rule Eight: Protect applicable privileges.406

If it is determined to give the SEC Staff access to any privileged information (i.e., attorney-client privilege or work-product protection), attempt to structure a Diversified Industries “limited waiver” so that privileges can still be asserted against third parties in private litigation.407


406 In general, any constitutional, common law or statutory privilege recognized in federal grand jury practice or in federal civil or criminal litigation in federal district courts will be applicable also in an SEC investigation. See Wooley v. United States, 97 F.2d 258 (9th Cir. 1938); McMann v. SEC, 87 F.2d 377 (2d Cir. 1937), cert. denied sub nom. McMann v. Engle, 301 U.S. 684 (1937). The most common privilege issues in SEC investigations arise concerning attorney-client privilege, work-product protection, Fourth and Fifth Amendment privileges, and governmental “executive” or “deliberative process” privileges. 4 BROMBERG & LOWENFELS, supra note 292, § 13.2(1300), (1310), (1320), (1330), (1340), (1341), (1350), (1360) and (1370); STEINBERG & FERRARA, supra note 404, §§ 3:21, 3:22; John M. Fedders, Speech on the Attorney-Client Privilege in SEC Investigations, in [1982 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 83,242, at 85, 249 (Aug. 8, 1982); Effective Defense, supra note 379, at 592-605; A Practitioner’s Guide, supra note 379, at 70-78.

407 See Upjohn v. United States, 449 U.S. 383 (1981) (implied underpinning of opinion is that selective disclosure of privileged information to the SEC was not broad waiver of privilege); United States v. Billmyer, 57 F.3d 31, 36-37 (1st Cir. 1995) (disclosure to government of internal corporate information received from corporation’s outside counsel held to be broad, general waiver of attorney-client privilege); In re Steinhardt Partners, L.P., 9 F.3d 230, 235-36 (2d Cir. 1993) (court rejects Diversified Industries holding and finds broad waiver of privilege upon disclosure of information to government investigatory agencies); Westinghouse Elec. Corp. v. Republic of Philippines Nat’l Power Corp., 951 F.2d 1414, 1425-26 (3d Cir. 1991) (finding broad waiver of privilege upon voluntary disclosure of information to the SEC); In re Martin Marietta Corp., 856 F.2d 619, 623-24 (4th Cir. 1988) (disclosure to government agency during settlement negotiations held to be broad, general waiver of attorney-client privilege); In re Subpoena Duces Tecum (Tesorio Petroleum/Fulbright & Jaworski), 738 F.2d 1367 (D.C. Cir. 1984) (by voluntarily disclosing materials to the SEC, company waived work-product protection for materials in subsequent private damage action); In re John Doe Corp., 675 F.2d 482, 489 (2d Cir. 1982) (disclosure of internal company reports to underwriters and auditors effects general waiver of attorney-client privilege and work-product protection); In re Sealed Case (No. 81-1717), 676 F.2d 793 (D.C. Cir. 1982) (after disclosure to the SEC, limited waiver doctrine rejected); Permian Corp. v. United States, 665 F.2d 1214 (D.C. Cir. 1981) (court finds waiver of privilege by virtue of disclosure to the SEC despite existence of agreement with the SEC purporting to limit waiver implications of such disclosure); Diversified Indus. v. Meredith, 572 F.2d 596 (8th Cir. 1978) (en bane) (court holds limited disclosure to the SEC is not a broad waiver of privilege); In re Kidder Peabody Sec. Litig., 168 F.R.D. 459 (S.D.N.Y. 1996) (notes and memoranda created in connection with published report of internal investigation protected by attorney work-product privilege to the extent that they reflected “attorney mental processes,” but not to the extent they contained “purely factual summaries of witness statements”); In re Woolworth Corp. Sec. Litig., No. 94 Civ. 2217 (RO), 1996 U.S. Dist. LEXIS 7773 (S.D.N.Y. June 7, 1996) (internal notes and memoranda created in connection with public Audit Committee report protected by both attorney-client privilege and work-product...
Consider attempting to establish a "self-evaluative" privilege, or some other type of possibly applicable privilege such as an "ombudsman" privilege. 

immunity); In re Leslie Fay Cos., Inc. Sec. Litig., 152 F.R.D. 42 (S.D.N.Y. 1993); In re Worlds of Wonder Sec. Litig., 147 F.R.D. 208, 212 (N.D.Cal. 1992) (corporation waived work-product protection by voluntarily producing documents to the SEC in informal investigation); In re Atlantic Fin. Management Sec. Litig., 121 F.R.D. 141 (D. Mass. 1988); In re LTV Securities Litigation, 89 F.R.D. 595 (N.D. Tex. 1981) (court accepts "hybrid" privilege where the SEC and corporation shared common interest in analyzing facts and legal theories upon appointment of an independent special investigatory officer by consent decree); Teachers Ins. & Annuity Ass'n of Am. v. Shamrock Broadcasting Co., 521 F. Supp. 638, 644-46 (S.D.N.Y. 1981) (suggesting application of limited waiver with respect to disclosures to SEC Staff in SEC investigation if producing party expressly preserves privilege prior to releasing documents to agency); Byrnes v. IDS Realty Trust, 85 F.R.D. 679 (S.D.N.Y. 1980) (limited waiver doctrine accepted); In re Grand Jury Subpoena (dated July 13, 1979), 478 F. Supp. 368, 372-73 (E.D. Wis. 1979) (voluntary cooperation with the SEC or other government agency held not to be broad, general waiver of attorney-client privilege).

The Second Circuit, in In re Steinhardt Partners L.P., 9 F.3d at 236, clearly left the door open for negotiation in a particular case for the SEC for a limited or selective waiver of attorney-client privilege and work-product protection:

Establishing a rigid [waiver] rule would fail to anticipate situations in which the disclosing party and the government share a common interest in developing legal theories and analyzing information, or situations in which the SEC and the disclosing party have entered into an explicit agreement that the SEC will maintain the confidentiality of the disclosed materials.

Rule Nine: Protect the record.\footnote{410}

At the opening of the record, put a statement in the record that the witness and his counsel will not deem the investigative transcript to be complete and accurate until after the witness and counsel are provided access to a copy of the transcript, to be reviewed, corrected and supplemented if appropriate.

Put into the investigative record mitigation evidence (both documentary and by oral testimony) and defenses, subject by subject as the SEC interrogator completes each separate line of inquiry. If tactically appropriate, do not allow the SEC interrogator to explore on the record areas that are beyond the scope of the formal order of investigation. Make sure all documents are stamped and numbered both for identification and confidentiality purposes. Have in the record an itemization — as general as may be appropriate — of all withheld privileged documents (i.e., a cover letter containing a "privilege list").

Rule Ten: Preserve confidentiality.\footnote{411}

\begin{flushright}


\footnote{410} \textit{See BROMBERG & LOWENFELS, supra} note 292, § 13.2 (1220), (1230); \textit{STEINBERG & FERRARA, supra} note 404, § 3:19; \textit{Effective Defense, supra} note 379, at 588-91, 608-11.

AFM “laundry list”: Set out up front in the record your detailed list of confidentiality and related requests.412 Of particular note, as applicable, are:

- FOIA issues.413
- Privacy Act414 and Right to Financial Privacy Act issues415 — i.e., object to such SEC “routine uses” as providing investigative information to Congress and to the press.416
- Electronic Communications Privacy Act (ECPA) issues.417


416The “routine uses” of information the SEC assembles in its private informal and formal investigations, are set forth in SEC Form 1662 (Feb. 1966) (Supplemental Information for Persons Requested to Supply Information Voluntarily or Directed to Supply Information Pursuant to a Commission Subpoena), and SEC Form 1661 (Feb. 1996) (Supplemental Information for Regulated Entities Directed to Supply Information Other than Pursuant to a Commission Subpoena). See also 54 FR 24454 (SEC 1989); 59 FR 27626 (SEC 1994).

Defending SEC & DOJ FCPA Investigations

- Trade Secrets Act issues. There may be entitlement to confidential treatment for many classes of internal business, commercial and financial information.
- The related issue of whether, and, if so, when, a public company is required to disclose publicly the existence of a private formal SEC investigation.

Rule Eleven: Correct and supplement the record. After you and your witness or client review the investigative transcript of testimony, make whatever corrections, additions or supplementations (by letter, affidavit or further sworn testimony) required to ensure complete accuracy of the investigative record and to best protect your client's interests.

Rule Twelve: Make appropriate strategy decisions designed to keep the case civil or administrative rather than letting it develop into a subsequent criminal prosecution. The strategic goals are to avoid criminal prosecution, keep the prospective defendant or defendants out of jail, maintain licenses to do business, and save as much of the prospective defendant's money and assets as possible.
- Avoid any prospect of a perjury, false statements or obstruction of justice charge.

420 A formal private SEC investigation is not per se material as soon as the SEC enters the “formal order of investigation.” Therefore, absent peculiar circumstances, the investigation ordinarily is not required to be disclosed publicly. However, when the investigation is developed to the point where the SEC Staff has tentatively determined to recommend the SEC institute formal enforcement action, and has requested a “Wells Submission” from the investigatee, the materiality threshold may be crossed, and public disclosure may be required in a particular case. See infra Part A.3; see also A Practitioner's Guide, supra note 379, at 105; Phillips et al., supra note 383, at 94; Alan R. Bromberg & Lewis D. Lowenfels, Securities Disclosure: Disclosure of Government Investigations, INSIGHTS, June 1994, at 17.
421 See Effective Defense, supra note 379, at 590; 4 BROMBERG & LOWENFELS, supra note 292, §13.2(1230); STEINBERG & FERRARA, supra note 404, § 3:26; Rule 6 of the SEC Rules Relating To Investigations, 17 C.F.R. § 203.6, grants the witness (and thereby his counsel) an absolute right to inspect a copy of the transcript of investigative testimony, and a right to request purchase of a copy for the witness' retention. The SEC has discretion to deny "for good cause" the request to purchase, but in most cases the request is routinely granted. Once purchased, the transcript in the hands of the witness, is discoverable by adversaries in civil litigation. See, e.g., John F.X. Peloso, Discovery of SEC Transcripts, 10 REV. SEC. REG. 829 (Nov. 30, 1977); BROMBERG & LOWENFELS, supra note 292, §13.2 (1400), (1410), (1420), (1430).
A Fifth Amendment plea, despite the adverse inferences that can be drawn from it in an administrative or civil litigation, is much more protective of a client than is "creative" testimony that may form the basis for a criminal prosecution for perjury or obstruction of justice.

**Rule Thirteen:** If making a "Wells Committee" Submission, make sure all statements therein are completely accurate. At the same time, avoid making admissions that will bind the client if and when the Submission is produced in subsequent litigation, or will be used for cross-examination or impeachment purposes when the client testifies in any future proceeding. Avoid losing credibility with the Commission and its Staff by making unsupported or erroneous statements in a Submission.

**Rule Fourteen:** If your client chooses to negotiate a settlement, as opposed to litigating — which is typical when public corporations are the subject of investigation — negotiate a consent settlement that will accomplish, if possible, the following objectives:

- Make sure the consent settlement does not include any findings of fact or conclusions of law that adjudicate violations of law or guilt on behalf of your client, and make sure the formal settlement documents include "without admitting or denying" language, and point out that there has been no evidentiary or adjudicatory hearing or record adduced in connection with the settlement. This will avoid the collateral estoppel effects of the *Parklane Hosiery* Supreme Court opinion.
- If findings of statutory violations are necessary (e.g., in an administrative proceeding), if possible, agree only to non-fraud, or negligence-based "fraud" violations; *i.e.*, statutory provisions that do

---


For a discussion of the requirements and risks of a Wells Submission, see *infra* Part XIII.4.


*Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979).*
not require proof of "scienter" (such as Sections 17(a)(2) and 1(a)(3) of the 1933 Act, which require only mere proof of negligence).426

- Absent conflicts of interest, in cases in which the corporate entity will be named a defendant in any event, let the entity “take the rap” and avoid the circumstances of having individuals personally named as defendants. Individuals will be subject to the injunction’s prohibitions, even if they are not named as defendants, if they are put on proper notice of its proscriptions, and are acting on behalf of the corporate defendant. For example, an injunction against a corporate defendant pursuant to Rule 65 of the Federal Rules of Civil Procedure also binds the defendant corporation’s “officers, agents, servants, employees, and attorneys, and . . . those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.”427

- Rather than naming individual defendants, attempt to resolve the matter as to individuals by having them file an “undertaking” to comply with the consent decree against the corporation. Or, even if an individual is named as a defendant, attempt to settle with a court-ordered “undertaking” as opposed to a consent injunction.428

- Make sure any injunctive order limits “attorneys” to “attorneys-in-fact.” There is no need to enjoin defense counsel who has negotiated the settlement.

- When both a civil monetary penalty and disgorgement are required as part of the sanctions imposed, negotiate the penalty downward and the disgorgement upward. The civil monetary penalty likely will not be tax deductible, but the disgorgement likely will be tax deductible. Also get double credit for any money paid in disgorgement: Make sure 100% of any disgorgement fund can be used to settle parallel private damage actions or arbitration claims.

427 FED. R. CIV. P. 65(d).
428 See Arthur F. Mathews, SEC Civil Injunctive Actions — II, reprinted at 1 MATHEWS, supra note 282, at 372:

In some instances, the Commission will accept a defendant’s ‘undertaking’ not to violate the law in the future. While the undertaking may be filed in court and embodied in a formal court order, it does not constitute a formal injunction and does not carry with it the mandatory or discretionary disqualifications that result from the entry of an injunction or an ordinary consent decree. Complete settlement by ‘undertaking’ has been accepted by the Commission in at least two recent cases. (citations omitted.)

• Agree to ancillary relief that embraces prophylactic policies, procedures and practices (e.g., independent audit committee, compliance review) that constitute good business practice the client would consider implementing in any event, even without the existence of an SEC enforcement proceeding.

• Resolve as many direct or indirect statutory disqualifications as possible as part of the formal settlement.\(^\text{429}\)

• Negotiate the specific language in the charging document (injunctive complaint or SEC order for proceedings) as well as the settlement order (injunctive decree or SEC order imposing remedial sanctions or SEC cease and desist order). The “cosmetics” of the settlement may be the most important aspect of how much damage the settled enforcement proceeding does to the client’s ongoing business interests.

• Have the settlement filed in the jurisdiction of the most inoffensive venue.

• Influence the publicity when the settlement is filed. Try to negotiate a bland SEC press release, and have your client issue a press release putting the client in the best fair light. But do not “deny” the allegations when the consent is specifically conditioned on “without admitting or denying” language.\(^\text{430}\)

3. When, If Ever, Must a Private Formal SEC Investigation Be Publicly Disclosed?

It is not clear whether, and, if so, when, a public company must disclose publicly the existence of a private SEC investigation or grand jury inquiries. Courts have not given clear guidance on this question.\(^\text{431}\) As a

\(^{429}\) See generally RALPH C. FERRARA & GREGORY S. CRESPI, REDEEMING FALLEN BROKERS: MANAGING THE AFTERMATH OF BROKER-DEALER ENFORCEMENT PROCEEDINGS (1988) (describing in detail the direct and indirect collateral consequences and disqualifications arising under state and federal law as a result of SEC enforcement actions).


general rule, absent special facts and circumstances, the author believes there is no obligation to disclose the existence of the private investigation, unless and until the SEC commences some type of enforcement proceeding against the company or the SEC Staff apprises the company that it has or is recommending that the Commission institute an enforcement proceeding. Section 21(a)(1) of the 1934 Act gives the SEC discretion to conduct its investigations either publicly or privately. Rule 5 of the SEC's Rules Relating to Investigations provides that "[u]nless otherwise ordered by the Commission, all formal investigative proceedings shall be non-public." The SEC chooses to conduct virtually all of its formal investigations on a non-public basis. The author believes it to be very unsound for any commentator to argue that a corporate issuer has a statutory obligation to publicly disclose the existence of an SEC investigation on the heels of the Commission formally exercising its statutory discretion under the 1934 Act in determining that the investigation should be private, not public. Nevertheless, some attorneys from time to time suggest (erroneously in the view of the author) that Rule 10b-5, or other 1933 Act or 1934 Act disclosure provisions, mandate that the corporate issuer publicly disclose the private investigation; i.e., that the mere existence of a private formal investigation is per se "material." Not even the SEC's Enforcement Director takes such an extreme, unfounded position:

The disclosure obligations of an issuer, registrant or an individual involved in an SEC enforcement investigation or action depend upon a number of factors. These factors include: the nature of the disclosure document; the status of the company or the individual; and the context in which the investigation or action arises. . . . [R]egistrants and issuers must disclose information responsive to particular line item disclosure requirements and must otherwise evaluate the materiality of the matter under inquiry for purposes of registration statement and periodic reporting.

Applying a general materiality analysis, disclosure of the existence of a Commission investigation may or may not be required in a particular situation; disclosure of the facts and circumstances giving rise to the investigation, however, very well may be required. . . . Outside counsel often advises registrants that disclosure of the matters under investigation and/or the existence of an investigation is prudent even if such disclosure is not specifically responsive to required disclosure items.

Clearly, management must evaluate disclosure requirements and weigh the materiality of the facts and their possible impact on both operations and investment decisions to determine if disclosure of the matters underlying the investigation, and/or if disclosure of the investigation, is required. Similarly, management will have to assess the status of the investigation as it proceeds...
because changes in the evolution of the facts will affect the disclosure analysis.433

While not necessarily legally required in any particular case, the author often advises clients that the point in time when it may be prudent for an issuer to disclose publicly the existence of a private formal SEC investigation is when the SEC Enforcement Staff requests the issuer to file a “Wells Submission.” At that point in time, the Staff has made a preliminary decision to recommend that the Commission authorize the institution of enforcement proceedings against the issuer. That may be the point in time when the “materiality” threshold is crossed. This is not necessarily so, however, because the arguments in the Wells Submission may persuade the SEC Staff to drop their enforcement recommendation, or may persuade the Commission to reject the Staff’s recommendation. In any event, it is relevant to note that Item 103 of Regulation SK,434 requires disclosure of both material pending legal proceedings and “proceedings known to be contemplated by governmental authorities.”435

4. “Wells Submission” Considerations436

At the end of a formal SEC investigation, the SEC Staff typically notifies a subject of the investigation whether the Staff will recommend to the Commission the institution of a formal enforcement action against the subject, and provides the subject an opportunity to submit a so-called “Wells Submission” to the Staff and the Commission arguing why the proposed enforcement action should not be authorized.437 In any investigation, includ-

433 A Practitioner’s Guide, supra note 379, at 105-06 (citations omitted).
Defending SEC & DOJ FCPA Investigations

ing FCPA investigations, company counsel faces the tactical decision of whether to file a Wells Submission, and, if so, what points to address therein. Typically, a Wells Submission would contain a pertinent discussion, in the context of the particular investigation, of: (i) the facts, (ii) the alleged statutory violations, (iii) applicable legal questions, (iv) pertinent enforcement policy questions, (v) the equities, and (vi) exploration of possible settlement.

On the one hand, a Wells Submission may highlight factual and legal deficiencies in a proposed enforcement action that may lead the Commission to reject institution of the recommended enforcement proceeding, or may persuade the Staff to abandon its enforcement recommendation. On the other hand, by flagging deficiencies in the Staff’s proposed case, the Wells Submission may cause the Staff to conduct further investigation or additional research in an attempt “to fill the holes” in its proposed case.

[A] Wells Submission requires extensive disclosure of the defense’s case and is costly to prepare. Such an effort is worthwhile only if there is a reasonable possibility that it can be effective in preventing an enforcement action, reducing the potential charges or sanctions, or facilitating a satisfactory settlement. Otherwise, it only depletes the client’s resources and may diminish the client’s ability to litigate.438

In addition, a brief that flags the weaknesses in a proposed defendant’s case, or contains patently incredible rationalizations or explanations, will both damage counsel’s credibility with the Staff, and diminish the client’s opportunity to negotiate a satisfactory resolution of the proposed enforcement matter.439

Some of the risks involved in filing a Wells Submission are: (i) statements in the Submission may be used against the client in a subsequent civil, administrative or criminal enforcement action, or related private litigation, as admissions, or for cross-examination or impeachment purposes; (ii) The Submission likely will be turned over to the DOJ in any parallel or subsequent grand jury inquiry or criminal prosecution, and will be provided to other government investigators or regulators in other cases; (iii) the Submission may at some future time be discoverable by the subject company’s adversaries either under the Freedom of Information Act, or under civil discovery rules,440 and (iv) false statements in a Submission presumably could be prosecuted criminally under the felony provisions of 18 U.S. C. § 1001 (1996).

Wells Submissions are particularly appropriate to persuade the Commission or its Staff not to proceed against peripheral proposed defendants.

439 See, e.g., Lynch & Choo, supra note 424.
Both the Commission and its Staff attempt to fashion enforcement cases to formally name as defendants principally central actors in violative activities. Further, since the Commission and its Staff appear to give closer scrutiny, and perhaps apply a more stringent standard, in determining whether to name attorneys or accountants as defendants in enforcement actions, it will usually be strategic to file a Wells Submission on behalf of any client who is a practicing attorney or accountant.

In the *Triton Energy/Indonesia* case, Wells Submissions were filed on behalf of the company, and a number of individuals. While the Commission determined to pursue enforcement actions against the company and several individuals, more peripheral proposed defendants were eliminated from the case. And the Wells Submissions did affect the nature of the charges, and facilitated the negotiated settlement of the cases.

5. **International Aspects of SEC Investigations**

In the 1980s and 1990s, the globalization of business and the worldwide expansion of securities markets has led to the internationalization of SEC enforcement efforts.

With this growth in 'cross border' investment, the instances of internationally focused investigations and enforcement actions by the SEC have rapidly increased. Since 1988 the SEC has made nearly 1400 requests for enforcement assistance to foreign regulators and received nearly 1900 requests for assistance from abroad.

The two typical types of SEC enforcement actions that involve investigative efforts abroad are insider trading cases and FCPA cases.

The SEC Enforcement Staff gathers evidence abroad in its investigations principally by use of two types of international law enforcement vehicles: Formal Mutual Legal Assistance Treaties in Criminal Matters (MLAT), and more informal Memoranda of Understanding (MOU). The United States is a party to MLATs with seventeen countries and is currently finalizing MLATs with eleven additional countries, or foreign polit-

---


442 Mills et al., supra note 441, at 491 [Footnote omitted].

443 Mann et al., *International Agreements*, supra note 441, at 781 and n.3 (Argentina, the Bahamas, Canada, the Cayman Islands — extended by diplomatic note to Anguilla, the British Virgin Islands and the Turk and Caicos Islands, and to Montserrat; Italy, Mexico, Morocco, the Netherlands, Spain, Switzerland, Thailand, Turkey, and Uruguay).
The SEC is a party to MOUs with twenty-five foreign states, provinces or countries. When an MLAT is used, the SEC’s request for evidence from abroad must be processed through the DOJ; when an MOU is used the SEC Staff deals directly with foreign authorities.

MOUs feature several advantages for the SEC that are not available from MLATs. A treaty represents a formal and, absent amendment, an inflexible agreement and process not easily adaptable to changing circumstances. It does not usually involve or form a mechanism for informal conversation on topics of mutual interest among regulators or prosecutors. On the other hand, MOUs are agreements among regulators. The very existence of the document signifies the regulators’ mutual interests in assisting each other and in addressing matters of concern to their foreign counterparts. The agreement does not require formal process, including Senate ratification. It can be tailored to the parties’ needs and, frequently, is couched in broad language which allows flexibility for addressing new situations. These agreements usually pledge each party to assist the other, to use all available processes to obtain and forward information, to keep shared information secret, and to undertake, not just enforcement related activities, but regulatory activities, such as inspections of entities doing business in the requested party’s nation. To date, the SEC has negotiated four generations of MOUs.

The use of MLATs and MOUs has been particularly effective in international SEC investigations to assist the SEC in circumventing foreign secrecy and “blocking” statutes to trace the flow of funds through foreign banks and trusts. Thus, bribes paid through secret foreign bank accounts in FCPA cases may be uncovered by the SEC Staff through MLAT and MOU requests to foreign governmental authorities.

The 1934 Act was amended in both 1988 and 1990 to specifically grant the SEC powers to assist foreign securities regulators and enforcement authorities to gather evidence in international investigations. In the Insider

444 Id. at 781 n.4 (Austria; Organization of American States (OAS) MLAT and Protocol on Assistance in Tax Cases; Hungary; the Philippines; United Kingdom; South Korea; Panama; Nigeria; Jamaica; Belgium; and Columbia).

445 Id. at 795; see also Pickholz, supra note 392, § 4.04[8] (Switzerland; Japan; Canada — Ontario, Quebec and British Columbia; Brazil; the Netherlands; France, Mexico; Norway; United Kingdom; Argentina; Spain; Italy; Chile; Australia; Sweden; South Africa; the Commission of European Communities; Hungary; the Inter-American Development Bank (IADB) and the United Nations Economic Commission for Latin America and the Caribbean (UNECLAC); Costa Rica; Indonesia; China; Luxembourg; Israel; Hong Kong).

In addition, pursuant to an exchange of diplomatic notes, the SEC is qualified to obtain assistance in gathering evidence in Germany through the German Ministry of Justice under the German Law on International Legal Assistance in Law Enforcement Matters (IRG). The IRG authorized the German Justice Ministry to coordinate with German states requests for documents and testimony on behalf of foreign law enforcement authorities in aid of their investigations. See, e.g., Mann et al., International Agreements, supra note 441, at 821.

446 Pickholz, supra note 392, § 4.04[8] (citations omitted). Pickholz describes the differing provisions of the “four generations” of SEC MOUs. Id. §§ 4.04[8][a], [b], [c] and [d].

447 Mills et al., supra note 441, at 513; Pitt et al., supra note 441 at 411.
Trading and Securities Fraud Enforcement Act of 1988 (ITSFEA), section 21(a)(2) was added to the 1934 Act to allow the SEC to assist foreign securities regulators in gathering investigative information relevant to violations of foreign securities laws and rules even though the activities being investigated do not violate U.S. laws. The International Securities Enforcement Cooperation Act of 1990 (ISECA) amended the 1934 Act (Section 24(c)) to authorize the SEC to provide nonpublic documents and records to foreign law enforcement officers upon an appropriate showing of need and assurances of confidentiality.

Counsel defending an FCPA investigation must input into all strategic decisions the recognition that the SEC now has extensive international investigatory tools that make it unlikely that evidence of foreign activity will be insulated from discovery in an SEC investigation.

B. Defending A DOJ/Grand Jury Inquiry

1. Informal and Formal Stages of the Inquiry

Like other federal white collar criminal investigations conducted by the DOJ, an FCPA inquiry usually commences at an informal level. An Assistant U.S. Attorney or other DOJ prosecutor with the assistance of the Federal Bureau of Investigations (FBI) or Customs agents requests voluntary production of corporate documents, and informal interviews of company employees. Often the interviews are accomplished by a single FBI agent, at the direction of the DOJ prosecutor, at the employee’s home or otherwise off the company’s premises without prior notice to the company or its counsel. Not infrequently, when outside counsel to the company gets involved in the inquiry, some company employees have already been interviewed by the FBI, and often have not been represented by counsel at the interview. These “informal” interviews inevitably lead to a more gradual formalization of the DOJ investigative process — a grand jury subpoena for the company’s documents relating to the questionable foreign payments under inquiry.

Despite use of the grand jury subpoena to gather company documents, the DOJ prosecutor at this early stage seldom produces documents or witnesses directly before the grand jury. Rather, the prosecutor pursues a rather semi-formal "office inquiry" reviewing the documents and perhaps interviewing witnesses without a formal stenographic transcript of testimony. It is at this stage of the inquiry that defense counsel has the most direct opportunities to influence the direction of the criminal inquiry. This is so principally because the investigating prosecutor will allow defense counsel to be present, and to participate, in such "office" interviews of employees whether at that time they be targets, subjects or merely witnesses. At the federal level, when such persons are formally subpoenaed to give sworn, transcribed testimony before the actual grand jury, counsel cannot be present in the grand jury room. Thus, from the defense perspective, the more the inquiry can be conducted in the prosecutor's office rather than in the grand jury's presence, the more the defense counsel may be able to present mitigation evidence in an attempt to forestall any formal criminal prosecution.

2. The Changing Climate: "Cooperating" rather than "Defending" the Company

Prior to the 1970s, apart from major anti-trust prosecutions, few major corporations were the subjects of white-collar criminal prosecutions. When corporate guilty pleas were entered, it was usually in cases where the corporation "took the rap" in instances where the federal prosecutor wanted to exercise favorable prosecutorial discretion regarding the corporate individuals involved in the matter. At least since the E.F. Hutton prosecution in the 1970s, national federal prosecutorial policy has changed. Witness the Drexel prosecution in the 1980s and the Daiwa Bank prosecution in the 1990s. As one prominent New York City defense lawyer, Larry Pedowitz, recently stated:

Twenty years ago when I began at the [SDNY] United States Attorney's Office — it's actually 24 years ago — we did not convict corporations very often. There was not much of an effort by prosecutors to go after corporations. If you did, it was generally because you did not want to convict the individuals, you would take a corporate plea instead. Today a sea change has occurred. Prosecutors are using the threat of criminal prosecution of corporations to get them to help prosecutors with their cases — to be cooperative. Prosecutors here in the Southern District and throughout the country have learned in cases like the Kidder [Peabody] case in 1987, and the Salomon [Brothers] case in 1991, and the Prudential [Securities] case this last year, that the prosecutor has extraordinary leverage in getting corporations to do what the prosecutor wants them to do in an investigatory context.451

451 FEDERAL BAR FOUND., REPRESENTING THE CORPORATION AND ITS OFFICERS IN GRAND JURY PROCEEDINGS 15 (1997). Indictments of major public companies came to the forefront in the 1980s and early 1990s in the area of defense procurement fraud, where at least 28 large corporations were charged with federal felonies: Avco, Boeing, Emerson Electric, E-
Whether it be an FCPA DOJ/ grand jury inquiry or any other type of corporate white-collar criminal investigation by the DOJ, the corporate issuer at the start of defending the inquiry, must make a strategic decision whether it is more likely than not that the company will end up cooperating with the prosecutors rather than taking a more adversarial litigating posture. This early strategic decision will influence multiple representation choices, joint defense agreements, privilege assertions or waivers, advancement of legal fees to involved individuals, and a host of other defense considerations that arise in almost every case.

There are tremendous pressures that cause public corporations to opt to cooperate with prosecutors in the course of a grand jury investigation of possible corporate criminal misconduct. First, consider the federal Organization Sentencing Guidelines. If a corporation is convicted (whether by guilty plea or after trial) of a federal felony, e.g., an FCPA bribery charge, the size of the corporate fine to be imposed as a sentence is increased if the corporation has impeded the criminal investigation, but is decreased if the corporation has cooperated in the investigation. Second, it is much more likely that a prosecutor will exercise prosecutorial discretion and choose not to criminally charge a public company, as opposed to its miscreant individual officers, directors, employees and agents, if the company diligently cooperates in the government investigation of the corporate wrongdoing. Compare, for example, the favorable treatment of the corporations in the Salomon Brothers, Kidder Peabody and Prudential Securities cases, with the unfavorable treatment of the corporations in the E.F. Hutton, Drexel Burnham, Consolidated Edison, Cooper Companies and Daiwa Bank cases.

When Salomon Brothers came under criminal investigation for unauthorized bidding at U.S. treasury auctions, its miscreant trader Paul Mozer, was criminally convicted, but favorable prosecutorial discretion was exercised in not criminally charging the broker-dealer firm. Instead, the broker-dealer and its responsible supervising managers were able to negoti-
Defending SEC & DOJ FCPA Investigations

ate civil and administrative settlements.\textsuperscript{457} Then S.D.N.Y. U.S. Attorney Otto Obermaier stated that Salomon Brothers’ cooperation in the grand jury investigation played a significant role in the decision not to criminally prosecute the broker-dealer firm; indeed, the S.D.N.Y. U.S. Attorney’s Office press release stated: “Salomon’s cooperation has been exemplary.”\textsuperscript{458} Among the factors considered important by the government in Salomon’s cooperation were the facts that Salomon Brothers (i) opened up its books and records to the government, (ii) encouraged its employees to cooperate and speak with the prosecutors, and (iii) waived its attorney-client privilege to enable it to share with the government the results of its internal investigation of the unauthorized treasury bidding activities.\textsuperscript{459} Obermaier highlighted the importance that Salomon’s cooperation played in his decision not to prosecute the broker-dealer corporation:

The [sentencing] guidelines . . . reward an organization for detecting crime before the Government investigation, bringing it to the authorities’ attention and unequivocally accepting responsibility. Those that refuse to cooperate will face heavier fines. Good corporate citizenship is now defined by expanded obligations; the traditional prevention and detection of crime, and now the reporting of crime when detected.

. . . .

The resolution of the Salomon case . . . especially [the U.S. Attorney’s Office’s] decision not to seek criminal penalties reflects the advantages of applying these principles. Salomon’s cooperation [was] exemplary. It replaced top management, discharged the principal wrongdoers, fully cooperated in the Government investigation and took substantial steps to prevent recurrence of its misconduct.\textsuperscript{460}

Kidder Peabody’s cooperation with the prosecutors kept it out of two criminal prosecutions in the past decade. In the celebrated insider-trading criminal prosecutions in the late 1980s, the Kidder Peabody broker-dealer firm was not charged criminally, even though one of its high level officials,


\textsuperscript{459} See Sara E. Moss & Ira Lee Sorkin, You Can Protect Your Company From the Rogue Criminal, 6 CORP. LEGAL TIMES 10 (1996); see also [S.D.N.Y. United States Attorney] Otto Obermaier, Department of Justice And SEC Enter $290 Million Settlement With Salomon Brothers In Treasury Securities Case, Press Release (May 20, 1992):

With regard to the decision not to seek criminal charges against Salomon, Obermaier noted that Salomon had cooperated extensively in the investigation and had taken decisive and extraordinary actions to restructure its management to avoid future misconduct. The cooperation included providing detailed information concerning the firm’s own internal investigation, turning over documents and making employees available for interviews and testimony.

\textsuperscript{460} Obermaier, supra note 458, at C-11.
Marty Siegel, had conspired with Ivan Boesky and others in extensive, insider-trading and related “parking” crimes. The broker-dealer firm was allowed to resolve the matter by settling SEC civil or administrative enforcement actions. The principal reason for nonprosecution of the broker-dealer corporation was the willingness of the firm, and its then new corporate parent, General Electric Company, to cooperate in the government investigation and to overhaul its management and compliance procedures.

In 1995-1997, Kidder Peabody again escaped criminal prosecution when it disclosed to government regulators that Joseph Jett, one of its government bond traders, incurred and covered up $85 million in trading losses, and had caused the firm to book hundreds of millions of fictitious profits, by engaging in sham government bond stripping and reconstitution transactions for future delivery with the Federal Reserve Bank. Conduct of a comprehensive internal corporate investigation, complete cooperation with DOJ prosecutors and in the parallel SEC investigation, and quick dismissal of the miscreant bond trader by Kidder Peabody and its parent General Electric — as well as eventual sale of assets and liquidation of the broker-dealer firm — led the U.S. Attorney’s Office in the S.D.N.Y. not to criminally charge the firm. Indeed, ostensibly due to the complexity of


The decision by the United States Attorney [not to prosecute Kidder, Peabody] was based on four principal factors: Kidder’s full cooperation with the government’s investigation; Kidder’s entry into a consent judgment with the SEC in the SEC’s related investigation, which provides mechanisms to avoid the commission of securities violations in the future; structural, management and policy changes instituted at Kidder by Kidder’s new owner, the General Electric Company; and the negative effect that charges against the firm would have on Kidder’s thousands of innocent employees and the firm’s legitimate activities.


See Giuliani Press Release, supra note 461, at 3:

The United States Attorney [Rudolph W. Giuliani] explained that because G. E. decided at an early stage to cooperate fully with the Government, began institution of vigorous structural, management policy and trading reforms, and reached an appropriate agreement with the SEC, the public interest has been well served; at this point a prosecution of Kidder is unnecessary.


the underlying trading activities, the S.D.N.Y. U.S. Attorney’s Office did not criminally charge the trader, Joseph Jett, leaving to the SEC the enforcement task of litigating administrative disciplinary proceedings against Jett and his supervisors.465

The Prudential Securities “direct investments” case involved an alleged eleven-year selling practices fraud scheme involving the sale of approximately $8 billion of limited partnership interests in over 700 oil and gas, real estate and aircraft rental ventures. In a global civil and administrative settlement with the SEC, the NASD, and the States, and in related class actions and arbitrations, Prudential Securities repaid investors over a billion dollars.466 By cooperating with the S.D.N.Y. U.S. Attorney’s Office con-


In 1996, the “Big Six” accounting firm, Coopers & Lybrand entered into a pre-trial diversion agreement with the U.S. Attorney’s Office for the Central District of California in Los Angeles. Warin & Schwartz, supra note 456, at 126. A federal grand jury was investigating the role of Coopers & Lybrand in the business activities of former Arizona Governor J. Fife Symington, III. Id. at 126-27. The allegations being investigated focused upon whether a Coopers & Lybrand partner (since deceased) “received inside information concerning a state contract, concealed material errors and omissions in [Governor Symington’s] personal financial statements, knowingly made false statements to a federal grand jury, and withheld documents subpoenaed by the grand jury. Id. at 126-27. Governor Symington was convicted at jury trial in D. Arizona on several federal felony fraud and false statement charges. Id. at 126. The Coopers & Lybrand investigation was transferred to the U.S. Attorney’s Office for the Central District of California when the United States Attorney’s Office for the District of Arizona recused itself from the grand jury inquiry into the activities of the accounting/auditing firm. On the Symington Indictments, ARIZ. REPUBLIC, June 16, 1996, at A-1, available in 1996 WL 7715214. The Coopers & Lybrand pre-trial diversion agreement was not filed in court; it is strictly a contractual obligation between Coopers & Lybrand and the United States. Warin & Schwartz, supra note 456, at 127. The pre-trial diversion agreement contains the following, among other, provisions:

(i) It runs for 24 months commencing Sept. 20, 1996.

(ii) It provides nonprosecution only to the limited liability partnership, Coopers & Lybrand, not to any individuals.

(iii) The firm committed to provide restitution payments of $3,000,000 ($725,000 previously paid to the State of Arizona and $2,275,000 paid to the United States).

(iv) The firm accepted responsibility for its wrongdoing.

(v) The firm agreed to the retention of independent counsel to monitor compliance, and to the implementation of a formal ethics and integrity program.

(vi) The firm agreed not to violate any local, state or federal laws during the 24 month supervision period, and agreed to perform 3,000 hours of community service.

421
duct of a grand jury investigation and settling related SEC civil and administrative proceedings, Prudential Securities avoided criminal prosecution — and the concomitant direct and indirect collateral consequences — through

- The firm waived its right to indictment, any claim of double jeopardy, and the applicable statutes of limitations should the government choose to prosecute it for any breach of the diversion agreement.

- The government reserved the right to fine Coopers & Lybrand $100,000 for each breach of the diversion agreement for which it chooses not to prosecute the firm.

See [Central District of California U.S. Attorney] Nora M. Manella, Coopers & Lybrand Agrees to Settlement in Government Investigation of Arizona Governor and Bid-Rigging of State Contract, News Release (Sept. 19, 1996); see also Warin & Schwartz, supra note 456, at 127. U.S. Attorney Nora M. Manella explained that the basis for the prosecution deferral agreement were: "Coopers' exemplary conduct following notification of possible wrongdoing; its public acceptance of responsibility, its ongoing cooperation with investigators, its restitution payments, its agreement to perform community service, and its agreement to institute nationwide ethics training for its professionals," Warin & Schwartz, supra note 456, at 127; Manella News Release, supra at 2.

In the global civil and administrative settlement, Prudential Securities consented to (i) an SEC administrative cease and desist order, (ii) payment of a $10 million civil penalty to the U.S. Treasury, (iii) payment of a $5 million civil fine to the NASD, (iv) payment of $26 million in fines to the States ($500,000 each to 50 states plus Puerto Rico and the District of Columbia), (v) payment of $330 million into an “uncapped” court-ordered arbitration fund for the benefit of defrauded investors, (vi) appointment of former SEC Commissioner Irving M. Pollack as Claims Administrator to adopt a claims resolution process and to supervise distribution of the arbitration fund to defrauded investors, (vii) payment of all claims authorized by the Claims Administrator even if total claims ultimately exceeded the initial $330 million deposit, (viii) adoption of various remedial measures to improve the firm’s securities law compliance, and (ix) a court order mandating the firm’s compliance with a prior 1986 SEC order against the firm relating to branch office supervision.

In achieving the deferral of prosecution agreement with the S.D.N.Y. U.S. Attorney’s Office, Prudential Securities was required (i) to accept the government’s filing of a criminal complaint alleging securities fraud, (ii) to acknowledge extensive wrongdoing, (iii) to pay an additional $330 million into the SEC claims resolution fund, (iv) to install an independent “ombudsman” to receive allegations of misconduct by any PSI employee and to file quarterly reports with the U.S. Attorney of any such allegations, (v) to retain an independent law firm to review PSI’s regulatory and compliance policies and procedures, and (vi) to provide full and truthful cooperation in any criminal investigations, including voluntarily providing any requested records and unlimited access to governmental authorities to PSI’s facilities, documents and employees. The prosecution deferral agreement ran for three years; on October 24, 1997, finding that PSI had complied with all the terms of the agreement, the criminal complaint was dismissed, and Prudential Securities thus avoided all criminal exposure for the underlying activity.

S.D.N.Y. U.S. Attorney Mary Jo White listed the following factors as the reasons why the government was willing to enter into the deferred prosecution agreement with Prudential Securities:

- “PSI’s payment of an additional $330 million to compensate innocent investors and its prior settlement with the SEC in October 1993, which included its paying an initial $330 million into a fund established to compensate victims and its agreeing to enhanced compliance procedures;”

---

467 See Warin & Schwartz, supra note 456, at 125-26.
468 See Mary Jo White, Press Release (Oct. 24, 1997) (concerning Prudential Securities). Prudential Securities Group and The Prudential Insurance Company, as parent companies of PSI, also had to agree to take appropriate steps to ensure PSI’s compliance with the prosecution deferral agreement.
• PSI's cooperation with the United States Attorney’s Office during the investigation, including its acknowledgment of its own wrongdoing;
• “the concern that an indictment would cause crippling collateral consequences to thousands of innocent employees and investors;” and
• “the fact that the core of the criminal conduct occurred in the 1980s and the departure from PSI of the individuals believed to be responsible for the wrongful acts.”

Thus, the Salomon Brothers, Kidder, Peabody, and Prudential Securities cases demonstrate that corporate cooperation with prosecutors may well best serve the interests of public corporations and their shareholders.469 On

469 Id. at 4. Ms. White added:

The public interest is well served by this agreement. Upon conviction, a corporation cannot be sentenced to jail but only to pay restitution, fines and adopt measures aimed at enhancing internal controls to prevent and detect future wrongdoing. This agreement imposes such sanctions. It will ensure restitution of over $650 million to defrauded investors and cause PSI, through the appointment of an independent ombudsman and other measures to adhere to the highest ethical and legal standards in its dealings with customers and regulatory authorities. If PSI fulfills all of its obligations under the agreement, further prosecution will be unnecessary.

Another example where corporate cooperation with the prosecutors led to a decision not to pursue corporate criminal charges is the Sequa Corp./Chromalloy Gas Turbine Corp. matter. The S.D.N.Y. U.S. Attorney's Office in 1993 determined not to criminally prosecute Sequa Corporation and its wholly-owned subsidiary, Chromalloy Gas Turbine Corporation, for alleged fraud in the manufacture and repair of airplane engine parts at Chromalloy's Research and Technology Division in Orangeburg, New York. See Mary Jo White, Press Release (June 24, 1993) (concerning Sequa/Chromalloy). The corporate nonprosecution decision by the U.S. Attorney was based upon four principal factors:

(i) Sequa's cooperation with the Government's investigation.
(ii) Sequa's entry into a civil/administrative consent order with the Federal Aviation Administration. (The FAA Consent Order required Sequa to make a $5 million remedial payment, and to agree to cease repair of airplane engine parts at Chromalloy’s Orangeburg Plant until the FAA approved enhanced plant compliance and inspection systems, policies and procedures.)
(iii) Structural, management, and policy changes instituted at Chromalloy by Sequa. (Sequa had conducted a timely internal corporate investigation, and thereafter made extensive structural, management, and policy changes to correct the perceived violations and to prevent their recurrence.)
(iv) The negative effect including severe and unintended economic impact that criminal charges against Chromalloy or Sequa would have on Sequa’s thousands of innocent employees, customers, and suppliers and on the firm’s legitimate activities.

See White Press Release, supra at 1-2.

As part of the nonprosecution agreement, Sequa and Chromalloy were required to “fund such scientific testing and expert analysis of airplane engine parts and such expert testimony regarding that testing and analysis as the United States Attorney’s Office deems appropriate in an amount not to exceed $5 million.” Id. at 2-3; see generally Jed S. Rakoff, Corporate Indictment and the Guidelines, N.Y.L.J., Jan. 13, 1994, at 3 (discussing Sequa’s cooperation with the government’s investigation); Jed S. Rakoff, Four Postulates of White Collar Practice, N.Y.L.J., Nov. 12, 1993, at 3; Warin & Schwartz, supra note 456, at 125; Moss & Sorkin, supra note 459, at 10-11; You Can Protect Your Company From the Rogue Criminal, CORP. LEGAL TIMES, Feb. 1996, at 10-11; David M. Zornow, Should Companies Turn Themselves In? Programs to Address Corporate Criminal Liability, N.Y.L.J., Oct. 31, 1994, 424
the other hand, failures to choose the cooperative route led to corporate disasters in the E.F. Hutton, Drexel Burnham, Consolidated Edison, Cooper Companies, and Daiwa Bank cases.

In 1985, E.F. Hutton & Company, Inc., then one of the largest, most prestigious full-service, publicly-held broker-dealer firms in the world pled guilty to 2,000 felony counts of federal mail and wire fraud violations as a result of a massive fraud in which E.F. Hutton allegedly defrauded a host of banks. The DOJ charged that E.F. Hutton's nationwide cash management program encompassed a massive "check-kiting" scheme and other fraudulent artifices designed to allow the broker-dealer firm to profit illegally on "float" in its checking accounts, thereby creating millions of dollars of illegal income. E.F. Hutton chose "to defend" vigorously the extensive underlying grand jury investigation, rather than "to cooperate" at the start in the prosecution's attempt to build a federal criminal case. Many high-level E.F. Hutton executives pled the Fifth Amendment to avoid testifying before the federal grand jury. The DOJ granted formal immunity to a number of mid-level E.F. Hutton branch managers, and accumulated sufficient evidence before the grand jury to support a major criminal prosecution.

Eventually E.F. Hutton agreed to plead guilty to 2,000 felony mail and wire fraud counts, and to extensive civil and administrative penalties, fines, and related sanctions, in return for the DOJ's agreement not to prosecute criminally any E.F. Hutton executives or employees. As a part of the plea bargain, the broker-dealer firm paid a $2 million fine, agreed to a civil "bank fraud" injunction, and consented to pay restitution to victims of the fraud.
The E.F. Hutton firm teetered on the brink of bankruptcy as a result of the criminal check-kiting guilty pleas and the implications of a potpourri of parallel proceedings, and extensive adverse publicity, generated thereby. The broker-dealer firm eventually expired when it was acquired by Shearson Lehman/American Express in 1987. The E.F. Hutton case epit}-
Defending SEC & DOJ FCPA Investigations

mizes the dangers to a corporation involved in "parallel proceedings" at the federal, state and SRO levels.

In September 1989, Drexel Burnham Lambert Incorporated pled guilty to six felony counts charging securities and mail fraud arising out of criminal arrangements between Michael R. Milken, the head of Drexel's High Yield and Convertible Bond Department, and others. Drexel paid in excess of $300 million in criminal fines and penalties, in addition to $350 million in disgorgement and civil penalties that the firm paid in settlement of a related SEC civil injunctive and penalty action. Both the Drexel firm

Even after E.F. Hutton was acquired by Shearson Lehman/American Express, the resulting firm, had to deal with other criminal problems arising from E.F. Hutton's prior activities. For example, there was a money-laundering case centered in E.F. Hutton's Providence, Rhode Island office that led to a criminal plea by the firm and former employees, and an SEC administrative disciplinary consent order against the firm and several employees. See United States v. E.F. Hutton Co., Cr. No. 88-036 (D. R. I., April 15, 1988); In the Matter of E.F. Hutton & Co., Inc. & John A. Pliakas, SEC 1934 Act Release No. 25054 (Oct. 22, 1987).


and its superstar "junk bond king," Michael Milken, resisted the DOJ's grand jury probe for almost two years before they finally succumbed to plea bargain dispositions of the criminal cases. Like the E.F. Hutton case, the


Michael Milken's SEC problems continued long after his criminal, civil and administrative DOJ and SEC settlements in 1991. For example, in February 1998, Milken consented to an SEC injunction in a case where the SEC alleged he violated the March 11, 1991 SEC administrative "bar order" that precluded him from associating with a broker-dealer. Milken, allegedly acting through McGroup, a company he owns and controlled, performed securities brokerage activities for compensation in connection with two corporate transactions including a 1995 transaction between MCI Communications Corporation and The News Corpora-
adverse publicity and direct and indirect collateral consequences of the
criminal plea and related SEC civil settlements, as well as a potpourri of
private damages actions, forced the Drexel firm out of business. But un-
like E.F. Hutton, the Drexel firm did not merge with another large broker-
deraler; rather it was liquidated in bankruptcy proceedings. The
Drexel/Milken prosecutions, coupled with a host of related criminal prose-
cutions of individuals and entities that took part in various illegal activities
of Drexel and Milken, will historically be labeled “Wall Street’s Scandals
of the 1980s.” Many observers believe that if the Drexel firm had cho-

478 For interesting contrasting accounts of the demise of the Drexel firm, see DAN G.
STONE, APRIL FOOLS: AN INSIDER’S ACCOUNT OF THE RISE AND COLLAPSE OF DREXEL
BURNHAM (1991); DANIEL R. FISCHEL, PAYBACK: THE CONSPIRACY TO DESTROY MICHAEL
MILKEN AND HIS FINANCIAL REVOLUTION (1995); JESSE KORNBLUTH, HIGHLY CONFIDENT:
THE CRIME AND PUNISHMENT OF MICHAEL MILKEN (1992); DOUGLAS FRANTZ, LEVINE & CO.: 
WALL STREET’S INSIDER TRADING SCANDAL (1987); MARK STEVENS, THE INSIDERS: 
THE TRUTH BEHIND THE SCANDAL ROCKING WALL STREET (1987); DENNIS B. LEVINE, INSIDE 
OUT: AN INSIDER’S ACCOUNT OF WALL STREET (1991); JAMES STEWART, DEN OF THIEVES (1992); 

479 See, e.g., In re The Drexel Burnham Lambert Group, Inc., 130 B.R. 910 (Bankr.

480 Ivan Boesky, who was the principal government witness in the Drexel/Milken cases,
cooperated with the government prosecutors from the start. He consented to an SEC civil
injunctive order, related SEC administrative disciplinary sanctions, and pled guilty to a tech-
nical criminal “parking” conspiracy charge. The criminal charge related to filing a false
Schedule 13D in connection with securities of Fischback Corporation. See United States v.
Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,991 (S.D.N.Y. Nov. 14, 1986); Ivan F. Boe-
administrative disciplinary bar order); In re Seemala Corp., Exchange Act Release No. 34-
24,089, 1987 SEC LEXIS 2598 (Feb. 12, 1987) (withdrawal of SEC broker-dealer registra-
tion of Boesky’s firm, Seemala Corp.); see also United States v. Boesky, [1989 Transfer 
Rule 35 sentence reduction motion).

Five principals of the Princeton/Newport Partners hedge fund and a related broker-dealer
firm, and a Drexel Burnham bond trader (Bruce Newman) were indicted for (i) conspiracy to
file false tax returns, to commit securities, mail and wire fraud, and to create false broker-
dealer books and records, (ii) RICO conspiracy, and (iii) 32 substantive counts of mail and
sen to cooperate with government prosecutors at the start, the firm would still be alive and prospering.

In October 1994, in mid-trial, Consolidated Edison Company of New York, Inc. pled guilty to federal environmental reporting and false statement offenses arising from the corporation’s deliberate concealment of the release of approximately 200 pounds of asbestos in the wake of a steam manhole explosion in the Gramercy Park section of Manhattan on Aug. 19, 1989.\footnote{See [S.D.N.Y. U.S. Attorney] Mary Jo White, Press Release (Dec. 16, 1993).} Consolidated Edison and two of its executives, Constantine J. Papakrasas and Philip B. McGivney, had been indicted in the S.D.N.Y. in December 1993 on charges that the company did not truthfully and promptly report to appropriate federal, state and city governmental agencies the amount of asbestos released into the environment as a result of the accident.\footnote{See [S.D.N.Y. U.S. Attorney] Mary Jo White, Press Release (Apr. 21, 1995).} The indictment alleged that federal law required Consolidated Edison “to report the release of more than a pound of asbestos into the environment to an appropriate agency of the U.S. Government immediately upon knowledge of the release,” but that the defendants “concealed the asbestos release in order to save the company the significant expense of le-

wire fraud, involving allegations that Princeton/Newport entered into sham transactions with Drexel Burnham and Merrill Lynch for the purpose of creating “false, fictitious and bogus long-term capital gains and short-term capital losses, through rigged and prearranged securi-

\text{t}ies trading . . . [which] were then to be reported on the partnership returns of “Princeton/

Newport entities.” The indictment further alleged that “to protect the aid of Drexel in accomplishing these illicit goals” Princeton/Newport carried on its books securities positions secretly held for Drexel’s benefit and executed transactions “in the manipulation and attempted manipulation of the price of certain securities” that “hid and concealed Drexel’s role in such manipulative acts.” The indictment sought criminal RICO forfeiture of all of Princeton/Newport’s assets. The prosecution obtained a RICO pretrial asset freeze, the first time such draconian action has been taken in a securities/tax prosecution. At jury trial, all the defendants were convicted, and RICO forfeitures — albeit in much lower amounts than the prosecution sought — were ordered. However, the trial judge imposed minimal jail terms, and, indeed, rebuked the government for utilizing RICO charges in the prosecution. See Asides — RICO Gets Mauled, \textit{WALL ST. J.}, Nov. 7, 1989, at A30; Laurie P. Cohen, \textit{Princeton Judge Imposes Terms Up to 6 Months — Light Sentences Are Blow To Use of RICO Statute Against Securities Aide}, \textit{WALL ST. J.}, Nov. 7, 1989, at A3. Eventually most of the convictions in the Princeton/Newport case were reversed on appeal. Indeed, on the few convictions sustained on appeal, a Rule 35 motion was granted, eliminating the jail terms imposed. \textit{See United States v. Regan}, 713 F. Supp. 629 (S.D.N.Y. 1988); \textit{United States v. Regan}, 706 F. Supp. 1102 (S.D.N.Y. 1989) (court denies motion to dismiss indictment, but does strike “intangible rights” mail fraud allegations); United States v. Regan, 699 F. Supp. 36 (S.D.N.Y. 1989); \textit{United States v. Regan}, 858 F.2d 115 (2d. Cir. 1988) (court sustaining RICO pretrial asset freeze); \textit{United States v. Regan}, 937 F.2d 823 (2d Cir. 1991); \textit{United States v. Regan}, 946 F.2d 188 (2d Cir. 1991). In a related case, Lisa Jones, a former assistant bond trader under Newberg and Milken at the Drexel firm, was convicted for perjury in her grand jury testimony in the Princeton/Newport case. \textit{See United States v. Jones}, 900 F.2d 512 (2d Cir. 1989) (affirming perjury conviction).
gally-mandated asbestos cleanup procedures, and that Consolidated Edison reported the release only after it became public that the residents of one building spewed with contaminated debris had conducted tests and found asbestos in the building." The indictment further charged "that the defendants made a false statement to the Environmental Protection Agency ... and that they failed immediately to notify, and then filed an untimely and misleading notification with the National Response Center of the Coast Guard, the agency responsible for receiving notifications of hazardous substance releases and relaying those notifications to appropriate government agencies." 

In addition to imposition against the company of a maximum $2,000,000 criminal fine and corporate probation for three years, S.D.N.Y. Judge John S. Martin, as part of the sentence against the company, appointed a court-supervised monitor to surveil Consolidated Edison to insure that the company will "comply with environmental rules, regulations and laws of the United States." In imposing sentence, Judge Martin stated that probation and appointment of a monitor were necessary because of "many disturbing things" including that company employees knew about the asbestos release but the "corporate culture" at Consolidated Edison encouraged the attitude among company employees that they "better not tell the bad news." Judge Martin added, "I want to make sure that attitude has changed."

U.S. Attorney Mary Jo White stated: "The sentence in this case, including the appointment of a monitor to make certain that Consolidated Edison observes all environmental laws, sends a clear message to the regulated community that corporations like Consolidated Edison, which commit environmental crimes and fail to take appropriate action after those crimes are discovered, will be held accountable."

The detriments to a public company for failing to cooperate with a DOJ/grand jury inquiry and a parallel SEC enforcement investigation can be no better illustrated than by the Cooper Companies case in the early 1990s. In November 1992, a S.D.N.Y. grand jury indicted the Cooper Companies, Inc. and its co-chairman Gary Singer on conspiracy, Travel Act, mail and wire fraud and related federal felony charges (including RICO and money-laundering crimes against Gary Singer), and the SEC

1 Id. at 2.
2 Id. at 3-4.
3 White Press Release, supra note 481, at 1-2. The monitor's corporate surveillance activities have apparently turned up a host of additional problems for the company including incidents involving "pollution spills, cover-ups and internal backbiting," including "a PCB leak at a transformer shop in Queens, a fire at a generating station in Manhattan, and a parking lot full of defective hydraulic trucks in nearby Westchester County." See Dean Starkman, Law: Corporate Monitors Form a New Industry, WALL ST. J., Dec. 1, 1977.
4 Id. at 2. Defendant Papakrasas, who pled guilty, was fined $5,000.
simultaneously filed a civil injunctive complaint charging the Cooper Companies, Gary Singer, and other senior officers of the company with securities fraud. The DOJ criminal prosecution and the companion SEC civil enforcement action encompassed three distinct frauds. In the first scheme, Gary Singer allegedly bribed a mutual fund analyst, G. Albert Griggs, Jr. who advised, and managed the portfolio of several mutual funds, in order to obtain inside information about the funds’ junk bond purchases, and then engaged in “front-running” trading ahead of the funds in personal family and company accounts. A friend of Griggs, John Collins, served as an intermediary, and assisted in furthering the scheme. Singer thereafter caused the high-yield bonds to be sold at inflated prices to the mutual funds and diverted Cooper Companies’ corporate funds representing a portion of the trading profits to Griggs and Collins. The second fraud involved a manipulation by Gary Singer and the Cooper Companies of the trading price of an issue of Cooper Companies’ 10-5/8% Convertible Subordinated Reset Debentures to avoid a June 1991 interest rate Reset. The manipulation was accomplished through massive purchases of the Debentures in accounts of the Cooper Companies. The third fraud encompassed a scheme whereby Gary Singer caused high-yield bonds to be traded between Cooper Companies’ account and accounts controlled by his wife and aunt in a manner whereby Singer sold bonds that had increased in value from the company’s portfolio to Singer family accounts at below market prices, thereby fraudulently transferring profits of over $560,000 from the company to Singer and his family.

The company was indicted, and charged with, among others, mail and wire fraud crimes, because prosecutors believed that company officials did not cooperate with the government’s grand jury investigation. The company and Gary Singer continued to resist the government through a criminal jury trial in January 1994 at which both the company and Gary Singer were convicted on multiple felony counts. Gary Singer appealed his criminal conviction and continued to litigate the parallel SEC civil injunctive and enforcement action. In July 1994, Cooper Companies was sentenced to pay a $1.8 million corporate criminal fine and to pay $1.3 million in restitution. In imposing the fine, the District Court denied the Company’s motion for a downward departure under the Sentencing Guidelines, finding that the Company had failed to take prompt action against the corporate officers re-


490 Gary Singer was convicted on 21 felony counts, including RICO, money-laundering, and mail and wire fraud. The Company was convicted on seven mail and wire fraud counts, and acquitted on the remaining charges against it.
sponsible for the criminal schemes — even while they were refusing to cooperate with either the government’s investigation or with the company’s own internal corporate inquiry. At the corporate sentencing, S.D.N.Y. U.S. Attorney Mary Jo White warned: “The firm sentence in this case sends a clear message that corporations like the Cooper Companies, Inc., who do little, if anything, to rectify the wrongdoings of their employees, and who fail to take appropriate action after those crimes are discovered, will be held accountable.”

In December 1994, the company negotiated a global settlement with the DOJ and the SEC, resolving all the governmental civil and criminal charges outstanding against it. The SEC in December 1995 issued a Section 21(a) Public Report of Investigation criticizing the directors of Cooper Companies for failing to adequately deal with the fraudulent conduct of management of the company. The SEC found the following facts:

1. The board of directors began to learn about the fraudulent schemes directed by Gary Singer in January through March 1992 when the Company was informed (in January) that the SEC and (in March) that the S.D.N.Y. U.S. Attorney’s Office had commenced parallel investigations of the Company and its co-chairman. In late January 1992 the Company filed a Form 10K with the SEC stating that Cooper Companies was “cooperating fully with the Commission’s investigation.”

2. Both CEO Gary Singer, and his brother Steven Singer who was COO, in February 1992 pled the Fifth Amendment to avoid giving testimony in the SEC investigation. In March 1992, after learning of the DOJ/grand jury inquiry, the Company’s board of directors authorized an internal corporate investigation by independent outside counsel. The directors were led to believe that both Singer brothers would consent to interviews by outside counsel in the internal inquiry. But both Singer brothers, on Fifth Amendment grounds, thereafter refused to be interviewed in the internal inquiry. In early April 1992, in a preliminary report generated in the internal inquiry the directors were informed of trading in high-yield bonds between Company accounts and Singer family ac-
counts, which generated over $560,000 profits to the Singer brothers management team. However, the Board of Directors failed to take any action to reclaim the more than $560,000 diverted from the Company by Gary Singer.

3. On May 21, 1992, the SEC and S.D.N.Y. U.S. Attorney’s Office publicly filed civil and criminal charges against Griggs and Collins, two co-conspirators with Gary Singer, based on the fraudulent high-yield bond front-running scheme with Cooper Companies. Both Griggs and Collins pled guilty, and were cooperating in the continuing DOJ/Grand Jury and SEC investigations. At the criminal plea hearing, Griggs publicly identified Gary Singer as the person at the Company with whom he had engaged in the illegal frontrunning scheme. In late May 1992 the Company issued a press release, drafted by Steven Singer, stating:

“The Company, including its Board of Directors and legal counsel, is reviewing the allegations of the U.S. Attorney for the Southern District of New York and the SEC as regards G. Albert Griggs and John Collins. The Company denies any wrongdoing and is unaware of any wrongdoing on the part of its officers or employees.”

The SEC found this press release to be false and misleading, because before it was issued the directors had already been informed of at least one instance of wrongdoing and the assertions of their Fifth Amendment privileges by both the CEO and the COO. Nonetheless, the directors let the press release stand and took no other action until three months later, when the Board placed CEO Gary Singer on temporary leave of absence. Even then, Gary Singer continued to be paid and to have an office on Company premises (although a Board resolution specified that the CEO relocate his office). Gary Singer continued to serve as a director, and COO Steven Singer was promoted to CEO.

4. At a July 28, 1992 Board meeting, the directors were advised that outside counsel conducting the internal corporate investigation was “not expected to progress further” with the internal inquiry in view of his inability to interview Gary and Steven Singer, Griggs and Collins.

The SEC’s conclusion in the Cooper Companies Section 21(a) Report, must be reflected upon by any public company’s directors, and legal counsel to the company, in determining what approach to take vis-a-vis DOJ and/or SEC in a serious investigation of corporate wrongdoing involving high-level management:

“The Commission considers it essential for board members to more aggressively to fulfill their responsibilities to oversee the conduct and performance of management and to ensure that the company’s public statements are candid and complete. The Commission has long viewed the issue of corporate governance and the fiduciary obligations of members of management and the boards of directors of public companies to their investors as an issue of paramount importance to the integrity and soundness of our capital markets. These obligations are particularly acute where potential violations of the federal securities laws involving self-dealing and fraud by management are called to the attention of the board of directors.” [Footnote omitted.]

In this case, Cooper’s Board failed to satisfy its obligations when confronted with serious indications of management fraud. After the Board learned that a member of senior management had concealed fraudulent self-dealing transactions and thereby caused the company’s outstanding reports to be inac-
Defending SEC & DOJ FCPA Investigations

The draconian punishment that can be foisted upon a corporation that fails to self-report corporate crime and fails to cooperate in a government investigation of corporate misconduct is also highlighted by the Daiwa Bank prosecution in 1995-96. In November 1995, Daiwa Bank was indicted in S.D.N.Y. in a twenty-four-count federal indictment alleging conspiracy, mail and wire fraud, obstructing an examination of a financial institution, falsification of bank records, and misprision of felonies by failing to disclose federal crimes. The prosecution of Daiwa Bank centered upon fraudulent trading activity by Toshihide Iguchi, an Executive Vice President and trader in the Bank’s New York Branch. The fraudulent trading generated approximately $1.1 billion in losses. The concealment of such losses through falsification of the bank’s books and records, and the concealment by the Bank’s senior management of Iguchi’s crimes, once discovered, brought investigations from U.S. bank regulators and other state and federal governmental departments and agencies.

Although Daiwa senior management learned of Iguchi’s crimes in mid-July 1995, the Bank concealed the crimes and did not report them to U.S. authorities until almost two months later in September 1995.

494 Id. at 86,065. For other enforcement actions that the SEC pursued in the Cooper Companies case, see SEC v. Russo, 25 Sec. Reg. & L. Rep. (BNA) 709 (S.D.N.Y. May 11, 1993); In re Russo, SEC Ad. Pro. File No. 3-8573 (Dec. 12, 1993).
496 Id.; see also id. at 1-2:

The charges arise out of the unauthorized sale of securities from Daiwa’s custody account, including the sale of more than $375 million in customer securities, by Toshihide Iguchi, a former Executive Vice President at the New York Branch, which were used to cover trading losses incurred by Iguchi; Iguchi’s attempts to cover-up those losses and unauthorized sales, which by 1995 had grown to more than $1.1 billion; and Daiwa’s attempts to continue the cover-up after learning of Iguchi’s illegal conduct; and Daiwa’s alleged repeated attempts, dating back to at least 1988, to obstruct the Board of Governors of the federal Reserve System and the New York State Banking Department.

497 Id. at 2:

According to the Indictment, Daiwa learned in mid-July 1995 that Iguchi had lost more than $1.1 billion through unauthorized trading in United States government securities, and the sale of securities belonging to Daiwa’s customers to conceal those losses. Rather than disclose Iguchi’s crimes to law enforcement authorities, as Daiwa was required by law to do, Daiwa allegedly attempted to conceal the losses and missing securities by, among other things: making extensive false entries in its books and records to hide the losses and preclude law enforcement action in the United States; removing the records of these crimes from Daiwa’s New York offices and secreting them in the
charges in the indictment relating to the Bank’s cover-up after senior management learned of Iguchi’s crimes included: (i) a charge that Daiwa, acting through senior Bank officials, both in New York and Japan, conspired to defraud the Federal Reserve Board, to make false statements to the Federal Reserve Board, and to falsify the Bank’s books and records to prevent discovery of the $1.1 billion trading loss; (ii) misprision of felonies based on Daiwa’s failure to report and affirmative concealment of federal crimes; and (iii) several counts of falsifying bank books and records. The indictment contained other charges relating to (i) Iguchi’s defrauding the Bank’s customers in the unauthorized sales of $377 million of customers’ securities; and (ii) the Bank’s conspiring to defraud the Federal Reserve Board during the period 1988 through 1995 by providing false information about the location and supervision of its traders.

A draconian collateral consequence of the indictment of Daiwa Bank was a parallel joint administrative order by several state and federal bank regulatory agencies ordering the Bank and one of its affiliates to cease doing business in the United States, thus forcing the Bank and its affiliates to sell all their U.S. assets, and to close down all their U.S. branches and other operations. The state/federal administrative order was issued jointly by the Federal Reserve Board, the Federal Deposit Insurance Corporation, the New York State Banking Department, and bank regulators in five additional states — California, Illinois, Massachusetts, Florida and Georgia. Daiwa was also penalized by Japan’s Ministry of Finance, and was subjected to an onerous monthly inspection program by the Bank of Japan.

When the indictment was returned, S.D.N.Y: U.S. Attorney Mary Jo White emphasized:

Daiwa was indicted today, not only because its former officer, Toshihide Iguchi, committed serious crimes, but because, as charged in the indictment, Daiwa and a number of its highest senior officials themselves committed crimes as they attempted to cover-up other crimes. The message to the financial community from today’s indictment should be clear and unambiguous: law enforcement will not tolerate financial institutions who unlawfully attempt to mislead regulatory authorities and cover up criminal misconduct by their employees. The law requires, and law enforcement expects, that all companies

apartment of the manager of Daiwa’s New York Branch; sending false account information to its customers; filing a false report with the Federal Reserve Board; and otherwise attempting to prevent law enforcement officials from discovering these crimes.

498 Id.

499 Id. at 3. The indictment alleged that Daiwa temporarily relocated traders from one location to another and disguised a trading room as a storage room prior to a bank examination in order to deceive banking authorities. The Bank was also charged with one count of obstructing an examination of a financial institution in connection with that conduct.


501 Id.
will abide by the law, all regulatory requirements, and the highest standards of corporate citizenship.\footnote{White Press Release, supra note 495, at 3.}

In addition to bringing criminal charges against the rogue trader, Toshihide Iguchi,\footnote{In October 1995, Iguchi pled guilty to money-laundering, embezzlement and forfeiture charges, as well as to fraud charges alleging that he schemed with other Daiwa traders to engage in unauthorized trading and conspired to engage in unauthorized trading and conspired with Daiwa's senior management to conceal the ensuing losses from federal regulators. See Daiwa V.P. Pleads Guilty to Charges He Conspired to Conceal Massive Losses, 27 Sec. Reg. & Law Rep. (BNA) 1770 (S.D.N.Y. Oct. 19, 1995).} a criminal complaint was filed charging Masahiro Tsuda, a former General Manager of Daiwa’s New York Branch, with one count of conspiracy to deceive the Federal Reserve Board by concealing the $1.1 billion loss, making false statements to the Federal Reserve Board, and making false entries in the Bank’s books and records; and one count of misprision of a felony.\footnote{United States v. The Daiwa Bank, Ltd., 95 Cr. 947 (KMW) (S.D.N.Y. Feb. 28, 1996) (guilty plea); see also [S.D.N.Y. U.S. Attorney] Mary Jo White, Press Release at 1-2 (Feb. 28, 1996): “Daiwa pled guilty to two counts of conspiring to defraud the United States and the Federal Reserve Bank, one count of misprison of felony, ten counts of falsifying bank books and records, two counts of wire fraud, and one count of obstructing a bank examination.” The Bank’s guilty pleas related to four separate incidents, id. at 2-3:

(i) “First, from 1984 through 1995, acting through Toshihide Iguchi, a former Executive Vice President of Daiwa’s New York Branch, sold without authorization billions of dollars worth of securities that Daiwa held in custody for its customers. As of July 1995, when Iguchi disclosed his crimes to Daiwa, approximately $1.1 billion was missing from Daiwa’s custody account, $377 million of which were owned by or held in trust for Daiwa’s customers. Iguchi concealed his theft of customer securities by falsifying Daiwa’s books and records, which in turn caused Daiwa to send false account statements to its customers. In connection with these crimes, Daiwa has pled guilty to five counts of falsifying bank books and records and two counts of wire fraud.”

(ii) “Second, Daiwa obstructed examinations by the Board of Governors of the federal Reserve System (the “Federal Reserve”) and lied to the Federal Reserve about Iguchi’s role in securities trading at the Branch. During the course of regulatory exams, including a federal Reserve exam in 1992, Daiwa temporarily relocated its traders from its downtown office, where they were supervised by Iguchi, to its midtown office and disguised the trading room downtown to make it look like a storage room.

“In November 1993, Daiwa also falsely stated to the Federal Reserve that Iguchi would no longer supervise the Branch’s securities traders when, in fact, as Daiwa management knew, Iguchi continued to supervise the trading until September 1995. In connection with these crimes, Daiwa has pled guilty to one count of conspiring to defraud the Federal Reserve and one count of obstructing an examination of a financial institution.”}

Daiwa Bank pled guilty in February 1996 to 16 federal felonies, paid a $340 million fine — believed to be the largest fine ever paid in a federal criminal case, and made full restitution to all the customer victims of Iguchi’s fraudulent trading.\footnote{White Press Release, supra note 495, at 4. Tsuda pled guilty in April 1996 to the conspiracy count. See Frances A. McMorris, Law: Ex-Daiwa Official Pleads Guilty In Failure to Disclose Trade Losses, WALL ST. J., Apr. 5, 1996, at B-6; see also United States v. Tsuda, 95 Cr. 01118 (S.D.N.Y. Nov. 2, 1995).} At sentencing, in a written allocution, Daiwa
admitted that the Bank kept the Iguchi trading losses secret from U.S. regulatory and governmental authorities from July 24, 1995 to September 18, 1995 by, among other things, creating false internal books and records relating to Iguchi's trading losses and the securities misappropriated by Iguchi, in violation of Daiwa's legal duty to keep and maintain accurate books and records. Daiwa explained that it intended to make full regulatory, governmental and public disclosure in due course, but the complexity of Iguchi's schemes coupled with advice from the Japanese Ministry of Finance caused disclosure to be delayed until September 18, 1995:

Daiwa's failure to make full and prompt disclosure to the Federal Reserve was due, in part, to the complexity and duration of Iguchi's scheme, the details of which Daiwa was still trying to unravel at the time of its disclosure to the authorities, and to grave concerns regarding the impact that reporting of the losses at the time would have on the Japanese economy, as expressed to Daiwa on August 8, 1995, by the Japanese Ministry of Finance (the "MOF"). Senior management of Daiwa also wished to announce the losses at a time when it could demonstrate its continuing financial stability by writing off the losses at one time. The MOF has the responsibility for overseeing Japanese financial policy and for safeguarding the Japanese financial system. Notwithstanding the fact that the incident had occurred in the U.S., because of a crisis that was then threatening the international reputation of the Japanese financial system, the MOF gave priority to the convenience of the Japanese government and implied that it would be the absolutely worst timing if the incident were to come out in September. MOF's comments reinforced Daiwa's own business decision to delay disclosure, which was in violation of Daiwa's duty to notify the authorities of the losses under U.S. banking regulations.

At the sentencing hearing, S.D.N.Y. Assistant U.S. Attorney Reid M. Figel stated:

(iii) "Third, Daiwa actively concealed Iguchi's crimes and the attending loss from United States regulators, from its customers, and from the public. For two months after Iguchi confessed to the bank in July 1995, Daiwa committed numerous crimes in its effort to hide these losses. In particular, Daiwa made extensive false entries in its books and records, prepared and sent false account statements, filed a false report with the Federal Reserve, explored plans to hide the loss permanently by moving it off-shore, secretly replaced the missing $377 million of customer securities, and engaged in a fictitious transfer of $600 million worth of non-existent securities. In connection with this conduct, Daiwa has pled guilty to one count of conspiring to defraud the Federal Reserve, one count of misprision of felony, and five counts of false entries in bank books and records."

(iv) "Fourth, Daiwa has admitted committing similar crimes in connection with trading losses incurred by its wholly-owned subsidiary, Daiwa Bank Trust Company. Specifically, Daiwa admitted that from 1984 through 1987 it concealed approximately $97 million in trading losses at Daiwa Trust by transferring the losses to an off-shore entity, falsifying Daiwa Trust's books and records, and making false and misleading statements to bank regulators."

Daiwa Allocution, at 3 (Feb. 27, 1996) (Submitted pursuant to Fed. R. Crim. P. 11(e)(6)).

Daiwa Allocution, at 4; see also Brian Bremner et al., The Daiwa Coverup will Backfire on the Banks: MOF's Withholding of the Facts Enrages the U.S. — and Damages Credibility Worldwide, BUS. WEEK, Oct. 23, 1995, at 46.
[I]f Iguchi's crimes were all that were involved in this case, and had Daiwa reported timely those crimes, it is unlikely Daiwa would have been charged at all.

A primary factor leading to Daiwa's indictment and to its ultimate plea of guilty was the conduct of Daiwa's management, not the conduct of its faithless traders. Daiwa was indicted in this case because of the knowing, intentional, and fundamentally unacceptable response of Daiwa's management to the crimes committed by its employees. . . .

. . .

We hope that Daiwa's plea to this [misprision] count will serve as a stark reminder to the corporate community, and particularly regulated entities that have an affirmative duty to disclose material events, of their need to comply scrupulously with their disclosure obligations, and that the failure to make timely disclosure, coupled with attempts at concealment, constitutes a violation of federal criminal law.

The fine of this magnitude [$340 million] is justified, in part, because Daiwa has steadfastly refused to provide any meaningful cooperation in the investigation of this matter. While providing cooperation is not required by the law, the government routinely rewards corporations that provide timely and genuine cooperation to the government in investigating the criminal conduct of its employees. Thus, although Daiwa insured that none of its customers suffered any losses as a result of its crimes, and it should be commended for that effort, Daiwa's serious crimes and its failure at the time of the disclosure of Iguchi's losses . . . to provide any meaningful cooperation to the government in its investigation of the Iguchi-related matter further supports the imposition of the fine in this case. It is because of Daiwa's failure to obey the laws of the United States, that Daiwa merits the harsh punishment that will be imposed today. 508

After Daiwa Bank's guilty plea, S.D.N.Y. U.S. Attorney Mary Jo White stated

i. that her office made many efforts to obtain the bank's cooperation in the criminal investigation, "but no meaningful cooperation was ever given."509

ii. "These corporate crimes represent companies at their highest levels acting at their worst."510

iii. "What we aim for in law enforcement in the corporate context is good corporate citizenship, cooperation and openness with authorities, and genuine efforts to improve a corporate culture that has led to the problems and crimes under investigation. Unfortunately, until today's guilty pleas, we had the opposite from Daiwa."511

iv. That Daiwa's guilty pleas "should serve as a very clear message to other corporations — and hopefully stop in its tracks any thought of en-

---

508 Transcript of Daiwa Plea and Sentencing at 31, 33-34, 44 (Feb. 28, 1996).
510 Id.
511 Id.
gaging in Daiwa-like conduct when confronted with crimes committed by officers and employees or significant problems which require prompt disclosure to the authorities and to the public. The integrity of the financial markets and financial institutions depends upon the prompt and full disclosure that the law and corporate ethics require.512

Perhaps the most onerous aspect of the Daiwa Bank criminal prosecution was the inclusion of misprision of felony charges513 in the potpourri of federal crimes to which the Bank had to plead guilty.514 Prior to the guilty plea, Daiwa had made a motion to dismiss the misprision count, arguing that its voluntary disclosure to the Federal Reserve on September 15, 1995, of Iguchi’s crimes protected the Bank from a criminal misprision charge.515 The Bank had learned of Iguchi’s crimes in a “confession letter” written by Iguchi in mid-July and received by Daiwa’s president in Osaka, Japan on or before July 21, 1995. The misprision statute requires a person to report a felony crime to appropriate law enforcement authorities “as soon as possible.”516 Since Daiwa reported the crimes fifty-six days after the Bank was put on notice, Daiwa argued that if fifty-six days was too tardy, then the statute should be held unconstitutional as “void for vagueness” because the phrase “as soon as possible” provided Daiwa with no notice or guidance as to how quickly it had to report to avoid violating the statute.517

Daiwa argued that when applied to an eyewitness to a crime, “as soon as possible” might be a sufficiently clear requirement; but when applied to corporate knowledge of a complex financial matter, where a corporation has fiduciary duties to investigate the facts before precipitously reporting, the statute did not provide sufficient guidance as to the time period available before a delay in reporting triggered criminal liability.518

Since Daiwa pled guilty, this important criminal law issue will remain open until litigated in a future corporate criminal prosecution.519

The Southern District of New York is not the only federal prosecutorial office that is stressing corporate self-reporting and cooperation with the

512 Id.
515 Id. at 6, 34 nn.21-22.
516 Id. at 6, 34 nn.22-25.
517 Id. at 6, 34 n.25.
518 Id. at 6, 34 n.26.
519 See discussion of Audrey Strauss, id. at 6. See also FEDERAL BAR FOUND., supra note 451, at 26 nn.44 & 46. Daiwa waited almost two months to report its wrongdoing, and was prosecuted for misprision. Yet, Salomon Brothers took a much longer period of time to investigate its criminal wrongdoing before it self-reported to the government, but was not criminally prosecuted. Id. at 27-28 nn.47-48:

Salomon corporate officials were aware of the wrongdoing in April 1991 and did not disclose it to authorities until August 1991. This is in contrast to Daiwa officials who disclosed after approximately two months. The difference is that once Salomon did disclose, it continued to voluntarily cooperate with the government in its investigation.
Defending SEC & DOJ FCPA Investigations

government's investigation of corporate crime. This is a nationwide DOJ initiative. For example, former Deputy Attorney General Jamie S. Gorelick, in a May 1996 address to the Conference Board's Business Ethics Conference, contrasted the wrong approach of Daiwa Bank in dealing with corporate crime, to the much more constructive approach of the Pepco utility in Maryland and Washington, D. C.

Beginning in the 1980's, a site supervisor at Pepco's 600 acre fly ash storage facility in Maryland began to illegally pump fly ash, which is acidic and contains metals, into wetlands adjacent to the site.

In 1993, the site manager was removed from his position because of an unrelated investigation. His replacement discovered the long-term environmental law violations. Pepco, acting on advice of outside counsel, conducted an internal investigation and then immediately came forward, bringing its environmental problems to the attention of the government and assisting it to identify the culpable employees.

Pepco provided all relevant information concerning the violation, including the results of its internal investigation, and made its employees available for interviews. In addition, Pepco took disciplinary action against the plant manager's supervisors and worked with environmental regulators to determine the nature and extent of the environmental violations.

As a result, the company was not criminally charged. . . . Pepco agreed to pay a civil penalty ($950,000), which was commensurate with the extent and duration of the violations. 520

I want to underscore that Pepco's ability to mitigate its potential liability and to avoid criminal liability was not merely the result of good judgment exercised upon the discovery of the violations. Rather, Pepco had in place, before and after the occurrence of these violations, an extensive quality assurance process through which line managers provided oversight and control over environmental compliance issues. . . .

Unlike Daiwa, Pepco was well-prepared long before discovering any illegal acts. With the help of counsel, its executives had prepared the company for the eventuality of wrongdoing, and, when it occurred, made judgments that enhanced, rather than detracted from, its reputation. 521

Gorelick also pointed out the DOJ's Antitrust Division's Corporate Amnesty Policy which provides corporations with the possibility of escaping criminal antitrust liability altogether if their internal corporate compliance policies enable the company to detect violations early, and come forward in disclosing the illegal conduct to the Antitrust Division. She contrasted the experience of Miles, Inc., the country's leading maker of steel wool scouring pads including SOS, to the experience of Dial Corporation, the manufacturer of Brillo. Miles and Dial had engaged in conspiratorial antitrust activities.

520 Remarks Of Jamie S. Gorelick, 5 Corp. Conduct Q. 1, 3-4 (Rutgers 1996). The plant manager was convicted of mail fraud and Clean Water Act felonies and sentenced to 15 months imprisonment. Id. at 4. Two subcontractors were convicted for a separate commercial bribery scheme. Id.

521 Id.
In the end, Miles agreed to plead guilty to the violations and pay a $4.5 million fine. Dial was not prosecuted. What was the difference? Upon discovering the illegal activity, Dial informed the Department of its participation with the other company, cooperated fully, and took advantage of the Antitrust Division’s amnesty policy.\footnote{Id.} Attorney General Janet Reno recently advocated that effective corporate compliance programs “can increase the company’s chances of obtaining a satisfactory civil resolution as opposed to a criminal case with possible forfeitures and exclusion,” and can provide “perhaps the best way for a corporation to protect itself from the dire consequences of indictment and conviction.” She stressed, however, that an effective corporate compliance program must not only be aimed at preventing fraud; the program must also be focused on investigating and reporting fraud.

Making a voluntary disclosure should be part of a business executive’s or corporate counsel’s calculus when he discovers that one or more of his employees are engaged in fraudulent conduct. When a corporation discloses wrongdoing, makes full restitution, and takes swift disciplinary action against the employees engaged in this misconduct, the federal interest in prosecuting the corporation may be greatly reduced, and the Department will view the corporation more favorably.

On the other hand, the corporation that learns of criminal activity and fails to report it or fails to cooperate fully with the government cannot expect to obtain the same benefits.\footnote{In Speech To American Hospital Association, Reno Uses Carrot And Stock Approach, 12 CORP. CRIME REP., Feb. 16, 1998, at 1, 3. See also Obermaier, Do the Right Thing, supra note 451, at 18:}

The trend for the DOJ to encourage corporations to become the ally of the prosecutor, \textit{i.e.}, the government’s partner in prosecuting federal white-collar criminal cases, has led Brian Elmer, a criminal defense lawyer at Crowell & Moring in Washington, D.C., to comment: “Defending the corporation is now an oxymoron. You cooperate the corporation. You don’t defend it.”\footnote{Federal Bar Found., supra note 451, at 17.} If the corporation chooses cooperation with the federal prosecutors in the conduct of a grand jury inquiry, several legal and strategic matters will differ dramatically from the case of the corporation, joining hands with its executives, officers and employees resisting the government...
prosecutorial efforts. Larry Pedowitz and other defense counsel provide the following factors or “ingredients” for the “recipe” by which a corporation that may have committed serious federal crimes can become the government’s “partner” and thereby avoid prosecution:

(i) Disclose suspected criminal activity to the government prosecutor at an early stage.

(ii) Have a corporate internal investigation conducted by outside rather than inside counsel.

(iii) Preclude the attorney for the corporation from representing any corporate personnel who also come under scrutiny.

(iv) Don’t indemnify or advance legal fees for principal wrongdoers.

(v) Waive the corporation’s attorney-client privilege and work product protection, and provide the government with the results, report, and work-product of the corporate internal investigation.

(vi) Refuse to enter into joint defense agreements.925

However, sometimes corporate cooperation is not deemed to be strategically appropriate for a corporation and its shareholder constituency, particularly if the prosecutor insists on an onerous corporate criminal plea, and extravagant monetary fines, and related penalties including license divestiture or bar from regulated business activities.

3. Defending the Corporation Before the Grand Jury

The grand jury investigation of suspected corporate misconduct often differs significantly from a parallel SEC investigation of the same activities.

925 See Reports and Proposals, White Collar Crime Meeting Addresses Issues of Privilege, Corporate ‘Good Citizenship’, 61 CRIM. L. REP., Apr. 2, 1997, at 1020-22; see also FEDERAL BAR FOUND., supra note 451, at 17. Some commentators point out that while corporate cooperation with the government prosecutors may be commendable, it is improper for a prosecutor to condition a favorable plea bargain or civil/administrative disposition on a corporation’s agreement to fire the suspected employee, to restrict the employee’s access to witnesses and documents or to withhold indemnification and advancement of attorneys’ fees for the employee’s criminal defense:

Apart from the fact that a government demand such as this is usually in conflict with state-law policies and an employee’s contractual rights under company bylaws, the practice is offensive because it undermines the effective functioning of the adversary system. . . . When the government uses its naked power over the corporation to interdict the lawful flow of funds to an employee, it alters the balance of forces between government and defense for a reason unrelated to guilt or innocence. . . . A basic assumption of the system is that neither side will take action that interferes with the other party’s ability to collect and present evidence. The government’s use of corporate cooperation for a purpose other than securing evidence of the employee’s wrongdoing is indistinguishable from prosecutorial directives to witnesses not to speak with defense counsel. In both cases, the conduct violates due process. See Roger C. Spaeder, Mens Rea: Corporate Cooperation, NAT’L L.J., Dec. 4, 1995, at A-19, A-20.

For example, in the Drexel/Milken prosecution, the government attempted to condition Drexel’s guilty plea on the broker-dealers agreement to refuse to pay Michael Milken over $100 million of compensation allegedly due to him. The S.D.N.Y. Court refused to sanction such a condition in the corporate plea bargain.
In dealing with the grand jury inquiry, defense counsel must be prepared to cope with (i) grants of immunity; (ii) undercover surveillance including clandestine tape-recording and electronic eavesdropping; (iii) paid informants; and (iv) "sting" operations. In addition, defense counsel must deal with search warrants, as well as grand jury subpoenas.

In any grand jury investigation involving FCPA violations, or other corporate misconduct, if the government is resisted, defense counsel will inevitably be forced to deal with the "bread and butter" strategic issues that arise in virtually every case; i.e., (i) preservation of attorney-client privilege and work-product doctrine; (ii) exploration or maintenance of joint defense agreements; (iii) advancement of legal fees and costs (or indemnification thereof) for present and former officers, employees and agents; (iv) discipline of corporate wrongdoers, i.e., termination, suspension, or other sanctions; and (v) enhanced supervisory and compliance procedures. All of these strategic issues must be resolved in a manner best suited not only to minimize corporate criminal sanctions, but also to minimize financial and other business damages occasioned by parallel civil litigation, including class actions and derivative suits. All of these strategic considerations will also be influenced to one degree or another by the parallel internal corporate investigation.

526 For example, in a pending grand jury investigation of foreign business activities of McDermott International Inc. and J. Ray McDermott S.A., including possible anticompetitive activity of McDermott joint ventures with ETPM S.A. of France and with Heerema Offshore Construction Group, Inc., the DOJ has granted immunity to a number of current and former employees of McDermott entities. In December 1997, Heerema and one of its employees pleaded guilty to charges that they were part of a conspiracy to rig bids in the lint venture's heavy-lift business in the Gulf of Mexico, the North Sea, and the Far East. See McDermott Says U.S. Granted Immunity to Some Employees, WALL ST. J., Feb. 10, 1998, at B8. In the current grand jury investigations of Columbia Health Care Corporation, the DOJ has granted immunity to a potpourri of present and former Columbia officers and employees.
C. Conducting An Internal Corporate Investigation\textsuperscript{527}

Virtually no serious corporate FCPA problem in the 1990s gets resolved in the absence of an internal corporate investigation. Sometimes the internal inquiry is precipitated or accompanied by “whistle-blower” allegations or related litigation such as unjust termination suits\textsuperscript{528} or \textit{qui tam} litigation.

Many recurring issues arise in connection with corporate internal investigations. First, who should conduct the inquiry? Options include: inside counsel and/or an internal auditor; regular outside corporate counsel; and, independent outside counsel. There is no uniform answer and particular circumstances will always drive procedure. Most commentators do counsel, however, that if the suspected wrongdoing may be serious, and the likelihood of eventually negotiating with government prosecutors or enforcement officials is high, then outside counsel should be retained to conduct the inquiry.\textsuperscript{529}

\begin{itemize}
\item \textsuperscript{528} For example, the 1986 Ashland Oil FCPA case (\textit{see SEC v. Ashland Oil, Inc. & Orin Atkins, SEC Lit. Release No. 11150, 36 SEC Docket No. 1 at 88 (D.D.C. 1986)}, led to a companion civil RICO private damage action by former Ashland officers Bill McKay and Harry Williams, in an unlawful employment termination suit against Ashland and some of its directors, alleging they had been punished for, among other things, whistle-blowing. McKay and Williams obtained a $65 million verdict against Ashland at jury trial; the case ultimately settled for $25 million. \textit{See Williams v. Hall, 683 F. Supp. 639 (E.D. Ky. 1988)}; McKay v. Ashland Oil, Inc., 120 F.R.D. 43 (E.D. Ky. 1988); Williams v. Ashland Oil, Inc., 853 F.2d 927 (6th Cir. 1988); Howes v. Atkins, 668 F. Supp. 1021 (E.D. Ky. 1987).
\item \textsuperscript{529} See, e.g., \textit{Federal Bar Found., supra} note 451, (remarks of Peter Zimroth); Lynch & Underhill, \textit{supra} note 527, at A-52 to A-54:
\end{itemize}
Second, who should direct and control the internal investigation? Again, options include: inside counsel; management; the board of directors; or a special committee of the board of directors. Once again there is no uniform answer, and circumstances will drive procedure. As a matter of evolving practice, in most major cases either the Audit Committee, or a Special Committee (usually staffed by outside directors) of the board will be assigned the task of supervising and directing outside counsel in the investigation.\footnote{See, e.g., Black & Pozin, supra note 396, § 119.02[2][a], at 119-17 to 119-18:}

Third, should there be a written report at the conclusion of the investigation? Sometimes there is, and sometimes there isn’t. There ordinarily is no general legal requirement mandating a written report; again, the circumstances, particularly the corporation’s strategic goals, will govern this deci-

\begin{itemize}
\item If the wrongdoing is widespread, is serious enough to expose the corporation to substantial liability, or implicates high-level officers, the investigation generally should be performed by independent outside counsel, who may be retained by a committee of outside directors. Such independence lends the investigation a measure of objectivity and credibility which may be essential in dealing with the government and third parties. [I]
\end{itemize}


For an analysis of a series of criminal prosecutions which involved an internal corporate investigation jointly by regular outside counsel and inside corporate general counsel, which internal inquiry ultimately did more harm than good, see the discussion of the Southland Corporation cases in Arthur F. Mathews, Internal Corporate Investigations, 45 OHIO ST. L.J. 655, 680-92 (1984). \textit{See also In re John Doe Corp.} (Southland Corp.), 675 F.2d 482 (2d Cir. 1982); \textit{In re Kitchen}, 706 F.2d 1266 (2d Cir. 1983); United States v. Matthews, 787 F.2d 38 (2d Cir. 1986);

[\textit{Id.} at 119-17. See also The Special Litigation Committee in RALPH C. FERRARA, SHAREHOLDER DERIVATIVE LITIGATION ch. 8, particularly § 8.09 (discussing Statutory Responses to Special Litigation Committees) and § 8.10 (discussing Independence, Good Faith and Due Care: Characteristics of an Adequate Special Litigation Procedure). Compare General Electric Co. v. Rowe, No. 89-7644, 1992 U.S. Dist. LEXIS 15,036 (E.D. Pa. Sept. 30, 1992) (finding procedures of GE special litigation committee assisted by independent outside counsel adequate to support dismissal of derivative litigation based on two claims brought against GE under the False Claims Act and a criminal conviction against a GE subsidiary and two employees for alleged misconduct involving foreign bribery of an Israeli General in connection with securing aircraft engine business from the Israeli Air Force for the GE subsidiary), with Hasan v. CleveTrust Realty Investors, 729 F.2d 372 (6th Cir. 1984) (holding that procedures used by special litigation committee were inadequate to support dismissal of derivative litigation alleging wasting of corporate assets in connection with repurchase of CleveTrust stock).]
Sometimes, however, a written report is either required or useful to serve the corporation’s interests. For example, in the Kidder Peabody/Joseph Jett trading scandal, the General Electric Company determined from the start, when it hired former SEC Enforcement Director Gary Lynch to conduct the internal broker-dealer inquiry, to prepare a written report, and upon completion, to publicize the report in order to serve General Electric’s corporate goals. In addition, in the E.F. Hutton “check-kiting” scandal, the report of an internal inquiry by former Attorney General Griffin Bell was immediately publicized upon completion.

One risk of publicizing a written report of an investigation is that libel claims may be pursued by alleged wrongdoers described in the report. Therefore care must be taken in fashioning the content and conclusions of a written report in a manner that best protects the company from liability for defamation or other tort damages.

If a written report is prepared, but not publicized, and not provided to any governmental prosecutors or regulators or private party adversaries, then both the report and its underlying investigative work-product, including memoranda of interviews of witnesses questioned in the inquiry, can ordinarily be shielded by corporate attorney-client privilege and work-product protection. However, if a copy of the investigative report is shared with the DOJ or the SEC, or with other third parties like outside auditors or underwriters, in most federal circuits, attorney-client privilege and work-product protection will be deemed to be waived for all purposes. The Eighth Circuit, in an en banc decision in the Diversified Industries case has fashioned a “limited waiver” doctrine, sometimes more appropriately called the “selective waiver” rule, which sanctions the provision of internal investigative materials to government regulators and prose-

531 See Black, supra note 530, at 119-43 to 119-44: Since a written report may eventually be discoverable in litigation by a corporation’s third party adversaries, it may be preferable in some cases not to write a report but simply to present an oral report of the results of the investigation to the board of directors. The minutes of the meeting would reflect that the presentation was made in confidence and contained legal advice, but would not repeat the substance of the report. (citation omitted.)

532 See Lynch & Underhill, supra note 527, at A-85: “A written report is required in certain contexts, such as enforcement-agency ordered investigations and where special litigation committees have been convened.”


cutors without a concomitant broad, general waiver of attorney-client privilege or work-product protection as to all third parties. However, the other circuits that have confronted the issue have expressly rejected the “limited waiver” doctrine, although the Second Circuit has left the door ajar to the possibility that it might in the future accept the “limited waiver” theory in two narrow circumstances, namely: (i) where the corporation and the government share a common interest; and (ii) where the government agency and the corporation enter into a specific confidentiality agreement.


\[538\] See In re Steinhardt Partners, 9 F.3d 230 (2d Cir. 1993). The First Circuit, in dicta in United States v. Billmyer, 57 F.3d 31 (1st Cir. 1995), has left open perhaps a crack in the door leading to “limited waiver” in some narrow future case:

One argument not made by appellants is that, as a matter of policy, private revelations to the government of possible criminal conduct ought not waive the privilege as to third parties. The concern, of course, is to encourage such revelations. The general tendency of the law is to treat waivers as an all or nothing proposition ... but there is a trace of support for limited waivers in some cases involving confidential disclosures to the government. ... If there was ever an argument for limited waiver, it might well depend importantly on just what
In dealing with privilege and confidentiality issues respecting written reports and underlying memoranda of interview and other investigative work-product of an internal investigation, counsel would be wise to review the circumstances of and holdings in five decisions in the Southern District of New York. In the In re Leslie Fay Companies Securities Litigation (Leslie Fay I) case, the corporation’s disclosure to the SEC of internal investigative report waived both attorney-client privilege and work-product protection as to the report itself. In In re Leslie Fay Companies Securities Litigation (Leslie Fay II), the corporation’s disclosure of the internal investigative report to the SEC also waived attorney-client privilege as to the documents and other investigative work-product underlying the report; court held that there was no work-product protection because the internal investigation was conducted for business purposes, not in anticipation of litigation. In the In re Kidder Peabody Securities Litigation case, the disclosure of the Gary Lynch/Kidder Peabody Report to the SEC and to the public was held to be a waiver of attorney-client privilege as to the underlying factual summaries of witness interviews; the court held that there was no work-product protection because the report was prepared primarily for business purposes, not in anticipation of litigation. In In re Woolworth Corporation Securities Class Action Litigation, the court held that public disclosure of internal investigation report does not waive attorney-client

had been disclosed to the government and on what understandings. Without intending to preclude such an argument in a future case, we think that it is enough in this one to say that no such claim of limited waiver has been argued to us.

See also Scott W. McKay, Protection of Privileged Information in the Context of Corporate Voluntary Disclosure, in WHITE COLLAR CRIME 1997, supra note 527, at B-17.

Larry Pedowitz and Carol Miller, in addressing the Second Circuit Steinhart Partners holding, state: “We are familiar with a number of federal grand jury investigations where corporations have produced privileged and confidential documents to the government and the government has entered into stipulated and sealed agreements, so-ordered by a District Court, expressly providing that attorney-client and work-product protections were not waived as to third parties.” Lawrence B. Pedowitz & Carol Miller, Disclosure of Privileged Information to the Government Without Causing a Waiver of Privilege; Essential Provisions in Joint Defense Agreements; And a Recent Ethics Opinion on Multiple Representation in Criminal Investigations, in WHITE COLLAR CRIME - 1996: Representing Corporations, Financial Institutions and Their Directors, Officers and Employees, H-51, at H-52 (ABA National Institute 1996) [hereinafter WHITE COLLAR CRIME - 1996]. They offer the following caveats to counsel attempting to negotiate “limited” or “selective” waiver agreements: (i) The information must be disclosed pursuant to an explicit written confidentiality agreement or protective order. (ii) The agreement must adequately set forth the basis for the court’s order (i.e., the mutually beneficial purposes of production and the extent to which the corporation is relying on the protection of the order). (iii) The agreement should be “so ordered” by the judge. (iv) The agreement should specifically identify the individuals who are authorized to have access to the material and the uses to which it may be put. (v) The agreement should provide for the return and/or destruction of the documents.

privilege for attorneys’ notes and memoranda prepared during the course of the internal investigation. Finally, in In re Subpoena Duces Tecum Served on Willkie Farr & Gallagher (Sensormatics Electronics Corp.),\textsuperscript{543} since the company shared the results of internal investigation with its outside auditors, the court held that the attorney-client privilege and work-product protection was waived as to all the law firm’s otherwise confidential notes and memoranda underlying the internal investigation report.

Fourth, how does counsel deal with multiple representation issues in an internal investigation? Counsel conducting the inquiry should certainly never represent personally any of the officers, directors, employees or agents interviewed in the investigation.\textsuperscript{544} However, once the internal inquiry is completed, absent any conflicts of interest, it may be perfectly appropriate for investigative counsel to represent both the company and certain of its officers, directors, employees or agents in litigation arising from the corporate activities underlying the investigation or in related governmental investigations.

A myriad of issues also arise regarding how investigative counsel deals with employees to be interviewed in the investigation.\textsuperscript{545} May or must the employee be represented by counsel? Is the company obligated to pay for the employees counsel? How many different employees can one counsel represent? What action should be taken by the company if an employee pleads the Fifth Amendment or otherwise refuses to be interviewed? Can or should the employee interview be subject to a “joint defense” agreement among the company, the employee and their respective counsel? What warnings should or must investigative counsel give to the employee about to be interviewed?

An employee generally need not be represented by counsel, but if the employee desires to have personal counsel present at the interview the company ordinarily should accommodate the employee’s wish. A company generally is not required to pay for an employee’s counsel, but in some circumstances the company appropriately chooses to do so.\textsuperscript{546} General con-
Conflict of interest rules will govern how many different employees one counsel will professionally and ethically be able to represent.\(^{547}\) There is a general trend in criminal law at both the federal and state level to require separate counsel for each defendant in a criminal prosecution.\(^{548}\) It is unclear whether and when such separate representation would be required in particular circumstances at the investigatory level, whether in a grand jury inquiry, a governmental regulatory or enforcement investigation, or, indeed, a private internal corporate investigation.\(^{549}\)

As an incident of employment, a corporation is entitled to have any employee provide the company with any knowledge the employee has about the company's past or present business activities. If an employee pleads the Fifth Amendment or otherwise refuses to be interviewed in an internal inquiry, the company may lawfully discipline or sanction the employee.\(^{550}\) Whether the appropriate sanction might be termination, suspen-

---


Once a case begins to enter the criminal arena, there is an even more important element that will usually preclude one attorney from simultaneously representing two or more potential targets: The possibility that one target/client may be able to obtain total immunity in return for becoming a government witness against the other targets/clients will raise an insoluble conflict of interest.

\(^{548}\) See, e.g., Standards for Criminal Justice, § 4-3.5(b); People v. Mroczko, 672 P.2d 835, 853 (Cal. 1983); United States v. Cooper, 672 F. Supp. 155 (D. Del. 1987); Fed. R. Crim. Pro. 44(c).

\(^{549}\) In 1997 the New York County Lawyers’ Association Committee on Professional Ethics rendered an Opinion on Question No. 707 that concludes:

In general, the joint representation of multiple clients whose conduct is the target of a criminal investigation is inadvisable, though not strictly prohibited, even if the clients consent upon full disclosure. . . . In the context of a criminal investigation, the legal interests of individuals whose conduct is the target of inquiry frequently differ, because even small variances in the situation of each may be material to the outcome. And such are the stakes that, when the interests of multiple clients diverge in a criminal investigation, it will rarely be obvious that a lawyer can adequately represent the interests of each. . . .

\(^{550}\) See Stephen F. Black, supra note 530, § 119.04[3][b]; Lynch & Underhill, supra note 527, at A-67; see also In re The Cooper Cos., SEC 1934 Act Release No. 35082 (Dec. 12, 1994) (SEC criticizes board of directors for not taking action when a senior officer pled Fifth
tion with or without pay, placement on administrative leave, denial of advancement of attorneys’ fees, reduction or elimination of bonus, job reassignment, demotion, or some other form of discipline or punishment will vary with the circumstances.\textsuperscript{551} Company counsel should always examine any applicable union contract or collective bargaining agreement, state labor or employment statute or regulation, or state case law precedent, that may bear upon imposing discipline on or terminating an employee.\textsuperscript{552}

Corporate counsel should never let an employee interview in an internal inquiry be subject to a joint defense privilege,\textsuperscript{553} thereby allowing an employee and his or her personal counsel to prevent the company from providing to the government or from publicizing — either generally or in the company’s annual or periodic SEC filings — material factual information gleaned from the employee in the interview. The attorney-client privilege and concomitant work-product protection must be the company’s — and the company’s alone — not a shared confidentiality blanket controlled as much by the employee and his or her counsel as it is by the corporation’s board of directors. The company must have unfettered freedom to waive privilege to meet its legal obligations to publicize all material facts in its SEC filings, to provide full and accurate factual disclosure in any other required regulatory filings or in meting any self-reporting obligations, or to voluntarily provide information to government prosecutors in furtherance of a corporate decision to fully cooperate with the government in a grand jury or other enforcement or regulatory inquiry.\textsuperscript{554}

\textsuperscript{551} Black, \textit{supra} note 530, \S 119-42:

[A] witness may have a Fifth Amendment right to refuse to answer questions, but he has no right to continued employment if he invokes that right. A corporate employer also has rights, including the right to require its employees to provide the corporation with information relevant to its affairs. A refusal to provide such information constitutes a breach of an employee’s duty of loyalty to the corporation and is good grounds for terminating his employment.

[Footnote omitted.]

\textsuperscript{553} Id.

\textsuperscript{554} Consider, for example, the respective corporation’s governmental/regulatory reporting obligations in the Daiwa Bank case, and in the Salomon Brothers (Gutfreund/Feuerstein) case.
Defending SEC & DOJ FCPA Investigations

If corporate counsel conducting the internal inquiry is also representing the company in private or governmental litigation embracing the subject matter of the investigation, i.e., securities class actions or an SEC civil enforcement action, it is appropriate for the corporation and its corporate counsel to be a party to a joint defense agreement with other officers, directors or employees (and their personal counsel) who are also defendants in the ongoing litigation. But when each of those officers, directors or employees are interviewed in the internal inquiry, despite the existence of the joint defense agreement applicable to the pending litigation, a written acknowledgment should be obtained from each interviewee that he or she is aware, and agrees, that the interview in the internal inquiry is wholly outside the joint defense arrangement.

It is prudent for investigative counsel to give a fair warning to any employee or any other person about to be interviewed in an internal corporate inquiry. At a minimum the warning should make it clear that (i) counsel conducting the inquiry represents solely the corporation, not the individual employee; (ii) the attorney-client privilege applicable to the interview belongs solely to the corporation, not to the employee; therefore, even if the employee objects, the board of directors can waive the corporate attorney-client privilege and provide the information obtained in the interview to the government or any third party, or may publicize it in SEC reports or other governmental reports or filings; and (iii) if deemed appropriate, that the employee may be accompanied by personal counsel at the interview. A good practice would embrace the employee/interviewee signing a written acknowledgment of receipt of such warnings prior to commencement of the interview. This procedure will protect against subsequent claims by the present or former employee in litigation that he or she understood that counsel conducting the interview represented both the corporation and the employee personally. Such claims would prevent the corporation from waiving the attorney-client privilege when it wishes to do so, or prevent corporate counsel from later pursuing claims on behalf of the corporation against the employee.

---


Once an internal corporate investigation is completed, and an oral or written investigative report is duly considered by the board of directors, the corporation must determine what use it will make of the results of the investigation. If material undisclosed facts are unearthed, they necessarily will have to be disclosed in the company's SEC filings. If the facts trigger other governmental or regulatory reporting obligations, e.g., to bank regulators, such required reporting will have to be accomplished. But if the undisclosed facts are not material, e.g., a small foreign bribe for a non-material contract in an FCPA case, and if there is no special reporting obligation, what does the company do? It may choose not to publicize the incident, and instead choose to deal with the matter solely “in-house” by terminating and/or disciplining responsible personnel, tightening internal compliance procedures, and correcting any false or misleading books and records. On the other hand, depending on particular circumstances, including the status of any pending or threatened DOJ grand jury inquiry, SEC enforcement investigation, or governmental or private litigation, the company may choose to pursue one of the government's voluntary disclosure programs. There have been a number of formal and informal federal voluntary disclosure programs available to corporate America in the 1970s, 1980s, and 1990s. The most highly visible ones include: (i) the SEC Voluntary Disclosure Program, which commenced in 1975 and led to the passage of the FCPA in 1977; (ii) the DOJ Antitrust Division Voluntary Disclosure Program and Corporate Leniency Policy, which began in 1978 and was reinvigorated in 1993; (iii) the DOJ/Department of Defense Voluntary Disclosure Program, which commenced in 1978 and was further formalized in 1987; (iv) the DOJ Guidelines For Environmental Prose-

557 For an analysis of how to avoid ten common mistakes in the implementation of corporate compliance programs, see Jeffrey M. Kaplan, Designing And Implementing Corporate Compliance Programs, 30 Rev. Sec. & Comm. Reg. No. 21, at 249 (Dec. 10, 1997).


559 See SEC REPORT, supra note 3.


561 See U.S. DEPARTMENT OF JUSTICE, DEPARTMENT OF JUSTICE GUIDELINES REGARDING DEPARTMENT OF DEFENSE VOLUNTARY DISCLOSURE PROGRAMS (July 17, 1987); see also
Defending SEC & DOJ FCPA Investigations

cutions, which were promulgated in 1991;\(^5\) the Department of Health and Human Services' Operation Restore Trust\(^6\) that commenced in 1995.

XIV. CONCLUSION

Multinational corporations can expect to be confronted over the next generation with aggressive enforcement programs by both the DOJ and the SEC that are designed to ferret out and prosecute foreign bribery in the criminal, civil and administrative fora. The corrupt foreign payments provisions of the FCPA will continue to serve as the principal federal statutory prescription that will provide the underpinning for most foreign bribery enforcement actions. So few of the elements of an FCPA bribery offense or the defenses thereto have been analyzed to date in contested judicial decisions, it is likely that increased governmental enforcement efforts will spawn a much larger body of FCPA judicial precedent in the next decade or so. The Triton Energy case flags many of the open issues that are ripe for judicial determination and exposition in the next generation of litigated FCPA bribery cases.

It is also likely that the corrupt foreign payments provisions of the FCPA will soon be expanded legislatively in a few respects to conform to the recent Convention on Combating Bribery of Foreign Public Officials in International Business Transactions\(^6\) adopted in late 1997 by the twenty-nine Member States of the Organization for Economic Cooperation and Development (OECD) and five nonmember countries.\(^5\) Each party to the OECD Convention has agreed to pass such domestic legislation as may be necessary to establish that it is a criminal offense under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public offi-

---

\(^5\) See DEPARTMENT OF JUSTICE MANUAL, FACTORS IN DECISIONS ON CRIMINAL PROSECUTIONS FOR ENVIRONMENTAL VIOLATIONS IN THE CONTEXT OF SIGNIFICANT VOLUNTARY COMPLIANCE ON DISCLOSURE EFFORTS BY THE VIOLATOR, 5-11.301 A (July 1, 1991).

\(^6\) See Operation Restore Trust OIG Procedures for Administering the Pilot Disclosure Program, 4 Health L. Rep. (BNA) 926-934 (June 12, 1995) — HHS program to curb Medicare and Medicaid fraud, waste and abuse is modeled after the DOD Voluntary Disclosure Program, but is far more limited. The program is limited to five states — California, Florida, Illinois, New York and Texas.


\(^6\) The 29 Members of the OECD, comprising the most-developed trading states in the world, include: United States, Germany, Japan, France, United Kingdom, Italy, Canada, Korea, Netherlands, Belgium, Luxembourg, Spain, Switzerland, Sweden, Mexico, Australia, Denmark, Austria, Norway, Ireland, Finland, Poland, Portugal, Turkey, Hungary, New Zealand, Czech Republic, Greece and Iceland. The five nonmember countries that also adopted the Convention are Argentina, Brazil, Bulgaria, Chile and the Slovak Republic.
cial, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.66

The language in the OECD Convention is broader than the FCPA in several respects, thereby necessitating legislative amendments broadening the scope of the FCPA. For example, the FCPA applies to “issuers” and “domestic concerns;” it does not apply to foreign subsidiaries.67 The FCPA will have to be broadened to reach “any person.”

Article 1 of the OECD Convention, which defines the elements of the offense of bribery of foreign governmental officials, contains not only the FCPA’s “obtain or retain business” language, but also has the phrase “or other improper advantage.” It will be necessary to add this language legislatively to the FCPA. The result will be to clarify that the United Brands-type bribe for favorable tax legislation will clearly be proscribed even if not directly tied to obtaining or retaining business. Thus, the FCPA will no longer arguably be limited solely to procurement bribery, i.e., payment bribes in return for business contracts, as opposed to other business advantages such as tax breaks and regulatory permits.68

Corporations running afoul of the FCPA bribery provisions will always have potential exposure to parallel or sequential DOJ/grand jury inquiries and SEC enforcement investigations. In most instances, it will be necessary for the corporation to accomplish an internal corporate investigation of the suspect activities in order to provide management and the board of directors the necessary information to (i) assure the adequacy of corporate compliance policies and procedures, and thereby protect and preserve the company’s legitimate business interests; (ii) accomplish the proper discipline of employees or agents guilty of malfeasance or nonfeasance; and (iii) reach an informed determination whether the best interests of the entity and its shareholders are to resist any government inquiry/enforcement action, or, rather, to cooperate with the government in quickly reaching a negotiated settlement. There are no black letter rules or clear guidelines that provide a company and its counsel the precise path to pursue when major corporate misconduct begins to surface. The competing strategic issues applicable to the defense of DOJ/grand jury inquiries and SEC enforcement investigations, as well as related internal corporate investigations, will continue to challenge defense lawyers representing multinational companies as our world’s markets continue to develop as part of an overall interrelated global economy.

66 OECD Convention, supra note 564, art. 1(1); see also David A. Gantz, Globalizing Sanctions Against Foreign Bribery, 18 NW. J. INT’L L. & Bus. 457 (1998).
68 Id.