The Practical Necessity for Amendment of the Foreign Corrupt Practices Act: S. 708-The Current Legislative Initiative

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Introduction

The anxieties created by the Foreign Corrupt Practices Act—among men and women of utmost good faith—have been, in my experience, without equal.

The enactment of the Foreign Corrupt Practices Act (FCPA) in December 1977 was a reaction to the host of disclosures by some U.S. corporations that they were engaged in the systematic bribery of foreign government officials worldwide. This conduct, reprehensible certainly by American legal and ethical standards, is said to have contributed to the downfall of some governments and to have impacted severely on the stability of others.


The author gratefully acknowledges the contribution of Mr. David Eppsteiner, a third-year student at Washington College of Law, American University. His research and analysis of the issues discussed herein were invaluable to the preparation of this article.


4. The bribery of foreign government officials by American companies cost us dearly overseas. Our image as a democracy was tarnished. A democratic government, a crucial Asia-Pacific ally, Japan, was toppled. In Western Europe a monarch [Netherlands] was nearly destroyed. Our relations were complicated with Italy,
The 1977 congressional solution contained two essential elements: accounting controls⁵ and criminalization of foreign bribes.⁶ The legislative history of the FCPA is interesting in that U.S. businesses that would be affected by the proposed legislation voiced little meaningful criticism of its provisions.⁷ But the reticence of these companies must be viewed against the background of the times. Watergate had set the tone for the rejuvenated condemnation of public corruption. Moreover, the disclosures by more than 400 public companies of their payment practices⁸ left them little credibility for a later plea for lenient legislative treatment.⁹

**Accounting Requirements**

Their ardor chilled, the companies saw legislation enacted that not only criminalized foreign bribery but imposed more rigid accounting requirements upon the public enterprises. These stringent accounting controls were designed to track the disposition of corporate assets in order to reasonably assure management's knowledge of their precise use.¹⁰ The standard of "materiality," which over the

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¹. See generally Foreign Corrupt Practices and Domestic and Foreign Investment Disclosures: Hearings on S. 305 Before the Senate Comm. on Banking, Housing and Urban Affairs, 95th Cong., 1st Sess. (1977). The testimony at the hearings before Senator Proxmire's committee featured a litany of examples of corrupt payments by American companies doing business abroad. What is conspicuous by its absence is any testimony by these companies or any representatives of business going to the effect of the proposed legislation itself. This is in sharp contrast to four years later in the Senate Hearings on the amendment to the FCPA when a number of corporate executives testified to the adverse effects of the FCPA. See, e.g., Senate Hearings, supra note 1, at 184 (statement of Joseph R. Creighton, Vice President and General Counsel, Harris Corp.); id. at 210 (testimony of Norman Pacun, Vice President and General Counsel, Ingersoll-Rand).


³. This feeling was not limited to the business community. Other witnesses and the Senators themselves repeatedly stressed their endorsement of the anti-bribery law. See, e.g., Senate Hearings, supra note 1, at 1 (statement of Sen. D'Amato); id. at 5 (statement of Sen. Heinz); id. at 40 (statement of Ambassador William E. Brock, U.S. Trade Representative).


Every issuer . . . shall—

(A) make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer; and
years had evolved to govern accounting practices as measured by the significance of the transaction, was shelved. In addition, this federalization of accounting controls exceeded the evil that inspired them. Public companies, regardless of whether they were involved in international business, were required to institute internal accounting controls sufficient to comply with the new Act. Indeed, failure to comply was met with appropriate enforcement action by the SEC.

The governance of public companies has developed new dimensions as a result of the FCPA. Audit committees were permanently installed to which accountants were answerable. These committees had wide-ranging investigative authority into the legitimacy of both

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

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

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

(iii) access to assets is permitted only in accordance with management's general or specific authorization; and

(iv) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.


11. The FCPA has been criticized because of the lack of the "materiality" standard or some other definite standard upon which companies could govern their accounting conduct. As Sen. Heinz explained:

[T]he present law has some serious deficiencies. In the accounting section, present law potentially makes a corporation liable for the smallest accounting error—whether material or not, whether intentional or not, whether related to a corrupt payment or not.

127 CONG. REC. S13972 (daily ed. Nov. 23, 1981); see COMPTROLLER GENERAL, REPORT TO CONGRESS ON THE IMPACT OF THE FOREIGN CORRUPT PRACTICES ACT ON UNITED STATES BUSINESS, (1981) [hereinafter cited as COMPTROLLER'S REPORT]: "Compounding the uncertainty [as to what constitutes compliance] is the controversy over whether the accounting provisions include a materiality standard . . . [the] SEC has stated that a 'reasonableness' standard governs." Id. at iii.

The shortcomings of the current accounting provisions become more acute because of the SEC's position that the anti-bribery provisions of the FCPA cover all bribes, however, de minimis. A failure of a company to record even a de minimis payment to a foreign official could constitute a violation of the FCPA.


13. Id. § 78ff (Supp. IV 1980).

14. See COMPTROLLER'S REPORT, supra note 11, at 12. Further enhancement of corporate governance is evident from other developments such as creation of codes of conduct, management reports, research efforts, and informational seminars. See Senate Hearings, supra note 1, at 467 (statement of Financial Executives Institute).
foreign and domestic corporate transactions. Since the undertakings of these committees had to be above reproach, it was not unusual to staff them and their support personnel with independent directors who met with outside accountants (perhaps not the ones who conducted the companies' general accounting), and lawyers (certainly not in-house counsel and probably lawyers other than their regular outside counsel). Many companies had already begun the implementation of audit committees prior to enactment of the FCPA.

The work of these committees includes consideration of pre-FCPA transactions. All pre-Act transactions of the corporations were to be reviewed in order to determine not only their post-Act implications but also their pre-Act significance within the disclosure requirements of the SEC. The companies, therefore, found themselves addressing two disclosure standards: (1) materiality of pre-Act payments, and (2) obligations dating from pre-Act arrangements that continued after passage of the Act, regardless of their "materiality." The materiality concept was advanced by the SEC to mean something more than its traditional limitation as to the mere size of the payoff, although that was an important factor. Materiality included the idea that a transaction must be viewed for its impact

15. See, e.g., Springer v. Jones, Civ. No. 74-1455-F (C.D. Cal. 1975) (Final Judgment based on Stipulation of Settlement). This case arose in conjunction with a report by Northrop Corporation's Audit Committee which identified various Northrop campaign contributions made through the use of foreign consultants. The Audit Committee looked at all such payments which appeared unusual, unauthorized or of interest to the Committee. In the settlement, the corporation agreed to: (1) complete the inquiry into the company's relationship and arrangements with foreign consultants; and (2) restructure the board of directors and the executive, audit and nominating committees, adding independent and outside members. See also Goldman v. Northrop Corp., 603 F.2d 106 (9th Cir. 1979) (affirming dismissal on the ground that the Springer case encompassed the relief sought in Goldman).


18. Lawyers have advised clients that the scope of corporate review of business transactions must include situations such as the one in SEC v. Katy Indus., Civ. No. 78C-3476 (N.D. Ill. filed Aug. 30, 1978) (Final Judgment and Permanent Injunction and Other Equitable Relief). In Katy Industries, the company, between 1972 and 1975, engaged in negotiations for drilling rights in Indonesia that culminated in a 1975 agreement for payment to an entity known to be half-owned by the key governmental official involved in granting the concession. The promise to pay continued until July 1978 when Katy terminated the agreement. Katy was enjoined (by consent) from violation of the 1971 FCPA. Katy Industries was the measure by which counsel's advice was taken and public companies geared their reviews to search for such transactions within their own precincts. It is noteworthy that no case similar to Katy Industries has been filed since by the SEC.

on the honesty and integrity of management in the conduct of the corporation's business affairs;\textsuperscript{20} this information is relevant both to shareholders and to the investing public who are constantly making investment decisions based upon such information.\textsuperscript{21} In effect, the two standards become one, translating into a mandatory requirement that public companies investigate and disclose \textit{all} transactions involving payoffs of foreign government officials regardless of the amount and the manner in which those payoffs were accounted for in the corporate books.

The SEC staff was quick to advise company counsel that materiality was whatever was appropriate in the staff's judgment and that the company had better satisfy that unstated rule.\textsuperscript{22} The consequence of a mistake might be an enforcement action and an injunction with ancillary relief provisions requiring the company to retain a special agent.\textsuperscript{23} This agent would review the company's international transactions for a specified period of time and file a report with the court that specifically, rather than generally, disclosed these transactions. All documents and backup materials filed with the Commission pursuant to these undertakings are subject to Freedom of Information Act\textsuperscript{24} disclosure under pending requests of several news publications.\textsuperscript{25}

In addition, the specter exists that the public company will be the subject of a class action brought by one shareholder who claims injury based on the lack of disclosure concerning these transactions at the time of or during his investment. Injury may also be alleged.


\textsuperscript{21} The concept of materiality under the proposed amendment is concerned not only with disclosures to shareholders but also with management's responsibilities. \textit{See Senate Hearings, supra} note 1, at 300 (statement of John S.R. Shad, Chairman of the SEC).

\textsuperscript{22} The SEC primarily was concerned with payments that would represent material information to the investors. \textit{Id.} at 84 (statement of Edward C. Schmults, Deputy Attorney General, Department of Justice).


\textsuperscript{25} The Wall Street Journal's request, under the Freedom of Information Act (FOIA), for all documents relating to illegal payments to foreign governmental officials is still pending, according to SEC officials. SEC Chairman Shad told the Senate that the SEC proposed to amend the Securities Exchange Act to exempt materials obtained from companies during SEC law enforcement related activities from FOIA disclosure. \textit{See Senate Hearings, supra} note 1, at 26. The purpose of the SEC's proposed amendment is to limit access to the confidential business information that is divulged in the course of a law enforcement inquiry. \textit{See id.}, at 332 (testimony of Ralph Ferrara, SEC General Counsel).
because of the waste of corporate assets flowing from the payments themselves.26

Another problem facing corporations is the potential for parallel investigation: A corporation may be subject to an SEC proceeding and a criminal investigation. This phenomenon was a product of the SEC's Voluntary Disclosure Program,27 which preceded the FCPA and resulted in the referral of some of the participating companies to the Department of Justice for criminal prosecutive determinations.28

In a parallel investigation, for example, a public company could find itself in an ongoing enforcement investigation with the SEC and, at the same time, in a criminal investigation, complete with an empaneled Grand Jury, by the Department of Justice.29 The SEC staff, after filing suit against the company, would engage in document discovery and depositions. Counsel for the deponents, aware that a criminal investigation is underway, would advise his witness to invoke his right to remain silent under the fifth amendment. The Commission staff would take umbrage and its willingness to negotiate a settlement with the company, the usual method of disposing of the enforcement litigation, is diminished. In the meantime the Justice Department would continue its criminal investigation of the company.

The corporate tension experienced under a parallel investigation was addressed in Dresser v. United States.30 Both the district31 and the circuit court held that independent, legally authorized parallel investigations may be conducted without essential impairment of the right of either the SEC or the Justice Department to carry out their functions. The court reasoned that no impairment existed due to the validity of both proceedings.32 A protective order, designed to prevent broader discovery rights for the Department of Justice by virtue of SEC civil discovery practices vis-à-vis the company under investi-

27. The procedures for the Voluntary Disclosure Program are discussed in THE REPORT OF THE SECURITIES AND EXCHANGE COMMISSION ON QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES, submitted to the Senate Banking, Housing and Urban Affairs Committee (Comm. Print 1976).
30. Id.
32. 628 F.2d at 1388-89.
gation, was rejected, therefore, by both courts.33

Viewed from a practical perspective, the operation of the FCPA's internal accounting controls will clean up slipshod and unreliable accounting practices, a value that should be preserved. It is equally obvious, however, that compliance has been costly, and has produced certain consequences that call for reform.

This need for reform lies not only in the accounting provisions of the FCPA but in the anti-bribery provisions as well.34 Before discussing the pending legislative initiatives to amend these provisions of the FCPA, it is appropriate to focus on the interpretative problems of the anti-bribery section of the Act; for it is bribery that gave rise to the legislation of the accounting provisions in the first place.

**Anti-Bribery Provisions of the FCPA**

The jurisdictional subsection of the FCPA provides:

> It shall be unlawful for any issuer . . . officer, director, employee, or agent of such issuer or any stockholder thereof acting on behalf of such issuer, to make use of the mails or any means of instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value . . . .58

This proscription is strangely phrased. Rather than leave unstated the obvious jurisdictional basis for this federal law—the interstate and foreign commerce clause of the Constitution—the Act connects the forbidden conduct to the use of the mails or other instrumentalities of interstate commerce.38

The framers of the anti-bribery provision apparently sought the broadest possible application of the FCPA to international business

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33. The District of Columbia Circuit expressly distinguished United States v. LaSalle Nat'l Bank, 437 U.S. 298 (1978), where the Court noted that an Internal Revenue Service summons may not be used in a tax case after it has been referred to the Justice Department for criminal prosecution. Id. at 311-13. The circuit court in Dresser said that the LaSalle rule was inapplicable because it applied only to tax and not to securities cases. In a tax case, once a case is referred for criminal prosecution the authority for civil investigation is terminated. In a securities case, the SEC civil investigative authority “continues undiminished.” SEC v. Dresser Indus., 628 F.2d at 1378.


transactions. The Supreme Court has recognized that the federal mail fraud statute can reach all kinds of fraudulent conduct that has yet to be otherwise specifically identified and proscribed. Courts have interpreted these laws broadly, giving law enforcement officials flexibility to keep pace with the creative miscreants who each day victimize the public with new and different "scams." Thus, although concededly speculative, the jurisdictional invocation of interstate commerce suggests an intention of the Senate (but perhaps only of the drafters) to assure that whatever the structure of the foreign transaction, its movement in "interstate commerce" will be construed in the broadest sense of that term.

Culpable Mental State Under the FCPA

While the issue of the jurisdictional predicate for the statute might be academic, the problem of knowledge as an element of the crime is a troublesome and practical one. Specifically, the Act provides:

[A]ny person, while knowing or having reason to know that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office . . . .

No attempt is made here to claim that the anti-bribery law as formulated has so injured American business abroad that it must be reformed. Some have made that argument while others hotly dis-

38. See United States v. Maze, 414 U.S. 395, 405-06 (1974) (Burger, C.J., with White, J., dissenting) (stating that mail fraud statute is sufficiently flexible to reach "new" frauds and to act as a stopgap measure against such conduct until appropriate legislation can be enacted to proscribe it).
39. Id. at 407 (Burger, C.J., with White, J., dissenting).
40. Interestingly, neither the FCPA nor the proposed amendments thereto premise jurisdiction expressly on the commerce clause of the Constitution.
42. The claim of lost business because of the FCPA has come from government officials and corporate executives alike. See, e.g., COMPTROLLER'S REPORT, supra note 11, at 15-18: [M]ore than 30 percent [of corporate respondents to a GAO survey] engaged in foreign business reported they had lost overseas business as a result of the act. In addition, over 60 percent report that, assuming all other conditions were similar, American companies could not successfully compete abroad against foreign competitors that were bribing.
Id. at 15; Senate Hearings, supra note 1, at 45-66. Due to the ambiguity in the FCPA, companies "just don't know where they stand and as a consequence, many companies have simply
The truth lies, in all likelihood, between the polarities of these positions. It is undeniable that American companies have withdrawn from or have lost business opportunities because of the perceived risk of criminal prosecution under the provisions of the FCPA. Whether these losses translate into a statistical revelation that demands a change in the law is far from clear. In the practicing lawyer's view, the issue is immaterial. He is confronted with the need to provide counseling to a client who wishes to transact international business in compliance with the laws of the United States and the foreign country involved. The questions do not depend on statistics: What does "reason to know" mean? Does the company have reason to know that this transaction includes the bribery of a foreign government official? Is reason to know something less than full actual knowledge? If so, how much less, and should that be a standard used in prosecution of criminal conduct?

After little more than four years of experience under the FCPA, lawyers are no closer to giving clear answers to these questions than when the law was passed. There are important reasons for this puzzle. First, courts have not reported any decisions interpreting the Act. Second, notwithstanding the promise of President Carter that the government would issue guidelines under the Act, the Justice Department initially refused to do so on the ground that advisory opinions on criminal law compliance were inappropriate. The
“guidelines” that Justice eventually issued were so lopsided in their disclosure requirements vis-à-vis the guidance they might have provided that very few companies ever resorted to the procedure set forth in that program.47 Third, proponents of the FCPA want to limit the ability of companies to deny knowledge of wrongdoing.48 Fourth—a problem intensified by the above-mentioned gaps—the unhealthy combination of corporate paranoia and lawyerly cynicism.

Lawyers are left wholly to their own devices without benefit of precedent or guidelines to advise clients on their business judgments in a variety of situations. This has infected the analysis of every business transaction. For example, in a direct agency relationship, knowledge about the activities of the company’s agent in a foreign country is at issue. The answer—in terms of who, how much, for what purpose, according to what terms, the extent of the obligations, the risk, the expenses, the fee and the methods of its payment—is often difficult to evaluate.

In joint venture relationships, the consortium members often include foreigners who may own, control, or manage the deal with the foreign government. Again, the nature and degree of knowledge to be imputed to the American members must be determined and assessed in this standardless legal environment. Foreign subsidiaries of American corporations must be examined for the focus of control in the relationship. The management factor might be difficult to assess in the context of the questioned transaction. Also, where an American company is a subcontractor on a project, its role in pre-contract negotiations, its importance to the overall arrangement between the foreign prime contractor and the country in question, as well as the magnitude of the subcontractor’s risks relative to the prime contract

47. The Department of Justice created the FCPA Review Procedure in March, 1980. See 28 C.F.R. § 50.18 (1980). The procedure has been criticized because it permits the Justice Department to use the information, submitted by advice seeking companies, in the Department’s subsequent prosecutions for violations of the FCPA. See generally Surrey & Popkin, An Exercise In Non-Guidance: The Foreign Corrupt Practices Act Review Procedure, 3 MID. E. EXECUTIVE REP. 3 (May 1980).

48. See, e.g., Senate Hearings, supra note 1, at 4, 127-28 (statements of Sen. Proxmire). Senator Proxmire believes that the “reason to know” standard in the FCPA is necessary and that the proposed change “will allow companies to wear legal blinders and escape liability.” Id. at 4.
tor's, are areas to be considered.

Most troublesome of all is not that the questions cannot be asked, but rather what to make of the disparate answers in the light of the "reason to know" formulation. The standard, in short, is not a standard at all. It comes as no surprise, then, that there is near unanimity that the "reason to know" element of the FCPA must be changed.49

The Business Accounting and Foreign Trade Simplification Act —The Chafee Bill

The hue and cry for reform of the FCPA's accounting and anti-bribery provisions has resulted in the Senate's passage of S. 708, the Business Accounting and Foreign Trade Simplification Act.60 Senator Proxmire of Wisconsin, author of the original FCPA, did not oppose passage, although he expressed reservations about some of the sections of the bill.61 Overall, S. 708 reaffirms the FCPA's objective to prohibit bribery of foreign government officials, but seeks, through its clarifying language, to reduce the business community's concerns regarding its accounting obligations and its potential criminal liability.52

51. Senator Proxmire's main concern with S. 708 was with the sections of the bill that removed SEC jurisdiction over the criminal provisions of the FCPA that prohibit bribes through an agent. See 127 CONG. REC. S13974 (daily ed. Nov. 23, 1981).
52. Other salient provisions that warrant comment but are foreclosed in this article are:
   (1) facilitating payments—S. 708 like the FCPA itself exempts "grease payments" from criminal liability. See 127 CONG. REC. S13973 (daily ed. Nov. 23, 1981). S. 708 shifts emphasis from the FCPA's focus on the rank of the person receiving the payment to the purpose of the payment and type of function sought to be facilitated. Thus:
   S. 708 makes clear that the concept of a facilitating payment covers payments for routine governmental actions not involving judgment, and ordinary expenditures in certain cases, including those associated with the performance of a contract with a foreign government or agency, token payments intended as a courtesy, and payments legal in the country where made. Id. (remarks of Sen. Heinz).
   (2) enforcement jurisdiction—under section 5(b) of S. 708, the Justice Department is responsible for enforcing the civil provisions of S. 708, and the SEC for the accounting rules. Id. at S13984.
   (4) mandate for guidelines—section 8 of S. 708 requires the Attorney General after consultation "to issue guidelines to assist in compliance with the antibribery provisions." 127 CONG.
S. 708's accounting provisions retain the FCPA's requirements for internal accounting controls and for maintenance of accurate books and records. However, these provisions have been realigned to integrate the two concepts. In the FCPA as enacted, the books and records provision was “free standing” and, as such, incorporated the overall obligation of disclosure of all material information in the filings of a public company. The hearings and statements on the Senate floor clearly reveal that this concept of materiality was at once pervasive and undefined. Yet no agreement could be reached in the context of foreign corrupt practices as to what was material. S. 708 seeks, therefore, to tie the concept of reasonableness to the books and records provision thereby harmonizing it with the requirements of reasonableness prescribed in the internal accounting controls provisions.

The bill's remaining clarification regarding the accounting provisions focuses on the knowledge and intent of the public company in discharging its obligations. Liability is grounded on a knowing failure to comply with or an attempt to violate the accounting requirements. The bill recognizes a defense of good faith efforts to comply with the accounting provisions and imposes civil rather than criminal liability.

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55. See id. To avoid a repetition of this problem “the reported version of the bill drops the concept [of materiality] but at the same time attempts to deal with the deficiencies of the too inclusive present law by incorporating the statutory reference to accurate books and records into the parallel requirement to maintain an internal accounting system.” Id. (remarks of Sen. Heinz).
57. Id.
58. Id.
59. Even though the penal provisions of 15 U.S.C. § 78ff(a) (Supp. IV 1980) would be abolished, the question arises as to whether S. 708 precludes criminal prosecution for concealment and falsification of accounting records relating to foreign bribery. The Reagan administration urged elimination of the accounting controls provisions of the FCPA in favor of criminalizing the concealment and falsification of payments prohibited by the FCPA. See Senate Hearings, supra note 1, at 55 (statement of William E. Brock, U.S. Trade Representative); id. at 73 (testimony of S.E. Unger, General Counsel, Department of Commerce). This position did not prevail in S. 708. It is difficult to envision the Justice Department not prosecuting an act of fraudulent concealment in connection with a foreign bribery. Thus, while an indictment would not charge a violation of S. 708 in accounting rules, a falsified record could form the basis of charges ranging from violation of 18 U.S.C. § 1001 (1976) (making false statements against the United States) to 18 U.S.C. § 371 (1976) (conspiring to violate an
The element of scienter and the corollary defense of good faith in the context of the entire accounting section of S. 708 portend very significant consequences. First, there has been no retreat from the basic obligation of public companies to establish adequate internal accounting systems and reasonably accurate books and records. This means that certain private sector initiatives to comply with these obligations—development of codes of conduct, establishing audit committees and staffs for the conduct of internal audits, issuance of reports of management to demonstrate its accountability, and continuing education of corporate officers and directors in these areas of fiscal and management responsibilities—will not be relegated to history. The predicate for their being part of the corporate scene has not been eliminated. Second, the scienter element and the good faith efforts defense will enhance the burden of proof required before the SEC makes a prosecutive determination. On the one hand, there is no doubt that the threat of litigation will be sharply reduced because of the added requirements. On the other hand, the quality of prosecutions will be upgraded, as minor noncompliance would not be actionable. Furthermore, S. 708 repeals the criminal provisions of the FCPA as they apply exclusively to public companies.60 Public companies are included among the domestic concerns that remain forbidden to engage in foreign bribery.61

But S. 708 restates the FCPA proscription against bribery in two major respects. As to the company itself, such payments are banned whether made "directly or indirectly" by any officer, director, employee, or shareholder acting on the company's behalf.62 "Directly or indirectly" does not appear in the FCPA as enacted. Its inclusion in S. 708 is an improvement because it tends to conform in scope and concept with the domestic bribery law.63 Moreover, internationalizing of schemes that previously were subject to domestic bribery prosecution adds to the jurisprudence that can be drawn upon to determine the legality of a payment practice.

As to the company that engages a third party in its transaction with a foreign government, S. 708 makes it unlawful "to make use of
the mails or . . . interstate commerce corruptly to direct or authorize, expressly or by a course of conduct, a third party in furtherance of a payment.\textsuperscript{64} Removal of the "reason to know" element from the FCPA presented the drafters with their greatest difficulty. Fearful that any redraft might operate to "gut" the FCPA,\textsuperscript{65} S. 708 carefully delineates the prohibition attending the most common international business transaction, use of a foreign agent in the obtaining or retention of business in a certain foreign country. The clear intention of the Senate is to avoid the situation where a company might be able to claim ignorance of its agents' activities where, in fact, the company has studiously avoided, by purposeful ignorance, knowledge of the man in the field's activities.\textsuperscript{66} The language, whatever one's view might be of its artfulness, gets the job done. What might be cognizant under the domestic bribery cases—and others that focus on scienter and its proof through circumstantial evidence of an indirect bribe—is delineated here. Notwithstanding the verbosity of the formulation, the elimination of "reason to know" and the insertion of S. 708's language, marks the FCPA as a law that punishes the knowing violation of its terms. Knowledge, which is an essential element of the crime of foreign bribery, must be actual and proven by direct or circumstantial evidence. Whether stated or not, it clearly includes within its rubric the knowledge that common human experience imputes to responsible parties by reason of their conduct.\textsuperscript{67}

It is interesting to speculate about the practical implications that would flow from enactment of S. 708. Lawyers and accountants will approach the accounting issues and related problems of corporate governance with less apprehension. The specter of criminal prosecution is virtually nonexistent and the prospect of actual SEC en-


65. "S. 708 in my judgment does its job. It guts the law. Under S. 708, bribery will flourish, foreign governments will be corrupted and free markets will take a back seat." Senate Hearings, supra note 1, at 4 (statement of Sen. Proxmire).

66. "While clearing up the ambiguities in the present statute, this provision would also make clear that a 'head in the sand' approach to illegal payments, such as a company's failure to respond to suggestions that illegal payments be made, would not be permitted." See 127 CONG. REC. S13977 (daily ed. Nov. 23, 1981) (remarks of Sen. Dodd).

67. It remains to be seen whether those critical of amending the FCPA's scienter requirements will claim that S. 708 emasculates these requirements. One anti-amendment witness argued in essence that "reason to know" was a sufficient standard by which to determine criminal liability. For him "[t]he question is what did the businessman know in fact?" Senate Hearings, supra note 1, at 411, 417-18 (emphasis added) (testimony of William Dobrovir).
From the standpoint of enforcement, the SEC should be more willing to resolve informally questions that involve the accounting rules promulgated immediately after enactment of the FCPA. Assuming that a private right of action under the Act may be implied, investor suits, which usually pony SEC enforcement actions, will diminish. On the other hand, those private actions that are otherwise instituted should have more merit because, to maintain the suit, the plaintiff would have to undertake an increased amount of original discovery at a greater cost. Thus, when initiated, these cases will signify a level of commitment, in terms of issues and costs, beyond that of most similar suits previously filed. And, in those private suits, a question to be litigated will be the availability of a good faith defense for the corporation. It does not take a clairvoyant to foresee the argument advanced that, as between the investing public or a company shareholder, a corporation should not enjoy the good faith defense in the face of proven allegations that the plaintiff lost money as a result of the corporation’s noncompliance with the accounting rules.

The harder question is what does S. 708 do for the legal counselor. What may he advise under S. 708 that he cannot under the current law? It is actual knowledge and that which can fairly be imputed to the company that is pivotal to the issue of whether S. 708 has changed the FCPA in a meaningful, practical sense. In those special cases involving third parties—whether agents, joint venturers, foreign subsidiaries, or foreign prime contractors—the key becomes not what is suspected but what is in fact known or should have been known by one not purposely ignoring the facts.

It is obvious that criminal prosecutions must be based on a firm evidentiary basis for finding that level of knowledge. In that respect, S. 708 should make it more difficult to prosecute offenders, although where the evidence is established, the prospect of acquittal must be even dimmer. Since the Justice Department has prosecuted only two FCPA cases since the law was enacted, the likelihood that the Attorney General will bring many more under S. 708 is remote. But that does not relieve the careful counsel from his obligations to advise his client. True, he will be called upon to evaluate the legality of

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70. See supra note 45.
transactions that have occurred and about which he is trying to obtain facts. However, the true meaning of S. 708 will be understood only in the more urgent situation of a developing transaction where the lawyer must advise, negotiate, develop the business arrangement with the third party, and ultimately structure the agreement with the foreign governmental customer. Even in this context, his client’s actual and imputed (by reason of his conduct) knowledge, and nothing less, should enable the lawyer to protect his client from violations of the bribery law. This would eliminate the double-think so often prompted by the “reason to know” standard. Counsel would no longer have to ask himself whether his suspicion or his guess, which may have no factual foundation, but which is always among the range of possibilities in any transaction, must push his inquiry beyond that which he would otherwise reasonably require. S. 708 should not be construed as an exemption from due diligence. Due diligence is focused in this statute, which has criminal consequences, on that which fairly makes it a penal law—the guilty knowledge essential to make bribery, whether foreign or domestic, a crime.

Conclusion

While the practical need exists for amending the Foreign Corrupt Practices Act, the question is whether S. 708 will pass the House of Representatives and ultimately be signed by the President. Given that this bill has not completed the legislative course, the answer remains an unknown. What is clear from Senator Chafee’s initiative is that more traditional concepts respecting the law of bribery have replaced certain social and political statements, the values underlying which could hardly be said to have been adequately protected under the FCPA. Thus, while amendment to the existing law is a virtual certainty, with its final formulation still to be articulated, the lawmakers have attempted to use the experiences of the past four years to redefine that conduct which is required and that which is proscribed in order to assure greater awareness, understanding and protection of the national values in the transaction of international business.