

ENFORCEMENT OF THE FCPA BY THE DEPARTMENT OF JUSTICE

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I. INTRODUCTION

Let me begin by following up on some of the comments regarding the antibribery provisions of the Foreign Corrupt Practices Act (FCPA).¹ However, let me first point out that, as to the record-keeping provisions² of the Act, the Justice Department has pretty much deferred to the Securities and Exchange Commission (SEC) because the SEC has the accountants on its staff. Enforcement of the record-keeping provisions³ has been pretty much the burden of the SEC, and the Justice Department has focused its attention and efforts on the antibribery provisions⁴ which, in some ways, we are in a better position to deal with, particularly if one looks at it as a straight corruption statute. The SEC and the Justice Department are staffed quite differently, the latter being better staffed to enforce an anticorruption statute.

On the antibribery provisions, I think it might be useful for me to point out that when you look at sections 103 and 104,⁵ the two antibribery provisions, it is clear that the gravamen of the offense is the corrupt use of an interstate facility for all of the prohibited purposes which would include, with some modifications and some limitations, those prohibited purposes which are traditionally associated with bribery. Now, what does that mean? The legislative history makes it clear that you do not have to have a completed offense in order to violate the antibribery provisions of the Act.⁶ What that means, as a practical matter, is that when the chairman of the board of a major Los Angeles multinational cor-

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1. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, §§ 102-104, 91 Stat. 1494 (codified at 15 U.S.C. §§ 78a, 78m, 78dd-1, 78dd-2, 78ff (Supp. V 1981)), reprinted in Appendix I, *infra* [hereinafter referred to as "the Act" or the "FCPA"].

2. *Id.*, 15 U.S.C. § 78m(b)(2) (Supp. V 1981).

3. *Id.*

4. *Id.* §§ 78dd-1, 78dd-2.

5. Codified at *id.*

6. See H.R. REP. NO. 831, 95th Cong., 1st Sess. 10, reprinted in 1977 U.S. CODE CONG. & AD. NEWS 4121.

poration, sitting in his office in Los Angeles, picks up the telephone and calls the prime minister of an Asian country on the phone and says to him, "You're about to decide whether your country is going to buy 200 of my flying widgets; if you make sure that your government purchases our widgets we'll deposit two million dollars into your Swiss bank account;" at that point, there has been a completed violation of the antibribery provisions of the Foreign Corrupt Practices Act. All of the elements of the offense could be established if the government were able to prove the fact of that conversation. That is true even if the Asian prime minister said, "That's an outrageous suggestion, and I reject your offer; if you come to my country, I'm going to have you arrested for attempted bribery." There would still have been a completed offense with the making of that single phone call.

That is not terribly different from federal domestic bribery law. If that same chairman of the board walked into the office of an elected federal official, a federal legislator for example, made that same offer, and got that same response from that official, he would have violated federal bribery law.⁷ He made an offer, a corrupt offer, as the term "corrupt" is used in federal bribery law. Of course, the thing that is a significant departure in the Act is the nature of the offense: there must be some use of an interstate facility, such as the telephone or a flight on a commercial airline, internationally or within the United States. For example, in one of our prosecutions, an airport facility in Florida, from which a private airplane took off en route to Qatar, was the basis for the charge; the airport itself was considered an interstate facility.⁸

Let me make some additional observations about a few of the Act's provisions which are of particular interest.

II. FOREIGN SUBSIDIARIES

First, let me discuss foreign subsidiaries in connection with the Act. Initially, the term "domestic concern" was defined, in the House of Representatives version of the bill, to include foreign subsidiaries. In the Conference Committee, foreign subsidiaries were excluded from the definition of domestic concern. As a consequence, the term "domestic concern," and therefore the coverage of section 104 of the Act,⁹ is limited to corporations, business

7. 18 U.S.C. § 201 (1980).

8. *United States v. Carver*, Civ. No. 79-1768 (S.D. Fla., filed April 9, 1979).

9. Codified at 15 U.S.C. § 78dd-2(d)(B) (Supp. V 1981).

trusts, and any other kinds of business entities which are organized under the laws of a State, and to foreign corporations which have their principal place of business in the United States.

In addition, "domestic concern" is also defined to include all United States citizens.¹⁰ Now the significance of that inclusion in the Act, in terms of its relationship to foreign subsidiaries, is that, although a foreign subsidiary cannot be charged as a principal violator of the Act, an American citizen who is an employee of that foreign subsidiary can be charged as a principal violator, i.e., a "domestic concern." An example of the use of that theory occurred in the civil injunctive action which was brought in the *Carver* case.¹¹ Carver and his partner had set up a Cayman Islands corporation. We reached that conduct by charging Carver and his partner, because they were United States citizens, as domestic concerns under the statute, even though they were theoretically operating through a foreign corporation, i.e., their Cayman Islands corporation.

I should also add that a foreign subsidiary, or a foreign corporation, whether it's a subsidiary or not, could also be charged under this Act, as in any other criminal statute in the federal criminal code, if that foreign corporation is an aider or abettor to a principal violator of the statute.¹² Such a foreign corporation could also be charged as a co-conspirator under 18 U.S.C. § 371.

III. THE "CORRUPTLY" STANDARD

Now, on the issue of "corruptly," there is a great deal of concern about the meaning of that term. Let me supplement some of the things that Frederick Wade said about the word "corruptly" by indicating to you the best guide as to the meaning of that term. I am focusing on the language in the legislative history which refers to "evil motive or purpose." That language is similar to what is contained in the Devitt and Blackmar standard federal jury instruction on the meaning of the word corruptly.¹³ I am not sure

10. *Id.* at § 78dd-2(d)(A).

11. *See supra*, note 8.

12. Title 18 U.S.C. § 2 (1980) provides:

- (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
- (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

13. DEVITT & BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 34.08 (3d ed. 1977) contains the following language:

that that language, although it is the way juries are instructed in federal criminal trials, is terribly enlightening in terms of the meaning of "corruptly." The most significant part of the legislative history, as to the meaning of the word "corruptly," appears in the House Report.¹⁴ Let me just read a sentence or two. In the House Report, it says, in part,

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 the act to be fully consummated, or succeed in producing the desired outcome.¹⁵

The significance of that legislative history is that one can then argue that the meaning of the word "corruptly" in the Foreign Corrupt Practices Act can be divined from looking at the cases that construe the term "corruptly" in 18 U.S.C. § 201. I would suggest to you that a good starting place in that journey would be *United States v. Brewster*.¹⁶ Without getting into the details of the *Brewster* case, Brewster had been charged with a violation of both the bribery subsection and the gratuities subsection of the statute. A bribe is covered by 18 U.S.C. § 201(c) and is a fifteen-year felony. An illegal gratuity is covered by 18 U.S.C. § 201(g) and is a lesser felony. Brewster was acquitted of the major bribery charge, but convicted of taking an illegal gratuity. The issue in the *Brewster* case for the Court of Appeals was to define the difference between an illegal gratuity and a bribe under 18 U.S.C. § 201. I will read to you what you might consider to be one of the more significant parts of the *Brewster* case, in terms of providing guidance as to the meaning of "corruptly." The Court said:

An act is "corruptly" done, if done voluntarily and intentionally, and with the bad purpose of accomplishing either an unlawful end or result, or a lawful end or result by some unlawful method or means.

So, a person acts "corruptly" whenever he makes a willful attempt to persuade or influence the official action of a public official, by an offer of money or anything of value.

The motive to act "corruptly" is ordinarily a hope or expectation of either financial gain or other benefit to one's self, or some aid or profit or benefit to another.

14. H.R. REP. NO. 640, 95th Cong., 1st Sess. 4 (1977).

15. *Id.* at 8.

16. 506 F.2d 62 (D.C. Cir. 1974).

The bribery section [that is, 201(c)] makes necessary an explicit *quid pro quo*, which need not exist if only an illegal gratuity is involved. The bribe is the mover or producer of the official act, but the official act for which the gratuity is given might have been done without the gratuity, although the gratuity was produced because of the official act.¹⁷

I would suggest that one can construe the term "corrupt" in the FCPA, consistent with the *Brewster* decision, to mean, as a kind of rule of thumb, that there must be a *quid pro quo*: "I'll pay you in return for your doing this official act to benefit me."

A. Extortion

The issue of the meaning of "corrupt" raises a series of other related issues under the Act which have been of significant concern to people. First, what about the issue of extortion? What about the situation where a company operating in a foreign country is told, "You must pay me this or you will not get the contract." Or a foreign official says, "You must pay me this or we will expropriate your business." Or, "You must pay me this or we will," (to use the language from the legislative history) "dynamite your oil rig."

Now that raises a whole series of interesting and sometimes difficult questions as to the extent to which extortion is a defense under the Act. I would suggest to you that, here again, the meaning of the term corrupt as used in 18 U.S.C. § 201 is helpful. On the issue of extortion, the legislative history¹⁸ reads as follows: "Section 103 and 104 cover payments and gifts intended to influence the recipient regardless of who first suggested the payment or gift."¹⁹

Let me pause here to interject that that sentence is designed to make clear that the common law distinction between extortion and bribery is eliminated under this Act. As some of you may know, at common law, the distinction between extortion and bribery turned on who first proposed the payment. If the government official first proposed the payment, then it was extortion. If the citizen first proposed the payment, it was bribery. Well, of

17. *Id.* at 82 (bracket added).

18. S. REP. NO. 114, 95th Cong., 1st Sess., reprinted in U.S. CODE CONG. & AD. NEWS 4098.

19. *Id.* at 10.

course that resulted in some difficult choices for the government, depending on what the proof was. If you charged extortion and the proof showed bribery, or charged bribery and the defense can establish extortion in that the foreign official first broached the offer, then the defendant is acquitted. What is clear from this legislative history is that the common law distinction is eliminated. It is irrelevant who first proposed the payment.

Going back to the legislative history, it states: "The defense that the payment was demanded on the part of the 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."²⁰

Let me interject here that that legislative history means that if the payment is to *obtain* business, that is, to get into the market in the first place, such a payment is corrupt and therefore illegal, and not a lawful payment made in response to an extortion demand by the foreign official. The reason being that the company has the choice of not going into the market at all. Its will is not being overborne. The company has freedom of choice. The legislative history goes on to say:

That the payment may have been at 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.²¹

I would suggest to you that this language from the legislative history is consistent with the definition of the term "corruptly" as it is used in federal domestic bribery law. Extortion in federal domestic bribery law, it is clear, is not a complete defense to a charge of bribery. Evidence of extortion is, however, admissible at the trial in that it is relevant to the issue of whether or not the defendant had a corrupt intent at the time he made the payment. *U.S. v. Barash*²² deals with the relationship between extortion and the issue of corrupt intent. Basically, the courts have found that such evidence is admissible and is to be considered by the jury in

20. *Id.*

21. *Id.* at 10-11.

22. 365 F.2d 395 (2d Cir. 1966).

making its finding of fact as to whether there was a corrupt intent.

*United States v. Kahn*²³ deals with this same issue. Let me quote an interpretation of *Barash* from the *Kahn* case.

Finally, as a policy matter, we think that the *Barash* rule is the preferable one. Almost every bribery case involves at least some coercion by the public official. The instances of honest men being corrupted by "dirty money," if not non-existent, are at least exceedingly rare. The proper response to coercion by corrupt public officials should be to go to the authorities, not to make the payoff. Thus, unless the extortion is so overpowering as to negate criminal intent or willfulness we would be loath to allow those who give in to illegal coercion to claim it as a total defense to bribery charges.²⁴

I would suggest that it would be very difficult to establish that one did not have a corrupt intent on the basis that the payment was extorted. The evidence of extortion must be strong enough, as the *Kahn* court indicated, to negate criminal intent.

Evidence of economic extortion, as contrasted to threats of violence to persons or to property which is referred to in the legislative history, is also admissible on the issue of corrupt intent. This notion is supported by the federal domestic bribery cases.

IV. ENFORCEMENT POLICIES OF THE JUSTICE DEPARTMENT

Let me move on to discuss some of the enforcement policies the Department of Justice has adopted relating to the Act. These policies apply both to criminal enforcement actions and civil enforcement actions, since Justice has civil injunctive authority for domestic concerns.

You might be interested to know that, because of the obvious sensitivity both from a national security point of view and a foreign policy point of view, the Department has administered the enforcement of this statute quite differently than the enforcement of most of the provisions of Title 18 of the United States Code. Administration of the enforcement effort has been highly centralized. Generally, FCPA cases, by the terms of the United States Attorney's Manual, are not investigated and prosecuted by the

23. 472 F.2d 272 (2d Cir. 1973).

24. *Id.* at 278.

ninety-four United States Attorney's Offices around the country. They are primarily investigated and prosecuted by the Multinational Fraud Branch in the Criminal Division at the Justice Department. Among other reasons, that is being done to make sure that there is a nationally uniform enforcement policy. Moreover, virtually any step that is taken in the investigative process, even more than in the post-indictment process, has potentially significant foreign policy and national security implications.

At the current time we have about sixty cases under investigation. Thus far, we have closed without prosecution perhaps another thirty cases. Justice has had only two cases in which public charges have been brought under the antibribery provisions of the FCPA: one was a civil injunctive action, *United States v. Carver*²⁵ filed in the Southern District of Florida; and the other, *United States v. Kenny International Corp.*,²⁶ filed in the District of Columbia.

One of the reasons for the limited number of prosecutions under the Act is that much of our time, until quite recently, has been spent in the investigation and prosecution of what has been commonly referred to as the pre-Act or pre-Foreign Corrupt Practices Act overseas payment cases. There were a long series of prosecutions of companies in connection with those overseas payment cases in which the conduct pre-dated the existence of the FCPA.²⁷

25. *Supra* note 8.

26. Crim. No. 79-372 (D.D.C., filed Aug. 2, 1979) and *United States v. Kenny International Corp.*, Civ. No. 79-2038 (D.D.C., filed Aug. 2, 1979).

Since this lecture was given, the Justice Department has initiated some additional FCPA prosecutions: *United States v. C.E. Miller Corporation*, Crim. No. 82-788 (C.D. Cal., filed Sept. 17, 1982); *United States v. Ruston Gas Turbines, Inc.*, Crim. No. H-82-207 (S.D. Tex., filed Sept. 22, 1982); *United States v. Crawford Enterprises, Inc.*, Crim. No. H-82-224 (S.D. Tex., filed Oct. 22, 1982); *United States v. International Harvester Co.*, Crim. No. H-82-244 (S.D. Tex., filed Nov. 18, 1982); *United States v. Applied Process Products Overseas, Inc.*, Crim. No. 83-004 (D.D.C., filed Jan. 5, 1983); *United States v. Gary D. Bateman*, Civ. No. 83-014 (D.D.C., filed Jan. 5, 1983); and a related case, *United States v. Gary D. Bateman*, Crim. No. 83-005 (D.D.C., filed Jan. 5, 1983).

27. See *United States v. The Williams Companies*, Crim. No. 78-144 (D.D.C., filed March 24, 1978); *United States v. Control Data Corp.*, Crim. No. 78-210 (D.D.C., filed April 26, 1978); *United States v. United Brands Co.*, Crim. No. 78-538 (S.D.N.Y., filed July 19, 1978); *United States v. Westinghouse Electric Corp.*, Crim. No. 78-566 (D.D.C., filed Nov. 20, 1978); *United States v. Gulfstream American Corp.*, Crim. No. 79-7 (D.D.C., filed Jan. 3, 1979); *United States v. Lockheed Aircraft Corp.*, Crim. No. 79-270 (D.D.C., filed June 1, 1979); *United States v. Page Airways, Inc.*, Crim. No. 79-273 (D.D.C., filed June 4, 1979); *United States v. Textron, Inc.*, Crim. No. 79-330 (D.D.C., filed July 10, 1979); *United States v. McDonnell Douglas Corp.*, Crim. No. 79-516 (D.D.C., filed Nov. 9, 1979); *United States v. Bethlehem Steel Corp.*, Crim. No. 80-431 (S.D.N.Y., filed July 24, 1980); *United States v. The Boeing Co.*, Crim. No. 82-199 (D.D.C., filed July 30, 1982).

A variety of criminal statutes were utilized, including the Currency and Foreign Transactions Reporting Act,²⁸ the false statements statutes²⁹ and, to a lesser extent, the mail and wire fraud statutes.³⁰ Much of the Department's time until now has been devoted to finishing those cases, many of which were enormously complex. The Department is now completing the final phases of that pre-Act enforcement effort and has begun to focus more attention on post-FCPA investigations and prosecutions.

V. INVESTIGATIVE PROCEDURES

At this point I would like to discuss some of the unique investigative approaches which are being utilized by the Justice Department because of the unique nature of the Act, particularly in terms of its foreign policy implications. Initially, as a general rule, what we try to do in these cases is to focus our investigative effort in the United States, without informing the foreign government in question of the fact that we are investigating. But I should add that there are obviously some exceptions to that general rule. The primary reason we generally do not notify the foreign government at the beginning of an investigation is that, as you can well imagine, it is relatively easy for confidence men, whether they be company employees or independent agents, to claim that they need an extra million dollars added to the commission fee because they must pass the extra money to the prime minister of the country involved in order to obtain the contract. In fact, these employees or agents never talked to the prime minister and have no intention of bribing him. It is merely a fraud or a device to increase their own fee. They deposit the extra million dollars into their own or a confederate's Swiss bank account.

When an informant or an insider tells us that there is a bribe in process or that a bribe of a foreign government official has already occurred, we do *not* immediately notify the foreign government. As you can well imagine, if we started to communicate to a foreign government every unsupported and uncorroborated allegation of bribery of its officials, there would be worldwide foreign relations turmoil, given the ease with which such allegations can be made by persons with ulterior motives. This point is best evidenced by the fact that we have closed a significant number of cases without any prosecution.

28. 31 U.S.C. § 1051 *et seq.*

29. 18 U.S.C. § 1001.

30. *Id.* at §§ 1341, 1343.

We have avoided this problem by focusing our investigation within the United States and closely controlling dissemination of the allegation and any information developed. We have sought evidence initially from witnesses in the United States, corporate records maintained within the United States, and bank records and whatever other sources we might have available in the United States. Only after we have concluded, as a result of our initial investigation, that indeed there is significant reason to believe a bribe was paid or offered to a foreign government official, do we notify the foreign government.

A. Notification of foreign governments and disclosure of the identity of foreign officials in indictments and complaints

In order to deal with the problems of international investigation and with the foreign policy consequences of much of what we do, we have established an informal procedure with our colleagues at the State Department. The procedure is two-fold. First, we do not tell our colleagues at the State Department anything at all about our investigations as they are proceeding. We do not pass information to the State Department about the substance of what we are investigating or what we are developing. Consequently, the State Department can not pass along information on the investigation to the United States Ambassador in the country in question. That is a long-standing policy, agreed upon by us and our colleagues at State. It is designed primarily to avoid politicization of these investigations in a way that could prove embarrassing to the United States.

Many ambassadors are not happy with this policy, as you can well imagine. However, if for example, the United States Ambassador were told that the Justice Department had received allegations that a bribe had been paid to Minister X, and Minister X, having learned of the investigation, questions the Ambassador about the investigation at a cocktail party, the Ambassador is then in a rather untenable position. Either he discloses to Minister X what he knows about the investigation or he dissembles. Even if he dissembles, the Ambassador may inadvertently and unknowingly disclose something to Minister X that would compromise the investigation. Therefore, both State and Justice have agreed that both agencies are better off if the Ambassador does not know about Department of Justice investigations. This is particularly true since, as I have already indicated, many of these investiga-

tions are closed without prosecutions. It would cause unnecessary complications to American foreign relations if the State Department were to know about every allegation and the details of our investigations.

However, the second part of this procedure is an arrangement for notification of the State Department when we reasonably anticipate something happening in the investigation which will make public the fact of the investigation or the allegation. If we are about to file a criminal charge or a civil complaint which names the foreign official or foreign country, we will first notify the State Department so that it can notify the United States Embassy, which will pass the appropriate diplomatic note to the foreign government. Therefore, the foreign government will first learn about the investigation through formal diplomatic channels and not through the newspaper. Then the foreign government is not caught by surprise, which is of crucial importance in maintaining stable diplomatic relations. Moreover, if for example, and this has already happened in some instances, during a grand jury investigation a witness refuses to answer questions, we may have to ask the court to hold the witness in civil contempt. If we ask the court to incarcerate the witness until the witness answers the questions, that will be part of a public proceeding in which some of the allegations may be disclosed. When we anticipate that might happen, we also notify the State Department so that it can formally notify the foreign government.

In regard to notification of the foreign government, let me mention something of interest to the many private practitioners around the country who may become involved in our cases. In our public pleadings, whether we are bringing an indictment or filing a civil complaint, generally we will *not* agree to withhold the identity of the foreign country or of the foreign official. Our current policy evolved out of our experience in the *Westinghouse*³¹ pre-Act prosecution. Let me first indicate what happened in that case. Then I will explain our current policy.

In the *Westinghouse* case, which involved bribes to an individual who was, at the time of the prosecution, the Deputy Prime Minister of Egypt, we initially agreed with the company to withhold the identity of the foreign official and the country. We reached this agreement because, at the time of the plea, the late

31. See *supra* note 27.

President Sadat was in the United States negotiating a peace settlement in the Middle East. For a variety of reasons, the United States District Court for the District of Columbia rejected the plea bargain. The Court objected, among other things, to the fact that, by the terms of the plea agreement, the name of the country and of the foreign official would not be disclosed in public. The day after the plea agreement was rejected, sources outside the Justice Department leaked to the press the identity of the country and of the official. Therefore, when we went back into court everything was disclosed in the pleadings. To our great relief, the disclosure had no impact whatsoever on our foreign relations with any nation, including Egypt. Moreover, the Egyptian government stripped the Deputy Prime Minister of his parliamentary immunity and prosecuted him in Egypt for bribery. Indeed, the Egyptian government, as have the governments of a number of other countries in which there have been allegations of widespread corruption, has now launched a major anticorruption campaign.

As a result of our experience in the *Westinghouse* case, we adopted a more refined policy dealing with the disclosure *vel non* of the identity of the country or of the foreign official as part of plea agreements in FCPA cases. This policy applies only in the plea bargain situation since, obviously, if an indictment is to be litigated we have to allege all of the details of the transaction which we would have to prove at trial. In the plea bargain situation, we will agree not to disclose the identity of the country or of the foreign official only if there is a satisfactory law enforcement or foreign policy basis to do so. The law enforcement basis is limited to those situations where there would be significant risk of death or great bodily injury to persons if the identity of the country or of the official is disclosed. In that regard, our general position is that the presence of company employees in the foreign country is not a sufficient basis for nondisclosure. We can control the timing of any public disclosures. The company can avoid danger to its employees by simply removing them from the country in advance of the public plea, particularly if the employees are United States citizens. However, if we believe that there is an unavoidable risk of death or great bodily injury to persons if full disclosure is made, we will agree to withhold the identity of the country or of the official. I should add, however, that such a situation has yet to arise.

The only other basis upon which we will agree to non-

disclosure is that of foreign policy. However, the foreign policy reasons for nondisclosure must be communicated to the Justice Department in writing by the State Department. If we receive such a communication, then we would certainly consider it in making the decision on whether to insist on full disclosure. I might add that thus far we have never received such a written communication, although a number of people have asked the State Department to send us that kind of written request. The State Department has yet to find that any of our cases are of such a nature that full disclosure would significantly damage United States foreign policy interests.

B. Notification of foreign governments and investigative cooperation through the use of executive agreements on mutual assistance

There is one other major circumstance in which we will go to the foreign government for reasons other than anticipated public disclosures in the United States. When our investigation has advanced to the point where we are convinced that there was indeed criminal activity, not only in the United States under the FCPA, but criminal activity in the foreign country under its own domestic bribery laws, and we have reason to believe that we may receive investigative assistance from the foreign government because that government is interested in enforcing its own domestic bribery laws, we may then make disclosures to the foreign government.

But we proceed in some very special ways. First, we will go to the foreign government only on a prosecutor-to-prosecutor basis. We never do any of these investigations through the use of Interpol, which in ordinary criminal cases conducts many transnational criminal investigations. In the ordinary case, Interpol people in the United States ask the local police in the foreign country to do the investigation for them. Because of the nature of the allegations we are investigating, using Interpol would be similar to asking the local police in the United States to investigate an allegation that the President took a bribe. It would be explosive in the foreign country. It would be far beyond what one would reasonably expect local law enforcement in that country to handle. As a consequence we have never used Interpol to assist us in these investigations.

Secondly, when we have reached the conclusion that we may be able to get assistance from the foreign government, we first

seek an executive agreement on mutual assistance. The executive agreement is an agreement between our Department of Justice and the Ministry of Justice of the foreign government. They are not government-to-government agreements. They are also limited by their terms to particular investigations. We currently have in force executive agreements on mutual assistance with the ministries of justice of twenty-six foreign governments.

As background information, these agreements represent a policy begun in 1976 by the Justice Department, with the concurrence of the SEC and the State Department. At that time the overseas bribery scandals became public in the United States, the first major one that resulted in an agreement being the scandal involving Lockheed. In 1976, after the public disclosures in the United States involving Lockheed's activities in the Netherlands, Japan and Italy, those governments, of course, asked us to disclose our evidence to them. At that time the Justice Department adopted a policy which is still in effect today. We will not pass any information to a foreign government relating to illicit payments in that country unless that government first enters into an executive agreement on mutual assistance with us. Such agreements were entered into with Italy,³² Japan,³³ and the Netherlands³⁴ in mid-1976 in connection with the Lockheed matter. Since that time we have negotiated agreements with the ministries of justice of an additional twenty-three countries. A number of those agreements have since been amended to include additional investigations.

Basically, the agreements do two things. First, each Department obligates itself to keep confidential and in law enforcement channels any evidence or information received pursuant to the agreement. Such information may be made public only in connection with administrative, civil or criminal judicial proceedings. The agreements are designed to prevent the minister of justice from receiving information from us and then releasing it at a press

32. Procedures for Mutual Assistance in the Administration of Justice in Connection with the Lockheed Aircraft Corporation Matter, March 29, 1976, United States-Italy, 27 U.S.T. 3437, T.I.A.S. No. 8374.

33. Procedures for Mutual Assistance in the Administration of Justice in Connection with the Lockheed Aircraft Corporation Matter, March 23, 1976, United States-Japan, 27 U.S.T. 946, T.I.A.S. No. 8233.

34. Procedures for Mutual Assistance in the Administration of Justice in Connection with the Lockheed Aircraft Corporation Matter, March 29, 1976, United States-Netherlands, 27 U.S.T. 1064, T.I.A.S. 8245.

conference the next day. The information may only be used for legitimate law enforcement purposes. This prevents, as would otherwise happen in Japan for example, the disclosure of the information given to the foreign government to investigative committees of the legislature. The second significant purpose of the agreements is that they obligate the ministries in both countries to use their best efforts, within the confines of their domestic law, to assist each other in the investigation, and any prosecutions which may result from the investigations.

It should be noted that the agreements are limited to illicit payment cases. Moreover, they are limited by their terms to particular investigations. Most of the agreements came into being because, with all due respect to my colleagues from the SEC, the SEC had a number of cases in which they filed civil injunctive actions naming countries and officials. That, of course, always caused those countries to ask the Justice Department for information. In response, the Justice Department said, with the concurrence of the SEC, that unless there was an executive agreement, we would not give the information to the foreign government. The bulk of the agreements, therefore, were initially negotiated as a result of prior public disclosures in the United States by the SEC.

We have now started, in the last year or so, to use the agreements in a more aggressive way. Until that time the fact of the investigation and the identity of the company was already a matter of public record. Therefore, the agreement itself would disclose the fact that it covered the investigation of the Boeing Company or the McDonnell-Douglas Corporation. Lately, when we are conducting a non-public investigation and we reach a point where we feel it is appropriate to go to the foreign government, we contact that government through diplomatic channels and seek an amendment to the agreement. Rather than publicly identify in the agreement the company which is under the investigation, which for obvious reasons we do not want to do, we have started to identify the investigations by means of Justice Department numbers. In more recent agreements, therefore, instead of a company name you will find a Justice Department investigation number such as MA101. The significant thing is that in some instances we are notifying the foreign government in advance, obtaining its commitment to help us, and assisting that government to enforce its own bribery laws simultaneously with the enforcement of the FCPA.

C. Bilateral Mutual Assistance Treaties

Permit me to draw a distinction between these executive agreements on mutual assistance which thus far, as I said, have been limited to illicit payment cases, and another federal initiative in the field of bilateral mutual assistance treaties. Since 1979 when the Office of International Affairs (OIA) in the Criminal Division was created, there has been a continuous effort to negotiate bilateral mutual assistance treaties. The first and earliest such treaty was negotiated with the Swiss in 1977 before OIA was created. The Swiss Treaty³⁵ is limited to providing assistance in criminal matters.

These are broad-based treaties in that they apply to all criminal matters, not just illicit payment cases. The Swiss treaty is a fairly long, complex document. Some have suggested that it is too long and too complex. In any case, the treaties are primarily designed to make more efficient the international evidence gathering process by eliminating the need for letters rogatory. The traditional means of obtaining evidence has been through letters rogatory. The letters are issued by a court in the United States, and are addressed to a court in the foreign jurisdiction seeking that court's assistance. The letters are sent to the State Department, which sends them through diplomatic channels to the United States Embassy in the foreign country. The Embassy then transmits the documents to the Ministry of Foreign Affairs of that country, which transmits them to the foreign Attorney General or to the foreign court directly. It is an extraordinarily inefficient process sometimes taking eight months or a year.

In lieu of the letters rogatory process, the Mutual Assistance Treaties provide for a "Competent Authority" to be appointed in each country, usually the Ministry of Justice in each country. The two competent authorities then make direct prosecutor-to-prosecutor requests of each other, avoiding the diplomatic channel. These written requests do not involve the courts, which must sign letters rogatory requests. These treaties, depending upon the country involved, can by their terms modify domestic law. In the United States, since treaty law is supreme, the treaties do modify our domestic law.

35. Mutual Assistance in Criminal Matters, January 23, 1977, United States-Switzerland, 27 U.S.T. 2019, T.I.A.S. No. 8302.

As a result of, for example, the 1977 Swiss treaty, we may now obtain Swiss bank records for use in criminal prosecutions, notwithstanding prior provisions to the contrary in Swiss bank secrecy laws. Since the OIA was created, there has been a concerted effort to negotiate similar treaties with other countries. There has been a similar treaty negotiated with Turkey which has been ratified both by the Senate and by the Turkish government and is now in effect.³⁶ Treaties have been negotiated with the Netherlands and Colombia, which have been ratified by the Senate but are still awaiting ratification by the two treaty partners. Treaties now are being negotiated with Germany, Italy, and several other countries.³⁷

I should add that in all of these negotiations, we initially try to have the treaty cover not only criminal matters, but civil and administrative matters as well. The Dutch, I believe, have agreed to a treaty which covers not only criminal, but civil and administrative matters. Of course, the Swiss treaty, even with the recent interest of the SEC, is limited to criminal matters.

VI. FCPA REVIEW PROCEDURE

In conclusion, I would be remiss if I did not briefly describe the procedure the Justice Department has established to provide guidance to the business community on the FCPA. In 1980 we established the Foreign Corrupt Practices Act Review Procedure.³⁸ Basically the Procedure is modelled after the Antitrust Division's Business Review Procedure. It permits a company to submit to us a Review Request, in writing, describing a proposed transaction. We will then indicate whether or not we will take an enforcement action, if the transaction proceeds. Thus far, there have been ten Review Releases under the Review Procedure.

In establishing the Procedure, we have maximized the protection from public disclosure that we provide to confidential business information. The first four releases, issued in 1980, dealt with a variety of issues, some of which are addressed in S.708, a

36. Treaty on Extradition and Mutual Assistance in Criminal Matters, Jan. 1, 1981, United States-Turkey, ___ U.S.T. ___, T.I.A.S. No. 9891.

37. In November 1982 the United States signed a Mutual Assistance Treaty with Italy which, like the Treaties with the Netherlands and Colombia, is now pending final ratification before it goes into effect.

38. 28 C.F.R. § 50.18.

bill to amend the FCPA.³⁹ Release Number 80-4, involving Lockheed and Sulyman Olayan in Saudi Arabia, is of particular interest.⁴⁰ It sets out a fact pattern outlining a situation where, under certain very limited circumstances, a company may enter into a business relationship with someone who is also a foreign government official. The Release does not, by any means, support the notion that a company can hire as an agent a full-time official of a foreign government, particularly when that official is going to decide whether or not the company will get a contract. It is a much more narrow Release in that Olayan was, if you will, similar to a very part-time, outside director in his capacity as a government official.

We issued, in 1981, two more Releases. The one which may be of particular interest involves Bechtel. The issue of "reason to know" under the FCPA and the precautionary steps that were taken by Bechtel to avoid a "reason to know" problem were dealt with the Release Number 81-2. Under the circumstances, we indicated we would not take an enforcement action.

Finally, there have been four Releases issued in 1982. Release Number 82-1 deals with another important current issue under the Act. It involves the payment of a finder's fee to an agent which is not necessarily related to services performed by the agent. Release Number 82-2 involves a Request by the State of Missouri relating to promotional expenses. The State, in combination with some private business interests, wanted to bring to Missouri foreign government officials in connection with promotional activities. The State wanted to pay for the travel and entertainment expenses of the officials. Such promotional expenses are also addressed in S.708.

The Releases all indicate that our decision is not binding on anyone other than the parties submitting the Review Request. However, the Releases are issued to provide some guidance to the private practitioner and to the business community. The most significant thing, from the corporation's point of view, about the availability of the Review Procedure is that, even in situations where they may be a "technical violation" of the FCPA, the company can obtain from us in advance a binding exercise of prosecutorial discretion.

39. S. 708 was passed by the Senate on November 23, 1981 during the ninety-seventh Congress. S. 708, 97th Cong., 1st Sess., 127 CONG. REC. 13,983-85 (1981). No action was taken by the House on S. 708 during that Congress.

40. The Review Releases have not been published but are available upon request from the Department's Public Information Office.