

AN EXAMINATION OF THE PROVISIONS AND STANDARDS OF THE FCPA

Frederick B. Wade*

As I was reflecting on what I should say here this morning, I took into account what was said last night, particularly the suggestion that we should reflect on the process and consider what insights our experience with the Foreign Corrupt Practices Act¹ (FCPA) can give us into the policymaking process. There are a number of points I would like to make in this regard. First is the extent to which it is possible to reconcile the need, indeed the desirability, of having a statute that is predictable and certain in its application, with the need for standards of law that will adequately cover a variety of disparate situations without loopholes that would frustrate achievement of the statutory purpose. Other questions involve the extent to which the policymaking process is capable of coming to grips with situations where it is difficult to determine what is actually going on in the business community, what impact the statute has had since its enactment, and how it may be possible to alleviate the concerns expressed by critics of the law with respect to the application and interpretation of the Act in a way that is consistent with the policies of the Act, if indeed we want to preserve those policies.

I. BACKGROUND

Let me begin by putting the statute in perspective. According to the House Report² concerning the Act, more than 400 corporations admitted making questionable or illegal corporate payments by October of 1977. These companies included some of the largest and most widely held public companies in the United

* Chief Counsel, Enforcement Division, Securities and Exchange Commission. The Securities and Exchange Commission, as a matter of policy, disclaims responsibility for private publications by any of its employees. The remarks presented herein are solely those of Mr. Wade and do not necessarily reflect the position of the SEC.

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*.

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

States. The total amount of payments disclosed was in excess of \$300 million, much of it in payments to foreign government officials, politicians and political parties.³

The legislative history reflects a number of different reasons for enactment of the antibribery provisions of the Act. As Wally Timmeny pointed out last night, a large factor, perhaps the primary factor, was the impact that these payments had in terms of the foreign relations of the United States. The disclosures of payments by Lockheed in Japan shook the government of that nation to its foundations.⁴ In Italy, payments to government officials eroded public support for the government and jeopardized our foreign policy in that area.⁵ The Congress was particularly concerned about the fact that, since Italy was a member of the NATO treaty alliance, the possibility existed that a government could come to power which could give representatives of the communist party access to NATO secrets. It was felt that this possibility had profound implications, not only for our foreign policy generally, but for defense policy as well.

The Congress also pointed to the adverse impact that bribery could have upon American business. The Senate and House reports point out that bribery could seriously injure the long-range interests of American business by affecting the stability of overseas sales. In addition, the committee reports indicate that bribery is destructive of a basic tenet of the free-market system, namely, the principle that competition for sales should take place on the basis of price, quality and service, and should not be skewed by the payment of bribes. They also point out that the disclosure of such payments can damage a company's image, lead to costly lawsuits, cause the cancellation of contracts, and result in the expropriation of overseas assets. Moreover, to the extent that these types of costs might result, there may be disclosure questions raised under the securities laws.

These are the policy considerations the Congress relied upon

3. *Id.*

4. Japanese Premier Kakui Tanaka resigned in 1974, following accusations that he had accepted \$1.7 million in bribes from Lockheed Corporation. N.Y. Times, Nov. 28, 1974, at 3, col. 5.

5. Italian President Giovanni Leone resigned on June 15, 1978, after accusations of tax evasion and kickbacks including a \$2 million Lockheed bribe. N.Y. Times, June 16, 1978, at 1, col. 3. Lockheed signed a consent agreement with the SEC, promising not to make such payments in the future. SEC v. Lockheed Aircraft Corp., [1975-1976 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,509 (D.D.C. 1976).

in adopting the FCPA. These are the reasons why there was a great deal of momentum behind the movement to deal with the problems associated with bribery of foreign officials. The Congress enacted a statute that was intended to eliminate or eradicate such bribery.

II. CORPORATE RESPONSE

This is where my thoughts about the nature of the process first come into play. In retrospect, the business community has had a great deal of difficulty with the Act. But at the time the legislation was being considered in the Congress, and hearings were being held, there was a great reluctance on the part of interested companies and persons to come forward and make their views known. Although this reluctance may be understandable, given the subject matter, there was virtually no opposition to the bill. Few, if any, concerns were expressed in a public forum as to how the FCPA might affect overseas operations or how the statute might be interpreted and applied.

There was a hearing in June of 1979 before a subcommittee chaired by former Congressman Eckhart of Texas, who was one of the principal sponsors of the FCPA. He commented during the course of that hearing about the lack of concern raised about the Act at the time it was under consideration. Moreover, there is still great difficulty in getting the corporate sector to come forward and express concerns in a public forum in a way that the Congress can get a handle on them and try to deal with them in a rational way.

The public record, as it existed at the time the statute was enacted, does not reflect the kinds of concerns that have been raised since the FCPA became law. For example, it is said that the FCPA has caused American companies to lose a substantial amount of business. However, to the extent that there is legislative history bearing on this subject, persons testified that bribery was unnecessary in order to conduct business overseas. In addition, it was suggested that a prohibition of bribery might benefit American companies by giving them a basis to refuse attempted shakedowns by foreign officials, or by eliminating unfair competition by American competitors. In some cases, bribes were paid by American companies not to obtain business that might otherwise have gone to foreign concerns, but to divert business from other American companies.

The situation is rather complicated. How do you grapple with this kind of situation, and make a determination as to where the national interest lies? How do you assess the need for a statute of this kind in the first instance, and then evaluate the impact that it has had since enactment? This is particularly difficult when you have a situation, due to the nature of the subject, where the people most affected do not feel free to come forward and to lay out their concerns.

Much of the criticism levied against the Act comes down to a call for greater predictability and certainty with respect to the interpretation and application of the statute. There are allegations that the statute is ambiguous and unclear as to what one has to do to comply. But it is difficult to get a handle on the impact that the statute has had, because most of the experience people have had is related to the government or to the Congress in the form of anonymous anecdotes. People say we have had this type of experience, or this kind of problem, but you have to take our word for it, accept our general description of the circumstances, and agree not to identify the source of the information. As a result, there is no way to look at the circumstances involved and verify the accuracy of the information received. Nor is it possible to evaluate the anecdotes to see if a claim of lost business results from ambiguity in the statute or from a perception that the business could not be obtained without engaging in conduct that the Congress clearly intended to prohibit.

People may say that they are unsure as to what they can do with respect to overseas business, but if you look at the circumstances presented, the difficulty with the FCPA is not very often ambiguity or a lack of clarity. Instead, business may be lost because it would require the kind of conduct that Congress clearly intended to proscribe.

I am not suggesting that there is no room for improvement. We all agree that statutes should be clearly written so that there will be predictability and certainty. However, I am attempting to illustrate that, from the perspective of the policymaking process, it is very difficult to sort out the concerns expressed about the FCPA, to evaluate the anecdotal information that is presented, and to determine what ought to be done.

A. *The GAO Report*

The only empirical study that has been done to date is the

report by the Controller General on the Impact of the Foreign Corrupt Practices Act on U.S. Business.⁶ The findings are interesting, although I am not sure how much weight they should be given in light of the nature of the survey and the types of responses elicited.

The GAO report surveyed 250 American businesses and corporations. It does not necessarily reflect hard data because many questions merely asked respondents for opinions as to the impact of the Act.

The GAO report reflects that 76.5 percent of the respondents stated that the Act has, or probably has, been effective in reducing questionable corporate payments abroad. Only five percent asserted that the Act has not, or probably has not, been effective in that respect. These figures indicate that the Act has had a tremendous impact in the way that business has been conducted abroad.

Much of the impact occurs in meetings between private counsel and the companies that they advise. Those who engage in advising companies how to comply with the statute will confirm that this statute has had a tremendous impact.

Perhaps another indication that the statute has been effective in achieving its intended purpose is the fact that, since the enactment of the statute in 1977, the Commission has brought only two cases enforcing the antibribery provisions. I do not think this low number reflects a lack of commitment to enforcement. We are committed to strong enforcement of the FCPA. However, we have to take cases as they come. The Justice Department, which shares responsibility for enforcement of the FCPA with the Commission, has brought only two civil cases and one criminal case under the Act. If you compare the large number of cases prosecuted prior to the FCPA, with the small number of cases prosecuted since enactment, the figures appear to confirm the finding that there has been a tremendous change in the way overseas business is conducted.

There are a number of inferences which could be drawn from this. It is clear, however, we have not had that many enforcement cases involving bribery of foreign officials since the statute was enacted.

The GAO report also took note of the widespread assertions

6. U.S. GAO, IMPACT OF THE FOREIGN CORRUPT PRACTICES ACT ON U.S. BUSINESS (1981) [hereinafter referred to as "the GAO report"].

that bribery provisions have caused American companies to lose business. As I have indicated, these claims were not supported by hard, verifiable data. But GAO's survey data indicates that the problem of lost business that is attributable to ambiguity may be much less than many have assumed or asserted.

Of the respondents, nearly sixty-eight percent reported that the bribery prohibitions had little or no effect on their business. If you include those reporting what the GAO classified as a marginal decrease in business, you find that 87.5 percent of the companies responding to the survey either experienced no loss in business or only a minor decrease. Twelve percent of the respondents reported a decrease of business that could be characterized as moderate. Less than one percent indicated they had suffered a great decrease.

As I said earlier, I do not know how much weight one can give to these statistics. I am not inclined to give them a great deal of emphasis, but this is the only empirical data available with respect to the impact that the statute has had.

With respect to claims of a lack of clarity and ambiguity in the statute, the survey data provides another interesting insight. A total of 79.5 percent of the respondents indicated that the clarity of the bribery provisions was either adequate or more than adequate. Only 8.8 percent expressed the view that the clarity of the provisions was either inadequate or very inadequate.

B. General Criticisms of the Act

Let me return to the essential questions I raised at the outset. How do you assess where the national interest lies? How do you make a reasoned judgment as to what is the appropriate policy for the United States?

I attended a conference at the Smithsonian Institute which was attended by a representative of a developing nation in Africa. The principal criticism of the FCPA asserted at the conference was the notion that the antibribery provisions of the statute were little more than an effort to export American notions of morality. Critics suggested that the United States was acting like a "Boy Scout in seeking to proscribe bribery." The African representative responded with the observation that people around the world, including those of his own country, are very sensitive about the corruption of their public officials. Although bribery may be common in some areas of the

world, he pointed out that bribery is universally condemned in law and policy. He believed it is in the long-range interests of the United States to eliminate bribery of foreign officials by American corporations because this will prevent an adverse public reaction in those countries if such payments should be made and subsequently disclosed.

Should the policy of the United States be one of attempting to eradicate bribery of foreign officials on the part of American corporations? Or does one take the position that it is simply unrealistic to try to conduct business without bribery in an imperfect world and that, under these circumstances, the nation has to accept the risks—and the potential costs—such a policy may have in terms of the long-range interests of the nation and of American corporations.

Although the debate is often couched in terms of "exportation of morality," I believe a good case can be made that the Congress, in enacting the statute in 1977, made a very pragmatic judgment in assessing these policy considerations. It is an oversimplification to characterize the FCPA as merely an effort to export morality.

This leads me to an observation about the quality of the public debate going on for four years since the statute was enacted. From my perspective, the critics of the FCPA and those in government charged with administering the Act have been talking past each other for four years. I am not sure why this is true. I am sure that there has been a failure to communicate and that we have not advanced the ball to a great degree in terms of coming to grips with the issues. This failure to communicate has profound implications with respect to the ability of the policymaking process to evaluate the issues and make needed changes in the law.

I have already discussed one aspect of the problem. Many have claimed, or assumed, that the antibribery provisions of the FCPA have caused American companies to lose a substantial amount of business. However, there has been a failure to communicate the kind of information needed to assess the extent of such losses, identify reasons for such losses and determine whether there are changes that could alleviate the problems encountered in a manner consistent with the policies of the Act. I say "consistent with the policies of the Act" because most critics state that their problem lies not with the policy of the Act, but with a lack of clarity and ambiguity in the terms used to express that policy.

III. ACCOUNTING PROVISIONS

Another example which illustrates the failure to communicate that has characterized the debate on the FCPA involves the accounting provisions of the Act. The debate with respect to this aspect of the FCPA was initiated with the publication of the so-called "ABA Guide."⁷

The ABA Guide suggested, among other things, that the accounting provisions of the statute should be limited by a materiality standard. The materiality standard is a standard of limitation applicable to the disclosure requirements of the federal securities laws. In general, the materiality standard limits liability for a false or misleading statement in a required report to the Commission, or misleading or false statements which would be "material" to a reasonable investor. In other words, the statement must be false or misleading in a manner that a reasonable investor would consider important in making a decision to buy, sell or hold securities, or to exercise voting rights on matters put before the shareholders.

The ABA Guide took the position, particularly with reference to the record-keeping requirement, that there had to be some limitation on liability. The record-keeping provision requires that issuers, generally referred to as "reporting companies," subject to the Securities Exchange Act,⁸ shall "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." The statutory command is clear and straightforward. Companies should have accurate books and records.

The difficulty with this proposition lies in the fact that in a company of any size, it is virtually impossible to maintain books and records that are entirely accurate. There are always going to be errors and inadvertant mistakes. As a result, even with the standard of reason incorporated in the "reasonable detail" language of the statute, every company subject to the Act would likely be in technical violation of the statute.

A. *The Materiality Standard*

How do you deal with that problem? The ABA Guide said,

7. ABA Comm. on Corp. Law and Accounting, Sec. of Corp., Banking and Business Law, *A Guide to the New Section 13(b)(2) Accounting Requirements of the Securities Exchange Act of 1934*, 34 BUS. LAW 307 (1978) [hereinafter referred to as the "ABA Guide"].

8. Securities Exchange Act, 15 U.S.C. §§ 78a-78kk (1976 & Supp. V 1981).

let's have a materiality standard. But materiality is defined in terms of what a reasonable investor would consider important, or "material," to the financial statements of an issuer. For a company of any size, this means that you would need transactions of thousands, perhaps tens or hundreds of thousands of dollars, before the record-keeping requirement would be applicable. Transactions of a lesser amount—not "material" to the financial statements—would not be subject to the requirement that they be recorded accurately.

Understand what is happening here. The Securities Exchange Act⁹ is a statute which traditionally has regulated disclosure on the part of reporting companies. All of a sudden, you have a new statute which requires companies to have accurate books and records. The new law has nothing to do with the output of the accounting system, which is reflected in the financial statements and other disclosure documents. It is a statutory requirement that regulates the input that goes into the accounting system. It regulates how individual transactions must be recorded, as distinguished from how financial information based upon the aggregate results of all transactions must be disclosed to investors.

How should a transaction be recorded? Section 320.38 of Statement on Auditing Standards No. 1 indicates that transactions should be recorded at the amounts in which they occur, in the periods in which they occur, and be classified in appropriate accounts. That is what an auditor expects to find when he audits a company's books. However, if you use a materiality standard to determine what goes into your accounting system—to define the transactions a company is required to record accurately—few, if any, transactions would be subject to the record-keeping requirements. From that perspective, the argument set forth in the ABA Guide simply does not make sense. But we've been talking about the "materiality" issue for four years.

When members of the Commission staff speak in a forum such as this, we are asked, "Is there, or should there be, a materiality standard?" Members of the Commission staff say, "No. There is no basis for such a view in either the language of the statute or in the legislative history. Moreover, it would not make sense to have such a standard."

Such statements by Commission staff members have been misunderstood and misinterpreted as assertions that the Commis-

9. *Id.*

sion intends to sue every company that has an inadvertent or minor deficiency in its record-keeping system. There is a perception that, if a company has an error in the five or ten dollar expense account voucher, the Commission may bring an enforcement action. Frankly, we have much more important things to do. Nevertheless, the fear was there. The concern was real, and the perception of the problem was real. And, as a result, the debate continues.

B. Pending Legislation

When hearings were held on the Chafee Bill,¹⁰ which would amend the statute, the proponents of the Bill were still arguing that a materiality standard should be applied to the record-keeping requirement, despite the fact that a standard stated in terms of a financial statement materiality simply would not work in the context of a record-keeping requirement. Representatives of the business community urged that a materiality standard be adopted to limit liability for violations of the record-keeping requirement. There were a number of efforts made to develop a definition of "materiality" that various segments, among the interested parties, could agree upon. However, interested parties could not agree upon a definition of "materiality" that was workable. The upshot of the process was S. 708 which, as passed by the Senate, has no books and records requirement.

Senate Bill 708 would retain the internal accounting controls provision, requiring companies to devise and maintain systems of internal accounting controls sufficient to provide reasonable assurances that certain statutory objectives are met. These objectives include the recording of transactions as necessary to prepare financial statements in accordance with generally accepted accounting principles, and to maintain accountability for assets. However, the specific requirement that each transaction be recorded accurately and fairly has been deleted from the Bill.

The words of the record-keeping requirement are still there, but they have been moved into the internal accounting controls provision. This approach emphasizes that accuracy in record-

10. S. 708, 97th Cong., 1st Sess., 127 Cong. Rec. 13,983-85 (1981); *Business Accounting and Foreign Trade Simplification Act: Joint Hearings on S. 708 Before the Subcomm. on Securities and the Subcomm. on International Finance and Monetary Policy of the Senate Comm. on Banking, Housing, and Urban Affairs*, 97th Cong., 1st Sess. (1981). These proposed changes to the FCPA are reprinted in Appendix II, *infra*.

keeping is still an objective to be achieved, but also makes clear that liability will not always result if a company fails to make and keep records that are accurate in every respect.

I think the Bill, as passed by the Senate, is an improvement. It does clarify a number of areas of difficulty. However, that result was delayed by the failure of interested parties to come to grips with the problem, define the relevant issues and come up with solutions that are workable.

There is a related issue that I want to discuss. That is the need to reconcile the goals of predictability and certainty, on one hand, with the need for statutory standards that are capable of covering a broad range of conduct.

When I was in law school, my first course was torts. For the first two to three weeks of the class, the professor began each class by asking, "What is negligence?" A number of people would take a cut at trying to define the term, but he would never tell us that answer. He just kept asking the question. The ultimate answer, and the point of the exercise, was the fact that there is no answer. The answer depends on the circumstances of each and every case.

I think we have a similar problem here. The accounting provisions and the antibribery provisions of the FCPA established standards of conduct that can only be understood in terms of the specific facts of each and every case. This fact is perceived by those who have to advise companies how to comply, as well as those who are subject to the Act, as a problem that needs to be solved. On the other hand, it is not a very unique situation. Another example of a legal standard that depends on the facts and circumstances of each case is the materiality standard. The materiality standard requires what the Supreme Court has referred to as "a delicate assessment" of the relevant facts and circumstances to determine whether a reasonable investor would have considered a particular fact so significant that it would alter the total mix of facts bearing upon a particular investment decision.^{10a}

I submit that the application of the materiality standard to particular cases is not different from the situation we have with the legal standards incorporated in the FCPA. Yet we do not see the same kind of concerns and fears expressed about the materiality standard, which potentially has much broader application to corporations and may involve greater potential liabilities. In con-

10a. *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 450 (1976).

trast, there is a great deal of concern expressed with respect to the standards set forth in the antibribery and accounting provisions of the FCPA.

Perhaps the difference results from the fact that the materiality standard has been in the law for about fifty years and people are familiar with it. The term has been construed by the courts and you can read cases explaining what the courts have said. In contrast, there have been no litigated or adjudicated cases under the FCPA. From an analytical perspective, you have the same kind of problem. The legal standard generally describes what the statute requires or proscribes, but its application depends on the facts and circumstances of each case. This means that the judgments as to potential liability necessarily have to be made in the light of hindsight.

Consider the standards contained in the accounting provisions of the FCPA. Reasonable detail in record-keeping is equated in the legislative history with the recording of transactions in accordance with accepted methods of recording economic events. Frankly, no one knows precisely what that means. The accounting profession does not know, I do not know precisely what that means. I think it means that if you have a problem as to what degree of detail is "reasonable," you should consider whether that degree of detail is consistent with generally accepted practices and methods of recording economic events. Frankly, I do not think there is much doubt among accountants as to how transactions ought to be recorded.

The reasonable assurances standard contained in the internal accounting controls provision also depends on the facts and circumstances of each case. It requires management to make judgments as to the adequacy of its internal accounting control systems in terms of the relative costs and benefits involved. In fact, to the extent that it explicitly incorporates the concept of a cost-benefit analysis, this provision may be unique among regulatory statutes.

The reasonable assurances standard is intended to make clear, among other things, that that statute requires only cost effective measures to be taken. As a result, all improvements to an internal accounting control system made in response to the statute should, theoretically, be cost beneficial to the company. Yet the principal criticism of the provision involves assertions that there have been excess costs of compliance. The GAO report is probably the best evidence for the criticism.

IV. ANTIBRIBERY PROVISIONS

Turning to the antibribery provisions, we have the "corruptly" and "reason to know" standards. I suggest that these two standards are also fact specific. Their applicability depends on the circumstances of each case.

How do you deal with this problem of reconciling the need for predictability and certainty with the countervailing need to have a statutory standard that will cover a broad range of circumstances without loopholes for evasion? Let me leave you with some thoughts expressed by former Commissioner Stephen J. Friedman about a year ago in the context of the accounting provisions. I think it may also provide an insight into the questions which have been raised about the antibribery provisions.

The common thread running through responsible criticism of the Act's accounting provisions is their lack of precisions. Truly, they are fairly general statements. There are no safe harbors or precise guidelines. I submit, however, that this generality is not the Act's weakness, but its strength—in the circumstances the only practicable means of achieving its goals.

Today there are over 9,000 public companies subject to the Act. They range from firms with assets of approximately \$1 million to behemoths with billions of dollars in assets. Each is different. Yet the Act must apply to them all—with as much fairness and equity as we can muster. In my view, fixing precise guidelines applicable to all issuers with equal force would put these companies into strait jackets without any hope of realizing the Act's goals. It would, in fact, do precisely what the Act's critics fear: put the SEC directly into the business of setting accounting principles and practices.¹¹

Many have requested that the Commission provide guidance as to how to comply with the accounting provisions of the Act. I think that this could lead to the result Mr. Friedman predicted. If we respond in the way requested, the Commission would now be in the business of prescribing accounting standards.

The Commission has resisted the notion it should tell companies what accounting methods they should employ, what are accepted methods of recording economic events, and what con-

11. "The Accounting Provisions of the Foreign Corrupt Practices Act," remarks to the University of Kentucky Distinguished Speaker Series, Lexington, Kentucky, Feb. 25, 1981.

stitutes reasonable assurances. These are judgments that should be made by the private sector.¹²

Let me return now to the antibribery provisions. How do you define standards of conduct in this area that are flexible enough to cover a broad range of conduct and, at the same time, provide the kind of predictability and certainty in administration and application so that persons can comply?

The antibribery provisions of the Act are divided into two parts. One part is administered by the Commission. It gives the Commission civil enforcement authority with respect to "reporting companies." The Justice Department has criminal enforcement responsibility with respect to that provision. There is also a separate provision applicable to "domestic concerns," which includes corporations, partnerships, and individuals. The Justice Department has both criminal and civil enforcement responsibilities with respect to "domestic concerns." Substantively, the two provisions are virtually identical. Accordingly, I will not distinguish between them during my remaining remarks.

The antibribery provisions make it unlawful for any reporting company or domestic concern, or any officer, director, employee, or any agent or shareholder acting on behalf of a company, or domestic concern, to make use of the mails or any instrumentality of interstate commerce, in furtherance of any offer, payment, or promise to pay, any money, gift, or thing of value, to foreign officials and certain other persons for a corrupt purpose. Classes of recipients covered by the prohibition include an official of a foreign government, a foreign political party, an official of such a party, a candidate for foreign political office, or any other person who knows, or has reason to know, that all or a portion of such money, or a thing of value, will be offered, given or paid, directly or indirectly, to any of the foregoing persons.

A. *The "Corruptly" Standard*

The prohibition applies to payments that are made for a corrupt purpose; i.e., the purpose of influencing an act or decision of a foreign official, foreign political party or candidate for foreign political office, or inducing such a person to use his or its influence

12. The SEC has announced that, as a matter of policy, it does not intend to render interpretative advice. Exchange Act Release No. 34-14478, *reprinted in* FED. SEC. L. REP. (CCH) ¶ 72,264 (Feb. 16, 1978).

to affect any government act or decision, in order to assist any issuer in obtaining, retaining or directing business to any person. The word "corruptly" is used in order to make clear, according to the House Report¹³ concerning the FCPA, that the offer, payment, promise, or gift must be intended to induce the recipient to misuse his official position, for example, wrongfully to direct business to the payer or his client. The House Report also makes clear that the word "corruptly" denotes an evil motive or purpose, an intent wrongfully to influence the recipient. The "corruptly" standard does not require either that the proscribed act be fully consummated or that it succeed in producing the desired outcome.

The "corruptly" standard has been a source of concern. The principal area of concern has been what constitutes evidence of a corrupt or evil intent. For example, questions are raised as to what extent it may be permissible to provide entertainment or gifts to foreign officials in connection with efforts to sell goods, or the extent to which one may incur costs for inviting foreign officials to the United States in connection with sales demonstrations or presentations. As I indicated earlier, the determination of what may be "corrupt" necessarily involves a review of the facts and circumstances of each case.

People engaged in overseas business don't find this a terribly satisfying response. Nevertheless, there is a serious question as to what the alternative would be if you did not have such a standard to distinguish between what is, and is not, permissible.

The Chafee Bill,¹⁴ as it passed the Senate, would retain the "corruptly" standard. However, it would add a series of exceptions to the coverage of the antibribery provisions.

It may be useful to review some of the exceptions contained in S. 708. Ask yourselves, as I read them to you, "Will the new language provide certainty and predictability? Will it provide a more adequate guide to corporations and others subject to the statute with respect to what they should or should not do? To what extent will we have advanced the ball if we end up with a formulation along these lines?"

The Bill would exclude any payment, gift, offer or promise of anything of value to a foreign official which is lawful under the laws and regulations of the foreign official's country. I suppose

13. H.R. REP. NO. 831, *supra* note 2.

14. S. 708 *supra* note 10.

this reflects the notion that there may be countries in which such payments would be permissible. However, it is my understanding that virtually every country in the world prohibits bribery of their officials.

What effects would such an exclusion have? On one hand, it would cause the government some difficulty in proving a case because prosecutors would have to look to the substantive content of the laws of other nations. But from the perspective of a company, the corporate managers and company counsel would also have to look to the substance of the laws of other nations, and there may be substantial difficulties in construing the provisions of foreign law.

Another exception would apply to any payment, gift, offer or promise of anything of value which constitutes a courtesy, a token of regard or esteem, or a return for hospitality. It is clear what the thrust of this exception is. It would make clear that payments or gifts which are no more than a mere courtesy, a token of regard or a return for hospitality would not be considered corrupt. But what do these terms mean? What conduct is included or excluded?

Another exception refers to any expenditures, including travel and lodging expenses, associated with the selling or purchasing of goods or services, or with the demonstration or explanation of products. This is another very broad exception. The general thrust is clear. But what will the exception mean when applied in particular sets of facts and circumstances?

A fourth exception would exclude ordinary expenditures, including travel and lodging expenses, associated with the performance of a contract. Again, there is a question as to what this would mean.

In my view, these exceptions reflect an attempt to define the scope of the term "corruptly," but while the general thrust is clearly to remove certain types of conduct from the ambit of the term "corruptly," the application of the exclusions to concrete facts may be difficult. Under the existing "corruptly" standard, one must look to the facts and circumstances to determine whether a payment or gift is "corrupt," or was made with the requisite intent. In performing such an analysis, there are a number of factors to be considered, such as the amount of the payment involved, the person to whom it was given, and the purpose for which it was paid. Was it really something that should be viewed in the nature of a courtesy rather than an attempt to influence someone to misuse his official position?

B. The "Reason to Know" Standard

The "reason to know" standard, which is applicable to agents, is a provision that is designed to pick up situations in which agents are used to channel payoffs to foreign officials. If you do not have some way of dealing with the problem of payments made through intermediaries, it would not be possible to have a statute that would effectively accomplish the goal of eradicating corporate bribery. On the other hand, it is very difficult to precisely define what can and cannot be done. I think that is one reason the Congress determined to utilize the "reason to know" standard. Congress, in effect, left it to the corporate community, the courts, and the Commission to decide whether there is "reason to know" on the basis of the facts and circumstances of each particular case.

When you are engaged in a legislative process, or any other kind of negotiating process, there are always differences of views. One way to resolve them is to raise the level of abstraction. If the level is high enough, it's easier to find principles upon which an agreement can be based.

Moreover, the "reason to know" standard is not that unusual in the law. According to one commentator, it appears in twenty-nine provisions of federal criminal and civil statutes. According to the American Law Institute Restatement of Torts, the definition of "reason to know" may be summarized as "an awareness of a substantial probability."¹⁵

What does this mean in practice? Companies have been admonished by their counsel and others to look at various factors as possible red flags or indices that "reason to know" may exist. One is the question of where the business is to be conducted. Some have suggested that merely because a company does business in a particular country, it will be presumed to have "reason to know." I think that is a mischaracterization of how the standard works. However, it reflects the type of concerns that have been raised, the kind of perceptions that we are dealing with, and the type of understanding that exists as to what this provision means.

Another factor is the reputation of an agent. Some agents have notorious reputations. Accordingly, inquiries have been made as to the reputation of an agent and the way in which the agent has conducted business in the past. This kind of inquiry obviously imposes cost burdens on companies in connection with the

15. RESTATEMENT (SECOND) OF TORTS § 12 (1965).

inquiry and consultations with counsel. The results are not always terribly satisfactory. What do you do if an agent refuses to make a representation that he would not pass money or gifts on to a foreign official? Another factor is the amount of commission or payment that may be involved. These are the kinds of inquiries which companies have been making.

A large part of the difficulty with the "reason to know" standard results from the fact that, after the inquiry is made, there is not always that clear-cut basis for making a business decision. On the other hand, it may be very clear that there are problems.

In this respect, the Chafee Bill would alter the reason to know standard. The Bill would make it unlawful to make use of the mails, or any means or instrumentality of interstate commerce, corruptly to direct or authorize, expressly or by a course of conduct, a third party to act in furtherance of a payment, gift, offer or promise of anything of value to a foreign official for a prohibited purpose. A new "course of conduct" standard would replace the "reason to know" standard.

This seems to be another fact specific standard. You still have to look to the facts and circumstances of each case to determine whether a "course of conduct" falls within the proscription or does not.

V. CONCLUSION

In conclusion, we have been grappling with these issues for a number of years. There are serious concerns that have been expressed by the business community and others. The Congress is in the midst of an effort to try to provide greater predictability, clarity and certainty. However, as I reflect upon the way the process has worked to date, and the need to reconcile the goals of predictability and certainty with legal standards that will accomplish the statutory purpose, I am not confident that we will be able to provide a greater degree of predictability, certainty, and clarity — which everyone agrees is a desirable objective.