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I. Introduction

One impact of the Omnibus Trade and Competitiveness Act of 1988 (1988 Trade Act)[1] which has received little attention from commentators, but is of substantial interest to U.S. businessmen is its amendment of the Foreign Corrupt Practices Act of 1977 (FCPA).[2] The principal question raised by that amendment (the Amendment) is whether it will reduce the alleged compliance burdens and anticompetitive impact of the FCPA. This article addresses that question.

Section II below describes the FCPA's purpose and its key provisions prior to its recent amendment. Section III notes the primary criticisms that have been raised for almost a decade regarding the FCPA, which the 1988 Trade Act attempts to address. Section IV describes the specific provisions of the FCPA which give rise to those criticisms and analyzes the probability of whether the provisions of the 1988 Trade Act will, as intended, resolve the criticisms, thereby easing the compliance burden and alleged anticompetitive effect of the FCPA.

II. Purpose and Key Provisions of FCPA

The FCPA was enacted in late 1977 in response to public disclosure of the apparently widespread practice of U.S. businesses bribing foreign officials to obtain business benefits.[3] Its

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1. Pub. L. No. 100-418, 102 Stat. 1107 (1988) [hereinafter 1988 Trade Act].

2. Pub. L. No. 95-213, 91 Stat. 1494 (1977) (codified at 15 U.S.C. §§ 78a, 78m, 78dd-1, -2, 78ff (1982)).

3. Senator Proxmire opened hearings on proposed FCPA legislation in 1977 by not-

alleged purpose was to promote an international "free market" not distorted by bribes and to protect and enhance the image of the U.S. overseas.[4]

The FCPA was designed to reduce bribes of foreign officials by U.S. businesses in two ways. First, it imposed accounting obligations on public companies designed to curb "off-the-books" transactions and to eliminate "slush funds," which were perceived as facilitating payment of bribes.[5] Second, it prohibited certain U.S. businesses and certain individuals associated with those businesses from making payments to persons falling within the statutory definition of "foreign officials" and related terms for the purpose of obtaining or retaining business.

The FCPA accounting provisions apply to all companies registered under or required to file reports pursuant to certain sections of the Securities Exchange Act of 1934 (SEA)[6] (issuers), whether or not the issuer does business internationally.[7] Those provisions require each issuer to maintain certain records and to devise and maintain a system of internal accounting controls which will provide "reasonable assurances" that certain statu-

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ing that the Securities and Exchange Commission (SEC) had "recently uncovered 300 instances in which U.S. companies engaged in the bribery of foreign officials involving over $300 million." *Foreign Corrupt Practices and Domestic and Foreign Investment Disclosure: Hearing on S. 305 Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 95th Cong., 1st Sess. 1 (1977) [hereinafter 1977 FCPA Hearings]. Senators Proxmire and Williams introduced S. 305 in January of 1977. *See generally* S. REP. No. 114, 95th Cong., 1st Sess. 1-2 (1977). A conference committee resolved disagreements of the House and Senate on amendments of the House to S. 305. *See* H.R. CONF. REP. No. 831, 95th Cong., 1st Sess. (1977). S. 305 was adopted as Pub. L. No. 95-213 on Dec. 19, 1977.

4. *See, e.g.*, S. REP. No. 114, 95th Cong., 1st Sess. 4 (1977) (concluding that

> the reputation and image of all U.S. businessmen has been tarnished by the activities of a sizable number, but by no means a majority of American firms. A strong antibribery law is urgently needed to bring these corrupt practices to a halt and to restore public confidence in the integrity of the American business system.

Id. The report noted that the essence of the free market system is that products should be sold based on price, quality and service, and concluded that "[c]orporate bribery is fundamentally destructive of this basic tenet." *Id.*).

5. H.R. CONF. REP. No. 831, 95th Cong., 1st Sess. 10 (1977).

6. 15 U.S.C. §§ 78a-kk (1982).

7. Specifically, the accounting provisions apply to every issuer which has a class of securities registered pursuant to section 12 of the SEA, 15 U.S.C. § 78l (1982), and to every issuer which is required to file reports pursuant to section 15(d) of the SEA, 15 U.S.C. § 78o(d) (1982). *See* 15 U.S.C. § 78m(b)(2)(1982) (all citations to specific provisions of the FCPA refer to the FCPA prior to its amendment by the 1988 Trade Act, *supra* note 1, unless otherwise noted).

tory objectives are met relating to the company's transactions and the disposition of its assets.[8]

The FCPA anti-bribery provisions apply both to issuers and to "any domestic concern," defined to include any U.S. citizen or resident and any business entity which has its principal place of business in the U.S. and is organized under the laws of a U.S. state, territory or possession.[9] The antibribery provisions also apply to any officer, director, employee or agent of and to any stockholder acting on behalf of an issuer or domestic concern.[10]

The anti-bribery provisions make it unlawful for any of the described U.S. entities and individuals to corruptly offer, pay, promise to pay or authorize the payment of any money or anything of value to any foreign official, foreign political party or official thereof, or candidate for foreign political office, for the purpose of either influencing any act or decision of such persons or inducing such persons to influence any act or decision of a foreign government in order to assist the U.S. entity or person in obtaining or retaining business.[11] The antibribery provisions also prohibit indirect or "third party" bribery, making it unlawful for the described U.S. entities or persons to offer or pay anything of value to "any person," while "knowing or having reason to know" that such person will use any portion of it, directly or indirectly, to commit bribery as defined by the FCPA.[12]

Criminalization of bribery was not the only approach to the issue available to the framers of the FCPA. Congress considered extensively whether it would be more appropriate to discourage foreign bribery through disclosure requirements or by making such bribery a crime. The criminalization approach was selected for pragmatic reasons: it would impose no reporting burden on U.S. businesses, would impose "less of an enforcement burden

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8. These objectives are 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. 15 U.S.C. § 78m(b)(2)(B) (1982).

9. 15 U.S.C. § 78dd-2(a), -2(d) (1982).

10. 15 U.S.C. § 78dd-1(a), -2(a) (1982).

11. 15 U.S.C. § 78dd-1(a)(1), -1(a)(2), -2(a)(1), -2(a)(2) (1982).

12. 15 U.S.C. § 78dd-1(a)(3), -2(a)(3) (1982).

on the government," and would "to a significant extent act as a self-enforcing, preventative mechanism."[13]

Under the FCPA before the Amendment, the penalty for willful violation of the record-keeping and accounting-control provisions was a fine of up to $100,000 and/or imprisonment of up to five years.[14] The penalty for violation of the bribery provision by a business was a fine of up to $1 million and the penalty for willful violation of the bribery provision by officers, directors, employees, agents or stockholders of businesses was a fine of up to $10,000 or imprisonment of up to five years or both.[15] However, the FCPA provided an element of "protection" for agents and employees of issuers and domestic concerns, by expressly predicating their liability upon a finding that the issuer or domestic concern in question had violated the bribery prohibitions of the FCPA.[16] Individual violators cannot be indemnified as to the foregoing fines, with the exception of the fine for violation of the accounting provisions.[17]

III. Primary Criticisms of the FCPA

The FCPA has provoked substantial criticism since its enactment.[18] Proposed amendments intended to address the most prevalent criticisms have been considered in Congress almost every year beginning in 1980, but none were enacted prior to the 1988 Trade Bill.[19]

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13. S. Rep. No. 114, 95th Cong., 1st Sess. 10 (1988).

14. 15 U.S.C. § 78ff(a) (1982 Supp. IV 1986). A person is not subject to the imprisonment penalty if he proves that he had no knowledge of the rule in question. *Id.* The maximum fine was initially $10,000 but was increased to $100,000 by Pub. L. No. 98-376, § 3, 98 Stat. 1265 (1984).

15. 15 U.S.C. §§ 78ff(c)(4), 78dd-2(b)(1)-(3) (1982).

16. 15 U.S.C. §§ 78ff(c)(3), 78dd-2(b)(3) (1982). *See also* H.R. Conf. Rep. No. 831, 95th Cong., 1st Sess. 13 (1977).

17. 15 U.S.C. §§ 78ff(c)(4), 78dd-2(b)(4) (1982).

18. *See, e.g.*, Note, *The Antibribery Provisions of the Foreign Corrupt Practices Act of 1977: Are They Really as Valuable as We Think They Are?* 10 Del. Corp. L. 71, 72 (1985) [hereinafter 1985 Note]; Bader & Shaw, *Amendment of the Foreign Corrupt Practices Act*, 15 N.Y.U. J. Int'l L. & Pol. 627, 628-29 & n.9 (1983); Note, *S. 708: A Proposed Amendment to the Foreign Corrupt Practices Act*, 1 B.U. Int'l L.J. 187, 190 (1982) (each of which summarizes the nature and sources of the criticism).

19. Senator John Chafee introduced the first set of amendments, S. 2763, in 1980. That same bill was reintroduced in 1981 as S. 708, and was reintroduced at the commencement of the 98th Congress as S. 414. *See* 1985 Note, *supra* note 18, at 72 n.9. *See also* the bibliography of legislative history relating to the proposed amendments, including reports from numerous Congressional hearings on the need to amend the FCPA, during the 94th through 99th Congress (1976-86) in Perkins, *Bibliography on the Foreign*

The primary criticisms of the FCPA have been that it reduces the competitiveness of U.S. business abroad and imposes an unduly expensive and difficult compliance burden on U.S. businesses. These two criticisms are the focus of the 1988 Trade Act Amendment.

Critics' opinions differ on what causes the anti-competitive impact of the FCPA. Some claim any unilateral prohibition of bribery is necessarily anticompetitive, because it allows businessmen not subject to the prohibition to do business in a manner prohibited only to U.S. businessmen.[20] That view assumes that bribery is an unavoidable element of doing business in some countries. The only adequate resolution of that criticism, if it is valid, would therefore be either repeal of the FCPA or adoption of an FCPA equivalent by most countries or at least by most major trading partners of the U.S. The 1988 Trade Bill advocates the latter resolution.[21]

The other alleged cause of the FCPA's anticompetitive impact is its lack of clarity, which critics claim imposes an unduly oppressive compliance burden on U.S. business. For example, U.S. Trade Representative William Brock advised a Senate committee in 1983 that the FCPA "may be our most serious trade problem because it is a self-imposed constraint that comes not from the fact that we have stood alone as a nation against international bribery but because we have done so in an ambiguous way."[22] Mr. Brock noted that elimination of the FCPA's anticompetitive effect would require elimination of its lack of clarity and of the "unnecessary burdens created by [its] structure and requirements."[23]

Corrupt Practices Act of 1977, 14 W. ST. U.L.R. 491, 492-97 (1987).

20. *See, e.g.*, Brennan, *Amending the Foreign Corrupt Practices Act of 1977: "Clarifying" or "Gutting" a Law?* 11 J. LEGIS. 56, 76 & n.171 (1984) (referring to North, *The Economics of Extortion*, 10 WASH. MONTHLY 30 (1978)).

21. *See infra* text accompanying notes 64-66.

22. *Business Accounting and Foreign Trade Simplification Act: Joint Hearings on S. 414 Before the Subcomm. on Securities of the Comm. on Banking, Housing, and Urban Affairs*, 98th Cong., 1st Sess. 25 (1983) [hereinafter *1983 Joint Hearing Rep.*] (testimony of William E. Brock, U.S. Trade Representative).

23. *Id.*

IV. Specific Criticisms of FCPA: Are They Adequately Addressed by the 1988 Trade Act Amendments?

A. Criticisms of the Accounting Provisions

The primary criticism of the FCPA accounting provisions has been that they permit imposition of criminal penalties without a materiality standard and without clarity as to what constitutes compliance. As a result, companies incur unduly high compliance costs attempting to maintain records and control systems with a degree of exactitude which may not even be required by the FCPA in order to avoid the risk of incurring criminal sanctions.[24]

The 1988 Trade Act addresses the accounting criticisms in a manner generally consistent with amendments previously proposed. First, it decriminalizes the mere failure to comply with the record-keeping requirements.[25] It provides that criminal liability may only be imposed if a person "knowingly circumvent[s] or knowingly fail[s] to implement" a system of accounting controls or "knowingly falsif[ies]" the records or accounts which must be maintained by issuers under the FCPA.[26]

Second, the Amendment provides a standard for determining the level of detail and degree of assurance required to meet the FCPA obligations of (1) maintaining records which "in reasonable detail accurately and fairly reflect" certain matters and (2) devising and maintaining an internal accounting system which "provide[s] reasonable assurances" that certain statutory objectives are met.[27] The new standard is the "level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs."[28] That standard is virtually identical to the standard in a proposed amendment considered by Congress in 1983 and supported by the then Chairman of the SEC, John S. R. Shad, with one critical exception. The standard proposed in 1983 included a cost-benefit test: it required a degree of detail and assurance that would satisfy prudent officials "having

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24. *See 1983 Joint Hearing Rep.*, *supra* note 22, at 50.

25. 15 U.S.C. § 78m(b)(4) (1982), *as amended by* 1988 Trade Act, *supra* note 1, Title 5, Subtitle A, Pt. 1, § 5002. (References hereinafter to 1988 Trade Act will refer only to pertinent section of Title 5, Subtitle A, Pt. 1.)

26. 15 U.S.C. § 78m(b)(5) (1982), *as amended by* 1988 Trade Act, *supra* note 1, § 5002.

27. 15 U.S.C. § 78m(b)(2)(A), (B) (1982).

28. 15 U.S.C. § 78m(b)(7) (1982) *as amended by* 1988 Trade Act, *supra* note 1, § 5002.

in mind a comparison between benefits to be obtained and costs to be incurred."[29] Inclusion of that test as part of the standard added by the 1988 Trade Act would have eased compliance with the accounting provisions further, by codifying the cost-benefit standard which the legislative history of the FCPA clearly indicates was intended.[30] It would also have been consistent with pertinent auditing standards.[31]

Third, the Amendment clarifies the extent of an issuer's accounting obligations with respect to U.S. or foreign subsidiaries in which the issuer holds fifty percent or less of the voting power. The issuer's obligation is limited to a good-faith attempt "to use its influence to the extent reasonable" under pertinent circumstances to cause the subsidiary to comply with the internal accounting control requirements of the FCPA.[32] Even more important, from the perspective of easing the compliance burden, is the fact that an issuer which demonstrates "good faith efforts to use such influence shall be conclusively presumed to have complied" with its obligations in relation to the subsidiary.[33]

B. Criticisms of Antibribery Provisions

1. Need to Clarify Grease Payments Exception

The legislative history of the original FCPA expressly excludes facilitating or "grease" payments from the bribery prohibition.[34] However, the FCPA itself included a grease payment exception only by implication. It defined "foreign official" as excluding "any employee of a foreign government or any department, agency or instrumentality thereof whose duties are essentially ministerial or clerical."[35]

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29. *See 1983 Joint Hearing Rep., supra* note 22, at 51 (statement of Hon. John S. R. Shad, Chairman, SEC).

30. S. REP. No. 114, 95th Cong., 1st Sess. 8 (1977).

31. *1983 Joint Hearing Rep., supra* note 22, at 51 (statement on Auditing Standard No. 1, Section 320.32, cited in the Shad Statement).

32. 15 U.S.C. § 78m(b)(6) (1982) *as amended by* 1988 Trade Act, *supra* note 1, § 5002.

33. *Id.*

34. S. REP. No. 114, 95th Cong., 1st Sess. 10 (1977). The Senate Report defined such payments only by listing the following examples: "Payments for expediting shipments through customs or placing a transatlantic telephone call, securing required permits, or obtaining adequate police protection, transactions which may involve even the proper performance of duties." *Id.*

35. 15 U.S.C. § 78dd-1(b), -2(d)(2) (1982).

The FCPA's "exception by implication" for grease payments has been criticized, because it focuses on the identification and primary duties of the recipient of the payment rather than on the purpose for the payment. It is often difficult for U.S. businessmen to determine whether the duties of each of the foreign officials with whom they deal are "essentially ministerial." Even if that could be determined, the definitional exception frustrates the intent of the exception. It implies that a payment to an official whose duties are "essentially" but not entirely ministerial for the purpose of obtaining a benefit relating to the official's discretionary duties, would be permitted. It also implies, however, that a payment to an official whose duties are essentially discretionary for a benefit relating to that official's ministerial responsibilities would be a bribe.

The Amendment clarifies the grease payment exception substantially. It removes the exclusion of persons whose duties are "essentially ministerial" from the definition of "foreign officials,"[36] and creates an express exception for any "facilitating or expediting payment" to any foreign official or even political party, as long as the purpose of the payment is "to expedite or to secure the performance of a routine governmental action."[37] The definition of "routine governmental action" provides a rather extensive list of actions by foreign officials as to which companies can freely make "facilitating" payments without risk of violating the FCPA.[38] Payments for any other actions "of a similar nature" are also defined as within the grease payment exception.[39] The outer boundaries of the exception are defined by excluding certain categories of discretionary actions from the definition of "routine governmental action."[40]

Finally, the criticism that the FCPA unfairly prohibits acts which, while not "facilitating payments," are lawful and customary in foreign countries or international trade is addressed by a provision permitting one to demonstrate as an affirmative defense that a payment, gift, offer or promise of anything of value

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36. 15 U.S.C. § 78dd-1(f)(1), -2(h)(2) (1982), *as amended by* 1988 Trade Act, *supra* note 1, § 5003(a), (c).

37. 15 U.S.C. § 78dd-1(b), -2(b) (1982), *as amended by* 1988 Trade Act, *supra* note 1, § 5003(a), (c).

38. 15 U.S.C. § 78dd-1(f)(3)(A), -2(h)(4)(A) (1982), *as amended by* 1988 Trade Act, *supra* note 1, § 5003(a), (c).

39. *Id.*

40. 15 U.S.C. § 78dd-1(f)(3)(B), -2(h)(4)(B) (1982) *as amended by* 1988 Trade Act, *supra* note 1, § 5003(a), (c).

"was lawful under the written laws and regulations" of the foreign country in question or was a "reasonable . . . expenditure, such as travel or lodging," incurred by a foreign official which was "directly related" to specific marketing or contract performance activities.[41]

2. *Need to Eliminate "Reason to Know" Standard*

The most prevalent and controversial objection to the FCPA has been its reliance on the "reason to know" standard as the basis for criminal liability for indirect bribes.[42] A common criticism was that the "vagueness and ambiguity over when reason to know exists" deterred U.S. businesses from pursuing potentially lucrative overseas opportunities, for fear of being charged with criminal violation of the indirect bribery prohibition.[43] The most telling indictment of the standard came from the Department of Justice, which characterized it as "plainly in-

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41. 15 U.S.C. § 78dd-1(c)(1), (2), -2(c)(1), (2) (1982) *as amended by* 1988 Trade Act, *supra* note 1, § 5003 (a), (c). Restriction of the "lawful" defense to "written" laws may pose problems in some countries, where a substantial portion of the law, or at least accepted interpretations of the law are not written.

42. The third party bribery prohibition creates liability for one who "corruptly" uses an interstate instrumentality in furtherance of a payment to a third party "while knowing or having reason to know" that all or part of such payment will be used by the third party as a bribe. The wording of the prohibition arguably requires that the initial payor intend that the third party use the payment for a bribe. That interpretation, if accurate, would have made elimination of the reason to know standard unnecessary or at least less critical, because a criminal conviction would have required proof of corrupt intent by the initial payor.

In 1983 the Department of Justice, which has sole responsibility for prosecuting criminal violations of the FCPA bribery provisions, issued a memorandum stating its conclusion that

> in situations governed by the "reason to know" provisions of the FCPA, a requirement of intent that an illicit payment be made by an intermediary is unsupported by the Act's legislative history and is at odds with the express language of the Act. An attorney could not responsibly advise his client that such a requirement exists under the current foreign bribery law, and a businessman could not reasonably act in reliance on such a strained construction.

1983 Joint Hearing Report, *supra* note 22, at 39 (memorandum from U.S. Department of Justice, Edward C. Schmults, Deputy Attorney General, dated July 26, 1982) [hereinafter 1982 Department of Justice Memorandum].

43. *1983 Joint Hearing Rep.*, *supra* note 22, at 46 (Statement of Lionel Olmer, Under Secretary for International Trade). Mr. Olmer noted that the deterrence has been documented by numerous governmental studies and that it is particularly strong for small businesses, which are forced to rely on little-known foreign distributors instead of their own personnel to service export opportunities. *Id.*

appropriate . . . harsh and inconsistent with the general approach of modern criminal law to state of mind requirements."[44]

Supporters of the standard argued that it's deletion in favor of a pure "knowledge" standard would remove the teeth from the bribery prohibitions, permitting companies to end run the prohibitions by making or allowing payments to third parties in highly suspicious circumstances on a "no questions asked" basis.[45] The 1988 Trade Bill attempted to appease both critics and supporters of the old standard by deleting the reason to know standard while also making it clear

> that the so-called "head-in-the-sand" problem—variously described in the pertinent authorities as "conscious disregard," "willful blindness" or "deliberate ignorance"—[is] covered so that management officials [cannot] take refuge from the Act's prohibitions by their unwarranted obliviousness to any action (or inaction) language or other "signaling device" that should reasonably alert them to the "high probability" of an FCPA violation.[46]

The Amendment achieves its dual objectives as follows. First, it restricts criminal liability for violation of the indirect bribery prohibition to payments made to "any person, while knowing" that the recipient will use some portion of the payment to commit bribery.[47] It then defines a "knowing" state of mind in terms of the following so-called "willful blindness" test of knowledge:

> When knowledge of the existence of a particular circumstance is required for an offense, such knowledge is established if a

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44. *1983 Joint Hearing Rep., supra* note 22, at 35 (1982 Department of Justice Memorandum).

45. Senator William Proxmire, the primary opponent of attempts to change the reason to know standard, claimed at congressional hearings on earlier attempts to amend the FCPA that deletion of the reason to know standard "would gut the law" because companies would no longer be required to police their agents and could escape liability by wearing "legal blinders." *Business Accounting and Foreign Trade Simplification Act: Joint Hearings on S. 708 Before the Subcommittee on Securities and the Subcommittee on International Finance and Monetary Policy of the Senate Comm. on Banking, Housing and Urban Affairs*, 97th Cong., 1st Sess. 4-5 (1981) [hereinafter 1981 Joint Hearings] (remarks of Senator Wm. Proxmire). Senator Proxmire predicted that if the reason to know standard was deleted "bribery will flourish, foreign governments will be corrupted and free markets will take a back seat." *Id.* at 4.

46. H.R. CONF. REP. No. 576, 100th Cong., 1st Sess., 920 (1988) [hereinafter H.R. CONF. REP. No. 576].

47. 15 U.S.C. § 78dd-1(a)(3), -2(a)(3) (1982), *as amended by* 1988 Trade Act, *supra* note 1, § 5003(a), (c).

> person is aware of a high probability of the existence of such circumstance unless the person actually believes that such circumstance does not exist.[48]

The new standard has generally been construed as far more subjective and closer to actual knowledge than the "reason to know" standard. As such, it seems both more appropriate and less likely to provoke the anticompetitive chilling effect of the reason to know standard. However, cases construing the new standard in other contexts suggest there is some risk the new standard may be eroded or misinterpreted in a manner making it not much different from the deleted reason to know standard.

A person has "reason to know" a fact if the person is aware of information from which persons of ordinary intelligence would infer that the fact exists.[49] Under that standard, a violation of the FCPA indirect bribery prohibition would occur if a person made a payment to an agent "under circumstances in which a person of ordinary intelligence would perceive a risk of the agent's bribing a foreign official, where the disregard of that risk would constitute simple negligence."[50] By contrast, a court

> can properly find wilful blindness only where it can almost be said that the defendant actually knew. He suspected the fact; he realized its probability, but he refrained from obtaining the final confirmation because he wanted in the event to be able to deny knowledge. . . . It requires in effect a finding that the defendant intended to cheat the administration of justice.[51]

Congressional reports on the 1988 Trade Act note that the new willful blindness standard is intended to reflect the "carefully drawn elements that comprise the 'head-in-the-sand' state of mind" as discussed in other contexts in federal case law.[52]

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48. 15 U.S.C. § 78dd-1(f)(2)(B), § 78dd-2(h)(3)(B) (1982), *as amended by* 1988 Trade Act, *supra note 1*, § 5003(a), (c).

49. See account of the meaning of "reason to know" in the RESTATEMENT (SECOND) OF AGENCY, § 9 (1958), *cited in* 1982 Department of Justice Memorandum, reprinted in *1983 Joint Hearing Rep.*, *supra* note 22, at 35.

50. *See 1983 Joint Hearing Rep.*, *supra* note 22, at 35-36.

51. G. WILLIAMS, CRIMINAL LAW: THE GOOD PART § 57 at 159 (2d. ed. 1961), *quoted in* United States v. Jewell, 532 F.2d 697, 700 n.7 (9th Cir.), *cert. denied*, 426 U.S. 951 (1976).

52. H.R. CONF. REP. No. 576, *supra* note 46, at 920, states that the "Conferees agree with the reasoning" concerning the new standard found in such decisions as *Jewell*, 532 F.2d 697; United States v. Bright, 517 F.2d 584 (2d Cir. 1975); and United States v. Jacobs, 475 F.2d 270, 287 & n.37 (2d Cir.), *cert. denied sub nom.* Lavelle v. United States, 414 U.S. 821 (1973).

The reports note that courts "should . . . apply the appropriate 'mix' of subjective and objective standards implied in such a carefully-structured test."[53]

Both federal judges and commentators have noted that the subjective, actual belief "defense" provides a necessary balance to the objective, high probability element of the new standard.[54] The fact that actual belief can obviate the objective high probability element means mere negligence, mistake, "foolishness" and probably even recklessness should be insufficient grounds for conviction.[55] Thus, mere carelessness or impercep-

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53. H.R. CONF. REP. No. 576, *supra* note 46, at 921. The conferees note that "knowledge of a fact may be inferred where the defendant has notice of the high probability of the existence of the fact and has failed to establish an honest, contrary disbelief." *Id.* However, the conferees expressly note, relying on the cases cited in the following quotation, that the inference of knowledge "cannot be overcome by the defendant's 'deliberate avoidance of knowledge,' United States v. Manriquez Arbizo, 833 F.2d 244, 249 (10th Cir. 1987), his or her 'willful blindness,' United States v. Kaplan, 832 F.2d 676, 682 (1st Cir. 1987), or his or her 'conscious disregard,' United States v. McAllister, 747 F.2d 1273, 1275 (9th Cir. 1984), of the existence of the required circumstance or result. As such, it covers any instance where 'any reasonable person would have realized' the existence of the circumstances or result and the defendant has 'consciously chose[n] not to ask about what he had 'reason to believe' he would discover,' United States v. Picciandra, 788 F.2d 39, 46 (1st Cir. 1986)." *Id.*

54. *See, e.g., Bright*, 517 F.2d 584 (in which a conviction for possession of stolen mail is reversed and remanded because, on the crucial issue of whether defendant knew the mail in her possession was stolen, the lower court instructed the jury that either "reckless disregard" or "conscious effort to avoid learning the truth" would be sufficient instead of providing a "balanced" instruction "coupling . . . the 'high probability' test with its negation by an actual belief of the non-existence of the fact" at issue). *See also* United States v. Feroz, 848 F.2d 359, 361 (2d Cir. 1988) (in which the circuit court admonishes the trial judge for failing to give the jury a balanced instruction including the actual belief concept and directs that copies of the opinion be issued to all U.S. attorneys in the Second Circuit to insure that future jury instructions include both the "high probability" and "actual belief" concepts).

55. *See, e.g., Jewell*, 532 F.2d at 705-708 (Kennedy, J., dissenting) (discussing evolution of the willful blindness test in England and the restriction of the English doctrine under the version of the test adopted in the U.S.). Judge Kennedy notes that the U.S. version of the test "is a *definition* of knowledge, not a substitute for it." *Id.* at 707 (emphasis in original).

> [It] requires an awareness of a high probability that a fact exists, not merely a reckless disregard, or a suspicion followed by a failure to make further inquiry. It also establishes knowledge as a matter of subjective belief, an important safeguard against diluting the guilty state of mind required for conviction. . . . The failure to emphasize . . . that subjective belief is the determinative factor may allow a jury to convict on an objective theory of knowledge—that a reasonable man should have inspected the car [that he agreed to drive across the Mexican border] and would have discovered what was hidden inside.

Id.

Judge Kennedy's description of the wilful blindness standard is not inconsistent with the majority opinion in Jewell. The majority affirmed conviction of the defendant,

tiveness should not subject U.S. businessmen to a significant risk of criminal penalties under the FCPA bribery provisions. By contrast, gross carelessness or willful disregard in the face of facts indicating a high probability that a third party payee will commit a violation would create a significant risk of criminal liability even in the absence of actual knowledge of the violation, unless the surrounding facts and the businessman's course of action credibly demonstrate that the businessman had a good faith, actual belief that a violation was not likely to occur. Judicial development of the willful blindness standard is still in the formative stages in the U.S. It has been applied primarily in drug abuse cases, where the standard appears "aptly suited to easing the prosecutorial burden of proving the essential element of knowledge" as to defendants who claim lack of knowledge while deliberately avoiding "reasonable investigation" of highly suspicious circumstances.[56] At least one commentator has expressed concern that development of the standard in such a context could result in a significant erosion of the standard, leaving it essentially synonymous with the "reason to know" or "mere negligence" standards.[57]

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holding that it was not erroneous for the lower court to instruct the jury that the government must prove "beyond a reasonable doubt, that if the defendant was not actually aware [that the car he drove across the border contained marijuana concealed in a secret compartment] . . . his ignorance in that regard was *solely* and *entirely* a result of . . . a conscious purpose to avoid learning the truth." *Id.* at 704 (emphasis in original). The majority acknowledged that the "jury should have been instructed more directly" that the required knowledge could be established if the accused was aware of a high probability of the existence of the fact in question "unless he actually believes it does not exist." *Id.* at n.21. However, the majority found both of those elements were "implied" in the instruction as given, so that the deficiency in the instruction was not so substantial as to justify reversal for plain error. *Id.*

56. Comment, *Willful Blindness as a Substitute for Criminal Knowledge*, 63 IOWA L. REV. 466, 471 (1977) [hereinafter Comment]. The comment provides a detailed discussion of development of the willful blindness doctrine in England and the U.S., noting that it appeared briefly in the U.S. in 1899 and again in the 1930s and then reemerged, after a long period of dormancy, "during the 1960s, coinciding with a dramatic increase in drug abuse and a resultant increase in prosecutions for possession, transportation and use of drugs." *Id.* 471 & n.40.

57. *Id.* The comment notes, for example, that in one 9th Circuit decision decided after *Jewell*, "the evidence tending to show willful blindness could just as easily be interpreted as showing only negligence," *Id.* at 477 (referring to United States v. Murrieta-Bejarano, 552 F.2d 1323 (9th Cir. 1977)). The comment author concludes that a jury should not be able to determine knowledge on the basis of facts that provide evidence of no more than negligent conduct. In order to make it clear that negligence is a valid defense, jury instructions should at least explain the test employed to distinguish willful blindness from negligence or recklessness: that is, whether there was evidence of "a conscious purpose to avoid enlightenment." *Id.* (citing Griego v. United States, 298 F.2d 845,

Although criminal liability should be more difficult to establish under both the accounting and bribery provisions of the revised FCPA, the monetary penalties, once civil or criminal liability is established, have been substantially increased.[58] In addition, the requirement that a business must be found in violation of the bribery provisions before agents or employees of the business can be found in violation has been deleted, making it easier for authorities to bring charges against agents and employees.[59]

3. *Lack of Sufficient Guidelines for Compliance*

One factor which has been criticized as contributing to both the anticompetitive "chill factor" and the undue compliance burden of the FCPA is the lack of adequate guidelines and review procedures to define what constitutes compliance in particular factual contexts. Although the Department of Justice did establish a voluntary review procedure, that procedure has been deemed inadequate, in part because businesses had no assurance that information they provided would not be subject to disclosure under the Freedom of Information Act (FOIA).[60]

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849 (10th Cir. 1962); United States v. General Motors Corp., 226 F.2d 745, 749 (3d Cir. 1955)).

58. The maximum penalty for violation of the bribery provisions by a business was increased from $1 million to $2 million. 15 U.S.C. §§ 78ff(c)(1)(A), 78dd-2(g)(1)(A) (1982), *as amended by* the 1988 Trade Act, *supra* note 1, §5003(b), (c). The maximum civil penalty for violation by an officer, director, employee, agent or stockholder is $10,000, and the maximum criminal penalty is $100,000 (up from $10,000 before revision) and/or up to five years imprisonment. 15 U.S.C. §§ 78ff(c)(1)(B), (c)(2)(A)-(C), 78dd-2(g)(1)(B), (2)(A)-(C) (1982), *as amended by* 1988 Trade Act, *supra* note 1, § 5003(b), (c).

59. 15 U.S.C. §§ 78ff(c)(2)(B), (C), 78dd-2(g)(2)(B), (C) (1982), *as amended by* 1988 Trade Act, *supra* note 1, §§ 5003(b), (c).

60. 5 U.S.C. § 552 (1982) (FOIA). When President Carter first directed the Department of Justice to provide businesses with guidance on enforcement policy, the Department was quoted as responding that "all they (businessmen) want to know is who they can bribe and who they can't. Well, we're not going to tell them—we'll go down kicking and screaming on this one." Wash. Post, Oct. 10, 1978, § D, at 7. *See also* President's Statement on U.S. Export Policy, 14 WEEKLY COMP. PRES. DOC. 1633 (Sept. 26, 1978) and Hibey, *The Practical Necessity for Amendment of the Foreign Corrupt Practices Act: S. 708—The Current Legislative Initiative*, 10 HOFSTRA L. REV. 1121, 1129 & n.46 (1982).

The FCPA Review Procedure was created by the Department of Justice in March, 1980. *See* 28 C.F.R. § 50.18 (1980). Under that procedure, firms may request guidance from the Dept. of Justice on whether it intends to prosecute a proposed course of action. *See* General Accounting Office, Impact of Foreign Corrupt Practices Act on U.S. Business 42 (1981). A firm may ask the Dept. of Justice to "delay or refrain from ever making publicly available" submitted information under an FOIA exemption. 28 C.F.R. § 50.18(0)(1)(1980). *See also* Georges, *The Foreign Corrupt Practices Act Review Proce-*

Under the revised FCPA the Attorney General is required to determine, within six months following enactment of the 1988 Trade Bill and based in part on input from the public, to what extent compliance with the bribery provisions "would be enhanced and the business community would be assisted by further clarification" of the bribery provisions.[61] Thereafter the Attorney General "may" issue (1) guidelines describing specific types of conduct which would be in conformance with Department of Justice enforcement policy, and (2) general precautionary procedures businesses may follow voluntarily in establishing their compliance procedures.[62] The revised FCPA also requires the Attorney General to establish a procedure under which he will issue opinions, within thirty days after receiving specific inquiries from issuers or other domestic concerns concerning conformance of their conduct with the Department of Justice enforcement policy. An opinion indicating that the described conduct does conform raises a presumption of compliance which is rebuttable only by a preponderance of evidence. Any material provided to or prepared by federal agencies in connection with such requests will be exempt from FOIA disclosure and may not be made publicly available without the consent of the business which submitted the request.[63]

C. Criticism of the Unilateral Nature of the FCPA

The criticism that a unilateral prohibition of bribery in an international business context is per se anticompetitive is addressed by a "sense of the Congress" provision in the 1988 Trade Act. That provision requests that the President attempt to negotiate an agreement among the members of the Organization of Economic Cooperation and Development governing persons in those member countries as to acts U.S. businesses are

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dure: A Quest for Clarity," 14 CORNELL INT'L L.J. 57, 57 (1981). However, the SEC has claimed that because courts construe that exemption narrowly, competitors may use the FOIA to gain a business advantage over firms utilizing the review procedure. *1981 Joint Hearings*, *supra* note 45 at 309 (written statement of Hon. John Shad, chairman of the SEC). *See also* Note, 1 B.U. INT'L L.J. 187, *supra* note 18, at 202.

61. 15 U.S.C. § 78dd-1(d), -2(e) (1982) *as amended by* the 1988 Trade Act, *supra* note 1, § 5003(a), (c). The six month deadline applies to the Attorney General's determination as to domestic concerns, but a twelve month deadline applies to his determination as to issuers.

62. *Id.*

63. 15 U.S.C. § 78dd-1(e), -2(f) (1982), *as amended by* the 1988 Trade Act, *supra* note 1, § 5003 (a), (c).

prohibited from doing under the FCPA. The President must report to Congress on the progress of those negotiations within one year after enactment of the 1988 Trade Act.[64]

Given the inability of prior administrations to negotiate multilateral versions of the FCPA and strong indications from administrative spokesmen that foreign countries generally express lack of interest in such an agreement,[65] it is important to note that the President's report must also identify the actions the executive branch and Congress should consider taking "in the event that [the multilateral] negotiations do not successfully eliminate any competitive disadvantage of U.S. businesses that results when persons from other countries commit the acts" prohibited under the FCPA.[66]

D. Conclusion

The Amendment's clarification of what constitutes compliance with the accounting and antibribery provisions plus its restriction of criminal penalties to violations which involve either knowledge or the knowledge equivalent represented by the willful blindness standard should substantially reduce the compliance burden and anticompetitive impact of the FCPA, subject to the concerns noted regarding omission of a cost-benefit element in the new accounting standard and the risk that the willful blindness standard may be eroded. It appears that the question of whether the FCPA's unilateral status makes it anticompetitive per se, and if so, whether that fact would justify repeal of the FCPA or some lesser remedy, will be answered as part of the described report to Congress from the President, if negotiation of a multilateral FCPA continues to be as difficult as it has been to date.

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64. 1988 Trade Act, *supra* note 1, § 5003(d)(1), (d)(2)(A).

65. *See generally* Note, 1 B.U. INT'L L.J. 187, *supra* note 18, at 203-04 & nn.125-44 (describing the inability of prior administrations to negotiate multilateral versions of the FCPA, citing statements of various administrative spokesmen and others at congressional hearings on that topic, and citing discussions of the problem in various journals and reports).

66. 1988 Trade Act, *supra* note 1, § 5003(d)(2)(ii).