

TRADE AND COMPETITIVENESS ACT

P.L. 100--418

TITLE V - FOREIGN CORRUPT PRACTICES AMENDMENTS;

INVESTMENT; AND TECHNOLOGY

SUBTITLE A - FOREIGN CORRUPT PRACTICES ACT AMENDMENTS;

REVIEW OF CERTAIN ACQUISITIONS

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PART I - FOREIGN CORRUPT PRACTICES ACT AMENDMENTS

Title of the Act - Foreign Corrupt Practices Act Amendments of 1988

House bill. The House bill contained no provision.

Senate amendment. The Senate amendment established the title of the Act as the "Foreign Corrupt Practices Act of 1987."

Conference agreement. The House receded to the Senate, with an amendment substituting "1988" for "1987."

Findings and Conclusions

House bill. The House bill contained no provision.

Senate amendment. The Senate amendment contained three Congressional findings and two conclusions. The findings noted (1) the significant contribution Congress made in enacting the Foreign Corrupt Practices Act (FCPA) in 1977, while citing (2) unnecessary concern among exporters about the scope of the Act and (3) unnecessary and costly paperwork burdens imposed on issuers of securities by unclear and excessive accounting standards. The conclusions stated that (1) the principal objectives of the FCPA should be maintained because they are important to the nation and our trade relationships and (2) exporters should not be subject to conflicting demands by diverse agencies enforcing the FCPA.

Conference agreement. The Senate receded to the House.

Accounting

Penalties for Violations of Accounting Standards

House bill. The House bill contained no provision.

Senate amendment. The Senate amendment amended Section 13(b) of the Securities Exchange Act of 1934 to provide that no criminal liability shall be imposed for failing to comply with the FCPA's books and records or accounting

control provisions unless a person knowingly circumvents a system of internal accounting controls or knowingly falsifies books, records, or accounts kept pursuant to Section 13(b)(2) of the Exchange Act.

Conference agreement. The House receded to the Senate. The Conferees intend to codify current Securities and Exchange Commission (SEC) enforcement policy that penalties not be imposed for insignificant or technical infractions or inadvertent conduct. The amendment adopted by the Conferees accomplishes this by providing that criminal penalties shall not be imposed for failing to comply with the FCPA's books and records or accounting control provisions. This provision is meant to ensure that criminal penalties would be imposed where acts of commission or omission in keeping books or records or administering accounting controls have the purpose of falsifying books, records, or accounts, or of circumventing the accounting controls set forth in the Act. This would in-

[page 917] -clude the deliberate falsification of books and records and other conduct calculated to evade the internal accounting controls requirement.

Accounting Practices of Subsidiaries [sic]

House bill. The House bill contained no provision.

Senate amendment. The Senate amendment added a new paragraph (b)(6) to Section 13(b) of the Exchange Act to define the responsibility of an issuer with respect to the accounting practices of a domestic or foreign subsidiary in which the issuer owns an interest of 50 percent or less. The provision provided that such an issuer's responsibility would be discharged where the issuer makes a good-faith effort to cause the subsidiary to comply with the requirements of Section 13(b)(2).

Conference agreement. The House receded to the Senate. The amendment recognizes that it is unrealistic to expect a minority owner to exert a disproportionate degree of influence over the accounting practices of a subsidiary. The amount of influence which an issuer may exercise necessarily varies from case to case. While the relative degree of ownership is obviously one factor, other factors may also be important in determining whether an issuer has demonstrated good-faith efforts to use its influence.

Cost/benefit Test

House bill. The House bill contained no provision.

Senate amendment. The Senate amendment provided that, for purposes of Section 13(b)(2), the term "reasonable assurances" and "reasonable detail" mean such level of detail and degree of assurance as would satisfy prudent officials in the conduct of their affairs, having in mind a comparison between benefits to be obtained and costs to be incurred in obtaining such benefits.

Conference agreement. The House receded to the Senate, with an amendment deleting the cost-benefit test. The conference committee adopted the prudent man qualification in order to clarify that the current standard does not connote an unrealistic degree of exactitude or precision. The concept of reasonableness of necessity contemplates the weighing of a number of relevant factors, including the costs of compliance. The Conferees therefore deleted the Senate cost-benefit language as superfluous and in response to concerns that such a statutory provision might be abused and weaken the accounting provisions at a time of increasing concern about audit failures and financial fraud and resultant recommendations by experts for stronger accounting practices and audit standards. *See, e.g., "Report of the National Commission on Fraudulent Financial Reporting, October 1987."*

Prohibited Corrupt payments by Issuers

Repeal of Section 30A

House bill. The House bill contained no comparable provision.

Senate amendment. The Senate amendment repealed Section 30A of the Exchange Act and placed in the Justice Department all jurisdiction for enforcing the anti-bribery provisions of the Act. In addition, it required the SEC to transmit to the Justice Depart-

[page 918] -ment evidence that an issuer had violated the FCPA, and the Department was required to report annually to the appropriate Congressional oversight committees on the disposition of any such referrals.

Conference agreement. The Senate receded to the House, with an amendment making conforming amendments to Section 30A of the Exchange Act to reflect the provisions of the conference substitute for Section 104 of the FCPA (with the exception of granting injunctive authority to the Department of Justice). The conferees intend that the SEC remain responsible for civil enforcement of the FCPA under Section 30A. The Conferees intend such conforming changes to have the same meaning and impact in Section 30A of the Exchange Act as they have in Section 104 of the FCPA, as described below.

Prohibited Corrupt Payments by Domestic Concerns

Anti-bribery Provision - Definition of Payments Prohibited under FCPA: "Official Function" v. "Legal Duty"

House bill. The House bill, in keeping with present law, included within prohibited payments those made to foreign officials for the purpose of inducing the official to make a "decision to fail to perform his or its *official function*." (Emphasis added)

Senate amendment. The Senate amendment changed the approach under present law to one which included within prohibited payments those made to induce a foreign official "to do or omit to do any act *in violation of his legal duty* as a foreign official." (emphasis added)

Conference agreement. The House receded to an amended Senate provision which would prohibit payments to any foreign official for the purpose of "'influencing any act or decision of such foreign official in his official capacity, or inducing such foreign official to do or not to do any act in violation of the lawful duty of such official." This language conforms to the domestic bribery standard found at 18 U.S.C. 201.

Anti-bribery Provision - Definition of Payments Prohibited under FCPA: Legislative or Other Action

House bill. The House bill provided that the prohibition under current law against the use of corrupt payments to foreign officials for the purpose of obtaining or retaining business includes payments for "procurement of legislative, judicial, regulatory, or other action in seeking more favorable treatment by a foreign government."

Senate amendment. The Senate amendment contained no comparable provision.

Conference agreement. The House receded to the Senate. The Conferees wish to make clear that the reference to corrupt payments for "retaining business" in present law is not limited to the renewal of contracts or other business, but also includes a prohibition against corrupt payments related to the execution or performance of contracts or the carrying out of existing business, such as a payment to a foreign official for the purpose of obtaining more favorable tax treatment. *See, e.g., the United Brands case.* The term

[page 919] should not, however, be construed so broadly as to include lobbying or other normal representations to government officials.

Anti-bribery provision - Standard of Liability for Acts of Third Parties (Agents)

House bill. The House bill changed current law, which applies civil and criminal liability to firms and individuals who make payments to third parties "knowing or having reason to know" that the payment would be used by that third party for purposes barred under the statute.

In provisions concerned with the requisite states of mind applicable to offenses known as "third party bribery" (the furnishing of money or any other "thing of value" by an agent for the purpose of bribing foreign officials), the House bill contained state-of-mind requirements (proposed Section 30A(a)(3) and proposed Section 104(a)(3)) of "knowing or recklessly disregarding" that the money in question would be used for bribery.

Under the House bill, criminal liability would have applied for firms and individuals who made payments to third parties while "knowing" that the payment would be used by the third party for purposes barred under the statute. The House bill contained a definition (proposed Section 30A(f)(2) and proposed Section 104(h)(4)) of the "knowing" state of mind applicable in the case of the foreign corrupt practice of "third party" bribery by securities issuers and domestic concerns. "Knowing" was defined as being "aware or substantially certain" or "consciously disregarding a high probability" that a payment would be made for prohibited purposes. Civil liability would have applied if the payment were made to a third party while "recklessly disregarding" that all or a portion of the payment would be made for purposes barred under the statute. "Reckless disregard" was defined (proposed Section 30A(f)(3) and proposed Section 104(h)(5)) to include "awareness" and disregard of a "substantial risk" that a third party would transmit a prohibited payment.

Senate amendment. The Senate bill addresses the state-of-mind requirement for third-party bribe offenses by making it unlawful "corruptly to direct or authorize, expressly or by a course of conduct" a third party to make such payments. The phrase "course of conduct" was not defined in the Senate amendment, but the Senate report stated that the standard was meant to preclude a "head-in-the-sand" approach involving willful ignorance of facts and circumstances underlying the subject transaction which would indicate the payment of a bribe.

Conference agreement. The Senate receded to the House with an amendment. The conference substitute retains the "knowing" requirement and deletes the "recklessly disregarding" requirement as those terms were defined in proposed Sections 30A(f)(2) and (3) and 104(h)(4) and (5). The compromise bill adopts a modified version of the House bill regarding these provisions and encompasses the concepts of "conscious disregard" or "willful blindness." *See generally United States v. Bright*, 517 F.2d 584 (2d Cir. 1975); H. Rept. No. 96-1396, 96th Cong., 1st Sess., 35 (1980). The Conferees intend that the requisite "state of mind" for this category of offense include a "conscious purpose to avoid learning the truth."

[page 920] *United States v. Jacobs*, 475 F.2d 270, 277-88 (2d Cir. 1973). Thus the "knowing" standard adopted covers both prohibited actions that are taken with "actual knowledge" of intended results as well as other actions that, while falling short of what the law terms "positive knowledge," nevertheless evidence a conscience disregard or deliberate ignorance of known circumstances that should reasonably alert one to the high probability of violations of the Act.

In clarifying the existing foreign anti-bribery standard of liability under the Act as passed in 1977, the Conferees agreed that "simple negligence" or "mere foolishness" should not be the basis for liability. However, the Conferees also agreed that the so called "head-in-the-sand" problem - variously described in the pertinent authorities as "conscious disregard," "willful blindness" or "deliberate ignorance" -- should be covered so that management officials could not take refuge from the act's prohibition by their unwarranted obliviousness to any action (or inaction), language or other "signaling device" that should reasonably alert them of the "high probability" of an FCPA violation.

The "head-in-the-sand" problem is not unique to this area of criminal law and occurs in a variety of contexts, perhaps the most common being the situation where a person acquires property under "suspicious" circumstances and is charged with "knowledge" that it is stolen. Courts and commentators have considered such behavior to be "distinct from, but *equally culpable* as actual knowledge." *See G. Williams, Criminal Law: The General Part*, sec. 57 at 157 (2d ed. 1961). (emphasis added)

Federal case law has discussed the carefully-drawn elements that comprise the "head-in-the-sand" state of mind in other contexts. The Conferees agree with the reasoning found in such decisions as *United States v. Jewell*, 532 F.2d

679 (9th Cir. 1976): *United States v. Bright*, 517 F.2d 584 (2d Cir. 1975); *United States v. Jacobs*, 470 F.2d 270, 287 n.37 (2d Cir.), *cert. denied sub nom. Lavelle v. United States*, 414 U.S. 821 (1973). See also H. Rept. No. 96-1396, 96th Cong., 1st Sess. 35 (1980). The knowledge requirement is not equivalent to "recklessness." It requires an awareness of a high probability of the existence of the circumstance. As the Court stated in the *Jacobs* case:

"Knowledge that the goods have been stolen may be inferred from circumstances that would convince a man of ordinary intelligence that this is the fact. The element of knowledge may be satisfied by proof that a defendant deliberately closed his eyes to what otherwise have been obvious to him.

"Thus, if you find that a defendant acted with reckless disregard of whether the bills were stolen and with a conscious purpose to avoid learning the truth, the requirement of knowledge would be satisfied unless the defendant actually believed they were not stolen.

* * *

*** You should scrutinize the entire conduct of the defendant at or near the offense are [sic] alleged to have been committed." 475 F.2d 287 n.37 (emphasis added)

[page 921] Accordingly, the Conferees intend that the knowledge requirement reflect existing law, including provision for cases of deliberate ignorance. In such cases, 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. The inference cannot be overcome by the defendant's "deliberate avoidance of knowledge," *United States v. Manrique Aribizo*, 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).

Courts should, accordingly, apply the appropriate "mix" of subjective and objective standards implied in such a carefully-structured test.

Anti-bribery Provision - Exception for "Routine Governmental Action"

House bill. The House bill created a defense for "routine governmental action," which was defined as one "ordinarily and commonly performed" by a foreign official and explicitly including: processing governmental papers, loading and unloading cargoes; scheduling inspections associated with contract performance; and "actions of a similar nature."

Senate amendment. The Senate amendment created an exception for similar action, but included additional explicit categories: obtaining permits, licenses, or "other governmental approvals" to qualify a person to do business in a foreign country; and protecting perishable products or commodities from deterioration. Unlike the House bill, it did not limit actions to those "of a similar nature."

Conference agreement. The House receded to the Senate exception, with an amended definition of "routine governmental action." The conference substitute reflects the intent of the Conferees that the scope of the "routine governmental action" exception apply only to the listed subcategories (i)-(iv) and actions of a similar nature. The Conferees wish to make clear that "ordinarily and commonly performed" actions with respect to permits or licenses would not include those governmental approvals involving an exercise of discretion by a government official where the actions are the functional equivalent of "obtaining or retaining business for or with, or directing business to, any person."

Anti-bribery provision - Affirmative Defense for "Lawful Payments" v. Defense for

Those "Expressly Permitted" in Foreign Country

House bill. The House bill created a defense for payments "expressly permitted under any law or regulation" of the foreign official's country.

Senate amendment. The Senate amendment created an affirmative defense for payments that are "lawful" under the laws and regulations of the foreign official's country.

[page 922] Conference agreement. The House receded to the Senate, with an amendment to make it an affirmative defense that a payment to a foreign official is "lawful under the written laws and regulations of the foreign official's country." (emphasis added) The Conferees wish to make clear that the absence of written laws in a foreign official's country would not by itself be sufficient to satisfy this defense. In interpreting what is "lawful under the written laws and regulations, " the Conferees intend that the normal rules of legal construction would apply.

Anti-bribery Provision - Senate Exception for "Reasonable and Bona Fide Expenditures"

House bill. The House bill contained no provision.

Senate amendment. The Senate amendment created new exceptions for "reasonable and bona fide expenditures" incurred by or on behalf of a foreign official. The exceptions included travel and lodging expenses associated with (1) the selling or purchasing of goods or services or with the demonstration or explanation of products; or (2) the performance of a contract with a foreign government or agency.

Conference agreement. The House receded to the Senate, with an amendment making the exception an affirmative defense. The conference substitute makes clear that payment of reasonable and bona fide expenses associated with promotional activities would also be a defense to prosecution, and explicitly includes "execution" of a contract as well as "performance". If a payment or gift is corruptly made, in return for an official act or omission, then it cannot be a bona fide, good-faith payment, and this defense would not be available.

Anti-bribery Provision - Senate Affirmative Defense for "Nominal" Payments

House bill. The House bill contained no comparable provision.

Senate amendment. The Senate amendment created an affirmative defense for any "nominal" [sic] payment, gift, offer, or promise of anything of value to a foreign official which constituted a "courtesy, a token of regard or esteem or in return for hospitality" if it is of "reasonable value in the context of the type of transaction involved, local custom, and local business practices."

Conference agreement. The Senate receded to the House.

Anti-bribery Provision - House "Due Diligence" Defense for Vicarious Liability of Firms

House bill. The House bill established a new "safe harbor" defense for civil or criminal liability of issuers and domestic concerns for FCPA violations by their employees or agents. Under current law, under appropriate circumstances, a firm may be held vicariously liable for violations of the FCPA by its employees or agents. Under the House bill, a firm could not be held vicariously liable for such violations if it had established procedures "reasonable [sic] expected to prevent and detect" any such violation, and the officer and employee with supervisory responsibility for the offending employee's or agent's conduct used "due diligence" to prevent the violation.

[page 923] Senate amendment. The Senate amendment contained no provision.

Conference agreement. The House receded to the Senate.

Anti-bribery Provision - Exclusivity of FCPA for Foreign 'Bribery

House bill. The House bill contained no provision.

Senate amendment. The Senate amendment provided that, except in plea bargain situations, criminal prosecution against any firm or individual for overseas bribery must be pursued exclusively as a violation of the FCPA and not as a violation of the mail or wire fraud laws, where the prosecution is based upon the theory that a foreign official violated a fiduciary duty to or defrauded a foreign government or the citizens of a foreign country. Similarly, no prosecution for conspiracy to violate the mail or wire fraud statute based on that theory would have been permissible.

Conference agreement. The Senate receded to the House.

Anti-bribery Provision - DOJ Civil Injunctive and Subpoena Authority

House bill. The House bill contained no provision.

Senate amendment. The Senate amendment provided civil injunctive and subpoena authority to the Department of Justice with respect to domestic concerns.

Conference agreement. The House receded to the Senate. The Conferees intend that this authority be used by the Department to enhance its ability to enforce the Act.

Anti-bribery Provision-Attorney General Authority to Issue General Guidelines and Advisory Opinions

House bill. The House bill established a procedure under which the Attorney General may issue general guidelines describing examples of activities that would or would not conform with the Justice Department's enforcement policy regarding FCPA violations. In addition, the Department must establish Procedures to provide opinions in response to specific inquiries from firms concerning conformance of their conduct with the Department's present enforcement policy. The Department must also, to the extent possible, provide timely guidance to exporters and small businesses who are unable to obtain specialized counsel with respect to compliance with the FCPA.

Senate amendment. The Senate amendment contained no provision.

Conference agreement. The Senate receded to the House. The Conferees intend that the Department provide the SEC and other appropriate departments and agencies with copies of the opinions required under new Sections 30A(e) and 104(f).

Anti-bribery Provision - House Repeal of Eckhardt Amendment

House bill. The House bill repealed the so-called Eckhardt amendment to the FCPA by deleting the lead-in clause of present law, which reads, "whenever an issuer/domestic concern is found to have violated ***." The deleted language had the effect of providing that employees or agents could not be prosecuted for FCPA

[page 924] violations unless the domestic concern or issuer, whichever the case may be, had been found to have violated the Act.

Senate amendment. The Senate amendment contained no comparable provision.

Conference agreement. The Senate receded to the House.

Anti-bribery Provision - Raising of Fines

House bill. The House bill amended both the FCPA and Section 32(c) of the Exchange Act to raise the maximum criminal fine for a firm or domestic concern from \$1 million under present law to \$2 million, and for individuals from \$10,000 to \$100,000 (maximum potential imprisonment for an individual remains at 5 years). The House bill also created a new civil penalty of \$10,000.

Senate amendment. The Senate amendment contained no provision.

Conference agreement. The Senate receded to the House. The Conferees intend that the FCPA penalty provisions not operate to override the relevant provisions of P.L. 100-185, the "Criminal Fine Improvements Act of 1987." See 18 U.S.C. 3571.

Anti-bribery Provision - Negotiation of International Agreement

House bill. The House bill included the sense of Congress that the President should pursue the negotiation of an international agreement, "among the largest possible number of countries," to govern acts now prohibited under FCPA. Within one year of enactment of the trade bill, the President must submit to the Congress a report on the progress of the negotiations and those steps which should be taken in the event that the negotiations fail.

Senate amendment. The Senate amendment contained no provision.

Conference agreement. The Senate receded to the House, with an amendment to change the requirement to pursuing an agreement "with the member countries of the Organization of Economic Cooperation and Development (OECD)."