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## Foreign Corrupt Practices Act Amendments: The Omnibus Trade and Competitiveness Acts Focus on Improving Investment Opportunities

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# FOREIGN CORRUPT PRACTICES ACT AMENDMENTS: THE OMNIBUS TRADE AND COMPETITIVENESS ACT'S FOCUS ON IMPROVING INVESTMENT OPPORTUNITIES

BEVERLEY H. EARLE\*

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President Reagan signed into law the Omnibus Trade and Competitiveness Act of 1988 (OTCA) on August 23, 1988.<sup>1</sup> Included within this law were provisions addressing authority for trade agreements,<sup>2</sup> section 301 remedies,<sup>3</sup> section 201<sup>4</sup> escape clause, antidumping<sup>5</sup> and countervailing duties<sup>6</sup> as well as amendments to the Foreign Corrupt Practices Act (FCPA).<sup>7</sup> Additionally, export control provisions were included in this law as part of the Export Enhancement Act of 1988.<sup>8</sup> This comprehensive law was the culmination of a lengthy process over several years which included hearings; debates; negotiation among House and Senate leaders and the President; and one Presidential veto.<sup>9</sup> The amendments to the FCPA<sup>9</sup> were sandwiched into the lengthy and more controversial provi-

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<sup>1</sup> The Omnibus Trade and Competitiveness Act [hereinafter OTCA], Pub. L. No. 100-418, 102 Stat. 1107 (1988) (signed by President Reagan on August 23, 1988). For a timely discussion of the overall impact of the Act, see Holmer & Bello, *The 1988 Trade Bill: Savior or Scourge of the International Trading System*, 23 INTL LAW 523 (1989).

<sup>2</sup> *Id.* See generally Applebaum & Kaplan, *U.S. Trade Law and Policy*, 408 PRAC. L. INST. (1987) (for background on trade law); Applebaum & Schlitt, *The New Trade Law*, 482 PRAC. L. INST. (1988) (for overview of OTCA) [hereinafter Schlitt-P.L.I.].

<sup>3</sup> OTCA, amending the Trade Act, 19 U.S.C. § 2411 (1974); also added a new section 182 providing "[i]dentification of countries that deny adequate protection or market access for intellectual property rights".

<sup>4</sup> OTCA, 19 U.S.C. § 2253 (a)(3). See generally, Schlitt-P.L.I., *supra* note 2, at 206 (discussion of amendment).

<sup>5</sup> OTCA, §§ 1316, 1318-1320, 102 Stat. 1107, 1186-92 (amending Title VII of the Tariff Act of 1930, 19 U.S.C. §§ 1677. See generally Schlitt-P.L.I., *supra* note 2, at 27-31.

<sup>6</sup> OTCA, §§ 1312-1314, 102 Stat. 1107, 1184-85.

<sup>7</sup> Foreign Corrupt Practices Act, 15 U.S.C. §§ 78 m(b), dd-1, dd-2, ff (1982) [hereinafter FCPA]; OTCA, §§ 5001-5003, 102 Stat. 1107, 1415 (to be codified at 15 U.S.C. §§ 78 m(b), 78 dd-1, 78 dd-2 (1988)).

This legislation also abolished the "Eckhardt Amendment" 15 U.S.C. §§ 78 dd-2 (b)(3), ff (c)(3) (1982), which required that a corporation be found guilty of violating the FCPA before any individual within the corporation could be prosecuted. The repeal of this section clears the way for more individual prosecutions.

<sup>8</sup> Berlack, *Analysis of the Amendments to the Export Administration Act of 1979 Contained in the Omnibus Trade and Competitiveness Act of 1988*, 482 PRAC. L. INST. 315 (1988).

<sup>9</sup> Hirschhorn, *Foreign Corrupt Practices Act: Narrowed, Significantly Clarified*, NATL L. J. Dec. 26, 1988 - Jan. 2, 1989, at 16. See also, Sweeney & Macintosh, *Proposed Amendments to the U.S. Foreign Corrupt Practices Act*, 2 REV. INTL BUS. L. 175, 184 (1988) (discussion of Presidential veto).

sions of the OTCA, thus escaping significant public scrutiny.<sup>10</sup> This paper will examine the 1977 FCPA and the 1988 amendments thereto and assesses their impact on effectuating the original purpose of the FCPA which was to insure that corporations act ethically by prohibiting bribery on an international level.<sup>11</sup>

The FCPA was passed in 1977 in response to revelations during Watergate era investigations that "slush funds" were used to pay illegal campaign contributions as well as to bribe foreign officials in pursuit of business opportunities.<sup>12</sup> Pursuant to a Securities and Exchange Commission (SEC) investigation, one company was charged with paying over \$59 million dollars to government officials in Italy.<sup>13</sup> Congress sought to change corporate behavior by enacting this statute.<sup>14</sup>

The original FCPA was divided into accounting standards and anti-bribery sections.<sup>15</sup> The accounting section required an "issuer"<sup>16</sup> of securities to keep detailed records<sup>17</sup> and internal accounting controls<sup>18</sup> "to reflect the transactions".<sup>19</sup> This was a record keeping requirement. Secondly, "issuers" were prohibited from directly or indirectly paying or giving anything of value to a foreign official in order to influence or to obtain, retain or direct business.<sup>20</sup> The section defined "foreign official" to exclude employees whose duties were "essentially ministerial or clerical."<sup>21</sup>

<sup>10</sup> Hippler & Bello, *The 1988 Trade bill: is it protectionist?*, 5 INT'L TRADE REP. (BNA) 1347, 1347-1351 (1988).

<sup>11</sup> Fadimen, *A Traveler's Guide to Gifts and Bribes*, HARV. BUS. REV., July-Aug. 1986, at 122, 122-36; Gevurtz, *Using the antitrust laws to combat Overseas Bribery by Foreign Companies: A step to even the odds in International Trade*, 27 VA. J. INT'L L. 211 (1987), reprinted in 1987 CORP. PRAC. COMM. 139, 139-200; Longobardi, *Reviewing the Situation: What is to be done with the Foreign Corrupt Practices Act?*, 20 VAND. J. OF TRANSNAT'L L. 431, 431-494 (1987); Surrey, *The Foreign Corrupt Practices Act: Let the Punishment fit the Crime*, HARV. INT'L L. J. 293 (1979); Sweeney & Macintosh, *supra* note 9, at 175-194.

<sup>12</sup> Fadimen, *supra* note 11, at 123. See also Kurkjian & Kelly, *The Meese Case and a Little Used Law on Bribes Abroad*, Boston Globe, April 3, 1988, at 3, col. 1. See generally Timmeny, *An Overview of the Foreign Corrupt Practices Act*, SYRACUSE J. INT'L L. & COM. L. REV. 235 (1982); Wade, *An Examination of the Provisions and Standards of the FCPA*, 9 SYRACUSE J. INT'L L. & COM. 255 (1982).

<sup>13</sup> Fadimen, *supra* note 11, at 123 (explaining that "[A] second allegedly paid \$4 million to a political party in South Korea. A third [company] reportedly provided \$450,000 in gifts to Saudi generals. A fourth [company] may have diverted \$377,000 to fly plane loads of voters to the Cook Islands to rig elections there"). See also Longobardi, *supra* note 11, at 433 (discussion of existing business practices).

<sup>14</sup> *But cf.* Kurkjian & Kelly, *supra* note 12. The authors discuss the fact that a

whole series of publicly held corporations were not covered by the act's requirements that businesses file accurate records with the SEC. This was "because they are covers for the CIA." The statute allows companies to avoid keeping accurate records if they are carrying out a mission of "national security" on behalf of the president.

*Id.*

<sup>15</sup> FCPA, 15 U.S.C. §§ 78 m(b), dd-1, dd-2, ff (1982).

<sup>16</sup> 15 U.S.C. § 78 m(b)(2).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> FCPA, 15 U.S.C. §§ 78 m(b), dd-1, dd-2, ff (1982).

The antibribery section applied to both "issuers" of securities as well as to "domestic concerns."<sup>22</sup> This section caused great confusion among corporations because of the vagueness of its provisions: For example, what did it mean to corruptly use the mail<sup>23</sup> or an "instrumentality of commerce"?<sup>24</sup> Section 103 also made it unlawful if a person "[knew] or [had] reason to know . . ." that the "bribe" was being offered directly or indirectly "for the purposes of obtaining, retaining . . . or directing business."<sup>25</sup>

Enforcement of the antibribery sections was shared by the SEC and the Department of Justice.<sup>26</sup> The SEC had responsibility for the enforcement of the accounting provisions.<sup>27</sup> Accounting violations carried sanctions of up to five years in prison and a \$100,000 fine, while violations of the foreign bribery section earned sanctions of up to \$1 million in corporate fines and, for a willful individual violator, five years in prison and a \$10,000 fine.<sup>28</sup> The authors of the legislation believed that disclosure requirements would protect the corporation's shareholders.<sup>29</sup>

There has been substantial criticism of this law because, since its inception, there has been little international movement toward the United States position nor has there been an agreement on an international treaty.<sup>30</sup> Thus the perception that American businesses were at a competitive disadvantage persisted.<sup>31</sup> Then President Carter attempted to improve the situation by calling for guidelines which would assist corporations.<sup>32</sup> Instead, the Department of Justice established a review procedure.<sup>33</sup> Under this procedure a company was required to disclose a significant amount of information before it could receive a decision, which has proven to be a disincentive in itself. It was reported that less than 20 reviews were ever undertaken.<sup>34</sup>

Since 1980, there have been numerous bills filed to amend the FCPA.<sup>35</sup> During the 100th Congress, there was unanimous agreement that some action needed to be taken to rectify these problems but no agreement between the Houses on specifically what should be done. One commentator counted over twelve bills submitted to Congress.<sup>36</sup> However, none were able to muster support of both the House and the Senate.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> FCPA, 15 U.S.C. §§ 78 m(b), dd-1, dd-2, ff (1982).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> See generally Longobardi, *supra* note 11.

<sup>30</sup> *Id.* at 493. *Contra*, Fadimen, *supra* note 11, at 136 (heading suggests that good ethics equals good business). Compare Pastin & Hooker, *Ethics and the Foreign Corrupt Practices Act*, BUSINESS ETHICS 463 (M. Hoffman & J. Moore eds. 1984) with Longobardi, *supra* note 11 and Fadimen, *supra* note 11.

<sup>31</sup> *Cf.* Gevurtz, *supra* note 11. Even the title of the article, *Using the Antitrust Laws to Combat Overseas Bribery by Foreign Companies: A Step to Even the Odds in International Trade*, suggests the need to even the race between American companies saddled with compliance with the FCPA and the other nations who may freely bribe.

<sup>32</sup> Longobardi, *supra* note 11, at 462.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 465.

<sup>35</sup> See generally sources cited *supra* notes 9 and 11.

<sup>36</sup> Longobardi, *supra* note 11, at 449.

While almost every country considers bribery of its own officials a crime, "[N]o nation other than the U.S. prohibits bribery of another country's officials or bribery occurring outside its own territory."<sup>37</sup> Other countries, including Switzerland, West Germany and other developed countries, even allow tax deductions for certain illegal payments.<sup>38</sup>

At the 100th Congress there was substantial disagreement between the House and the Senate regarding what amendments to the FCPA were required.<sup>39</sup> Both the House and Senate sponsored trade bills on the floor, such as H.R. 3, with amendments to the FCPA President Reagan vetoed the legislation on May 24, 1988, but not specifically because of the FCPA amendments. The Congress enacted a compromise which the President signed on August 23, 1988.<sup>40</sup>

The final version of the FCPA Amendments and its changes may be summarized into five categories.

1. Recordkeeping and accounting
2. Permissible payments
3. Antibribery and Reason to Know Standard  
(Affirmative Defenses)
4. Increased penalties
5. Executive Branch Responsibilities.

An exegesis of the above-mentioned sections follows.

#### I. RECORDKEEPING AND ACCOUNTING

Section 13(b) of the Securities and Exchange Act of 1934 (15 U.S.C. § 78m (b)) has been amended by adding sections 4, 5, 6 and 7.<sup>41</sup> These

<sup>37</sup> Gevurtz, *supra* note 11, at 140 n.4 (citing numerous other sources).

<sup>38</sup> *Id.* at 141 n.10 (noting that Switzerland and "most developed countries" do allow a deduction for illegal overseas payments).

<sup>39</sup> Sweeney & Macintosh, *supra* note 9.

<sup>40</sup> *Id.* at 175.

<sup>41</sup> The additional sections read as follows:

(4) No criminal liability shall be imposed for failing to comply with the requirements of paragraph (2) of this subsection except as provided in paragraph (5) of this subsection.

(5) No person shall knowingly circumvent or knowingly fail to implement a system of internal accounting controls or knowingly falsify any book, record, or account described in paragraph (2).

(6) Where an issuer which has a class of securities registered pursuant to section 12 of this title or an issuer which is required to file reports pursuant to section 15(d) of this title holds 50 per centum or less of the voting power with respect to a domestic or foreign firm, the provisions of paragraph (2) require only that the issuer proceed in good faith to use its influence, to the extent reasonable under the issuer's circumstances, to cause such domestic or foreign firm to devise and maintain a system of internal accounting controls consistent with paragraph (2). Such circumstances include the relative degree of the issuer's ownership of the domestic or foreign firm and the laws and practices governing the business operations of the country in which such firm is located. An issuer which demonstrates good faith efforts to use such influence shall be conclusively presumed to have complied with the requirements of paragraph (2).

(7) For the purpose of paragraph (2) of this subsection, the terms "reasonable assurances" and "reasonable detail" mean such level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs.

amendments are important for several reasons. Paragraph 4 of this section limits criminal liability to the conditions of paragraph 5 which turns on whether a party “knowingly circumvents” or “knowingly failed to implement a system of internal accounting controls.” The term “knowing” requires a higher degree of culpability and replaces the concept of “reason to know.” “Knowing” is subsequently defined in a later section as:

- 2A. (i) if such person is aware that such person is engaging in such conduct, that such circumstance exists or that such result is substantially certain to occur; or
- (ii) such person has a firm belief that such circumstance exists or that such result is substantially certain to occur.<sup>42</sup>

However, there is substitute language which implicitly states a standard similar to the reason to know:

- 2B. When knowledge of the existence of a particular circumstance is required for an offense, such knowledge is established if a person is aware of a high probability of the existence of such circumstance unless the person actually believes that such circumstance does not exist.<sup>43</sup>

Paragraph 6 requires that the issuer only use “good faith efforts . . . to the extent reasonable to persuade those in charge to comply.”<sup>44</sup> Reasonable as defined in paragraph 7, means that “level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs.”<sup>45</sup>

The question remains how this will be interpreted and prosecuted.<sup>46</sup> The House Senate Conference Committee stated that “[s]imple negligence’ or ‘mere foolishness’ is insufficient for liability, but liability cannot be avoided by engaging in conscious disregard’, ‘willful blindness’ or deliberate ignorance of the facts.”<sup>47</sup> Thus, the individual and corporation enjoy greater latitude to rebut any circumstantial evidence to prove that they did not know.

## II. PERMISSIBLE PAYMENTS

The original FCPA prohibited payments to foreign officials by both issuers and domestic concerns “to obtain retain or direct business,”<sup>48</sup> and

<sup>42</sup> FCPAA, 15 U.S.C. § 78 dd-1(f)(2)(A) (1988).

<sup>43</sup> *Id.* at § 78 dd-1(f)(2)(B).

<sup>44</sup> *Id.* at § 78 m(b)(6).

<sup>45</sup> *Id.* at § 78 m(b)(7).

<sup>46</sup> For a discussion of limited prosecution under previous law, see Kurkjian & Kelly, *supra* note 12. Compare Pastin & Hooker, *supra* note 30 with Alpern, *Moral Dimensions of the Foreign Corrupt Practices Act: Comments on Pastin and Hooker*, BUSINESS ETHICS 468 (M. Hoffman & J. Moore eds. 1984).

<sup>47</sup> H.R. CONF. REP. No. 576, 100th Cong., 2d Sess. 920, *reprinted in* 134 Cong. Rec. H1863, H2116 (daily ed. April 20, 1988).

<sup>48</sup> FCPA, 15 U.S.C. § 78 m(b) (1982).

also contained an exemption for officials who were performing functions essentially "ministerial or clerical."<sup>49</sup> The OTCA abandons this approach and adopts a more practical approach which contains an exemption for "routine governmental action" which is specifically defined as those actions "ordinarily and commonly performed" in such things as "obtaining permits . . . processing governmental papers such as visas, . . . providing police protection . . . scheduling inspections . . . providing phone services . . . loading and unloading cargo . . . protecting perishable products . . ."50

These complementary sections specifically exclude certain types of activity from the umbrella of routine governmental action. They do not encompass:

any decision by a foreign official whether or on what terms, to award new business to or to continue business with a particular party, or any action taken by a foreign official involved in the decisionmaking process to encourage a decision to award new business to or continue business with a particular party.<sup>51</sup>

Even with these amendments there remains ambiguity about what actions would fall into routine government action or "actions of a similar nature."<sup>52</sup>

### III. THE ANTIBRIBERY AND AFFIRMATIVE DEFENSES

The aforementioned definition of "knowing"<sup>53</sup> becomes relevant in this antibribery section as well, although the basic definitions of what conduct is unacceptable remain unchanged. However, the new law introduces several specific affirmative defenses<sup>54</sup> which again serve to clarify and aid the corporation or individual. The defenses available include that the payment or offer "was lawful under the written laws and regulations of that . . . country" or that it was a "bona fide expenditure such as travel or lodging . . . related to promotion . . . of products . . . or execution of a contract . . . ."<sup>55</sup>

Thus bringing officials to the United States to view a product system would not be a bribe.

<sup>49</sup> *Id.*

<sup>50</sup> FCPAA, 15 U.S.C. § 78 dd-1 (b) and (f)(3)(A) (1988) ("issuers"); FCPAA, 15 U.S.C. § 78 dd-2 (b) and (n)(4)(A) (1988) ("domestic concerns").

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> "Knowing" is defined for "issuers" at FCPAA, 15 U.S.C. § 78 dd-1 (f)(2)(A) and (B) (1988); for "domestic concerns" at FCPAA, 15 U.S.C. § 78 dd-2 (h)(3)(A) and (B) (1988).

<sup>54</sup> FCPAA, 15 U.S.C. § 78 dd-1, (c) (1988) ("issuers"); FCPAA, 15 U.S.C. § 78 dd-2, (c) (1988) ("domestic concerns").

<sup>55</sup> *Id.*

## IV. PENALTIES

The penalties in the amendments have been considerably strengthened. A comparison helps to illustrate:

1977	1988
\$1 million corporate	\$2,000,000 issuer/domestic concern
\$10,000 individual	\$100,000 individual
5 years prison	5 years prison <sup>56</sup>

While the prison terms remain the same, the amendments target fines as a way of increasing compliance with the new law.

## V. EXECUTIVE BRANCH RESPONSIBILITIES

The OTCA contains a provision under which the U.S. Attorney General is obligated to determine whether guidelines for the business community would enhance compliance.<sup>57</sup> If it is determined that the corporate community would benefit from such guidelines, the U.S. Attorney General would issue guidelines describing "common types of export sales arrangements" and "general precautionary procedures."<sup>58</sup> However, as of June 15, 1990, the Fraud Section of the Attorney General's office had no plans to issue any guidelines.<sup>59</sup>

There is also a provision that companies may request an opinion from the Attorney General regarding prospective conduct.<sup>60</sup> This provision establishes a "rebuttable presumption" that conduct carried out in conformance with that detailed in the request is legal. The presumption may be rebutted by a "preponderance of the evidence."<sup>61</sup> Confidentiality is guaranteed<sup>62</sup> thus eliminating a weakness with the original law.

<sup>56</sup> FCPAA, 15 U.S.C. § 78 dd-1 (b) (1988) ("issuers"); FCPAA, 15 U.S.C. § 78 dd-2 (g) (1988) ("domestic concerns").

<sup>57</sup> FCPAA, 15 U.S.C. § 78 dd-1 (d) (1988) ("issuers"); FCPAA, 15 U.S.C. § 78 dd-2 (e) (1988) ("domestic concerns").

<sup>58</sup> *Id.*

<sup>59</sup> Telephone interview with U.S. Attorney General's fraud division lawyer who wished to remain anonymous (June 6, 1989). The lawyer stated that there was great difficulty in defining and consequently writing any specific behavior to include in guidelines.

<sup>60</sup> FCPAA, 15 U.S.C. § 78 dd-1 (e) (1988) ("issuers"); FCPAA, 15 U.S.C. § 78 dd-2 (f) (1988) ("domestic concerns"). The original FCPA contained a similar provision. FCPA, 15 U.S.C. § 78 m(b) (1982).

<sup>61</sup> FCPAA, 15 U.S.C. § 78 dd-1 (e) (1988) ("issuers"); FCPAA, 15 U.S.C. § 78 dd-2 (f) (1988) ("domestic concerns").

<sup>62</sup> *Id.*

Congress urged the President in section (d) to "pursue the negotiation of an international agreement."<sup>63</sup> The President is to report to Congress:

- (1) the progress
- (2) alternative
- (3) impact on U.S. when companies from other countries engage in bribery
- (4) legislative recommendations.<sup>64</sup>

Presumably Congress will reevaluate the FCPA on an ongoing basis thereafter.

## VI. CONCLUSIONS

The clarification in the OTCA of the FCPA was necessary for business to be on notice of what specific acts constitute illegal corporate conduct. Although there is no hard data on the amount of business lost because of the preexisting law, there may be some available after the 1989 report by the President. Many commentators have long called for amendments similar to those just passed, while others have lamented the watering down of a law imposing ethical behavior on corporations and individuals.<sup>65</sup> What remains to be seen is whether in another few years the FCPA will be remembered as "the high water mark of American Paternalism."<sup>66</sup>

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<sup>63</sup> FCPAA, 15 U.S.C. § 78 dd-2 (d) (1988).

<sup>64</sup> *Id.*

<sup>65</sup> See generally sources cited *supra* notes 9, 11, 12 and 46.

<sup>66</sup> Hirschhorn, *supra* note 9, at 16.