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Extraterritorial Jurisdiction Under the 1998 Amendments to the Foreign Corrupt Practices Act: Does the Government’s Reach Now Exceed its Grasp?

H. Lowell Brown*


The OECD Convention was the culmination of over a decade of effort by the United States government and others to build an international consensus for the criminalization of transnational bribery. The Convention established the following: (1) bribery of a foreign official as a criminal offense; (2) requirements for

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corporate accounting and for internal corporate financial controls; and (3) a basis for mutual assistance among the signatories for the investigation and prosecution of offenses arising from the bribery of foreign officials. The Convention required, among other things, that signatory countries adopt implementing legislation to conform their domestic laws to the provisions of the Convention, as a prerequisite to ratification. The 1998 amendments to the FCPA accomplished this implementation by the United States, and following the deposit of instruments of ratification by Canada, Finland, Germany, Hungary, Iceland, Japan, and the United Kingdom, as well as by the United States, the OECD Convention entered into force on February 15, 1999. The 1998 amendments to the FCPA expanded the Act's substantive scope of the FCPA and extended the jurisdictional reach of the government's enforcement powers. This article analyzes the 1998 amendments. Part I of the article provides a historical overview of the FCPA. Part II of the article discusses the OECD Convention. Part III analyzes the United States' 1998 Amendments to the Foreign Corrupt Practices Act. Part IV of the article analyzes the applicability of the FCPA extraterritorially. Part V concludes that while the amendments' importance in conjunction with the OECD Convention largely remains to be seen, it is clear that the enlargement of the extraterritorial effect of the Act's antibribery provisions may prove to be the most significant and challenging foray by the United States into the regulation of international business, certainly since the FCPA was originally enacted.

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7 Convention, supra note 5, 37 I.L.M. at 1.
9 See infra notes 14-58 and accompanying text.
10 See infra notes 59-164 and accompanying text.
11 See infra notes 165-210 and accompanying text.
12 See infra notes 211-377 and accompanying text.
13 See infra Part V.
I. An Overview of the Foreign Corrupt Practices Act

The FCPA was enacted in 1977 in response to the revelation of widespread bribery of foreign government officials by U.S. companies doing business overseas. Investigations by the Watergate Special Prosecutor and by the Securities Exchange Commission (SEC) disclosed the existence of overseas "slush funds" that were used to finance illegal contributions to the Nixon re-election campaign and other domestic political campaigns and to fund bribes paid to foreign officials. The SEC brought

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14 As then SEC Commissioner Philip A. Lomis, Jr. commented:

[The involvement of the SEC in the problem of illicit payments] may be said to have grown out of the investigations made by the Watergate Special Prosecutor's office of illegal, and therefore undisclosed, corporate campaign contributions in the 1972 elections. Our staff, observing these proceedings, recognized that the activities disclosed for the first time involved questions of possible significance to public investors and that this might have a bearing upon our responsibilities. Accordingly, the Special Prosecutor's Office referred to us information obtained in various of its investigations.


While investigating certain contributions to the former presidential campaign, the Watergate Special Prosecutor uncovered a number of corporate political slush funds. These funds had been concealed from normal corporate accounting controls. Since such activities involved matters of possible significance to public investors, the Securities and Exchange Commission initiated its own investigation. Their investigation revealed that a number of U.S. corporations, in connection with their overseas operations, had used such secret slush funds for questionable or illegal foreign payments.

Id.

15 "Congress was aware of the investigation by the Special Watergate Prosecutor concerning illegal campaign contributions by U.S. companies, which often had been financed through off-shore entities and accounts, that had resulted in criminal prosecutions of twenty-two corporations and twenty-one individuals. See Abuses of Corporate Power, Hearings Before the Subcomm. on Priorities in Government of the Joint Economic Comm., 94th Cong. 91 (1976) [hereinafter Abuses]; GEORGE C. GREANIAS & DUANE WINDSOR, THE FOREIGN CORRUPT PRACTICES ACT: ANATOMY OF A STATUTE, 17-19 (1982); Charles R. McManis, Questionable Corporate Payments Abroad: An Antitrust Approach, 86 YALE L.J. 215 (1976).

Congress also heard a substantial amount of testimony concerning the overseas
practices of many of the country's largest corporations. For example, D.J. Houghton, Chairman of Lockheed Aircraft Corporation, testified in hearings held by the Senate Committee on Banking, Housing and Urban Affairs, and by the Subcommittee on Multinational Corporations of the Senate Committee on Foreign Relations. In the course of his testimony, Houghton acknowledged that between 1970 and 1975, 15% of the commissions paid to foreign agents had been paid, in turn, to foreign government officials. Houghton estimated this amount to have been $22 million. Houghton also testified that in excess of $100 million had been paid to an agent in Saudi Arabia, Adnan Khashoggi, and that at least $400,000 had been paid to a Saudi official using funds from Swiss and Liechtenstein entities. See Lockheed Bribery Hearings Before the Comm. on Banking, Housing and Urban Affairs, 94th Cong. 349-53 (1975). Thomas V. Jones, Chairman of Northrop Corporation, and Richard W. Millar, a member of Northrop's board of directors, also testified before the Subcommittee on Multinational Corporations and acknowledged that $450,000 had been paid to two Saudi Air Force officers through Khashoggi. Millar also testified that approximately $476,000 in payments to a foreign consultant had been used to make unlawful contributions to the 1972 Nixon re-election campaign. Multinational Corporations and United States Foreign Policy, Hearings Before the Subcomm. on Multinational Corporations of the Comm. on Foreign Relations, 94th Cong. 110-13, 180-83 (1975).

Executives from several major oil companies testified as well. B.R. Dorsey, Chairman of Gulf Oil Corporation, testified that between 1960 and 1973 approximately $10.3 million of corporate funds had been used to make political contributions of which approximately $5 million had been expended overseas. Id. at 5-12. Archie L. Monroe, Controller of Exxon Corporation, testified that between 1963 and 1972 Exxon's Italian subsidiary, ESSO Italiana, had made political contributions to campaigns in Italy totaling $46-49 million. Id. at 241-59. Everett S. Checket, Executive Vice President of Mobil Oil Corporation, also testified that Mobil's Italian subsidiary made payments in Italy totaling approximately $2,130,000 between 1970-73. Id. at 316-23. The report of the internal review of Gulf Oil's overseas payments conducted by John J. McCloy was subsequently published in JOHN MCCLOY ET AL., THE GREAT OIL SPILL: THE INSIDE REPORT—GULF OIL'S BRIbery AND POLITICAL CHICANERY (1976).

16 See Mary Jane Dundas & Barbara Crutchfield George, Historical Analysis of the Accounting Standards of the Foreign Corrupt Practices Act, 10 MEMPHIS ST. L. REV. 499-500 (1980); see, e.g., SEC v. Boeing Co., [1975-1976 Transfer Binder] 1976 Fed. Sec. L. Rep. (CCH) ¶¶ 95,442, 99,233 (D.D.C. 1976); SEC v. Lockheed Aircraft Co., 404 F. Supp. 651 (D.D.C. 1975). Congress heard extensive testimony from the SEC concerning the SEC's inquiry into overseas corrupt payments. SEC Chairman Roderick M. Hills testified before the Joint Economic Committee that the SEC had reason to believe that United Brands had made "questionable payments" of $1.25 million to officials of a Central American country and $750,000 to officials of two European countries. Abuses, supra note 15, at 4-6. Hills further testified that enforcement actions had been brought against General Refactories alleging that approximately $400,000 had been paid to European government officials; against Phillips Petroleum Company alleging that $2.8 million which had been paid to two European companies had been returned to the United States to fund illegal campaign contributions; against Gulf Oil Corporation, alleging that $4.5 million paid to a foreign subsidiary had been used to make illegal campaign contributions in the United States; against Northrop Corporation enforcement proceedings against major public corporations.16
Additionally, the SEC instituted a voluntary disclosure program under which companies could self-report violations of U.S. securities laws in the hope of avoiding SEC enforcement action.\footnote{See Abuses, supra note 15, at 16-18 (testimony of Roderick M. Hills, Chairman of the SEC); see also Greanis & Windsor, supra note 15, at 75-78; Neil H. Jacoby et al., Bribery and Extortion in World Business 46-58 (1977); Wallace Timmeny, An Overview of the FCPA, 9 Syracuse J. Int'l L. & Com. 235, 236-37 (1982); John Sweeny, The SEC Interpretive and Enforcement Program Under the FCPA, 9 Syracuse J. Int'l L. & Com. 273, 275 (1982); Note, Disclosure of Payments to Foreign Government Officials Under the Securities Acts, 89 Harv. L. Rev. 1848, 1851-52 (1976). The Honorable Stanley Sporkin was Director of the SEC Division of Enforcement at the time of the inquiry into questionable overseas payments. Judge Sporkin recalled that the Division of Enforcement and the Division of Corporation Finance were directed by the Commission to review the findings of the SEC's formal investigation of overseas payments. Judge Sporkin noted that the "SEC was literally overrun with these cases, and its meager resources were tapped to the utmost." Stanley Sporkin, The Worldwide Banning of Schmiergeld: A Look at the Foreign Corrupt Practices Act on its Twentieth Birthday, 18 Nw. J. Int'l L. & Bus. 269, 272-73 (1998). Accordingly, a "creative solution became absolutely necessary." Id. at 272. As Judge Sporkin explained:}

The solution that we developed was inspired by the spirit of the federal securities laws. The securities laws have long been a model for appropriate government regulation. They are largely statutes that mandate transparency. Full and fair disclosure is the general concept underpinning these laws. As part of its administration of the federal securities laws, the SEC relies heavily on voluntary private sector compliance. Thus, instead of requiring government auditors to examine the financial reports of public corporations, that responsibility has been delegated to the nation's Certified Public Accountants.

With these concepts in mind, [Allan Levenson, Director of the Division of Corporate Finance,] with some input from me and then-Commissioner Pollack, came up with the idea of a voluntary disclosure program. A corporation with an illicit payment problem could, in effect, go to a corporate "confessional." It would be required to publicly disclose the questionable payments it had made. In addition, it would have to agree to commission an independent internal investigation to determine the full nature and extent of its worldwide bribery and other similar questionable activities. It was contemplated that the results would be turned over to the SEC and made public.

As the last part of the program, the corporation would have to assure the Commission that appropriate steps had been taken to insure that such activities did not recur. Because we did not know whether the so-called private investigation would have the requisite integrity and objectivity, the Commission reserved the right to bring formal action. The corporate community was informally assured, but not promised, that if all went well, no Commission
The SEC’s voluntary disclosure program resulted in more than 400 companies disclosing overseas payments in excess of $300 million. In light of these revelations, Congress attempted to eliminate the problems of foreign bribery by U.S. individuals and entities in two distinct, although related, ways.

A. The Anti-Bribery Provisions

First, the FCPA made foreign bribery illegal. The FCPA prohibits the payment or offer of payment, either directly or indirectly through a third party, of money or “anything of

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More than 400 companies have admitted making questionable or illegal payments. The companies, most of them voluntarily, have reported paying out well in excess of $300 million in corporate funds to foreign government officials, politicians and political parties. These corporations included some of the largest and most widely held public companies in the United States; over 117 of them rank in the top Fortune 500 industries.

Id.; see also S. REP. NO. 95-114, at 3 (1977) (“Recent investigations by the SEC have revealed corrupt foreign payments by over 300 U.S. companies involving hundreds of millions of dollars.”); Timmeny, supra note 17, at 237.

19 A corrupt payment need not actually be made to a foreign official to constitute a violation. Instead, the FCPA also prohibits the “offer[,...] promise to pay, or authorization of the giving of anything of value” to foreign officials. §§ 78dd-1(a), -2(a), -3(a).

20 The FCPA prohibits both payments made directly to foreign officials and payments made indirectly to third parties “while knowing that all or a portion of such money or thing of value will be offered, given or promised, directly or indirectly, to any foreign official, to any foreign political party, or official thereof, or to any candidate for foreign political office.” §§ 78dd-1(a)(3), -2(a)(3), -3(a)(3) (West Supp. 1977). As originally enacted in 1977, the FCPA prohibited payments to third parties if there was “reason to know” that all or a portion of the payment would be given, offered or promised to a foreign official. §§ 78dd-1(a)(3), -2(a)(3). The “reason to know” standard was subject to the criticism that it was so ambiguous that negligent payments could fall within its scope. See Business Accounting and Foreign Trade Simplification Act Joint Hearings Before the Subcomm. on Finance and Monetary Policy and the Subcomm. on Securities of the Comm. on Banking, Housing and Urban Affairs, 99th Cong. 45-46, 85-86, 96-98 (statement of Malcolm Baldridge, Sec’y of Commerce; testimony of Calman J. Cohen, Emergency Comm. for Am. Trade; testimony of Allen B. Green, Am. Bar Ass’n Public Contract Law Section); Foreign Corrupt Practices Act—Oversight Hearings Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the Comm. on Energy and Commerce, 97th Cong. at 243, 278, 356 (1982); H.R. REP. NO.
value," to an official of a foreign government or political party, or a candidate for political office, with corrupt intent, in order to


The payment, offer, gift or authorization of the giving of “anything of value” is prohibited by the FCPA. 78dd-1(a), -2(a), -3(a). Although corrupt payments typically involve cash or a cash equivalent, the term “anything of value” is not so limited. Instead, as used in the domestic bribery statute, 18 U.S.C. § 201(b) (1994), the term “anything of value” is construed broadly to include both tangible and intangible objects. United States v. Marmolejo, 89 F.3d 1185, 1192 (5th Cir. 1992); United States v. Picquet, 963 F.2d 54, 55 (5th Cir. 1992); United States v. Griard, 601 F.2d 69, 71 (2d Cir. 1979). See H. Lowell Brown, The Foreign Corrupt Practices Act Redux: The Anti-Bribery Provisions of the Foreign Corrupt Practices Act, 12 Int'l Tax & Bus. L. 260, 273-75 (1994). Thus, the term “anything of value” has been construed as including, for example, charitable donations in Lamb v. Phillip Morris, Inc., 915 F.2d 1024 (6th Cir. 1990); travel expenses in United States v. Liebo, 923 F.2d 1308 (8th Cir. 1991); and transportation of voters who supported the ruling party in United States v. Kenny International Corp., (D.D.C. 1979), 2 Foreign Corrupt Practices Act Rep. 649 (BNA 1997).

The term “foreign official” is defined in the FCPA as “any officer or employee of a foreign government or any department, agency or instrumentality thereof.” §§ 78dd-1(f)(1), -2(h)(2), -3(f)(2)(A). As originally enacted in 1977, the FCPA definition of “foreign official” did not include “employees whose duties were primarily ministerial or clerical.” S. Rep. No. 95-831, at 12 (1977). The 1988 amendments to the FCPA removed this limitation and the U.S. Department of Justice has suggested that the elimination of the exclusion of ministerial or clerical employees from the reach of the FCPA was consistent with the focus of the 1988 amendments on the purpose of the payment rather than the duties or the position of the person receiving the payment. U.S. Dep't of Justice, Foreign Corrupt Practices Act Antibribery Provisions 5 (1992), available at http://www.usdoj.gov:80/criminal/fraud/test/dojdocb.htm (last visited Nov. 20, 2000). Also like the term “public official” in the domestic bribery statute, “foreign official” has been construed broadly. See, e.g., United States v. Young & Rubicam, Inc., 741 F. Supp. 334 (D. Conn. 1990) (treating consultant to the Jamaica tourist board with
obtain or retain business. Not all payments to foreign officials are prohibited, however. Instead, payments that are solely intended "to expedite or secure the performance of a routine governmental action by a foreign official, political party, or party officer" are exempt from the anti-bribery prohibition. Such payments are often referred to as "facilitating payments" or "grease payments."

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23 The legislative history, both in 1977 and 1988, reflects Congress' intent that the use of the term "corruptly" be analogous to the use of the same term in the domestic bribery statute. See S. Rep. No. 95-114, at 10; H.R. Rep. No. 95-40, at 7-8; H.R. Conf. Rep. No. 100-576, at 918 (1988). Accordingly, proof of the requisite corrupt intent requires showing that the payment was made or offered with the intent of influencing an official act. See Liebo, 923 F.2d at 1312; United States v. Johnson, 621 F.2d 1073, 1076 (10th Cir. 1980).

The government must show that the money was knowingly offered to an official with the intent and expectation that, in exchange for the money, some act of a public official would be influenced. The money must be given with more than some generalized hope or expectation of ultimate benefit on the part of the donor . . . . The money must be offered, in other words, with the intent and design to influence official action in exchange for the donation.

24 §§ 78dd-1(a), -2(a), -3(a).

25 §§ 78dd-1(b), -2(b), -3(b).

26 Although not specifically referred to in the 1977 Act, the legislative history strongly suggests that the anti-bribery provisions were not intended to apply to so-called "grease payments." See H.R. Rep. No. 95-640, at 8 (1977); S. Rep. No. 95-114, at 10 (1977). The exception for "grease payments" or "facilitating payments" was made explicit in the 1988 amendments, which the House-Senate conference made clear were payments made to expedite routine governmental actions. The conference also made it clear that the exception applied only to payments in connection with "ordinarily and commonly performed actions with respect to permits or licenses," and not to payments in connection with "those governmental approvals involving an exercise of discretion by a government official where the actions are the functional equivalent of obtaining or retaining business." H.R. Conf. Rep. No. 100-576, at 921. Accordingly,

"routine governmental action" is defined in the FCPA as being "ordinarily and commonly performed . . . in connection with: (i) obtaining permits, licenses or other official documents to qualify a person to do business in a foreign country; (ii) processing governmental papers; (iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to the transit of goods across country; (iv) providing phone service, power and water supply, loading and unloading cargo, or
Other payments are exempt from the anti-bribery provisions as well. Proof that a payment to a foreign official was lawful under the written laws of the foreign country could constitute an affirmative defense to an alleged violation of the FCPA. 27 Similarly, the FCPA recognizes an affirmative defense for reasonable and bona fide promotional expenses. 28

 protecting perishable products or commodities from deterioration; or (v) actions of similar nature.


27 Thus, the FCPA provides that it is an affirmative defense that "the payment, gift, offer or promise of anything of value that was made, was lawful under the written laws and regulations of the foreign official’s, political party’s, party official’s, or candidate’s country . . . ." §§ 78dd-1(c)(1), -2(c)(1), -3(c)(1). The House-Senate conference on the 1988 Amendments made it clear, however, that simply showing that the absence of written law in the foreign country would not be sufficient to make out the defense. "The conferees wish to make clear that the absence of written laws in a foreign official’s country would not 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.” H.R. CONF. REP. No. 100-576, at 921-22. Additionally, commentators note that the laws of virtually every country prohibit bribery of public officials. See Philip M. Nicholas, Regulating Transnational Bribery in Times of Globalization and Fragmentation, 24 YALE J. INT’L L. 257, 272 (1999).

28 The FCPA provides an affirmative defense to liability:

The payment, gift, offer or promise of anything of value that was made, was a reasonable and bona fide expenditure such as travel and lodging expenses, incurred by or on behalf of a foreign official, party, party official, or candidate and was directly related to:

(a) the promotion, demonstration, or explanation of products or services; or

(b) the execution or performance of a contract with a foreign government or agency thereof.

§§ 78dd-1(c)(2), -2(c)(2), and -3(c)(2). The 1988 Conference cautioned, however, that the defense would not be available if the otherwise permissible payment were made corruptly in return for an official act. As the conferees explained, "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.” H.R. CONF. REP. NO. 100-576, at 922. It should be noted that a similar exception for "nominal" payments or gifts that were a “courtesy, a token of regard or esteem in return for hospitality” was rejected in 1988. See H.R. CONF. REP. NO. 100-576, at 923-24.

In a recent civil enforcement action, United States v. Metcalf & Eddy, Inc., 99 Civ. 12566 NG (D. Mass. 1999), the DOJ took the position that payment of first-class air travel and other expenses, such as food and lodging, for an Egyptian government official and his family to visit the United States was prohibited by the FCPA because the purpose of the visit was to induce the official to use his influence concerning the award of United States Agency for International Development (U.S.A.I.D.) contracts to Metcalf & Eddy, Inc. Without admitting or denying the allegations, Metcalf & Eddy consented to the entry of a final judgment of permanent injunction.

The other prong of Congress' response to international bribery was the establishment of accounting and financial controls requirements for companies whose stock is registered with the Securities and Exchange Commission pursuant to the Securities Exchange Act of 1934. These requirements represent a significant expansion of the SEC's regulatory authority. Their adoption was heralded as a "new era" in federal jurisdiction because the accounting and financial controls requirements represented the first time in which standards for corporate governance had been imposed on public companies under federal law. Previously, federal securities laws had relied on disclosure standards and prohibitions against the making of false entries in a

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29 § 78a.

30 As was observed in SEC v. World-Wide Coin Inv., Ltd., 567 F. Supp. 724, 747 (N.D. Ga. 1983):

The FCPA... has important implications for the SEC, since the incorporation of the accounting provisions into the federal securities laws confers on the SEC new rule making and enforcement authority over the control and record-keeping mechanisms of its registrants. The FCPA reflects a congressional determination that the scope of the federal securities laws and the SEC's authority should be expanded beyond the traditional ambit of disclosure requirements. The consequence of adding these substantive requirements governing accounting control to the federal securities laws will significantly augment the degree of federal involvement in the internal management of public corporations.

Id.

31 Barbara Crutchfield George & Mary Jane Dundas, Responsibilities of Domestic Corporate Management Under the Foreign Corrupt Practices Act, 31 SYRACUSE L. REV. 865, 866-67 (1980) ("The internal accounting provisions of the FCPA have changed the mandate of the Securities and Exchange Commission (SEC) by giving that agency the means for regulating the internal management of domestic corporations. Thus, the FCPA heralds a new era."); see also Kathleen A. Lacey & Barbara Crutchfield George, Expansion of SEC Authority into Internal Corporate Governance: The Accounting Provisions of the Foreign Corrupt Practices Act, 7 J. TRANSNAT'L L. & POL'Y 119, 120 (1998) ("These accounting sections significantly extended the authority of the Securities Exchange Commission... beyond traditional disclosure requirements of the 1933 Securities Act... and the 1934 Securities Exchange Act... . The FCPA granted the SEC authority over the entire financial management and reporting requirements of those corporations subject to SEC regulation."); George J. Siedel, Corporate Governance Under the Foreign Corrupt Practices Act, 21 Q. REV. ECON. & BUS. 43, 44 (1981) ("[T]he accounting provisions were referred to as the most significant intrusion into corporate affairs since the 1930's, when federal securities legislation was originally enacted.").
The accounting and financial controls provisions of the FCPA apply to all corporations whose securities are registered with the company's books and records.\textsuperscript{32}

\textsuperscript{32} See § 78m(b)(2)(A). As the SEC explained in its May 12, 1976 report to the Senate Committee on Banking, Housing and Urban Affairs:

The almost universal characteristic of the cases reviewed to date by the Commission has been the apparent frustration of our system of corporate accountability which has been designed to assure that there is a proper accounting of the use of corporate funds and that documents filed with the Commission and circulated to shareholders do not omit or misrepresent material facts. Millions of dollars of funds have been inaccurately recorded in corporate books to facilitate the making of questionable payments. Such falsification of records has been known to corporate employees and often to top management, but often has been concealed from outside auditors and counsel and outside directors. Accordingly, the primary thrust of our actions has been to restore the efficiency of the system of corporate accountability and to encourage the boards of directors to exercise their authority to deal with the issue.


For this reason, the enforcement actions brought by the SEC arising from the questionable payments investigation, preceding the enactment of the FCPA, were grounded on the financial disclosure requirements of the federal securities laws. The Deputy Director of the SEC's Division of Enforcement at the time of these actions noted:

In the early days when we were drafting some of the complaints in the first cases, the seeds were planted for the FCPA as we know it. For example, the first thing we did when we drafted our complaints in these cases was to seek an injunction against the falsification of books and records. At that time there was no requirement that companies maintain accurate books and records, but we sought injunctions against false entries. That was the seed for Section 13(b)(2)(a) of the Exchange Act.

See, e.g., Timmeny, supra note 17, at 236. Other commentators have made similar observations. See, e.g., John D. Reed, Corporate Self-Investigating Under the Foreign Corrupt Practices Act, 47 U. CHI. L. REV. 803, 806 (1980) ("It is the obligation of the SEC to ensure that investors are fully informed of material dealings of subject corporations. It is therefore not surprising that the Commission viewed increasing evidence of foreign bribery as a frustration of the system of corporate accountability."); Steven M. Morgan, In Search of an International Solution to Bribery: The Impact of the Foreign Corrupt Practices Act of 1977 on Corporate Behavior, 12 VAND. J. TRANSNAT'L L. 359, 361 n.11 (1979):

The SEC proceeded on the theory that misleading or suppressed disclosure of improper or questionable expenditures could violate § 13(a) of the Exchange Act . . . and the rules and regulations thereunder, all of which relate to the filing of periodic and other reports with the SEC by registered companies. The SEC then brought the injunctive action under § 21(d) of the Exchange Act.
The provisions also apply to corporations required to file reports with the SEC pursuant to the Securities Exchange Act of 1934.33 These corporations are referred to as “issuers.”34 Under the accounting provisions, issuers are required to “make and keep books, records, and accounts, which in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer.”35 In essence, issuers are required to keep their books and records in accordance with generally accepted accounting principles.36

The SEC proposed these requirements based on the observation that corrupt and “questionable” payments had not been recorded in the companies’ books as such, but had been disguised and mischaracterized in order to avoid detection. It was the SEC Enforcement Director’s view that if public corporations

33 The FCPA accounting provisions were enacted as a new Section 13A of the Securities Exchange Act and apply to “every issuer which has a class of securities registered pursuant to [15 U.S.C. § 781] and every issuer which is required to file reports pursuant to [15 U.S.C. § 780] . . . .” § 78m(b)(2).

34 An “issuer” is defined in the Securities Exchange Act as:

Any person who issues or proposes to issue any security; except that with respect to certificates of deposits for securities, voting-trust certificates, or collateral-trust certificates, or with respect to certificates of interest or shares in an unincorporated investment trust not having a board of directors or of the fixed, restricted management, or unit type, the term “issuer” means the person or persons performing the acts and assuming the duties of depositor or manager pursuant to the provisions of the trust or other agreement or instrument under which such securities are issued; and except that with respect to equipment-trust certificates or like securities, the term “issuer” means the person by whom the equipment or property is, or is to be, used.

§ 78c(a)(8).

35 § 78m(b)(2)(A).

36 By requiring that records be kept “accurately,” Congress intended that corporations record transactions in conformity with generally accepted accounting principles. As explained in S. Rep. No. 95-114, at 8 (1977), “[s]tandards of reasonableness must apply. In this regard, the term ‘accurately’ does not mean exact precision as measured by some abstract principle. Rather, it means an issuer’s records should reflect transactions in conformity with generally accepted accounting principles or other applicable criteria.” Id.

The House-Senate conference also noted that the amendment of the record-keeping requirements of the Securities Exchange Act “makes clear that the issuer’s records should reflect transactions in conformity with accepted methods of recording economic events and effectively prevent off-the-books slush funds and payments of bribes.” H.R. Conf. Rep. No. 95-831, at 10 (1977).
were required to keep accurate books and records subject to scrutiny by auditors and others, those corporations would "think twice" before accurately recording the payment of bribes on their books.\footnote{As Judge Sporkin recalled:}

Accordingly, the standard for compliance with the FCPA accounting provisions is not one of materiality, as are other securities law disclosure requirements.\footnote{The accounting provisions of the FCPA were modeled after the auditing standards of the American Institute of Certified Public Accountants (AICPA). See \textit{Business Accounting and Foreign Trade Simplification Act: Hearings on S.708 Before the Subcommittee on Securities and the Subcommittee on International Finance and Monetary Policy}, 97th Cong., 83-84 (1981). At the time Congress enacted the accounting provisions, both the AICPA and the American Bar Association construed those provisions as incorporating a standard of materiality. See L. Robert Primoff, \textit{The Foreign Corrupt Practices Act: Implications for the Private Practitioner}, 9 \textit{Syracuse J. Int'l L.} \& Com. 325, 328 (1982).}

\footnote{As Judge Sporkin recalled:}

I analyzed the various cases the SEC had brought and came to the conclusion that in no instance was an illicit payment recorded in the corporation's books for what it was. The payments were carefully disguised. For example, a bribe to a government official was often made through an agent. The books and records would merely reflect an "agent's fee." The system of private sector enforcement was thus being subverted. In many instances, the corporation's public accountants were outright lied to or otherwise misled.

Most of all, I was amazed that there was no requirement that publicly traded corporations maintain honest books and records. My research of the various laws did reveal that such a "books and records" requirement was included in the laws governing this nation's financial institutions. It occurred to me that if such a requirement was good enough for this nation's brokerage and banking institutions, why not for its industrial concerns?

I became convinced that what was necessary was a simple law that would require corporations to keep accurate books and records. In my view, a corporation would think twice before it recorded a bribe for what it was. Since bribery is generally considered a crime, it would be virtually untenable for someone to admit in writing that the corporation is engaging in such activities on an ongoing basis. Bribery needs secrecy in order to flourish. Thus, I theorized that requiring the disclosure of all bribes paid would, in effect, foreclose that activity.

\textbf{Sporkin, supra} note 17, at 274.

\footnote{The SEC disagreed with this view. See \textit{Promotion of the Reliability of Financial Information and Prevention of the Concealment of Questionable or Illegal Corporate Payments and Practices}, Exchange Act Release No. 34-15570, 44 Fed. Reg. 10,964 to 10,967 (Feb 23, 1979). As a former Chief Counsel to the SEC Division of Enforcement stated:}

\footnote{Materiality is defined in terms of what a reasonable investor would consider}
important, or "material," to the financial statements of an issuer. For a company
of any size, this means that you would need transactions of thousands, perhaps
tens or hundreds of thousands of dollars, before the record-keeping requirement
would be applicable. Transactions of a lesser amount . . . would not be subject
to the requirement that they be recorded accurately. . . . Section 320.8 of the
Statement on Accounting Standards No. 1 indicates that transactions should be
recorded at the amounts in which they occur, in the periods in which they occur,
and be classified in appropriate accounts. That is what an auditor expects to find
when he audits a company's books. However, if you use a materiality standard
to determine what goes into your accounting system—to define the transactions
a company is required to record accurately few, if any, transactions would be
subject to the record-keeping requirements. From that perspective, the argument
set forth [by the American Bar Association] simply does not make sense.

Frederick B. Wade, An Examination of the Provisions and Standards of the FCPA, 9
SYRACUSE J. INT’L L. & COM. 255, 263 (1982). In any event, the SEC considered illicit
payments to be material regardless of the amount of the bribe or the financial size of the
corporation. As Judge Sporkin noted:

The key issue was the application of the materiality standard. Not all corporate
information requires disclosure. Apart from information that is specifically
required to be disclosed, all other required disclosures must meet a materiality
standard . . . .

The SEC largely predicated its lawsuits on the theory that the illicit activities
of publicly traded corporations are material and must be disclosed to their
shareholders. There was no question that the theory was a good one, especially
inside the Commission. Outside the Commission, certain members of the
private bar held other views. They contended that if a corporation with a billion
dollars in assets paid bribes in the low millions, that conduct would not be
material. The SEC theory on materiality squarely stood up to their contentions.
The Commission's position on materiality was several-fold. In its view, an
activity that subjects a corporation to possible substantive criminal penalties
would be important to shareholders and thus would meet the . . . materiality
standard. Moreover, to properly test materiality, one must look beyond the
amount of the bribe. According to the Commission, one must look to the
amount of business that the corporation would lose if it could no longer use
bribery to obtain that business. In effect, it was the amount of business that was
derived from the Schmiergeld that was particularly crucial to the materiality
issues.

Sporkin, supra note 17, at 275.

39 It has been noted in this regard that:

The [FCPA's] purpose is not to require business records and controls to
conform to some absolute ideal, but rather to assure that the records of a public
company "in reasonable detail, accurately reflect" disbursements of its assets,
and that its internal accounting controls are "sufficient to provide reasonable
assurances" that the provision's objectives will be met. Reasonableness, rather
than materiality, is the test to be applied.
In this connection, the SEC has identified factors to be considered in evaluating whether the corporation's accounting procedures achieve the objectives of the act. These factors are: (1) the overall control environment;\(^4^0\) (2) the translation of broad accounting control objectives into specific objectives which are applicable to the business, organizational, and other characteristics of the company; (3) the specific control procedures and environmental factors which should contribute to the achievement of the specific control objectives; (4) whether control procedures are functioning as intended; and (5) the benefits (i.e., reduction of risk of failing to achieve objectives) and costs of additional or alternative controls.\(^4^1\)

In adopting the reasonableness standard, Congress recognized the necessity of management's balancing of benefits and costs.\(^4^2\) The SEC recognized the necessity of flexibility in implementing accounting controls as well.\(^4^3\)

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\(^4^0\) In his remarks at a meeting of the AICPA, former SEC Chairman Harold M. Williams noted that "the key to an adequate control environment is an approach on the part of the board and top management which makes clear what is expected, and that conformity to these expectations will be rewarded while breaches will be punished." Williams' Remarks before the AICPA, Exchange Act Release No. 34-17500, 46 Fed. Reg. 11,544, 11,545 (Feb. 9, 1981).


\(^4^2\) For example, the report of the Senate Committee on Banking, Housing and Urban Affairs stated:

The Committee recognizes that management must necessarily estimate and evaluate the cost/benefit relationships of the . . . business, diversity of operations, degree of centralization of financial and operating management, amount of contact by top management with day-to-day operations, and numerous other circumstances are factors which management must consider in establishing and maintaining an internal accounting controls system. S. REP. No. 95-114, at 8 (1977).

\(^4^3\) SEC Chairman Williams observed with regard to the reasonableness standard that:

Reasonableness, as a standard, allows flexibility in responding to particular facts and circumstances. Inherent in this concept is a toleration of deviations from the absolute. One measure of the reasonableness of a system relates to whether the expected benefits from improving it would be significantly greater than the anticipated costs of doing so.
Issuers are also required to have in place internal financial controls providing "reasonable assurances" that:

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.  

In sum, the corporation's records and controls must provide "such level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs."
The internal controls provisions of the FCPA were intended to assure that management was adequately informed concerning the company’s assets and to ensure that those assets were treated as management intended, thereby preventing the creation of off-the-books “slush funds” or the disbursement of corporate funds as bribes contrary to company policy and management’s direction.\(^\text{46}\)

Thus, in contrast to the accounting system adopted by a corporation to process and report transactions, the accounting and controls provisions of the FCPA contemplate a broader array of controls to guard against misappropriation of the corporation’s assets, in accordance with management’s stewardship obligations.\(^\text{47}\) Other “directives,” such as the segregation of appropriate minimum standard for publicly owned corporations.” \textit{Id.} Thus, as former SEC Chairman Harold M. Williams stated with respect to the internal controls provisions, “[i]n essence, these objectives are that assets be safeguarded from unauthorized use, the corporate transaction conform to managerial authorizations, and that records are accurate.” Williams’ Remarks before the AICPA, 46 Fed. Reg., \textit{supra} note 40, at 11,545.

\(^\text{46}\) As former Deputy Enforcement Director Timmeny explained:

The internal control provisions . . . are designed to deal with the problems of off-the-books slush funds or company employees going beyond company policy and using corporate assets to make payments . . . in a way the management would not want them used. They were also designed to ensure that there are controls on the company assets—that a company knows what assets it has and that management is aware of what is going on within a company concerning its assets.

Timmeny, \textit{supra} note 17, at 240. The legislative history of the 1977 Act is to the same effect:

The establishment and maintenance of a system of internal controls is an important management obligation. A fundamental aspect of management’s stewardship responsibility is to provide shareholders with reasonable assurances that the business is adequately controlled. Additionally, management has a responsibility to furnish shareholders and potential investors with reliable financial information on a timely basis. An adequate system of internal accounting controls is necessary to management’s discharge of these obligations.

\textit{S. REP. NO. 95-114, at 8 (1977).}

\(^\text{47}\) As observed in \textit{SEC v. World-Wide Coin Inv., Ltd.}:

The internal controls requirement is primarily designed to give statutory content to an aspect of management stewardship responsibility, that of providing shareholders with reasonable assurances that the business is adequately controlled . . . . Internal accounting control is generally speaking, only one aspect of a company’s total control system; in order to maintain accountability for the disposition of its assets, a business must attempt to make it difficult for
accounting functions and personnel, have also been inferred from the accounting and control provisions.\(^8\)

The FCPA accounting and control provisions are rules of general applicability to issuers that were adopted for the protection of all investors.\(^9\) For that reason, the finding of a violation does

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\(^8\) Thus, in *SEC v. World-Wide Coin Inv., Ltd.*, the court observed that in conformity with the accounting and controls provisions:

Every company should have reliable personnel, which may require that some be bonded, and all should be supervised. . . . Account functions should be segregated and procedures designed to prevent errors and irregularities. The major functions of recordkeeping, custodianship, authorization, and operation should be performed by different people to avoid the temptation for abuse of these incompatible functions. . . . Reasonable assurances should be maintained that transactions are executed as authorized. . . . Transactions should be properly recorded in the firm's accounting records to facilitate control, which would also require standardized procedures for making accounting entries. Exceptional entries should be investigated regularly. . . . Access to assets of the company should be limited to authorized personnel. . . . At reasonable intervals, there should be a comparison of the accounting records with the actual inventory of assets, which would usually involve the physical taking of inventory, the counting of cash, and the reconciliation of accounting records with the actual physical assets.

*Id.* at 750-51.

\(^9\) As SEC Chairman John S.R. Shad observed, “as the legislative history of the Foreign Corrupt Practices Act makes clear, the accounting provisions were enacted in part to facilitate the disclosure provisions of the federal securities laws and in part to provide for greater accountability of corporate assets. They were not intended exclusively to curb foreign bribery.” Written Statement of Hon. John S. R. Shad, *supra* note 45, at 84,333. The broad remedial purpose of the accounting and control provisions was recognized by the court in *SEC v. World-Wide Coin Inv., Ltd.*:

The FCPA was enacted on the principle that accurate record keeping is an
not require evidence of off-the-books "slush funds" or corrupt overseas payments.\(^5\) Indeed, a corporation that conducts no business overseas may nevertheless be liable for violation of the FCPA accounting and controls provisions.\(^5\)

essential ingredient in promoting management responsibility and is an affirmative requirement for publicly held American corporations to strengthen the accuracy of corporate books and records, which are the "bedrock elements of our system of corporate disclosure and accountability." A motivating factor in the enactment of the FCPA was a desire to protect the investor, as was the purpose behind the enactment of the securities acts. It is apparent that investors are entitled to rely on the implicit representations that corporations will account for their funds properly and will not channel funds out of the corporation or omit to include such funds in the accounting system so that there are no checks possible on how much of the corporation's funds are being expended in the manner management later claims.

567 F. Supp. at 750-55.

\(^5\) See United States v. Crop Growers Corp., 954 F. Supp. 335 (D.D.C. 1997); see also Christopher F. Corr & Judd Lawler, Damned if You Do, Damned if You Don't? The OECD Convention and the Globalization of Anti-Bribery Measures, 32 Vand. J. Transnat'l L. 1249, 1265 (1999). Nevertheless, application of the accounting and controls provision in cases that do not involve overseas corrupt payments has been criticized. See, e.g., Robert B. von Mehren, Introduction to the Foreign Corrupt Practices Act of 1977—Law, Procedures and Practices, 10 PLI Inst. on Sec. Reg. 65, 69 (1979) ("I find it deplorable that our legislative process should have produced legislation considered largely as legislation dealing with foreign payments but, upon passage, turns out to have perhaps its most critical impact upon internal corporate governance"); John W. Bagby, Comment, Enforcement of Accounting Standards in the Foreign Corrupt Practices Act, 21 Am. Bus. L.J. 213, 231-32 (1983) ("The SEC has used FCPA accounting provisions in a manner which is arguably inconsistent with the legislative purpose of preventing foreign corrupt payments. This clearly provides the strongest argument for removal of the record-keeping requirements from the FCPA.") (emphasis in original).

\(^5\) In this regard, Professor Kathleen Brickey has observed:

Even though the record keeping and control provisions [of the FCPA] are intended to work in tandem with the foreign bribery provisions to deter corporate bribery, liability for violating the accounting provisions is not contingent upon the establishment of a nexus between the inadequacy of the recording system and maintenance of off book accounts to finance unlawful foreign payments. For while Congress hoped that the combined effect of the antibribery provisions and the accounting provisions would be deterrence, the structure of the statute does not inextricably intertwine liability under each.

Indeed, the record keeping and accounting requirements . . . apply to domestic corporations that conduct no business abroad and conduct no business with foreign entities here in the United States.

2 Kathleen F. Brickey, Corporate Criminal Liability § 9:20 (2d ed. 1992); see also Morgan, supra note 32, at 369 ("It is a significant development that issuers are now
Additionally, no proof of intent, or “scienter,” is required to establish liability under the accounting and controls provisions.\(^52\) Notwithstanding the absence of a scienter requirement, the SEC has stated that only instances of knowing or reckless conduct will be prosecuted.\(^53\)

**C. Penalties and Sanctions**

Responsibility for enforcement of the FCPA is shared by the SEC and the U.S. Department of Justice. The Department of required to implement a system of internal accounting controls—it must be remembered that this provision applies regardless of whether or not the company operates overseas. Even without engaging in bribery, a company must be careful to comply.”); Hubert Lenczowski, *Questionable Payments By Foreign Subsidiaries: The Extraterritorial Jurisdictional Effect of the Foreign Corrupt Practices Act of 1977*, 3 Hastings INT’L & COMP. L. REV. 151, 158-59 (1979) (quoting Stabler, *SEC’s New Weapon: Foreign Bribery Act Imposes Tough Rules on the Bookkeeping of All Public Firms*, WALL ST. J., July 28, 1978, at 30, col.1) (“Under the new Foreign Corrupt Practices Act, it is becoming clear, you don’t have to be either operating in foreign lands or corrupt to be in trouble.”).


\(^53\) For example, the SEC has stated that:

Nothing in the Congressional objectives of the accounting provision requires that inadvertent record keeping inaccuracies be treated as violations of the Act’s record keeping provisions. The Act’s principal purpose is to reach knowing or reckless misconduct . . . .

Neither its text and legislative history nor its purposes suggest that occasional, inadvertent errors were the kind of problem that Congress sought to remedy in passing the Act. No rational federal interest in punishing insignificant mistakes has been articulated.

Justice has authority to prosecute criminal violations of the FCPA. The SEC retained jurisdiction over "issuers" while the Department of Justice was given jurisdiction to bring civil actions to enjoin violations by "other domestic concerns."  

The penalties for violation of the anti-bribery provisions of the Act are substantial. Individuals who violate the Act are subject to imprisonment for up to five years and may be fined up to $100,000. Violators may also be subject to civil penalties of up to $10,000 for each violation. The Act prohibits the indemnification, directly or indirectly, of a fine or penalty imposed on an individual. Corporations convicted of criminal violations of the FCPA may be fined up to $2,000,000.

II. The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions

From the time of enactment, the FCPA has been criticized for placing U.S. firms at a competitive disadvantage internationally because the United States was the only country to outlaw foreign bribery. Foreign corporations, even subsidiaries of U.S.

54 SEC jurisdiction over "issuers" is grounded in § 78u. The jurisdiction of the Department of Justice over "domestic concerns" is provided under § 78dd-2(d).

Under § 78dd-2(h)(1), "domestic concern" is defined as:

(A) Any individual who is a citizen, national or resident of the United States; and
(B) any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States.

55 §§ 78dd-2(g)(2), 78ff(c)(2).

56 §§ 78dd-2(g)(1)(B), 78ff(c)(1)(B).


59 For example, in 1981 the Comptroller General reported to Congress that over 60% of the companies responding to a questionnaire concerning FCPA compliance felt that they could not compete successfully against foreign competitors who paid bribes. Aircraft and construction companies reported that they had lost overseas business as a result of the FCPA's restrictions. The Comptroller General noted, however, that these perceptions could neither be supported nor rejected on the basis of verifiable data. Impact of Foreign Corrupt Practices Act on U.S. Business, [1981 Transfer Binder] Fed. Sec. L. Rep. (CCH), ¶ 82,841 (1981). Another 1981 survey of 400 stockholders of publicly held corporations and 400 certified public accountants also reflected the belief that the anti-bribery provisions of the FCPA would cause U.S. companies to lose
companies organized under the laws of a foreign country, were considered to be beyond the reach of the FCPA.\textsuperscript{60} Indeed, a number of countries unofficially condoned bribery of foreign officials.\textsuperscript{61}

As early as 1975, Congress was aware that the problem of international bribery would have to be addressed internationally, rather than simply by unilateral action, if reform were to be achieved.\textsuperscript{62} Congress called on U.S. negotiators to seek the business. Manuel A. Tipgos, \textit{Compliance With the Foreign Corrupt Practices Act}, Fin. Exec., at 4 (Aug. 1981); see also Howard L. Weisberg & Eric Reichenberg, \textit{The Price of Ambiguity: More Than Three Years Under the Foreign Corrupt Practices Act}, U.S. Chamber of Commerce (1981); John Kimelman, \textit{The Lonely Boy Scout}, Fin. World, Aug. 16, 1994, at 50. More recently, a 1996 study by the U.S. Department of Commerce reported that between April 1994 and May 1995 there were approximately 100 cases in which foreign bribes “undercut” efforts to win procurements valued at $45 billion. Kari Lynn Diersen, \textit{Foreign Corrupt Practices Act}, 36 Am. Crim. L. Rev. 753, 764-65 n.88 (citing Joseph F. Savage, Jr., \textit{Bribery By Any Other Name is Giving Non-U.S. Firms Advantage In Global Deals}, 1998 J. Com. 11C, 3) (1999); Administration Highlights Bribery As Trade Problem For U.S. Exporters, 12 Int’l Trade Rep. (BNA), 1711 (Oct. 18, 1995).


\textsuperscript{61} For example, in a May 1997 report to the OECD Ministerial Council, the OECD Committee on Fiscal Affairs noted that bribes to foreign officials were tax deductible as a business expense under the laws of Australia, Austria, Belgium, France, Germany, Iceland, Ireland, Luxembourg, Netherlands, New Zealand, Portugal, and Switzerland. \textit{Implementing the 1996 OECD Recommendation on Tax Deductibility of Bribes to Foreign Officials: Report By the Committee on Fiscal Affairs to the OECD Council at Ministerial Level}, OECD (May 26-27, 1997) (on file with author). On April 28, 1998, the Committee on Fiscal Affairs reported that Denmark, France, Germany, Netherlands, and Portugal had adopted or were in the process of adopting legislation that would deny tax deductibility to foreign bribes. In addition, Australia, Belgium, Luxembourg, New Zealand, Sweden, and Switzerland were considering similar legislation. \textit{See Update on the Implementation of the OECD Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials: Report by the Committee on Fiscal Affairs (CFA) to the OECD Council at the Ministerial Level}, OECD, at http://www.oecd.org/da/fnocorruption/tax.htm (Apr. 28, 1998). Bribery of foreign government officials is a pervasive problem in international business. A recent survey by the World Bank of 3,600 companies in 69 countries disclosed that bribes had been paid by 40% of the companies. J. Lee Johnson, \textit{A Global Economy and the Foreign Corrupt Practices Act: Some Facts Worth Knowing}, 63 Mo. L. Rev. 979, 979 (1998).

\textsuperscript{62} \textit{See Foreign Payments Disclosure, supra note 14, at 43.}
adoption of international codes of conduct prohibiting corrupt payments to foreign officials.\textsuperscript{63} Congress directed the Special Representative for Trade Negotiations to "initiate at once negotiations within the framework of the current multilateral trade negotiations in Geneva."\textsuperscript{64} However, participants received the United States' proposal at the GATT negotiations with "polite

\textsuperscript{63} On November 12, 1975, the Senate adopted Resolution 265 which called on all U.S. negotiators to seek the adoption of codes of conduct by "all appropriate international forums," eliminating "bribery, kickbacks, unethical political contributions, and other such disreputable activities." S. Res. 265, 94th Cong. (1975). Congress also had the benefit of others' views on the importance of a multinational response to foreign bribery. The Association of the Bar of the City of New York stated in a report on questionable payments prepared in 1977 as follows:

It is clear that the problem of questionable foreign payments is an international problem. As such, any solution attempted unilaterally through legislative actions by one state is necessarily incomplete and may also be unwise . . . . United States business cannot be taken out of the bribery syndrome so long as it remains a "way of life" for competing firms not subject to United States jurisdiction.

The Association of the Bar of the City of New York, Report on Questionable Foreign Payments by Corporations: The Problem and Approaches to a Solution, 34 (Mar. 14, 1977) [hereinafter New York City Bar Assoc. Rep.]. A task force organized by the Ford Administration under the chairmanship of Secretary of Commerce Elliot L. Richardson made a similar observation:

It is the view of the President and the task force that the ultimate legal basis for adequately addressing the questionable payments problem must be an international treaty along the lines proposed by the United States. A treaty is required to make the "criminalization" of foreign bribery fully enforceable—for, in the absence of foreign cooperation, it would be extremely difficult, and in many cases impossible, for U.S. law enforcement officials and potential defendants to be assured of access to relevant evidence. A treaty is also required to treat the actions of foreign as well as domestic parties to a questionable transaction. And a treaty is required to assure that all nations, and the competing firms of differing nations, are treated on the same basis.

Foreign Payments Disclosure, supra note 14, at 40, 46, (report of the Richardson Task Force). Other commentators also emphasized the need for multilateral action. See, e.g., Morgan, supra note 32, at 385:

Actions by the United States government, acting alone, will not be fully effective in dealing with bribery until those efforts are matched by similar action by other nations. Critics of the FCPA assert that if only United States corporations are prohibited from bribing foreign officials, then United States corporations are likely to lose their competitive position vis-à-vis foreign corporations whose governments take a more benign view toward the payment of corporate funds to foreign officials.\textsuperscript{64}

\textsuperscript{64} See Foreign Payments Disclosure, supra note 14, at 43:
When negotiations concluded in 1979, public corruption was not among the trade practices that were addressed.66

U.S. efforts in other international organizations met with somewhat greater success. The permanent council of the Organization of American States (OAS) adopted a resolution in July 10, 1975 that condemned “in the most emphatic terms any act of bribery, illegal payment or offer of payment by any transnational enterprise; any demand for acceptance of improper payments by any public or private person, as well as any act contrary to ethics and legal procedures . . . .”67 Although the OAS resolution called on members to conform their laws to the prohibition against international bribery, the resolution provided no mechanism for enforcement.68

On December 15, 1975, the United Nations General Assembly adopted Resolution 3514 entitled “Measures Against Corrupt Practices of Transnational and Other Corporations, Their Intermediaries and Others Involved,” condemning corrupt business practices including bribery.69 The resolution directed the Economic and Social Council (ECOSOC) to include international bribery in the program work of the United Nations Commission on Transnational Corporations.70 The United States proposed that

65 Id.

66 Seymour Rubin, International Aspects of the Control of Illicit Payments, 9 Syracuse J. Int’l L. & Com. 315, 317-18 (1982); New York City Bar Assoc. Rep., supra note 63, at 39. The efficacy of the GATT negotiations as a forum for a multinational prohibition against foreign bribery was questioned in the Association’s report:

It is . . . open to question whether the fact that GATT is concerned with trade, but not with investment, impairs its suitability as a forum. Although the negotiators at the multinational trade negotiations are engaged in an attempt to establish fair rules of government procurement policies, the problem of questionable foreign payments applies to government actions affecting investment as well as procurement. Furthermore, the effects of injecting these sensitive issues into the already delicate negotiations relating to international terms of concessions in other areas argue against use of GATT for this purpose.

Id. at 41.

67 Id.; Morgan, supra note 32, at 386.


69 Id.; Mark J. Murphy, International Bribery: An Example of An Unfair Trade
ECOSOC adopt a code outlawing corrupt payments in international trade. However, once again, the United States' proposal was met with "deafening silence." Although ECOSOC subsequently established the Ad Hoc Inter-Governmental Working Group on Corrupt Practices, the draft agreement proposed by the


According to the Richardson Task Force, the United States' proposal included the following principles:

(i) It would apply to international trade and investment transactions with governments, i.e., government procurement and other governmental actions affecting the international trade and investment as may be agreed; (ii) It would apply equally to those who offer to make improper payments and to those who request or accept them; (iii) Importing governments would agree to establish clear guidelines concerning the use of agents in connection with government procurement and other covered transactions, and establish appropriate criminal penalties for defined corrupt practices by enterprises and officials in their territory; (iv) All governments would cooperate and exchange information to help eradicate corrupt practices; (v) Uniform provisions would be agreed upon for disclosure by enterprises, agents and officials of political contributions, gifts and payments made in connection with covered transactions.

Foreign Payments Disclosure, supra note 14, at 44.

As Professor Seymour Rubin, who was the United States Representative to the United Nations Commission on Transnational Corporations explained:

At Lima, for example, there was nothing on the Commission's agenda which indicated that the subject of illicit payments would be discussed. Instead, the Commission was focusing on other aspects of the regulation or conduct of transnational corporations. Nonetheless, I received instructions to present the subject at four o'clock on a Friday afternoon, with the understanding that Mr. Ingersoll, who was then Undersecretary of State, would make a presentation before Senator Proxmire's committee at the same time. Surprisingly, I succeeded in introducing the subject at that time.

The subject of illicit payments was brought up in that forum, at least partially, because there had been a great deal of noise made in the United Nations about the reprehensible conduct of certain corporations, which were known to be bribing governments of developed and developing countries alike. Iran was one of the chief proponents of this kind of activity. In Iran, under the Shah, there was considerable activity which fell into the category of reprehensible conduct. The Japanese cases were also receiving substantial publicity. I was, therefore, not entirely prepared for the deafening silence which greeted my own suggestion that the Commission on Transnational Corporations take up this particular topic, especially since it was discussing a code of conduct to instruct transnational corporations on the proper mode of conduct in the international arena. Needless to say, I received support from only a few members of the Commission.

Rubin, supra note 66, at 319-20.
working group in 1979 was not adopted because the United States was unable to obtain support from the industrialized countries of Europe.\textsuperscript{73}

When Congress amended the FCPA in 1988, it made its views explicit concerning the necessity of an international response to foreign bribery. Congress informed the President that it was the "sense of Congress" that negotiations to that end should be undertaken with the members of the OECD.\textsuperscript{74}

\textsuperscript{73} See Murphy, supra note 70, at 38. As Professor Rubin reported:

Interestingly, America's Western European allies have created the greatest difficulties. Although the Western European countries usually side with the United States in most matters, whether it be Restricted Business Practices or the general conduct of transnational corporations, the United States has not been able to obtain their support for a code of conduct on illicit payments in the U.N. forum. Consequently, it is easy to understand why, in the area of illicit payments, there is great difficulty in arriving at any agreed-upon code.

Rubin, supra note 66, at 321. Professor Rubin also noted that an impediment to achieving consensus on international bribery was the disconnect between perceived and actual standards of conduct on the part of the "moral allies" of the United States:

The problem in the United Nations stems partially from the fact that there exists a difference in perception between what the conduct really is, or what the standards of conduct really are, and what they are said to be. Specifically, this situation occurs when a nation has a law opposed to bribery, as well as a law permitting a tax deduction for a payment that is stated to have been made for the purposes of a bribe and justified as being in the regular course of business. For this reason, the United States has not been able to achieve any degree of consensus with its moral allies in the United Nations.

\textit{Id.} at 332.

\textsuperscript{74} Section 5003(d) of the Foreign Corrupt Practices Act Amendments of 1988, Pub. L. No. 100-418, 102 Stat. 1415, provided that:

It is the sense of the Congress that the President should pursue the negotiation of an international agreement, among the members of the Organization of Economic Cooperation and Development, to govern persons from those countries concerning acts prohibited with respect to issuers and domestic concerns by the amendments made by this section.

§ 78dd.

It has been suggested that this provision of the 1988 amendments was intended to emphasize the concern that U.S. companies not be put at a competitive disadvantage with respect to other companies not subject to the FCPA. See Freemantle & Katz, supra note 4, at 764:

It appears that the purpose of this requirement is to respond to the concern that other nations do not have the same standards Congress has enshrined in the FCPA. If not, American corporations will continue to be at a competitive disadvantage. Some commentators may suggest that, should such negotiations
Thereafter, in 1990, the OECD Ministerial Council requested the Committee on International Investment and Multinational Enterprises (CIME) to study the feasibility of cooperative action by member governments to prohibit corrupt payments. The CIME issued its findings in 1992.

Acting on the CIME study, the OECD Ministerial Council adopted the Recommendation on Bribery in International Business Transactions which strongly encouraged member nations to "take effective measures to deter, prevent, and combat the bribery of foreign public officials in connection with international business transactions." The Council urged member countries to take "concrete and meaningful steps" with regard to their own domestic laws to deter, prevent, and combat international bribery. These fail, the bribery provisions of the FCPA may be completely eliminated from U.S. law.

Implementing the 1997 OECD Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials: Report by the Committee on Fiscal Affairs to the OECD Council at the Ministerial Level, OECD (May 26, 1997) (on file with author) [hereinafter CIME Study]. Earlier, in June 1996, the OECD Ministerial Conference had adopted a declaration of policy proposed by the Committee on International Investment and Multinational Enterprises which had been established the previous year, prohibiting the solicitation and payment of bribes. The declaration also prohibited political contributions, unless such contributions were "legally permissible." Morgan, supra note 32, at 386. The policy further provided that multinational enterprises should "abstain from any improper involvement in local political activities." Id. See also Foreign Payments Disclosure, supra note 14, at 43. Compliance with the declaration of policy was voluntary and no enforcement mechanism was established. See New York City Bar Assoc. Rep., supra note 63, at 40.

See CIME Study, supra note 74.


Id. at 1390. The Ministerial Council recognized that "bribery is a wide spread phenomenon in international business" and that "all countries share a responsibility to combat bribery." Id. The Council also observed that all member countries had laws prohibiting bribery of their own governmental officials, "while only a few member countries have specific laws making the bribery of foreign officials a punishable offense . . . ." Id. Accordingly, the Ministerial Council was "[c]onvinced that further action is needed on both the national and international level to dissuade both enterprises and public officials from resorting to bribery when negotiating international business transactions and that an OECD initiative in this area could act as a catalyst for global action." Id.

Id. at 1391.
steps included revision of the criminal law, revision of civil and administrative law, revision of the tax laws, and the establishment of accounting and record-keeping requirements. The Council also encouraged member countries to cooperate with each other in the investigation and prosecution of foreign bribery, including entering into and utilizing agreements to facilitate the sharing of information and the extradition of persons accused of bribery offenses.

The Council directed CIME to monitor implementation of the recommendation and was invited to form a working group to assist in that effort. The Council also directed CIME to report to the Ministerial Council within three years.

CIME issued its report on May 26, 1997. CIME noted that in May 1996, the OECD Council had recognized the necessity of criminalizing bribery in a coordinated manner and that “[a]n important concern was to ensure that companies face substantially

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80 Id. The recommendation provided as follows:

[E]ach Member country should examine the following areas and, in conformity with its jurisdictional and other basic legal principles, take concrete and meaningful steps to meet this goal. These steps may include: (i) criminal laws, or their application, in respect of the bribery of foreign public officials; (ii) civil, commercial, administrative laws and regulations so that bribery would be illegal; (iii) tax legislation, regulations and practices, insofar as they may indirectly favor bribery; (iv) company and business accounting requirements and practices in order to secure adequate recording of relevant payments; (v) banking, financial and other relevant provisions so that adequate records would be kept and made available for inspection or investigation; and (vi) laws and regulations relating to public subsidies, licenses, government procurement contracts, or other public advantages so that advantages could be denied as a sanctions for bribery in appropriate cases. Id.

81 Id. Member countries were encouraged to “make full use of existing agreements and arrangements for mutual international legal assistance” and, if necessary, to enter into such agreements. Id. Member countries were also encouraged to “ensure that their national laws afford an adequate basis for this co-operation.” Id.

82 Id. at 1392.

83 Id.

84 Review of the 1994 Recommendation on Bribery in International Business Transactions, Including Proposals to Facilitate the Criminalization of Bribery of Foreign Officials, OECD Committee on International Investment and Multinational Enterprises (CIME) to the OECD Council at the Ministerial Level (May 26, 1997) (on file with author).

85 Id. § III.
similar rules and penalties for international bribery, no matter what their own country of origin, and that the network of laws forged by the combined effort will permit effective enforcement and mutual legal assistance."86 Along with the report, CIME submitted a Revised Recommendation on Combating Bribery in International Business Transactions, which was adopted by the OECD Ministerial Council.87

The Revised Recommendation set forth "concrete and meaningful steps" to be taken regarding the revision of criminal laws, tax laws, accounting requirements and practices, banking laws, rules for public contracting, civil laws, administrative regulations, and international cooperation in law enforcement.88 With certain technical amendments, the OECD adopted the Recommendation as a convention on December 18, 1997.89

The OECD Convention can fairly be viewed as a sweeping change in the way the industrialized countries of Europe regarded international bribery.90 For the first time, signatories to the Convention were called upon to criminalize the bribery of foreign public officials and to adopt "effective, proportionate and dissuasive" sanctions for those who engage in international

86 Id. § IIIA.
88 Id. § II, at 1019.
89 Convention, supra note 5, 37 I.L.M. at 1.
Additionally, the OECD Convention established mechanisms for monitoring compliance and for enforcement. To that end, in addition to criminalizing bribery, signatory countries were to adopt accounting and internal controls requirements allowing greater visibility into corporate transactions and dispositions of assets. Member countries were to aggressively assert both territorial jurisdiction and nationality jurisdiction with respect to international bribery. Signatory countries were also to take appropriate action to facilitate the sharing of investigative and prosecutive resources in cases of international bribery.

A. Criminalization of Foreign Bribery

The signatories to the Convention agreed to enact legislation establishing the bribery of a foreign official as a criminal offense. Thus, the Convention provided:

Each party shall take such measures as may be necessary to establish that it is a criminal offense under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.

As explained in the commentaries accompanying the Convention, the prohibition against bribery was intended to apply to the individual or entity offering the bribe (sometimes referred
to as "active bribery") rather than the acceptance of a bribe by a foreign official (sometimes referred to as "passive bribery").

However, the Convention did not require signatories to employ the Convention's terms precisely in implementing legislation. Instead, signatories could adopt their own approach to fulfilling their obligations under the Convention, so long as "conviction of a person for the offense does not require proof of elements beyond those which would be required to be proved if the offense were defined as in the Convention." Thus, the Convention sought "to assure a functional equivalence among the measures taken by the Parties to sanction bribery of foreign public officials, without requiring uniformity or changes in fundamental principles of a Party's legal system."

Additionally, signatories to the Convention were to establish

98 Id. at 8. As the commentaries explain:

This Convention deals with what, in the law of some countries, is called "active corruption" or "active bribery," meaning the offense committed by the person who promises or gives the bribe, as contrasted with "passive bribery," the offense committed by the official who receives the bribe. The Convention does not utilize the term "active bribery" simply to avoid it being misread by the non-technical reader as implying that the briber has taken the initiative and the recipient is the passive victim. In fact, in a number of situations, the recipient will have induced or pressured the briber and will have been, in that sense, the more active.

Id. at 8.

99 Id.

100 Id. The commentaries state in this connection as follows:

Article 1 establishes a standard to be met by Parties, but does not require them to utilize its precise terms in defining the offense under their domestic laws. A party may use various approaches to fulfill its obligations, provided that conviction of a person for the offense does not require proof of elements beyond those which would be required to be proved if the offense were defined as in this paragraph. For example, a statute prohibiting the bribery of agents generally which does not specifically address bribery of a foreign official, and a statute specifically limited to this case, could both comply with this Article. Similarly, a statute which defined the offense in terms of payments "to induce a breach of the official's duty" could meet the standard provided that it was understood that every public official had a duty to exercise judgement or discretion impartially and this was an "autonomous" definition not requiring proof of the law of the particular official's country.

Id. at 8.

101 Id.
complicity in bribery as a criminal offense.\textsuperscript{102} Under the Convention, complicity included “incitement, aiding and abetting, or authorization of an act of bribery of a foreign public official.”\textsuperscript{103} An attempt to bribe or a conspiracy to commit bribery was to be a criminal offense “to the same extent as attempt and conspiracy to bribe a public official” of the signatory nation.\textsuperscript{104} Further, the offer or promise of a bribe proscribed by the Convention would be an offense whether it was made on the offeror’s own behalf or on behalf of a third party.\textsuperscript{105}

Like the U.S. FCPA, the Convention’s prohibitions extend to corrupt payments intended to improperly influence official action.\textsuperscript{106} Thus, corrupt payments “in order to obtain or retain business” are prohibited, as are payments to obtain any “other improper advantage,”\textsuperscript{107} which “refers to something to which the company concerned was not clearly entitled.”\textsuperscript{108} It is not a defense that the company paying or offering the bribe was the best

\textsuperscript{102} Id. at 4.

\textsuperscript{103} Id. If incitement, aiding and abetting, or authorization are not discrete crimes under the signatory’s law, however, the Convention does not require their criminalization where no prohibited bribery results. Id. at 9. The commentaries explain:

The offen[s]es set out in paragraph 2 are understood in terms of their normal content in national legal systems. Accordingly, if authorization, incitement, or one of the other listed acts, which does not lead to further action, is not itself punishable under a Party’s legal system, then the Party would not be required to make it punishable with respect to bribery of a foreign public official.

\textsuperscript{104} Id. at 4.

\textsuperscript{105} Id. at 9. The Convention commentaries state that: “[t]he conduct described in paragraph 1 [establishing the offense of bribery of a public official] is an offen[s]e whether the offer or promise is made or the pecuniary or other advantage is given on that person’s behalf or on behalf of any other natural person or legal entity.” Id.

\textsuperscript{106} Id. at 4. Influencing a foreign public official to act or to refrain from acting in relation to the performance of a public function includes “any use of the public official’s position, whether or not within the official’s authorized competence.” Id. The commentaries noted that an act of bribery under this provision would be one “[w]here an executive of a company gives a bribe to a senior official of a government, in order that this official use his office—though acting outside his competence—to make another official award a contract to that company.” Id. at 9.

\textsuperscript{107} Id. at 4.

\textsuperscript{108} Id. at 8. The commentaries cite as an example of an “improper advantage,” an operating permit for a factory which fails to meet the statutory requirements.” Id.
qualified or otherwise could have been awarded the business.  

The definition of the term “foreign public official” was more comprehensive in the Convention than in the FCPA. Like the FCPA, the definition of “foreign public official” included “any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected” as well as “any person exercising a public function for a foreign country, including for a public agency or public enterprise.” However, the

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109 Id. It is similarly not a defense that the advantage sought was de minimis, or that the bribe was unsuccessful, or that the payment was in keeping with local custom, or that the payment was deemed to be necessary. As stated in the commentaries, “[i]t is . . . an offen[s]e irrespective of, inter alia, the value of the advantage, its results, perceptions of local custom, the tolerance of such payments by local authorities, or the alleged necessity of the payment in order to obtain or retain business or other improper advantage.” Id. at 9.

110 The Convention uses the term “foreign country” to include “all levels and subdivisions of government, from national to local.” Id. at 4. Additionally, as the commentaries note, a foreign country “is not limited to states, but includes any organi[z]ed foreign area or entity, such as an autonomous territory or separate customs territory.” Id. at 9.

111 Id. at 4. The commentaries define “public function” as including “any activity in the public interest, delegated by a foreign country, such as the performance of a task delegated by it in connection with public procurement.” Id. at 9. A “public agency” is one “constituted under public law to carry out specific tasks in the public interest.” Id. A “public enterprise” is defined as:

[A]ny enterprise, regardless of its legal form, over which a government, or governments, may, directly or indirectly, exercise a dominant influence. This is deemed to be the case, inter alia, when the government or governments hold the majority of the enterprise’s subscribed capital, control the majority of votes attaching to shares issued by the enterprise or can appoint a majority of the members of the enterprise’s administrative or managerial body or supervisory board.

Id. An official of such a public enterprise is deemed to perform a public function and is to be considered a foreign public official “unless the enterprise operates on a normal commercial basis in the relevant market, i.e., on a basis which is substantially equivalent to that of a private enterprise, without preferential subsidies or other privileges.” Id.

Further, however, the commentaries note that a public function could be performed by persons not denominated as officials but who nevertheless would be considered public officials under the Convention by virtue of their performance of a public function. Thus, the commentaries provide as follows:

In special circumstances, public authority may in fact be held by persons (e.g., political party officials in single party states) not formally designated as public officials. Such persons, through their de facto performance of a public function, may, under the legal principles of some countries, be considered to be foreign public officials.
Convention also included within the definition of "foreign public official," officials or agents of "a public international organization."112

Also, like the FCPA, the Convention recognized certain transactions as being outside the purview of the bribery prohibition.113 For example, obtaining an "advantage" that was permitted or required under the written laws or regulations of the country in which the payment was made and the advantage obtained would not constitute a violation of the anti-bribery provisions.114 Similarly, modest "facilitation payments" would not constitute prohibited payments.115

Finally, the Convention called upon signatories to treat the bribery of foreign officials as a predicate offense under their money laundering legislation, in the same way that bribery of a domestic government official was treated as a predicate offense.116

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112 Id. at 4. A "public international organization" was defined as including "any international organization formed by states, governments, or other public international organizations, whatever the form of organization and scope of competence, including, for example, a regional economic integration organization such as the European Communities." Id. at 9.

113 Id. at 9.

114 The commentaries state that "[i]t is not an offense, however, if the advantage was permitted or required by the written law or regulation of the foreign public officials' country, including case law." Id. at 9.

115 With regard to such "facilitation" payments, the commentaries explained:

Small "facilitation" payments do not constitute payments made "to obtain or retain business or other improper advantage" within the meaning of paragraph 1 and, accordingly, are also not an offense. Such payments, which, in some countries, are made to induce public officials to perform their functions, such as issuing licenses or permits, are generally illegal in the foreign country concerned. Other countries can and should address this corrosive phenomenon by such means as support for programmes of good governance. However, criminalisation by other countries does not seem a practical or effective complementary action.

Id. at 8.

116 Id. art. 7, at 5. The Convention states in regard to the applicability of money-laundering legislation that "each party which has made bribery of its own public official a predicate offense for the purpose of the application of its money laundering legislation shall do so on the same terms for the bribery of a foreign public official, without regard to the place where the bribery occurred." Id. In this regard, the commentaries emphasize as follows:
B. Accounting and Internal Controls Requirements

The OECD Convention also established requirements for the implementation by corporations of accounting and internal financial controls. In substance, those requirements were equivalent to the accounting and financial controls provisions of the FCPA.

Like the FCPA, the Convention's requirements were aimed at preventing corporations from establishing off-the-books sources of funds with which to bribe foreign public officials. Thus, the Convention provided that:

[I]n order to combat bribery of foreign public officials effectively, each party shall take such measures as may be necessary, within the framework of its laws and regulations regarding the maintenance of books and records, financial statement disclosures, and accounting and auditing standards, to prohibit the establishment of off-the-books accounts, the making of off-the-books or inadequately identified transactions, the recording of non-existent expenditures, the entry of liabilities with incorrect identification of their object, as well as the use of false documents, by companies subject to those laws and regulations, for the purpose of bribing foreign public officials or of hiding such bribery.

The Convention's accounting and internal controls requirement grew out of the earlier OECD Recommendation concerning bribery of foreign officials which contained specific provisions regarding accounting and auditing requirements.

[reference to bribery of the signatories' own public officials was] intended broadly, so that bribery of a foreign public official is to be made a predicate offense for money laundering legislation on the same terms, when a party has made either active or passive bribery of its own public official such an offense. When a party has made only passive bribery of its own public officials a predicate offense for money laundering purposes, this article requires that the laundering of the bribe payment be subject to money laundering legislation.

\[\text{Id at 10.}\]

\[117 \text{ Id. art. 8, at 5.}\]

\[118 \text{ Id.}\]

\[119 \text{ Id.}\]

\[120 \text{ As the commentaries note:}\]

Article 8 is related to section V of the 1997 OECD Recommendation, which all Parties will have accepted and which is subject to follow-up in the OECD
Commentators noted that an immediate effect of the Convention's implementation would be that corporate financial disclosures would have to take account of liabilities created by the Convention and the consequences to the corporation resulting from criminal conviction. The commentaries also noted that there were "implications for the execution of professional responsibilities of auditors regarding indications of bribery of foreign public officials."\textsuperscript{122}

The 1997 OECD Recommendation established accounting and auditing principles to which member countries were urged to conform their laws.\textsuperscript{123} It recommended that member countries prohibit off-book transactions and require companies to keep accurate records of receipts and expenditures, and disclose in financial statements "the full range of material contingent liabilities."\textsuperscript{124}

The 1997 Recommendation also proffered proposals for implementation of the Convention. This paragraph contains a series of recommendations concerning accounting requirements, independent external audit and internal company controls the implementation of which will be important to the overall effectiveness of the fight against bribery in international business.

\textit{Id.} at 10.

\textsuperscript{121} The commentaries note in this regard as follows:

\textit{[O]ne immediate consequence of the implementation of this Convention by the Parties will be that companies which are required to issue financial statements disclosing their material contingent liabilities will need to take into account the full potential liabilities under this Convention, in particular its Articles 3 and 8 [establishing sanctions], as well as other losses which might flow from conviction of the company or its agents for bribery.}

\textit{Id.}

\textsuperscript{122} \textit{Id.}

\textsuperscript{123} \textit{Combating Bribery, supra} note 87, 36 I.L.M. at 1016, 1020-21.

\textsuperscript{124} The 1997 Recommendation provides in this regard that:

(i) Member countries should require companies to maintain adequate records of the sums of money received and expended by the company, identifying the matters in respect of which the receipt and expenditure takes place. Companies should be prohibited from making off-the-books transactions or keeping off-the-books accounts. (ii) Member countries should require companies to disclose in their financial statements the full range of material contingent liabilities. (iii) Member countries should adequately sanction accounting omissions, falsifications and fraud.

\textit{Id.} at 1020.
concerning independent audits.\textsuperscript{125} One proposal recommended that member countries review their own laws concerning independent audits and, in conjunction with professional associations, establish standards for the independence of external auditors.\textsuperscript{126} Requirements for the disclosure of possible bribery to company management were to be adopted, and member countries were encouraged to consider requiring auditors to report possible acts of bribery to government authorities.\textsuperscript{127}

The Recommendation also set forth proposals concerning the implementation of internal controls.\textsuperscript{128} Member countries were to encourage companies to adopt and implement internal controls which included: standards of conduct for employees; management statements concerning internal controls in annual reports; creation of independent committees of the board of directors, such as an audit committee to monitor the efficacy of internal controls; and the establishment of mechanisms for internal reporting of misconduct without fear of retaliation.\textsuperscript{129}

\textsuperscript{125} Id.

\textsuperscript{126} Id.

\textsuperscript{127} The 1997 Recommendation provide as follows:

(i) Member countries should consider whether requirements to submit to external audit are adequate. (ii) Member countries and professional associations should maintain adequate standards to ensure the independence of external auditors which permits them to provide an objective assessment of company accounts, financial statements and internal controls. (iii) Member countries should require the auditor who discovers indications of a possible illegal act of bribery to report this discovery to management and, as appropriate, to corporate monitoring bodies. (iv) Member countries should consider requiring the auditor to report indications of a possible illegal act of bribery to competent authorities.

\textsuperscript{128} Id.

\textsuperscript{129} With respect to internal company controls, the Recommendation states that:

(i) Member countries should encourage the development and adoption of adequate internal company controls, including standards of conduct. (ii) Member countries should encourage company management to make statements in their annual reports about their internal control mechanisms, including those which contribute to preventing bribery. (iii) Member countries should encourage the creation of monitoring bodies, independent of management, such as audit committees of boards of directors or of supervisory boards. (iv) Member countries should encourage companies to provide channels for communication by, and protection for, persons not willing to violate professional standards or ethics under instructions or pressure from hierarchical
C. Sanctions

The Convention provides that signatories are to establish sanctions for the bribery of foreign public officials. Sanctions are also to be imposed for "omissions and falsifications" in corporate books and records in violation of the accounting and controls provisions.

With respect to the bribery of foreign public officials, the Convention requires signatories to adopt "effective, proportionate and dissuasive criminal penalties." Such penalties are to be comparable to the penalties imposed by the signatory for bribery of domestic public officials.

In cases of bribery by natural persons, the penalty was to include deprivation of liberty. Countries in which legal persons were not subject to criminal liability were to impose "effective,

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130 Convention, supra note 5, 37 I.L.M. at 5.
131 Id.
132 In this regard, the Convention reiterates the view that the committee expressed in the Recommendation:

The offense of bribery of foreign public officials should be sanctioned/punishable by effective, proportionate and dissuasive criminal penalties, sufficient to secure effective mutual legal assistance and extradition, comparable to those applicable to the bribers in cases of corruption of domestic public officials.

Monetary or other civil, administrative or criminal penalties on any legal person involved, should be provided, taking into account the amounts of the bribe and of the profits derived from the transaction obtained through the bribe.

Forfeiture or confiscation of instrumentalities and of the bribe benefits and the profits derived from the transactions obtained through the bribe should be provided, or comparable fines or damages imposed.

Combating Bribery, supra note 87, 36 I.L.M. at 1024.

133 Convention, supra note 5, 37 I.L.M. at 5.
134 With regard to the sanctions to be imposed in cases of bribery of foreign public officials, the Convention provides as follows:

The bribery of a foreign public official shall be punishable by effective, proportionate and dissuasive criminal penalties. The range of penalties shall be comparable to that applicable to the bribery of the Party's own public officials and shall, in the case of natural persons, include deprivation of liberty sufficient to enable effective mutual legal assistance and extradition.

Id. art. 3, at 5.
proportionate and dissuasive non-criminal sanctions, including monetary sanctions."\textsuperscript{135} In any event, signatories were to ensure that the bribe and the proceeds of the bribery,\textsuperscript{136} or "property the value of which corresponds to that of such proceeds," would be subject to seizure and confiscation\textsuperscript{137} or that comparable monetary sanctions were applicable.\textsuperscript{138}

With respect to the falsification of corporate books and records, signatories were also to establish effective, proportionate and dissuasive penalties.\textsuperscript{139} The Convention contemplated that signatories would fashion appropriate civil and administrative sanctions for violations.\textsuperscript{140} These sanctions could include suspension and debarment from participation in public programs or public procurements, disqualification from engaging in regulated activates and judicial dissolution.\textsuperscript{141}

\textsuperscript{135} Id. The Convention states that "in the event that, under the legal system of a Party, criminal responsibility is not applicable to legal persons, that Party shall ensure that legal persons shall be subject to effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions, for bribery of foreign public officials." \textit{Id.}

\textsuperscript{136} Id. As the commentaries explain, the "proceeds" of the bribery of a foreign public official are considered to be "the profits or other benefits derived by the briber from the transaction or other improper advantage obtained or retained through the bribery." \textit{Id.} at 9.

\textsuperscript{137} Id. As the commentaries note, "confiscation" included forfeiture and meant "the permanent deprivation of property by order of a court or other competent authority." The commentaries also state that the confiscation of proceeds that the Convention calls for is not to prejudice any rights of recovery by victims of the bribery. \textit{Id.}

\textsuperscript{138} Id. Thus, the Convention provides as follows:

Each Party shall take such measures as may be necessary to provide that the bribe and the proceeds of the bribery of a foreign public official, or property the value of which corresponds to that of such proceeds, are subject to seizure and confiscation or that monetary sanctions of comparable effect are applicable. \textit{Id.} at 5.

\textsuperscript{139} Id. With regard to the penalties for violating the accounting requirements, the Convention provides that "each party shall provide effective, proportionate and dissuasive civil, administrative or criminal penalties for such omissions and falsifications in respect of books, records, accounts and financial statements of such companies." \textit{Id.}

\textsuperscript{140} Id. With respect to the sanctions for bribery of foreign public officials, in addition to the criminal and civil penalties described above, the Convention provides that "each Party shall consider the imposition of additional civil or administrative sanctions upon a person subject to sanctions for the bribery of a foreign public official." \textit{Id.}

\textsuperscript{141} Id. As the commentaries explain:

Among the civil or administrative sanctions, other than non-criminal fines,
D. Jurisdiction Over Offenses

Of the generally recognized theories of extraterritorial jurisdiction over criminal offenses under international law,\(^{142}\) the predominant bases for the assertion of a state's prescriptive jurisdiction are jurisdiction based on territoriality and jurisdiction based on nationality.\(^{143}\) The OECD Convention called upon signatories to assert both territorial and national forms of jurisdiction.\(^{144}\)

Territorial jurisdiction over crime is predicated upon the place where the offense is committed.\(^{145}\) Territoriality has been said to be the most common basis of extraterritorial jurisdiction,\(^{146}\) and is

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which might be imposed upon legal persons for an act of bribery of a foreign public official are: exclusion from entitlement to public benefits or aid; temporary or permanent disqualification from participation in public procurement or from the practice of other commercial activities; placing under judicial supervision; and a judicial winding-up order.

*Id.* at 9. The OECD previously recommended that member nations adopt laws and regulations to exclude individuals and entities involved in domestic or foreign bribery from participating in public procurements. Thus, in the 1997 Recommendation the OECD stated as follows:

Member countries' laws and regulations should permit authorities to suspend from competition for public contracts enterprises determined to have bribed foreign public officials in contravention of the Member's national laws and, to the extent a Member applies procurement sanctions to enterprises that are determined to have bribed domestic public officials, such sanctions should be applied equally in case[s] of bribery of foreign public officials.

*Combating Bribery, supra* note 87, 36 I.L.M. at 1021. In the 1997 Recommendation, the OECD also called for anti-corruption requirements in aid-funded procurements. “Member countries should require anti-corruption provisions in bilateral aid-funded procurements, promote the proper implementation of anti-corruption provisions in international development institutions and work closely with development partners to combat corruption in all development co-operation efforts.” *Id.*

\(^{142}\) The seminal study *Harvard Research in International Law, Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. 435, 445 (Supp. 1935) [hereinafter *Harvard Research*], identified these theories of jurisdiction; see also *infra* note 219 and accompanying text.

\(^{143}\) *Id.*

\(^{144}\) *Convention, supra* note 5, art. 4, 37 I.L.M. 5.

\(^{145}\) Thus, for example, Section 402 of the *Restatement (Third) of Foreign Relations Law of the United States* (1987) [hereinafter *Restatement*] provides that “a state has jurisdiction to prescribe law with respect to . . . conduct that, wholly or in substantial part, takes place within its territory . . . .” *Id.* § 402(1)(a).

\(^{146}\) For example, it was observed in the comments to Section 402 of the *Restatement*

The OECD Convention directed each signatory to “take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offense is committed in whole or in part in its territory.”\footnote{Convention, supra note 4, 37 I.L.M. at 5.} The Convention contemplated that the assertion of territorial jurisdiction would be “interpreted broadly so that an extensive physical connection to the bribery act is not required.”\footnote{Id. at 10; see also, Combating Bribery, supra note 87, 36 I.L.M. at 1023.}

The OECD Convention also directed signatories to assert nationality-based jurisdiction over persons engaging in the bribery of foreign public officials.\footnote{The OECD Convention provides in this regard that “[e]ach party which has jurisdiction to prosecute its nationals for offenses committed abroad shall take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official, according to the same principles.” Convention, supra note 5, art. 4, 37 I.L.M. at 4.} Such jurisdiction is predicated on the domicile, the residence, and the nationality or national character, of the person committing the offense.\footnote{Section 402 of the Restatement provides that a state’s prescriptive jurisdiction extends to “the activities, interests, status, or relations of its nationals outside as well as within its territory . . . .” RESTATEMENT, supra note 145, § 402(2). The comments to Section 402 note, however, that “[i]nternational law has increasingly recognized the right of a state to exercise jurisdiction on the basis of domicile or residence, rather than nationality, especially in regard to ‘private law’ matters . . . .” Id. cmt. e.} Nationality-based jurisdiction is considered a jurisdictional basis that is “discrete and independent” from territorial jurisdiction, and although territorial jurisdiction has been said to be the “normal” basis of jurisdiction and nationality has been said to be the “exceptional” basis, the
same conduct can provide grounds for the assertion of jurisdiction by both the territorial state and by the state of nationality. In those instances in which two signatories have prosecutorial jurisdiction over the same act of bribery, the Convention counseled the two parties to consult, "with a view to determining the most appropriate jurisdiction for prosecution."

E. Mutual Legal Assistance and Extradition

The OECD Convention also provided for the facilitation of mutual legal assistance in the investigation and prosecution of international bribery cases, including the extradition of persons to face foreign prosecution.

The OECD had emphasized in the 1997 Recommendation the need for international cooperation among signatories in investigating and prosecuting persons involved in foreign bribery. The commentaries to the OECD Convention noted that

152 As the comments to the Restatement § 402 explain:
Territoriality and nationality are discrete and independent bases of jurisdiction; the same conduct or activity may provide a basis for exercise of jurisdiction both by the territorial state and by the state of nationality of the actor. Territoriality is considered the normal, and nationality an exceptional, basis for the exercise of jurisdiction.

RESTATEMENT, supra note 145, § 402 cmt. b. Thus, the commentaries to the OECD Convention state with respect to nationality-based jurisdiction as follows:

Nationality jurisdiction is to be established according to the general principles and conditions in the legal system of each Party. These principles deal with such matters as dual criminality. However, the requirement of dual criminality should be deemed to be met if the act is unlawful where it occurred, even if under a different criminal statute.

Convention, supra note 5, 37 I.L.M. at 10.

153 Id. at 5.

154 Id. art 6, at 9.

155 In the 1997 Recommendation, the OECD stated that "effective mutual legal assistance is critical to be able to investigate and obtain evidence in order to prosecute cases of bribery of foreign public officials." Combating Bribery, supra note 87, 36 I.L.M. at 1024. In the 1997 Recommendation, the OECD further stated that "[c]ountries should tailor their laws on mutual legal assistance to permit co-operation with countries investigating cases of bribery of foreign public officials even including third countries (country of the offeror; country where the act occurred) and countries applying different types of criminalization legislation to reach such cases." Id. Therefore, the OECD directed that "[m]eans should be explored and undertaken to improve the efficiency of mutual legal assistance." Id. Accordingly, the OECD recommended that member
having accepted the 1997 Recommendation, signatories had agreed "to explore and undertake means to improve the efficiency of mutual legal assistance." 156

Accordingly, the Convention directed each signatory, "to the fullest extent possible under its laws, relevant treaties and arrangements," to "provide[] prompt and effective legal assistance to another Party concerning offenses within the scope of this Convention...." 157 To that end, the Convention also included specific actions to remove obstacles to mutual assistance. 158

countries take the following actions:

(i) Consult and otherwise cooperate with appropriate authorities in other countries in investigations and other legal proceedings concerning specific cases of such bribery through such means as sharing of information (spontaneously or upon request), provision of evidence and extradition; (ii) Make full use of existing agreements and arrangements for mutual international legal assistance and where necessary, enter into new agreements or arrangements for this purpose; (iii) Ensure that their national laws afford an adequate basis for this cooperation.

Combating Bribery, supra note 87, 36 I.L.M. at 1021.

156 Convention, supra note 5, 37 I.L.M. at 10. As the commentaries note, signatories were encouraged to facilitate voluntary access to witnesses, even those in custody:

Parties should, upon request, facilitate or encourage the presence or availability of persons, including persons in custody, who consent to assist in investigations or participate in proceedings. Parties should take measures to be able, in appropriate cases, to transfer temporarily such a person in custody to a Party requesting it and to credit time in custody in the requesting party to the transferred person's sentence in the requested party. The Parties wishing to use this mechanism should also take measures to be able, as a requesting Party, to keep a transferred person in custody and return this person without necessity of extradition proceedings.

Id. 157

The Convention provides in this regard that:

Each Party shall, to the fullest extent possible under its laws and relevant treaties and arrangements, provide prompt and effective legal assistance to another Party for the purpose of criminal investigations and proceedings brought by a Party concerning offenses within the scope of this Convention and for non-criminal proceedings within the scope of this Convention brought by a party against a legal person. The requested party shall inform the requesting Party, without delay, of any additional information or documents needed to support the request for assistance, and where requested, of the status and outcome of the request for assistance.

Id. at 6.

158 Id.
First, in instances when a signatory conditioned mutual assistance on the existence of dual criminality, the Convention directed that dual criminality would be deemed to exist for offenses within the scope of the Convention. Second, the Convention dictated that signatories would not be denied mutual assistance on grounds of bank secrecy in criminal offenses if such offenses were within the scope of the Convention.

Additionally, the Convention established bribery of foreign public officials as an extraditable offense. In instances when there was no extradition treaty between signatories, the Convention was designated as the legal basis for extradition. Similarly, as in the case of mutual legal assistance, the Convention stipulated that the requirement of dual criminality as a condition of extradition was fulfilled for offenses within its scope of the Convention. Finally, the Convention obliged signatories that declined extradition of their nationals to submit those individuals to prosecution by their own authorities.

The 1997 Recommendation notes that “[a]doption of laws criminalising the bribery of foreign public officials would remove obstacles to mutual legal assistance created by dual criminality requirements.” Combating Bribery, supra note 87, 36 I.L.M. at 1024. Consistent with this, the OECD Convention states that “[w]here a Party makes mutual legal assistance conditional upon the existence of dual criminality, dual criminality shall be deemed to exist if the offense for which the assistance is sought is within the scope of this Convention.” Convention, supra note 5, 37 I.L.M. at 6.

The Convention states that “[a] Party shall not decline to render mutual legal assistance for criminal matters within the scope of this Convention on the ground of bank secrecy.” Id. at 6

The Convention provides that “[b]ribery of a foreign public official shall be deemed to be included as an extraditable offense under the laws of the Parties and the extradition treaties between them.” Id. at 10, at 6.

The Convention states that “[i]f a Party which makes extradition conditional on the existence of an extradition from another Party with which it has no extradition treaty, it may consider this Convention to be the legal basis for extradition in respect of the offense of bribery of a foreign public official.” Id.

Thus, under the Convention:

Extradition for bribery of a foreign public official is subject to the conditions set out in the domestic law and applicable treaties and arrangements of each Party. Where a Party makes extradition conditional upon the existence of dual criminality, that condition shall be deemed to be fulfilled if the offense for which extradition is sought is within the scope of Article 1 of this Convention.

Id.

The 1997 Recommendation provides that a member state which did not assert
III. The 1998 Amendments to the Foreign Corrupt Practices Act

The U.S. State Department hailed the OECD Convention as "a bold and historic step in the fight against international commercial bribery." At the signing ceremony in Paris on December 17, 1997, Secretary of State Madeleine Albright described the Convention as "a victory for good government, fair competition jurisdiction to prosecute based on nationality "should be prepared to extradite their nationals in respect of the bribery of foreign public officials." Combating Bribery, supra note 87, 36 I.L.M. at 1023. The Convention takes a somewhat different tack and provided that states which declined to extradite their own nationals should undertake their prosecutions themselves:

Each Party shall take any measures necessary to assure either that it can extradite its nationals or that it can prosecute its nationals for the offense of bribery of a foreign public official. A Party which declines a request to extradite a person for bribery of a foreign official solely on the ground that the person is its national shall submit the case to its competent authorities for the purpose of prosecution.

Id.; Convention, supra note 5, 37 I.L.M. at 6.

In both the Convention and the 1997 Recommendation, the OECD recognized and underscored the criticality of the exercise of independent prosecutorial judgement unaffected by national economic interest or political considerations or the identity of the persons or entities involved. As the OECD stated in the 1997 Recommendation, "[i]n view of the seriousness of the offense of bribery of foreign public officials, public prosecutors should exercise their discretion independently, based on professional motives. They should not be influenced by considerations of national economic interest, fostering good political relations or the identity of the victim." Combating Bribery, supra note 87, 36 I.L.M. at 1024. Thus, the Convention provides that:

Investigation and prosecution of the bribery of a foreign public official shall be subject to the applicable rules and principles of each Party. They shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the national or legal persons involved.

Convention, supra note 5, art 5, 37 I.L.M. at 5. As the commentaries further explains:

Article 5 recognizes the fundamental nature of national regimes of prosecutorial discretion. It recognizes as well that, in order to protect the independence of prosecution, such discretion is to be exercised on the basis of professional motives and is not to be subject to improper influence by concerns of a political nature.

Id.

and open trade.\textsuperscript{166}

On May 1, 1998, President Clinton transmitted the Convention to the Senate with a view toward receiving its advice and consent.\textsuperscript{167} The Senate unanimously approved the Convention on July 31, 1998.\textsuperscript{168}

\textbf{A. The Legislative History of the 1998 Amendments}

As a prerequisite to the deposit of instruments of ratification, the OECD Convention required signatory countries to adopt legislation implementing the central provisions of the Convention.\textsuperscript{169} To that end, on May 4, 1998, the Clinton Administration sent to the Congress its legislative proposals for implementation of the Convention.\textsuperscript{170} In its transmission, the Clinton Administration noted that there had long been a bipartisan effort to achieve a multinational prohibition against international bribery, which had culminated in the signing of the OECD Convention.\textsuperscript{171} The State Department echoed these sentiments and


\textsuperscript{167} Press Release, White House, Statement of the President of the United States (Nov. 10, 1998) (on file with the author).


\textsuperscript{169} Under the terms of the Convention, instruments of acceptance, approval, and ratification were to be filed by signatories on or before December 31, 1998. Within that time, the signatories were to have enacted legislation implementing the Convention and conforming the signatories’ domestic criminal law to the provisions of the Convention. See Convention, \textit{supra} note 5, art. 15, 37 I.L.M. at 7.


\textsuperscript{171} The administration’s transmittal letter states:

Administrations of both parties have long urged our trading partners to criminalize bribery of foreign public officials by their nationals, as the United States did in 1977 in the Foreign Corrupt Practices Act of 1977 (the “FCPA”). These bipartisan efforts finally succeeded when thirty-three countries signed the OECD Convention in Paris in December of last year. The OECD Convention, when fully implemented by both parties, will help create the level playing field
urged rapid implementation of the Convention by the Congress.¹⁷²

Both the Senate and the House held hearings concerning the
proposed legislation. Testifying before the Senate Foreign
Relations Committee on June 9, 1998, Stuart E. Eizenstat,
Undersecretary of State for Economic, Business and Agricultural
Affairs, and Fritz F. Heimann, Chairman of Transparency
International USA, stressed the adverse affect of international
bribery on the ability of U.S. companies to compete in world
business.¹⁷³ Before a subcommittee of the House Commerce

and transparent contracting long sought by American businesses as they
compete around the world for public contracts.

Harkins, supra note 170.

¹⁷² Calling the Convention “an historic agreement,” the U.S. Department of State
urged Congress to enact the implementing legislation “as soon as possible”:

This Convention strikes a major blow against bribery and corruption, will
bolster economic development and foster democracy, and will help level the
playing field for U.S. companies. U.S. firms have lost billions of dollars in
overseas business deals in which bribes played the decisive role in the awarding
of contracts.

The OECD Convention is the product of strong American leadership and
reflects a broad, bipartisan consensus on the need for effective international
action on foreign corrupt practices. Twenty years ago, a bipartisan effort in
Congress led to the adoption of the Foreign Corrupt Practices Act, which
prohibits U.S. companies from bribing foreign officials. The Congress called in
the 1988 Trade Act for the U.S. government to launch an anti-bribery effort in
the OECD. The OECD Convention owes its conception to these actions . . .

The Secretary urges the Senate to approve the Convention and both Houses
of Congress to pass implementing legislation as soon as possible. Continued
U.S. leadership will spur other governments to act. Rapid implementation of the
Convention will directly benefit our international interests and U.S. firms and
their employees.

Press Statement, James B. Foley, Deputy Spokesman, U.S. Department of State, OECD

¹⁷³ In his testimony, Undersecretary Eizenstat stated:

Let me say, Mr. Chairman, this Convention is very much in our national
interest. Bribery damages economic development and hinders the growth of
democracy. It hurts U.S. exporters and suppliers—in every state and district in
the U.S.—and impedes international trade. The U.S. government is aware of
allegations of bribery by foreign firms in the last year affecting international
contracts worth $30 billion, which is not currently prohibited by criminal laws
in their home jurisdictions.

Testimony before the Senate Foreign Relations Committee by Stuart E. Eizenstat Under
Secretary of State for Economic, Business and Agricultural Affairs on the OECD
Committee, both Paul V. Gerlach, Associate Director of the SEC Division of Enforcement,\textsuperscript{174} and Andrew J. Pincus, General Counsel of the Department of Commerce,\textsuperscript{175} similarly emphasized the need to "level the playing field" for U.S. companies competing in the increasingly globalized economy.\textsuperscript{176}

\textit{Convention on the Bribery of Foreign Public Officials in International Transactions}, (June 9, 1998), 1998 WL 304007 (F.D.C.H.). Mr. Heimann also observed as follows:

The U.S. Department of Commerce estimates that 139 international commercial contracts valued at $64 billion may have involved bribery by foreign firms and that U.S. firms lost 36 of those contracts valued at $11 billion . . . . In many countries, including Germany and France, bribes continued to be treated as tax deductible business expenses. Foreign governments not merely condoned, but effectively subsidized foreign bribes. Notwithstanding the failure of other countries to act, the U.S. Congress refused to repeal or water down the FCPA and insisted on retaining the high moral ground. In the past five years the tide has finally begun to turn. There is now widespread recognition that international bribery should no longer be tolerated.


\textsuperscript{174} Associate Director Gerlach testified in this regard as follows:

The increasing globalization of the world's economy, along with the establishment of capital markets in new environments, have contributed to U.S. companies having increased business dealings and interests abroad. As this trend continues, the risk of U.S. companies operating in situations where bribery of foreign officials is a normal part of doing business increases. Accordingly, it is important to enact, and to encourage other countries to enact, legislation that will provide a more level playing field for U.S. companies in the international marketplace.


\textsuperscript{175} Testimony of Andrew J. Pincus, General Counsel of the Department of Commerce, before the Subcommittee on Finance and Hazardous Materials of the House Commerce Committee (Sept. 10, 1998), 1998 WL 778823 (F.D.C.H.):

The prevalence of bribery in international transactions has been costly for the United States, for the countries whose officials demand or accept bribes, and also for countries whose companies pay bribes. Bribery hurts U.S. exporters and suppliers in every state and district in our country. In economies in transition, it hinders economic growth and the development of democracy.

\textsuperscript{176} See Gerlach, \textit{supra} note 174; Pincus, \textit{supra} note 175.
On July 30, 1998, the Senate Committee on Banking, Housing, and Urban Affairs issued its report on the International Anti-Bribery Act of 1998. In its report, the Committee observed that:

Since the passage of FCPA, American businesses have operated at a disadvantage relative to foreign competitors who have continued to pay bribes without fear of penalty. Such bribery is estimated to affect overseas procurements valued in the billions of dollars each year. Indeed, some of our trading partners have explicitly encouraged such bribes by permitting businesses to claim them as tax-deductible business expenses. It is impossible to calculate with certainty the losses suffered by U.S. businesses due to bribery by our foreign competitors. The Commerce Department has stated that it has learned of significant allegations of bribery by foreign firms in approximately 180 international commercial contracts since mid-1994, contracts that were valued at nearly $80 billion. This legislation, coupled with implementation of the OECD Convention by our major trading partners, will go a long way towards leveling the playing field for U.S. businesses in international contracts.

The October 8, 1998 report of the House Commerce Committee was to the same effect.

On October 20, 1998, the House unanimously adopted the International Anti-Bribery and Fair Competition Act. The Senate also unanimously passed the legislation on October 21, 1998. The President signed the Act on November 10, 1998. Following

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182 In his statement at the time of signing the Act, the President noted that:
The United States has led the effort to curb international bribery. We have long believed bribery is inconsistent with democratic values, such as good governance and the rule of law. It is also contrary to basic principles of fair competition and harmful to efforts to promote economic development. Since the enactment in 1977 of the Foreign Corrupt Practices Act (FCPA), U.S. businesses have faced criminal penalties, if they engaged in business-related
the deposit of instruments of ratification by Iceland, Japan, Germany, the United States, Finland, the United Kingdom, and Canada, the OECD Convention entered into force on February 15, 1999.\footnote{OECD Convention on Combating Bribery to Enter into Force on 15 February 1999, OECD, at http://www.oecd.org/media/release/nw98-124a.htm (Dec. 17, 1998). Dates on which the countries deposited instruments of ratification are as follows: (1) Iceland—August 17, 1998; (2) Japan—October 15, 1998; Germany—November 10, 1998; (3) the United States—December 8, 1998; (4) Finland—December 10, 1998; (5) the United Kingdom—December 14, 1998; and 6) Canada—December 17, 1998. Id.}

The 1998 amendments extended the reach of the FCPA both substantively and jurisdictionally. Substantively, the 1998 amendments enlarged the proscribed purposes for corrupt payments to include payments made in order to obtain an "improper advantage" in obtaining or retaining business.\footnote{See infra notes 190-94 and accompanying text.} The amendments also enlarged the definition of persons considered to be "foreign officials" to include persons employed by international organizations.\footnote{See infra notes 195-98 and accompanying text.} Jurisdictionally, the amendments extended the assertion of nationality-based jurisdiction to reach acts committed by U.S. nationals outside the United States.\footnote{See infra notes 208-10 and accompanying text.} The amendments also extended U.S. territorial jurisdiction to reach violations of the FCPA by foreign nationals, both individuals and entities, solely predicated on an act in furtherance of the violation having been bribery of foreign public officials. Foreign competitors, however, did not have similar restrictions and could engage in this corrupt activity without fear of penalty. Moreover, some of our major trading partners have subsidized such activity by permitting tax deductions for bribes paid to foreign public officials. As a result, U.S. companies have had to compete on an uneven playing field, resulting in losses of international contracts estimated at $30 billion per year.

The OECD Convention—which represents the culmination of many years of sustained diplomatic effort—is designed to change all that. Under the Convention, our major competitors will be obligated to criminalize the bribery of foreign public officials in intentional business transactions. The existing signatories already account for a large percentage of international contracting, but they also plan an active outreach program to encourage other nations to become parties to this important instrument. The United States intends to work diligently, through the monitoring process established under the OECD, to ensure that the Convention is widely ratified and fully implemented. We will continue our leadership in the international fight against corruption.
committed within the territorial United States.\footnote{See infra notes 200-07 and accompanying text.}

**B. Substantive Amendments to the FCPA**

In accordance with the provisions of the OECD Convention, Congress amended the FCPA to include the prohibition against corrupt payments for the purpose of obtaining an “improper advantage” in obtaining and retaining business.\footnote{§ 78dd-1(a)(1)(A)(iii).} Also in accordance with the Convention, the amendments include employees of international organizations within the definition of “foreign official.”\footnote{§ 78dd-1.}

1. Obtaining An Improper Advantage

The 1998 amendments conform the FCPA anti-bribery provisions, pertaining to both “issuers” and “domestic concerns,” to the OECD Convention’s language concerning the purpose for which the corrupt payment was made.\footnote{§§ 78dd-1(a)(1)(A)(iii), -1(f)(1)(A); Convention, supra note 5, 37 I.L.M. at 1.} As noted, the Convention prohibits corrupt payments to a foreign official “in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.”\footnote{Convention, supra note 5, 37 I.L.M. at 4.} As explained in the commentaries, the term “improper advantage” was intended to refer to “something to which the company was not clearly entitled . . . .”\footnote{ld. at 9.}

Accordingly, the scope of the FCPA’s anti-bribery provisions is broad enough to include corrupt payments for the purpose of obtaining an “improper advantage.”\footnote{§§ 78dd-1(a)(1)(A), -2(a)(1).} Thus, the FCPA now provides that it is unlawful for issuers or domestic concerns to offer or to pay a bribe to a foreign official:

for purposes of . . . (i) influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage . . .
order to assist such [issuer or domestic concern] in obtaining or retaining business for or with, or directing business to any person . . . .”

2. Foreign Official

In accordance with the Convention, Congress enlarged the FCPA definition of “foreign official” to include officers and employees of public international organizations. Accordingly, the 1998 amendments to the FCPA define the term “foreign official” as:

[A]ny officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public

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194 §§ 78dd-1(a)(1)(A), -2(a)(1). While the OECD Convention made the obtaining of an “improper advantage” a prohibited purpose of the corrupt payment along with obtaining or retaining business, the 1998 amendments made the “improper advantage” subservient to obtaining and retaining business. Thus, the FCPA now prohibits corrupt payments: (1) to influence an official act or decision of the foreign official; (2) to induce the foreign official to do an act, or omit doing an act, in violation of the foreign official's lawful duty; (3) to induce the foreign official to use influence to affect a government act or decision; or (4) to secure an improper advantage. Id. It has been suggested that this juxtaposition of “improper advantage” in the 1998 amendments was intended to avoid “tinkering with the ‘obtain or retain business’ element [of the FCPA], which has been broadly interpreted by enforcement officials and the courts.” Lucinda A. Low & Timothy P. Trenkle, U.S. Antibribery Law Goes Global, BUS. L. TODAY, July-Aug. 1999, at 13, 20 (quoting remarks by Peter Clark, Deputy Chief of the Fraud Section, Criminal Division, U.S. Department of Justice). As Low and Trenkle further observed:

By adding “any improper advantage” to the quid pro quo element [of an FCPA violation] . . . a significant expansion of the law may have been achieved. Before this amendment, a prosecutor had to show a breach of duty, misuse of position or use of influence by an official; now, he or she apparently may only have to show much less specific actions by the official or even merely the intent by a payor to secure an improper advantage in its business. Thus, if “business” already included enhanced profits, tax benefits, collection of revenues and discretionary licenses, concessions and permits as well as government contracts, “any improper advantage” could mean preferential bidding terms, preferential access, or other preferential rights even in the preliminary stages of the pursuit of business opportunity.

Id.

The FCPA now defines a "public international organization" as:

(i) [A]n organization that is designated by Executive order pursuant to Section 288 of Title 22; or

(ii) [A]ny other international organization that is designated by the President by Executive order for the purposes of this section, effective as of the date of publication of such order in the Federal Register.\(^\text{197}\)

In this connection, an "international organization" under the International Organizations Immunities Act is one:

in which the United States participates pursuant to any treaty or under the authority of any Act of Congress authorizing such participation, or making an appropriation for such participation, and which shall have been designated by the President through appropriate Executive Order as being entitled to enjoy the privileges, exemptions, and immunities provided under the Act.\(^\text{198}\)

Thus, an officer or employee of an international organization who is entitled to the benefits of diplomatic immunity, or as such is otherwise designated by Executive Order, will now be considered a foreign official to whom corrupt payments are prohibited by the FCPA.

C. Jurisdictional Amendments to the FCPA

The 1998 amendments also greatly extended the jurisdictional reach of the FCPA by making violations of the Act by foreign individuals and entities, in addition to actions by U.S. nationals overseas, prosecutable in the United States.\(^\text{199}\) For this reason, the jurisdictional amendments may prove to be the most significant.

1. Jurisdiction Over Foreign Persons Based on Territoriality

At the time of both the original enactment of the FCPA in 1977 and the amendments in 1988, Congress refrained from

\(^{196}\) Id.


\(^{199}\) § 78dd-3.
asserting jurisdiction over non-U.S. individuals and entities. Despite having heard extensive testimony concerning the use of off-shore subsidiaries to make questionable domestic and foreign payments, and of the use of foreign agents and consultants as intermediaries to make corrupt payments, Congress ultimately decided not to include foreign nationals within the definition of a domestic concern. In effect, unless a foreign national was an "issuer" or there was some other basis for the United States to assert jurisdiction, a foreign national was beyond the reach of the Act.

As originally proposed by the House, the definition of "domestic concern" included entities owned or controlled by U.S. nationals; this definition extended to foreign subsidiaries of U.S. companies. The Senate bill did not contain the same definition. In conference, the House deferred to the Senate recognizing the possible conflicts with principles of international law and comity that could result from the assertion of U.S. jurisdiction over

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200 See supra notes 15, 16, 18, and accompanying text.

201 H.R. REP. No. 95-640, at 4 (1977). In order to address the use of foreign subsidiaries in affecting overseas corrupt payments, the House bill included within the definition of "domestic concern" as follows:

and entity (A) which is owned or controlled by individuals who are citizens or nationals of the United States; (B) which has its principal place of business in the United States; or (C) which is organized under the laws of a state of the United States or any territory, possession or commonwealth of the United States.

Id. The committee explained that:

By so defining domestic concern, the committee intends to reach not only all U.S. companies other than those subject to SEC jurisdiction but also foreign subsidiaries of any U.S. corporation. The committee found it appropriate to extend the coverage of the bill to non-U.S. based subsidiaries because of the extensive use of such entities as a conduit for questionable or improper foreign payments authorized by their domestic parent.

Id. at 12.

202 S. REP. NO. 95-114, supra note 18.

The term "domestic concern" is defined in the bill to mean an individual who is a citizen or national of the United States as well as any corporation . . . which is owned or controlled by individuals who are citizens or nationals of the United States and which has its principal place of business in the United States or any territory, possession, or commonwealth of the United States.

Id. (emphasis added).
foreign nationals outside the territorial United States. 203

In contrast, because jurisdiction over issuers arose from the registration of securities with the SEC, a sufficient territorial nexus existed to assert jurisdiction over a foreign national. 204 Thus, foreign corporations that traded securities on U.S. exchanges, including those companies trading securities in the form of American Depository Receipts (ADRs), 205 were subject to the

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203 As the House-Senate Conference Committee explained:
The House receded to the Senate in the definition of “domestic concern” with an amendment to make clear that any company having a principal place of business in the United States would be subject to the bill.

In receding to the Senate, the conferees recognized the inherent jurisdictional, enforcement, and diplomatic difficulties raised by the inclusion of foreign subsidiaries of U.S. companies in the direct prohibitions of the bill. However, the conferees intend to make clear that any issuer or domestic concern which engages in bribery of foreign officials indirectly through any other person or entity would itself be liable under the bill. The conferees recognized that such jurisdictional, enforcement, and diplomatic difficulties may not be present in the case of individuals who are U.S. citizens, nationals, or residents. Therefore, individuals other than those specifically covered by the bill (e.g., officers, directors, employees, agents, or stockholders acting on behalf of an issuer or domestic concern) will be liable when they act in relation to the affairs of any foreign subsidiary of an issuer or domestic concern if they are citizens, nationals, or residents of the United States. In addition, the conferees determined that foreign nationals or residents otherwise under the jurisdiction of the United States would be covered by the bill in circumstances where an issuer or domestic concern engaged in conduct proscribed by the bill.


204 See infra note 339.

205 Issuers of foreign securities commonly gain access to U.S. capital markets through the trading of ADRs. An ADR is a certificate issued by a depository in the United States (i.e., a bank or a trust company) representing an ownership interest in securities deposited with the financial institution and held overseas. The foreign securities can be either debt or equity instruments. Once established, an ADR trades like any other security, either over-the-counter or on an established exchange. ADRs offered to the public require registration with the SEC pursuant to § 78e(a). Meritt B. Fox, Securities Disclosure in a Globalizing Market, Who Should Regulate Whom, 95 Mich. L. Rev. 2498, 2608-17 (1997); see also Joseph Velli, American Depository Receipts: An Overview, 17 Fordham Int'l L.J. 2498, 2608-17 (1997); Jay D. Hansen, Other International Issues: London Calling? A Comparison of London and U.S. Stock Exchange Listing Requirements for Foreign Equity Securities, 6 Duke J. Comp. & Int'l L. 197, 208-209 (1995); Mark A. Saunders, American Depository Receipts: An Introduction to U.S. Capital Markets for Foreign Companies, 17 Fordham Int'l L.J. 48 (1994); James L. Cochrane, Are U.S. Regulatory Requirements for Foreign Firms Appropriate?, 17
FCPA, at least with regard to compliance with the accounting and financial controls requirements. For example, the SEC recently asserted jurisdiction in an enforcement action against an Italian company, Montedison S.p.A., because Montedison’s ADRs were traded on U.S. exchanges.206

Trading in ADRs has been very significant in U.S. markets. For example, it was reported that ‘‘[f]rom January to August 1995, ADRs accounted for nine percent of the volume on the New York Stock Exchange (NYSE) where all foreign stocks accounted for 10.7 percent of volume. Of the 220 companies now listed on the Exchange, 161 are in ADR format.” GLOBAL INVESTMENT MAGAZINE, Dec. 1995, at 28. In May 1996, the Securities Industry Association reported that U.S. investors had purchased $51.2 billion in foreign equity securities in 1995. U.S. bought $98 billion in foreign securities in ’95, REUTERS FINANCIAL SERVICE, May 8, 1996. According to a 1996 report commissioned by Citibank, approximately 1000 depository receipt programs had been established between 1991 and 1996 and U.S. portfolio managers indicated their intent to increase their holdings of ADRs. Growth Seen in U.S. Foreign Investment, FIN. TIMES OF LONDON, Sept. 5, 1996, at 24.

206 SEC v. Montedison S.p.A., Civil Action No. 1:96CV02631 (H.H.G.) (D.D.C. Nov. 21, 1996). The SEC contended that Montedison had materially misstated its financial condition and the results of operations in reports filed with the SEC for the years 1988-1993. It was alleged that Montedison had misrepresented the true nature of two transactions: the “Exilar Loan” and the “Enimont Affair.”

With regard to the “Exilar Loan,” it was alleged that payments were made by Montedison or its agents in the form of bearer bonds deposited by Montedison subsidiaries in Swiss accounts for the benefit of unidentified third parties. In order to account for these payments, a fictitious account receivable for $272 million was created and then “loaned” to a wholly-owned Curacao subsidiary which, in turn, “loaned” the same amount to a Virgin Island’s company, Exilar International, S.A. This “loan” was later classified as “uncollectable,” and Montedison took a $272 million write-down. Complaint, ¶¶ 11-13.

With regard to the “Enimont Affair,” Montedison entered into a joint venture with ENI, the Italian state energy company. Montedison and ENI each owned 40% of the joint venture and the remaining 20% was offered to the public. Montedison attempted to purchase control of the joint venture through nominees, but the transactions were overturned by a Milan court and Montedison’s interest was put in the custody of a third party. Complaint, ¶¶ 14-15.

Undeterred, Montedison embarked on a course to gain political support by paying bribes. Under its scheme, Montedison purchased real estate at inflated prices from a developer in Rome who used the proceeds to make corrupt payments on Montedison’s behalf. Montedison was ultimately unsuccessful in gaining control of the joint venture, however. As a result of the transactions, Montedison overstated the value of the properties on its books. Eventually, Montedison “wrote down” the value of the properties by approximately $126,250,000 for the year ending December 31, 1993. The write-down
The OECD Convention, however, called on signatory nations to exercise fully their national and territorial jurisdiction in prohibiting international bribery. In accordance with the Convention’s direction, the 1998 amendments added an entirely new section to the FCPA, Section 104A, that made the anti-bribery provisions of the FCPA applicable to non-U.S. nationals for violations committed outside the United States if there was an act in furtherance of the violation committed in the United States.\(^{207}\)

Among other violations, the SEC charged Montedison with having created false books and records and with having failed to devise and maintain a system of internal controls with respect to the disbursement of corporate funds. Jurisdiction was grounded on the trading of Montedison ADRs on the NYSE. The SEC noted that during the period between January 1993 and the filing of the complaint, 1 million ADRs (each representing 10 shares of Montedison common stock) had been traded each month on the NYSE. The complaint also noted that as of May 1, 1995, U.S. residents owned the equivalent of 6.1% of Montedison’s common stock. Complaint, ¶ 7-8. Thus, notwithstanding the fact that all of the conduct constituting the violations occurred in Italy, U.S. jurisdiction was asserted over Montedison by virtue of Montedison having offered registered securities in the U.S. and having filled periodic reports with the SEC.

\(^{207}\) The FCPA now provides that:

It shall be unlawful for any person other than an issuer that is subject to section 30A of the Securities Exchange Act of 1934 [§ 78dd-1] or a domestic concern (as defined in section 104 of this Act [§ 78dd-2]), or for any officer, director, employee, or agent of such person or any stockholder thereof acting on behalf of such person, while in the territory of the United States, corruptly to make use of the mails or any means or instrumentality of interstate commerce or to do any act in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to:

(1) any foreign official for purposes of

(A)(i) influencing any act or decision of such foreign official in his official capacity, inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official . . . or (iii) securing any improper advantage; or

(B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to effect or influence any act or decision of such government or instrumentality,

in order to assist such person in obtaining or retaining business for or with, or directing business to, any person;

(2) any foreign political party or official thereof or any candidate for foreign political office for purposes of

(A)(i) influencing any act or decision of such party, official, or candidate in its or his official capacity, (ii) inducing such party, official, or candidate to
Thus, under this newly created section, either the use of the U.S. mails or "any means or instrumentality of interstate commerce," or the doing of any act in furtherance of a violation, will subject a foreign national to prosecution in a U.S. court.

2. Jurisdiction Based Upon Nationality

Conforming to the OECD Convention's mandates, the 1998 amendments also enlarged the anti-bribery provisions' jurisdictional reach with respect to actions by U.S. nationals outside of U.S. territory. The amended FCPA now makes it clear that corrupt acts by "United States persons,"\(^\text{208}\) committed outside the United States, constitute a basis for jurisdiction.

\(^{208}\) The term "United States person" is defined in the amended FCPA to mean: [A] national of the United States (as defined in section 1101 of the Immigration and Nationality Act [8 U.S.C. § 1101] or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship organized under the laws of the United States or any State, territory, possession, or commonwealth of the United States, or any political subdivision thereof.

§ 78 dd-l(g)(2), -2(i)(2).
the United States, which are in furtherance of a violation of the anti-bribery provisions, will be subject to U.S. jurisdiction.\textsuperscript{209} Significantly, assertion of this nationality-based jurisdiction does not require use of the U.S. mails or instrumentalities of U.S. interstate commerce, or indeed any nexus with the United States, as a predicate.\textsuperscript{210}

IV. Extraterritorial Jurisdiction of the FCPA

A longstanding presumption of American law is that acts of Congress are to apply only domestically unless there is a clear manifestation of a contrary congressional intent.\textsuperscript{211} There is, however, no constitutional limitation on Congress’ legislative reach,\textsuperscript{212} and courts have not refrained from inferring the necessary

\begin{itemize}
\item For any United States person to corruptly do any act outside the United States in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value [to a foreign official].
\end{itemize}

\textsuperscript{209} Thus, with respect to both “issuers” and “domestic concerns,” the amended FCPA makes it unlawful:

\begin{itemize}
\item for any United States person to corruptly do any act outside the United States in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value [to a foreign official].
\end{itemize}

\textsuperscript{210} These extraterritorial prohibitions against a “United States person” apply “irrespective of whether such United States person makes use of the mails or any means or instrumentality of interstate commerce in furtherance of such offer, gift, payment, promise or authorization.” Id.


\textsuperscript{212} See, e.g., United States v. Felix-Gutierrez, 940 F.2d 1200, 1204 (9th Cir. 1991) (“Generally, there is no constitutional bar to the extraterritorial application of United States penal laws.”). As Chief Justice Marshall observed in \textit{Gibbons v. Ogden}, 22 U.S. (9 Wheat.) 1, 196 (1824), Congress’ authority under the Commerce Clause “is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution.”
legislative intent when extraterritorial jurisdiction has been necessary to effectuate the statutory purpose. In enacting the

Thus, Professor Andreas F. Lowenfeld has noted:

The Constitution does not express any territorial limitation on the powers of Congress. For example, the power to regulate commerce with foreign nations, and to enact criminal laws necessary and proper to carry out the regulation of commerce, might well include laws that apply outside as well as within the territory of the United States, to aliens as well as to nationals . . . .

The Constitution also grants to Congress the power to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations. In addition, Congress must have at least some of the powers inherent in the international sovereignty of the United States, which being unenumerated, have no express territorial limitation.

Lowenfeld, supra note 147, at 881. The absence of constitutional limitation on Congress' jurisdiction was noted by Professor Lea Brilmayer as well:

In the international context . . . the Constitution plays virtually no role at all. The Supreme Court has never invalidated the extraterritorial application of federal law on constitutional grounds. In fact, none of the Court's decisions on extraterritorial application even seriously discuss the constitutional issues. The most attention these decisions ever give to the issue is a back handed reference to the Constitution at the outset of the discussion about congressional intent.

Lea Brilmayer, The Extraterritorial Application of American Law: A Methodological and Constitutional Appraisal, 50 LAW & CONTEMP. PROBS. 11, 24 (1987). Professor Brilmayer has also suggested, however, that the extraterritorial effect of legislation is nevertheless subject to the requirements of due process. Id. at 27-28; see also Bret A. Sumner, Due Process and True Conflicts: The Constitutional Limits on Extraterritorial Federal Legislation and the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996, 46 CATH. U. L. REV. 907, 908-09 (1997); Christopher J. Lord, Stapled Stock and the I.R.C. Section 269B: Ill Conceived Charge in the Rules of International Tax Jurisdiction, 71 CORNELL L. REV. 1066, 1067 (1986) ("Except for the due process clause, which proscribes arbitrary taxation, no constitutional provision or international law restricts the scope of United States tax jurisdiction.").

Thus, the Supreme Court observed in United States v. Bowman, as follows:

[some laws] are such that to limit their locus to the strictly territorial jurisdiction would be greatly to curtail the scope and usefulness of the statute and leave open a large immunity for frauds as easily committed by citizens on the high seas and in foreign countries as at home. In such cases, Congress has not thought it necessary to make specific provision in the law that the locus shall include the high seas and foreign countries, but allows it to be inferred from the nature of the offense.

260 U.S. 94, 98 (1922). For example, with regard to the extraterritorial application of the federal securities laws, courts have noted that, "[w]hen Congress drafted the securities laws, it did not consider the issue of extraterritorial applicability, [which requires] that federal courts fill the void." MGC, Inc. v. Great W. Energy Corp., 896 F.2d 170, 173 (5th Cir. 1990). The court in Bersch v. Drexel Firestone, Inc. similarly observed, "[o]ur conclusions rest on case law and commentary concerning the application of the securities
FCPA, Congress plainly intended to reach foreign conduct.\footnote{214}

Nevertheless, as broad as its prescriptive jurisdiction may be,\footnote{215} Congress is presumed to legislate in accordance with "customary international-law limits on jurisdiction to prescribe."\footnote{216} As a result, laws and other statutes to situations with foreign elements and our best judgment as to what Congress would have wished if these problems had occurred to it," a process which has been characterized candidly as "largely a policy decision." 519 F.2d 974, 993 (2d Cir. 1975); Cont. Grain (Austl.) Pty., Ltd. v. Pacific Oilseeds, Inc., 592 F.2d 409, 421 (8th Cir. 1979).

\footnote{214} It has been observed, in this regard, that "[w]here Congress explicitly enacts a statute with the intent to control conduct outside its boarders, the decision to focus on international activity is clear. In the white-collar area, several criminal statutes fall within this realm. Perhaps the most noteworthy is the Foreign Corrupt Practices Act." Podgor, \textit{supra} note 147, at 329. For this reason, the FCPA has been said to be sui generis because the FCPA is "a domestic criminal law that applies extraterritorially to U.S. citizens and companies to prohibit bribery of foreign officials in a foreign country." \textsc{Donald Zarin}, \textsc{Doing Business Under the Foreign Corrupt Practices Act} 1, 1-2 (1995).

\footnote{215} There are three generally recognized categories of jurisdiction. As described in the \textit{Restatement}, these three categories of jurisdiction are:

(a) jurisdiction to prescribe, i.e., the authority of a state to make its law applicable to persons or activities; (b) jurisdiction to adjudicate, i.e., the authority of a state to subject particular persons or things to its judicial process; and (c) jurisdiction to enforce, i.e., the authority of a state to use the resources of government to induce or compel compliance with its law.

\textsc{Restatement}, \textit{supra} note 145, pt. IV, introductory note. As Justice Scalia recently observed with regard to Congress' jurisdiction to prescribe:

There is . . . a type of "jurisdiction" relevant to determining the extraterritorial reach of a statute; it is known as "legislative jurisdiction" . . . or "jurisdiction to prescribe" . . . . This refers to the "authority of a state to make its law applicable to persons or activities," and is quite a separate matter from "jurisdiction to adjudicate" . . . . Congress has broad power under Article I, § 8 cl. 3, "[t]o regulate commerce with foreign Nations," and this court has repeatedly upheld its power to make laws applicable to persons or activities beyond our territorial boundaries where United States interests are affected.


\footnote{216} \underline{Hartford Fire Ins. Co.}, 509 U.S. at 815 (Scalia, J., dissenting). As Chief Justice Marshall stated in \textit{Murray v. Schooner CHARMING BETSY}, "[a]n act of Congress ought never be construed to violate the law of nations, if any other possible construction remains, and consequently can never be construed to violate neutral rights, or to affect
Congress has exercised this extraterritorial jurisdiction sparingly.\textsuperscript{217} Of the five generally recognized bases of extraterritorial prescriptive jurisdiction under international law,\textsuperscript{218} the territorial neutral commerce, further than is warranted by the law of nations as understood in this country.” 6 U.S. (2 Cranch) 64, 81 (1804); Lowenfeld, supra note 147, at 881-82:

It is arguable that the Constitution permits Congress to make acts committed abroad crimes under United States law only to the extent permitted by international law. It is arguable that, especially when Congress acts under its power to define offenses against the law of nations, it cannot violate territorial limitations imposed by that law.


\textsuperscript{217} For example, Professor Lowenfeld has observed that, “[w]hatever the answers that an uncertain constitutional jurisprudence might give [as to the limit of Congress’ extraterritorial authority], Congress has in fact respected the territorial limitations imposed by international law, at least until recently. In that policy, I think Congress has followed the lead of the framers.” Lowenfeld, supra note 147, at 882.

\textsuperscript{218} Five theories of jurisdiction to prescribe were identified in the Harvard Research, supra note 142. These theories are: territorial, nationality, protective, universality, and passive. As explained in the introductory comment:

[The] five principles are: first, the territorial principle, determining jurisdiction by reference to the place where the offense is committed; second, the nationality principle, determining jurisdiction by reference to the nationality or national character of the person committing the offense; third, the protective principle, determining jurisdiction by reference to the national interest injured by the offense; fourth, the universality principle, determining jurisdiction by reference to the custody of the person committing the offense; and fifth, the passive personality principle, determining jurisdiction by reference to the nationality or national character of the person injured by the offense.

Id. at 445. These five theories of jurisdiction are incorporated in the Restatement as well. See Restatement, supra note 145, § 402 cmts. c-g. In his paper prepared for the Eighth Congress of the International Academy of Comparative Law, Professor Rollin M. Perkins suggested four theories of criminal jurisdiction: territorial, Roman, injured forum, and cosmopolitan. Perkins, supra note 147, at 155. Under Professor Perkins’ construction, the “Roman” theory is, in essence, the same as the “nationality” theory, or in other words,

The perpetrator rather than the place of perpetration, is the determinant under the Roman theory. A nation, in this view, has jurisdiction over its national wherever he may be and hence can hold him accountable for his criminal misdeed wherever committed. It is the logical outgrowth of the conception of law enforcement as a means of disciplining members of the tribe or clan.

Id. Similarly, Perkins’ “injured forum” theory places emphasis upon the effect of the crime (i.e., “[t]he injured forum theory places emphasis upon the effect of crime. A
principle and the nationality principle predominate.\textsuperscript{219} Congress may take jurisdiction of any crime which has the effect of causing harm to it."\textemdash Id. The "cosmopolitan" theory appears to be a synthesis of the "universality" and "passive personality" theories (i.e., "this theory is drawn upon the extent necessary to authorize any nation having actual control of a pirate, and evidence of his piracy, to convict him no matter who he may be, wherever his acts of piracy were committed, and without reference to the harm resulting therefrom."\textemdash Id. at 1156.

\textsuperscript{219} As Harvard Research noted:

Of these five principles, the first is everywhere regarded as of primary importance and of fundamental character. The second is universally accepted, though there are striking differences in the context to which it is used in the different national systems. The third is claimed by most States, regarded with misgivings in a few, and generally ranked as the basis of an auxiliary competence. The fourth is widely though by no means universally accepted as the basis of an auxiliary competence, except for the offense of piracy, with respect to which it is the generally recognized principle of jurisdiction. The fifth, asserted in some form by a considerable number of States and contested by others, is admittedly auxiliary in character and is probably not essential for any State if the ends served are adequately provided for on other principles.

\textit{Harvard Research, supra} note 142, at 445. Prosecution of extraterritorial crime has been upheld under each of five theories of jurisdiction, however. With regard to the "territorial theory," see, for example, United States v. Sisal Sales Corp., 274 U.S. 268, 276 (1927); United States v. Pac. & Arctic Ry. & Navigation Co., 228 U.S. 87, 106 (1913).

With regard to the "nationality theory," see, for example, Kawakita v. United States, 343 U.S. 717, 732-36 (1952); Skiriotes v. Florida, 313 U.S. 69, 76-77 (1941); Blackmer v. United States, 284 U.S. 421, 436-38 (1932); United States v. Bowman, 260 U.S. 94, 102 (1922); Jones v. United States, 137 U.S. 202 (1890); United States v. Juda, 46 F.3d 961, 966 (9th Cir. 1995); United States v. Harvey, 2 F.3d 1318, 1328-29 (3d Cir. 1993); United States v. Thomas, 893 F.2d 1066, 1069 (9th Cir. 1990); United States v. Goldberg, 830 F.2d 459, 463-64 (3d Cir. 1987); United States v. Walczak, 783 F.2d 852, 854 (9th Cir. 1986); United States v. See, 780 F.2d 1524, 1543 n.2 (11th Cir. 1986); United States v. King, 552 F.2d 833, 851 (9th Cir. 1976); United States v. Cotten, 471 F.2d 744, 750 (9th Cir. 1973); Rocha v. United States, 288 F.2d 545, 548 (9th Cir. 1961); Chandler v. United States, 171 F.2d 921, 929-31 (1st Cir. 1948).

With regard to the "protective theory," see, for example, Ford v. United States, 273 U.S. 593, 619-20 (1927); Strassheim v. Dailey, 221 U.S. 280, 285 (1911); United States v. Nippon Paper Indus. Co., 109 F.3d 1, 4 (1st Cir. 1997); United States v. Caicedo, 47 F.3d 370, 371 (9th Cir. 1995); \textit{Juda}, 46 F.3d at 966; United States v. Vasquez-Velasco, 15 F.3d 833, 841 (9th Cir. 1994); \textit{Harvey}, 2 F.3d at 1327; United States v. Felix-Gutierrez, 940 F.2d 1200, 1205 (9th Cir. 1991); United States v. Davis, 905 F.2d 245, 249 (9th Cir. 1990); \textit{Goldberg}, 830 F.2d at 462; United States v. Wright-Palmer, 784 F.2d 161, 168 (3d Cir. 1986); Mow v. United States, 730 F.2d 1308, 1312 (9th Cir. 1984); \textit{In re} Marc Rich & Co., A.G., 707 F.2d 663, 666 (2d Cir. 1983); United States v. Gilboe, 684 F.2d 235, 238 (2d Cir. 1982); \textit{Cotten}, 471 F.2d at 749; Stegman v. United States, 425 F.2d 984, 986 (9th Cir. 1970); United States v. Pizzarusso, 388 F.2d 8, 9-10 (2d Cir. 1968); United States v. Braverman, 376 F.2d 249, 251 (2d Cir. 1967); Marin v. United States, 352 F.2d 174, 177-78 (5th Cir. 1965); \textit{Rocha}, 288 F.2d at 548-49; \textit{see also
asserted both principles as bases of extraterritorial jurisdiction in the 1998 amendments to the FCPA. In enlarging the FCPA’s jurisdiction to cover the acts of foreign individuals and entities, Congress relied on its authority under the territorial principle. In expanding the reach of the FCPA to include the acts of U.S. persons abroad, Congress relied on the nationality principle.

However, even though consistent with established norms of prescriptive jurisdiction, Congress’ assertion of its jurisdiction is nevertheless subject to a requirement of reasonableness, in recognition of the interests of other states and the interests of affected private parties that are implicated by the assertion of extraterritorial jurisdiction. Neither the legislative history of the 1998 amendments nor the underlying provisions of the OECD Convention provide clear guidance as to the circumstances in which this broad jurisdiction should be exercised, particularly with regard to an absent foreign national. Thus, the question posed by the 1998 amendments is not whether congressional action can reach extraterritorial conduct, but instead, the question in each case is whether that authority should be exercised.

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Blakesley, supra note 147, at 1123-39; Podgor, supra note 147, at 342-43.


With regard to the “passive personality theory,” see, for example, Vasquez-Velasco, 15 F.3d at 841; Yunis, 924 F.2d at 1090. See also Blakesley, supra note 147, 73 J. CRIM. L. at 1139-41; Mason H. Drake, United States v. Yunis: The D.C. Circuit’s Dubious Approval of U.S. Long-Arm Jurisdiction Over Extraterritorial Crimes, 87 NW. U. L. REV. 697, 704-13 (1993); Lowenfeld, supra note 147, at 886-91.

220 See infra notes 224-69 and accompanying text.

221 See infra notes 270-88 and accompanying text.

222 See RESTATEMENT, supra note 145, pt. IV, ch. 1, introductory note.

223 Cf. Foley Bros., Inc. v. Filardo, 336 U.S. 281, 284-85 (1949) (“The question before us is not the power of Congress to extend the eight hour law to work performed in foreign countries. Petitioners concede that such power exists. The question is rather whether Congress intended to make the law applicable to such work.”).
1. Territorial Jurisdiction Over Foreign Nationals

Prior to the 1998 amendments, Congress had been circumspect in the assertion of jurisdiction over foreign nationals for violation of the FCPA when a basis for U.S. jurisdiction did not already exist. However, emboldened by the mandate of the OECD Convention to aggressively assert territorial jurisdiction over acts of foreign bribery, Congress abandoned its previous reticence and instead broadly asserted U.S. jurisdiction over foreign nationals, even those who may not have been physically present in the United States.

Subject matter jurisdiction over a foreign national under the amended FCPA requires a nexus between activity within the territory of the United States and the furtherance of a violation of the statute. This nexus may result from use of the mails or means of interstate commerce to further the violation or from the commission of some other act within the territorial United States that sufficiently implicates interests of the United States to warrant the assertion of U.S. jurisdiction.

a. The “Territory” of the United States

Underscoring the intended breadth of its assertion of territorial jurisdiction, both the House and the Senate made clear that the territory of the United States “should be understood to encompass all areas over which the United States asserts territorial jurisdiction.” This includes “all places and waters, continental or insular, subject to the jurisdiction of the United States,” the high

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224 See supra notes 199-207 and accompanying text.
225 With respect to territorial jurisdiction, the OECD Convention directs that “[e]ach party shall take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offense is committed in whole or in part in its territory.” Convention, supra note 5, § 1, 37 I.L.M. at 5.

The commentaries to the convention are equally emphatic: “The territorial basis for jurisdiction should be interpreted broadly so that extensive physical connection to the bribery act is not required.” Id. at 10.
226 See § 78dd-3(a).
227 Id.
seas and the special maritime jurisdiction,\textsuperscript{230} and vehicles subject to the special aircraft jurisdiction of the United States.\textsuperscript{231}

\textsuperscript{230} See H.R. REP. NO. 105-802, at 10; S. REP. NO. 105-277, at 6; 18 U.S.C. § 7 (1994). The "special maritime and territorial jurisdiction of the United States" includes:

1. The high seas, any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, and any vessel belonging in whole or in part to the United States or any citizen thereof, or to any corporation created by or under the laws of the United States, or of any State, Territory, District, or possession thereof, when such vessel is within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State.

2. Any vessel registered, licensed, or enrolled under the laws of the United States, and being on a voyage upon the waters of any of the Great Lakes, or any of the waters connecting them, or upon the Saint Lawrence River where the same constitutes the International Boundary Line.

3. Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, other needful building.

4. Any island, rock, or key containing deposits of guano, which may, at the discretion of the President, be considered as appertaining to the United States.

5. Any aircraft belonging in whole or in part to the United States, or any citizen thereof, or to any corporation created by or under the laws of the United States, or any State, Territory, District, or possession thereof, while such aircraft is in flight over the high seas, or over any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State.

6. Any vehicle used or designed for flight or navigation in space and on the registry of the United States pursuant to the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies and the Convention on Registration of Objects Launched into Outer Space, while that vehicle is in flight, which is from the moment when all external doors are closed on Earth following embarkation until the moment when one such door is opened on Earth for disembarkation or in the case of a forced landing, until the competent authorities take over the responsibility for the vehicle and for persons and property aboard.

7. Any place outside the jurisdiction of any nation with respect to an offense by or against a national of the United States.

8. To the extent permitted by international law, any foreign vessel during a voyage having a scheduled departure from or arrival in the United States with respect to an offense committed by or against a national of the United States.

\textit{Id.}

\textsuperscript{231} See H.R. REP. NO. 105-802, at 10; S. REP. NO. 105-277, at 6; 49 U.S.C.
b. *Use of the Mails or Any Means of Interstate Commerce*

Jurisdiction over a foreign national may arise from the use of the mails or other means of interstate or foreign commerce in furtherance of a violation of the Act.\(^{232}\) The connection with interstate commerce need not be a strong one, however. For example, in prosecutions for money laundering,\(^{233}\) which require proof of a transaction "affecting interstate or foreign commerce,"\(^{234}\) it has been held that "[a] minimal effect on interstate commerce is sufficient to meet this requirement."\(^{235}\)

Thus, subject matter jurisdiction in cases involving foreign nationals requires evidence of the corrupt use of the mails or of any means or instrumentality of interstate commerce or of any other act in furtherance of a violation. Although the contours of

\[^{232}\] § 46501(2) (1994). The "special aircraft jurisdiction of the United States" includes the following aircraft in flight:

(A) a civil aircraft of the United States.

(B) an aircraft of the armed forces of the United States.

(C) another aircraft in the United States.

(D) another aircraft outside the United States

(i) that has its next scheduled destination or last place of departure in the United States, if the aircraft next lands in the United States;

(ii) on which an individual commits an offense (as defined in the Convention for the Suppression of Unlawful Seizure of Aircraft), if the aircraft lands in the United States with the individual still on the aircraft; or

(iii) against which an individual commits an offense (as defined in subsection (d) or (e) of article I, section 1 of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation) if the aircraft lands in the United States with the individual still on the aircraft.

(E) any other aircraft leased without crew to a lessee whose principal place of business is in the United States or, if the lessee does not have a principal place of business, whose permanent residence is in the United States.

\[^{233}\] The Senate Report noted that "[i]t is the view of Congress that any act committed by a foreign national within the United States that is in furtherance of a bribe paid to a foreign official falls within the Congress' power to regulate 'Commerce with foreign Nations.'" U.S. CONST. art. I, § 8, cl. 3.\(^{236}\) S. REP. No. 105-277, at 6.


\[^{235}\] Id. § 1956(c)(4).

\[^{236}\] United States v. Kunzman, 54 F.3d 1522, 1527 (10th Cir. 1995); United States v. Lovett, 964 F.2d 1029, 1038 (10th Cir. 1991).
these jurisdictional acts are undefined in the statute and the legislative history, reference to other statutes sheds some light on what actions may constitute the involvement of interstate commerce required to engender subject matter jurisdiction.

2. Use of the Mails

Like the FCPA, use of the mails in furtherance of the execution of a fraudulent scheme gives rise to a violation of the federal mail fraud statute. The mail fraud statute has been extensively litigated, and it has been observed that "much ink has been spilled" in illuminating what is meant by "use of the mails in furtherance of the fraudulent scheme." Several instances have emerged with respect to the conduct that would give rise to jurisdiction over a foreign national.

First, it is not necessary that the use of the mails be an "essential element" of the unlawful scheme. Instead, all that is necessary to establish subject matter jurisdiction under the federal mail fraud statute is that the use of the mail was "incident to an essential part of the scheme" or was "a step in the plot." "The scheme’s completion must depend in some way on the charged mailings." The mailing may be the means by which the fraudulent representations were conveyed or by which the

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Whoever, having devised or intending to devise any scheme or artifice to defraud... for the purpose of executing such scheme or artifice... places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the postal service... or knowingly causes to be delivered by mail... any such matter or thing, shall be fined... or imprisoned not more than five years, or both.

_United States v. Hickok_, 77 F.3d 992, 1003-04 (7th Cir. 1996).

237 United States v. Hickok, 77 F.3d 992, 1003-04 (7th Cir. 1996).

238 _Pereira v. United States_, 347 U.S. 1, 8 (1954).

239 _Id._


241 _United States v. Coyle_, 63 F.3d 1239, 1244 (3d Cir. 1995).

242 See _id._ (as part of a scheme to conceal excess "administrative expenses," the defendant prepared false cost schedules that were mailed by a health care provider to a union welfare fund); _see, e.g._, _United States v. Alanis_, 945 F.2d 1032 (8th Cir. 1991) (holding that the defendant submitted a false claim to an insurer for a death benefit); _Hofstetter v. Fletcher_, 905 F.2d 897 (6th Cir. 1988) (finding that as part of a fraudulent scheme to sell tax-sheltered insurance policies, invitations to informational seminars...
proceeds of the fraud were obtained. Additionally, it is sufficient if the mailing may have allowed the fraudulent scheme to continue either by lulling the victims or by otherwise concealing the fraud.

were mailed to possible buyers); United States v. Curdy, 681 F.2d 406 (5th Cir. 1982) (finding that as part of a scheme to steal funds given to a political action committee, defendant filed false affidavits with state supervisory authorities).

See, e.g., United States v. Lane, 474 U.S. 438 (1986) (holding that defendants received partial payments of fraudulent insurance claim by mail); Pereira, 347 U.S. at 1 (finding that the victim sent check to defendant through the mail); United States v. Hickok, 77 F.3d 992 (7th Cir. 1996) (determining that the commission checks obtained by fraud were mailed to defendant); United States v. Pepper, 51 F.3d 469 (5th Cir. 1995) (holding that the victim of fraud mailed proceeds to defendant); United States v. Silvano, 812 F.2d 754 (1st Cir. 1987) (holding that defendant committed fraud by mailing premium and commission payments to insurer where defendant received a fifty percent share of the profits); United States v. Dick, 744 F.2d 546 (7th Cir. 1984) (explaining that the mailing of reimbursement checks from the Small Business Administration to various construction sureties completed defendant’s fraudulent scheme).

The Supreme Court has held that mailings after the fraud has been completed do not establish subject matter jurisdiction. See, e.g., United States v. Maze, 414 U.S. 395 (1974) (holding that the processing of credit card invoices after food and lodging had been fraudulently obtained would not sustain indictment for mail fraud); Kann v. United States, 323 U.S. 88, 94 (1944) (finding that mailing of fraudulently obtained checks from banks that had cashed the checks to the drawee bank occurred after the scheme “had reached fruition” and accordingly would not support the charge of mail fraud); see also Parr v. United States, 363 U.S. 370 (1960) (holding that the lawful use of the mails to collect tax revenue subsequently converted by defendants was not in furtherance of the scheme to defraud). The Court has recognized, however, that mailings which have the effect of lulling the victim into a false sense of security and thereby allowing the scheme to continue are in furtherance of an unlawful scheme and therefore will provide the jurisdictional predicate for mail fraud. See, e.g., Schmuck v. United States, 489 U.S. 705 (1988). Thus, in Schmuck, the mailing of title applications by retail auto dealers to whom defendant had sold cars in which the odometer had been altered “was essential to the perpetuation of Schmuck’s scheme” and therefore satisfied the mailing element of the mail fraud offense. 489 U.S. at 712. The Court explained as follows:

The success of Schmuck’s venture depended upon his continued harmonious relations with, and good reputation among, retail dealers, which in turn required the smooth flow of cars from the dealers to their . . . customers . . . . Schmuck’s scheme would have come to an abrupt halt if the dealers either had lost faith in Schmuck or had not been able to resell the cars obtained from him . . . . Thus, although the registration form mailings may not have contributed directly to the duping of either the retail dealers or the customers, they were necessary to the passage of title, which in turn was essential to the perpetuation of Schmuck’s scheme.

Id. Similarly, in Lane, 479 U.S. at 438, the Court held that mailings of a proof of loss and explanatory memoranda by an insurance adjuster to the insurer’s headquarters would support a mail fraud prosecution arising from defendant’s arson-for-insurance scheme, despite defendants having previously received the proceeds of their fraudulent claim.
Commenting on the post hoc mailings, the Court stated as follows:

Mailings occurring after receipt of the goods obtained by fraud are within the statute if they were “designed to lull the victims into a false sense of security, postpone their ultimate compliant to authorities, and therefore make the apprehension of the defendants less likely than if no mailings had taken place.”

479 U.S. at 451 (quoting Maze, 414 U.S. at 403). In an earlier case decided after Parr and Kann but prior to Maze, the Court held that mailings to the victims of a fraudulent scheme, after the victim’s money had been obtained, would support jurisdiction under the mail fraud statute when the purpose of the mailings was to lull the victims into believing that the falsely promised services were being performed. United States v. Sampson, 371 U.S. 75 (1962). The Court noted in this regard as follows:

The indictment specifically alleged that the signed copies of the accepted applications and the covering letters were mailed by the defendants to the victims for the purpose of lulling them by assurances that the promised provided services would be performed. We cannot hold that such a deliberate and planned use of the United States mails by defendants engaged in a nationwide, fraudulent scheme in pursuance of a previously formulated plan could not, if established by evidence, be found . . . to be “for the purpose of executing” a scheme within the meaning of the mail fraud statute.

371 U.S. at 80-81. Applying this line of authority, federal mail fraud jurisdiction has been upheld in the circuits under a variety of circumstances in which mailings were used to lull investors into believing the defendant’s scheme was legitimate business activity. See, e.g., United States v. Lefkowitz, 125 F.3d 608, 615 (8th Cir. 1997) (finding letters to investors in real estate limited partnerships that construction of projects were underway to have “furthered the scheme to defraud by falsely assuring investors their projects were proceeding”); United States v. Slevin, 106 F.3d 1086, 1089-90 (2d Cir. 1996) (holding that reimbursements for construction bonds, which defendant falsely claimed to have arranged, after defendant had received payment from the contractors furthered the ongoing scheme); United States v. Stein, 37 F.3d 1407, 1409 (9th Cir. 1994) (finding that the mailing of an SEC consent order which was based on false representations by defendant to defendant’s securities customers “falsely assured them that repayment would be forthcoming, making them less likely to press either the government for continued investigation or Stein for immediate repayment”); United States v. Hubbard, 96 F.3d 1223, 1228-29 (9th Cir. 1996) (holding that the mailing of title documents to the victim of an odometer modification scheme allowed the scheme to continue even though defendant had received the proceeds); United States v. Ashman, 979 F.2d 469, 482 (7th Cir. 1992) (finding that the mailing of account statements and transaction confirmations to commodity trading customers “furthered the scheme by lulling customers into believing that nothing was wrong with the execution of their orders”). Similar mailings were also found to support mail fraud jurisdiction in United States v. Biesiadecki, 933 F.2d 539, 545 (7th Cir. 1991) (holding “the mailing of the customer account statements helped to lull customers into a sense of security by furthering the impression that FCCB was a legitimate business enterprise, and that without such statements, customers might have closed their accounts sooner, discerned that they were victims of fraud, and taken action against FCCB”); see also Hofstetter, 905 F.2d at 903 (deciding that filing of a false tax return on behalf of the victim of a insurance tax shelter scheme, together with the preparation of correspondence which the
victim mailed to the IRS which occurred after plaintiff initially agreed to purchase the life insurance policies were in furtherance of the scheme to defraud, since the defendants continued to dupe the plaintiff into believing that she would not be liable for federal income taxes and thereby lulled her into a false sense of security); United States v. Otto, 742 F.2d 104, 108 (3d Cir. 1984) (finding correspondence with a participant in a Ponzi scheme assuring him that business was going well “was an attempt to buy time in order to avoid or at least postpone detection”); United States v. Angelilli, 660 F.2d 23, 36 (2d Cir. 1981) (holding checks sent to judgement creditors purporting to be the proceeds of judgment sales were “designed to lull the debtors and creditors into believing that the defendants had duly sold the property at auction”); United States v. Tackett, 646 F.2d 1240, 1243 (8th Cir. 1981) (finding the defendants’ agreement to execute an affidavit attesting to the existence of an option to buy property, which was false, was for the purpose of lulling the victims and their attorney because “even if we assume that [defendant] did not intend to get any more money from [the victims] at this point, the letter was still mailed for the purpose of executing the fraud. [Defendant] was clearly trying to ‘buy time’ to allay [the attorney’s] suspicions for a while by agreeing to put his representations in writing”).

245 Mailings for the purpose of concealing the fraudulent scheme will also support mail fraud jurisdiction, even though the mailings occur after the defendant has received the proceeds of the fraudulent scheme. Thus, for example, in Coyle, evidence of defendant’s submission of false financial statements on behalf of a healthcare provider (HCA) to a union welfare fund, and ultimately to the IRS, the Department of Labor, and Pension Benefits Guaranty Corporation, supported a finding that “but for the mailings . . . HCA would have been unable to carry out its scheme either because the true figures would have prompted an investigation by the Department of Labor . . . or because the [union] [f]und’s accountants or consultant would have alerted the fund to the amount of HCA’s profit . . . .” 63 F.3d at 1245. Similarly, in United States v. Frey, 42 F.3d 795 (3d Cir. 1994), fraudulent correspondence concerning the title to a non-existent boat for purpose of securing a federal lien was necessary “in order to either further the scheme or to facilitate the concealment of the scheme. If the fraud had been discovered, defendant’s scheme would have come to an abrupt halt.” 42 F.3d at 799; see also United States v. Morrow, 39 F.3d 1228, 1236 (1st Cir. 1994) (holding that the mailing of title documents relating to an automobile falsely reported as stolen was intended to and did serve to forward and shield the fraudulent scheme by seeming to corroborate the story that [defendant] had already told the police); United States v. Young, 955 F.2d 99, 108 (1st Cir. 1992) (finding correspondence with the Veterans’ Administration purporting to explain the investment of veteran’s trust funds concealed defendant’s embezzlement); United States v. Curry, 681 F.2d at 415-16 (holding the submission of affidavits to state regulatory authority falsely understating the amount of contributions received from candidates served to conceal defendant’s fraud from the state authorities and from the political action committee’s members). Courts have also upheld mail fraud jurisdiction where the purpose of the mailing was to lend an air of legitimacy to the scheme and thereby avoid detection. See, e.g., United States v. Massey, 48 F.3d 1560, 1567 (10th Cir. 1995) (holding correspondence sent to participants in a fee-for-loan program explaining why loans were delayed was to “avoid detection and exposure of the fraudulent nature of the European Loan Program”); Ashman, 979 F.2d at 481 (finding the mailing of trade execution confirmations and accounts statements concealed fraudulent commodity
Further, use of the mail need not have been made by the person accused. Instead, if the accused caused the use of the mail or use of the mail was reasonably foreseeable as a result of the accused's actions or in the ordinary course of business, the

trading); United States v. Kuzniar, 881 F.2d 466, 472 (7th Cir. 1989) (holding that the correspondence concerning discovery in support of defendant's fraudulent insurance claim concealed the scheme); United States v. Wormick, 709 F.2d 454, 462 (7th Cir. 1983) (finding that the defendant's rental of a car, and thus the mailings incident thereto, "was to give a fictitious accident an air of authenticity").

In regard to causation, the Supreme Court stated that "[w]here one does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended, then he 'causes' the mails to be used." Pereira v. United States, 347 U.S. 1, 8-9 (1954). Where one does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended, then he "causes" the mails to be used. Id.

Courts have found the requirement of use of the mails in furtherance of the scheme has been found to be satisfied in circumstances where the use of the mails was the foreseeable result of defendant's actions. See, e.g., United States v. Pemberton, 121 F.3d 1157, 1171 (8th Cir. 1997) (the filing of a state sales tax return by the seller of a boat purchased by defendant and the mailing of title documents by the state were foreseeable consequences of defendant's action); Hubbard, 96 F.3d at 1228 (the mailing of title documents to automobile dealers who had purchased automobiles with altered odometer readings was a foreseeable result of defendant's scheme); Morrow, 39 F.3d at 1237 (foreseeable that an insurer would mail claim forms to an insured in response to a false claim that the insured's automobile had been stolen and stripped); United States v. Koen, 982 F.2d 1101, 1106 (7th Cir. 1992) (foreseeable that an insurer would engage an investigator and an adjuster to assess a claim for fire loss); Kuzniar, 881 F.2d at 472 (foreseeable that an insurer would require support for a claim; United States v. Draiman, 784 F.2d 248, 250-51 (7th Cir. 1986) (foreseeable that an insurer would have its lawyers inquire into the claim). Use of the mails incident to a commercial relationship is also foreseeable. United States v. Griffith, 17 F.3d 865, 876-77 (6th Cir. 1994) (foreseeable result of commercial activity that a vendor would check a retailer's credit references before shipping goods); United States v. Paccione, 949 F.2d 1183, 1195 (2d Cir. 1991) (foreseeable result of commercial activity that a company operating in a regulated industry would apply for permits to engage in regulated activity).

Mailings that occur in the ordinary course of business are considered foreseeable and are therefore deemed to have been caused by the defendant. See, e.g., Carpenter v. United States, 484 U.S. 19, 20 (1987) (holding that publication of defendant's "Heard on the Street" column in the Wall Street Journal satisfied mailing requirement); Sleven, 106 F.3d at 1088 (upholding mail fraud charges based on reimbursement of construction bond premiums by contract obligees to contractors in accordance with industry practice). Thus, the use of the mails by a state's department of motor vehicles to convey title to a purchaser of an automobile would be foreseeable because such mailings routinely occur in the ordinary course of business. See, e.g., Schmuck, 489 U.S. at 705; Hubbard, 96 F.3d at 1228. The use of the mails to facilitate inter-bank check clearing is also
mailing element of the offense will be deemed to have been met, even if the mailing were by the victim or an uninvolved third party.\(^{249}\)

In this connection, if the scheme involves multiple participants, conspiracy principles are applied. Thus, one participant in the scheme will be responsible for the use of the mail by other participants.\(^{251}\)

By analogy to federal mail fraud jurisdiction, use of the U.S. mail by a foreign national, or one acting on behalf of the foreign national, will give rise to U.S. jurisdiction so long as the mailing was in furtherance of a violation. The violation does not have to result from the mailing, however. Instead, what appears to be required is that the mailing be incidental to an essential part of the

\(^{249}\) See, e.g., United States v. Hickok, 77 F.3d 992 (7th Cir. 1996) (fraudulently procured commission from cellular telephone service provider); United States v. Alanis, 945 F.2d 1032, 1036 (8th Cir. 1991) (insurance company issued check in settlement of fraudulent claim); United States v. Nelson, 988 F.2d at 804 (undervalued invoice obtained from IBM by fraud); Hofstetter v. Fletcher, 905 F.2d 897, 902 (6th Cir. 1988) (victim mailed correspondence and tax return to IRS); \(Otto\), 742 F.2d at 109 (letter sent to defendant by victim of insurance fraud).

\(^{250}\) See, e.g., Schmuck v. United States, 489 U.S. 705 (1988) (title documents sent by state department of motor vehicles); \(Carpenter\), 484 U.S. at 19 (column published in newspaper); United States v. Lane, 474 U.S. 438 (1986) (correspondence between adjuster and insurer); United States v. Manges, 110 F.3d 1162 (5th Cir. 1997) (correspondence from state land authority); United States v. Slevin, 106 F.3d 1086, 1088 (2d Cir. 1996) (reimbursement of fraudulent performance bond premiums by third party); United States v. Hubbard, 96 F.3d 1223 (9th Cir. 1996) (mailing of title documents by state department of transportation); \(Hickok\), 77 F.3d at 992 (mailing of commission checks by cellular telephone service provider); \(Reed\), 47 F.3d at 298 (mailing of trust account statement by bank); \(Frey\), 42 F.3d at 795 (inquiries mailed by admiralty title analyst); \(Morrow\), 39 F.3d at 1228 (acknowledgment by insurer of receipt of claim); \(Koen\), 982 F.2d at 1101 (retainer checks from insurer to investigator); \(Kuzniar\), 881 F.2d at 466 (correspondence from insurer's lawyer); \(Draiman\), 784 F.2d at 248 (same); \(Freitag\), 768 F.2d at 243 (checks and account statements mailed by bank).

\(^{251}\) See United States v. Lothian, 976 F.2d 1257, 1262-63 (9th Cir. 1992) ("[J]ust as acts and statements of co-conspirators are admissible against other participants, we also apply similar principles of vicarious liability... 'knowing participants in the scheme are 'legally liable' for their co-schemers' use of the mails or wires"); \(accord\) United States v. Dick, 744 F.2d 546, 552 (7th Cir. 1984); United States v. Wormick, 709 F.2d 454, 461 (7th Cir. 1983).
scheme to violate the Act.

Furthermore, the use of the mail is not required to precede the violation, so long as the mailing is directly related to the overall success of the scheme.\textsuperscript{252} Thus, use of the mail to conceal the violation or to postpone discovery of the violation may be a sufficient basis for FCPA jurisdiction.

It is not necessary that the foreign national personally use the U.S. mail for any of these purposes. Rather, jurisdiction may be predicated on a mailing by an agent of a foreign national or by a co-participant in the FCPA violation, of which the foreign national is unaware.\textsuperscript{253} Moreover, a mailing by a wholly uninvolved third party, such as a bank, may provide a predicate for FCPA jurisdiction if the mailing is in furtherance of the violation and was reasonably foreseeable.

Accordingly, in specifying use of the mail, the FCPA appears to contemplate a broad basis for the assertion of U.S. subject matter jurisdiction over foreign nationals. Indeed, the use of the mails is not the sole predicate for finding jurisdiction.

3. \textit{Use of Any Means or Instrumentality of Interstate Commerce}

The FCPA also provides that jurisdiction can be based on the use of "any means or instrumentality of interstate commerce" in furtherance of a violation.\textsuperscript{254} The Securities Exchange Act of 1934, of which the FCPA is a part, establishes the same basis of jurisdiction for actions brought under its Section 10.\textsuperscript{255} Thus,

\begin{footnotesize}
\begin{enumerate}
\item See supra note 245 and accompanying text.
\item See supra note 251 and accompanying text.
\item § 78dd-3(a).
\item Section 10 of the Securities Exchange Act of 1934, § 78j, provides as follows:
\begin{enumerate}
\item It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—
\begin{enumerate}
\item To effect a short sale, or to use or employ any stop-loss order in connection with the purchase or sale, of any security registered on a national securities exchange, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.
\item To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so
\end{enumerate}
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\end{footnotesize}
decisions under Section 10 may also be instructive as to the jurisdictional reach of the FCPA.

Evidence of use of the mail is a prerequisite to establishing federal subject matter jurisdiction under Section 10.\textsuperscript{256} However, like the federal mail fraud statute, it is not necessary that the violation be shown to have been effectuated through use of mails. Instead, all that need be shown is that "the jurisdictional means are used in connection with a fraudulent scheme."\textsuperscript{257} Thus, the use of mails in connection with the inter-bank clearance of checks,\textsuperscript{258} as well as other communications in furtherance of the fraudulent scheme,\textsuperscript{259} are sufficient to establish federal jurisdiction under

registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

\textsuperscript{256} \textit{Id.}

\textsuperscript{257} \textit{McLaury v. Duff & Phelps, Inc.}, 691 F. Supp. 1090, 1095 (N.D. Ill. 1988) ("It is not necessary that the fraud be committed during and through the actual use of the jurisdictional means; to be a violation of Section 10(b) and Rule 10b-5, it is sufficient if the jurisdictional means are used in connection with the fraudulent scheme."); see also \textit{United States v. DeVeau}, 734 F.2d 1023, 1029 n.4 (5th Cir. 1984) ("In order to satisfy section [10(b)], the fraud need only be employed in connection with the instruments of interstate commerce."); \textit{Stevens v. Vowell}, 343 F.2d 374, 379 (10th Cir. 1965) ("All that is required is that the manipulative or deceptive device or contrivance be used or employed in connection with the use of the instruments of interstate commerce or the mails."); \textit{Kline v. Henrie}, 679 F. Supp. 464, 468 (M.D. Pa. 1988) (In order for the court to have jurisdiction under the Securities Exchange Act, "all that need be shown is that the mails have been used in furtherance of the alleged fraud.") (quoting \textit{United States v. Pray}, 452 F. Supp. 788, 794 (M.D. Pa. 1978)).

\textsuperscript{258} See \textit{e.g.}, \textit{United States v. Kunzman}, 54 F.3d 1522, 1527 (10th Cir. 1995); \textit{DeVeau}, 734 F.2d at 1029 n.4; \textit{McLaury}, 691 F. Supp at 1095; \textit{Starck v. Dewane}, 364 F. Supp. 466, 467 (N.D. Ill. 1973). Indeed, courts have suggested that the check clearance system itself should be considered an instrumentality of interstate commerce. \textit{McLaury}, 691 F. Supp. at 1095.

The system of clearing checks . . . is highly automated and integrated into the national banking system. Because our telephone system as a whole is integrated and an integral part of interstate commerce, courts consistently have held that even intrastate phone calls suffice to establish jurisdiction. For those same reasons, use of our system for clearing checks also should be considered use of an "instrumentality of interstate commerce" for purposes of Section 10(b).

\textit{Id.}

\textsuperscript{259} \textit{See}, \textit{e.g.}, \textit{Stevens}, 343 F.2d at 379 (mails used to introduce the victim to the scheme’s perpetrators); \textit{Marks v. CDW Computer Ctrs., Inc.}, 901 F. Supp. 1302, 1312 (N.D. Ill. 1995) (letter sent to plaintiff notifying him of his termination from employment
Section 10. Indeed, so long as the instrumentality used was "an integral part of an interstate system," intrastate use of mail or other instrumentalities will satisfy the jurisdictional requirement.\(^\text{260}\)

Use of the means of interstate telecommunications is also a jurisdictional predicate for actions under Section 10 of the Securities Exchange Act and under the federal wire fraud statute.\(^\text{261}\)

With regard to wire fraud, the principles governing the sufficiency of the nexus with interstate commerce in cases of mail fraud apply equally to establish subject matter jurisdiction.\(^\text{262}\)

In like fashion, the means of interstate telecommunication are also instrumentalities of interstate commerce, the use of which in furtherance of an unlawful scheme will give rise to federal subject matter jurisdiction over actions brought under Section 10. Like federal mail fraud, Section 10b jurisdiction does not require that the deception be effected directly through the telecommunication, so long as the telecommunication is made in connection with the fraudulent scheme.\(^\text{263}\) Also like the mail, the interstate

\(^{260}\) As stated in Kunzman: "As long as the instrumentality used is itself an integral part of an interstate system, Congress may regulate intrastate activities involving the use of the instrumentality under the federal securities law." 54 F.3d at 1527; accord Harrison, 435 F. Supp. at 284-85.

\(^{261}\) 18 U.S.C. § 1343 (1994) provides as follows:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than five years, or both.

\(^{262}\) See United States v. Allen, 76 F.3d 1348, 1362 (5th Cir. 1996); United States v. Frey, 42 F.3d 795, 797 n.2 (3d Cir. 1994); United States v. Bentz, 21 F.3d 37, 40 (3d Cir. 1994); United States v. Bruno, 809 F.2d 1097, 1104 (5th Cir. 1987); United States v. Puckett, 692 F.2d 663, 669 (10th Cir. 1982); United States v. Gioveno, 637 F.2d 941, 944 (3d Cir. 1980); United States v. Tarnopol, 561 F.2d 466, 475 (3d Cir. 1977); United States v. Calvert, 523 F.2d 895, 903 (8th Cir. 1975).

\(^{263}\) Thus, as explained in Gower v. Cohn, 643 F.2d 1146, 1152 (5th Cir. 1981):
telecommunication network is considered to be an integrated system, and accordingly, evidence of solely intrastate communication will support federal jurisdiction.

Additionally, federal jurisdiction does not require the defendant to engage in the telecommunication personally. Thus, where there is more than one perpetrator of the scheme, each participant will be held responsible for the telecommunications of the other participants, and, therefore, jurisdiction will lie against a defendant even though the defendant did not use the means of interstate communication. Similarly, when a defendant causes a

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264 See, e.g., United States v. Kunzman, 54 F.3d 1522, 1527 (10th Cir. 1995); Dupuy v. Dupuy, 511 F.2d 641, 643-44 (5th Cir. 1975) ("[W]e align ourselves with the great majority of courts which have considered this issue, and hold that intrastate use of the telephone may confer federal jurisdiction over a private action alleging violation of § 10 of the Securities Exchange Act of 1934 and SEC Rule 10b-5."); Kerbs v. Fall River Industries, Inc., 502 F.2d 731 (10th Cir. 1974):

Both intrastate and interstate telephone communications are part of an aggregate telephonic system as a whole and as long as the instrumentality itself is an integral part of an interstate system, Congress has the power, when necessary for the protection of interstate commerce, to include intrastate activities within regulatory control. Accordingly, we hold that proof of intrastate telephonic messages in connection with the employment of deceptive devices or contrivances is sufficient to confer jurisdiction in a 10(b) and Rule 10b-5 action.

Id. at 738; Myzel v. Fields, 386 F.2d 718, 728 (8th Cir. 1967):

[W]e recognize that the telephone system and its voice transmission by wire is an integrated system of both intrastate and interstate commerce. As such, proof of the interstate telephonic message is not a prerequisite to jurisdiction over a Section 10b action. As long as the instrumentality itself is an integral part of an interstate system, nothing in the Constitution requires Congress to exclude intrastate activities from its regulatory control.

Id.; see also Gower, 643 F.2d at 1151 ("The defendant, without question, placed an intrastate telephone call that was received by his mother, and he admits that an intrastate call can suffice.").

265 See, e.g., Kerbs, 502 F.2d at 737-38.

It is evident that throughout the course of their dealings with plaintiff, and in the implementation of their scheme to defraud him, [defendants] acted for and on behalf of each other, with a common purpose and with a common goal; each played his respective role in the overall plan to induce plaintiff to enter into the
third party to engage in the wire communication or when such a telecommunication is reasonably foreseeable, the requirements for federal subject matter jurisdiction will have been met.\textsuperscript{266}

Thus, federal jurisdiction does not require the direct use of the means of interstate communication in the accomplishment of the fraud. Indeed, wire communications used simply to arrange a meeting at which fraudulent representations were made have been held sufficient to give rise to federal jurisdiction under Section 10b of the Securities Exchange Act.\textsuperscript{267}

Moreover, other means of interstate commerce, unrelated to communication, have served as the basis of federal jurisdiction under Section 10b. For example, interstate travel by air\textsuperscript{268} and by

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\textsuperscript{266} See United States v. Boots, 80 F.3d 585 n.8 ("Defendants need not personally use the wires as long as such use was a reasonably foreseeable part of the scheme in which they participated."); \textit{Muni}, 668 F.2d at 89 ("While Muni did not personally make an interstate communication, he caused such a communication to be made.").


\textsuperscript{268} See, \textit{e.g.}, \textit{Kunzman}, 54 F.3d at 1527; United States v. Deveau, 734 F.2d 1023, 1025 (5th Cir. 1984).
automobile\textsuperscript{269} have been found to be sufficient uses of the instrumentalities of interstate commerce in Section 10b actions.

Accordingly, jurisdiction predicated on the use of the instrumentalities of interstate commerce is extremely broad, and it comprehends the involvement of virtually any channel of interstate commerce, including the means of communication and travel, so long as that channel is used in furtherance of the violation. The connection with the violation need not be direct. Use of the instrumentalities of interstate commerce even by persons other than the defendant will be deemed sufficient if use of the instrumentality was reasonably foreseeable as a result of defendant's actions or occurred in the ordinary course. Finally, use of an instrumentality of interstate commerce to conceal the violation will be considered to have been in furtherance of the violation and will therefore support subject matter jurisdiction.

Thus, the mailing of a letter; the use of the telephone system, the interbank clearing of a check, the wire transfer of funds, travel by air, by train, or on the interstate highway system by a foreign national or caused by a foreign national; if in furtherance of a violation, can provide a basis for jurisdiction under the amended FCPA.

\textbf{B. Extraterritorial Jurisdiction Over U.S. Nationals}

The 1998 Amendments prohibit an issuer or domestic concern from committing "any act outside the United States in furtherance of a violation of the anti-bribery provisions of the Act."\textsuperscript{270} U.S. jurisdiction over these acts will attach "irrespective of whether such United States person makes use of the mails or any means or instrumentality of interstate commerce . . . ."\textsuperscript{271} In short, jurisdiction based on nationality is asserted over all U.S. persons regardless of the situs of the acts in furtherance of the violation and regardless of whether there is a nexus to interstate commerce within the United States.

According to commentators, the United States is among "the least aggressive proponents" of "nationality-based criminal

\textsuperscript{269} See, e.g., Kunzman, 54 F.3d at 1527; Stevens v. Vowell, 343 F.2d 374, 376 (10th Cir. 1965).

\textsuperscript{270} §§ 78dd-1(g)1, -2(i)(1).

\textsuperscript{271} Id.
Nevertheless, the sovereign’s exercise of extraterritorial jurisdiction over its subjects abroad is well established under international law, which recognizes that a state has jurisdiction to prescribe “the activities, interests, status, or relations of its nationals outside as well as within its territory....” This principle of jurisdiction applies equally to individuals and entities and derives increasingly from domicile or residence rather than strict nationality.

Nationality-based jurisdiction is also well-established under U.S. law. As the Supreme Court has succinctly stated, “[t]he jurisdiction of the United States over its absent citizen, so far as the binding effect of its legislation is concerned, is a jurisdiction in personam, as he is personally bound to take notice of the laws that are applicable to him and to obey them.”


[C]riminalization of transnational bribery is permissible under the rules of international law. The nationality principle is accepted by all as a means of asserting criminal jurisdiction, and its use to regulate the conduct of nationals outside the territory of the home country does not constitute an affront to the host country.

274 RESTATEMENT, supra note 145, § 402(2) cmt. e.

275 Id.

276 As early as 1807, Chief Justice Marshall observed that “it is conceded that the legislation of every country is territorial; that beyond its own territory, it can only affect its own subjects or citizens.” Rose v. Himley, 8 U.S. 241, 279 (1808).

277 Blackmer v. United States, 284 U.S. 421, 438 (1932). The Court also observed that the exercise of congressional authority over absent citizens raised no issues of international law or of legislative power, but rather was only a question of construction.

With respect to such an exercise of authority, there is no question of international law, but solely of the purport of the municipal law which establishes the duties of the citizen in relation to his own government. While the legislation of the Congress, unless the contrary intent appears, is construed to apply only within the territorial jurisdiction of the United States, the question of its application, so far as citizens of the United States in foreign countries are concerned, is one of construction, not of legislative power.

Id. at 437 (citations omitted); see also Skiriotes v. Florida, 313 U.S. 69 (1941).

[T]he United States is not debarred by any rule of international law from governing the conduct of its own citizens upon the high seas or even in foreign
The jurisdiction of the United States over its absent nationals has been upheld in a variety of settings, including crimes committed by U.S. nationals on the high seas,\textsuperscript{278} treason,\textsuperscript{279} manufacture of a controlled substance in a foreign country with the intent to import it into the United States,\textsuperscript{280} taking sexually explicit photographs of a minor outside the United States,\textsuperscript{281} false claims against the United States,\textsuperscript{282} theft of U.S. government property,\textsuperscript{283} trade-mark infringement,\textsuperscript{284} monopoly and unfair trade practices,\textsuperscript{285} compulsory process issued to a U.S. national overseas,\textsuperscript{286} application of the automatic stay in bankruptcy,\textsuperscript{287} and the application of a state statute providing for the survival of a right of action and recovery.\textsuperscript{288}

Although historically there has been a reluctance to assert countries when the rights of other nations or their nationals are not infringed. With respect to such an exercise of authority there is no question of international law, but solely of the purport of the municipal law which establishes the duty of the citizen in relation to his own government.

\textit{Id.} at 73 (citations omitted).

\textsuperscript{278} See, e.g., \textit{Skiriotes}, 313 U.S. at 69 (use of diving equipment in the taking of sponges); United States v. Flores, 289 U.S. 137 (1933) (murder); United States v. Kaeracher, 720 F.2d 5, 5-6 (1st Cir. 1983) (possession of contraband); United States v. Smith, 680 F.2d 255, 258 (1st Cir. 1982) (possession of contraband); United States v. Perez-Herrera, 610 F.2d 289, 292 (5th Cir. 1980) (possession of contraband).

\textsuperscript{279} E.g., Iva Ikulo Toguri D'Aquino v. United States, 192 F.2d 338 (9th Cir. 1951); Bourgman v. United States, 188 F.2d 637, 639 (D.C. Cir. 1950); Gillars v. United States, 182 F.2d 978-79 (D.C. Cir. 1950); Chandler v. United States, 171 F.2d 921, 929-31 (1st Cir. 1948).

\textsuperscript{280} E.g., United States v. King, 552 F.2d 833, 850-52 (9th Cir. 1976).

\textsuperscript{281} E.g., United States v. Thomas, 893 F.2d 1066, 1068-69 (9th Cir. 1990).

\textsuperscript{282} E.g., United States v. Bowman, 260 U.S. 94, 96-103 (1922).

\textsuperscript{283} E.g., United States v. Cotten, 471 F.2d 744, 749-51 (9th Cir. 1973).


\textsuperscript{285} E.g., Pac. Seafarers v. Pac. Far E. Line, Inc., 404 F.2d 804 (D.C. Cir. 1968); Branch v. FTC, 141 F.2d 31, 35 (7th Cir. 1944). \textit{But cf.} Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 356 (1909) (holding that "the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done.").

\textsuperscript{286} E.g., Blackmer v. United States, 284 U.S. 421, 436-37 (1932); see also United States v. Lansky, 496 F.2d 1063, 1067 (5th Cir. 1974).

\textsuperscript{287} E.g., \textit{In re Rimsat}, Ltd., 98 F.3d 956, 961 (7th Cir. 1996).

\textsuperscript{288} E.g., Old Dominion S.S. Co. v. Gilmore, 207 U.S. 398, 402, 405-07 (1907).
nationality-based jurisdiction over extraterritorial criminal acts, there is a recognized basis under international law and United States law to do so. For that reason, virtually any act of a United States national in furtherance of a violation of the FCPA could result in federal subject matter jurisdiction.

C. Reasonableness of Jurisdiction

The jurisdictional provisions of the 1998 Amendments can be construed as conferring federal subject matter jurisdiction over a foreign national anytime the channels of U.S. interstate commerce are implicated in a violation, and over a U.S. national based on acts committed anywhere in the world. Principles of international law and United States precedent counsel, however, that this jurisdiction only be invoked when U.S. interests are directly involved and when the assertion of U.S. jurisdiction is a reasonable exercise of U.S. sovereignty.

When the interests and sovereignty of other nations would be implicated by the assertion of U.S. jurisdiction, principles of international law dictate that the exercise of prescriptive jurisdiction be tempered by reasonableness and fairness. Determinations of reasonableness require an examination of the various national interests involved rather than an application of rigid rules.

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289 See generally Watson, supra note 272.


291 Id. § 403 cmt. a. As Professor Steven R. Salbu observed, the assertion of extraterritorial jurisdiction carries with it both moral peril and political peril. "The moral peril consists of the dangers of intrusiveness, paternalism, imperialism, and disrespect that arise whenever one state imposes its discretionary values upon another state. The political peril entails the ill will, as well as the potential conflict, that can result from the imposition of alien values." Steven R. Salbu, Extraterritorial Restriction of Bribery: A Premature Evocation of the Normative Global Village, 24 Yale J. Int’l L. 223, 226-27 (1999).

292 Restatement, supra note 145, § 403(2). Thus, as the Restatement notes: International law has long recognized limitations on the authority of states to exercise jurisdiction to prescribe in circumstances affecting the interests of other states. In the past, the jurisdiction of a state to make its law applicable in a transactional context was determined by formal criteria supposedly derived from concepts of state sovereignty and power. In principle, it was accepted that a state had jurisdiction to exercise its authority within its territory and with respect to its nationals abroad.
There was international hostility toward the aggressive assertion of jurisdiction over foreign nationals for acts committed abroad, largely due to attempts by the United States and a few other countries to construe territorial jurisdiction and nationality-based jurisdiction broadly. In recognition of the complexities of transnational commerce, international law has tempered the assertion of extraterritorial prescriptive jurisdiction with principles of reasonableness.

Thus, in order to accommodate potentially conflicting national interests, reliance on strict rules and formal criteria for the exercise of extraterritorial jurisdiction based on territoriality and nationality has given way to concepts of reasonableness in which the interests of involved states and parties are weighed in the search for a jurisdictional "center of gravity." Accordingly, as provided in the Restatement (Third) of Foreign Relations Law of the United States, "even when one of the bases for jurisdiction . . . is present, a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when . . .

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Id. pt. IV, ch. 1, subch. A, introductory note.

293 Id. pt. IV, ch. 1, subch. A, introductory note. Thus the Restatement observes that "attempts by some states—notably the United States—to apply their law on the basis of very broad conceptions of territoriality or nationality bred resentment and brought forth conflicting assertions of the rules of international law." Id.

294 Id. As the Restatement explains:

Increasingly, the practice of states has reflected conceptions better adapted to the complexities of contemporary international intercourse. State sovereignty was to be controlled by law, and its power tempered by reason and reasonableness. States have not in fact regulated all the foreign activities of their nationals (or affiliates of their nationals), nor every activity that could be said to have some effect in their territory.

Id.

295 Id. In this regard, the Restatement provides:

Territoriality and nationality remain the principle bases of jurisdiction to prescribe, but in determining their meaning rigid concepts have been replaced by broader criteria embracing principles of reasonableness and fairness to accommodate overlapping or conflicting interests of states, and affected private interests. Courts and other decision makers, learning from the approach to comparable problems in private international law, are increasingly inclined to consider various interests, examine contacts and links, give effect to justified expectations, search for the "center of gravity" of a given situation, and develop priorities.

Id.
the exercise of such jurisdiction is unreasonable.\textsuperscript{296}

The reasonableness of one nation’s exercise of its prescriptive jurisdiction over the nationality of another depends on a variety of factors. Among these factors are the degree to which the act resulting in the violation occurred within the territory of the nation asserting jurisdiction and the degree to which any extraterritorial conduct produces effects within the nation asserting jurisdiction.\textsuperscript{297}

\textsuperscript{296}Id. \textsuperscript{297}Id. § 403(2). As set forth in the Restatement, these factors are:

(a) the link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;

(b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;

(c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;

(d) the existence of justified expectations that might be protected or hurt by the regulation;

(e) the importance of the regulation to the international political, legal, or economic system;

(f) the extent to which the regulation is consistent with the traditions of the international system;

(g) the extent to which another state may have an interest in regulating the activity; and

(h) the likelihood of conflict with regulation by another state.

Id. These factors are to be considered particularly when “one state exercises jurisdiction over activity in its territory and the other [state’s territory] on the basis of the effect of that activity in its territory.” Id. § 403 cmt. d. Accordingly, “[w]here regulation of transnational activity is based on its effects in the territory of the regulating state, the principal of reasonableness calls for limiting the exercise of jurisdiction so as to minimize conflict with the jurisdiction of other states, particularly with the state where the act takes place.” Id. § 403 reporters’ note 3. The requirement of reasonableness in the exercise of extraterritorial jurisdiction is not simply a matter of comity but is a rule of international law. See id. § 403 cmt. a:

Some United States courts have applied the principle of reasonableness as a requirement of comity, that term being understood not merely as an act of discretion and courtesy but as reflecting a sense of obligation among states. This section states the principal of reasonableness as a rule of international law.

Application of territorial or nationality-based jurisdiction could support assertions of worldwide jurisdiction in denigration of the sovereignty of nations. Thus, it has been
Two generally recognized tests of whether the assertion of U.S. subject matter jurisdiction over a foreign nation is reasonable emerge from this analysis: the "conduct doctrine" and the "effects doctrine."

1. The Conduct Doctrine

In cases decided under Section 10 of the Securities Exchange Act, the courts have striven to define the contours of the domestic conduct necessary for subject matter jurisdiction, particularly where the victims of the fraudulent scheme, or the perpetrators, or

observed that "[t]he realization that the effects approach could potentially lead to worldwide jurisdiction, coupled with the fact that jurisdiction has often not been exerted over conduct within the United States or involving United States nationals, suggests that states, in effect, temper the power of territoriality and citizenship with other considerations." Note, Constructing the State Extraterritorially: Jurisdictional Discourse, the National Interest, and Transnational Norms, 103 HARV. L. REV. 1273, 1277 (1990) (footnotes omitted). The reasonableness of the exercise of jurisdiction has been viewed as implicating due process, Ziegler v. Indian River County, 64 F.3d 470, 474-75 (9th Cir. 1995), and courts consider the reasonableness of exercising jurisdiction in a particular setting when determining whether Congress intended a law to have extraterritorial effect. See, e.g., United States v. Javino, 960 F.2d 1137, 1142-43 (2d Cir. 1992) (concluding that the requirements of the National Firearms Act did not apply to destructive devices manufactured outside the United States); United States v. Felix-Gutierrez, 940 F.2d 1200, 1204-05 (9th Cir. 1991) (holding that the crime of "accessory after the fact" gave rise to extraterritorial jurisdiction to the same extent as the underlying offense); United States v. Wright-Barker, 784 F.2d 161, 168 (3d Cir. 1986) (holding that extraterritorial jurisdiction over a conspiracy to import 23 tons of marijuana was reasonable). In this connection, Restatement § 403(1) provides that "[e]ven when one of the bases of jurisdiction . . . is present, a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable." RESTATEMENT, supra note 145, at § 403 cmt. a; see also RESTATEMENT, supra note 145, pt. IV, introductory note. As Judge Learned Hand observed in United States v. Aluminum Co. of Am., 148 F.2d 416, 443 (2d Cir. 1945), "[w]e should not impute to Congress an intent to punish all whom its courts can catch, for conduct which has no consequences in the United States." Thus, comment a to Restatement § 403 explains:

There is wide international consensus that the links of territoriality or nationality, while generally necessary, are not in all instances sufficient conditions for the exercise of such jurisdiction. Legislatures and administrative agencies, in the United States and in other states, have generally refrained from exercising jurisdiction where it would be unreasonable to do so, and courts have usually interpreted general language in a statute as not intended to exercise or authorize the exercise of jurisdiction in circumstances where application of the statute would be unreasonable.

RESTATEMENT, supra note 145, at § 403 cmt. a
both, are foreign. Congress' intent to give extraterritorial effect is clearer in the FCPA than it is in Section 10; therefore, courts may not face, to the same extent, the task of "fill[ing] the void" created by a combination of congressional silence and the growth of international commerce since the Exchange Act was passed in 1934.  

Nevertheless particularly where transactions are predominantly foreign, it is incumbent upon a court "to determine whether Congress would have wished the precious resources of United States courts and law enforcement agencies to be devoted to these foreign transactions rather than leave the problem to foreign countries." The "conduct doctrine" is an analytical framework that courts have developed to make this determination.

The doctrine, also referred to as the "conduct test," focuses on acts committed within the territorial United States and seeks to vindicate the national interest by preventing the United States from becoming a haven for criminality. Thus, the conduct

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298 Robinson v. TCI/US W. Communications, Inc., 117 F.3d 900, 905 (5th Cir. 1997). The Fifth Circuit explained earlier:

The jurisdictional provisions of the federal securities laws furnished no specific indications of when American federal courts have jurisdiction over securities law claims arising from extraterritorial transactions. When Congress drafted the securities laws, it did not consider the issue of extraterritorial applicability, requiring that the federal courts fill the void.


300 As was stated in IIT v. Vencap, Ltd., 519 F.2d 1001, 1017 (2d Cir. 1975), "[w]e do not think Congress intended to allow the United States to be used as a base for manufacturing fraudulent security devices for export, even when these are peddled only to foreigners." Id. at 1017. This view was also expressed in SEC v. Kasser, 548 F.2d 109, 114 (3d Cir. 1977), cert. denied, 431 U.S. 938 (1977):

We are, like the IIT court, skeptical that Congress wished to preclude all SEC suits for injunctive relief where the victim of a fraudulent scheme happens to be foreign or where there was insubstantial impact on the United States. Consequently, we decline to immunize, for strictly jurisdictional reasons, defendants who unleash from this country a pervasive scheme to defraud a foreign corporation. This would appear to be especially appropriate where the corporation is owned by a foreign governmental subdivision of a neighboring nation.

The court in MGC, Inc., identified three policy considerations bearing on whether Section 10b of the Exchange Act should be given extraterritorial effect under the conduct doctrine, where the "effects test" is found not to apply:
doctrine bears directly on the assertion of extraterritorial jurisdiction based upon the territorial principle. Not surprisingly, however, courts do not fully agree on the nature of conduct required to engender subject matter jurisdiction, particularly where a transaction or fraudulent scheme has not had a significant effect in the United States. 301

The decisions applying the conduct doctrine to find extraterritorial jurisdiction describe a range of activities. The most stringent view recognizes extraterritoriality only when the conduct in the United States constitutes all of the elements of the offense. 302

The least stringent construction of the conduct test would sustain extraterritorial jurisdiction if "some activity" designed to further a
fraudulent scheme occurred within the United States.\footnote{303} Other courts have taken a moderate view in evaluating domestic conduct for purposes of extraterritorial jurisdiction. Thus, some courts require that the action in furtherance of the fraudulent scheme be “significant with respect to its accomplishment.”\footnote{304} Other courts, notably the Second Circuit,\footnote{305} require that the U.S. conduct be

\footnote{303} This was the view of the Third Circuit expressed in Kasser, in which the court opined, “[i]n our view, the federal securities laws do grant jurisdiction in transnational securities cases where at least some activity designed to further a fraudulent scheme occurs within this country.” 548 F.2d at 114.

\footnote{304} This was the test applied by the Eighth Circuit in Cont’l Grain (Austl.) Pty. Ltd. v. Pac. Oilsseeds, Inc., 592 F.2d 409 (8th Cir. 1979). The court stated as follows:

“Where the defendant’s conduct in the United States was in furtherance of a fraudulent scheme and was significant with respect to its accomplishment, and moreover necessarily involved the use of the mails and other instrumentalities of interstate commerce, the district court has subject matter jurisdiction.”

\textit{Id.} at 421. The Ninth Circuit in Grunenthal GmbH v. Hotz adopted the Eighth Circuit’s formulation of the conduct test. 712 F.2d 421, 425 (9th Cir. 1983) (“We adopt the Continental Grain test and hold that defendant’s conduct was sufficient to establish subject matter jurisdiction. The misrepresentations that took place in this country were 'significant with respect to the alleged violation[s],' and ‘furthered the fraudulent scheme.’”) (citations omitted).

\footnote{305} Beginning with its decision in Schoenbaum v. First Brook, 405 F.2d 200, 209-10 (2d Cir. 1968), the U.S. Court of Appeals for the Second Circuit, which has been described as the “mother court” in interpreting the federal securities laws, Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 762 (1975) (Blackmun, J, dissenting), has decided a number of cases concerning the applicability of Section 10 of the Exchange Act to overseas transactions involving foreign nationals. In Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326 (2d Cir. 1972), decided four years after Schoenbaum, the Second Circuit recognized the applicability of the Exchange Act to a transaction in the shares of a British company on the London Stock Exchange based on conduct occurring in the United States:

“Conduct within the territory alone would seem sufficient from the standpoint of jurisdiction to prescribe a rule. It follows that when, as here, there has been significant conduct within the territory, a statute cannot properly be held inapplicable simply on the ground that, absent the clearest language, Congress will not be assumed to have meant to go beyond the limits recognized by foreign relations law.”

468 F.2d at 1334. Following its decision in Leasco, the Second Circuit has decided a series of cases applying and refining the “conduct test.” \textit{E.g.,} Eur. & Overseas Commodity Traders, S.A. v. Banque Paribas London, 147 F.3d 118, 128-29 (2d Cir. 1998); Itoha Ltd. v. Lep Group PLC, 54 F.3d 118, 122 (2d Cir. 1995); Alfadda v. Fenn, 935 F.2d 475, 478 (2d Cir. 1991); AVC Nederland B.V. v. Atrium Inv. P’ship, 740 F.2d 148, 153-54 (2d Cir. 1984); Psimenos v. E.F. Hutton & Co., 722 F.2d 1041, 1046 (2d Cir. 1983); IIT v. Cornfeld, 619 F.2d 909, 918-21 (2d Cir. 1980); Vencap, 519 F.2d at
more than "mere preparation" and that the conduct be "substantial acts in furtherance of the scheme," or acts that are "material to the successful completion of the alleged [scheme]," or which "significantly contributed to" the success of the scheme. Also, the U.S. conduct must have "directly caused" the loss.

Accordingly, it is clear that jurisdictional acts, such as making international telephone calls or sending mail into the United States, are appropriate predicates to U.S. subject matter jurisdiction.


306 Eur. & Overseas Commodity Traders, S.A., 147 F.3d at 129; see also Kauthar, 149 F.3d at 667; Robinson, 117 F.3d at 905; Itoha, 54 F.3d at 122; Alfadda, 935 F.2d at 478; Psimenos, 722 F.2d at 1045-46, Vencap, 519 F.2d at 1018; Bersch, 519 F.2d at 987.

307 Psimenos, 722 F.2d at 1045.

308 Tamari v. Bache & Co. (Leb.) S.A.L., 730 F.2d 1103, 1108; see also Kauthar, 149 F.3d at 666-67; Alfadda, 935 F.2d at 478; Psimenos, 722 F.2d at 1046.

309 E.g., Itoha, 54 F.3d at 122; Bersch, 519 F.2d at 993; see also Leasco, 468 F.2d at 1335.

310 Alfadda, 935 F.2d at 478 ("Under the 'conduct' test, a federal court has subject matter jurisdiction if the defendant's conduct in the United States was more than merely preparatory to the fraud, and particular acts or culpable failures to act within the United States directly caused losses to foreign investors abroad."); see also Kauthar, 149 F.3d at 667. The court in Kauthar stated as follows:

We believe . . . that federal courts have jurisdiction over an alleged violation of the antifraud provisions of the securities laws when the conduct occurring in the United States directly causes the plaintiff's alleged loss in that the conduct forms a substantial part of the alleged fraud and is material to its success. Id.; see also Psimenos, 722 F.2d at 1046 ("[O]nly where conduct 'within the United States directly caused' the loss will a district court have jurisdiction over suits by foreigners who have lost money through sales abroad."); Bersch, 519 F.2d at 993 ("We have . . . concluded that the anti-fraud provisions of the federal securities laws . . . do not apply to losses from sales of securities to foreigners outside the United States unless acts (or culpable failures to act) within the United States directly caused such losses.").

311 E.g., Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326, 1335 (2d Cir. 1972) ("[W]e see no reason why, for purposes of jurisdiction to impose a rule, making telephone calls and sending mail to the United States should not be deemed to constitute conduct within it.").
However, those acts alone should not be sufficient to establish jurisdiction under the FCPA over an absent foreign national who otherwise had no contact with the United States. Indeed, as one court noted, "the line has to be drawn somewhere if the securities laws are not to apply in every instance where something has happened in the United States..." 

The conduct doctrine should be employed as it is in cases under Section 10 of the Exchange Act. Those cases apply the doctrine to determine whether conduct in the United States in furtherance of the violation is of sufficient materiality reasonably to assert extraterritorial subject matter jurisdiction.

Thus, the use of the mail or of an instrumentality of interstate commerce, or the commission of any other act in the United States in furtherance of a violation would be sufficient to warrant the assertion of subject matter jurisdiction over a foreign national under the FCPA if: (1) the action was more than mere preparation; (2) the action was material to the perpetration of the violation; and (3) it could fairly be said that the action directly caused the violation.

2. The Effects Doctrine

Unlike the conduct doctrine which focuses on conduct that takes place within the United States in furtherance of a violation, the effects doctrine evaluates the extraterritorial applicability of U.S. law to foreign conduct that directly implicates U.S. interests.

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Although phone calls (or any other communications into the United States) soliciting or conveying an offer to sell securities ordinarily would be sufficient to support jurisdiction, it would be inconsistent with the law of this circuit to accept jurisdiction over this dispute, because the surrounding circumstances show that no relevant interest of the United States was implicated. In other words, a series of calls to a transient foreign national in the United States is not enough to establish jurisdiction under the conduct test without some additional factor tipping the scales in favor of our jurisdiction.

Id.

313 IIT v. Vencap, Ltd., 519 F.2d 1001, 1018 (2d Cir. 1975) ("[T]he line has to be drawn somewhere if the securities laws are not to apply in every instance where something has happened in the United States, however large the gap between the something and a consummated fraud and however negligible the effect in the United States or on its citizens.").
Under the effects doctrine, “courts have looked to whether conduct occurring in foreign countries had caused foreseeable and substantial harm to interests in the United States.”

For this reason, the effects doctrine analysis has relevance in determining the reasonableness of asserting U.S. jurisdiction over the extraterritorial acts of foreign nationals under the “objective territoriality” principle and the acts of U.S. nationals overseas.


315 With respect to the “objective territoriality” principle of jurisdiction, it has been said that “American law has traditionally allowed the assertion of jurisdiction over offenses when the conduct giving rise to the offense has occurred extra-territorially, as long as the harmful effect(s) or result(s) take place within the jurisdiction’s territorial boundaries . . .” Blakesley, supra note 147, at 1123. Thus, in Strassheim v. Daly, 221 U.S. 280, (1911), Mr. Justice Holmes stated as follows:

Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm as if he had been present at the effect, if the state should succeed in getting him within its power.


The principle that a man who outside of a country willfully puts in motion a force to take effect in it is answerable at the place where the evil is done, is recognized in the criminal jurisprudence of all countries. And the methods which modern invention has furnished for the performance of criminal acts in that manner has made this principle one of constantly growing importance and of increasing frequency of application.

273 U.S. at 623.

The effects doctrine is rooted in the jurisprudence of the “objective territoriality principle.” A.D. Neale & M.L. Stephens, International Business and National Jurisdiction 167 (1988) (“The mainstream view in the United States, however, is that the ‘effects doctrine’ derives from the ‘objective’ territorial principle under which a state may exercise jurisdiction over a crime completed or consummated in its territory but initiated or set in train elsewhere.”). Beginning with Judge Learned Hand’s decision in United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945), in which he stated that “any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state apprehends.” Id. at 443. The courts of the United States abandoned the apparently strict rule of territoriality applied by Justice Holmes in Am. Banana Co. v. United States, 213 U.S. 347, 356 (1909), and fashioned an effects-based analysis, applying the federal antitrust laws to conduct outside the United States. The effects analysis is consistent with the view expressed in the Restatement that “the link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place within the territory, or has substantial, direct and foreseeable effect upon or in the territory” is one of the factors considered when determining whether the exercise of jurisdiction is reasonable. Restatement, supra note 145, § 403(2)(a).
under the nationality principle.

The effects doctrine has developed primarily in the context of the extraterritorial application of federal antitrust laws, where it is now deeply entrenched.\textsuperscript{316} Jurisdictional analysis under the effects doctrine generally requires that the foreign conduct have a substantial effect on U.S. commerce.\textsuperscript{317} The interests of foreign nations, however, are also to be taken into consideration.\textsuperscript{318}

The effects doctrine is also an established test or jurisdiction under federal securities laws.\textsuperscript{319} Similar to the analysis under the

\textsuperscript{316} For example, the Supreme Court observed in \textit{Hartford Fire Ins. Co. v. Cal.}, 509 U.S. 764 (1993), that "[a]lthough the proposition was perhaps not always free from doubt, it is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." \textit{Id.} at 795-96 (citations omitted); see also Donald I. Baker, \textit{Antitrust and World Trade: Tempest in an International Teapot?}, \textit{8 Cornell Int'l L.J.} 16, 37 (1974):

Suffice it to say, however, that it is no longer the place of the act that is key. When the act or agreement can be shown to have a direct effect on the markets within the United States, our law should reach it—and this is especially so where the act was clearly intended to affect our market.

\textsuperscript{317} In \textit{Timberlane Lumber Co. v. Bank of Am. N.T. & S.A.}, 549 F.2d 597 (9th Cir. 1976), the Ninth Circuit held that extraterritorial antitrust jurisdiction required: 1) that there be an affect on, or an intent to effect, U.S. commerce; 2) that the effect be substantial; and 3) that the exercise of jurisdiction not offend principles of international comity and fairness. \textit{Id.} at 615. Three years later, the Third Circuit held that a "substantial effect" on U.S. commerce was required to sustain antitrust jurisdiction over foreign acts. Mannington Mills, Inc. \textit{v. Congoleum Corp.}, 595 F.2d 1287, 1292 (3d Cir. 1979). The Sherman Act, 15 U.S.C. §§ 1-7 (1994), was subsequently amended by the Foreign Trade Antitrust Improvements Act of 1982, Pub. L. No. 97-290, § 401, 96 Stat. 1233, 1246, to include the requirement that in order to invoke the jurisdiction of U.S. courts, the alleged extraterritorial monopolistic conduct must have had "a direct, substantial and reasonably foreseeable effect" on domestic commerce. 15 U.S.C. § 6a(1)(A).

\textsuperscript{318} As U.S. Secretary of State George Shultz stated in his 1984 address to the South Carolina Bar Association:

The United States... will continue to maintain that it is entitled under international law to exercise its jurisdiction over conduct outside the United States in certain situations. We will continue to preserve the statutory authority to do so. But we will exercise the authority with discretion and restraint, balancing all the important interests involved, American and foreign, immediate and long-term, economic and political.

\textit{Neale & Stephens}, \textit{supra} note 315, at 166. The necessity of balancing of foreign interests had also been recognized by the Ninth Circuit in \textit{Timberlane Lumber Co.}, 549 F.2d at 614-15; and by the Third Circuit in \textit{Mannington Mills, Inc.}, 595 F.2d at 1297-98.

\textsuperscript{319} An "effects test" under the federal securities laws was first articulated by the
antitrust laws, extraterritorial jurisdiction under the federal securities laws requires that the foreign conduct have a direct (not general) and substantial (not theoretical) effect on persons whom the law is intended to protect.\textsuperscript{320}


\textsuperscript{320} For example, in \textit{Mak v. Wocom Commodities Ltd.}, 112 F.3d 287 (7th Cir. 1997), the court observed as follows:

Our courts cannot assume jurisdiction of foreign actors whose foreign fraudulent activities might only be theorized to have had some vague and immeasurable effect on our markets. Those foreign traders who want the protection afforded by our investment laws must either show contact with American exchanges or show particularized harm to our domestic markets. \textit{Id.} at 291. Similarly, in \textit{Bersch}, the court rejected plaintiffs' expert testimony concerning the generalized effects on the U.S. capital markets caused by the collapse of Investors Overseas Services Fund as insufficient to confer subject matter jurisdiction. 519 F.2d at 989. The court concluded as follows:

\textit{[T]}here is subject matter jurisdiction of fraudulent acts relating to securities which are committed abroad only when these result in injury to purchasers or sellers of those securities in whom the United States has an interest, not where acts simply have an adverse affect on the American economy or American
Congress has exercised its effects-based jurisdiction by enacting a variety of criminal statutes.\textsuperscript{321} Criminal jurisdiction over extraterritorial acts has also been grounded in the effects doctrine.\textsuperscript{322}

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\textit{Id.}
\end{flushright}


\textsuperscript{322} The courts have often recognized the effects doctrine as justifying jurisdiction over extraterritorial conspiracies to violate the contraband laws of the United States. \textit{E.g.}, Ford v. United States, 273 U.S. 593, 621-22 (1927); United States v. MacAllister, 160 F.3d 1304, 1307-08 (11th Cir. 1998); United States v. Klimavicos-Viloria, 144 F.3d 1249, 1257 (9th Cir. 1998); United States v. Palella, 846 F.2d 977, 980 (5th Cir. 1988); United States v. Alomia-Riascos, 825 F.2d 769, 771 (4th Cir. 1987); United States v. Wright-Baker, 784 F.2d 161, 167-68 (3d Cir. 1986); United States v. Gonzales, 776 F.2d 931, 934-35 (11th Cir. 1985); United States v. Lozzi-Vasquez, 735 F.2d 153, 156 (5th Cir. 1984); United States v. Orozco-Prada, 732 F.2d 1076, 1087-88 (2d Cir. 1984); Mow v. United States, 730 F.2d 1308, 1312 (9th Cir. 1984); United States v. Arra, 630 F.2d 836, 840 (1st Cir. 1980); United States v. Ricardo, 619 F.2d 1124, 1128-29 (5th Cir. 1980); United States v. Cadena, 585 F.2d 1252, 1257 (5th Cir. 1978); United States v. King, 552 F.2d 833, 850-52 (9th Cir. 1976); United States v. Winter, 509 F.2d 975, 980-83 (5th Cir. 1975); United States v. Cadena, 585 F.2d 1252, 1257 (5th Cir. 1978); United States v. Woodward, 149 F.3d 46, 67 (1st Cir. 1998) (bribery); Stegemen v. United States, 425
Courts have exercised a fair degree of flexibility in applying the effects doctrine to find subject matter jurisdiction. However, where U.S. interests have not been demonstrably affected, courts have not hesitated to reject extraterritorial subject matter jurisdiction under an effects analysis.


For example, in Lawrence v. SEC, 398 F.2d 276, 278 (1st Cir. 1968), the court observed as well established the principal "[t]hat the jurisdictional hook need not be large to fish for securities law violations."

E.g., Kauthar SDN BHD v. Sternberg, 149 F.3d, 659, 665 (7th Cir. 1998) (finding that the Malaysian corporation’s investment in a satellite communications company incorporated in Nevis, with its principle place of business in Indiana did not effect U.S. interests); Eur. & Overseas Commodity Traders, S.A. v. Banque Paribas London, 147 F.3d 118, 128 (2d Cir. 1998):

If evaluated as an effect, the U.S. interest affected by this transaction is indiscernible . . . the plaintiff is a Panamanian corporation; the individual who placed the purchase orders, and who ultimately suffered any losses, is a Canadian citizen; the securities are not traded on a U.S. exchange; and no effect on a U.S. affiliated company is alleged by EOC. There is, thus, no U.S. entity that Congress could have wished to protect from the machinations of swindlers.

Id.; Mak, 112 F.3d at 290 (explaining that there was no U.S. jurisdiction where investor and broker were both located in Hong Kong and the omission resulting in the losses—the “bucketing” of orders to trade commodity futures contracts on U.S. exchanges occurred in Hong Kong); Butte Mining PLC v. Smith, 76 F.3d 287, 290 (9th Cir. 1996).

The sale occurred outside the United States. Neither the purchaser nor the sellers were United States entities. The securities markets were neither used nor affected. The fraud alleged was a fraud committed by foreign individuals on a foreign corporation in a foreign country. [Plaintiffs] failed to allege any effect on United States citizens or on United States securities markets . . . .

Id.; MGC, Inc. v. Great W. Energy Corp., 896 F.2d 170, 174 (5th Cir. 1990) (holding that no U.S. jurisdiction under effects test because defendant’s stock was not traded on a U.S. exchange and no American individual or entity invested in the foreign offering); Cont’l Grain (Austl.) Pty. Ltd. v. Pac. Oilseeds, Inc., 592 F.2d 409 (8th Cir. 1979).

The only victim of the alleged fraud was a foreign corporation, Continental; the securities involved are those of a foreign corporation, PacSeeds, and were never registered or listed on a national securities exchange; and the financial loss to Continental Grain Corp., the American corporate parent is not direct. In the present case . . . it is questionable whether any effect in the United States was
When a foreign national or a U.S. national overseas commits acts in furtherance of a corrupt payment on behalf of a U.S. company or a company subject to U.S. jurisdiction, that action would directly and substantially affect U.S. interests sufficient to engender federal subject matter jurisdiction under the effects doctrine. Similarly, where overseas acts in furtherance of a corrupt payment harms a U.S. company—that is, a corrupt payment by a foreign competitor that has the effect of preventing a U.S. company from obtaining or retaining business—the effect on the U.S. company would provide at least an arguable basis for jurisdiction over the extraterritorial acts under an effects analysis. In contrast, however, where a U.S. company is not affected by a corrupt transaction—either because the U.S. company was not a participant in the corrupt payment or because the U.S. company was not a competitor in the procurement influenced by the corrupt payment—no substantial U.S. interests would be implicated and the assertion of U.S. jurisdiction over the participants in the transaction would therefore be unreasonable under international law.

Accordingly, even though a basis exists for asserting jurisdiction under the amended FCPA over a foreign national or over an absent U.S. national, international law counsels forbearance from asserting jurisdiction unless the exercise of jurisdiction would be reasonable. This, in turn, requires an appraisal of the U.S. interests that may be affected.

When actions taken within United States territory directly and substantially further a violation of the FCPA, the United States may assert jurisdiction consistent with the conduct doctrine. In like fashion, actions taken outside the United States that directly and substantially affect U.S. interests would give rise to U.S. jurisdiction under the effects doctrine. However, where U.S. interests are not implicated, the assertion of subject matter

wrought by the alleged fraudulent activity of the defendant(s).

Id. at 417; IT v. Vencap, Ltd., 519 F.2d 1001, 1017 (2d Cir. 1975) (explaining that American investors held only a half percent of fund thus losses occurring from the alleged fraud "is not the 'substantial' effect within the territory" to which the Restatement referred); cf United Fin. Group, Inc., 474 F.2d at 356 ("The relative number of American citizen shareholders vis-à-vis alien shareholders is not determinative of whether United States courts may assert jurisdiction.").

325 See supra notes 199-210 and accompanying text.
jurisdiction would be unreasonable even though acts in furtherance of corrupt payment were committed by a U.S. national or by a foreign national within the territory of the United States.

Additionally, the assertion of U.S. jurisdiction is subject to the limitation of due process. Thus, before a United States court may adjudicate an alleged violation of the FCPA, there must be in personam jurisdiction over the foreign national or the absent U.S. national.

D. Due Process Considerations

The Due Process Clause of the Fifth Amendment limits the assertion of extraterritorial jurisdiction. In the first instance, an exercise of prescriptive jurisdiction that exceeds Congress’ authority under the Commerce Clause would be invalid as violating due process. In enacting the 1998 amendments to the FCPA, however, Congress plainly intended to exercise its full authority under the Commerce Clause, as it had in enacting the Securities Exchange Act of 1934. Further, enforcement of the FCPA against an absent defendant requires that the court have in personam jurisdiction, which is also subject to the strictures of due process.

1. In Personam Jurisdiction Over Foreign Nationals

Due process requires that personal jurisdiction over an absent defendant comport with “traditional notions of fair play and substantial justice.” Thus, before a U.S. court may subject an absent defendant to its judgment, the “constitutional touchstone” is “whether the defendant purposefully established minimum contacts” with “the territory of the forum.”

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327 SEC v. Unifund SAL, 910 F.2d 1028, 1033 (2d Cir. 1990); Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 998 (2d Cir. 1975); Leasco Data Processing Equip. v. Maxwell, 468 F.2d 1326, 1339 (2d Cir. 1972).


330 Burger King Corp. v. Rudzewick, 471 U.S. 462, 474 (1985); Int'l Shoe Co. v. State of Wash., 326 U.S. 310, 316 (1945). As the Court explained in International Shoe:

Due process requires . . . that in order to subject a defendant to a judgement in
What constitutes sufficient "minimum contacts" within the territory of the forum has been extensively litigated largely in the context of private civil litigation, in which courts have wrestled with the qualitative and quantitative contacts with a specific forum necessary for general or specific jurisdiction. In contrast, when determining whether there is a sufficient basis for jurisdiction in cases arising under federal law, it is the defendant's contacts with the United States, rather than any one state, that are relevant to determining whether extraterritorial in personam jurisdiction comports with due process.

326 U.S. at 316.


332 In their seminal study on adjudicatory jurisdiction, Professors Arthur T. Von Mehren and Donald T. Trautman distinguished between "specific jurisdiction," adjudicatory authority that arises from and is restricted to the controversy or the "affiliating circumstances" upon which jurisdiction is based, and "general jurisdiction," adjudicatory authority that is based upon the relationship between the forum and the person whose legal rights are to be affected by the judgment. Arthur T. Von Mehren & Donald T. Trautman, Jurisdiction to Adjudicate: A Suggested Analysis, 79 Harv. L. Rev. 1121, 1136-37 (1966). The Supreme Court has contrasted a court's general jurisdiction with its specific jurisdiction over a defendant, which arises when an absent defendant purposefully directs her activities at residents of the forum and the cause of action arises from those activities. Burger King Corp., 471 U.S. at 472. Where the defendant's contacts with the jurisdiction are sufficient to give rise to a court's general jurisdiction over the defendant (for example, where a corporation conducts continuous systematic business in the jurisdiction, as in Perkins v. Benquet Consol. Mining Co., 342 U.S. 437, 438 (1952)), the court's in personam jurisdiction is not dependent upon the claim arising from or being related to the defendant's contacts with the forum. Burger King Corp., 471 U.S. at 473 n.15; Helicopteros Nacionales de Columbia, S.A., 466 U.S. at 414-15; see generally Mary Twitchell, The Myth of General Jurisdiction, 101 Harv. L. Rev. 610 (1988).

In any event, in order for personal jurisdiction to lie against an absent defendant, the defendant's conduct and connection with the forum state must have been "such that he should reasonably anticipate being haled into court there."\(^{334}\) The "[absent] defendant has acted in such a way as to have caused consequences" in the United States.\(^{335}\) Thus, the conduct doctrine and the effects doctrine are also instructive in analyzing whether in personam jurisdiction over an absent defendant is reasonable.

It has long been settled that under the territorial principal of jurisdiction, personal jurisdiction will lie over a foreign defendant who commits a criminal act within the territory of the forum.\(^{336}\) Therefore, in personam jurisdiction over foreign nationals in prosecutions under the amended FCPA for actions committed in the United States would be sustainable under the conduct doctrine and the territorial principle.

In personam jurisdiction over an absent foreign national who caused such action to be taken in the territory is somewhat more problematic. A requirement of strict territoriality, however, has been relaxed in recognition of the expansion in the geographic scope of commerce,\(^{337}\) such that now, in personam jurisdiction can extend to foreign nationals whose conduct caused a violation of U.S. law, even though that conduct occurred outside the United States.\(^{338}\) In order for jurisdiction to lie, however, the violation

\(^{334}\) *World-Wide Volkswagen*, 444 U.S. at 297 ("[T]he foreseeability that is critical to due process analysis is not mere likelihood that a product will find its way into the forum state. Rather, it is that the defendant's conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there.").

\(^{335}\) *SEC v. Unifund SAL*, 910 F.2d 1028, 1033 (2d Cir. 1990); *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1340 (2d Cir. 1972).

\(^{336}\) *E.g.*, *The Case of the S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10.

\(^{337}\) As the Supreme Court observed in *Hanson v. Denckla*:

As technological progress has increased the flow of commerce between States, the need for jurisdiction over non residents has undergone a similar increase. At the same time, progress in communications and transportation has made the defense of a suit in a foreign tribunal less burdensome. In response to these changes, the requirements for personal jurisdiction over non residents have evolved from the rigid rule of *Pennoyer v. Neff*... to the flexible standard of *International Shoe Co. v. State of Washington* . . .

\(^{338}\) *E.g.*, *United States v. MacAllister*, 160 F.3d 1304 (11th Cir. 1998) (finding that
must have been a "direct foreseeable result" of the extraterritorial conduct and the defendant must have known, or had good reason to know, that the conduct would have that effect in the United States.\textsuperscript{339}

\textsuperscript{339} In \textit{Leasco}, 468 F.2d at 1341, the court held as follows:

At a minimum the conduct must have met the tests laid down in \S\ 18 of the \textit{Restatement (Second) of Foreign Relations Law}, including the important requirement that the effect "occurs as a direct and foreseeable result of the conduct outside the territory." We believe, moreover, that attaining the rather
This assertion of both subject matter and in personam jurisdiction over absent foreign nationals based on the domestic effects of their extraterritorial conduct has been criticized.\textsuperscript{340} The criticism has been in the form of diplomatic notes of concern and protest,\textsuperscript{341} which have given way to the adoption of counter-legislation including secrecy laws,\textsuperscript{342} blocking statutes,\textsuperscript{343} and "claw

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\textsuperscript{340} As the Reporter for the American Law Institute noted with regard to limitation on the jurisdiction to prescribe, "[s]ome states, particularly the United Kingdom, have questioned various applications of United States laws as 'exorbitant'...in particular, some states have questioned the lawfulness of applying the 'effects doctrine'...to economic effects." \textit{Restatement, supra} note 145, § 403, reporter's note 1. Commentators have also noted the adverse international reaction to the U.S. assertion of effects-based jurisdiction. Russell J. Weintraub, \textit{The Extraterritorial Application of Antitrust and Securities Laws: An Inquiry Into the Utility of a "Choice-of-Law" Approach}, 70 \textit{Tex. L. Rev.} 1799, 1807 (1992) ("It is the 'effects' basis for jurisdiction to prescribe...that creates the most problems and controversy, particularly when asserted to apply United States antitrust or securities laws to activities abroad."); Jeffery A. Brown, \textit{Extraterritoriality: Current Policy of the United States}, 12 \textit{Syracuse J. Int'l L. \\& Com.} 493, 494 (1986) ("[T]he extraterritorial application of U.S. domestic laws has elicited ever increasing responses from the U.S. allies in the form of retaliatory action, threats and a barrage of criticism"); David J. Gerber, \textit{Beyond Balancing: International Law Restraints on the Reach of National Laws}, 10 \textit{Yale J. Int'l L.} 195, 197 (1984) ("[T]he assertion of extraterritorial jurisdiction by the United States has created, and continues to create, significant international conflicts. These conflicts often have damaged U.S. foreign relations, especially with its allies, and they have even been held responsible for weakening the western alliance.").

\textsuperscript{341} Brown, \textit{supra} note 340, at 503-04. A U.S. antitrust enforcement official was quoted as having remarked that "there have been five diplomatic protests of U.S. antitrust cases for every instance of express diplomatic support, and three blocking statutes for every cooperation agreement." Joseph P. Griffin, \textit{Possible Resolutions of International Disputes Over Enforcement of U.S. Antitrust Laws}, 18 \textit{Stan. J. Int'l L.} 279, 281-82 (1983). Some of these expressions have been less than diplomatic. Brown, \textit{supra} note 340, at 504-05 (noting that in response to U.S. pipeline controls, the government of Italy suggested that the national airline might not be able to complete the purchase of thirty DC-9 jets until the pipeline sanctions were lifted).

\textsuperscript{342} See Brown, \textit{supra} note 340, at 506-07; Griffin, \textit{supra} note 341, at 280-81.
back” acts.

Nevertheless, the amended FCPA appears to contemplate this effects-based jurisdiction over foreign nationals as well. As the legislative history makes clear, jurisdiction over acts in furtherance of a violation committed by a foreign national in the United States is not limited just to the foreign national who commits the act; instead, both the Senate and the House committee reports stated that “established principles” of vicarious liability would apply to “foreign businesses for acts taken on their behalf.” Whether viewed as being based on agency principles or on the effects doctrine, this enlargement of jurisdiction over absent foreign nationals is dramatic.

For almost a century the law has held a corporation vicariously responsible for crimes committed by its directors, officers, employees, and agents if those criminal acts were committed within the scope of employment and were intended, at least to some degree, to benefit the corporation. Under this rule of

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343 Brown, supra note 340 at 508-09; Gerber, supra note 340, at 188-89; Griffin, supra note 341, at 280-81.

344 Griffin, supra note 341, at 280-81. As an example of a “claw back” act, Griffin cites the provision of the Protection of Trading Interests Act of 1980 which created a cause of action for British nationals to recover damages awarded to a plaintiff by a foreign court “as exceeds the part attributable to compensation,” which in the case of an award under the Sherman Act would be two thirds of the judgement. Id.

345 Both Senate Report 277 and House Report 802 provided:

The new offense complies with [the OECD convention's territorial jurisdiction provision] by providing for criminal jurisdiction in this country over bribery by foreign nationals of foreign officials when the foreign national takes some act in furtherance of the bribery within the territory of the United States. It is expected that the established principles of liability, including principles of vicarious liability, that apply under the current version of the FCPA shall apply to the liability of foreign businesses for acts taken on their behalf by their officers, directors, employees, agents or stockholders in the territory of the United States, regardless of the nationality of the officer, director, employee, agent, or stockholder.


346 As Professor William S. Laufer has observed, “[f]or nearly a century, during many shifts of liability risk, courts and legislatures have embraced enforcement strategies, both implicit and explicit, but only one liability rule: vicarious liability.” William S. Laufer, Corporate Liability, Risk Shifting, and the Paradox of Compliance, 52 Vand. L. Rev. 1343, 1357 (1999). Thus, in N.Y. Cent. & Hudson River R.R. Co. v. United States, 212 U.S. 481 (1909), the Supreme Court held that the railroad was liable for violating the Elkins Act, 49 U.S.C. §§ 41-43 (1976), repealed in Pub. L. 95-473, 92
vicarious liability, the criminal intent of those acting on behalf of the corporation will be imputed to the corporation,\textsuperscript{347} as will the

Stat. 1466, 1467-70 (1978), as a result of the payment of illegal rebates by one of the railroad’s employees. In reaching this decision, the Court borrowed respondeat superior principles from tort law and concluded that the employee’s criminal intent should be imputed to the railroad. As the Court explained:

We see no valid objection in law and every reason in public policy, why the corporation, which profits by the transaction, and can only act through its agents and officers, shall be held punishable by fine because of the knowledge and intent of its agents to whom it has entrusted authority to act in the subject matter . . . and whose knowledge and purposes may well be attributed to the corporation for which the agents act.


\textsuperscript{347} The Supreme Court made this clear in \textit{United States v. Union Supply Co.}, 215 U.S. 50 (1909), upholding the conviction of a corporation for willful failure to maintain the books and records required of wholesale dealers of oleo margarine. Writing for the Court, Justice Holmes remarked that “it is impossible to believe that corporations were intentionally excluded [from the requirements of the statute]. They are as much within the mischief aimed at as a private person, as capable of a ‘willful’ breach of the law.”
215 U.S. at 54-55. Consistent with this view, Judge Learned Hand later observed in *Nearing v. United States*, 252 F. 223, 231 (S.D.N.Y 1918), "there is no distinction in essence between the civil and criminal liability of corporations based upon the element of intent or wrongful purpose. Each is merely an imputation to the corporation of the mental condition of its agents." Similar observations were made in *United States v. Ingredient Tech. Corp.*, 698 F.2d 88, 99 (2d Cir. 1983) ("[W]hile a corporation has no independent state of mind, the acts of individuals on its behalf may be properly chargeable to it."). *cert. denied, 462 U.S. 1311 (1983)*, and in *United States v. Inv. Enter., Inc.*, 10 F.3d 263, 266 (5th Cir. 1993):

a corporation is criminally liable for the unlawful acts of its agents, provided that the conduct is within the scope of the agent's authority, whether actual or apparent. Thus, while Great Western cannot possess the requisite intent to conspire or aid and abet, Michael Warren—its president and undisputedly authorized agent at all times—can. His unlawful acts are the basis for Great Western's criminal liability.

Thus, in a prosecution for willfully and knowingly making false claims for government subsidies, the court explained:

[The corporate employee] here acted not as an individual, but in the role of president and representative of the corporation within the scope of his capacity both actual and apparent. His illegal activities were carried on as an incident to the carrying on of the corporation's business and were made possible only through the corporate authority with which he was clothed . . . . His guilty intent is imputable to the corporation for the purpose of proving guilt of the corporation.

United States v. Empire Packing Co., 174 F.2d 16, 20 (7th Cir. 1949), *cert. denied, 337 U.S. 959 (1949).* The imputation of "intent" to an otherwise mindless and soul-less legal creature, the corporation, has been criticized by scholars and commentators. As Professor Pamela Bucy has observed, "traditionally, the criminal law has been reserved for intentional violations of the law. Yet our prosecutions of corporations have been marked by floundering efforts to identify the intent of intangible, fictional entities." Bucy, *supra* note 346, at 1097; see also V.S. Khanna, *Is the Notion of Corporate Fault a Faulty Notion?: The Case of Corporate Mens Rea*, 79 B.U. L. REV. 355, 359 (1999) ("[E]ven though mens rea standards for individuals may prove desirable for many reasons, corporate mens rea standards are generally undesirable."); Ann Foerschler, *Corporate Criminal Intent: Toward a Better Understanding of Corporate Misconduct*, 78 CAL. L. REV. 1287, 1296-97 (1990):

[T]he idea of "intent," a troublesome concept at best, is even more formidable when applied to corporate criminal prosecutions. A number of courts have concluded that the criminal conduct of officers and employees could be imputed to the corporation because they were the "hands" of the corporation. But courts have had a much harder time deciding if there was a "mind" in a corporation, and if so, who could possibly represent this mind in the context of forming criminal intent.

*Id.; Developments in the Law, Corporate Crime: Regulating Behavior Through Criminal Sanctions, 92 HARV. L. REV. 1227, 1241 (1979):*

[T]here is no single, broadly accepted theory of corporate blameworthiness
which justifies the imposition of criminal penalties on corporations. For an individual defendant, the mental state with which he committed the illegal act determines his moral culpability. But mental state has no meaning when applied to a corporate defendant, since an organization possesses no mental state.

Id.; Note, Criminal Liability of Corporations for Acts of Their Agents, supra note 346, at 284 ("[I]nstead of regarding the problem as one of vicarious liability, however, the courts have stumbled over the theoretical difficulties of ascribing criminal intent to a corporation."). This has led Professor Gerhard Mueller to observe that:

Many weeds have grown on the acre of jurisprudence which has been allotted to the criminal law. Among these weeds is a hybrid of vicarious liability, absolute liability, an inkling of mens rea—though a rather degenerated mens rea—a few genes from tort law and a few from the law of business associations. This weed is called corporate criminal liability . . . nobody bred it, nobody cultivated it, nobody planted it, it just grew.

Mueller, supra note 346, at 21. Despite the flaws and criticism of corporate “willfulness” and “intent,” courts have not hesitated to impute the mental state of employees and agents to the corporation in order to find willful and knowing violations of law. E.g., United States v. Shortt Accounting Corp., 785 F.2d 1448 (9th Cir. 1986) (attributing to the corporation the chief operating officer’s willful intent in providing false information to a tax preparer), cert. denied, 478 U.S. 1007 (1986); Boise Dodge, Inc. v. United States, 406 F.2d 771 (9th Cir. 1969) (convicting corporation of willful violation of the Automobile Information Disclosure Act by removing labeling); United States v. Knox Coal Co., 347 F.2d 33 (3d Cir. 1965) (affirming conviction of corporation that willfully attempting to evade federal taxes based on actions by the president and the treasurer), cert. denied, 382 U.S. 904 (1965); Steere Tank Lines, Inc. v. United States, 330 F.2d 719 (5th Cir. 1963) (finding that corporation knowingly and willfully failed to require drivers to maintain logs required by the Motor Carrier Safety Regulations); United States v. Carter, 311 F.2d 934 (6th Cir. 1963) (holding that a corporation knowingly and willfully violated the Taft-Hartley Act), cert. denied, 373 U.S. 915 (1963); Inland Freight Lines v. United States, 141 F.2d 315 (10th Cir. 1951) (finding that corporation knowingly and willfully maintained false drivers' logs); United States v. John Kelso Co., 86 F. 304, 306 (N.D. Cal. 1898) (determining that corporation intentionally violated limits on hours of labor). Thus, it has been observed that:

Under New York Central’s respondeat superior approach to corporate crime, both the criminal act and the required state of mind are imputed from the agent to the corporation. Since this method of imposing criminal liability dispenses with the need to demonstrate the criminal intent of the corporation qua corporation, it divorces criminal liability from culpability. Despite the serious questions that have been raised about the conceptual basis of corporate liability under federal law, to date neither Congress nor the federal courts have overridden the rule of respondeat superior.


*348 A corporation can be held liable for a knowing violation of law based on the knowledge of its employees. United States v. Sun-Diamond Growers of Cal., 964 F.
Supp. 486, 491 n.10 (D.D.C. 1997) (holding that knowledge obtained by corporate agent acting within the scope of his employment is imputed to the corporation). As was observed in *Steere Tank Lines*, 330 F.2d at 723 n.3, “knowledge affecting the corporation, which has been gained by any officer, agent or employee thereof in the course of his work for the company is attributed to the corporation, and this includes subordinate employees . . . .” Thus, in *United States v. Bank of New Eng.*, 821 F.2d 844 (1st Cir. 1987), *cert denied*, 484 U.S. 943 (1987), the bank was convicted of multiple counts of violating the Currency Reporting Act, 31 U.S.C. §§ 5311-5322 (1982), resulting from the failure to report cash withdrawals by one of its customers effected by means of the presentation of a series of checks, each less than the reportable amount of $10,000, to a single teller. Rejecting the bank’s argument that no part of the bank had complete knowledge of the transactions, the court stated:

Corporations compartmentalize knowledge, subdividing the elements of specific duties and operations into smaller components. The aggregate of those components constitutes the corporation’s knowledge of a particular operation. It is irrelevant whether employees administering one component of an operation know the specific activities of employees administering another aspect of the operation . . . .

821 F.2d at 856. This concept of “collective knowledge” has been applied in a variety of other cases. *United States v. LBS Bank-N.Y., Inc.*, 757 F. Supp. 496, 501 n.7 (E.D. Pa. 1990) (“[K]nowledge possessed by employees is aggregated so that a corporate defendant is considered to have acquired the collective knowledge of its employees.”); *United States v. Miller*, 676 F.2d 359, 362 (9th Cir. 1982) (imputing to lender its employees’ knowledge of a fraudulent real estate financing scheme); *Apex Oil Co. v. United States*, 530 F.2d 1291 (8th Cir. 1976) (holding that employee’s knowledge of oil spill was attributed to corporation); *United States v. T.I.M.E.-D.C.*, Inc., 381 F. Supp. 730, 738 (W.D. Va. 1974):

[A] corporation can only act through its employees and, consequently, the acts of its employees, within the scope of their employment, constitute acts of the corporation. Likewise, knowledge acquired by employees within the scope of their employment is imputed to the corporation. In consequence, a corporation cannot plead innocence by asserting that the information obtained by several employees was not acquired by any one individual employee who then would have comprehended its full import. Rather, the corporation is considered to have acquired the collective knowledge of its employees and is held responsible for their failure to act accordingly.

*Id.; United States v. Sawyer Transp.*, Inc., 337 F. Supp. 29 (D. Minn. 1971), *aff’d*, 463 F.2d 175 (8th Cir. 1972) (finding collective knowledge of falsified motor carrier logs); *Inland Freight Lines*, 191 F.2d at 313 (“One agent or representative had knowledge of the material contents of the logs and another had knowledge of the material contents of the reports. The knowledge of both agents or representatives was attributed to the company.”); see generally Thomas A. Hagemann & Joseph Grinstein, *The Mythology of Aggregate Corporate Knowledge: A Deconstruction*, 65 GEO. WASH. L. REV. 210 (1997); Martin J. Weinstein & Patricia Bennett Ball, *Criminal Law’s Greatest Mystery Thriller: Corporate Guilt Through Collective Knowledge*, 29 NEW ENG. L. REV. 65 (1994). Professor Brickey points out that as a result of collective knowledge, a corporation may be held criminally liable in circumstances in which no individual
The corporation's vicarious liability is not restricted to the
criminal actions of its directors, officers or "control group."
Instead, vicarious criminal liability may result from the acts of
mid-level and lower level employees.

employee could be convicted. Kathleen F. Brickey, Corporate Criminal Liability: A
Primer for Corporate Counsel, 40 Bus. Law. 129, 133 (1984). However, the knowledge
must have been gained by the employee within the scope of employment and not merely
because the agent was employed by the corporation or was on the corporation's
premises. United States v. Route 2, Box 472, 60 F.3d 1523, 1527 (1st Cir. 1995)
("[K]nowledge of an illegal activity may be attributed to a corporation only when the
knowledge was obtained by an agent acting within the scope of his or her employment
and for the benefit of the corporation.").

349 It is common that the acts of senior management will subject their corporate
employers to criminal liability. Sun-Diamond Growers, 964 F. Supp. at 491 (holding that
the second highest ranking officer arranged for corporate funds to be illegally
contributed to retire the debt of a congressional campaign); Inv. Enter., 10 F.3d at 263
(explaining attribution to the company of its president's participation in conspiracy to
ship obscene material); Short, 785 F.2d at 1448, (deciding that the chief operating
officer of accounting firm provided false information to a tax preparer on behalf of a
client resulting in the making of a false tax return); United States v. Richmond, 700 F.2d
1183 (8th Cir. 1983) (holding that the officers and management of family owned
construction company made false statements regarding time charged to federally funded
construction projects); Ingredient Tech. Corp., 698 F.2d at 88 (explaining that president
overstated value of inventory resulting in tax fraud), cert. denied, 462 U.S. 1131 (1983);
United States v. Beusch, 596 F.2d 871 (9th Cir. 1979) (vice president of currency
exchange dealer failed to report cash currency transactions); United States v. Griffin, 401
F. Supp. 1222 (S.D. Ind. 1975) (deciding that president of real estate brokerage under
contract with H.U.D. solicited bribes and kickbacks), aff'd without opinion, 541 F.2d 284
(7th Cir. 1976); United States v. Am. Radiator & Std. Sanitary Corp., 433 F.2d 174 (3d
Cir. 1970) (finding that sales manager, who was also a member of the board of directors,
participated in price fixing with competing companies), cert. denied, 401 U.S. 948
(1971); Carter, 311 F.2d at 934 (arguing that president and CEO made illegal payments
in the form of "loans" to president of a labor union), cert. denied, 337 U.S. 959 (1969);
Empire Packing, 174 F.2d at 16 (holding that president of slaughter house caused false
claims for subsidies to be filed); Old Monastery Co. v. United States, 147 F.2d 905 (4th
Cir. 1945) (finding that president of liquor distributor sold whiskey to black marketeers
in violation of price controls), cert. denied, 326 U.S. 734 (1945); Mininsonh v. United
States, 101 F.2d 477 (3d Cir. 1939) (holding that officers of lumber company conspired
to defraud the United States by supplying underweight bags of cement).

350 The criminal acts of mid-level managers are also attributed to their corporate
employers. United States v. Ill. Cent. R.R., 303 U.S. 239 (1938) (yardmaster); N.Y.
Cent., 212 U.S. at 481 (freight manager and assistant manager); United States v. Hughes
Aircraft Co., Inc., 20 F.3d 974 (9th Cir. 1994) (mid-level quality supervisor); United
States v. Jakeway, 783 F. Supp. 592 (M.D. Fla. 1992) (regional manager); United States
v. Twentieth Century Fox Film Corp., 882 F.2d 656 (2d Cir. 1989) (regional distribution
manager); United States v. Automated Med. Labs., Inc., 770 F.2d 399 (4th Cir. 1985)
(manager of subsidiary); United States v. Phelps Dodge Indus., Inc., 589 F. Supp. 1340
Like the law of agency from which the principle derives, the vicarious criminal liability of a corporation results from the


351 Corporations have been vicariously liable for the crimes of non-managerial employees as well. See, e.g., Bank of New Eng., 821 F.2d at 844 (bank teller), cert. denied, 484 U.S. 943 (1987); Automated Med. Labs., 770 F.2d at 399 (lab employees); United States v. Gold, 743 F.2d 800 (11th Cir. 1984) (optometrist's employees), cert. denied, 469 U.S. 1217 (1985); United States v. Basic Constr. Co., 711 F.2d 570 (4th Cir. 1983) (relatively minor officials), cert. denied, 464 U.S. 956 (1983); United States v. Demauro, 581 F.2d 50 (2d Cir. 1978) (bank employees); Gibson Prods., 426 F. Supp. at 768 (salesmen); Apex Oil, 530 F.2d at 1291 (oil facility employee); T.I.M.E.-D.C., 381 F. Supp. at 730 (dispatcher); United States v. Harry L. Young & Sons, Inc., 464 F.2d 1295 (10th Cir. 1972) (truck drivers); Tex.-Oklahoma Express, Inc. v. United States, 429 F.2d 100 (10th Cir. 1970) (truck stop workers); Boise Dodge, 406 F.2d at 771 (automobile dealer employees); Uniroyal, Inc., 300 F. Supp. at 84 (salesmen); Steere Tank Lines, 330 F.2d at 719 (truck drivers); Std. Oil Co. of Tex. v. United States, 307 F.2d 120 (5th Cir. 1962) (clerk); United States v. Chi. Express, Inc., 273 F.2d 751 (7th Cir. 1960) (truck driver); Riss & Co., Inc. v. United States, 262 F.2d 245 (8th Cir. 1958) (clerk); United States v. E. Brooke Matlack, Inc., 149 F. Supp. 814 (D. Md. 1957) (truck driver); St. Johnsbury Trucking Co. v. United States, 220 F.2d 393 (1st Cir. 1955) (clerk); Inland Freight Lines, 191 F.2d at 313 (truck drivers); United States v. Armour & Co., 168 F.2d 342 (3d Cir. 1948) (salesmen); United States v. George F. Fish, Inc., 154 F.2d 798 (2d Cir. 1946) (salesman), cert. denied, 328 U.S. 869 (1946); Dollar S.S. Co. v. United States, 101 F.2d 638 (9th Cir. 1939) (deck hand); Zito v. United States, 64 F.2d 772 (7th Cir. 1933) (salesman); John Gund Brewing Co. v. United States, 204 F. 17 (8th Cir. 1913) (salesman). Indeed, in at least one instance, liability resulted from the acts of an independent contractor engaged by the corporation. See United States v. Parfait Powder Puff Co., 163 F.2d 1008 (7th Cir. 1948).
authority that the corporation confers upon its employee or agent to act on the corporation's behalf. As the Supreme Court stated in the *New York Cent.* decision:

A corporation is held responsible for acts not within the agent's corporate powers strictly construed, but which the agent has assumed to perform for the corporation when employing the corporate powers actually authorized, and in such cases there need be no written authority under seal or vote of the corporation in order to constitute the agency or to authorize the act.\(^{352}\)

Thus, it has been said that, "[i]t is the function delegated to the corporate officer or agent which determines his power to engage the corporation in a criminal transaction."\(^{353}\) This authority may be


\(^{353}\) C.L.T. Corp., 150 F.2d at 89. Judge Hand made a similar observation in *United States v. Nearing*:

That the criminal liability of a corporation is to be determined by the kinship of the act to the powers of the officials who commit it, is true enough, but neither the doctrine of ultra vires, nor the difficulty of imputing intent or motive, should be regarded any longer to determine the result.

252 F. 223, 231 (S.D.N.Y. 1918). Indeed, it has been held that all that is required is that the employee or agent be performing the type of act he or she is authorized to perform. *Cincotta*, 689 F.2d at 241-42:

A corporation may be convicted for the criminal acts of its agents, under a theory of respondeat superior. But criminal liability may be imposed on the corporation only where the agent is acting within the scope of employment. That, in turn, requires that the agent be performing acts of the kind that he is authorized to perform.

*Accord Automated Med. Labs.*, 770 F.2d at 407 (defining scope of employment to include acts on the corporation's behalf "in performance of the agent's general line of work"). In this regard, Dean Frosster has observed that "in general, the servant's conduct is within the scope of his employment if it is of the kind he is employed to perform, occurs of time and space, and is actuated, at least in part, by a purpose to serve the master." W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 70 at 461 (4th ed. 1971). Corporations have been held liable where there was no evidence of corporate authorization. See *United States v. Carter*, 311 F.2d 934 (6th Cir. 1963), cert. denied, 373 U.S. 915 (1963); *Egan v. United States*, 137 F.2d 369 (8th Cir. 1943). Corporations are also subject to criminal liability even though the act was contrary to the corporation's instructions. As the court in *Egan* stated, if an act was done within the scope of employment, "it will be imputed to the corporation whether covered by the agent or officer's instructions, whether contrary to his instructions, and whether lawful or unlawful." Thus, for example, in *Hilton Hotels*, the corporation was held liable for an employee's participation in an illegal boycott despite the employee's admission that he had been instructed to make purchases "solely on the basis of price, quality and service."
apparent as well as actual. Similarly, some courts have viewed vicarious criminal liability as resulting from the non-performance of certain acts by an agent. 467 F.2d at 1004. As the court explained, "as a general rule, a corporation is liable under the Sherman Act for the acts of its agents in the scope of their employment, even though contrary to corporate policy and express instructions to the agent." 467 F.2d at 1007; see also United States v. Portac, 869 F.2d 1288 (9th Cir. 1989), cert. denied, 498 U.S. 845 (1990); Automated Med. Labs., 770 F.2d at 406; Basic Constr. Co., 711 F.2d at 570; Cadillac Overall Supply, 568 F.2d at 1078; Harry L. Young & Sons, Inc., 464 F.2d at 1295; Std. Oil, 307 F.2d at 120; St. Johnsbury Trucking Co., 220 F.2d at 398 (concurring opinion); Dollar S.S. Co., 101 F.2d at 638. Thus, the rule of vicarious liability relieves the court of having to determine whether the corporation acted reasonably in circumscribing the acts of its agent and instead, the burden of controlling its agents, on pain of strict liability, is placed on the corporation. See Deborah A. DeMott, Organizational Incentives to Care About the Law, 60 LAW & CONTEMP. PROBS. 39, 54 (1997) ("A rule of vicarious liability obviates the need for courts to make difficult fact-specific assessments of whether the employee acted reasonably, leaving it to the employer to determine how best to control its employees’ conduct").

WELLING ET AL., supra note 347, at 152 ("[T]he federal cases hold that a corporation may be held criminally liable not only for actions within the authority expressly granted to a particular agent but also within that agent’s apparent authority."); Kevin B. Huff, Note, The Role of Corporate Compliance Programs in Determining Corporate Criminal Liability: A Suggested Approach, 96 COLUM. L. REV. 1252, 1258 (1996) ("In the context of vicarious criminal liability for corporations, the federal courts have expansively interpreted the requirement that the employee be acting within the 'scope of authority.' The scope of authority includes both actual and apparent authority.”). This apparent authority is said to be "the authority which outsiders would normally assume the agent to have, judging from his position with the company and the circumstances surrounding his past conduct." United States v. Bi-Co Pavers, Inc., 741 F.2d 730, 737 (5th Cir. 1984); Basic Constr. Co., 711 F.2d at 572; Hilton Hotels, 467 F.2d at 1004; Am. Radiator, 433 F.2d at 205; Cont'l Baking Co., 281 F.2d at 151. In essence, it is the agent’s authority to act, as perceived by others, in which, impliedly at least, the corporation has acquiesced. E.g., United States v. Tri-State Home Improvement Co., 446 F. Supp. 14, 16 (E.D. Wis. 1977) (holding that corporation had violated an FTC cease-and-desist order as a result of representations made by salesmen: "[D]efendant’s salesmen and representatives were acting within the apparent scope of their authority when the representations took place, [thus] liability is imposed upon the defendant.") (emphasis in original); Am. Radiator, 433 F.2d at 204 (convicting corporation of price fixing conspiracy on the basis of agreements made by a sales manager whom the corporation claimed was not authorized to set prices but whom the court noted that at least one meeting claimed "he was speaking for the company"). Thus, Professor Welling and her colleagues have suggested that "[t]he critical inquiry is directed not at the specific responsibilities a corporate agent may have been granted, but at whether a third party might reasonably infer that the agent, was capable of acting on the corporation’s behalf in a particular matter." WELING ET AL., supra note 347, at 153. It has also been suggested that the agent’s “authority” to commit a criminal act may result from the incentives provided or the pressures imposed by the corporate employer. DeMott, supra note 353, at 45.
of the corporation’s duty “to ensure that those conducting the corporation’s business do so lawfully.”

As originally enacted in 1977, the FCPA provided for vicarious liability for the acts of third parties. The 1998 Amendments made this same vicarious liability principle applicable to foreign nationals whose employees or agents commit acts in the United States that are in furtherance of a corrupt payment to a foreign official.

This vicarious responsibility for the acts of employees and agents not only establishes a U.S. court’s subject matter jurisdiction over a violation of the FCPA, but also serves as the basis for personal jurisdiction over an absent foreign corporate defendant. As the Supreme Court has explained:

Since the corporate personality is a fiction, although a fiction intended to be acted upon as though it were fact, it is clear that

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355 Armour, 168 F.2d at 344; see also Uniroyal, Inc., 300 F. Supp. at 95:

This is not an instance of respondeat superior; it is one of the non-performance of a non-delegable duty. A corporation has a responsibility to eliminate unlawful practices by its salesmen and branch managers in the course of their routine labors . . . [e]ven if the extent of its business precludes the personal supervision of high level officers who, as a result, rely upon written and oral instructions to their subordinates to ensure that their policies will be carried out.

As one court commented:

While the primary responsibility for conducting the operations of the corporation lay with its principal officers, it was their duty in delegating authority to lesser agents to take effective measures to supervise and assure performance of the affirmative duty imposed upon the corporation. Thus, the corporation cannot avoid responsibility by merely saying that a subordinate agent neglected his duty.

E. Brooke Matlack, Inc., 149 F. Supp. at 820. Thus, it has been said that “[t]he federal cases imposing liability based on the actions of subordinate employees begin with the premise that corporations must exercise care in selecting and supervising the agents to whom they delegate authority.” WELLING ET AL., supra note 347, at 149. Professor Jennifer Arlen suggests, however, that the vicarious liability standard under current law does not necessarily result in greater corporate self-enforcement. Jennifer Arlen, The Potentially Perverse Effects of Corporate Criminal Liability, 23 J. LEGAL STUD. 833 (1994). Professor Michael Tigar has also suggested that the expansive criminalization of corporate conduct may have the effect of breeding contempt for the law: “Criminalizing a broad range of otherwise marginally acceptable business conduct trivializes the criminal sanction and breeds contempt for it, at least among rational actors, which most white collar offenders are.” Tigar, supra note 346, at 213.

356 See supra note 20.

357 § 78 dd-3(a)(3).
Unlike an individual its "presence" without, as well as within, the state of its origin can be manifested only by activities carried on in its behalf by those who are authorized to act for it. To say that the corporation is so far "present" there as to satisfy due process requirements, for purposes of taxation or the maintenance of suits against it in the courts of the state, is to beg the question to be decided. For the terms "present" or "presence" are used merely to symbolize those activities of the corporation's agent within the state which courts will deem to be sufficient to satisfy the demands of due process.\footnote{Int'l Shoe Co. v. State of Wash., 326 U.S. 310, 316 (1945); see also David James Homsey, Criminal Jurisdiction Over Foreign Corporations: The Application of a Minimum Contacts Theory, 17 San Diego L. Rev. 429, 439-48 (1980).}

Thus, it is the contacts of the corporation's employee or agent with the United States that will determine whether the requirements of due process have been met such that a court can exercise in personam jurisdiction over a foreign corporation.\footnote{E.g., Panavision Int'l L.P. v. Toeppen, 141 F.3d 1316, 1322 (9th Cir. 1998) (registration by corporation's principal, and alter ego, of plaintiff's registered trademarks as domain names for the corporation were sufficient forum-related activities to create personal jurisdiction over foreign defendants in California); Ballard v. Savage, 65 F.3d 1445, 1498 (9th Cir. 1995) (business trips to the U.S. by officials of an Austrian bank were not sufficient to create personal jurisdiction because the claim did not arise therefrom, but establishment of correspondent banking relationship and the creation of "numerous ongoing obligations to the U.S. residents" was sufficient); SEC v. Unifund SAL, 910 F.2d 1028, 1033 (2d Cir. 1990) (securities trading based on inside information by foreign investment funds deliberately caused effects in the U.S. and was sufficient to find personal jurisdiction); Retail Software Serv., Inc. v. Lashlee, 854 F.2d 18, 21-22 (2d Cir. 1988) (sales by corporation's officers of franchises which were the subject of litigation were insufficient to create jurisdiction under the New York long arm statute); Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 998-1000 (2d Cir. 1975) (trading in U.S. securities on Canadian exchanges for Canadian customers was not "doing business" in the U.S. for purposes of general jurisdiction nor were two breakfast meetings during which a public offering was discussed sufficiently related to a harmful effect in the U.S. to ground specific jurisdiction.); Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326, 1339-43 (2d Cir. 1972) (attendance at meetings in U.S. at which false representations were made by agents was sufficient to subject foreign corporation to in personam jurisdiction); Consol. Gold Fields, PLC v. Anglo Am. Corp. of S. Afr. Ltd., 698 F. Supp. 487, 493-96 (S.D.N.Y. 1988) (holding that, although contacts with U.S. were not sufficient to constitute a basis for general jurisdiction, meetings with investment bankers and lawyers in anticipation of a hostile takeover of plaintiff were sufficient to give rise to specific personal jurisdiction for antitrust injunctive relief).}
EXTRATERRITORIAL JURISDICTION AND THE FCPA

subsidiary located in the United States. Of course, as a general rule, a foreign parent corporation does not become subject to in personam jurisdiction simply because its subsidiary is located in the United States.\(^{360}\) However, jurisdiction may arise from the parent-subsidiary relationship if the subsidiary is so dominated by the parent that "they do not in reality constitute separate and distinct corporate entities but are one and the same corporation for purposes of jurisdiction."\(^{361}\) In essence,\(^{362}\) courts will look to

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\(^{360}\) For example, it was observed in Hargrave v. Fireboard Corp.: Generally, a foreign parent corporation is not subject to the jurisdiction of a forum state merely because its subsidiary is present or doing business there; the mere existence of a parent-subsidiary relationship is not sufficient to warrant the assertion of jurisdiction over the foreign parent. It has long been recognized, however, that in some circumstances a close relationship between a parent and its subsidiary may justify a finding that the parent does business in a jurisdiction through the local activities of its subsidiaries.

710 F.2d 1154, 1159 (5th Cir. 1983). The parent-subsidiary relationship alone will not defeat the general rule of corporate separateness, even if the subsidiary is wholly-owned by the parent corporation. United Elec., Radio and Mach. Workers of Am. v. 163 Pleasant Street Corp., 960 F.2d 1080, 1093 (1st Cir. 1992); United States v. Jon-T Chems., Inc., 768 F.2d 686, 691 (5th Cir. 1985); Am. Bell, Inc. v. Fed'n of Tel. Workers of Pa., 736 F.2d 879, 887 (3d Cir. 1984); Ohio Tank Car Co. v. Keith RV Equip. Co., 148 F.2d 4, 6 (7th Cir. 1945), cert denied, 326 U.S. 730 (1945). The Supreme Court has observed that "[l]imited liability is the rule, not the exception; and it is on that assumption large undertakings are rested, vast enterprises are launched, and huge sums of capital attracted." Anderson v. Abbot, 321 U.S. 249, 362 (1944); accord First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba, 462 U.S. 611, 626 (1983); NLRB v. Deena Artware, Inc., 361 U.S. 399, 403 (1960).

\(^{361}\) 2 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE, § 4.25[6], at 4-273 (2d ed. 1982). As subsequently explained:

Because a parent corporation and a subsidiary are separate legal entities, minimum contacts with the parent does not necessarily ensure personal jurisdiction over the subsidiary nor does minimum contacts with the subsidiary ensure personal jurisdiction over the parent. Only when the parent has sufficient control over the subsidiary, or when the appearance of separateness is actually a sham, may the contacts [of] one be imputed to the other.


\(^{362}\) Courts have made it clear that there is no "litmus test" for determining whether a subsidiary is merely the "alter ego" of the parent. United Steel Workers of Am. v. Connors Steel Co., 855 F.2d 1499, 1506 (11th Cir. 1988); Alman v. Danin, 801 F.2d 1, 3 (1st Cir. 1986); Jon-T Chems., Inc., 768 F.2d at 694. Instead, courts look to the totality of the circumstances of the parent-subsidiary relationship, an analysis that is "heavily fact specific." United Steel Workers of Am., 855 F.2d at 1506; Jon-T Chems., Inc., 768 F.2d at 694. Before the corporate veil separating the parent and subsidiary will be disregarded,
whether the formalities of corporate separateness were respected, \(^{363}\)

three things must be shown: (1) that the parent dominated the affairs of the subsidiary; (2) that there was an intent to avoid contractual or statutory obligations; and (3) that injustice would result from the continued recognition of the corporate separateness of parent and subsidiary. *United Elec. Radio & Mach. Workers of Am.*, 960 F.2d at 1093:

[A] court using the federal standard should consider 1) whether the parent and the subsidiary ignored the independence of their separate operations, 2) whether some fraudulent intent existed on the principal’s part, and 3) whether a substantial injustice would be visited on the proponents of veil piercing should the court validate the corporate shield.


\(^{363}\) The respect accorded the corporate formalities is a significant indicia of the independence of the subsidiary. Thus, courts have declined to pierce a subsidiary’s corporate veil where it has been shown that the subsidiary was governed by its own officers and directors, maintained separate books, and records and conducted its own financial affairs (i.e., the subsidiary was adequately capitalized, maintained separate bank accounts and financial accounts, and paid its own taxes). *Ministry of Def. of the Islamic Repub. of Iran*, 969 F.2d at 769; *Apex Oil Co. v. DiMauro*, 744 F. Supp. 53 (S.D.N.Y. 1988); *United States v. Van Diviner*, 822 F.2d 960, 965 (10th Cir. 1987) (finding that although there was evidence that the sole shareholder “did not always scrupulously maintain the distinction between himself and the corporation,” alter ego liability was not found, “there is no evidence he commingled the corporation’s funds with his own, distributed to himself corporate assets, misled the government or anyone, or otherwise misused or abused the corporate form in any way that would threaten injustice to the government”). It has been observed in this regard that “the concept of complete domination by the parent is decisive.” *Phoenix Can. Oil Co., Ltd. v. Texaco*, Inc., 842 F.2d 1466, 1477 (3d Cir. 1988); *accord United Steel Workers of Am.*, 855 F.2d at 1507; *Culbreth v. Amosa (Pty) Ltd.*, 898 F.2d 13, 14-15 (3d Cir. 1990) (applying New Jersey and Pennsylvania law); *Celi v. Canadian Occidental Petroleum, Ltd.*, 804 F. Supp. 988, 100 (E.D. Mo. 1992) (applying Missouri law); *A.M. Kashfi v. Philbro-Salamon, Inc.*, 628 F. Supp. 727, 733 (S.D.N.Y. 1986) (applying New York law); *see also* FLETCHER, *CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS* § 43, at 490 (1983) (holding that the control warranting the piercing of the corporate veil is “complete domination, not only of finances but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own”); *Note, Piercing the Corporate Veil: The Alter Ego Doctrine Under Federal Common Law*, 95 HARV. L. REV. 853, 854 (1982).
or whether the parent and subsidiary were, in fact, a single enterprise. In making this determination, courts have looked to a

(explaining the alter ego liability requirement):

[There must be] such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist . . . . [This requirement] may be satisfied by a showing of domination and control of the corporation which occurs most often in the context of a parent-subsidiary relationship or of a closely held corporation.

State law cases have also looked to the parent's complete domination of the subsidiary as a basis for disregarding the corporate form. See Wm. Passalaqua Builders v. Resnick Developers S., Inc., 933 F.2d 131, 138 (2d Cir. 1991) (New York law) (“Liability therefore may be predicated either upon a showing of fraud or upon complete control by the dominating corporation that leads to a wrong against third parties.”).

[It is nevertheless plain that Pennsylvania, like New Jersey, does not allow recovery unless the party seeking to pierce the corporate veil on an alter ego theory establishes that the controlling corporation wholly ignored the separate status of the controlled corporation and so dominated and controlled its affairs that its separate existence was a mere sham . . . . In other words, both Pennsylvania and New Jersey require a threshold showing that the controlled corporation acted robot or puppet-like in mechanical response to the controller’s tugs on its strings or pressure on its buttons.

_Culbreth_, 898 F.2d at 14-15 (Pennsylvania law); Craig v. Lake Asbestos Quebec, Ltd., 843 F.2d 145, 148 (3d Cir. 1988) (New Jersey law) (“Under New Jersey law the corporate veil of a parent corporation may not be pierced unless the parent so dominated the subsidiary that it had no separate existence but was merely a conduit for the parent.”); Quarles v. Fugua Indus., Inc., 504 F.2d 1358, 1364 (10th Cir. 1974) (Kansas law) (denying the “domination of the day-to-day business decisions”).


[Where stock ownership has been resorted to . . . for the purpose . . . of controlling a subsidiary company so that it may be used as a mere agency or
variety of factors, including whether the parent dominated the operation of the subsidiary through common management, establishment of the subsidiary’s policies and procedures, performance of management functions, or through control of the subsidiary’s financial affairs.

instrumentality of the owning company or companies... The courts will not permit themselves to be blinded or deceived by mere forms of law but, regardless of fictions, will deal with the substance of the transaction involved as if the corporate agency did not exist and as the justice of the case may require.

Id. at 501.

For example, courts have considered the following factors: common stock ownership, common directors and officers, common business departments, consolidated financial statements and tax returns, incorporation of the subsidiary by the parent, financing of the subsidiary by the parent; gross undercapitalization of the subsidiary, siphoning of funds from the subsidiary by the parent; payment of the subsidiary’s salaries and other expenses by the parent, the parent is the only source of the subsidiary’s business; common use of property by the parent and subsidiary, lack of separation of operations between the parent and the subsidiary, policies and procedures directed by the parent, and failure to observe corporate formalities (e.g., separate books and records, regular shareholder and board of directors meetings). United Steel Workers of Am., 855 F.2d at 1507; Van Diviner, 822 F.2d at 965; Jon-T Chems., Inc., 768 F.2d at 691-92; Am. Bell, Inc., 736 F.2d at 886; Midwest Fasteners, Inc., 779 F. Supp. at 793-95; DiMauro, 744 F. Supp. at 57; Kayser-Roth, 724 F. Supp. at 20; United States v. Arkwright, Inc., 690 F. Supp. 1133, 1139 (D. N.H. 1988); In re Acushnet River & New Bedford Harbor, 675 F. Supp. 22, 33 (D. Mass. 1987); United States v. Advance Mach. Co., 547 F. Supp. 1085, 1093 (D. Minn. 1982). A number of decisions construing state laws rely on the same factors as well. Passalaqua Builders, 933 F.2d at 139 (New York law); Key v. Liquid Energy Corp., 906 F.2d 500, 503 (10th Cir. 1990) (Oklahoma law); Lowell Staats Mining Co. v. Pioneer Urvan, Inc., 878 F.2d 1259, 1262-63 (10th Cir. 1989) (Colorado law); Craig, 843 F.2d at 150 (New Jersey law); Luckett v. Bethlehem Steel Corp., 618 F.2d 1373, 1378 n.4 (10th Cir. 1980) (Oklahoma law); Dewitt Truck Brokers, Inc. v. W. Ray Femming Fruit Co., 540 F.2d 681, 685-86 (4th Cir. 1976) (South Carolina law); Lakota Girl Scout Council, Inc. v. Harvey Fund-Raising Mgmt., Inc., 519 F.2d 634, 638 (8th Cir. 1975) (Iowa law); United States v. Daugherty, 599 F. Supp. 671, 673 (E.D. Tenn. 1984) (Kentucky law); Schmid v. Roehm GmbH, 544 F. Supp. 272, 274-75 (D. Kan. 1982) (Kansas law).


Courts will look particularly to whether the subsidiary was operated in an under
Jurisdiction may also arise over the parent as a result of the acts of a subsidiary—even a subsidiary that is separate and distinct from the parent—if it is found that the subsidiary acted as the agent of the parent in committing the offense or in committing an act in furtherance of an offense within the territory of the United States. Agency principles have served as the basis for parental liability for the acts of subsidiaries.\(^\text{370}\)

Once again, however, the ability of the parent corporation to control the actions of the subsidiary is the predicate for liability and jurisdiction based on agency.\(^\text{371}\) Thus, it has been said that
"[w]here one corporation is controlled by another, the former acts not for itself but as directed by the latter, the same as an agent, and the principal is liable for the acts of its agents within the scope of the agent's authority." 

015-1CR, Order at 3. In like fashion, in Nat'l Dairy Prods. Corp., 350 F.2d at 321, the parent corporation was held liable for the crimes of the subsidiary. Noting that the parent approved the subsidiary's board of directors, established the subsidiary's policies, exercised control over capital investments, and could override decisions of the subsidiary's president, the court found that the subsidiary's independence from the parent was "in form only." Id. at 327. As a result, the court concluded that "[s]ince [the subsidiary] was merely an operating division of [the parent] in corporate form, the jury was entitled to find [the parent] liable for any conspiratorial conduct in which [the subsidiary] might have engaged with its distributor prior to the formal merger of [the subsidiary] with [the parent]." Id. The ability of the parent to control the actions of the subsidiary has long been viewed as the essential test of agency liability in civil litigation. See, e.g., In re Ky Wagon Mfg., 3 F. Supp. 958, 963 (W.D. Ky. 1932) (holding that the test of parental control for purposes of agency "is whether the [principal] corporation [actually] controls the action of the [subordinate corporation]"). Complete control is not necessary, however. Where the parent has exercised control over the sphere of activity giving rise to the cause of action, the subsidiary has been considered as having acted as the parent's agent. See e.g., Phoenix Can. Oil Co., Ltd. v. Texaco:

[O]ne corporation whose shares are owned by a second corporation does not, by that fact alone, become the agent of the second company. However, one corporation . . . may assume the role of the second corporation's agent in the course of one or more specific transactions . . . . Under this [agency] theory, total domination or general alter ego criteria need not be proven . . . . [u]nlike the alter ego/piercing the corporate veil theory, when customary agency is alleged the proponent must demonstrate a relationship between the corporations and the cause of action. Not only must an arrangement exist between the two corporations so that one acts on behalf of the other and within usual agency principles, but the arrangement must be relevant to the plaintiff's claim of wrongdoing.

842 F.2d 1466, 1477 (3d Cir. 1988); cf. United States v. Carter, 311 F.2d 934 (6th Cir. 1963), cert. denied, 373 U.S. 915 (1963) (despite the fact that the maker of an illegal payment to a union official, in the guise of a loan, was president of both the parent and subsidiary, the parent was not criminally liable because the only involvement of the parent in the transaction was to approve the "loan" which appeared to be bona fide); United States v. Little Rock Sewer Comm., 460 F. Supp. 6 (D. Ark. 1978) (finding that a municipal government which appointed the members of the sewer committee, a separate municipal corporation, was insufficient to find the municipality liable on an agency theory for the filing of a false report by an employee of the sewer committee); E. Indus., Inc. v. Traffic Controls, Inc., 142 F. Supp. 381 (D. Del. 1956) (denying injunctive relief in patent infringement case where it was shown that the parent had no interest in the patent and had no control over the patent except for equitable ownership of the subsidiary which had an interest in the patent).

372 Pac. Can. Co. v. Hewes, 95 F.2d 42, 46 (9th Cir. 1938). At least one commentator has suggested that agency principles would result in liability under the
In sum, personal jurisdiction over an absent foreign defendant is subject to the requirements of due process. However, the due process requirement with regard to personal jurisdiction that the accused have "minimum contacts" with the forum is deemed to be satisfied when the accused commits a criminal act within the territory. Thus, due process would appear to be no bar to personal jurisdiction over an absent foreign national who had committed an act in furtherance of a violation of the FCPA while in the United States.

Similarly, an accused may be deemed to have had the requisite minimum contacts with the United States by doing or causing acts which are intended to have a direct effect in the United States. Thus, a foreign national outside the United States who authorizes or directs an agent, including a subsidiary, in the United States to commit an act in violation of the FCPA, or in furtherance of a violation, may thereby be subjected to the in personam jurisdiction of a U.S. court.

2. In Personam Jurisdiction Over Absent U.S. Nationals

The same due process considerations that bear on whether a court should exercise in personam jurisdiction over an absent foreign national do not apply when the jurisdiction of a U.S. court is invoked in regard to an absent U.S. citizen. Following this rule, U.S. courts have not hesitated to exercise personal jurisdiction over citizens in proceedings arising from their FCPA for the parent:

[A] subsidiary is considered the agent of its parent, as for example, when it enters into a contract on the parent's account. If a foreign subsidiary is the agent of the parent corporation, the parent would be liable for all questionable payments made by the subsidiary in the exercise of its agency authority. In some cases, even though a subsidiary is not technically an agent, the parent is held liable for the actions of its subsidiary. This view is commonly referred to as 'piercing the corporate veil'; the separate corporate existence of the subsidiary is disregarded because it is so dominated by the parent as to be only its instrument. If therefore, a foreign subsidiary's activities are substantially under the control of the parent corporation, the parent corporation would be chargeable with the subsidiary's wrongs.


activities outside the United States, so long as the accused has been afforded adequate notice and an opportunity to be heard, as required by due process. The amended FCPA specifically prohibits U.S. issuers and domestic concerns from corruptly doing any act outside the United States in furtherance of a violation. All U.S. nationals are therefore charged with knowledge of what is prohibited. Accordingly, a U.S. national may be subject to the in personam jurisdiction of a U.S. court based on prohibited acts committed overseas, even if the U.S. national is a resident outside of the United States.

V. Conclusion

The 1998 Amendments greatly enlarged the assertion of U.S. jurisdiction over U.S. nationals who commit prohibited acts abroad and over foreign nationals who commit an act in furtherance of violations of the FCPA in the territorial United States. Read in light of judicial construction of similar provisions in analogous statutes, the jurisdictional reach of the amended FCPA with regard to foreign nationals extends to virtually any


375 Blackmer, 284 U.S. at 438 (“For the exercise of judicial jurisdiction in personam, there must be due process, which requires appropriate notice of the judicial action and an opportunity to be heard.”); accord Juda, 46 F.3d at 967; In re Marc Rich, 707 F.2d at 666.

376 §§ 78 dd-l(g)(1), 78 dd-2 (i)(1).

377 As the Supreme Court made clear in Blackmer, “[t]he jurisdiction of the United States over its absent citizens, so far as the binding effect of its legislation is concerned, is a jurisdiction in personam, as he is personally bound to take notice of the laws that are applicable to him and to obey them.” 284 U.S. at 438.
contact with the United States, however glancing. A telephone call
to the United States, a letter mailed to the United States, the use of
air or road travel, or the clearing of a check or wire transfer of
funds through a financial institution in the United States
apparently are sufficient predicates for jurisdiction, so long as the
act in some way furthers a violation of the FCPA. The
jurisdictional reach is even broader with respect to U.S. nationals,
enshrining any act in furtherance of a violation, committed
anywhere in the world.

The effects doctrine extends even farther the potential reach of
U.S. jurisdiction over foreign nationals. Even though due process
requires that an accused have "minimum contacts" with the forum,
under an effects analysis, evidence that a foreign national caused a
prohibited action to be taken in the United States by a third party
could be the predicate for U.S. subject matter and in personam
jurisdiction over a foreign national, even one who was never
physically present in the United States.

The possibility of jurisdictional overreaching is compounded
by the failure of the FCPA to specifically include a requirement
that U.S. interests be affected directly by the corrupt acts of a
foreign national. For example, a foreign national who causes the
transfer of funds from a U.S. depository in order to pay a bribe to a
foreign official for the purpose of gaining an "improper
advantage" in obtaining business would appear to have violated
the FCPA. Therefore, he would be subject to prosecution in the
United States, regardless of whether a U.S. national, an issuer or
domestic concern, was harmed as a result of the corrupt payment.

By failing to link a violation of U.S. law to a demonstrable
prejudice of national interest, the jurisdictional reach of the FCPA
exceeds the legitimate grasp of U.S. legislative and enforcement
authorities. Indeed, taken to its apparent limits, the amended
FCPA would in effect be a general warrant against international
bribery.

Fortunately, the proscriptive zeal of the FCPA is restrained by
international law which imposes a requirement of reasonableness
on the exercise of both proscriptive and enforcement jurisdiction.
Under this standard, the interests of the foreign sovereign in which
the foreign national resides must be weighed against the interest of
the United States in enforcing its laws. Additionally, the burdens
imposed on the foreign national of having to defend against
charges in the United States, and the availability of another forum whose interests may be equal to or greater than those of the United States, must be considered.

Unfortunately, in enacting the 1998 Amendments, Congress did consider these sovereignty and comity concerns. In the absence of congressional guidance, it must rest, therefore, on the prosecutors in the first instance and ultimately on the judiciary to ensure that the jurisdictional reach of the FCPA does not exceed the legitimate grasp of the United States, in accordance with due process and the law of nations.