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15 UNITED STATES DISTRICT COURT
16 CENTRAL DISTRICT OF CALIFORNIA
17 SOUTHERN DIVISION

18 UNITED STATES OF AMERICA,

19 Plaintiff,

20 v.

21 STUART CARSON, et al.,

22 Defendants.

CASE NO. SA CR 09-00077-JVS

**DECLARATION OF PROFESSOR
MICHAEL J. KOEHLER IN
SUPPORT OF DEFENDANTS'
MOTION TO DISMISS COUNTS
ONE THROUGH TEN OF THE
INDICTMENT**

Hearing

Date: March 21, 2011

Time: 8:00 A.M.

Courtroom: 10C

Trial Date: October 4, 2011

The Honorable James V. Selna

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1 I, Michael J. Koehler, declare as follows:

2 1. I am an Assistant Professor of Business Law at Butler University in
3 Indianapolis, Indiana, a position I have held since August 2009. From September 2000 to
4 July 2009, I was an attorney at Foley & Lardner LLP. A substantial portion of my
5 practice at Foley & Lardner LLP focused on the Foreign Corrupt Practices Act
6 (“FCPA”). During my private practice career, I conducted numerous FCPA
7 investigations around the world, negotiated resolutions to FCPA enforcement actions
8 with government enforcement agencies, and advised clients on FCPA compliance and
9 risk assessment. I make this declaration of my own personal knowledge, unless the
10 context indicates otherwise, and, if called as a witness, I could and would testify
11 competently to the facts stated herein.

12 2. The FCPA is the predominant area of my scholarship and public
13 engagement. My FCPA scholarship has appeared in numerous law reviews and journals,
14 most recently the Georgetown Journal of International Law and the Indiana Law Review.
15 In November 2010, I testified at a hearing of the Senate Subcommittee on Crime and
16 Drugs of the Judiciary Committee titled “Examining Enforcement of the Foreign Corrupt
17 Practices Act.” In September 2010, I chaired the World Bribery & Corruption
18 Compliance Forum in London, England. I also run the website “FCPA Professor,” a
19 forum devoted to the FCPA and related topics, and I am a frequent featured source on the
20 FCPA and related topics in national and international media. A copy of my curriculum
21 vitae (as of December 2010) is attached as **Exhibit 1**.

22 **I.**
23 **BACKGROUND AND ISSUE CONSIDERED**

24 3. The FCPA contains both anti-bribery provisions and books and records and
25 internal control provisions.

26 4. The FCPA’s anti-bribery provisions, which I understand to be at issue in this
27 case and which are the primary focus of this declaration, generally prohibit U.S.
28 companies (whether public or private) and their personnel, U.S. citizens, foreign

1 companies with shares listed on a U.S. stock exchange or otherwise required to file
2 reports with the Securities and Exchange Commission (“SEC”), or any person while in
3 U.S. territory from corruptly paying, offering to pay, promising to pay, or authorizing the
4 payment of money, a gift, or anything of value to a “foreign official” in order to obtain or
5 retain business. 15 U.S.C. § 78dd-1 *et seq.*

6 5. The FCPA defines “foreign official,” as “any officer or employee of a
7 foreign government or any department, agency, or instrumentality thereof, or of a public
8 international organization, or any person acting in an official capacity for or on behalf of
9 any such government or department, agency, or instrumentality, or for or on behalf of any
10 such public international organization.” 15 U.S.C. § 78dd-2(h)(2)(A).

11 6. The FCPA does not define “department,” “agency,” or “instrumentality.”

12 7. The Department of Justice (“DOJ”) maintains that “[s]tate-owned business
13 enterprises may, in appropriate circumstances, be considered instrumentalities of a
14 foreign government and their officers and employees to be foreign officials.” (*See* U.S.
15 Response to OECD Questions Concerning Phase I, at § A.1.1.) Further, DOJ maintains
16 “that Congress expressly intended to include employees of state-owned enterprises in the
17 definition of foreign official.” (*See* U.S. Response to OECD Questions Concerning
18 Phase III at 5 n.1.)

19 8. In the above-captioned matter, I understand that the DOJ has alleged as
20 follows: “CCI’s state-owned customers included, but were not limited to, Jiangsu
21 Nuclear Power Corporation (“JNPC”) (China), Guohua Electric Power (China), China
22 Petroleum Materials and Equipment Corporation (“CPMEC”), PetroChina, Dongfang
23 Electric Corporation (China), China National Offshore Oil Corporation (“CNOOC”),
24 Korea Hydro and Nuclear Power (“KHNP”), Petronas (Malaysia), and National
25 Petroleum Construction Company (“NPCC”) (United Arab Emirates). Each of these
26 state-owned entities was a department, agency, and instrumentality of a foreign
27 government, within the meaning of the FCPA. The officers and employees of these
28 entities, including the Vice-Presidents, Engineering Managers, General Managers,

1 Procurement Managers, and Purchasing Officers, were ‘foreign officials’ within the
2 meaning of the FCPA.” (Indictment ¶ 12.)

3 9. Several other recent FCPA enforcement actions have also been based, in
4 whole or in part, on the DOJ’s legal interpretation that alleged state-owned or state-
5 controlled enterprises (hereinafter “SOEs”) are “instrumentalities” of a foreign
6 government and that employees of alleged SOEs are therefore “foreign officials” under
7 the FCPA’s anti-bribery provisions.

8 10. The DOJ’s “foreign official” legal interpretation in this matter, as well as in
9 numerous other recent FCPA enforcement actions, is the functional and substantive
10 equivalent of the DOJ alleging that General Motors Co. (“GM”) or American
11 International Group Inc. (“AIG”) is an “instrumentality” of the U.S. government (given
12 its ownership interests in these companies) and that all GM and AIG employees are
13 therefore U.S. “officials.”

14 11. As part of my scholarship, I have reviewed and keep up to date on all
15 available case law interpreting the FCPA. Based on that scholarship, I am aware that the
16 DOJ’s legal interpretation of the key “foreign official” element of the FCPA’s anti-
17 bribery provisions (as set forth in paragraphs 7-9) has never been fully and
18 comprehensively addressed by any court utilizing a thorough analysis of the FCPA’s
19 extensive legislative history.

20 12. The purpose of this declaration is to thus provide the Court with a detailed
21 overview of the FCPA’s extensive legislative history, particularly as to the “foreign
22 official” element of the FCPA’s anti-bribery provisions, so that a full and complete
23 analysis of the FCPA’s “foreign official” element can be made for the first time,
24 particularly a complete analysis of whether Congress intended the phrase
25 “instrumentality” to cover SOEs and for employees of SOEs to thus be deemed “foreign
26 officials.”

27 13. In preparing this declaration, I spent approximately 150 hours personally
28 reviewing and analyzing thousands of pages of original source documents and

1 information that collectively make up the FCPA’s legislative history. This does not
2 include the significant time I spent identifying, locating, and collecting this legislative
3 history, much of which is not electronically available. I have conducted a diligent search
4 for all of the FCPA’s legislative history, and to the best of my knowledge, I have
5 collected it all. To the best of my knowledge, no other person has ever centrally collected
6 and engaged in such an extensive analysis and review of the FCPA’s complete legislative
7 history, particularly with respect to the meaning of the “foreign official” element.

8 14. Because the FCPA’s legislative history is so voluminous, totaling several
9 thousand pages, and covers several Congresses, this declaration attempts to summarize,
10 organize and highlight relevant portions of that legislative history, put the legislative
11 material in historical context, and thereby aid the Court’s understanding of the legislative
12 history. For the Court’s convenience, relevant portions of the legislative history are
13 submitted with this declaration.

14 **II.**
15 **OVERVIEW OF OBSERVATIONS**

16 15. Based on my review and analysis of the FCPA’s extensive legislative
17 history, I make the following observations:

18 16. There is no express statement or information in the FCPA’s legislative
19 history describing the “any department, agency, or instrumentality” portion of the
20 “foreign official” definition. Further, there is no express statement or information in the
21 FCPA’s legislative history to support the DOJ’s expansive legal interpretation that
22 alleged SOEs are “instrumentalities” (or “departments” or “agencies”) of a foreign
23 government and that employees of SOEs are therefore “foreign officials” under the
24 FCPA’s anti-bribery provisions.

25 However, there are several statements, events, and information in the
26 FCPA’s legislative history that demonstrate that Congress did not intend the “foreign
27 official” definition to include employees of SOEs. These statements, events, and
28

1 information are briefly summarized below (and are discussed in detail in this
2 declaration):

3 a. The events in the mid-1970s that prompted Congress to become
4 interested in foreign corporate payments principally involved Lockheed Aircraft
5 Corporation, Gulf Corporation, United Brands Company, Northrop Corporation, Ashland
6 Oil, and Exxon Corporation. Each of these instances concerned allegations or admissions
7 that the companies made questionable payments directly or indirectly to traditional
8 foreign government officials or foreign political parties in connection with a business
9 purpose. For instance, Lockheed principally involved \$1.7 million in payments to
10 Japanese Prime Minister Tanaka, \$1.1 million in payments to Prince Bernhard (the
11 Inspector General of the Dutch Armed Forces and the husband of Queen Juliana of the
12 Netherlands), and millions of dollars in payments to Italian political parties; Gulf
13 principally involved contributions to the political campaign of the President of the
14 Republic of Korea; United Brands principally involved payments to Oswaldo Lopez
15 Arellano, President of Honduras; Northrop principally involved payments through a
16 foreign sales agent to two Saudi Arabian generals; Ashland principally involved
17 payments to Albert Bernard Bongo, President of Gabon; and Exxon principally involved
18 contributions to political parties in Italy. *See, e.g.*, ¶¶ 29, 33, 39, 42-43, 49, 58-59, 75-77,
19 91, 159, 165-66, 197, 222, 236, 243, 252, 269, 301, 327, 336, *infra*.

20 b. It was these events – and the foreign policy issues that flowed from
21 them – that motivated Congress to pass the FCPA in 1977. In the legislative history
22 relevant to enactment of the FCPA, the following terms were all used to describe the
23 alleged recipients of certain foreign corporate payments being investigated by Congress:
24 “foreign government official,” “foreign public official,” and “foreign official.” In many
25 cases, the same sentence or paragraph of congressional testimony or reports contains
26 different combinations of these terms. It is clear from this legislative history that the
27 terms “foreign government official,” “foreign public official” and “foreign official” all
28 refer to the same thing – traditional foreign government officials. The term “foreign

1 official” – the shortest of the three terms commonly used – quickly developed into a
2 short-hand or condensed term to describe traditional foreign government officials
3 throughout the FCPA’s legislative history. In passing the FCPA, Congress intended to
4 prohibit payments to this narrow recipient category of traditional foreign government
5 officials performing official or public functions. *See, e.g.*, ¶¶ 76, 108, 183, 238, 253, 266,
6 273, 275, 336, *infra*.

7 c. During its multi-year investigation of foreign corporate payments that
8 preceded enactment of the FCPA, Congress was aware of the existence of SOEs and that
9 some of the questionable payments uncovered or disclosed may have involved such
10 entities. *See, e.g.*, ¶¶ 41, 79, 95, 148-51, 162, 230-31, *infra*.

11 d. Indeed, in certain of the competing bills introduced in Congress to
12 address foreign corporate payments, the definition of “foreign government” expressly
13 included SOEs. These bills were introduced in both the Senate and the House during
14 both the 94th (1975-76) and 95th (1977-78) Congresses. For instance, in August 1976, S.
15 3741 was introduced in the Senate and H.R. 15149 was introduced in the House. Both
16 bills defined “foreign government” to include, among other things, “a corporation or
17 other legal entity established or owned by, and subject to control by, a foreign
18 government.” Similarly, in June 1977, H.R. 7543 was introduced in the House. H.R.
19 7543 defined “foreign government” to include “a corporation or other legal entity
20 established, owned, or subject to managerial control by a foreign government.” *See, e.g.*,
21 ¶¶ 149-51, 230-231, *infra*.

22 e. As to S. 3741 and H.R. 15149, an American Bar Association
23 committee informed the Chair of the House subcommittee holding hearings on these bills
24 that the definition of “foreign government” in these bills, specifically the portion of the
25 definition referring to “a corporation or other legal entity established or owned by, and
26 subject to control by, a foreign government” was “somewhat ambiguous.” The American
27 Bar Association committee suggested a “more precise definition of this aspect of the
28 definition of ‘foreign government’ and proposed the following language: “a legal entity

1 which a foreign government owns or controls as though an owner.” *See, e.g.*, ¶ 167,
2 *infra*.

3 f. However, despite being aware of SOEs, despite exhibiting a capability
4 for drafting a definition that expressly included SOEs in other bills, and despite being
5 provided a more precise way to describe SOEs, Congress chose not to include such
6 definitions or concepts in S. 305, the bill that ultimately became the FCPA in December
7 1977. *See, e.g.*, ¶¶ 279-80, *infra*.

8 17. Congress amended the FCPA in both 1988 and 1998, including the
9 definition of “foreign official.” In 1988, Congress removed the following sentence from
10 the original definition of “foreign official” – “such term does not include any employee
11 of a foreign government or any department, agency, or instrumentality thereof whose
12 duties are essentially ministerial or clerical” – and created an *express* facilitating
13 payment exception for “routine governmental action.” *See, e.g.*, ¶¶ 380-383, *infra*. In
14 1998, Congress amended the definition of “foreign official” to include officials of “public
15 international organizations” following adoption of the Organization for Economic
16 Cooperation and Development Convention on Combating Bribery of Foreign Public
17 Officials in International Business Transactions (“OECD Convention”). *See, e.g.*, ¶¶
18 435-37, *infra*. However, Congress did not amend the FCPA to include officials of
19 “public enterprises,” a term that was included (and defined) in the OECD Convention.
20 *See, e.g.*, ¶¶ 385-89, 407, 428, *infra*.

21 18. There is no express statement or information in the FCPA’s post-enactment
22 legislative history describing the “any department, agency, or instrumentality” portion of
23 the “foreign official” definition. Further, there is no express statement or information in
24 the post-enactment legislative history to support the DOJ’s expansive legal interpretation
25 that alleged SOEs are “instrumentalities” of a foreign government and that employees of
26 SOEs are therefore “foreign officials” under the FCPA’s anti-bribery provisions.

27 However (as discussed in detail in sections V and VI of this declaration), as in the
28 FCPA’s enacting legislative history, the post-enactment legislative history further

1 demonstrates that Congress was made aware of the existence of SOEs. *See, e.g.*, ¶¶ 330-
2 31, 421 *infra*. Nevertheless, in amending the “foreign official” definition in 1988 and
3 1998, Congress again chose not to include SOE definitions or concepts in the “foreign
4 official” definition.

5
6 **III.**
STRUCTURE OF DECLARATION

7 19. This declaration divides the FCPA’s legislative history into four sections:
8 (i) legislative history relevant to enactment of the FCPA in 1977; (ii) legislative history
9 relevant to the FCPA’s 1988 amendments; (iii) legislative history relevant to the FCPA’s
10 1998 amendments; and (iv) legislative developments since the 1998 amendments.

11 20. As explained in greater detail below, Congress held numerous hearings in
12 the mid-1970s (including nine key hearings between June 1975 and September 1977) in
13 the aftermath of news and disclosures of questionable foreign corporate payments to a
14 variety of recipients and for a variety of reasons. This declaration provides an overview
15 of the facts and circumstances in the mid-1970s that prompted Congress to become
16 interested in the topic of foreign corporate payments, as well as a summary of these
17 congressional hearings.

18 21. Testimony at these hearings was given by, among others, representatives
19 from the State Department, the Defense Department, the DOJ, the Commerce
20 Department, the Treasury Department, and the SEC. Testimony at these hearings was
21 also given by, among others, lawyers, law professors, the American Bar Association,
22 other bar association committees, industry groups, and public interest groups, all of
23 whom also submitted material found in the hearing records. This declaration provides a
24 summary of the above-described testimony to provide insight into the views of interested
25 agencies, organizations, and persons as to the type of conduct Congress sought to address
26 in passing the FCPA in December 1977.

27 22. Both the 94th and 95th Congresses, as well as the Administrations of Gerald
28 Ford and Jimmy Carter, were involved in seeking legislation to address foreign corporate

1 payments. Between June 1975 and September 1977, approximately twenty bills were
2 introduced in the Senate or the House to address foreign corporate payments. This
3 declaration provides a summary of these bills.

4 23. During Congress's multi-year focus on foreign corporate payments, certain
5 bills in both the 94th and 95th Congresses were reported out of Congressional
6 committees and were considered and passed by either the Senate or the House. This
7 declaration provides a summary of Senate and House Reports of those various bills, as
8 well as a summary of Congressional floor statements in connection with the passage of
9 these bills.

10 24. What became the FCPA in December 1977 (Public Law 95-213) resulted
11 from a compromise between the Senate as to its bill, **S. 305**, and the House as to its bill,
12 **H.R. 3815**. This declaration provides a summary of the Senate and House Reports of
13 these respective bills, the conference process as reflected in the Conference Report, and
14 Congressional floor statements and activity resulting in an amended S. 305 being sent to
15 President Carter for his signature in December 1977.

16 25. Beginning in 1980, Congress sought to amend the FCPA's anti-bribery
17 provisions, a process that took eight years. During this time span, various bills were
18 introduced in the 96th, 97th, 98th, 99th, and 100th Congresses. These bills, either stand-
19 alone bills or specific titles or sections of omnibus export or trade bills, included
20 proposed amendments to the FCPA's "foreign official" definition. In 1988, the FCPA
21 was amended in Title V of an omnibus trade act (Public Law 100-418), resulting from the
22 passage and signing of **H.R. 4848**. Among other things, the 1988 amendments amended
23 the FCPA's "foreign official" definition by removing the "ministerial or clerical"
24 language from the original "foreign official" definition and creating an express
25 facilitating payment exception for "routine governmental action." This declaration
26 provides an overview of this post-enactment legislative history, including a summary of
27 the various bills, Congressional hearings, and Senate and House Reports resulting in the
28 1988 amendments to the FCPA signed by President Ronald Reagan.

1 26. In December 1997, the U.S. signed the Organization for Economic
2 Cooperation and Development (“OECD”) Convention on Combating Bribery of Foreign
3 Public Officials in International Business Transactions. To implement portions of the
4 Convention, the FCPA was amended in 1998 (Public Law 105-366). Congress chose to
5 incorporate certain of the OECD’s concepts and provisions into the FCPA, but not others.
6 As relevant to the “foreign official” element, Congress chose to amend the “foreign
7 official” definition to include officials of “public international organizations.” However,
8 Congress did not incorporate the OECD’s definition of “public enterprise” into the
9 “foreign official” definition. This declaration provides an overview of the OECD
10 Convention and the DOJ’s guidance to Congress in seeking certain amendments to the
11 FCPA. This declaration also provides an overview of the legislative history relevant to
12 the “foreign official” definition being amended, including a summary of the relevant
13 bills, a Congressional hearing, and the Senate and House Reports resulting in the FCPA’s
14 1998 amendments signed by President William Clinton.

15 27. On November 30, 2010 the Senate Subcommittee on Crime and Drugs of the
16 Judiciary Committee held a hearing titled “Examining Enforcement of the Foreign
17 Corrupt Practices Act.” This declaration provides a summary of this hearing relevant to
18 the “foreign official” definition.

19 **IV.**
20 **LEGISLATIVE HISTORY RELEVANT TO**
21 **ENACTMENT OF THE FCPA IN 1977**

22 **A. Hearings Before the Subcommittee on Multinational Corporations,**
23 **United States Senate, 94th Congress, First Session (May 16 and 19; June**
24 **9 and 10; July 16 and 17; and September 12, 1975) (“Political**
Contributions to Foreign Governments” Hearings)

25 28. On May 16, 1975, the Senate Subcommittee on Multinational Corporations
26 held the first of several hearings generally dealing with U.S. corporate political
27 contributions to foreign governments. (**Exhibit 2.**) Senator Frank Church, Chairman of
28 the Subcommittee, opened the hearing as follows: “In the course of the Watergate

1 Committee hearing and the investigation by the Special Prosecutor, it became apparent
2 that major American corporations had made illegal political contributions in the United
3 States. More recently, the Securities and Exchange Commission has revealed that several
4 multinational corporations had failed to report to their shareholders millions of dollars of
5 offshore payments in violation of the Securities laws of the United States. The Gulf Oil
6 Corporation, before us today, has admitted making \$4.8 million in domestic political
7 contributions and at least \$4.3 million in overseas political payments. The Securities and
8 Exchange Commission is understandably concerned that the disclosure requirements of
9 the U.S. laws are complied with. This subcommittee is concerned with the foreign policy
10 consequences of these payments by U.S. based multinational corporations.” (*Id.* at 1.)
11 Senator Church stated that one of the tasks of the subcommittee was to “consider what
12 legislation if any, is warranted.” (*Id.* at 2.) He further stated as follows: “In short, we
13 cannot close our eyes to this problem. It is no longer sufficient to simply sigh and say
14 that is the way business is done. It is time to treat the issue for what it is: a serious
15 foreign policy problem.” (*Id.*)

16 29. The May 16, 1975 hearing of the subcommittee concerned Gulf Oil
17 Corporation. The June 9 and 10, 1975 hearings concerned Northrop Corporation. The
18 July 16, 1975 hearing concerned Exxon Corporation. In opening that hearing, Senator
19 Church made the following statement: “On May 16, this subcommittee learned ... that
20 Gulf made a \$4 million illegal political contribution in Korea. On June 10, ... Northrop
21 Corp. admitted that Northrop had paid \$450,000 to its agent in Saudi Arabia for the
22 purpose of bribing the former and present Minister of Aviation in that country, as well as
23 millions of dollars of other payments which could not be accounted for. In Italy, an
24 Italian magistrate uncovered evidence of questionable political payments by the major oil
25 companies but the dimensions of these payments were not known. Now, we have Exxon
26 Corp. admitting in Italy alone, \$46 million was allegedly paid to Italian political parties,
27 although even that is not certain since the corporation cannot be sure of the ultimate
28 destination of these payments. It is time for plain speaking. A cancer is eating away at

1 the vitals of Western society and that cancer is corruption, corruption on an endemic
2 scale.” (*Id.* at 239.) The July 17, 1975 hearing concerned Mobil Oil Corporation. The
3 September 12, 1975 hearing concerned Lockheed Corporation. In opening that hearing,
4 Senator Church made the following statement: “The Subcommittee on Multinational
5 Corporations is today continuing its public inquiry into the corporate practice of
6 promoting sales abroad by funneling money to foreign government officials through large
7 agents’ fees or direct political contributions.” (*Id.* at 341.)

8 **B. H.R. 7539 (Introduced June 3, 1975)**

9 30. During the time period these hearings were occurring, on June 3, 1975,
10 Representative Stephen Solarz introduced H.R. 7539. (**Exhibit 3.**) The bill stated as
11 follows: “Any American company or any official or employee of an American company
12 who, with intent to influence any official act affecting such company, gives or attempts,
13 offers, promises, conspires to give any thing of value to any foreign government, any
14 foreign official, or any foreign political organization, shall be fined not more than
15 \$10,000 or imprisoned not more than one year, or both.” H.R. 7539 did not define the
16 terms “foreign government” or “foreign official.” H.R. 7539 was referred to the House
17 Committee on the Judiciary.

18 **C. Hearings Before the Subcommittee on International Economic Policy,**
19 **House of Representatives, 94th Congress, First Session (June 5, July 17,**
20 **24, 29, September 11, 18 and 30, 1975) (the “International Economic**
21 **Policy Hearings”)**

22 31. On June 5, 1975, the House of Representatives, Committee on International
23 Relations, Subcommittee on International Economic Policy, held hearings on “The
24 Activities of American Multinational Corporations Abroad.” (**Exhibit 4.**)
25 Representative Robert N.C. Nix chaired the subcommittee and opened the hearings with
26 the following statement: “During the last few weeks, charges that American corporations
27 have maintained secret funds for the payment of gratuities to foreign government and
28 political figures have been made and substantiated by the Securities and Exchange
Commission and the Civil Aeronautics Board. Such payments to foreign officials are not

1 a violation of American law at present, although they are very often a violation of foreign
2 law.” (*Id.* at 1.)

3 32. In his opening statement, Representative Nix also noted that the “last several
4 weeks have brought to light facts and circumstances established by the Securities and
5 Exchange Commission among others that American corporations have engaged in
6 extensive bribery of foreign public officials in violation of the laws of those countries.”
7 (*Id.* at 2.)

8 33. Examples cited by Representative Nix included the following: (i) “[t]he
9 president of the Gulf Corp. has admitted making a \$3 million contribution to the last
10 political campaign in the Republic of Korea in which President Park won by 51 percent
11 of the vote”; and (ii) “[t]he United Brands Co. had admitted to making payments of \$1.25
12 million to the Honduran Chief of State, Oswaldo Lopez Areliano, who was ousted in
13 April in a coup as a result.” (*Id.* at 2.)

14 34. The first witness to testify at the hearings was Representative Solarz, a
15 member of the subcommittee who was described as a person having “a keen interest in
16 these issues.” (*Id.* at 3.) Representative Solarz began his testimony by stating: “It is
17 tragic when one hears that a major U.S. concern bribes a foreign official in order to
18 secure special trade concessions or when another leading multinational corporation
19 makes a massive political donation to an incumbent political party in order to maintain
20 business relations.” (*Id.* at 3.)

21 35. “[T]o deal with the problem,” Representative Solarz said he introduced H.R.
22 7539 “to specifically prohibit the bribery of any foreign government, foreign official, or
23 foreign political organization by any American company or official or employee thereof.”
24 (*Id.* at 4.) Representative Solarz stated that “[t]his legislation would remove any
25 questions which American business persons, foreign governments and their officials, and
26 any others may have about the manner in which a U.S. firm operates overseas.” (*Id.* at 5.)

27 36. Mark Feldman (Deputy Legal Advisor, Department of State) also testified at
28 the hearing. In his opening remarks, Feldman stated: “In recent weeks the media have

1 carried a number of stories dealing with reported political contributions and other
2 payments by U.S. firms to foreign government officials. Such payments and their
3 disclosure can have important ramifications for our foreign relations and economic
4 interests.” (*Id.* at 22.) In his testimony, Feldman offered “what the State Department
5 believes the U.S. Government should do about it.” (*Id.*) He stated as follows: “What,
6 then, should be done? First, it is important that all U.S. investors and foreign
7 governments clearly understand that we condemn payments to foreign government
8 officials and that any investor who makes them cannot look to the Department of State to
9 protect him from legitimate law enforcement actions by the responsible authorities of
10 either the host country or the United States.” (*Id.* at 23.) In closing, Feldman stated that
11 “[c]orruption of friendly foreign governments can undermine the most important
12 objectives of our foreign policy.” (*Id.*)

13 37. The International Economic Policy Hearings continued on July 17, 1975. A
14 June 17, 1975 written statement by Philip A. Loomis, Jr. (Commissioner, Securities and
15 Exchange Commission) was entered into the record. The statement was “on the subject
16 of contributions to officials of foreign governments by American companies.” (*Id.* at 35.)

17 38. Loomis’s written statement begins as follows: “We understand that the
18 initial concern of this Subcommittee is whether or not legislation may be required to
19 prohibit or regulate these foreign payments. Naturally, that is a legislative judgment only
20 the Congress can make. But, to assist you in your consideration of this important
21 question, I can detail for you the nature of the Commission’s activities in this area.” (*Id.*)

22 39. Loomis’s written statement continues as follows: “As a general proposition,
23 our current involvement may be said to have grown out of the investigations made by the
24 Watergate Special Prosecutors Office of illegal, and therefore undisclosed, corporate
25 campaign contributions in the 1972 elections. Our staff, observing these proceedings,
26 recognized that the activities disclosed for the first time involved questions of possible
27 significance to public investors, and that this might have a bearing upon our
28 responsibilities. Accordingly the Special Prosecutor’s Office referred to us information

1 obtained in various of its investigations. Starting with the leads thus provided, our staff
2 looked into these matters, using a somewhat broader focus. Inquiry into illegal campaign
3 contributions disclosed the falsification of corporate financial statements to disguise or
4 conceal the source and application of corporate funds misused for this purpose. More
5 specifically, they disclosed, in some instances, the existence of secret slush funds, derived
6 from the creation of expenses for fictitious purposes and disbursed without accountability
7 by corporate executives. In our view, this type of activity necessarily rendered inaccurate
8 the financial statements filed with the Commission. Such secret funds might be, and
9 were, used for a number of purposes, including in certain instances, payments abroad.
10 Thus, although some of the Commission's actions did not involve foreign payments, the
11 Commission, in its injunctive actions against Gulf Oil Corporation, Phillips Petroleum
12 Company, Northrop Corporation and Ashland Oil, Inc. has alleged violations in
13 connection with funds distributed in cash overseas. These latter four cases have alleged
14 only that undisclosed funds were distributed abroad; no specific allegations were
15 contained in the complaints that the funds in question were paid to foreign *government*
16 *officials*. I should note, however, as a result of testimony before the Senate
17 Subcommittee on Multinational Corporations, that it is known that funds went to foreign
18 officials in some of these cases: further details should be forthcoming in reports to the
19 courts and to the Commission as required by the consent decrees and the lawsuits we
20 have brought. The only case to date in which we have made a specific allegation of
21 payments to a foreign government official is our lawsuit against United Brands Company,
22 a case which, by the way, did not result from files sent to this Commission by the Special
23 Prosecutor, but rather, resulted from a routine Commission investigation of the
24 circumstances following the suicide of that company's Chief Executive Officer. The
25 Commission's complaint in the *United Brands* case, which is still in litigation, alleges
26 that, in September of 1974, the company deposited \$1.25 million in the Swiss bank
27 accounts of high government officials of the Republic of Honduras, in exchange for
28 favorable government action with respect to an export tax problem. United Brands is

1 further alleged to have agreed to pay an additional \$1.25 million the following spring.”

2 (*Id.* at 37, emphasis in original.)

3 40. The International Economic Policy Hearings continued on July 24, 1975.

4 41. Donald Baker (Deputy Assistant Attorney General, Antitrust Division, DOJ)
5 testified at the hearing. Baker began his testimony as follows: “Foreign governments are
6 becoming increasingly involved in the production, distribution and acquisition of goods
7 and services, especially primary commodities, such as oil, bauxite, and coffee. This
8 involvement increases the opportunities and incentives to induce governmental conduct
9 (by bribery and other techniques) in the service of private anticompetitive practices. It
10 also increases the opportunities and incentives for particular foreign governmental
11 officials – both in their official and personal capacities – to extract payments from private
12 firms as a condition for access to products or markets influenced by such governments.
13 These are matters of concern to this administration.” (*Id.* at 87.)

14 42. The International Economic Policy Hearings continued on July 29, 1975,
15 and focused on the role of foreign agents in military sales contracts. Representative Nix
16 opened the hearing by noting that “Northrop Aviation has admitted to paying two Saudi
17 generals \$450,000 through a foreign sales agent.” (*Id.* at 99.)

18 43. The International Economic Policy Hearings continued on September 11,
19 1975. Representative Nix opened the hearing as follows: “Since the subcommittee’s last
20 meeting on July 29, 1975, additional facts have been established in reference to the
21 payment of bribes to foreign officials by multinational corporations. Secretary of the
22 Treasury Simon, in his capacity as Chairman of the Emergency Loan Guarantee Board,
23 which oversees the \$195 million Federal loan guarantee program for Lockheed, testified
24 that Lockheed has paid out \$22 million in bribes since 1970, out of a total payment in
25 agents’ commissions of \$147 million. In addition, Secretary Simon testified that
26 Lockheed has kept the bribes secret from the Board until 2 months ago. Second, a front
27 page Washington Post news story stated that the Defense Department, on July 9,
28 disallowed \$59 million in commissions which were contracted for by Northrop with

1 Adnan Khashoggi [an individual “accused of funneling \$450,000 in bribes to two Saudi
2 Arabian generals”] for business in Saudi Arabia.” (*Id.* at 127, 140.)

3 44. The International Economic Policy Hearings concluded on September 30,
4 1975. In opening the hearing that day, Representative Nix stated as follows: “Today we
5 will conclude that portion of our hearings which deal with the existence of slush funds
6 maintained by international corporations. The existence of massive slush funds in
7 accounts of American international business first came to light with revelations by the
8 Watergate Prosecutors Office that illegal corporate contributions were made by
9 corporations out of slush funds maintained abroad. The Securities and Exchange
10 Commission has proven that hundreds of millions of dollars have been unaccounted for
11 in its investigation of the bribery of foreign public officials by international
12 corporations.” (*Id.* at 165.)

13 45. In both a written statement and oral testimony, Edward Schmults (Under
14 Secretary of the Treasury, Executive Director, Emergency Loan Guarantee Board (the
15 “Board”)), discussed the recent disclosure of improper payments by Lockheed. Schmults
16 explained as follows: “In August, 1971, The Emergency Loan Guarantee Act [the “Act”]
17 was passed for the purpose of providing guaranteed loan assistance to major corporations
18 whose failure could have a material adverse impact on the economy. At that time,
19 Lockheed was considered the most likely applicant for assistance.” (*Id.* at 170.)
20 Schmults further explained that “Lockheed has borrowed \$195 million under
21 Government guarantee,” and that in early June 1975 the “Board’s staff was orally advised
22 by Lockheed that the company may have made payments to foreign officials in
23 connection with marketing activities abroad.” (*Id.* at 170-71.) Schmults testified that
24 Lockheed’s disclosure was motivated by a June 6, 1975 media report involving “an
25 allegation by the Northrop Corporation that it had modeled a Swiss subsidiary utilized to
26 facilitate payments to its agents after one established by Lockheed...” (*Id.* at 171.)
27 Schmults stated as follows: “I think it is indefensible for American corporations to pay
28 bribes. I am talking about bribes to government officials now. I am not talking about

1 things that people can argue about whether they are bribes or whether they are legitimate
2 payments.” (*Id.* at 177.)

3 46. As indicated in the above statements from the International Economic Policy
4 Hearings, the following terms were all used to describe the alleged recipients of the
5 foreign corporate payments being investigated by Congress: “foreign government
6 official,” “foreign public official,” and “foreign official.” In many cases, the same
7 sentence or paragraph of testimony contains different combinations of these terms. As is
8 evident throughout the remainder of this declaration, these three terms individually, or a
9 combination thereof, were also used by Congress and witnesses in subsequent
10 Congressional hearings, reports, and statements. It is clear from the legislative history
11 that the terms “foreign government official,” “foreign public official” and “foreign
12 official” all refer to the same thing – traditional foreign government officials. The term
13 “foreign official” – the shortest of the three terms commonly used – quickly developed
14 into a short-hand or condensed term to describe traditional foreign government officials
15 throughout the FCPA’s legislative history.

16 **D. Hearings Before the Committee on Banking, Housing and Urban**
17 **Affairs, United States Senate, 94th Congress, First Session (August 25,**
18 **1975) (the “Lockheed Hearing”)**

19 47. On August 25, 1975, the Senate Committee on Banking, Housing and Urban
20 Affairs held a hearing on “Lockheed Bribery.” (**Exhibit 5.**)

21 48. On August 6, 1975, Lockheed disclosed in a Report to Stockholders as
22 follows: “Sales to foreign governments and other customers located in more than 30
23 foreign countries totaled approximately \$1.73 billion in the period 1970 through 1974
24 and \$482 million in the first half of 1975. In connection with certain of these sales, we
25 have paid commissions and other payments to consultants and others totaling \$63 million
26 in the period 1970 through 1974 and \$23 million in the first half of 1975. In addition to
27 those payments, we had as of June 29, 1975 prepaid (from customer advances) \$61
28 million and committed approximately \$55 million additional of commissions and other
payments, under existing consulting agreements, relating to a major portion of our June

1 29, 1975 foreign backlog of \$1.6 billion. Of the total commissions paid and other
2 payments made during the period 1970 through June 29, 1975, based on present
3 information, at least 15% is known or thought to have flowed to foreign officials and to
4 foreign political organizations in a number of countries abroad. Earlier, company
5 spokesmen in response to newspaper inquiries had generally indicated that such
6 payments had not been made. ... The foreign commissions and other payments were
7 made with the knowledge of management, and we believe they were necessary in
8 consummating certain foreign sales. We also believe that such payments are consistent
9 with practices engaged in by numerous other companies abroad, including many of our
10 competitors, and are in keeping with business practices in many foreign countries.” (*Id.*
11 at 52.)

12 49. Senator William Proxmire chaired the hearing. In his opening statement,
13 Senator Proxmire listed a “few examples of what is known” that “illustrate both the
14 seriousness of the matter and the gaps in our knowledge.” (*Id.* at 2.) The examples
15 included the following: (i) “In one case a senior government official of a foreign
16 government with important responsibilities in the approval and supervision of large
17 contracts told Lockheed that its marketing consultant had refused to pay the official his
18 share of the commission in connection with certain Lockheed contracts – Lockheed
19 mediated the dispute over the fee and arranged to pay about \$2.1 million to the official”;
20 (ii) “In the second case Lockheed was told by its marketing consultant that he had agreed
21 to pay part of his commission to a high government official who had been instrumental in
22 obtaining approval of a contract for Lockheed, and that the official was demanding
23 payment in advance of the agreed-upon date – Lockheed paid \$5 million to the
24 government official...”; (iii) “In the third case Lockheed paid \$8.7 million to an
25 individual who was both a government official and an official of a governmental
26 customer”; and (iv) “In the fourth case more than \$2 million was paid to government and
27 political party officials of a foreign government after Lockheed was told that the payoffs
28 had to be made if Lockheed expected to get a contract it wanted.” (*Id.* at 2.)

1 50. In an opening statement, Senator John Tower noted that holding the hearing
2 presented a “possibility of embarrassment of foreign governments, foreign officials”
3 because the committee was “dealing with something that is sensitive indeed.” (*Id.* at 3.)

4 51. The first witness at the hearing was William Simon (Secretary of the
5 Treasury). Secretary Simon explained that investigation into Lockheed’s payment of
6 bribes to “officials of foreign governments” presented several “difficult questions”
7 including “how can the Board distinguish between proper commissions to sales
8 consultants and instances where consultants use a portion of their fees to bribe foreign
9 government officials.” (*Id.* at 5, 8.)

10 52. D.J. Haughton (Chairman of the Board, Lockheed Aircraft Corp.) testified at
11 the hearing that the company “knew about the practice of payments on some occasions to
12 foreign officials,” “but so did everyone else who was at all knowledgeable about foreign
13 sales.” (*Id.* at 27.) Haughton noted that “there were no U.S. rules or laws which banned
14 the practice or made it illegal.” (*Id.*) He stated that Congress had taken under
15 consideration the question of “whether laws should be enacted in the United States
16 dealing with the subject of commissions paid abroad or direct or indirect payments to
17 foreign officials abroad” and that “if Congress passes laws dealing with commissions and
18 direct or indirect payments to foreign officials in other countries, Lockheed, of course,
19 will fully comply with them.” (*Id.* at 28.)

20 53. In describing the payments made by Lockheed, Haughton stated that
21 although Lockheed knows “how much in total was paid in overseas commissions, we are
22 far from sure how much actually went to foreign officials, and in some cases, we are not
23 even certain which officials actually received payments, or even whether they received
24 them.” (*Id.* at 28-29.)

25 54. Senator Proxmire asked Haughton during the hearing, “[D]id or did not
26 Lockheed make payments to Government officials in relationship to the sales of L-1011
27 in any foreign country?” to which Haughton answered, “Yes, we have.” (*Id.* at 39.) Roy
28 Anderson (Senior Vice President of Finance for Lockheed) stated during the hearing that

1 Lockheed made \$22 million in payments “that we know or think may have flowed to
2 Government officials.” (*Id.* at 40.)

3 55. Senator Proxmire concluded the hearings by criticizing the refusal of
4 Lockheed witnesses to answer certain specific questions and stated: “Lockheed refuses to
5 answer the questions asked by this committee about the details of the payoffs and bribes
6 to foreign government officials. ... The committee is determined to pursue this
7 investigation and to obtain all the facts.” (*Id.* at 54-55.)

8 **E. S. Res. 265 (Introduced September 25, 1975)**

9 56. On September 25, 1975, Senator Abraham Ribicoff introduced S. Res. 265.
10 (**Exhibit 6.**) In pertinent part, the resolution stated as follows: “Resolution – To protect
11 the ability of the United States to trade abroad. Whereas recent statements of American
12 multinational corporations before Congress and recent disclosures of the Securities and
13 Exchange Commission have revealed that policies and practices in foreign nations
14 necessitate the use of special and unusual payments through middlemen, and the use of
15 direct and indirect payments to foreign government officials, to reasonably and
16 effectively compete in those markets; and Whereas public disclosure by American
17 multinational corporations and by the Securities and Exchange Commission have
18 revealed direct and indirect involvements by the governments of other nations in
19 unreasonably and unjustifiably restricting and limiting trade and commerce with its
20 agencies and offices by requiring or inducing political contributions to reasonably and
21 effectively compete in those markets; ... Now, therefore, be it resolved, that the
22 President’s Special Representative for Trade Negotiations and appropriate officials of the
23 Departments of State, Commerce, Treasury, and Justice, in consultation with the
24 chairman of the Committee on Finance and the congressional delegates for trade
25 agreements, initiate at once negotiations within the framework of the current multilateral
26 trade negotiations in Geneva, and in other negotiations of trade agreements pursuant to
27 the Trade Act of 1974, with the intent of developing an appropriate code of conduct and
28 specific trading obligations among governments, together with suitable procedures for

1 dispute settlement, which would result in elimination of such practices on an
2 international, multilateral basis, including suitable sanctions to cope with problems posed
3 by nonparticipating nations, such codes and written obligations to become part of the
4 international system of rules and obligations within the framework of the General
5 Agreement on Tariffs and Trade, and other appropriate international trade agreements
6 pursuant to the provisions and intent of the Trade Act of 1974.” (*Id.*) S. Res. 265 was
7 referred to the Senate Committee on Finance.

8 **F. Hearings Before the Subcommittee on International Trade of the**
9 **Committee on Finance, United States Senate, 94th Congress, First**
10 **Session (October 6, 1975) (the “Trade Abroad Hearings”)**

11 57. On October 6, 1975, the Senate Subcommittee on International Trade held a
12 hearing on “Protecting the Ability of the United States to Trade Abroad.” (**Exhibit 7.**)

13 58. Senator Church testified at the hearing, and he framed the issue as follows:
14 “We are not just talking about a little baksheesh to grease the palm of some petty clerk in
15 order to speed needed documents on their way through the bureaucratic labyrinth. What
16 we are talking about is a concerted effort by the petroleum industry to buy favorable tax
17 and energy legislation in a European country in which one U.S. company alone made
18 over \$50 million in contributions to the government parties and members of the cabinet
19 over a 9-year period. What we are talking about is an arms industry campaign to flood
20 the Middle East with weapons, in which a U.S. aircraft company paid over \$100 million
21 in agents’ fees in one country to sell an airplane which has no competitor. A large part of
22 that \$100 million is known to have ended up in the Swiss bank accounts of high military
23 and civilian defense officials of the purchasing country.” (*Id.*) Senator Church stated
24 that “of most immediate concern is the role of corporate agents’ fees, and through them,
25 bribes to Government officials, in fueling a new arms race in the Middle East and other
26 parts of the world.” (*Id.* at 8.)

27 59. In his testimony, Senator Church also noted that “[s]everal oil companies
28 testified [before the Multinational Subcommittee] that they had made huge political
contributions in Italy and Korea.” (*Id.* at 9.)

1 60. In his testimony, Senator Church stated as follows: “I feel strongly that
2 some form of national legislation with regard to bribes and payoffs in foreign commerce
3 is in the best domestic and foreign policy interests of this country. The Subcommittee on
4 Multinational Corporations is, at the present time, considering several proposals ranging
5 from an absolute ban on political contributions in foreign countries and the use of agents
6 in arms sales, to more stringent public disclosure of agent and consultant fees paid
7 abroad. Full public disclosure would allow for the legitimate use of agents and
8 consultants while making it very difficult for corporations to disguise payoffs to
9 Government officials. However, as the Senate Resolution 265 points out, this is not just
10 an American problem, but an international one. Neither I nor my colleagues on this
11 subcommittee have any desire to unfairly penalize U.S. companies in the competition for
12 foreign markets. Therefore, some form of international agreement is a necessary
13 corollary to any national legislation.” (*Id.* at 10.)

14 61. On November 12, 1975, S. Res. 265 passed the Senate by a vote of 93-0.

15 **G. Hearings Before the Subcommittee on Priorities and Economy in**
16 **Government of the Joint Economic Committee, 94th Congress, First**
17 **and Second Session (January 14 and 15, March 2 and 5, 1976) (the**
18 **“Abuses of Corporate Power” hearings)**

19 62. On January 14, 1976, the Subcommittee on Priorities and Economy in
20 Government of the Joint Economic Committee began “an extended series of hearings on
21 the subject of abuses of corporate power.” (**Exhibit 8** at 1.) Senator Proxmire chaired
22 the subcommittee and, in opening the hearing, indicated that the focus of the hearings
23 would be on “official corporate crimes and improper behavior; bribes, kickbacks, illegal
24 campaign contributions, and other improper uses of corporate funds.” (*Id.* at 1.) One
25 goal of the hearings was to find “new solutions, including new legislation, needed to deal
26 with these problems.” (*Id.* at 2.)

27 63. The first witness at the hearing was Roderick Hills (Chairman of the SEC).
28 Chairman Hills described the SEC’s then active voluntary disclosure program and that
the issues under investigation included “overt corporate payments to foreign government

1 officials in return for favorable business concessions; and tens of millions of dollars paid
2 to consultants, the payments used allegedly to bribe foreign government officials in order
3 to procure business.” (*Id.* at 3.)

4 64. During the March 5, 1976 hearing Robert Ingersoll (Deputy Director – State
5 Department) testified. He stated as follows. “We have seen dramatic evidence in recent
6 weeks of the potential consequences of disclosure in the United States of events which
7 affect the vital interests of foreign governments. Preliminary results have included
8 serious political crises in friendly countries, possible cancellation of major overseas
9 orders for U.S. industries and the risk of general cooling toward U.S. firms abroad. [...] I
10 wish to state for the record that grievous damage has been done to the foreign relations
11 of the United States by recent disclosures of unsubstantiated allegations against foreign
12 officials. As I said, we do not condone bribery, nor does the U.S. government condone
13 bribery by American corporations overseas. On the other hand, it is a fact that public
14 discussion in this country of the alleged misdeeds of officials of foreign governments
15 cannot fail to damage our relations with these governments.” (*Id.* at 154.)

16 **H. H.R. 11987 (Introduced February 19, 1976)**

17 65. On February 19, 1976, Representative Ronald Mottl introduced H.R. 11987.
18 (**Exhibit 9.**) Unlike the prior bills discussed above dealing with foreign corporate
19 payments problem through an amendment to the securities laws, H.R. 11987 sought to
20 amend Title 18 of the United States Code to “prohibit corporate bribes of foreign
21 officials.” H.R. 11987 stated as follows: “Whoever, being a domestic corporation or its
22 subsidiary directly or indirectly corruptly gives, offers, or promises anything of value to
23 any foreign official, or offers or promises such official to give anything of value to any
24 other person or entity with the intent to influence an official act of that foreign official
25 affecting such domestic corporation shall be imprisoned not less than one nor more than
26 ten years, or fined not less than \$10,000 nor more than \$25,000, or both.” (*Id.*)

27 66. H.R. 11987 defined “foreign official” to mean “an officer or employee or
28 person acting for or on behalf of a foreign state or nation or any governmental

1 department, agency, or entity thereof in any official function.” (*Id.*) H.R. 11987 defined
2 “official act” to mean “any decision or action on any question, matter, cause, suit,
3 proceeding, or controversy which may at any time be pending, or at any time be brought
4 before a public official, in his official capacity, or in his place of trust or profit.” (*Id.*)
5 H.R. 11987 was referred to the House Committee on the Judiciary.

6 **I. S. 3133 (Introduced March 11, 1976)**

7 67. On March 11, 1976, Senator Proxmire introduced S. 3133. (**Exhibit 10.**) In
8 pertinent part, S. 3133 stated as follows: “It shall be unlawful for any issuer ... to make
9 use of the mails or of any means or instrumentality of interstate commerce to: (1) offer,
10 pay, or agree to pay money or offer, give, or promise to give anything of value to an
11 individual who is an official of a foreign government or instrumentality thereof for the
12 purpose of inducing that individual to use his influence within such foreign government
13 or instrumentality to obtain or maintain business for or with the issuer or to influence
14 legislation or regulations of that government; (2) pay or agree to pay any money or give
15 or agree to give any thing of value to any person knowing or having reason to know that
16 all or a portion of such money or thing of value will be offered, given or promised
17 directly or indirectly to any individual who is an official of a foreign government or
18 instrumentality thereof for the purpose of inducing that individual to use his influence
19 within such foreign government or instrumentality to obtain or maintain business for or
20 with the issuer or to influence legislation or regulations of that government; (3) pay or
21 agree to pay money or give or agree to give any thing of value to any foreign political
22 party or official thereof or any candidate for foreign political office for the purpose of
23 inducing that party, official, or candidate to use its or his influence with a foreign
24 government or instrumentality thereof to obtain or maintain business for or with the
25 issuer or to influence legislation or regulations of that government; or (4) pay or agree to
26 pay any money or give or agree to give any thing of value in a manner or for a purpose
27 which is illegal under the laws of a foreign government having jurisdiction over the
28 transaction.”

1 68. S. 3133 also sought to require an issuer to “file with the Commission
2 periodic reports relating to any payment of money or furnishing anything of value in an
3 amount in excess of \$1,000 paid or furnished by the issuer ... (i) to any person or entity
4 employed by, affiliated with, or representing directly or indirectly, a foreign government
5 or instrumentality thereof; (ii) to any foreign political party or candidate for foreign
6 political office; or (iii) to any person retained to advise or represent the issuer in
7 connection with obtaining or maintaining business with a foreign government or
8 instrumentality thereof or with influencing the legislation or regulations of a foreign
9 government.” (*Id.*)

10 69. S. 3133 did not define the terms “foreign government” or “instrumentality.”
11 S. 3133 was referred to the Senate Committee on Banking, Housing and Urban Affairs.

12 **J. S. 3150 (Introduced March 16, 1976)**

13 70. On March 16, 1976, Senator Harry Byrd introduced S. 3150 “to amend the
14 Internal Revenue Code of 1954 to deny certain benefits to taxpayers who make bribes or
15 illegal payments to foreign government agents or officials.” (**Exhibit 11.**) The relevant
16 portion of S. 3150 is its reference to any “illegal bribe, kickback or other unlawful
17 payment either directly or indirectly to an official, employee, or agent in fact of a foreign
18 government.” (*Id.*)

19 71. S. 3150 did not define the term “foreign government.” S. 3150 was referred
20 to the Senate Committee on Finance.

21 **K. President Ford Establishes the Task Force on Questionable Corporate**
22 **Payments Abroad (March 31, 1976)**

23 72. On March 31, 1976, President Gerald Ford issued a “Memorandum
24 Establishing the Task Force on Questionable Corporate Payments Abroad” to various
25 Cabinet Secretaries and others. (**Exhibit 12.**) The memorandum states as follows: “This
26 is to advise you of my decision to appoint you to a Cabinet-level Task Force which I am
27 establishing to examine the policy aspects of recent disclosures of questionable payments
28 to foreign agents and officials by U.S. companies in conjunction with their overseas

1 business operations. ... The full dimensions of this problem are not yet known but it is
2 clear that a substantial number of U.S. corporations have been involved in questionable
3 payments to foreign officials, political organizations or business agents. The possibility
4 exists that more can be done by our government. There would also appear to be some
5 interest in guidance as to what standards should be applied to the foreign sales activities
6 of the overwhelming majority of American businessmen who are deeply concerned about
7 the propriety of their business operations. The Task Force should explore all aspects of
8 this problem and seek to obtain the views of the broadest sense of interested groups and
9 individuals. While the problems are complex and do not lend themselves to simple
10 solutions, I am confident that your labors will contribute to a better international and
11 domestic climate in which American business continues to play a vital and respected
12 role.”

13 **L. Hearings Before the Committee on Banking, Housing and Urban**
14 **Affairs, United States Senate, 94th Congress, Second Session (April 5, 7**
15 **and 8, 1976) (the “Foreign and Corporate Bribes Hearings”)**

16 73. In April 1976, the Senate Committee on Banking, Housing and Urban
17 Affairs held hearings on S. 3133 (**Exhibit 13.**) Senator Proxmire opened the hearings as
18 follows: “The committee has already held several days of hearings on the Lockheed
19 affair in connection with our responsibility to oversee the Government-guaranteed loan to
20 Lockheed. By now, close to 100 publicly held corporations have made disclosures to the
21 Securities and Exchange Commission, under the SEC’s so-called voluntary program, of
22 literally hundreds of millions of dollars paid over the years as bribes to foreign officials
23 and political parties. This bloodletting, unfortunately, is continuing. It is the disgrace of
24 our free enterprise system.” (*Id.* at 1-2.)

25 74. The first witness at the hearing was John McCloy (Milbank, Tweed, Hadley
26 & McCloy). McCloy chaired the special review committee of Gulf Oil Corporation’s
27 board of directors which issued a report to the SEC in December 1975. Senator Proxmire
28 described McCloy as “the author of the most detailed report on corporate bribery to date
under the SEC’s voluntary program.” (*Id.* at 3.)

1 75. In his testimony, McCloy described how the Gulf Special Review
2 Committee made a comprehensive report “on the political contributions made by Gulf
3 over a substantial period of time to political parties and candidates in the United States.”
4 (*Id.* at 4.) McCloy also described how the report “referred to certain other payments
5 abroad which may have been made to foreign officials or government representatives for
6 the purpose of inducing them to take or recompensing them for having taken action
7 supposedly advantageous to the interests of Gulf in the country involved.” (*Id.* at 5.)
8 McCloy explained that the special committee was not able to trace down in each instance
9 “who was paid how much and for what” but that “we do know that the President of a
10 country was supplied with a helicopter which he used to some extent, at least, for political
11 campaign purposes” and that the helicopter was “eventually transferred over to the
12 country’s air force.” (*Id.*)

13 76. Responding to McCloy’s testimony, Senator Proxmire stated as follows:
14 “Well, the problem is this. You saw the Gulf violations that you referred to and referred
15 to so vividly in your report as very largely violations of law here in making contributions
16 to political candidates, violations certainly of federal law where a corporation cannot
17 make a contribution to a political candidate. ... And you point out in your statement that
18 this isn’t a violation of the law in some of our States. It’s not a violation of the law in
19 foreign countries to make a contribution to political candidates. By and large, while
20 that’s a very important area and one that certainly requires a lot of attention, that’s not
21 what we had in mind with this legislation. What we are concerned about is the kind of
22 payment that Lockheed, for example, engaged in and admits where a payment is made to
23 a foreign official indirectly for the purpose of selling what that corporation has to sell to
24 that country. It is a bribe. Now that kind of payment is not outlawed at the present time
25 in our law and while it is outlawed in many foreign countries – Japan, for example, where
26 some of these bribes were paid, and Italy – it’s very hard for those countries to prosecute
27 because they don’t have the facts. We may have the facts but we don’t prosecute because
28

1 it's not against the law. We are trying to bridge that situation and provide a provision in
2 law that would make this illegal so we have the basis for action.” (*Id.* at 8-9.)

3 77. The Foreign and Corporate Bribes Hearings resumed on April 7, 1976.
4 Senator Charles Percy, the first witness, explained that the committee “staff is presently
5 investigating other cases brought to the subcommittee’s attention but the revelation to
6 date of practices by such corporations as Lockheed, Gulf, Exxon and Northup have
7 shocked the American people as well as the electorates of the other nations involved.”
8 (*Id.*) Senator Percy stated: “I believe there is a need for legislation and I commend this
9 commission for moving so expeditiously on this matter.” (*Id.*)

10 78. The next witness at the April 7, 1976 hearing was George Ball (Lehman
11 Brothers). Ball began his testimony as follows: “The subject that the committee is
12 addressing this morning, the practice of some companies of paying bribes and arranging
13 kickbacks in connection with sales of their products to foreign governments demands the
14 attention of the Congress and the American people.” (*Id.* at 39.)

15 79. During the April 7, 1976 hearing Senator Joseph Biden asked Ian
16 MacGregor (Chairman of AMAX Inc.) during his testimony whether MacGregor saw
17 “any distinction in the kinds of bribery that take place.” (*Id.* at 62.) MacGregor
18 responded that Senator Biden was correct in noting that “there are cases where national
19 interests are clearly at issue, not only in our own country but in foreign countries.” (*Id.* at
20 63.) MacGregor further stated that his company’s “big problem” is the “interface with
21 something that is a phenomenon outside of the United States, increasingly Government-
22 controlled businesses run in many cases by officials whose compensation is generally
23 regarded as inadequate by the people in other parts of the world, and it does offer a
24 temptation. The biggest area of problem is in the interface between our business
25 organizations and these Government and quasi-Government industrial establishments.”
26 (*Id.*) Senator Biden responded as follows: “What do we do about that? What are you
27 suggesting?” MacGregor stated: “Well, we are looking for some help from you on that
28 sir.” Senator Biden asked, “Some help in terms of advice or some help in terms of

1 cooperation?” MacGregor stated as follows: “I think, as I said earlier, probably some
2 form of recognized international practices hopefully backed by legislation in the major
3 countries of the world will be a good solution.” (*Id.*)

4 80. The Foreign and Corporate Bribes Hearings resumed on April 8, 1976.

5 81. The first witness at the April 8, 1976 hearing was Elliot Richardson
6 (Secretary of Commerce). Secretary Richardson began by noting that “just one week
7 ago, on March 31” President Ford established a “Cabinet-level task force, to examine the
8 policy aspects arising from disclosures of questionable payments to foreign agents and
9 officials by U.S. companies in connection with their overseas business operations.” (*Id.*
10 at 77.) Secretary Richardson explained that “the task force has been directed by the
11 President to conduct a sweeping policy review of the subject of improper or questionable
12 corporate payments and to formulate a coherent national policy to deal with the problems
13 posed by such payments.” (*Id.*)

14 82. The next witness at the April 8, 1976 hearing was William Simon (Secretary
15 of the Treasury). Like Secretary Richardson, Secretary Simon also spoke of “the new
16 Cabinet-level Task Force on Questionable Corporate Payments Abroad, which the
17 President established last week.” (*Id.* at 87.) Secretary Simon explained that the “task
18 force was charged by the President, in part, with ensuring that existing Government
19 actions to deal with corrupt practices abroad will be fully coordinated” and that its
20 mandate is to “conduct an in-depth review of this matter and to recommend any new
21 Federal Government actions as it may feel are necessary.” (*Id.*)

22 83. Secretary Simon also offered a “few technical points” “with respect to
23 specific aspects of this bill [S. 3133].” He stated, “enforcement of the provisions of this
24 bill could well result in the extraterritorial application of U.S. law and might require the
25 U.S. Government to investigate the conduct of foreign government officials, resulting in
26 potentially serious political problems with other countries.” (*Id.* at 89.)

27 84. During his testimony, Secretary Simon also brought the committee “up to
28 date on the Lockheed situation.” Among other things, he noted that the Emergency Loan

1 Guarantee Board was “in the process of negotiating with Lockheed for the names of the
2 countries in which payments to government officials were known or suspected to have
3 been made.” (*Id.* at 90.)

4 85. The next witness at the April 8, 1976 hearing was Charles Robinson (Under
5 Secretary of State for Economic Affairs). He began his testimony as follows: “Illicit
6 payments abroad and disclosures in the United States of questionable transactions with
7 foreign officials can and have caused serious damage to U.S. foreign relations.” (*Id.* at
8 97.)

9 86. During the April 8, 1976 hearing, Senator Proxmire asked Secretary Simon
10 for his thoughts on S. 3133. Secretary Simon responded as follows: “You know that
11 trying to define exactly what bribery is is a real problem. You and I would have no
12 trouble saying what is a bribe and what isn’t. However, having said that, it’s very
13 difficult to put it down on paper in statutory language that would not be damaging to
14 some other legitimate things that happen on the periphery, such as payments of
15 commissions. It’s almost like the Justice who said that he can’t define pornography, but
16 he knows what it is when he sees it. In certain instances, we have a gray area when it
17 comes to this bribery question. Outright payment to secure a particular contract to an
18 official of a foreign government, fine, we have no trouble defining that as a bribe.
19 Payment of commissions to agents, which is an accepted practice throughout the world, is
20 another matter. There’s a gray area in between that where the agent may be related to, if
21 you will, or indeed may be a government official, which is allowed in certain countries.”
22 (*Id.* at 107.)

23 87. On May 3, 1976, on the Senate Floor, Senator Proxmire, referring to the
24 above Banking Committee hearings and S. 3133 stated as follows. “The legislation
25 before the committee S. 3133 would end corporate bribery first by requiring a systematic
26 program of disclosure to the SEC of all overseas consultant payments and second, by
27 flatly prohibiting such payments to foreign public officials.” (**Exhibit 14** at S 6283-84.)
28

1 **M. S. 3379 (Introduced May 5, 1976)**

2 88. On May 5, 1976, Senator Church introduced S. 3379, The International
3 Contributions, Payments, and Gifts Disclosure Act. (**Exhibit 15.**) S. 3379 begins as
4 follows: “The Congress of the United States, after extensive examination of facts
5 presented in public hearings, by the Securities and Exchange Commission and in public
6 statements made by major United States companies and foreign governments, finds that
7 certain United States based companies have made, and may continue to make
8 contributions, payments, or gifts or convey other benefits upon foreign individuals,
9 foreign governmental employees, foreign politicians, and foreign political entities, which
10 may be illegal in the country where made or of a questionable nature and that when these
11 payments are discovered and become publicly known they create substantial foreign
12 policy problems for the United States. Specifically, these contributions, payments, and
13 gifts can allow, and in some instances have allowed, corporate interests to take
14 precedence over United States foreign policy objectives and can create and foster an anti-
15 American sentiment in individual foreign countries.” (*Id.*)

16 89. Unlike H.R. 7539 and S. 3133 described above, S. 3379 did not contain an
17 outright prohibition of certain foreign payments, but rather called for a disclosure regime
18 of a broader category of foreign payments. In pertinent part, S. 3379 provided that a
19 company subject to the SEC’s jurisdiction “shall disclose in its annual report” the
20 following: “(A) direct and indirect political contributions to foreign governments; (B)
21 direct and indirect payments and gifts to employees of foreign governments which are
22 intended to influence the decisions of such employees and which are made either with or
23 without the consent of their sovereign; and (C) direct and indirect payments and gifts to
24 employees of foreign, nongovernmental purchasers and sellers which are intended to
25 influence normal commercial decisions of their employer and which are made without the
26 employer’s knowledge or consent.” (*Id.*)

27 90. S. 3379 defined the term “foreign government” to mean “the government of
28 a country other than the United States, any political or local subdivision thereof, any

1 agency or instrumentality of such a government or subdivision, and any politician,
2 political party, or political association within a foreign country.” (*Id.*) S. 3379 was
3 referred to the Senate Committee on Banking, Housing and Urban Affairs as well as the
4 Senate Committee on Foreign Relations.

5 91. On May 5, 1976, on the Senate floor, Senator Church, referring to S. 3379,
6 stated as follows. “U.S.-based corporations should not be allowed to weaken a friendly
7 government through bribery and corruption while the United States is relying on that
8 government as a stable sure friend supporting our policies. U.S.-based corporations
9 should not be supporting political factions antithetical to those supported by the U.S.
10 Government. Nor do we want, as was revealed in the Multinational Subcommittee
11 hearings, the defense priorities of our allies distorted by corporate bribery. Further, when
12 these payments become known, and they will and do, whether it be through revelations
13 by Senate-subcommittees or through the common knowledge that leads to revolution and
14 the downfall of such governments as the Idris regime in Libya, the repercussions are
15 often international and the foreign policy implications for the United States severe.
16 Payments by Lockheed alone may very well advance the communists in Italy. In Japan, a
17 mainstay of our foreign policy in the Far East, the government is reeling as a
18 consequence of payments by Lockheed.” (**Exhibit 14** at S 6515.) Elsewhere during his
19 floor statement, Senator Church noted as follows. “This is not to say that only the
20 corporations are at fault. For every giver there is a taker. And often the initiative comes
21 from the foreign government official.” (*Id.* at S. 6516.)

22 **N. S. 3418 (Introduced May 12, 1976)**

23 92. On May 12, 1976, Senator Proxmire introduced S. 3418. (**Exhibit 16.**) The
24 bill strictly related to what would become the FCPA’s books and records and internal
25 control provisions. S. 3418 was silent as to what would become the FCPA’s anti-bribery
26 provisions. S. 3418 was referred to the Senate Committee on Banking, Housing and
27 Urban Affairs.

28

1 **O. Report of the Securities and Exchange Commission on Questionable**
2 **and Illegal Corporate Payments and Practices (May 12, 1976) (the**
3 **“SEC Report”)**

4 93. Also on May 12, 1976, the SEC submitted to the Senate Committee on
5 Banking, Housing and Urban Affairs a report titled “Report of the Securities and
6 Exchange Commission on Questionable and Illegal Corporate Payments and Practices”
7 (the “SEC Report”). (**Exhibit 17.**)

8 94. The SEC Report begins as follows: “In a letter dated March 18, 1976, to
9 [Senate Committee on Banking, Housing and Urban Affairs] Chairman Proxmire, [SEC]
10 Chairman Hills offered to provide a detailed analysis of information concerning illegal or
11 questionable foreign payments contained in public documents filed with the Securities
12 and Exchange Commission.” (*Id.* at 2.) Among other things, the SEC Report “provides a
13 description of the Commission’s activities in this area, as well as an analysis of public
14 information that has been disclosed as a result of these activities and of the response of
15 the private sector to the problems we have identified.” (*Id.*)

16 95. The SEC Report contains two Exhibits. Exhibit A is a “synopsis of the
17 public filings made with the Commission” “by 89 corporations as of April 21, 1976, that
18 refer to questionable or illegal foreign and domestic payments and practices.” (*Id.*)
19 Exhibit B is a summary of the “six special reports obtained as a result of [the SEC’s]
20 enforcement actions,” as well as a “description of the allegations made in eight other
21 enforcement actions in which [the SEC] obtained judicial relief but where reports have
22 not been completed or, in one instance, will not be required.” (*Id.*)

23 96. The SEC Report details the SEC’s “enforcement efforts that produced the
24 information set forth in the Exhibits.” (*Id.* at 2.) The SEC Report explains as follows:
25 “In 1973, as a result of the work of the Office of the Special Prosecutor, several
26 corporations and executive officers were charged with using corporate funds for illegal
27 domestic political contributions. The Commission recognized that these activities
28 involved matters of possible significance to public investors, the nondisclosure of which
might entail violations of the federal securities laws.” (*Id.*) “The Commission’s inquiry

1 into the circumstances surrounding alleged illegal political campaign contributions
2 revealed that violations of the federal securities laws had indeed occurred. The staff
3 discovered falsification of corporate financial records, designed to disguise or conceal the
4 source and application of corporate funds misused for illegal purposes, as well as the
5 existence of secret ‘slush funds’ disbursed outside the normal financial accountability
6 system. These secret funds were used for a number of purposes, including in some
7 instances, questionable or illegal foreign payments.” (*Id.* at 2.)

8 97. The SEC Report explains that “as the Commission’s enforcement efforts
9 unfolded, it became apparent that the potential magnitude of the problems required an
10 additional disclosure mechanism to supplement the enforcement actions undertaken, and
11 that the most appropriate means was to encourage voluntary corporate disclosure of
12 questionable or illegal foreign payments.” (*Id.* at 3.)

13 98. As is evident from the SEC Report, the Commission’s focus was not
14 whether the domestic and foreign payments at issue were illegal or should be illegal
15 under U.S. law, but rather whether such payments should have been (and should be in the
16 future) disclosed to investors. Indeed, the SEC Report states that “[a]lthough the
17 voluntary disclosure program was originally conceived to apply only to foreign payment
18 problems, in practice it has been applied to disclosures of certain domestic problems as
19 well.” (*Id.* at 3, fn. 6.)

20 99. The SEC Report contains a separate section titled “Commission Practices
21 With Respect to Disclosure of Questionable Payments.” (*Id.* at 5.) It begins as follows:
22 “To date, the informal views expressed by the Commission’s staff and action taken by the
23 Commission itself have been significantly influenced by the fact that virtually all
24 questionable payment matters have involved the deliberate falsification of corporate
25 books or records, or the maintenance of inaccurate or inadequate books and records
26 which, among other things, prevented these practices from coming to the attention of the
27 company’s auditors, outside directors and shareholders.” (*Id.*) The SEC Report states:
28 “[t]he existence of inaccurate records has, in our judgment, often provided an

1 independent basis for requiring some form of disclosure or the initiation of Commission
2 enforcement action, regardless of whether the payments themselves were of material size
3 or a material amount of business depended on their continuation.” (*Id.*)

4 100. In the SEC Report, the Commission sets forth several factors “as to whether
5 some disclosure of certain matters was required.” (*Id.* at 5.) These include “the
6 accounting treatment accorded the payments in question; the amount of the payment and
7 its legality under local law; the recipient of the payment and the purpose for which it was
8 made; the knowledge or participation by senior management; the frequency and
9 pervasiveness of the payment practices; and whether the company has taken measures to
10 terminate the activities.” (*Id.*)

11 101. The SEC Report then states as follows: “In attempting to determine whether
12 a specific fact is material there is no litmus paper test. Each case normally presents
13 unique combinations of facts, and the consideration whether particular information
14 should be disclosed necessarily depends on the context in which the question arises.” (*Id.*
15 at 6.) The SEC Report continues as follows: “In an attempt to provide some guidance
16 for corporations faced with disclosure issues of this kind, the Commission has identified
17 various factors that have given rise to disclosable events in the past. In actual practice,
18 however, it must be recognized that these factors cannot be viewed in isolation. Thus, for
19 example, the Commission’s comments concerning the recipients of corporate payments
20 must be read in conjunction with the discussion relating to the knowledge or participation
21 of corporate management, defects in the system of corporate accountability and the
22 impact on the business of the corporation.” (*Id.*)

23 102. The SEC Report then contains an entire section titled “Recipients of the
24 Payments” which is set forth in full as follows. “The nature of the recipient often has
25 been an important factor in determining that a corporate payment was a disclosable event.
26 Various classes of recipients have presented these considerations, including but not
27 limited to government officials, commission agents and consultants of the paying
28 company, and recipients of commercial bribery. Government Officials: Typically, a

1 corporation would not, in the ordinary course of business, make payments to government
2 officials in their individual capacities. Such payments, therefore, are usually a form of
3 bribery that, where material, would give rise to a disclosable event. The Commission has
4 observed payments to government officials for four principal purposes. First, corporate
5 payments have been made in an effort to procure special and unjustified favors or
6 advantages in the enactment or administration of the tax or other laws of the country in
7 question. The disclosure of payments for these purposes has been required where the
8 amounts involved or the corporate benefits obtained have been significant and the
9 payment is made to influence the exercise of judgment and discretion in disposing of
10 matters on behalf of the government. Second, corporate payments may be made with the
11 intent to assist the company in obtaining or retaining government contracts. It may be
12 possible to distinguish payments intended to secure the favorable exercise of judgment or
13 discretion on behalf of the governmental body from situations where the official, under
14 applicable laws, regulations or customs, appears to have been permitted to act for
15 suppliers in connection with government contracts and to be paid for such services.
16 Where this is permitted, payments to governmental officials so employed may
17 nevertheless be material where other factors, such as the recipient's insistence on the
18 maintenance of secrecy or the inaccurate reflection of the payments on corporate books
19 and records, suggest that the payment is in fact a form of bribery. A third purpose for
20 payments is to persuade low-level governmental officials to perform functions or services
21 which they are obliged to perform as part of their governmental responsibilities, but
22 which they may refuse or delay unless compensated. These so-called facilitating
23 payments have been deemed to be material where the payments to particular persons are
24 large in amount or the aggregate amounts are large, or where corporate management has
25 taken steps to conceal them through false entries in corporate books and records.
26 Another type of payment is the political contribution. Where these contributions are
27 illegal under local law, they can be assimilated to bribery. Even where legal under local
28 law, such payments may be material if the expenditures are such that they appear to be

1 designed to unduly influence public policy decisions. Commercial Agents and
2 Consultants: The Commission recognizes that corporations doing business abroad often
3 engage the services of non-official nationals possessing specialized information with
4 regard to business opportunities or relationships which are of assistance in securing or
5 maintaining business. There is nothing inherent in this practice that gives rise to a
6 disclosure obligation under the federal securities laws. Certain factors may, however,
7 suggest that payments to such persons should be disclosed. A variety of considerations,
8 some legitimate and some questionable, may prompt the use of agents or consultants.
9 Among the key factors to be considered in determining whether disclosure may be
10 required is the relationship of the agent to the governmental entity or contracting party,
11 the size and nature of the payment, the services to be performed by the agent, and the
12 method and manner of payment. The disclosure obligation cannot be avoided because of
13 corporate management's indifference to the question whether the agents are acting as
14 conduits for improper payments. Management must take reasonable steps to determine
15 whether commissions and fees paid are to be transmitted, in whole or in part, to
16 governmental officials or their designees. Commission or consultant payments
17 substantially in excess of the going rate for such services may give rise to a disclosable
18 event, depending upon the significance of the business involved. In many instances, this
19 may suggest that a portion of the commission was, in fact, intended to be passed through
20 to government officials or their designees to influence government action. Similarly,
21 other circumstances that give companies reason to believe that portions of commission
22 payments will be passed on to government officials or their designees present the same
23 problems as those discussed above. Commercial Bribery: The Commission also has
24 observed payments made to improperly influence a non-governmental customer's use of
25 a company's product or services. These payments may also give rise to a disclosable
26 event." (*Id.* at 7, emphasis in original.)

27 103. In a separate section of the SEC Report, the Commission presents an
28 "Analysis of Information Disclosed." It presents "a general portrayal of the public

1 disclosures received as of April 21, 1976, concerning questionable or illegal foreign or
2 domestic corporate practices.” (*Id.* at 9.) However, as the SEC Report states, “[I]n cases
3 arising under the voluntary program, the Commission generally has not required
4 disclosure of the identity of recipients.” (*Id.* at 8.) Further, the Commission noted that
5 “the conduct reported varies significantly, and the companies included can by no means
6 universally be characterized as wrongdoers.” (*Id.* at 9.)

7 104. In sum, the SEC Report described *domestic* as well as foreign payments and
8 described foreign payments of a *broad* nature and not just those to foreign government
9 officials. The Commission’s focus as to these broad category of payments was not
10 whether the payments at issue were illegal or should be illegal under U.S. law, but rather
11 whether such payments should have been (and should be in the future) disclosed to
12 investors.

13 **P. Hearings Before the Committee on Banking, Housing and Urban**
14 **Affairs, United States Senate, 94th Congress, Second Session (May 18,**
15 **1976) (the “Prohibiting Bribes to Foreign Officials Hearing”)**

16 105. On May 18, 1976, the Senate Committee on Banking, Housing and Urban
17 Affairs held a hearing on S. 3133, S. 3379, and S.3418 titled “Prohibiting Bribes of
18 Foreign Officials.” (**Exhibit 18.**)

19 106. Senator Proxmire began the hearing by noting that “last week, the
20 Commission provided the Banking Committee with the SEC’s first comprehensive report
21 on the corporate bribery scandal....” (*Id.* at 1.)

22 107. As to the Senate bills (S. 3133, S. 3379, S. 3418), Senator Proxmire stated
23 that “on the one hand, the [SEC Report] says the Commission supports the philosophy
24 behind S. 3133” but that “on the other hand, [the Commission doesn’t] support the bill.”
25 Senator Proxmire noted that the “Commission’s own proposal, which I introduced last
26 week as S. 3418, would merely codify the requirement that a corporation keep honest
27 records, a requirement that is at least implicit in the entire system of corporate
28 accountability.” (*Id.*)

1 108. Senator Proxmire noted that the SEC Report offered “some loose guidelines
2 on what kind of questionable foreign payments must be disclosed under existing law,
3 based on the materiality doctrine.” However, Senator Proxmire said the guidelines were
4 “very elastic” and reminded him “of the comment attributed to a Supreme Court Justice
5 about pornography – I can’t define it, but I know it when I see it.” (*Id.*) Senator
6 Proxmire continued: “The SEC seems to be saying that they can’t quite define what sort
7 of bribe is material under existing law, but they know it when they see it. I would submit
8 that, unlike pornography, a bribe is fairly easy to define. In S. 3133, we define it as a
9 payment to an official of a foreign government for the purpose of inducing him to use his
10 influence to secure business for the issuer or influence legislation or regulations of his
11 government.” (*Id.* at 1-2.)

12 109. Senator Proxmire then discussed the three competing bills – S. 3133, S.
13 3379, and S. 3418. He called the “SEC measure,” S. 3418, “the weakest” because it
14 “simply provides for honest recordkeeping.” (*Id.* at 2.) Senator Proxmire said that his
15 own bill, S. 3133, “not only outlaws foreign bribes, but also requires disclosure of all
16 foreign sales commission payments.” (*Id.*) As to “Senate bill 3379 sponsored by
17 Senators Church, Clark, and Pearson of the Multinationals Subcommittee of the Foreign
18 Relations Committee,” Senator Proxmire described it as requiring, among other things,
19 “disclosure of both foreign government and commercial bribes.” (*Id.*)

20 110. Senator Proxmire noted that “after nearly 2 years of analysis and
21 investigation, a consensus seems to be developing that some legislative remedy is
22 needed” and that “mandatory disclosure is the most obvious common denominator.” (*Id.*)
23 Yet, Senator Proxmire expressed frustration that “somehow we can’t bring ourselves, at
24 least the executive branch can’t seem to bring itself to a clear-cut definition of this action
25 as illegal and then take effective action to prevent it.” (*Id.*)

26 111. Several SEC representatives testified at the hearing, which focused on
27 whether the foreign payments problem was best remedied by (i) internal controls and
28 books and record keeping requirements (like S. 3418); (ii) disclosure of a wide category

1 of payments (like S. 3379); or (iii) internal controls and books and record keeping as well
2 as an outright prohibition of certain payments (like S. 3133).

3 **Q. H.R. 13870 (Introduced May 18, 1976)**

4 112. Also on May 18, 1976, Representative John Moss introduced H.R. 13870.
5 (**Exhibit 19.**) H.R. 13870 provided, in pertinent part, that each issuer of a security “shall
6 file with the Commission periodic reports relating to any payment of money or furnishing
7 of anything of value in an amount in excess of \$1,000 paid or furnished or agreed to be
8 paid or furnished by the issuer during the period covered by the report: (i) to any person
9 or entity employed by, affiliated with, or representing directly or indirectly, a foreign
10 government or instrumentality thereof; (ii) to any foreign political party or candidate for
11 foreign political office; or (iii) to any person retained to advise or represent the issuer in
12 connection with obtaining or maintaining business with a foreign government or
13 instrumentality thereof or with influencing the legislation or regulations of a foreign
14 government.” (*Id.*)

15 113. Among other things, H.R. 13870 required the following information to be
16 disclosed: “the name of the person or entity to which the payment was or is to be made
17 or the thing of value was or is to be furnished and in the case of a person who is an
18 official of a foreign government or instrumentality thereof, the official position of that
19 person.” (*Id.*)

20 114. In addition to a disclosure provision, H.R. 13870 also contained a payment
21 prohibition which stated, in pertinent part, as follows: “[I]t shall be unlawful for any
22 issuer ... to make use of the mails or of any means or instrumentality of interstate
23 commerce to – (1) offer, pay, or agree to pay any money or offer, give, or promise to give
24 anything of value to an individual who is an official of a foreign government or
25 instrumentality thereof for the purpose of inducing that individual to use his influence
26 within such foreign government or instrumentality to obtain or maintain business for or
27 with the issuer or to influence legislation or regulations of that government; (2) pay or
28 agree to pay any money or give or agree to give any thing of value to any person knowing

1 or having reason to know that all or a portion of such money or thing of value will be
2 offered, given or promised directly or indirectly to any individual who is an official of a
3 foreign government or instrumentality thereof for the purpose of inducing that individual
4 to use his influence within such foreign government or instrumentality to obtain or
5 maintain business for or with the issuer or to influence legislation or regulations of that
6 government; (3) pay or agree to pay any money or give or agree to give any thing of
7 value to any foreign political party or official thereof or any candidate for foreign
8 political office for the purpose of inducing that party, official, or candidate to use its or
9 his influence with a foreign government or instrumentality thereof to obtain or maintain
10 business for or with the issuer or to influence legislation or regulations of that
11 government; or (4) pay or agree to pay any money or give or agree to give any thing of
12 value in a manner or for a purpose which is illegal under the laws of a foreign
13 government having jurisdiction over the transaction.” (*Id.*)

14 115. H.R. 13870 did not define the terms “foreign government” or
15 “instrumentality.” H.R. 13870 was referred to the House Committee on Interstate and
16 Foreign Commerce.

17 **R. H.R. 13953 (Introduced May 21, 1976)**

18 116. On May 21, 1976, Representative James Jarrell Pickle introduced H.R.
19 13953. (**Exhibit 20.**) H.R. 13953 was identical to H.R. 13870 described above and it
20 was referred to the House Committee on Interstate and Foreign Commerce.

21 **S. H.R. 14340 (Introduced June 11, 1976)**

22 117. On June 11, 1976, Representative Solarz introduced H.R. 14340. (**Exhibit**
23 **21.**) H.R. 14340 provided that issuers would be required to file a sworn disclosure
24 statement “to provide a complete accounting of any offer or agreement of any agent or
25 employee of a company or its parent, to make any contribution, pay any fee, or give
26 anything of significant value in connection with (A) direct and indirect political
27 contributions to foreign government; (B) direct and indirect payments and gifts to
28 employees of foreign governments which are intended to influence the decisions of such

1 employees and which are made either with or without the consent of their sovereign; and
2 (C) direct and indirect payments and gifts to employees of foreign, nongovernmental
3 purchasers and sellers which are intended to influence normal commercial decisions of
4 their employer and which are made without the employer's knowledge or consent." (*Id.*)

5 118. H.R. 14340 defined "foreign government" to mean "the government of a
6 country other than the United States, any political or local subdivision thereof, any
7 agency or instrumentality of such a government or subdivision, and any politician,
8 political party, or political association within a foreign country." (*Id.*) H.R. 14340 was
9 referred to the House Committee on Interstate and Foreign Commerce, the House
10 Committee on International Relations, and the House Committee on Ways and Means.

11 **T. Secretary Richardson's Letter to Senator Proxmire Regarding S. 3133**
12 **(June 11, 1976) ("Secretary Richardson's Letter")**

13 119. Also on June 11, 1976, Commerce Secretary Richardson provided written
14 comments to Senator Proxmire on S. 3133. (**Exhibit 22.**) The letter begins by noting
15 that during the April 8, 1976 Foreign and Corporate Bribes Hearings, Secretary
16 Richardson "promised to provide [Senator Proxmire] with written comments on your
17 proposed legislation concerning questionable corporate payments abroad." Secretary
18 Richardson's comments were based on a "relevant preliminary analysis of the issues
19 involved" by President Ford's Task Force on Questionable Payments Abroad, which was
20 created on March 31, 1976. (*Id.*)

21 120. Secretary Richardson's Letter begins: "[Y]our bill, S. 3133, amends the
22 Securities Exchange Act of 1934 and the Securities Act of 1933 to require disclosure of
23 certain foreign payments and to provide for criminal prosecution of payments made to
24 influence actions of foreign governments."

25 121. As to the "questionable payments problem" Secretary Richardson noted that
26 "it is clear on the basis of information already at hand that the questionable payments
27 problem is, in fact, real – i.e., that: a significant number of America's major corporations,
28 in their dealings with foreign governments, have engaged in practices which violated

1 ethical and in some cases legal standards of both the United States and foreign countries.”

2 (*Id.* at 40-41.)

3 122. Secretary Richardson’s letter states that “the President and the Task Force
4 have ... decided that current law is not sufficient to deal fully with the questionable
5 payments problem.” (*Id.* at 61.) The letter then reviews “the considerations which
6 underpin our choice of measures” and states as follows: “[T]here are two principal
7 competing general legislative approaches --- a disclosure approach or a criminal
8 approach.” (*Id.*) In his letter, Secretary Richardson states: “While it is possible to design
9 legislation – as indeed is the case with S. 3133 – which requires disclosure of foreign
10 payments and makes certain payments criminal under U.S. law, the Task Force has
11 unanimously rejected this approach.” (*Id.*, emphasis in original.) The letter states as
12 follows: “The disclosure-plus-criminalization scheme would, by its very ambition, be
13 ineffective. The existence of criminal penalties for certain questionable payments would
14 deter their disclosure and thus the positive value of the disclosure provisions would be
15 reduced. In our opinion the two approaches cannot be compatibly joined.” (*Id.*) The
16 letter notes that the “Task Force has given considerable scrutiny to the option of
17 criminalizing under U.S. law improper payments made to foreign officials by U.S.
18 corporation,” but the Task Force concluded “that the criminalization approach would
19 represent little more than a policy assertion, for the enforcement of such a law would be
20 very difficult if not impossible.” (*Id.*) The letter continues, “at the same time the Task
21 Force perceived several very positive attributes of systematic disclosure” including that
22 “it would avoid the difficult problems of defining and proving bribery.” (*Id.* at 62.)

23 123. Richardson’s letter concludes with a section titled “Recommendations for
24 Additional Legislation.” The section states as follows: “Based upon analyses of the
25 sufficiency of current law and of optional legislative approaches..., the President has
26 decided to recommend that the Congress enact legislation providing for full and
27 systematic reporting and disclosure of payments made by American businesses with the
28 intent of influencing, directly or indirectly, the conduct of foreign government officials.”

1 (*Id.* at 63.) The letter further states: “[A]t the same time, the President has decided to
2 oppose, as essentially unenforceable, legislation which would seek broad criminal
3 proscription of improper payments made in foreign jurisdictions.” (*Id.*)

4 124. The “basic outlines of the disclosure legislation” recommended by the Task
5 Force were as follows: “All American business entities, whether or not they have
6 securities registered with the SEC, would be required to report all payments in excess of
7 some floor amount, made directly or indirectly to any person employed by or
8 representing a foreign government or to any foreign political party or candidate for
9 foreign political office in connection with obtaining or maintaining business with, or
10 influencing the conduct of, a foreign government.” (*Id.*, emphasis in original.)

11 **U. President Ford’s Remarks Regarding Questionable Corporate**
12 **Payments Abroad (June 14, 1976)**

13 125. On June 14, 1976, President Ford released “Remarks Announcing New
14 Initiatives for the Task Force on Questionable Corporate Payments Abroad.” (**Exhibit**
15 **23.**) In pertinent part, President Ford stated as follows: “Ten weeks ago, I appointed a
16 task force headed by Secretary Richardson to review our policies towards corporations
17 that engage in questionable payments to other nations. Today, based upon the findings of
18 that task force, I am announcing three new initiatives. First, as a deterrent to bribery by
19 American-controlled industries, I am directing the task force to prepare legislation that
20 would require corporate disclosure of all payments made with the intention of influencing
21 foreign government officials. Failure to comply with the new disclosure laws would lead
22 to civil and criminal penalties. Second, I am announcing my support of pending
23 legislation to strengthen the law requiring corporations to keep their shareholders fully
24 and honestly informed about their foreign behavior. Finally, I am asking our major
25 trading partners to work with us in reaching agreement on a new code to govern
26 international corporate activities.” (*Id.*)

1 **V. H.R. 14358 (Introduced June 14, 1976)**

2 126. Also on June 14, 1976, Representative Herbert Harris introduced H.R.
3 14358. (**Exhibit 24.**) H.R. 14358 sought to amend the Internal Revenue Code “to deny
4 certain benefits to taxpayers who make bribes or other illegal payments to foreign
5 government agents or officials.” (*Id.*) The operative language in H.R. 14358 was “illegal
6 bribe, kickback, or other unlawful payment ... either directly or indirectly to an official,
7 employee, or agent in fact of a foreign government.” (*Id.*) H.R. 14358 did not define the
8 term “foreign government.” H.R. 14358 was referred to the House Committee on Ways
9 and Means.

10 **W. H.R. 14681 (Introduced July 1, 1976)**

11 127. On July 1, 1976, Representative Solarz introduced H.R. 14681. (**Exhibit**
12 **25.**) Although specific to investment insurance and guaranties issued by the Overseas
13 Private Investment Corporation (“OPIC”), in the Foreign Payments Disclosure Hearings
14 described below, Representative Solarz said that H.R. 14681 “deal[s] essentially with the
15 same kind of problem.”

16 128. H.R. 14681 provided for OPIC’s termination of insurance for any investor
17 found to have engaged in bribery of “an official of a foreign government or
18 instrumentality thereof.” (*Id.*) H.R. 14681 did not define the terms “foreign
19 government” or “instrumentality.”

20 129. H.R. 14681 was referred to the House Committee on International Relations,
21 and reported to the House on August 10, 1976. The House Report, “Termination of
22 Overseas Private Investment Corporation Insurance in Certain Circumstances,” states that
23 the “underlying principle behind H.R. 14681 is that the Overseas Private Investment
24 Corporation ... should not continue to provide insurance coverage for an investor who
25 gives or offers to give gifts or payments to foreign officials, in order to induce the
26 officials to use their influence to affect a decision in relation to the project.” (**Exhibit 26**
27 at 2.)

1 130. H.R. 14681 passed the House on August 24, 1976. Representative Solarz,
2 the bill's sponsor, remarked on the House floor in urging passage of H.R. 14681 as
3 follows: "This legislation is based on a very fundamental and important assumption
4 which is that agencies of the U.S. Government should not insure corporations which are
5 engaged in paying bribes to foreign officials. It seems to me that we have a moral
6 obligation, as well as a political interest, in prohibiting practices which are both corrupt
7 and counterproductive. Whatever the private advantages of illegal payments to foreign
8 officials may be to the corporations which engage in them, I think they are far
9 outweighed by the public disadvantages to the foreign policy of our own country, if and
10 when they are disclosed. Mr. Speaker, in the last several months a number of agencies of
11 our own Government, including the IRS and the SEC and the other body in this
12 Congress, have attempted to deal with this problem by passing new legislation and
13 promulgating revised regulations. I think we have a responsibility to act as well. This
14 bill is by no means a panacea. Obviously, it will not eliminate the problem of bribery.
15 But it is a significant step forward in the right direction, and it is a new beginning of
16 which I think we can be proud." (**Exhibit 27** at 27491.) H.R. 14681 was referred to the
17 Senate Committee on Foreign Relations on August 25, 1976.

18 **X. S. 3664 (Introduced July 2, 1976)**

19 131. On July 2, 1976, Senator Proxmire introduced S. 3664. (**Exhibit 28.**) The
20 payment prohibition contained in S. 3664 applied to "any issuer" and "any domestic
21 concern, other than an issuer" and provided, in pertinent part, that it shall be unlawful "to
22 make use of the mails or of any means or instrumentality of interstate commerce
23 corruptly to offer, pay, or promise to pay, or authorize the payment of, any money, or to
24 offer, give, or promise to give, or authorize the giving of, anything of value to – (1) any
25 person who is an official of a foreign government or instrumentality thereof for the
26 purpose of inducing that individual – (A) to use his influence with a foreign government
27 or instrumentality, or (B) to fail to perform his official functions, to assist such issuer in
28 obtaining or retaining business for or with, or directly business to, any person or

1 influencing legislation or regulations of that government or instrumentality; (2) any
2 foreign political party or official thereof or any candidate for foreign political office for
3 the purpose of inducing that party, official, or candidate – (A) to use its or his influence
4 with a foreign government or instrumentality thereof, or (B) to fail to perform its or his
5 official functions, to assist such issuer [or domestic concern] in obtaining or retaining
6 business for or with, or directing business to, any person or influencing legislations or
7 regulations of that government or instrumentality; or (3) any person, while knowing or
8 having reason to know that all or a portion of such money or thing of value will be
9 offered, given, or promised directly or indirectly to any individual who is an official of a
10 foreign government or instrumentality thereof, or to any foreign political party or official
11 thereof or any candidate for foreign political office, for the purpose of inducing that
12 individual, official or party – (A) to use his or its influence with a foreign government or
13 instrumentality, or (B) to fail to perform his or its official functions, to assist such issuer
14 [or domestic concern] in obtaining or retaining business for or with, or directing business
15 to, any person or influencing legislation or regulations of that government or
16 instrumentality.” (*Id.*)

17 132. S. 3664 did not define the terms “foreign government” or “instrumentality.”

18 **Y. Senate Report No. 94-1031 as to S. 3664 (July 2, 1976)**

19 133. Also on July 2, 1976, S. 3664 was reported to the Senate from the
20 Committee on Banking, Housing and Urban Affairs. (**Exhibit 29.**) The Senate Report
21 contains a detailed history of the various bills introduced in Congress to deal with foreign
22 corporate payments as well as a detailed summary of S. 3664.

23 134. As explained in the Senate Report, “the Committee held hearings on
24 improper overseas payments April 5, 7, 8, and May 18, 1976, as well as earlier hearings
25 on the Lockheed loan guarantee and alleged bribes by the Lockheed Company.” (*Id.* at
26 1.) The Senate Report states that the “Committee considered several proposed remedial
27 measures: S. 3133, introduced by Senator Proxmire March 11, 1976; S. 3379, introduced
28

1 by Senators Church, Clark and Pearson May 5, 1976; and S. 3418, introduced by Senator
2 Proxmire at the request of the [SEC] May 12, 1976.” (*Id.*)

3 135. As to the above described SEC Report, the Senate Report states as follows:
4 “The Committee also received from the SEC an extensive Report on Questionable and
5 Illegal Corporate Payments and Practices, dated May 12, 1976, summarizing the SEC’s
6 enforcement program to date under existing law. The Report analyzed public filings of
7 89 corporations disclosing varying types of questionable payments, plus six special
8 reports obtained as the result of SEC enforcement actions and the allegations made in
9 eight additional cases in which the SEC obtained judicial relief. The Report also contains
10 the SEC’s analysis of the degree of disclosure required under the materiality doctrine of
11 the securities laws where questionable foreign payments are made.” (*Id.*)

12 136. The Senate Report further states that on “June 12, 1976, the Committee
13 received interim recommendations from Secretary of Commerce Richardson, on behalf of
14 President Ford’s Cabinet-level Task Force on Questionable Payments Abroad.” (*Id.*)
15 The Senate Report states: “The Richardson Task Force proposal, which was not in
16 legislative form at the time the Committee met, recommended generally a disclosure
17 scheme to require disclosures by all domestic companies of payments in excess of some
18 floor amount made in connection with obtaining or retaining business with a foreign
19 government.” (*Id.* at 2.)

20 137. The Senate Report then briefly summarizes each of the varying bills
21 considered by the Committee. The Senate Report states as follows: “Senate bill 3133 ...
22 would authorize the SEC to issue regulations requiring issuers of registered securities to
23 keep accurate books and records. It would require such issuers to report to the SEC all
24 payments in excess of \$1,000 regardless of any corrupt purpose, to foreign officials,
25 political parties, or sales agents retained in connection with obtaining business from, or
26 influencing legislation or regulations, of a foreign government. The bill would also
27 prohibit payments to foreign officials, parties, or intermediaries where the payment was
28 intended to influence legislation, regulations, or to obtain business. Senate bill 3379

1 would require issuers of registered securities to file with the SEC reports describing
2 foreign political contributions, payments to foreign officials intended to influence their
3 decisions, and payments to commercial purchasers or sellers intended to influence normal
4 business decisions. ... Senate bill 3418 requires issuers of registered securities to keep
5 accurate books and records, and to devise and maintain an adequate system of internal
6 accounting controls; it makes it unlawful to falsify books or records, or to deceive an
7 accountant in connection with an audit.” (*Id.*)

8 138. The Senate Report then states: “The Committee met June 22, 1976 and
9 favorably reported a clean bill which incorporates verbatim all of S. 3418, and a narrowly
10 defined direct criminal prohibition against the payment of overseas bribes by any U.S.
11 business concern.” (*Id.*)

12 139. In summarizing S. 3664’s payment prohibition, the Senate Report states as
13 follows: “It applies the existing criminal penalties of the securities laws ... for payments,
14 promises of payment, or authorization of payment of anything of value to any foreign
15 official, political party, candidate for office, or intermediary, where there is a corrupt
16 purpose. The corrupt purpose must be to induce the recipient to use his influence to
17 direct business to any person, to influence legislation or regulations, or to fail to perform
18 an official function in order to influence business decisions, legislation, or regulations, of
19 a government.” (*Id.* at 3.)

20 140. As to the “need for the legislation,” the Senate Report states as follows:
21 “Bribery of foreign officials by U.S. corporations also creates severe foreign policy
22 problems. The revelations of improper payments invariably tends to embarrass friendly
23 regimes and lowers the esteem for the United States among the foreign public. It lends
24 credence to the worst suspicions sown by extreme nationalists or Marxists that American
25 businesses operating in their country have a corrupting influence on their political
26 systems. ... Bribery by U.S. companies also undermines the foreign policy objectives of
27 the United States to promote democratically accountable governments and
28 professionalized civil services in developing countries.” (*Id.* at 3-4.)

1 141. The Senate Report contains a separate section titled, “what is a prohibited
2 bribe,” and states as follows: “The bill as reported prohibits payments, promises to pay,
3 or authorizations of payments to foreign officials, candidates or parties corruptly intended
4 to involve the recipient to use his influence to secure business, influence legislation or
5 regulations. In drafting the bill, as reported, the Committee deliberately cast the language
6 narrowly, in order to differentiate between such payments and low-level facilitating
7 payments sometimes called grease payments.” (*Id.*)

8 142. The Senate Report also states that “the Committee fully recognizes that the
9 proposed law will not reach all corrupt payments overseas.” (*Id.* at 7.)

10 **Z. President Ford’s Message Urging Enactment of Proposed Legislation to**
11 **Require the Disclosure of Payments to Foreign Officials (August 3,**
12 **1976)**

13 143. On August 3, 1976, President Ford issued “Foreign Payments Disclosure –
14 Message From the President of the United States Urging Enactment of Proposed
15 Legislation to Require the Disclosure of Payments to Foreign Officials.” (**Exhibit 30.**)

16 144. In his message, President Ford explained how he “established the Task
17 Force on Questionable Corporate Payments Abroad on March 31, 1976, and directed it to
18 undertake a sweeping policy review of approaches to deal with the questionable
19 payments problem.” (*Id.* at 1.) President Ford’s message notes that on “June 14, after
20 reviewing an interim report of the Task Force,” he “directed the Task Force to develop, as
21 quickly as possible, a specific legislative initiative calling for a system of reporting and
22 disclosure to deter improper payments.” (*Id.*)

23 145. As to the proposed legislation, President Ford stated as follows: “The
24 legislation will require reporting to the Secretary of Commerce of certain classes of
25 payments made by U.S. businesses and their foreign subsidiaries and affiliates in relation
26 to business with foreign governments. The reporting requirement covers a broad range of
27 payments relative to government transactions as well as political contributions and
28 payments made directly to foreign public officials. By requiring reporting of all
significant payments, whether proper or improper, made in connection with business with

1 foreign governments, the legislation will avoid the difficult problems of definition and
2 proof that arise in the context of enforcement of legislation that seeks to deal specifically
3 with bribery and extortion abroad.” (*Id.*)

4 **AA. Secretary Richardson’s Statement on the Proposed Foreign Payments**
5 **Disclosure Act (August 3, 1976)**

6 146. Also on August 3, 1976, Commerce Secretary Richardson delivered a
7 statement on the proposed Foreign Payments Disclosure Act. (**Exhibit 31.**) He stated as
8 follows: “The Foreign Payments Disclosure Act will require reporting to the Secretary of
9 Commerce of certain classes of payments made by U.S. businesses and their foreign
10 subsidiaries and affiliates in relation to business with foreign governments. Specifically,
11 reports will be required of all payments made in connection with sales to or contracts
12 with foreign governments or official actions by foreign public officials, where such are
13 for the commercial benefit of the payor or his foreign affiliate.”

14 147. Secretary Richardson’s statement also provided a “Section-By-Section
15 Analysis” of the proposed Foreign Payments Disclosure Act. Among other things, the
16 proposed bill called for a reporting obligation of payments “made on behalf of the person
17 or the person’s foreign affiliate to any other individual or entity in connection with: an
18 official action, or sale to or contract with a foreign government, for the commercial
19 benefit of the person or his foreign affiliate.” (*Id.*)

20 148. The proposed bill contained the following relevant definitions: (i) “official
21 action” “means a decision, opinion, recommendation, judgment, vote, or other conduct
22 involving an exercise of discretion by a foreign public official in the course of his
23 employment;” (ii) “foreign public official” means “(1) an officer or employee, whether
24 elected or appointed, of a foreign government; or (2) an individual acting for or on behalf
25 of a foreign government; and includes an individual who has been nominated or
26 appointed to be a foreign public official or who has been official informed that he will be
27 so nominated or appointed”; and (iii) “foreign government” means: (1) the government of
28 a foreign country, irrespective of recognition by the United States; (2) a department,

1 agency, or branch of a foreign government; (3) a corporation or other legal entity
2 established or owned by, and subject to control by, a foreign government; (4) a political
3 subdivision of a foreign government, or a department, agency, or branch of the political
4 subdivision; or (5) a public international organization.” (*Id.* at 65-66.)

5 **BB. S. 3741 (Introduced August 6, 1976)**

6 149. On August 6, 1976, Senator Warren Magnuson introduced S. 3741.

7 (**Exhibit 32.**) S. 3741, based on the Ford Administration proposal described above,
8 provided that “a person” shall report to the Secretary of Commerce “payments hereafter
9 made on behalf of the person or the person’s foreign affiliate to any other individual or
10 entity in connection with an official action, or sale to or contract with a foreign
11 government, for the commercial benefit of the person or his foreign affiliate.”

12 150. S. 3741 contained the following relevant definitions: (i) “official action”
13 means “a decision, opinion, recommendation, judgment, vote, or other conduct involving
14 an exercise of discretion by a foreign public official in the course of his employment”;
15 (ii) “foreign public official” means (1) an officer or employee, whether elected or
16 appointed, of a foreign government; or (2) an individual acting for or on behalf of a
17 foreign government: and includes an individual who has been nominated or appointed to
18 be a foreign public official or who has been officially informed that he will be so
19 nominated or appointed”; and (iii) “foreign government” means: “(1) the government of
20 a foreign country, irrespective of recognition by the United States; (2) a department,
21 agency, or branch of a foreign government; (3) a corporation or other legal entity
22 established or owned by, and subject to control by, a foreign government; (4) a political
23 subdivision of a foreign government, or a department, agency, or branch of the political
24 subdivision: or (5) a public international organization.” S. 3741 was referred to the
25 Senate Committee on Commerce.

26 **CC. H.R. 15149 (Introduced August 10, 1976)**

27 151. On August 10, 1976, Representative Harley Staggers introduced H.R.
28 15149. (**Exhibit 33.**) H.R. 15149, like S. 3741, was based on the Ford Administration

1 proposal described above, and identical to S. 3741. H.R. 15149 was referred to the
2 House Committee on Interstate and Foreign Commerce.

3 **DD. H.R. 15481 (Introduced September 8, 1976)**

4 152. On September 8, 1976, Representative John Murphy introduced H.R. 15481.
5 **(Exhibit 34.)** H.R. 15481’s payment prohibitions applied to “any issuer” and “any
6 domestic concern, other than an issuer” and provided, in pertinent part, that it shall be
7 unlawful “to make use of the mails or of any means or instrumentality of interstate
8 commerce corruptly to offer, pay, or promise to pay, or authorize the payment of, any
9 money, or to offer, give, or promise to give, or authorize the giving of, anything of value
10 to – (1) any person who is an official of a foreign government or instrumentality thereof
11 for the purpose of inducing that individual – (A) to use his influence with a foreign
12 government or instrumentality, or (B) to fail to perform his official functions, to assist
13 such issuer [or domestic concern] in obtaining or retaining business for or with, or
14 directing business to, any person or influencing legislation or regulations of that
15 government or instrumentality; (2) any foreign political party or official thereof or any
16 candidate for foreign political office for the purpose of inducing that party, official, or
17 candidate – (A) to use its or his influence with a foreign government or instrumentality
18 thereof, or (B) to fail to perform its or his official functions, to assist such issuer [or
19 domestic concern] in obtaining or retaining business for or with, or directing business to,
20 any person or influencing legislation or regulations of that government or instrumentality;
21 or (3) any person, while knowing or having reason to know that all or a portion of such
22 money or thing of value will be offered, given, or promised directly or indirectly to any
23 individual who is an official of a foreign government or instrumentality thereof, or to any
24 foreign political party or official thereof or any candidate for foreign political office, for
25 the purpose of inducing that individual, official or party – (A) to use his or its influence
26 with a foreign government or instrumentality, or (B) to fail to perform his or its official
27 functions, to assist such issuer [or domestic concern] in obtaining or retaining business
28

1 for or with, or directing business to, any person or influencing legislation or regulations
2 of that government or instrumentality.”

3 153. H.R. 15481 did not define the terms “foreign government” or
4 “instrumentality.” H.R. 15481 was referred to the House Committee on Interstate and
5 Foreign Commerce.

6 **EE. Senate Passes S. 3664 (September 15, 1976)**

7 154. On September 14 and 15, 1976, the Senate considered S. 3664. (**Exhibit**
8 **35.**) In introducing S. 3664 on the Senate floor, Senator Proxmire, noted that S. 3664
9 “will not reach all corrupt payment overseas.” (*Id.* at S 15791.) Senator Proxmire further
10 stated that S. 3664 is a “compromise bill” and that the “committee narrowed the
11 definition of bribery.” (*Id.*) Senator Tower likewise stated that S. 3664 contains a
12 “narrowly defined prohibition against the payment of overseas bribes by U.S. business
13 concerns.” (*Id.*)

14 155. On the Senate floor, Senator Church offered an amendment to S. 3664. The
15 amendment sought to add to S. 3664 the disclosure provisions set forth in S. 3379. (*See*
16 *id.* at S 15792-15794.) On September 15, 1976, Senator Church’s amendment was
17 rejected by the Senate. (*See id.* at S 15861.)

18 156. However, S. 3664 passed the Senate 86-0 on September 15, 1976 and was
19 referred to the House Committee on Interstate and Foreign Commerce on September 16,
20 1976.

21 **FF. Hearings Before the Subcommittee on Consumer Protection, House of**
22 **Representatives, 94th Congress, Second Session (September 21 and 22,**
23 **1976) (the “Foreign Payments Disclosure Hearings”)**

24 157. On September 21 and 22, 1976, the House Subcommittee on Consumer
25 Protection and Finance held hearings titled “Foreign Payments Disclosure” on H.R.
26 15481, S. 3664, H.R. 13870 and H.R. 13953. (**Exhibit 36.**)

27 158. Representative Murphy chaired the Subcommittee and he noted that “largely
28 through the efforts and hearings by the Senate Committee on Banking, Housing and

1 Urban Affairs, and the Senate Foreign Relations Subcommittee on Multinational
2 Corporations, we have become acutely aware of the dimensions of the foreign bribery
3 problem and its deleterious effects on U.S. foreign policy, on the business climate abroad
4 for U.S. corporations and on our own moral expectations.” (*Id.* at 1)

5 159. Representative Murphy specifically referenced the “Lockheed incident” in
6 which the “SEC charged that since 1970 at least \$25 million in payments not reflected on
7 the company’s books and records were made to assist the company in obtaining and
8 retaining contracts with foreign governments.” (*Id.* at 2.) Representative Murphy noted
9 that the “foreign policy implications for the United States are staggering and in some
10 cases, perhaps irreversible.” (*Id.*) He noted that in Japan, “former Prime Minister
11 Tanaka was indicted on charges of accepting \$1.7 million from Lockheed” and that “most
12 recently, the monarchy in the Netherlands has been rocked by the Lockheed scandal.”
13 (*Id.*) Representative Murphy stated: “[A]ll of this lends substantial credence to the
14 suspicions by extremists that U.S. businesses operating in their country have a corrupting
15 influence on their political systems.” (*Id.*)

16 160. Representative Murphy described H.R. 15481’s payment prohibition as
17 follows: “It applies the existing criminal penalties of the securities laws, up to 2 years
18 imprisonment and a fine of up to \$10,000, for payments, promises of payment, or
19 authorization of payment of anything of value to any foreign officials, political party,
20 candidate for office, or intermediary, where there is a corrupt purpose.” (*Id.* at 3.) “The
21 corrupt purpose must be to induce the recipient to use his influence to direct business to
22 any person, to influence legislation or regulations, or to fail to perform an official
23 function in order to influence business decisions, legislation, or regulations of a
24 government.” (*Id.*)

25 161. The first witness at the hearing was Roderick Hills (Chairman of the SEC).
26 He began by stating that since the May 12, 1976 SEC Report, the SEC has “reviewed
27 some 90 additional companies that have made disclosures of questionable payments or
28 related practices.” (*Id.* at 17.) Chairman Hills noted that the “new disclosures follow

1 essentially the same format, and involved the same kinds of payments and the same kinds
2 of practices as were reviewed in detail in our report of May 12.” (*Id.*)

3 162. In a prepared written statement, Chairman Hills provided further detail of the
4 additional disclosures since the May 12, 1976 SEC Report. He stated as follows: “As
5 before, the most commonly reported transactions were payments to foreign officials made
6 in an effort to procure the enactment or favorable application of advantageous tax,
7 customs, or other laws: to assist companies in obtaining or retaining government
8 contracts; to persuade low-level government officials to perform their regular functions;
9 or to meet extortionate demands by foreign government officials. ... The next most
10 prevalent transaction, reported by 50 percent of the recent registrants, involves foreign
11 commercial payments made in a manner suggesting impropriety. Excessive sales
12 commissions, over-compensated foreign business agents or consultants, or inflated
13 invoicing to facilitate kickbacks to buyers’ purchasing agents were recurrent techniques
14 used to obtain business. These payments were channeled directly to the management or
15 procurement officers or prospective private-sector buyers, or took the form of excess
16 commissions or consultant’s fees to be passed on as payoffs to government officials with
17 intent to influence government contract decisions. Foreign political contributions were
18 reported by 20 percent of new registrants, but many of these contributions were allegedly
19 legal. ... Disclosures relating to domestic transactions have been less frequent. Although
20 roughly one-quarter of the companies admitted making domestic political contributions,
21 these payments were generally small and were made at the state and local level where
22 they were often legal. Of greater concern is the revelation that 20 percent of the firms
23 engaged in domestic commercial bribery, most often achieved through improper rebates
24 or kickbacks to purchasers of goods or services.” (*Id.* at 20-21.) Again, like the SEC
25 Report described above, Chairman Hills’ written statement described *domestic* as well as
26 foreign payments and foreign payments of a *broad* nature and not just those to foreign
27 government officials.

28

1 163. Mark Feldman (Deputy Legal Adviser, Department of State) also testified at
2 the hearing. Among the reasons Feldman offered as to why the State Department
3 opposed H.R. 15481's criminal payment prohibition was that "any proceeding under such
4 a law, an official of a foreign government will necessarily be accused of accepting a
5 bribe" and thus "this will complicate any efforts to gather the necessary evidence in an
6 official's country, a process which depends on the good will and cooperation of his
7 government." (*Id.* at 91.)

8 164. Theodore Sorensen (Paul, Weiss, Rifkind, Wharton & Garrison) also
9 testified at the hearing. He began by "commending this subcommittee and Congress for
10 acting to halt the payment of bribes by U.S.-based corporations to foreign government
11 officials and politicians." (*Id.* at 114.) As to H.R. 15481's criminal payment prohibition,
12 Sorensen noted that the bill outlaws "any payments by any U.S.-based enterprise to any
13 foreign government officials and politicians which are made for the purpose of inducing
14 those officials to either use their influence or neglect their duties in such a way as to help
15 the enterprise or payor obtain or retain business, channel business to someone else, or
16 alter local legislation or regulations." (*Id.*) During his testimony, Sorensen also noted
17 that the bill "does not attempt to prohibit what the law cannot enforce, and thus includes
18 no ban on so-called low-level grease payments made to encourage some foreign
19 functionary to do his duty instead of neglecting or violating it; no ban on payments
20 unrelated to government." (*Id.* at 115.)

21 165. The Foreign Payments Disclosure Hearings continued on September 22,
22 1976. The first witness was Representative Solarz. Representative Solarz stated that the
23 "problem with corporate bribery overseas is that it poses very significant problems for
24 our own foreign policy." (*Id.* at 139.) Among other things, Representative Solarz stated
25 that "our relationship with Japan is the foundation of our whole foreign policy in the Far
26 East, and yet we see the government of a valued ally being shaken as a result of the
27 disclosures relating to the Lockheed scandal." (*Id.*) In his written statement,
28 Representative Solarz noted that "the Netherlands have been similarly shaken by the

1 allegations surrounding Prince Bernhard, husband of Queen Juliana and Inspector
2 General of the Armed Forces, suggesting that he received \$1.1 million in Lockheed
3 payoffs.” (*Id.* at 141.) Similarly, Representative Solarz noted that Italy “is essential to
4 the viability of the southern plank of NATO, where a stable government committed to
5 continued participation in NATO is essential to our own security interests and where the
6 Italian Communist Party has made significant gains in the most recent elections, we find
7 that the Government has been at least partially undermined as a result of allegations
8 concerning the possible bribery of some of the highest officials of the Italian Government
9 by American corporations.” (*Id.*)

10 166. Representative John Moss also testified at the hearing. In reference to the
11 criminal payment provision set forth in H.R. 15481, he stated that it “would prohibit
12 publicly owned corporations whose securities are registered with the SEC from bribing
13 officials of foreign governments. Business practices of these corporations abroad often
14 impact directly on U.S. foreign policy. Disclosures have shown that United Brands
15 dealings with the Honduran Government and Lockheed’s relationship with the Dutch
16 Crown, Italian political parties, and former key leaders of the ruling Japanese party had
17 an impact as great as the Department of State might have had.” (*Id.* at 152.)

18 167. The Foreign Payments Disclosure Hearings record contains a September 22,
19 1976 letter from the American Bar Association to Representative John Murphy,
20 Chairman of the House Subcommittee on Consumer Protection and Finance. (*See id.* at
21 206-218.) As to S. 3741 and H.R. 15149 the letter states, under the heading “Comments
22 addressed to specific sections,” as follows: “Part (3) of the definition of ‘foreign
23 government’ is somewhat ambiguous. The words ‘established ... by’ and ‘subject to
24 control by’ appear susceptible of too inclusive an interpretation. Specifically
25 ‘established’ should not include ‘organized under the laws of.’ In addition, since all
26 entities operating within a jurisdiction are in some sense ‘subject to control by’ the
27 government within whose boundaries they exist, we suggest a more precise definition of
28

1 this aspect of the definition of ‘foreign government’ as follows: ‘(3) a legal entity which
2 a foreign government owns or controls as though an owner.’” (*Id.* at 216.)

3 168. The Foreign Payments Disclosure Hearings demonstrate the time constraints
4 Congress faced in attempting to pass what would become the FCPA given the pending
5 1976 elections. At various points during the hearings, it was discussed whether it was
6 even possible for Congress to enact a bill during the 94th Congress. Representatives
7 cautioned that “necessary legislation” should not be “hurriedly passed.” (*Id.* at 142.)
8 Representative Solarz said “we ought not in the closing days of the session try to rush
9 things through which otherwise would not be able to stand the kind of scrutiny which the
10 process ordinarily permits.” (*Id.* at 142-143.) However, Representative Solarz did point
11 out “that this is a matter which the Congress as a whole has been dealing with for about
12 1½ years now” and that the issue “received very careful considerations in the Senate” as
13 it “has been in the committee for quite some time.” (*Id.*) Likewise, Representative
14 Michael Harrington expressed “misgivings about rushing through this kind of bill at the
15 end of the session,” and Representative W.S. Stuckey, who presided over the September
16 22, 1976 hearing, said “being realistic, I think really what we are doing today is laying
17 the groundwork for the next session on this legislation, if there is to be legislation. I just
18 don’t see from a practical standpoint – since we are scheduled to adjourn in 10 days
19 whether the bill could get through this year.” (*Id.* at 144, 150.)

20 **GG. 1976 Elections**

21 169. The 94th Congress adjourned on or about October 1, 1976.

22 170. On November 2, 1976, Jimmy Carter defeated Gerald Ford in the
23 presidential election.

24 171. The 95th Congress began on or about January 4, 1977.

25 **HH. H.R. 1602 (Introduced January 10, 1977)**

26 172. On January 10, 1977, Representative Murphy introduced H.R. 1602.
27 (**Exhibit 37.**) H.R. 1602’s payment prohibitions were identical to H.R. 15481, the bill
28 that failed to make it out of committee during the final days of the 94th Congress. As

1 noted above, H.R. 15481's payment prohibitions, in turn, were identical to S. 3664's
2 payment prohibitions which unanimously passed the Senate 86-0 on September 15, 1976.

3 173. H.R. 1602's payment prohibitions applied to "any issuer" and "any domestic
4 concern, other than an issuer" and provided, in pertinent part, that it shall be unlawful "to
5 make use of the mails or of any means or instrumentality of interstate commerce
6 corruptly to offer, pay, or promise to pay, or authorize the payment of, any money, or to
7 offer, give, or promise to give, or authorize the giving of, anything of value to – (1) any
8 person who is an official of a foreign government or instrumentality thereof for the
9 purpose of inducing that individual – (A) to use his influence with a foreign government
10 or instrumentality, or (B) to fail to perform his official functions, to assist such issuer in
11 obtaining or retaining business for or with, or directing business to, any person or
12 influencing legislation or regulations of that government or instrumentality; (2) any
13 foreign political party or official thereof or any candidate for foreign political office for
14 the purpose of inducing that party, official, or candidate – (A) to use its or his influence
15 with a foreign government or instrumentality thereof, or (B) to fail to perform its or his
16 official functions, to assist such issuer [or domestic concern] in obtaining or retaining
17 business for or with, or directing business to, any person or influencing legislation or
18 regulations of that government or instrumentality; or (3) any person, while knowing or
19 having reason to know that all or a portion of such money or thing of value will be
20 offered, given, or promised directly or indirectly to any individual who is an official of a
21 foreign government or instrumentality thereof, or to any foreign political party or official
22 thereof or any candidate for foreign political office, for the purpose of inducing that
23 individual, official or party – (A) to use his or its influence with a foreign government or
24 instrumentality, or (B) to fail to perform his or its official functions, to assist such issuer
25 [or domestic concern] in obtaining or retaining business for or with, or directing business
26 to, any person or influencing legislation or regulations of that government or
27 instrumentality."

28

1 174. Like H.R. 15481 and S. 3664, H.R. 1602 did not define the terms “foreign
2 government” or “instrumentality.” H.R. 1602 was referred to the House Committee on
3 Interstate and Foreign Commerce.

4 **II. S. 305 (Introduced January 18, 1977)**

5 175. On January 18, 1977, Senator Proxmire introduced S. 305, the Senate bill
6 that, in compromise with the House bill H.R. 3815, ultimately became the FCPA.
7 **(Exhibit 38.)** S. 305 was substantively identical to S. 3664, the bill that passed the
8 Senate 86-0 on September 15, 1976 and was referred to the House Committee on
9 Interstate and Foreign Commerce on September 16, 1976.

10 176. Like S. 3664, S. 305’s payment prohibition applied to “any issuer” and “any
11 domestic concern, other than an issuer” and provided, in pertinent part, that it shall be
12 unlawful “to make use of the mails or of any means or instrumentality of interstate
13 commerce corruptly to offer, pay, or promise to pay, or authorize the payment of, any
14 money, or to offer, give, or promise to give, or authorize the giving of, anything of value
15 to – (1) any person who is an official of a foreign government or instrumentality thereof
16 for the purpose of inducing that individual – (A) to use his influence with a foreign
17 government or instrumentality, or (B) to fail to perform his official functions, to assist
18 such issuer in obtaining or retaining business for or with, or directly business to, any
19 person or influencing legislation or regulations of that government or instrumentality; (2)
20 any foreign political party or official thereof or any candidate for foreign political office
21 for the purpose of inducing that party, official, or candidate – (A) to use its or his
22 influence with a foreign government or instrumentality thereof, or (B) to fail to perform
23 its or his official functions, to assist such issuer [or domestic concern] in obtaining or
24 retaining business for or with, or directing business to, any person or influencing
25 legislation or regulations of that government or instrumentality; or (3) any person, while
26 knowing or having reason to know that all or a portion of such money or thing of value
27 will be offered, given, or promised directly or indirectly to any individual who is an
28 official of a foreign government or instrumentality thereof, or to any foreign political

1 party or official thereof or any candidate for foreign political office, for the purpose of
2 inducing that individual, official or party – (A) to use his or its influence with a foreign
3 government or instrumentality, or (B) to fail to perform his or its official functions, to
4 assist such issuer [or domestic concern] in obtaining or retaining business for or with, or
5 directing business to, any person or influencing legislation or regulations of that
6 government or instrumentality.” (*Id.*)

7 177. Like S. 3664, S. 305 did not define the terms “foreign government” or
8 “instrumentality.” Unlike S. 3664, S. 305 also contained provisions wholly unrelated to
9 what would become the FCPA, namely a section titled “Domestic and Foreign
10 Investment Improved Disclosure Act of 1977” concerning disclosure of beneficial
11 ownership of any equity security. (*See id.* at 82-88.)

12 178. S. 305 was referred to the Senate Committee on Banking, Housing and
13 Urban Affairs.

14 **JJ. H.R. 3815 (Introduced February 22, 1977)**

15 179. On February 22, 1977, Representative Bob Eckhardt introduced H.R. 3815,
16 the House bill that, in compromise with the Senate bill S. 305, ultimately became the
17 FCPA. (**Exhibit 39.**) H.R. 3815 differed from H.R. 1602, a companion bill introduced a
18 month earlier, in at least two respects. First, H.R. 3815 only contained a payment
19 prohibition, not what would become the FCPA’s books and records and internal controls
20 provisions as did H.R. 1602. Second, while H.R. 3815’s payment prohibition was similar
21 to H.R. 1602’s payment prohibition, H.R. 3815’s payment prohibition included a specific
22 definition of “foreign official.”

23 180. H.R. 3815’s payment prohibition stated that it shall be unlawful for any
24 issuer or domestic concern: “to make use of the mails, or of any means or instrumentality
25 of interstate commerce, corruptly to offer, pay, or promise to pay, or authorize the
26 payment of, any money, or to offer, give, or promise to give, or authorize the giving of,
27 anything of value to (1) any foreign official for purposes of (A) influencing any act or
28 decision of such foreign official in his official capacity; or (B) inducing such foreign

1 official to use his influence with a foreign government or instrumentality thereof to affect
2 or influence any act or decision of such government or instrumentality; (2) any foreign
3 political party or official or any candidate for foreign political office for purposes of
4 inducing such party, official, or candidate to use its or his influence with a foreign
5 government or instrumentality thereof to affect or influence any act or decision of such
6 government or instrumentality, or (3) any person, while knowing or having reason to
7 know that all or any portion of such money or thing of value will be offered, given, or
8 promised, directly or indirectly to (A) any foreign official for purposes of (i) influencing
9 any act or decision of such foreign official in his official capacity; or (ii) inducing such
10 foreign official to use his influence with a foreign government or instrumentality thereof
11 to affect or influence any act or decision of such government or instrumentality; or (B)
12 any foreign political party or official or any candidate for foreign political office for
13 purposes of inducing such party, official, or candidate to use its or his influence with a
14 foreign government or instrumentality thereof to affect or influence any act or decision of
15 such government or instrumentality.” (*Id.*)

16 181. H.R. 3815 defined “foreign official” to mean “any officer or employee of a
17 foreign government or any department, agency, or instrumentality thereof, or any person
18 acting in an official capacity for or on behalf of such government or department, agency,
19 or instrumentality. Such term does not include any employee of a foreign government or
20 any department, agency, or instrumentality thereof whose duties are ministerial or
21 clerical.” (*Id.*)

22 182. H.R. 3815 was referred to the House Committee on Interstate and Foreign
23 Commerce.

24 **KK. Hearings Before the Committee on Banking, Housing, and Urban**
25 **Affairs, United States Senate, 95th Congress, First Session (March 16,**
26 **1977) (the “Foreign Corrupt Practices and Domestic and Foreign**
Investment Disclosure Hearing”)

27 183. On March 16, 1977, the Senate Committee on Banking, Housing, and Urban
28 Affairs held a hearing on S. 305 titled “Foreign Corrupt Practices and Domestic and

1 Foreign Investment Disclosure.” (**Exhibit 40.**) In opening the hearing, Senator Proxmire
2 stated as follows: “Title I of S. 305 outlaws the bribery of foreign officials by American
3 companies. The SEC has recently uncovered 300 instances in which U.S. companies
4 engaged in the bribery of foreign officials involving over \$300 million. Public confidence
5 in the business community, the heart of our free enterprise system, has been seriously
6 affected by these revelations. Bribery is not only morally bad, it’s bad business.
7 Companies which engage in such practices run the risk that when uncovered substantial
8 business may be lost or, even worse, property may be confiscated by hostile
9 governments. The image of our Government abroad is tarnished and the effectiveness of
10 our foreign policy diminished. Bribery undermines fair competition between American
11 firms. Price and quality no longer control the market. The growth, profitability and
12 employment levels of firms operating in such circumstances are distorted. There’s just
13 no disagreement on these principles or on the venal effect of bribery, that it is wrong....
14 The only dispute is how to stop it and how to make any prohibition we write into law
15 effective. S. 305 provides one answer. The bill will make it a criminal offense for any
16 corporate officer or employee of any corporation is the way the bill is written, as I
17 understand it, to bribe a foreign government official to obtain business or to affect the
18 outcome of legislation or regulation of that Government.” (*Id.* at 1-2.)

19 184. Michael Blumenthal (Secretary of the Treasury) submitted a prepared
20 statement and testified at the hearing. His prepared statement began as follows: “I would
21 like to say at the outset that the Administration supports the aims of S. 305. The Carter
22 Administration believes that it is damaging both to our country and to a healthy world
23 economic system for American corporations to bribe foreign officials. The United States
24 should impose specific criminal penalties for such acts.” (*Id.* at 67.) The letter noted that
25 the Administration carefully reviewed the “record of recent regulatory action” and that
26 this record was a “very useful guide against which new initiatives can be examined.”
27 (*Id.*) In his prepared statement, Secretary Blumenthal reviewed the “considerable
28 regulatory action that has taken place during the past few years,” including the SEC’s

1 efforts “in obtaining disclosure from issuers of registered securities who have engaged in
2 these improper practices.” (*Id.* at 67-68.)

3 185. As to S. 305, Secretary Blumenthal said that the Administration supports
4 “the central aspect of S. 305, the criminalization of corrupt payments made to foreign
5 officials....” (*Id.* at 70.) “At the same time,” Secretary Blumenthal stated, “the
6 Administration recognizes that great care must be taken with an approach which makes
7 certain types of extraterritorial conduct subject to our country’s criminal laws” and that
8 “moreover, a law which provides criminal penalties must describe the persons and acts
9 covered with a high degree of specificity in order to be enforceable, to provide fair
10 warning to American businessmen.” (*Id.*)

11 186. The hearing record contains a March 24, 1977 letter from Robert Barnett
12 (Chairman of the Federal Deposit Insurance Corporation) which “responds” to Senator
13 Proxmire’s “request for a report on S. 305....” (*Id.* at 89.) The letter states: “Title I of
14 the bill makes it a crime for any U.S. national or any business entity organized or
15 headquartered in the United States and controlled by U.S. nationals to bribe foreign
16 government officials or politicians in order to obtain business or influence foreign
17 governmental legislation or regulations.... We fully support the objectives of Title I and
18 favor, in principle, criminalizing the bribery of foreign officials.” (*Id.*)

19 187. In an opening statement, Senator Tower noted that “we must exercise care in
20 enforcement” because “we wouldn’t want to be in a position of bringing down a friendly
21 government by precipitating for example, some kind of leftwing takeover of the country.”
22 (*Id.* at 103.) Senator Tower noted that “it would be quite contrary to our national interest
23 to do so merely to expose one bad member of what is actually a good government.” (*Id.*)

24 188. Roderick Hills (Chairman of the SEC) also testified at the hearing. Among
25 other things, he noted that one issue “not addressed over the course of this long history of
26 questionable payments” was finding “a way to assist the foreign governments that suffer
27 the corruption of their officials.” (*Id.* at 112-113.) In his prepared written statement,
28 Chairman Hills noted that S. 305’s payment prohibition “takes a considerably different

1 approach to the problem of questionable payments than does” S. 305’s books and records
2 and internal control provisions. (*Id.* at 124.) He stated that the payment prohibition
3 “would prohibit companies registered with the Commission [as well as domestic
4 concerns] from making certain types of payments to foreign governments, officials, or
5 political parties.” (*Id.*)

6 189. The hearing record also contains several letters or written statements from
7 interested groups or persons. Such letters or statements provide useful insight of the
8 views of others as to the type of conduct Congress was seeking to address in S. 305.

9 190. A March 15, 1977 letter to Senator Proxmire from the National Association
10 of Manufacturers began as follows: “Many options have been advanced in the policy
11 debate over measures to prevent improper corporate payments to foreign government
12 officials.” (*Id.* at 201.)

13 191. A March 16, 1977 written statement from the National Association of
14 Manufacturers stated that S. 305’s payment prohibitions “must have three elements”
15 including that “the corrupt payment or gift must be made to an official of a foreign
16 government, a foreign political party or an official or candidate thereof, or an
17 intermediary where the payor knows or has reason to know that the ultimate recipient is a
18 foreign government official, political party, or candidate.” (*Id.* at 206.) Elsewhere the
19 statement notes that “a case falling under the bill’s prohibitions would involve a payment
20 to a foreign government official....” (*Id.* at 209.)

21 192. The record also contains a written statement by Nicholas Wolfson (Professor
22 of Law, Connecticut University). (*Id.* at 215.) Professor Wolfson begins his letter by
23 noting that “foreign governments in Japan, Italy, Belgium, the Netherlands and Honduras
24 have been shaken or toppled by revelations of bribery.” (*Id.*) He noted that “bribery has
25 a disastrous political component” because it “is a method by which large United States
26 corporations are able to conduct American foreign policy without consent of the Senate,
27 concurrence of the White House, or approval by or knowledge of the American people.”
28 (*Id.* at 216.) Professor Wolfson states, “examples of this are the \$1,000,000 contribution

1 by Gulf Oil Corporation to the Korean Democratic Republican Party in 1966 and the
2 \$3,000,000 contribution in 1970.” (*Id.*)

3 **LL. Markup Session S. 305 (April 6, 1977)**

4 193. On April 6, 1977 the Senate Committee on Banking, Housing and Urban
5 Affairs held a “Markup Session” on S. 305. (**Exhibit 41.**) The Markup Session began
6 with a “short description of S. 305” as well as a “short description of the Administration
7 amendment respecting the criminalization of overseas bribery.” (*Id.* at 3.)

8 194. The “short description of S. 305” states, in pertinent part, as follows:
9 “Sections 103 and 104 of the bill [the payment provisions concerning issuers and
10 domestic concerns] make it a crime for an issuer or a domestic concern to engage in the
11 bribery of foreign officials in specific circumstances and for proscribed purposes. These
12 sections make it unlawful to use the mails or any means or instrumentality of interstate
13 commerce corruptly ... to offer, pay, or authorize the payment of any money or thing of
14 value to a foreign government official or an official of an instrumentality thereof in order
15 to have that individual (1) use his influence with a foreign government or to fail to
16 perform his official functions, and then for the purpose of assisting the company in
17 obtaining or retaining business or influencing legislation or regulations of the
18 government.... The same prohibitions which are made applicable to government officials
19 are made applicable to payments to foreign political parties, officials thereof, or
20 candidates for foreign political office. There is a specific provision in the bill that
21 payments to agents while knowing or having reason to know that all or a portion of such
22 payments will be offered, given, or promised to a foreign government official, political
23 party, or candidate for office for the same purpose are prohibited. So that the net effect of
24 the statute would prohibit both direct payments to the foreign government official and
25 indirect payments through an agent.” (*Id.* at 4-5.)

26 195. During the Markup Session, it was noted that S. 305 was “the identical bill
27 that passed the Senate last year by a vote of 86 to nothing.” (*Id.* at 7.)

28

1 **MM. Hearings Before the Subcommittee on Consumer Protection and**
2 **Finance, House of Representatives, 95th Congress, First Session (April**
3 **20 and 21, 1977) (the “Unlawful Corporate Payments Act Hearings”)**

4 196. On April 20 and 21, 1977, the House Subcommittee on Consumer Protection
5 and Finance of the House Committee on Interstate and Foreign Commerce held hearings
6 on H.R. 3815 and H.R. 1602 titled “Unlawful Corporate Payments Act of 1977.”

7 **(Exhibit 42.)**

8 197. Representative Eckhardt, Chairman of the Subcommittee, presided over the
9 hearings and began with the following statement. “Today, the Subcommittee on
10 Consumer Protection and Finance begins 2 days of hearings on H.R. 3815, The Unlawful
11 Corporate Payments Act of 1977. During the waning days of the 94th Congress, the
12 subcommittee held hearings on a similar foreign bribery bill, but was unable to report it
13 out because of end-of-session legislative pressures. ... Since 1974, approximately 200
14 American corporation have admitted making questionable foreign payments exceeding
15 \$300 million. The majority of these firms are Fortune 500 industrials. They are involved
16 in aerospace, airlines and air service, drugs and health care, oil and gas production and
17 services, and food products.” (*Id.* at 1.) Representative Eckhardt stated that “bribery of
18 foreign officials” by U.S. corporations creates “severe foreign policy problems.” He
19 noted that “[p]ayments by Lockheed, alone, have had serious repercussions for the
20 governments of Japan, Italy and the Netherlands, with concomitant diplomatic problems
21 for the United States” and that “many U.S. corporations would welcome a strong anti-
22 bribery statute because it would make it easier to resist pressures from foreign officials.”
23 (*Id.* at 2.) On this issue, Representative Eckhardt noted that “former Gulf Oil Company
24 Chairman Bob Dorsey testified that such a law would have put Gulf in a better position to
25 resist and refuse demands by the South Korean Government for political contributions.”

26 **(Id.)**

27 198. The hearing record contains an April 20, 1977 letter from Douglas Bennet,
28 Jr. (Assistant Secretary for Congressional Relations, Department of State) to
Representative Harley Staggers (Chairman of the House Committee on Interstate and

1 Foreign Commerce) (*See id.* at 21.) In the letter, the Department of State responds to
2 Representative Staggers' March 7, 1977 letter "requesting the Department of State's
3 views on H.R. 3815." (*Id.*) Bennet's letter states as follows: "The Administration agrees
4 with the aims of both S. 305 and H.R. 3815 and is in the process of suggesting
5 improvements to them. The Department of State is hopeful that a law can be passed
6 which will aid the Government's efforts to deter bribery of public officials abroad." (*Id.*)

7 199. The hearing record also contains an April 20, 1977 letter by Patricia Wald
8 (Assistant Attorney General, Office of Legislative Affairs, Department of Justice) to
9 Representative Staggers. Weld's letter begins: "As previously indicated to the Senate
10 Banking Committee, the Administration firmly supports legislation which would
11 proscribe the bribery of foreign public officials by American business and their
12 representatives." (*Id.* at 22.)

13 200. The first witness to testify at the hearing was Dr. Gordon Adams (Director
14 of Military Research, Counsel on Economic Priorities). (*Id.* at 25.) Dr. Adams explained
15 that the Counsel on Economic Priorities (CEP) is a "public interest organization" that
16 publishes a number of reports and studies on issues of major public importance including
17 corporate disclosure practices. (*Id.*) Given CEP's "commitment to more adequate and
18 systematic corporate disclosures," Dr. Adams explained that CEP "followed for some
19 time the mounting evidence, disclosed to the Securities and Exchange Commission, of
20 widespread questionable payments by American firms doing business overseas." (*Id.*)
21 Dr. Adams noted that "there have been few efforts to review in detail what American
22 corporations have reported," but that CEP made an "initial effort to fill this gap" by
23 undertaking a "survey of the disclosure statements filed with the SEC up to November 1,
24 1976." (*Id.*) Dr. Adams' testimony reviewed CEP's "findings with the subcommittee ...
25 because they bear on the need for and nature of legislation such as that under
26 consideration here." (*Id.* at 26.)

27 201. Dr. Adams stated that CEP's report ("The Invisible Hand: Questionable
28 Corporate Payments Overseas") "was intended to increase public knowledge of the

1 questionable payments problem and of efforts to bring it under control.” (*Id.*) Dr. Adams
2 explained that CEP discovered “that questionable payments appeared to be particularly
3 common in several areas of American industry: 22 of the companies on our list were in
4 the fields of drugs, health care and pharmaceutical production. Another 22 were involved
5 in oil and gas production and services; 16 manufactured and marketed food products; 14
6 were in aerospace, airlines and air services area, and another 14 were chemical
7 companies. These categories include over half of the companies covered in our report.”

8 (*Id.*)

9 202. Dr. Adams next explained that CEP’s “investigation revealed several
10 categories of payments, some of which are not covered by the legislation pending before
11 this subcommittee” and that the “SEC guidelines left disclosing firms free to define what
12 they considered to be questionable payments, hence, not all disclosures include all of the
13 categories of payments we discovered.” (*Id.* at 29.)

14 203. He noted as follows: “The first such category, and the most clearly illegal in
15 the jurisdictions where paid, are those made to foreign government officials, from the
16 most senior to the lowest administrative level. Ashland Oil, for example, paid \$150,000
17 in 1972 to Albert Bernard Bongo, President of Gabon. At the other end of a government
18 hierarchy, Memorex reported an aggregate \$731,000 in payments to low level non-
19 elected foreign government officials to persuade them to perform their required functions
20 between 1971 and 1976.” (*Id.*)

21 204. The “second major category,” according to Dr. Adams, covered “payments
22 to politicians and political parties, often during election campaigns.” (*Id.*) He explained
23 as follows: “Gulf illegally contributed \$4 million to the campaign war chest of South
24 Korea’s governing Democratic Republican Party. Exxon’s Italian subsidiary made \$27
25 million in authorized political contributions in Italy between 1962 and 1971. Further
26 company investigations revealed another \$19 million in questionable or illegal Exxon
27 campaign contributions in Italy, from 40 secret accounts. A number of companies have
28 reported legal, properly recorded political contributions to Canada.” (*Id.*)

1 205. Dr. Adams stated that the “third category of payment is even more difficult
2 to classify, since it covers a variety of questionable commercial practices by U.S. firms
3 abroad.” (*Id.*) He noted as follows: “Twentieth Century Fox, for example, paid \$60,744
4 in 1973 to an attorney in a foreign country in connection with the restructuring of the
5 company distribution operation in that country. Some of this went on to local trade union
6 representatives to help arrange for the employment of a certain number of personnel and
7 to settle indemnities required to be paid to members of that labor union. Signode paid
8 \$6,000 to a union official in another country between 1971 and 1975.” (*Id.* at 30.)

9 206. According to Dr. Adams, “another type of questionable commercial payment
10 involves gifts and payments to employees of foreign customers, to obtain business or to
11 celebrate a successful commercial relationship.” (*Id.*) He stated as follows: “Honeywell,
12 for example, reported payments of \$800,000 from 1971 to 1975 ‘to employees of private
13 customers by a number of subsidiaries in connection with specific sales.’ Harris, which
14 made over \$1.4 million in payments of this kind from 1971 to 1976, reported one
15 instance of payments aggregating \$125,000: ‘... made upon the demand of a highly
16 placed employee of a customer who claimed he could prevent award of a contract
17 involving a price in excess of \$2,000,000 on which the Company understood it had been
18 selected as the contractor ...’” (*Id.*)

19 207. “Still another questionable commercial practice,” according to Dr. Adams,
20 “concerns overbilling and illegal rebating to foreign customers.” (*Id.*) He stated as
21 follows: “International Minerals and Chemicals, for example, reported payments as high
22 as \$1,213,000 in 1974 by subsidiaries which were instructed by customers that they be
23 billed at amounts in excess of the agreed price for products or services supplied and that
24 such excess amounts due them be paid outside their country of domicile.” (*Id.*) Dr.
25 Adams continued: “Armco Steel reported nearly \$17,000,000 in rebates to foreign
26 customers as the result of over-invoicing.” (*Id.*)

27 208. Dr. Adams concluded his testimony by commenting on the “bill [H.R. 3815]
28 currently pending before the committee.” (*Id.*) He noted as follows: The “bill’s

1 language deals with the most prominent cases of questionable payments: Bribes paid to
2 government officials to influence them in the performance of their duties. It also deals,
3 through in looser language, with the problem of political contributions.” (*Id.* at 36.) Dr.
4 Adams noted however that the bill “does not deal with overseas business practices:
5 payments, kickbacks, rebates involving private foreign customers and businesses.” (*Id.*)
6 He stated that “this legislation may not be the appropriate context for handling this
7 problem, but I mention it as an issue with which this subcommittee, the Congress, and the
8 Executive ought to be concerned.” (*Id.*) In addressing the “strong opposition” that
9 existed to the “criminalization approach,” Dr. Adams noted that “the effort to obtain such
10 evidence, and the exposure of foreign governmental practices such a prosecution would
11 entail could pose problems for U.S. foreign policy.” (*Id.* at 37.)

12 209. During the hearing, Representative Eckhardt and Dr. Adams had an
13 exchange regarding monetary thresholds. Representative Eckhardt stated, “I am inclined
14 to think that the fact that we have in H.R. 3815, both the requirement of a corrupt intent
15 of the influencing of the government which I think would be construed to be something
16 more than merely to put into effect the normal channels of operation or to open the
17 sluices of bureaucracy with that particular nation, plus the requirement that if it be
18 criminal, it be willful, would probably be as good a standard as we can adopt.” (*Id.* at
19 52.)

20 210. Robert Von Mehren (Chairperson, Ad Hoc Committee on Foreign
21 Payments, Association of the Bar of the City of New York) also testified at the hearing.
22 Von Mehren explained that the ad hoc committee “was formed in the fall of 1975 at the
23 suggestion of Mr. Cyrus Vance, the then president of The Association of the Bar of the
24 City of New York.” (*Id.* at 53.) The ad hoc committee attempted “to define the problem
25 with which we were dealing and to consider what existing administrative and judicial
26 regulations applied in the foreign payment area.” (*Id.*) The ad hoc committee, consisting
27 of lawyers in private practice, lawyers employed by corporations, and a Columbia
28 University law professor, drafted a unanimous report (“Report on Questionable Foreign

1 Payments By Corporations: The Problem and Approaches to a Solution”) that represented
2 “an effort to place in one document (a) a description of the present state of the law with
3 respect to the foreign payments problem, (b) an analysis of the two fundamental
4 approaches to additional legislation – criminalization and disclosure – and (c)
5 recommendations with respect to the most desirable course for the United States to
6 follow.” (*Id.*)

7 211. In its report, the ad hoc committee states that “no problem can be analyzed
8 until it has been defined.” (*Id.* at 64.) The report states as follows: “The questionable
9 payments which have been brought to light in the recent past have varied tremendously in
10 type and amount. Those which have been the principal focus of attention by the public,
11 the Congress and [the SEC] are payments made to foreign government officials to gain
12 some important business advantage. In many instances, the payment was intended to
13 affect a governmental procurement decision, to influence an important regulatory
14 decision or simply to promote a generally favorable climate. The methods by which such
15 payments have been made have also varied considerably. For example, some were made
16 directly to a government official or his relatives, other were made indirectly through
17 inflated commissions to sales agents or consultants and still others were disguised as
18 political contributions.” (*Id.*)

19 212. The report contains a separate section, “comments on pending legislative
20 proposals,” and focuses on S. 305 and H.R. 1602. (*Id.* at 91.) The report states: “[T]he
21 prohibitions apply only where the recipient or proposed recipient is: (a) a foreign
22 government official; (b) a foreign political party, a party official or a candidate for
23 foreign political office; or (c) an intermediary if there is reason to know that all or a part
24 of the payment or gifts will be passed on to such persons.” (*Id.* at 92-93.)

25 213. Orville Schnell (Hughes, Hubbard and Reed and Co-Chairman of the Ad
26 Hoc Inter-Professional Study Group on Corporate Conduct, a group formed in January
27 1977 to analyze the foreign payments problem) also testified at the hearing. (*Id.* at 132-
28 133.) Schnell’s brief oral testimony was supported by a written statement in which he

1 explained that his group “looked carefully at the events over the past three years when
2 many payments to foreign officials have been disclosed on a voluntary and involuntary
3 basis.” (*Id.* at 137.) As to the types of payments, Schnell stated that his group “found
4 that there were many different types of payments, which fall into three general
5 categories.” (*Id.*) He stated as follows: “First are payments made to persuade a
6 government official to exceed his authority or fail to exercise his bounden duty – more
7 succinctly, bribes. Second, there are the so-called facilitating payments, made to
8 encourage government officials to carry out their assigned responsibilities, their
9 ministerial duties (payments often small in amount). And third, there are payments that
10 are extorted from the payor by a government official through improper application of the
11 power of his office.” (*Id.*)

12 214. The Unlawful Corporate Payments Act Hearings resumed on April 21, 1977.
13 Among those placing statements in the hearing record was Representative Solarz. He
14 stated as follows: “The time is long overdue ... for affirmative and meaningful steps to
15 be taken to cope with this situation. Failure to take prompt and effective action can only
16 encourage the continuation of these practices, and thereby, continue to create serious
17 problems in our international economic and political relations throughout the world. The
18 stability of numerous governments has been threatened and political parties in several
19 countries have been seriously compromised.” (*Id.* at 174-175.)

20 215. The first witness at the April 21, 1977 hearing was Michael Blumenthal
21 (Secretary of the Treasury). He began his testimony as follows: “Let me say at the outset
22 that the Carter Administration fully supports the aims of this bill. [H.R. 3815]. We agree
23 that the United States should impose criminal penalties on American businesses and their
24 officials who bribe foreign public officials.” (*Id.* at 175.) Secretary Blumenthal’s
25 prepared written statement similarly begins as follows: “The Carter Administration
26 supports the aims of H.R. 3815. We agree that the United States should impose criminal
27 penalties on American businesses and their officials who bribe foreign public officials.”
28 (*Id.* at 179.)

1 216. Several statements and letters were received by the Subcommittee and were
2 made part of the hearing record.

3 217. One statement is from the Chamber of Commerce of the United States of
4 America dated April 27, 1977. In opposing H.R. 3815, the Chamber noted, among other
5 things, the difficulties in administrating and enforcing the law. (*Id.* at 236.) The
6 Chamber noted that “U.S. prosecutors investigating the activities of foreign government
7 officials will be totally dependent on the foreign government for sufficient information.”
8 (*Id.*)

9 218. Another statement is from the National Association of Manufacturers dated
10 April 28, 1977. In opposing H.R. 3815, the Association noted, among other things, the
11 likely “insurmountable practical enforcement difficulties” because a “case falling under
12 the bill’s prohibitions would involve a payment to a foreign government official, most
13 likely on foreign soil, and perhaps by a foreign person.” (*Id.* at 243.)

14 **NN. Senate Report No. 95-114 as to S. 305 (May 2, 1977)**

15 219. On May 2, 1977, the Senate Committee on Banking, Housing, and Urban
16 Affairs reported S. 305 to the Senate. (**Exhibit 43.**)

17 220. The Senate Report begins: “[D]uring the 94th Congress, the Committee on
18 Banking, Housing and Urban Affairs held extensive hearings on the matter of improper
19 payments to foreign government officials by American corporations.” (*Id.* at 1.) The
20 Report notes that the “committee also considered several bills designed to deal with the
21 problem in various ways” including S. 3133, S. 3379, and S. 3418. The Report notes that
22 S. 3664 in the 94th Congress incorporated a “direct prohibition against the payment of
23 overseas bribes by an U.S. business concern” and that it passed the Senate, by a
24 unanimous vote of 86-0, on September 15, 1976. (*Id.* at 2.) According to the Report,
25 Title I of S. 305, is “identical to S. 3664, the measure which the Senate had passed
26 unanimously during the prior Congress....” (*Id.*)

27 221. The Report then contains a “Summary of the Bill.” The first section is “Title
28 I – corporate bribery of foreign officials.” (*Id.*) The Report states: “Title I of S. 305 is

1 designed to prevent the use of corporate funds for corrupt purposes. As reported, Title I:
2 ... makes it a crime for U.S. companies to bribe a foreign government official for the
3 specific corrupt purposes.” (*Id.* at 2-3.) The Report further states as follows: “In the
4 past, corporate bribery has been concealed by the falsification of corporate books and
5 records. Title I removes this avenue of coverup, reinforcing the criminal sanctions which
6 are intended to serve as the significant deterrent to corporate bribery. Taken together, the
7 accounting requirements and criminal prohibitions of Title I should effectively deter
8 corporate bribery of foreign government officials.” (*Id.* at 3.)

9 222. Under the title, “Need for Legislation,” the Report states as follows:
10 “Recent investigations by the SEC have revealed corrupt foreign payments by over 300
11 U.S. companies involving hundreds of millions of dollars. These revelations have had
12 severe adverse effects. Foreign governments friendly to the United States in Japan, Italy,
13 and the Netherlands have come under intense pressure from their own people.” (*Id.*)

14 223. As to S. 305’s payment prohibition, the Report notes that “[t]he committee
15 considered the matter extensively in the 94th Congress and concluded that the
16 criminalization approach was preferred over a disclosure approach.” (*Id.* at 10.) The
17 Report states as follows: “Sections 103 and 104 of the bill provide criminal penalties for
18 foreign corrupt bribery. Section 103 applies to issuers and reporting firms under the
19 jurisdiction of the SEC. Section 104 applies to all other domestic concerns. Under
20 sections 103 and 104, a corporation is prohibited from making payments to a foreign
21 official for the purpose of inducing him to obtain or retain business for the corporation or
22 to influence legislation or regulations of the Government. Payments to officials of a
23 foreign political office having the purposes set forth respecting payments to foreign
24 government officials are likewise proscribed. And payments to agents, while knowing or
25 having reason to know, that all or a portion of the payment will be offered or given to a
26 foreign government official, foreign political party or candidate for foreign political
27 office for the proscribed purposes are also forbidden.” (*Id.*)

28

1 224. In describing the word “corruptly” the Report states: “[T]he word
2 ‘corruptly’ is used in order to make clear that the offer, payment, promise, or gift, must
3 be intended to induce the recipient to misuse his official position in order to wrongfully
4 direct business to the payor or his client, or to obtain preferential legislation or a
5 favorable regulation.” (*Id.*)

6 225. Elsewhere, the Report states as follows: “Sections 103 and 104 cover
7 payments and gifts intended to influence the recipient, regardless of who first suggested
8 the payment or gift. The defense that the payment was demanded on the part of a
9 government official as a price for gaining entry into a market or to obtain a contract
10 would not suffice since at some point the U.S. company would make a conscious decision
11 whether or not to pay a bribe.” (*Id.*)

12 226. The Report specifically notes that “the committee has recognized that the
13 bill would not reach all corrupt overseas payments.” (*Id.* at 11.)

14 227. In a “Section-by-section analysis” of S. 305, the Report states as follows:
15 “Section 103 of the bill would add a new section 30A to the Act to prohibit any reporting
16 company, or any officer, director, or employee, or shareholder acting on behalf of such a
17 company, to use the mails or the means or instrumentalities of interstate commerce
18 corruptly in furtherance of an offer, payment, or promise to pay, or authorization of the
19 payment of, any money, offer, gift, or promise to give anything of value, to three classes
20 of persons: an official of a foreign government or instrumentality of a foreign
21 government; a foreign political party or an official of a foreign political party, or a
22 candidate for a foreign political office; or any other person while the issuer knows or has
23 reason to know that money or gift will be offered, promised or given to an official of a
24 foreign political party, or a candidate for foreign political office. ... Section 104 of the
25 bill would prohibit persons included in the definition of the term ‘domestic concern’ who
26 would not be covered by new section 30A of the Act from engaging in any of the same
27 types of conduct prohibited by that section.” (*Id.* at 17.)

28 228. On May 5, 1977, S. 305 passed the Senate.

1 229. On May, 12, 1977, the House Subcommittee on Consumer Protection and
2 Finance reported H.R. 3815 to the House Committee on Interstate and Foreign
3 Commerce.

4 **OO. H.R. 7543 (Introduced June 1, 1977)**

5 230. On June 1, 1977, Representative Frederick Rooney introduced H.R. 7543,
6 the “Emergency Foreign Business Practices Act of 1977,” a bill “to establish an Office of
7 Foreign Business Practices within the Department of Commerce, and for other purposes.”
8 **(Exhibit 44.)** Section 401 of the bill stated: “Each United States person shall report to
9 the Secretary [of Commerce], in accordance with rules prescribed by the Secretary, any
10 payment made, after the date of enactment of this Act, by or on behalf of such United
11 States person or any foreign affiliate of such person to any foreign public official in
12 connection with (1) any official act of such foreign official; or (2) any sale to or contract
13 with a foreign government involving potential commercial benefit to such United States
14 person or foreign affiliate.” (*Id.*)

15 231. H.R. 7543 contained the following relevant definitions: (i) “foreign public
16 official” means “an officer or employee of a foreign government whether elected or
17 appointed, and includes an individual who has been nominated or appointed to be a
18 foreign public official or who has been officially informed that he will be so nominated
19 or appointed;” and (ii) “foreign government” means “(A) the government of a foreign
20 country, whether or not recognized by the United States; (B) a department, agency, or
21 branch of a foreign government; (C) a political subdivision of a foreign government, or a
22 department, agency, or branch of such political subdivision; (D) a corporation or other
23 legal entity established, owned, or subject to managerial control by a foreign government;
24 or (E) a public international organization.” (*Id.*)

25 232. H.R. 7543 was referred to the House Committee on Interstate and Foreign
26 Commerce and the House Committee on International Relations.

27
28

1 **PP. Corporate Business Practices and United States Foreign Policy, Hearing**
2 **Before the Subcommittee on International Economic Policy and Trade,**
3 **95th Congress, 1st Session (September 7, 1977) (the “Corporate**
4 **Business Practices Hearing”)**

5 233. On September 7, 1977, the House Subcommittee on International Economic
6 Policy and Trade held a hearing titled “Corporate Business Practices.” (**Exhibit 45.**)
7 Representative Jonathan Bingham opened the hearing and stated as follows: “The
8 purpose of today’s hearing is to review progress and prospects for international
9 agreements governing the conduct of multinational corporations, and to take an initial
10 look at a bill, H.R. 7543, which has been referred to this subcommittee. That bill,
11 introduced by Congressman Fred Rooney of Pennsylvania, is pending jointly before this
12 committee and the Committee on Interstate and Foreign Commerce. It would, in essence,
13 discourage multinational corporations from making improper payments to foreign
14 officials, and engaging in other undesirable conduct abroad, by requiring public
15 disclosure of such activities under the scrutiny of a proposed new agency within the
16 Commerce Department.” (*Id.* at 1-2).

17 234. Representative Eckhardt, the sponsor of H.R. 3815, testified at the hearing.
18 As Representative Bingham noted in his introductory comments, Representative Eckhardt
19 “devoted special attention to possible legislative approaches to the foreign bribery
20 problem,” and he was “the sponsor of H.R. 3815, a bill which proposes that criminal
21 sanctions be imposed upon corporations found to have made improper payments to
22 foreign officials.” (*Id.* at 1.)

23 235. Representative Eckhardt testified that “[t]he foreign bribery bill, as it is
24 commonly referred to, is in response to disclosures by approximately 200 corporations,
25 which have paid out over \$300 million in corporate funds to foreign government officials.
26 Since 1975, largely through congressional hearings and Securities and Exchange
27 Commission investigations, we have become aware of the immense magnitude of the
28 foreign bribery problem. The majority of the firms disclosing questionable payments are

1 Fortune 500 industrials. Typically, they are involved in: aerospace, airlines and air
2 service, drugs and health care, oil and gas production, and food services.” (*Id.* at 8.)

3 236. Representative Eckhardt stated that “bribery of foreign officials by U.S.
4 corporations also creates severe foreign policy problems” and he noted that “payments by
5 Lockheed alone have had serious repercussions for the Governments of Japan, Italy, and
6 the Netherlands, with concomitant diplomatic problems for the United States.” (*Id.* at 8.)

7 237. Representative Eckhardt next stated as follows: “Despite the clear
8 consensus at our hearings that foreign bribery is a reprehensible activity and effective
9 remedial legislation is required there were some differences in approach to this problem.
10 The subcommittee considered a number of suggested changes to H.R. 3815. Foremost
11 among them was that the subcommittee adopt a disclosure approach to the foreign bribery
12 problem, such as H.R. 7543’s in lieu of the criminalization approach contained in H.R.
13 3815 and the Senate-passed S. 305. After carefully evaluating all the testimony received,
14 the subcommittee concluded that because foreign bribery is a reprehensible activity, it
15 should be outlawed rather than legalized through disclosure. The subcommittee also
16 found the criminalization approach to be the most effective deterrent, the least
17 burdensome on business, and no more difficult to enforce than disclosure.” (*Id.* at 9.)

18 238. Representative Eckhardt next described the provisions of H.R. 3815. He
19 stated as follows: “Briefly the bill would prohibit all U.S. corporations and their
20 subsidiaries which are more than 50 percent owned from making payments, promises of
21 payment, or authorization of payment of anything of value to any foreign official,
22 political party, candidate, or intermediary, where there is a corrupt purpose. The corrupt
23 purpose must be to induce the recipient to influence any official act or decision of a
24 government. So-called grease or facilitating payments made to Government officials for
25 the performance of ministerial or clerical duties would not be covered by this bill.” (*Id.*
26 at 11.)

1 **QQ. House Report No. 95-640 as to H.R. 3815 (September 28, 1977)**

2 239. On September 28, 1977, the House Committee on Interstate and Foreign
3 Commerce reported H.R. 3815 to the House. (**Exhibit 46.**)

4 240. The House Report states, under the title “Purpose of Legislation,” as
5 follows: “H.R. 3815 is designed to prohibit the corrupt use of the mails or other means
6 and instrumentalities of interstate commerce by U.S. corporations, directly or indirectly,
7 to bribe foreign officials, foreign political parties, or candidates for foreign political
8 office. The bill’s coverage does not extend to so-called grease or facilitating payments.”
9 (*Id.* at 4.)

10 241. Under the title, “Need for Legislation,” the House Report states as follows:
11 “More than 400 corporations have admitted making questionable or illegal payments. The
12 companies, most of them voluntarily, have reported paying out well in excess of \$300
13 million in corporate funds to foreign government officials, politicians, and political
14 parties. The corporations have included some of the largest and most widely held public
15 companies in the United States; over 117 of them rank in the top Fortune 500 industries.
16 The abuses disclosed run the gamut from bribery of high foreign officials in order to
17 secure some type of favorable action by a foreign government to so-called facilitating
18 payments that allegedly were made to ensure that government functionaries discharge
19 certain ministerial or clerical duties. Sectors of industry typically involved are: drugs
20 and health care; oil and gas production and services; food products; aerospace, airlines
21 and air services; and chemicals.” (*Id.*)

22 242. This last sentence of the above referenced House Report excerpt (regarding
23 the “[s]ectors of industry typically involved”) is nearly identical to statements made by:

24 (i) Representative Eckhardt on April 20, 1977 in opening hearings of the House
25 Subcommittee on Consumer Protection and Finance on H.R. 3815 and H.R. 1602; (ii)
26 Dr. Adams at the same hearing in describing the findings of CEP’s analysis; and (iii)
27 Representative Eckhardt on September 7, 1977 during the Corporate Business Practices
28 Hearings. In all three instances, it is clear from the context of these statements, that

1 Representative Eckhardt and Dr. Adams were referring to companies disclosing alleged
2 improper payments. Thus, when the above House Report states: “Sectors of industry
3 typically involved are: drugs and health care; oil and gas production and services; food
4 products; aerospace, airlines and air services; and chemicals,” that sentence refers to the
5 *payors* of the improper payments, not that the *recipients* of such payments were
6 employed by enterprises in those industries.

7 243. The House Report further states that “corporate bribery also creates severe
8 foreign policy problems for the United States.” (*Id.* at 5.) The Report states as follows:
9 “The revelation of improper payments invariably tends to embarrass friendly
10 governments, lower the esteem for the United States among the citizens of foreign
11 nations, and lends credence to the suspicions sown by foreign opponents of the United
12 States that American enterprises exert a corrupting influence on the political processes of
13 their nations. For example, in 1976, the Lockheed scandal shook the Government of
14 Japan to its political foundation and gave opponents of close ties between the United
15 States and Japan an effective weapon with which to drive a wedge between the two
16 nations. In another instance, Prince Bernhardt of the Netherlands was forced to resign
17 from his official position as a result of an inquiry into allegations that he received \$1
18 million in pay-offs from Lockheed. In Italy, alleged payments by Lockheed, Exxon,
19 Mobil Oil, and other corporations to officials of the Italian Government eroded public
20 support for that Government and jeopardized U.S. foreign policy, not only with respect to
21 Italy and the Mediterranean area, but with respect to the entire NATO alliance as well.”
22 (*Id.*)

23 244. Like the Senate Report on S. 305, the House Report also discusses the two
24 approaches considered in seeking to eliminate improper foreign payments, i.e.,
25 disclosure-only or prohibition. The House Report states that “[t]he committee believes
26 the criminalization approach to be the most effective deterrent, the least burdensome on
27 business, and no more difficult to enforce than disclosure.” (*Id.* at 6.)
28

1 245. The House Report also discusses the “end of session” pressures the 94th
2 Congress faced in passing a foreign corporate payments bill. The House Report states as
3 follows: “On September 21 and 22, 1976, the Subcommittee on Consumer Protection
4 and Finance held hearings on several bills to prohibit such payments including H.R.
5 15481, H.R. 13870, H.R. 13953, and S. 3664.” (*Id.*) “As a result of end of session
6 pressures, the Subcommittee was unable to report the bill out prior to the adjournment of
7 the 94th Congress.” (*Id.* at 7.) “In the 95th Congress, the Subcommittee on Consumer
8 Protection and Finance held hearings on April 20 and 21, 1977, which focused on the
9 bills H.R. 1602 ... and H.R. 3815....” (*Id.*) “The subcommittee reported out H.R. 3815
10 with amendments on May 12, 1977. The full committee reported the bill by voice vote on
11 September 20, 1977 ...” (*Id.*)

12 246. In a “Section by Section Analysis” of H.R. 3815, the House Report states as
13 follows: “H.R. 3815 broadly prohibits transactions that are corruptly intended to induce
14 the recipient to use his or her influence to affect any act or decision of a foreign official,
15 foreign government or an instrumentality of a foreign government. The word ‘corruptly’
16 is used in order to make clear that the offer, payment, promise, or gift, must be intended
17 to induce the recipient to misuse his official position; for example, wrongfully to direct
18 business to the payor or his client, to obtain preferential legislation or regulations, or to
19 induce a foreign official to fail to perform an official function.” (*Id.*) The House Report
20 notes that “[t]he language of the bill is deliberately cast in terms which differentiate
21 between such payments and facilitating payments, sometimes called ‘grease payments.’”
22 (*Id.* at 8.) On this issue, the House Report further states: “In defining ‘foreign official’,
23 the committee emphasizes this crucial distinction by excluding from the definition of
24 ‘foreign official’ government employees whose duties are essentially ministerial or
25 clerical.” (*Id.*)

26 247. Like the Senate Report, the House Report specifically states that “the
27 proposed law will not reach all corrupt payments overseas.” (*Id.*)
28

1 248. The House Report reprints two letters obtained by the Subcommittee on
2 Consumer Protection and Finance during its April 20, 1977 hearing and referenced
3 above: (i) an April 20, 1977 letter from Douglas Bennet, Jr. (Assistant Secretary for
4 Congressional Relations, Department of State) to Representative Harley Staggers,
5 Chairman of the House Committee on Interstate and Foreign Commerce in which Bennet
6 states that “[t]he Department of State is hopeful that a law can be passed which will aid
7 the Government’s efforts to deter bribery of public officials abroad”; and (ii) an April 20,
8 1977 letter from Patricia Wald (Assistant Attorney General, Office of Legislative Affairs,
9 Department of Justice) to Representative Staggers, which states: “As previously
10 indicated to the Senate Banking Committee, the Administration firmly supports
11 legislation which would proscribe the bribery of foreign public officials by American
12 business and their representatives.” (*Id.* at 15-17.)

13 249. The House Report also contains “Minority Views to H.R. 3815, Unlawful
14 Corporate Payments Act.” This section begins as follows: “This legislation would
15 prohibit U.S. corporations from making payments or promises of payments to foreign
16 political or government officials. Payments falling within the scope of the bill must be
17 made or offered with the purpose of corruptly influencing an act or decision of the
18 foreign official or inducing that official to use his influence to affect a decision of a
19 foreign government.” (*Id.* at 19.) While supporting the goal of H.R. 3815, “which is the
20 elimination of bribery,” the Minority View expressed a concern “that the approach
21 adopted by H.R. 3815 is not the most effective to eliminate questionable foreign
22 payments.” (*Id.*) The Minority View states: “We believe that adoption of the disclosure
23 approach would, in no way, imply that payoffs will be condoned as long as they are
24 disclosed. Rather we believe that this approach would prove ultimately to be a much
25 more effective deterrent than would the provisions of H.R. 3815.” (*Id.*)

26 **RR. House Passes H.R. 3815 (November 1, 1977)**

27 250. On November 1, 1977, H.R. 3815 was considered on the House floor.
28 Representative Eckhardt observed: “The bill is in response to disclosures by

1 approximately 400 corporations of having paid out over \$300 million in corporate funds
2 to foreign officials. Since 1975, largely through congressional hearings and Securities
3 and Exchange Commission investigations, we have become acutely aware of the
4 magnitude of the foreign bribery problem. The corporations engaging in this activity
5 have included some of the largest and most widely held public companies in the United
6 States; over 117 of them rank in the Fortune 500 industrials. Sectors of industry typically
7 making such payments are: drugs and health care; oil and gas production; aerospace,
8 airlines and air service; and food services.” (Exhibit 47 at 36304.)

9 251. The last sentence of Representative Eckhardt’s above statement further
10 confirms that the reference in the House Report to the “[s]ectors of industry typically
11 involved” refers to the *payors* of the improper payments, not that the *recipients* of such
12 payments were employed by enterprises in those industries.

13 252. Representative Eckhardt’s November 1, 1977 floor statement continued as
14 follows: “During the 94th and 95th Congresses, the Subcommittee on Consumer
15 Protection and Finance held hearings on this legislation which were attended by
16 representatives of the Departments of State, Treasury, and Commerce, the Securities and
17 Exchange Commission, the accounting profession, public interest groups and the bar.
18 There emerged from those hearings a clear consensus that foreign bribery is a
19 reprehensible activity. Such payments are counter to the moral expectations and values
20 of the American public. They subvert the free market system by directing businesses to
21 those companies too inefficient to compete in the traditional criteria of price, quality or
22 service. They also create severe foreign policy problems for the United States.
23 Companies making these payments sometimes put themselves in the position of making
24 foreign policy, often with disastrous results for all concerned. Payments by Lockheed
25 alone have had serious repercussions for the governments of Japan, Italy, and the
26 Netherlands, with concomitant diplomatic problems for the United States.” (*Id.*)

27 253. During his November 1, 1977 floor statement Representative Eckhardt
28 discussed the “provisions of H.R. 3815.” (*Id.*) Representative Eckhardt stated as

1 follows: “Briefly, the bill would prohibit U.S. corporations and their subsidiaries which
2 are more than 50-percent owned from making payments, promises of payment, or
3 authorization of money or anything of value to any foreign official, political party,
4 candidate for office, or intermediary, where there is a corrupt purpose. The corrupt
5 purpose must be to induce the recipient to influence any official act or decision of a
6 government. So-called ‘grease’ or ‘facilitating’ payments made to Government officials
7 for the performance of primarily ministerial or clerical duties would not be proscribed by
8 the legislation. While such payments may be reprehensible in the United States, your
9 committee recognizes that they are not necessarily so viewed in the world and that it is
10 not feasible for the United States to attempt unilaterally to eradicate these payments.
11 H.R. 3815 has not attempted to reach them.” (*Id.*)

12 254. During floor debate, Representative James Broyhill asked Representative
13 Eckhardt about the definition of “foreign official” contained in H.R. 3815 – specifically,
14 the portion of the definition which states: “Such term does not include any employee of a
15 foreign government or any department, agency, or instrumentality thereof whose duties
16 are essentially ministerial or clerical.” (*Id.* at 36306.) Representative Broyhill asked:
17 “What the gentlemen [Representative Eckhardt] is saying is that it may be permissible to
18 make a facilitating payment to a clerk for the purpose of getting goods off a dock, as long
19 as the payment is to a person who spends most of his time performing so-called
20 ministerial functions.” (*Id.*) Representative Eckhardt responded as follows: “That is
21 right. And I think the gentlemen [Representative Broyhill] should note that the exclusion
22 is as to the person involved, rather than as to the act. So if a person’s duties are
23 essentially ministerial and clerical, the payment to him to do something like move goods
24 off the dock, which he was probably under a ministerial duty to do anyway, would not
25 constitute a bribe, because that person has no authority to do other than essentially
26 ministerial and clerical duties. It may be that he has chosen not to do them, and in that
27 sense his activity is by his volition. But the test is whether or not what he should do, that
28 is, the duties assigned to him, are essentially ministerial and clerical. Payments to him,

1 for instance, to complete a form that ought, in equity, to be completed, to give everybody
2 equal treatment, to move the goods off a dock which he will not move without a tip, a
3 mordida, I think, as they call it in the Spanish language, a facilitating payment, or a
4 grease payment, would not constitute a foreign bribe.” (*Id.*) Representative Eckhardt
5 further stated that such a payment “is excluded in two ways” by H.R. 3815. (*Id.*) “The
6 payment is not made for a corrupt purpose, and it is not made to the classification of
7 persons to whom payments made may constitute foreign bribes.” (*Id.*)

8 255. Representative Thomas Luken also spoke on the House floor on November
9 1, 1977 and stated as follows: “Mr. Speaker, I rise in support of H.R. 3815 which would
10 proscribe the payment by U.S. companies of bribes to foreign officials or political parties.
11 Over 400 corporations have admitted to making questionable or illegal payments well in
12 excess of \$300 million to foreign government officials, politicians, and political parties.
13 The payments of bribes to foreign officials casts a shadow on all U.S. companies abroad,
14 lowering the esteem with which the U.S. businessman is held by citizens of foreign
15 countries and giving credence to our enemies who claim that American enterprises exert a
16 corrupting influence on the political processes of their nations.” (*Id.*)

17 256. On November 1, 1977, H.R. 3815 passed the House. Because H.R. 3815
18 was not identical to S. 305, a bill which previously passed the Senate on May 5, 1977, the
19 House amended S. 305 by including H.R. 3815’s language. (*Id.* at 36308.)

20 257. On November 3, 1977, Senator Proxmire moved that the “Senate disagree to
21 the amendments of the House, request a conference with the House on the disagreeing
22 votes of the two Houses thereon and that the Chair be authorized to appoint conferees.”
23 (**Exhibit 48** at 36756.) Senators Proxmire, Sparkman, Williams, Brooke and Tower were
24 appointed conferees on the part of the Senate. (*See id.*)

25 258. On November 3, 1977, Representative Eckhardt sought approval from the
26 Speaker of the House to “agree to the conference asked by the Senate.” (**Exhibit 49** at
27 36928-29.) Approval was granted, and Representatives Eckhardt, Staggers, Metcalfe,
28

1 Krueger, Carney, Devine, and Broyhill were appointed conferees on the part of the
2 House. (*See id.*)

3 **SS. Conference Report**

4 259. On December 6, 1977, the House and Senate conference released a
5 Conference Report. (**Exhibit 50.**)

6 260. As indicated in the Conference Report, the Senate receded from its
7 disagreement to the amendment of the House to the text of S. 305 and agreed to a bill
8 with a different amendment. The general effect of this amendment was to combine the
9 books and records and internal control provisions in S. 305 with the payment provisions
10 of HR 3815.

11 261. The Conference Report states, in pertinent part, as to the payment
12 prohibitions: it shall be unlawful for issuers or domestic concerns to “make use of the
13 mails or any means or instrumentality of interstate commerce corruptly in furtherance of
14 an offer, payment, promise to pay, or authorization of the payment of any money, or
15 offer, gift, promise to give, or authorization of the giving of anything of value to – (1)
16 any foreign official for purposes of – (A) influencing any act or decision of such foreign
17 official in his official capacity including a decision to fail to perform his official
18 functions; or (B) inducing such foreign official to use his influence with a foreign
19 government or instrumentality thereof to affect or influence any act or decision of such
20 government or instrumentality, in order to assist such issuer [or domestic concern] in
21 obtaining or retaining business for or with, or directing business to, any person; (2) any
22 foreign political party or official thereof or any candidate for foreign political office for
23 purposes of – (A) influencing any act or decision of such party, official, or candidate in
24 its or his official capacity, including a decision to fail to perform its or his official
25 functions; or (B) inducing such party, official, or candidate to use its or his influence with
26 a foreign government or instrumentality thereof to act or influence any act or decision of
27 such government or instrumentality, in order to assist such issuer [or domestic concern]
28 in obtaining or retaining business for or with, or directing business to, any person; or (3)

1 any person, while knowing or having reason to know that all or a portion of such money
2 or thing of value will be offered, given, or promised, directly or indirectly, to any foreign
3 official, to any foreign political party or official thereof, or to any candidate for foreign
4 political office, for purposes of (A) influencing any act or decision of such foreign
5 official, political party, party official, or candidate in his or its official capacity, including
6 a decision to fail to perform his or its official functions; or (B) inducing such foreign
7 official, political party, party official, or candidate to use his or its influence with a
8 foreign government or instrumentality thereof to affect or influence any act or decision of
9 such government or instrumentality, in order to assist such issuer [or domestic concern]
10 in obtaining or retaining business for or with, or directing business to, any person.” (*Id.*)

11 262. The text of the bill set forth in the Conference Report defined “foreign
12 official” to mean “any officer or employee of a foreign government or any department,
13 agency, or instrumentality thereof, or any person acting in an official capacity for or on
14 behalf of such government or department, agency or instrumentality. Such term does not
15 include any employee of a foreign government or any department, agency, or
16 instrumentality thereof whose duties are essentially ministerial or clerical.” (*Id.*)

17 263. The Conference Report states that the “House agree[d] to the same.” (*Id.* at
18 8.)

19 264. The Conference Report contains a detailed “Joint Explanatory Statement of
20 the Committee of Conference” (hereafter “Joint Explanatory Statement”) in “explanation
21 of the effect of the action agreed upon by the managers and recommended” in the
22 Conference Report. (*Id.* at 9.)

23 265. The Joint Explanatory Statement notes that the “Senate bill established the
24 title ... as the ‘Foreign Corrupt Practices Act of 1977,’” the “House amendment
25 established the title ... as the ‘Unlawful Corporate Payments Act of 1977,’” and the
26 “House receded to the Senate.” (*Id.* at 10.)

27 266. As to the payment prohibition, the Joint Explanatory Statement states: “[B]y
28 incorporating provisions from both bills, the conferees clarified the scope of the

1 prohibition by requiring that the purpose of the payment must be to influence any act or
2 decision of a foreign official (including a decision not to act) or to induce such official to
3 use his influence to affect a government act or decision so as to assist an issuer in
4 obtaining, retaining or directing business to any person.” (*Id.* at 12.)

5 267. The Joint Explanatory Statement notes that the “Senate Bill contained no
6 definitional section” whereas the House amendment defined the term “foreign official.”
7 (*Id.*) The Joint Explanatory Statement states: “[F]oreign official’ was defined to mean
8 any officer or employee of a foreign government or any department, agency or
9 instrumentality thereof, or any person acting in an official capacity for or on behalf of
10 such government, department, agency, or instrumentality. The term did not include
11 employees whose duties were primarily ministerial or clerical.” (*Id.*) The Joint
12 Explanatory Statement then states: “The Senate receded to the House.” (*Id.*)

13 268. The Joint Explanatory Statement notes that the payment prohibition
14 applicable to “domestic concerns” “parallels the agreement reached by the conferees with
15 respect to the provisions governing issuers,” including the definition of “foreign official”
16 discussed in the above paragraph. (*Id.* at 13.)

17 269. On December 6, 1977, Senator Proxmire submitted the Conference Report
18 on the Senate floor. (**Exhibit 51** at 38599.) Senator Proxmire began his Senate floor
19 statement as follows: “Mr. President, this is the antibribery bill which passed the Senate
20 87 to 0 earlier in the year. We had a very satisfactory conference with the House of
21 Representatives. I think we strengthened the bill. They have some provisions that were,
22 I think, stronger and wiser than ours, and they also made some concessions to us. Mr.
23 President, the purpose of this legislation is to stop foreign corporate bribery. Disclosures
24 during the past several years have shown that the bribery of foreign government officials
25 by corporations for the purpose of obtaining or retaining business is a significant problem
26 in need of clear legislative attention. Investigations by the Securities and Exchange
27 Commission revealed that over 300 companies made corrupt payments to foreign
28 governmental officials in hundreds of millions of dollars. Foreign democratic

1 governments friendly to the United States in Japan, Italy and the Netherlands came under
2 intense pressure from their own people complicating our foreign policy.” (*Id.*)

3 270. Senator Edward Brooke stated on the Senate floor: “While the conference
4 committee agreed to revise or delete certain provisions contained in S. 305, the bill is
5 substantially the same as when the Senate originally passed it.” (*Id.* at 38600.)

6 271. Senator Harrison Williams stated on the Senate Floor that “this bill would
7 make it a crime for U.S. companies to bribe a foreign government official for the
8 specified corrupt purposes.” (*Id.* at 38601.)

9 272. Senator Tower stated on the Senate Floor that “the Foreign Corrupt Practices
10 Act of 1977 constitutes a needed and rational response to the practice of some U.S.
11 companies paying bribes to officials of foreign governments to secure or retain business.”
12 (*Id.*)

13 273. On December 7, 1977, Representative Staggers submitted the Conference
14 Report on the floor of the House. (**Exhibit 52** at 38776.) Representative Staggers stated
15 as follows: “The conference report adopts the House provision prohibiting corporations
16 subject to SEC jurisdiction and other domestic concerns from making payments,
17 promises of payment, or authorization of payment of anything of value to any foreign
18 official, foreign political party, candidate for foreign political office, or intermediary
19 where there is a corrupt purpose. The Senate-passed provisions which define corrupt
20 purpose was vague and contained several loopholes. The House version which provided
21 that the corrupt purpose must be to influence any official act or decision of the recipient
22 or to induce the recipient to use his influence to affect a Government act or decision, with
23 the modification that the bribe must also be to obtain or retain business.” (*Id.* at 38777.)
24 In closing, Representative Staggers stated as follows: “Mr. Speaker, I believe we have a
25 good compromise bill which includes almost all of the House-passed provisions as well
26 as several related meritorious provisions from the Senate Bill. On behalf of the House
27 conferees, I urge the conference report’s passage.” (*Id.*)

28

1 274. Representative Samuel Devine also spoke on the House Floor and stated as
2 follows: “Sections 103 and 104 [the payment provisions relating to issuers and domestic
3 concerns] would prohibit U.S. corporations from making payments to foreign
4 government officials for a corrupt purpose.” (*Id.* at 38778.)

5 275. Representative Eckhardt also spoke on the House Floor. His statement
6 begins as follows: “Mr. Speaker, the conference report before us today is one of the more
7 important pieces of legislation to be considered by the Congress this year. It is legislation
8 designed to prohibit bribery by U.S. companies of officials of foreign governments and is
9 in response to recent disclosures by a large number of American companies of having
10 paid over \$300 million in corporate funds to foreign officials. While some funds were
11 given simply for the privilege of doing business in a particular foreign country, other
12 funds were given for the purpose of improperly obtaining business and influencing the
13 decisions of foreign governments. The disclosure of these payments has tarnished the
14 reputation of American business in the international community, and has created serious
15 repercussions for the governments of a number of foreign countries.” (*Id.*)

16 Representative Eckhardt further stated that the “focal point of the legislation is the
17 provision which would make it unlawful for any U.S. company to use the means of
18 interstate commerce in furtherance of an offer, payment, promise to pay, or authorization
19 of payment of anything of value directly or indirectly to any foreign official, foreign
20 political party, or candidate for foreign political office. The purpose of the payment must
21 be to influence any act or decision of a foreign government official or to induce such
22 official to use his influence to affect a government act or decision so as to assist U.S.
23 companies in obtaining, retaining, or directing business to any person.” (*Id.* at 38778-
24 79.)

25 276. On December 8, 1977, the Speaker of the House “announced his signature to
26 an enrolled bill of the Senate [S. 305]....” (**Exhibit 53** at 38848.)

27 277. On December 8, 1977, the “Secretary of the Senate reported that ... he
28 presented [S. 305] to the President of the United States.” (**Exhibit 54** at 38850.)

1 **TT. President Carter Signs S. 305**

2 278. On December 20, 1977, President Carter signed S. 305 into law. (**Exhibit**
3 **55.**) His signing statement was as follows: “I am pleased to sign into law S. 305, the
4 Foreign Corrupt Practices Act of 1977 and the Domestic and Foreign Investment
5 Improved Disclosure Act of 1977. During my campaign for the Presidency, I repeatedly
6 stressed the need for tough legislation to prohibit corporate bribery. S. 305 provides that
7 necessary sanction. I share Congress[‘s] belief that bribery is ethically repugnant and
8 competitively unnecessary. Corrupt practices between corporations and public officials
9 overseas undermine the integrity and stability of governments and harm our relations
10 with other countries. Recent revelations of widespread overseas bribery have eroded
11 public confidence in our basic institutions. This law makes corrupt payments to foreign
12 officials illegal under United States law. It requires publicly held corporations to keep
13 accurate books and records and establish accounting controls to prevent the use of ‘off-
14 the-books’ devices, which have been used to disguise corporate bribes in the past. The
15 law also requires more extensive disclosure of ownership of stocks registered with the
16 Securities and Exchange Commission. These efforts, however, can only be fully
17 successful in combating bribery and extortion if other countries and business itself take
18 comparable action. Therefore, I hope progress will continue in the United Nations
19 toward the negotiation of a treaty on illicit payments. I am also encouraged by the
20 International Chamber of Commerce's new Code of Ethical Business Practices.”

21 **UU. The Foreign Corrupt Practices Act of 1977 (Public Law 95-213)**

22 279. In pertinent part, the Foreign Corrupt Practices Act of 1977 (Public Law 95-
23 213) made it unlawful for issuers or domestic concerns to “make use of the mails or any
24 means or instrumentality of interstate commerce corruptly in furtherance of an offer,
25 payment, promise to pay, or authorization of the payment of any money, or offer, gift,
26 promise to give, or authorization of the giving of anything of value to – (1) any foreign
27 official for purposes of – (A) influencing any act or decision of such foreign official in
28 his official capacity including a decision to fail to perform his official functions; or (B)

1 inducing such foreign official to use his influence with a foreign government or
2 instrumentality therefore to affect or influence any act or decision of such government or
3 instrumentality, in order to assist such issuer [or domestic concern] in obtaining or
4 retaining business for or with, or directing business to, any person; (2) any foreign
5 political party or official thereof or any candidate for foreign political office for purposes
6 of – (A) influencing any act or decision of such party, official, or candidate in its or his
7 official capacity, including a decision to fail to perform its or his official functions; or (B)
8 inducing such party, official, or candidate to use its or his influence with a foreign
9 government or instrumentality therefore to act or influence any act or decision of such
10 government or instrumentality, in order to assist such issuer [or domestic concern] in
11 obtaining or retaining business for or with, or directing business to, any person; or (3) any
12 person, while knowing or having reason to know that all or a portion of such money or
13 thing of value will be offered, given, or promised, directly or indirectly, to any foreign
14 official, to any foreign political party or official thereof, or to any candidate for foreign
15 political office, for purposes of (A) influencing any act or decision of such foreign
16 official, political party, party official, or candidate in his or its official capacity, including
17 a decision to fail to perform his or its official functions; or (B) inducing such foreign
18 official, political party, party official, or candidate to use his or its influence with a
19 foreign government or instrumentality thereof to affect or influence any act or decision of
20 such government or instrumentality, in order to assist such issuer [or domestic concern]
21 in obtaining or retaining business for or with, or directing business to, any person.”

22 **(Exhibit 56.)**

23 280. The Foreign Corrupt Practices Act of 1977 defined “foreign official” to
24 mean “any officer or employee of a foreign government or any department, agency, or
25 instrumentality thereof, or any person acting in an official capacity for or on behalf of
26 such government or department, agency or instrumentality. Such terms does not include
27 any employee of a foreign government or any department, agency, or instrumentality
28 thereof whose duties are essentially ministerial or clerical.” (*Id.*)

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V.
LEGISLATIVE HISTORY RELEVANT TO THE FCPA’S 1988
AMENDMENTS

281. The FCPA’s anti-bribery provisions enacted in 1977: (i) contained a broad knowledge standard (“reason to know”) applicable to indirect payments to “foreign officials”; (ii) did not contain any affirmative defenses; and (iii) did not contain an *express* facilitating payments exception.

282. As explained above, however, the FCPA did contain an *indirect* facilitating payment exception embedded in the “foreign official” definition, which stated as follows: “The term ‘foreign official’ means any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or any person acting in an official capacity for or on behalf of any such government or department, agency or instrumentality. Such term does not include any employee of a foreign government or any department, agency, or instrumentality thereof whose duties are essentially ministerial or clerical.”

283. Beginning in 1980, Congress sought to amend the FCPA’s anti-bribery provisions, a process that took eight years. During this time span, various bills were introduced in the 96th, 97th, 98th, 99th, and 100th Congresses to amend the FCPA. The bills, either stand-alone bills or specific titles or sections of omnibus export or trade bills, largely focused on the three issues described above: (i) amending the FCPA’s “reason to know” standard for indirect payments to “foreign officials”; (ii) amending the FCPA to include certain affirmative defenses; and (iii) amending the FCPA to include an *express* facilitating payment exception by removing from the “foreign official” definition the categorical exclusion of “any employee of a foreign government or any department, agency, or instrumentality thereof whose duties are essentially ministerial or clerical” and creating an *express* facilitating payment exception for “routine governmental action.”

284. This portion of the declaration discusses the legislative history relevant to removing the indirect facilitating payment exception found in the FCPA’s original

1 “foreign official” definition and the creation of an express facilitating payment exception
2 for “routine governmental action.”

3 285. This portion of the declaration also discusses general legislative history
4 relevant to the FCPA’s 1988 amendments. As set forth in more detail below, this
5 legislative history is instructive as to Congressional intent as to the “foreign official”
6 element and further instructs, consistent with the legislative history relevant to enactment
7 of the FCPA in 1977, that the limited purpose of the FCPA’s anti-bribery provisions is to
8 prohibit improper payments to traditional foreign government officials performing
9 official or public functions.

10 **A. S. 2763 and Related Bills (96th-97th Congresses)**

11 286. On May 28, 1980, Senator John Chafee introduced S. 2763, the “Business
12 Accounting and Foreign Trade Simplification Act” to “amend and clarify the Foreign
13 Corrupt Practices Act of 1977.” (**Exhibit 57.**)

14 287. S. 2763 began with a “Findings and Conclusions” section which stated as
15 follows: “The Congress finds that ... the enactment of the Foreign Corrupt Practices Act
16 of 1977 was a positive and significant step toward the important objective of prohibiting
17 bribery of foreign government officials by United States companies in order to obtain,
18 retain, or direct business.” (*Id.* at 2) S. 2763 sought certain amendments to the FCPA’s
19 anti-bribery provisions, such as laying the foundation for what would ultimately become
20 the FCPA’s affirmative defenses.

21 288. Several related bills were also introduced in either the Senate or the House
22 during either the 96th or 97th Congress. *See* S. 2773, H.R. 7479, H.R. 2530, S. 969 and
23 H.R. 3173. These bills were either stand-alone bills or specific titles or sections to
24 omnibus export or trade bills. Like S. 2763, each bill contained a “Findings and
25 Conclusion” section that stated as follows: “The Congress finds that ... the enactment of
26 the Foreign Corrupt Practices Act of 1977 was a positive and significant step toward the
27 important objective of prohibiting bribery of foreign government officials by United
28 States companies in order to obtain, retain, or direct business.” These bills sought certain

1 amendments to the FCPA's books and records and internal control provisions and certain
2 amendments to the FCPA's anti-bribery provisions, such as laying the foundation for
3 what would ultimately become the FCPA's affirmative defenses. In addition, H.R. 2530
4 and S. 969 laid the foundation for what would become the FCPA's express facilitating
5 payment exception by removing the "ministerial or clerical" language from the "foreign
6 official" definition and creating an express facilitating payment exception.

7 289. Other bills seeking to amend the FCPA, including the "foreign official"
8 definition as described above, were also introduced in the 97th, 98th and 99th
9 Congresses, and certain bills were the focus of Congressional hearings, passed
10 Congressional committees resulting in Congressional Reports, and were passed by either
11 the Senate or the House. These bills are discussed in more detail below.

12 **B. S. 708 (97th Congress) (Introduced March 12, 1981)**

13 290. On March 12, 1981, Senator John Chafee introduced S. 708, the "Business
14 Accounting and Foreign Trade Simplification Act" to "amend and clarify the Foreign
15 Corrupt Practices Act of 1977." (**Exhibit 58.**) Like the numerous bills described above,
16 S. 708 similarly began as follows: "The Congress finds that . . . the enactment of the
17 Foreign Corrupt Practices Act of 1977 was a positive and significant step toward the
18 important objective of prohibiting bribery of foreign government officials by United
19 States companies in order to obtain, retain, or direct business." (*Id.* at 1-2).

20 291. Like the numerous bills discussed above, S. 708 sought certain amendments
21 to the FCPA's anti-bribery provisions, such as laying the foundation for what would
22 ultimately become the FCPA's affirmative defenses and facilitating payment exception
23 by removing the "ministerial or clerical" language from the "foreign official" definition
24 and creating an express facilitating payment exception.

25 292. S. 708 was referred to the Senate Subcommittee on Securities of the
26 Committee on Banking.

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1 **C. Hearings Before the Committee on Banking, Housing, and Urban**
2 **Affairs, Senate, 97th Congress, First Session on S. 708 (May 20 and 21,**
3 **June 16, July 23 and 24, 1981) (the “Business Accounting and Foreign**
4 **Trade Simplification Act Hearings”)**

5 293. On May 20, 1981, Senator Alfonse D’Amato opened hearings on S. 708.
6 **(Exhibit 59.)** Senator D’Amato stated that “this bill provides us with a good opportunity
7 to assess the effect of recently enacted legislation and its implementation.” (*Id.* at 1.)

8 294. Senator Proxmire, described as the “author” of the FCPA, made an opening
9 statement at the hearing. He spoke of the passage of the FCPA in 1977 and stated that the
10 “bribery of foreign government officials by American companies cost us dearly
11 overseas.” (*Id.* at 3.) Senator Proxmire opposed efforts to amend the FCPA. He called
12 S. 708 a “pro-bribery bill” and said that “under S. 708, bribery will flourish, foreign
13 governments will be corrupted and free markets will take a back seat.” (*Id.* at 3-4.)

14 295. As to the FCPA’s “foreign official” definition, specifically the indirect
15 facilitating payment exception embedded within the definition, the following prepared
16 statement (part of the hearing record) best captures the concern with the FCPA’s then
17 existing “foreign official” definition: “The FCPA sought to deal indirectly with the issue
18 of facilitating payments by defining the type of official involved. Specifically ‘foreign
19 official’ is defined not to include ‘any employee of a foreign government or any
20 department, agency or instrumentality whose duties are essentially ministerial or clerical.’
21 Under the FCPA, payments to a foreign government employee who falls within this
22 exclusion are outside the statutory proscriptions. In practice this approach has failed to
23 achieve Congress’ intent. Even in our own federal government, it is difficult to know
24 when an official has ‘essentially ministerial or clerical’ duties. The problem is acute in
25 foreign countries where the duties of government employees are less clearly articulated
26 and usually are not readily available in published form.” (*Id.* at 151.)

27 **D. Senate Report 97-209 as to S. 708 (October 9, 1981)**

28 296. On October 9, 1981, the Senate Committee on Banking, Housing and Urban
Affairs reported S. 708 to the Senate. **(Exhibit 60.)**

1 297. Under the heading “Amendments to the Antibribery Provisions,” the Report
2 states as follows: “[The relevant section in S. 708] is intended to eliminate ambiguities of
3 the current law concerning facilitating or so-called ‘grease’ payments. The FCPA
4 contains an exemption for such payments, by excluding from the definition of the term
5 ‘foreign official’ an employee ‘whose duties are essentially ministerial or clerical.’
6 Unfortunately, that definition has proved arbitrary and difficult to apply in practice, in
7 part due to the multitude of relationships and responsibilities of employees of foreign
8 countries. The Committee bill presents a different approach to facilitating and other
9 payments not intended to be covered by the Act, than that embodied in current law.
10 While the FCPA seeks to define facilitating payments in terms of *recipients*, the
11 Committee bill would remove uncertainty about the facilitating payments exception by
12 defining such payments in terms of their *purpose*. It provides for the following
13 exceptions: facilitating or expediting payments to a foreign official, the purpose of which
14 is to expedite or secure the performance of a routine government action as opposed to one
15 involving judgment as a significant factor; items lawful under the laws of the foreign
16 official’s country; items which constitute a courtesy, or a token of regard, or esteem, or in
17 return for hospitality; expenditures associated with the selling or purchase of goods or
18 services or with the demonstration or explanation of products; ordinary or customary
19 expenditures associated with the performance of a contract. The Committee wishes to
20 emphasize that the exception for facilitating payments and expediting payments should
21 not be interpreted to undermine the basic anti-bribery purpose of the statute. To make
22 this point clear, the provision distinguishes the exception from situations involving
23 government action in which the exercise of a foreign official’s judgment is a significant
24 factor.” (*Id.* at 18, emphasis in original.)

25 298. Under the heading “Section-By-Section Analysis of the Bill,” the Report
26 states as follows: “Foreign official” “would be defined so as to include officers and
27 employees of foreign governments and agencies, political parties, party officials, and
28 candidates.” (*Id.* at 21.)

1 299. S. 708 passed the Senate in November 1981. However it was not considered
2 in the House, and the 97th Congress did not amend the FCPA.

3 **E. Hearings Before the Subcommittee on Telecommunications, Consumer**
4 **Protection, and Finance of the Committee on Energy and Commerce,**
5 **House of Representatives, 97th Congress, (Sept. 16, Nov. 16, Dec. 16,**
6 **1981 and June 8, 1982) (“Foreign Corrupt Practices Act – Oversight”**
7 **Hearings)**

8 300. On September 16, 1981, Representative Timothy Wirth opened FCPA
9 oversight hearings. (**Exhibit 61.**) He stated as follows: “Today marks the first of a set
10 of hearings on the Foreign Corrupt Practices Act. Most of us remember the mid-1970’s
11 in which the country learned that hundreds of major American corporations had paid
12 millions of dollars in bribes and other payments to foreign government officials.” (*Id.* at
13 1.) Representative Wirth noted that “both Houses of Congress unanimously passed the
14 Foreign Corrupt Practices Act” but that “from the moment the act was passed, it has been
15 attacked as unwarranted interference in a variety of corporate affairs” and “these voices
16 have grown louder during this Congress.” (*Id.* at 1-2.) Representative Wirth next stated
17 as follows: “[B]efore exploring any amendments to modify the act, I think it is
18 appropriate to examine the underlying reasons for the act, its purposes, the conditions it
19 sought to deal with, and the public policy it sought to achieve. Rather than go roaring in
20 with the perception of a fix for a problem that isn’t yet defined, let’s first define the
21 problem. Our goal is to carefully determine whether those purposes and policies have
22 continuing validity. This is the first in a series of oversight hearings which will be
23 followed by an exploration of the manner in which the SEC and the Department of
24 Justice have enforced the act.” (*Id.* at 2.)

25 301. Robert Eckhardt, described as “the principal author of the [FCPA] when it
26 was offered, at least in the House of Representatives,” testified at the hearing as to the
27 circumstances that led to passage of the FCPA. Eckhardt, no longer a member of
28 Congress, noted that “several things had happened that very much shook the United
States image and position abroad.” (*Id.* at 3.) He noted that the Prime Minister of Japan

1 “had fallen due to a bribe in which Lockheed had been engaged” and that the Prince of
2 The Netherlands was implicated as well. (*Id.*)

3 302. Jack Blum (a former member of the staff of the Senate Foreign Relations
4 Committee “where [he] worked on the problems of questionable foreign payments by
5 U.S. corporations”) testified at the hearing as to the “factual origins” of the FCPA. (*Id.* at
6 84, 87.) Blum spoke of the national security concerns that motivated Congress to
7 investigate foreign payment issues in the mid-1970’s. His prepared statement states:
8 “[I]t is axiomatic that high level corruption undermines government,” and his statement
9 references Lockheed’s payments to “Prince Bernhard of the Netherlands in connection
10 with the sale of fighter planes” as well as the Prime Minister of Japan. (*Id.* at 88-89.)

11 303. During his testimony, Blum stated as follows. “The legislation this
12 committee develops should enable businessmen to operate, yet at the same time, protect
13 the national interest by keeping their behavior within bounds. In 1976 the Ford
14 Administration suggested a disclosure program as an alternative to criminalization. The
15 idea has merit and should be revived. Corporations should be required to disclose all
16 payments over a minimum threshold amount to foreign officials, including officials of
17 state-owned companies, foreign political candidates and foreign agents. The purpose,
18 amount and recipient of the payment would be reported to the Departments of State and
19 Justice.” (*Id.* at 96.)

20 304. During the hearing, Representative Wirth provided his understanding of the
21 FCPA’s “foreign official” definition. He stated as follows: “[T]he definition of the term
22 ‘foreign official’ states ‘any officer or employee of a foreign government or any
23 department, agency, or instrumentality thereof, or any person acting in an official
24 capacity for or on behalf of such government or department, agency, or instrumentality.’
25 In other words, somebody acting on behalf of the government.” (*Id.* at 109.)

26 305. The FCPA oversight hearings resumed on December 16, 1981. At the
27 hearing, William Brock (U.S. Trade Representative, Executive Office of the President)
28 stated that “FCPA reform legislation should seek to solve the problems which have been

1 identified by studies during the past 4 years, to assure businesses conducting legitimate
2 overseas transactions while retaining the strict prohibitions against bribery of foreign
3 government officials.” (*Id.* at 237.)

4 **F. S. 414 (98th Congress) (February 3, 1983)**

5 306. On February 3, 1983, Senator John Heinz introduced S. 414, the “Business
6 Accounting and Foreign Trade Simplification Act” to “amend and clarify the Foreign
7 Corrupt Practices Act of 1977.” (**Exhibit 62.**) Like the numerous bills introduced during
8 the 96th and 97th Congresses that sought to amend the FCPA, S. 414 similarly began
9 with a “Findings and Conclusion” section which stated as follows: “The Congress finds
10 that ... the enactment of the Foreign Corrupt Practices Act of 1977 was a positive and
11 significant step toward the important objective of prohibiting bribery of foreign
12 government officials by United States companies in order to obtain, retain, or direct
13 business.”

14 307. Like the numerous bills discussed above from the 96th and 97th Congress,
15 S. 414 sought certain amendments to the FCPA’s anti-bribery provisions, such as laying
16 the foundation for what would ultimately become the FCPA’s affirmative defenses and
17 facilitating payment exception by removing the “ministerial or clerical” language from
18 the “foreign official” definition and creating an express facilitating payment exception.

19 308. S. 414 was referred to the Senate Subcommittee on Securities of the
20 Committee on Banking.

21 **G. Hearings Before the Committee on Banking, Housing, and Urban**
22 **Affairs, Senate, 98th Congress, First Session on S. 414 (February 24,**
23 **1983) (the “Business Accounting and Foreign Trade Simplification Act”**
24 **hearing)**

25 309. On February 24, 1983, the Senate Committee on Banking, Housing, and
26 Urban Affairs held a hearing on S. 414. (**Exhibit 63.**) In opening the hearing, Senator
27 D’Amato noted that issues addressed in S. 414 were “the subject of much discussion in
28 the 97th Congress” but that the Senate was unable “to reach agreement with the House”
in the prior Congress. (*Id.* at 1-2.)

1 310. William Brock (U.S. Trade Representative) testified at the hearing. His
2 written statement best captures the concern with the FCPA's then existing "foreign
3 official" definition. It states as follows: "The problems that need to be addressed in
4 amending the FCPA fall into two broad categories: (1) lack of clarity in drafting the
5 initial legislation; and (2) unanticipated and unnecessary burdens created by the structure
6 and requirements of the current Act. The lack of clarity in drafting is most apparent in
7 the case of 'grease' payments. Congress exempted grease payments from the current Act
8 based on the pragmatic realization that they are an unavoidable aspect of international
9 commerce. The problem is that instead of describing the type and purpose of payments
10 allowed under the statute, Congress defined the exemption by excluding low level
11 officials performing ministerial or clerical duties from the definition of foreign official.
12 Thus, the exemption is buried in the Act and gives no useful guidance to the average
13 businessperson as to what is ministerial and what is not." (*Id.* at 25.)

14 **H. Senate Report 98-207 as to S. 414 (May 25, 1983)**

15 311. On May 25, 1983, the Senate Committee on Banking, Housing and Urban
16 Affairs reported S. 414 to the Senate. (**Exhibit 64.**)

17 312. Under the heading "Need for the Legislation," the Report states as follows:
18 "The other area of primary concern, that of facilitating payments, has also been a source
19 of major problems. The intention of the drafters of the FCPA was that facilitating, or
20 'grease,' payments designed to expedite, for example, the unloading of ships in ports as
21 well as the appropriate giving of gifts, tokens of esteem, courtesies, demonstration items,
22 etc. not be prohibited by the anti-bribery provisions. Nevertheless, the wording of the
23 FCPA (which refers to the duties of the recipient of a payment) has proved unworkable
24 and has failed to convince American businessmen that these kinds of activities can be
25 conducted without the serious threat of both civil and criminal liability." (*Id.* at 6-7.)

26 313. Under the heading "Amendments to the Antibribery Provisions" the Report
27 states as follows: "[The relevant section in S. 414] is intended to eliminate the
28 ambiguities of the current law concerning facilitating or so-called 'grease' payments.

1 The FCPA contains an exemption for such payments by excluding from the definition of
2 the term ‘foreign official’ an employee ‘whose duties are essentially ministerial or
3 clerical.’ Unfortunately, that definition has proved arbitrary and difficult to apply in
4 practice, in part due to the multitude of relationships and responsibilities of employees of
5 foreign countries. The Committee bill presents a different approach to facilitating and
6 other payments not intended to be covered by the Act, than that embodied in current law.
7 While the FCPA seeks to define facilitating payments in terms of *recipients*, the
8 Committee bill would remove uncertainty about the facilitating payments exception by
9 defining such payments in terms of their *purpose*. It provides for the following
10 exceptions: facilitating or expediting payments to a foreign official, the purpose of which
11 is to expedite or secure the performance of a routine governmental action by a foreign
12 official; items lawful under the laws of the foreign official’s country; items which
13 constitute a courtesy, or a token of regard, or esteem, or in return for hospitality;
14 expenditures, including travel and lodging expenses, associated with the selling or
15 purchase of goods or services or with the demonstration or explanation of products;
16 ordinary expenditures, including travel and lodging expenses, associated with the
17 performance of a contract. The Committee wishes to emphasize that the exception for
18 facilitating and expediting payments should not be interpreted to undermine the basic
19 anti-bribery purpose of the statute. The Committee believes this greater precision is
20 needed in defining exceptions to the Act, given the widely differing interpretations of
21 legitimate facilitating or ‘grease’ payments over the past four years and the divergent
22 situations which arise in foreign countries.” (*Id.* at 18-19, emphasis in original.)

23 314. Under the heading “Section-By-Section Analysis of the Bill” the Report
24 states as follows: “Foreign official would be defined so as to include officers and
25 employees of foreign governments and agencies, political parties, party officials, and
26 candidates.” (*Id.* at 21.)

27 315. S. 414 did not result in the FCPA being amended by the 98th Congress.
28

1 **I. H.R. 2157 (Introduced March 16, 1983)**

2 316. On March 16, 1983, Representative Dan Mica introduced H.R. 2157.
3 **(Exhibit 65.)** H.R. 2157 sought to amend the Export Administration Act of 1979 by
4 creating a new section titled the “Foreign Trade Practices Act.” This new act essentially
5 took the existing FCPA, but like the numerous bills discussed above from the 96th and
6 97th Congress, laid the foundation for what would ultimately become the FCPA’s
7 affirmative defenses and facilitating payment exception by removing the “ministerial or
8 clerical” language from the “foreign official” definition and creating an express
9 facilitating payment exception.

10 317. H.R. 2157 was referred to the House Committees on Foreign Affairs and
11 Energy and Commerce.

12 **J. Hearings Before the Subcommittee on International Economic Policy**
13 **and Trade of the Committee on Foreign Affairs, House of**
14 **Representatives, 98th Congress, First Session on H.R. 2157 (April 18**
15 **and 25; July 12; and October 6, 1983) (the “Foreign Trade Practices**
16 **Act” hearings)**

17 318. Representative Mica opened the hearings with the following statement. “We
18 are here today to begin a series of hearings on H.R. 2157, a bill to amend the Export
19 Administration Act of 1979 to prohibit certain actions by U.S. persons with respect to
20 foreign officials. [...] A great deal has been said and written about this legislation.
21 There have been a great number of hearings held in the Congress since its original writing
22 in 1977. [...] Since the inception of this legislation, it has become evident that there are
23 ambiguities in the legislation. The comments that have come to the attention of the
24 Foreign Affairs Committee, and I believe before other committees of the Congress,
25 concern problems with this legislation that need to be corrected, and one of the primary
26 ones is the vagueness of the language that deals with specific portions of the legislation.
27 [...] To my knowledge, no one has ever testified that this legislation does not need
28 amendment and, in fact, quite to the contrary, everyone who is a party to this debate says

1 that it should be changed. There are problems and areas where clarification is needed.”

2 (**Exhibit 66** at 1.)

3 319. William Brock (U.S. Trade Representative) testified at the hearing, and his
4 testimony best captures the concern with the FCPA’s then existing “foreign official”
5 definition. He stated as follows. “The lack of clarity in drafting is most apparent in the
6 case of so-called grease payments. Congress exempted the grease payments from the
7 present act based upon the pragmatic realization that they are an unavoidable aspect of
8 international commerce. The problem is that instead of describing the type and purpose
9 of payments allowed under the statute, Congress defined the exemption by excluding
10 low-level officials performing ministerial or clerical duties from the definition of foreign
11 official. Thus, the exemption is buried in the act and gives no useful guidance to the
12 average businessperson as to what is ministerial and what is not. It is difficult enough to
13 deal with varieties of cultural practices and customs involved in international commerce,
14 without having to deal with the added burden of trying to figure out what U.S. law
15 means. In countries where many governmental officials and sales agents belong to the
16 same family and where Government officials have a wide range of duties, the problem is
17 even more complex. We have the responsibility to paint a bright line for our firms to
18 follow so that they know exactly what Congress intended that they can and cannot do.”

19 (*Id.* at 20-21.)

20 320. During the hearing, Representative Mica asked Brock his opinion on
21 whether the reform bill should proceed. Brock said that reform bills such as H.R. 2157
22 should proceed because they make the law better without undermining the original
23 purpose of the FCPA. Brock stated as follows. “We made a decision in this country,
24 Republicans and Democrats alike, that we did not want to condone, allow, or tolerate
25 foreign bribery, the corruption of public officials of other governments. This is a
26 commitment of this country, and it is one that we ought to stick to. [...] But show me
27 where your bill falls short, or show me where S. 414 falls short of doing what we want
28 done, and that is, stopping the exercise of bribery which corrupts senior government

1 officials in other countries. That is the bottom line. That is what we have chosen to do as
2 a matter of public policy.” (*Id.* at 44-45.)

3 321. The Foreign Trade Practices Act hearings continued on April 25, 1983.
4 Representative Don Bonker chaired the hearing and opened it as follows. “Today, the
5 subcommittee meets to continue consideration of the question of payments in
6 international trade to Government officials.” (*Id.* at 47.)

7 322. The Foreign Trade Practices Act hearings continued on July 12, 1983.
8 Jonathan Rose (Department of Justice – Assistant Attorney General) testified at the
9 hearing. In his prepared statement, Rose commented on the changes H.R. 2157 would
10 make to the then existing anti-bribery provisions of the FCPA. As to removal of the
11 ministerial/clerical exception in the FCPA’s definition of “foreign official” and creation
12 of an express facilitating payment exception for “routine government action,” Rose stated
13 as follows. “Under the current law the class is defined in terms of the ministerial-
14 discretionary distinction: the Act expressly excludes foreign government employees
15 whose duties are essentially ministerial or clerical from the definition of ‘foreign
16 officials’ to whom payment is prohibited ...”. (*Id.* at 121.) Rose stated that the “line
17 between ministerial and discretionary functions is not by any means a hard and fast one,
18 and an American business doing business in a foreign country is often in a poor position
19 to determine what acts a government employee is required to perform by his country’s
20 law.” (*Id.* at 121-122.) As to an exemption in H.R. 2157 for anything of value given as a
21 “courtesy, a token of regard or esteem, or in return for hospitality,” Rose stated that
22 “assessment of this exemption requires some general explanation of the law of bribery,”
23 and he noted that “not all payment or provision of things of value to government officials
24 constitutes bribery.” (*Id.* at 124.)

25 **K. S. 430 (99th Congress) (Introduced February 7, 1985)**

26 323. On February 7, 1985, Senator John Heinz introduced S. 430, the “Business
27 Accounting and Foreign Trade Simplification Act” to ‘amend and clarify the Foreign
28 Corrupt Practices Act of 1977.” (**Exhibit 67.**) Like the numerous bills introduced during

1 the 96th, 97th and 98th Congresses that sought to amend the FCPA, S. 430 similarly
2 began with a “Findings and Conclusion” section which stated as follows: “The Congress
3 finds that ... the enactment of the Foreign Corrupt Practices Act of 1977 was a positive
4 and significant step toward the important objective of prohibiting bribery of foreign
5 government officials by United States companies in order to obtain, retain, or direct
6 business.”

7 324. Like the numerous bills discussed above in the 96th, 97th and 98th
8 Congress, S. 430 sought certain amendments to the FCPA’s anti-bribery provisions, such
9 as laying the foundation for what would ultimately become the FCPA’s affirmative
10 defenses and facilitating payment exception by removing the “ministerial or clerical”
11 language from the “foreign official” definition and creating an express facilitating
12 payment exception.

13 325. S. 430 was referred to the Senate Committee on Banking.

14 **L. Hearings Before the Committee on Banking, Housing, and Urban**
15 **Affairs, Senate, 99th Congress, Second Session on S. 430 (June 10, 1986)**
16 **(the “Business Accounting and Foreign Trade Simplification Act”**
17 **hearing)**

18 326. On June 10, 1986, the Senate Committee on Banking, Housing, and Urban
19 Affairs held hearings on S. 430. (**Exhibit 68.**) In opening the hearing, Senator Heinz
20 noted that it is “with a distinct sense of *déjà vu*” that the Committee was once again
21 turning attention “to the problems” of the FCPA. (*Id.* at 1.) As to the prior efforts to
22 amend the FCPA discussed above, Senator Heinz stated as follows: “The recognition of
23 these problems [with the FCPA] within the U.S. Government is not new. Both the Carter
24 and Reagan administrations have supported changes in the Foreign Corrupt Practices Act.
25 But despite the reporting of legislation by the Banking Committee with bipartisan support
26 in both 1981 and then again in 1983 and Senate passage in 1981, the Congress has never
27 succeeded in fixing the problems with the FCPA.” (*Id.*) Senator Heinz stated that the
28 “most important change” S. 430 would make to the FCPA “is to clarify the bribery
provisions to make them enforceable and to provide clear standards of conduct for

1 American businessmen.” (*Id.* at 2.) He stated as follows: “The original act recognized
2 that so-called facilitating payments were a necessary and acceptable part of doing
3 business in many countries, but left vague what they were and who could receive them.
4 S. 430 focuses on the intent of the payment, and clearly defines what are acceptable
5 payments.” (*Id.*)

6 327. Senator Proxmire testified at the hearing. In an opening statement he
7 described himself as the “author of the original law, the original Foreign Corrupt
8 Practices Act, that became law in 1977” and he reviewed the circumstances which led
9 Congress to pass the FCPA in 1977. He stated as follows: “Other investigations in 1976
10 and 1977 revealed that American corporations had made questionable payments to
11 Government officials and agents in the Netherlands, Iran, France, Germany, Saudi
12 Arabia, Brazil, Malaysia, and Taiwan. During our hearings on the Foreign Corrupt
13 Practices Act we in Congress concluded that corrupt payments to foreign officials caused
14 serious damage to America’s national interest in critical areas of the world. Lockheed
15 Corp.’s payment of \$1.6 million to Prime Minister Tanaka of Japan caused the Prime
16 Minister’s resignation and later his criminal conviction. Allegations about Lockheed’s
17 payments to Prime Minister Bernhardt of the Netherlands almost caused the monarchy to
18 collapse in that country. Payments of more than \$50 million to Italian political
19 candidates resulted in a scandal that brought substantial election gains to the Communist
20 Party in Italy.” (*Id.* at 20-21.) Senator Proxmire noted that the “FCPA law has been
21 successful” and that “evidence indicates that it has stopped utilization of slush funds by
22 American corporations” and “has deterred the corruption of foreign government officials
23 by U.S. corporations.” (*Id.* at 21.)

24 328. Senator D’Amato stated as follows: “It is my intention that any amendments
25 to the FCPA remedy the problems that presently exist with regard to that act’s
26 application. Any amendments should not be designed to emasculate the FCPA, nor
27 should they reflect any sentiment that we condone overseas bribery. Rather any
28 amendments must be designed to send a clear message to corporate America and our

1 trading partners by internationalizing the American view that bribing government
2 officials to obtain business is an unacceptable and illegal practice and therefore must be
3 proscribed. Further, any amendments must serve the dual purposes of proscribing bribery
4 and improving the competitive position of American business in global markets by
5 providing some certainty with regard to those acts that are proscribed by law.” (*Id.* at
6 42.)

7 329. Malcolm Baldrige (Secretary, Department of Commerce) testified at the
8 hearing. His prepared statement best captures the concern with the FCPA’s then existing
9 “foreign official” definition. It read in pertinent part as follows: “Another unclear
10 provision in the Act is the one which exempts payments to an employee of a foreign
11 government ‘whose duties are essentially ministerial or clerical.’ This provision was
12 added to the Act because the Congress recognized that certain types of ‘grease’ payments
13 are customary and expected in certain countries and should not be subject to the sanctions
14 against making bribes to win contracts. Examples of such payments included those
15 needed to get shipments through customs, to secure required permits, and to obtain
16 adequate police protection. Notwithstanding the intent to exempt them from the Act, the
17 standard used to govern such payments requires a subjective determination about whether
18 the duties of the employee are ‘essentially clerical or ministerial.’ In practice, this phrase
19 is difficult to interpret. Part of the difficulty is that it talks about the relationships and
20 functions of employees in foreign governments which may not be familiar to the
21 American business executive.” (*Id.* at 45.)

22 330. During the hearing, Senator Proxmire asked Secretary Baldrige about the
23 provision in S. 430 that would exempt from the FCPA’s anti-bribery provisions “any
24 facilitating or expediting payment to a foreign official the purpose of which is to expedite
25 or to secure the performance of a routine governmental action by a foreign official.” (*Id.*
26 at 52.) Senator Proxmire asked as follows. “We say ‘to a foreign official to expedite or
27 secure the performance of a routine governmental action by a foreign official.’ I would
28 think that virtually any kind of action by the foreign official would fall into that

1 category.” (*Id.*) Baldrige responded as follows: “In some countries, Senator, as you
2 know, there aren’t any really private businessmen. The businesses are all run by the
3 government. They are government-owned businesses and you must deal with either the
4 ministers or somebody in the ministerial department down the line who may not be of a
5 high rank, but if you want to get something down in a case of either getting your facilities
6 set up or just conducting normal business like getting a paper stamped so you can go and
7 get an import quote or something, frequently those people will hold you up unless you
8 have a facilitating payment. And I think that’s for two reasons. One is some of those
9 countries literally underpay the people working for them because they expect them to
10 make it up this way, and in other areas. It’s not looked on as immoral in these countries.
11 That’s something that some Americans don’t understand. (*Id.* at 52-53.) Senator
12 Proxmire did not follow-up with any questions regarding Baldrige’s statement regarding
13 government-owned businesses.

14 331. The hearing record contains a report, “The Price of Ambiguity: More Than
15 Three Years under the Foreign Corrupt Practices Act,” by Howard Weisberg and Eric
16 Reichenberg, sponsored by the International Division, Chamber of Commerce of the
17 United States. (*Id.* at 186.) In a section of the report titled “Statutory Ambiguities,” the
18 report states as follows: “In the bribery provisions of the Act, the following ambiguous
19 terms and phrases have injected uncertainty into overseas business transactions: ... 2. the
20 term ‘foreign official’ as defined in the FCPA, which includes any officer or employee of
21 any agency or instrumentality of a foreign government, leaves uncertain the status of
22 employees of government-owned enterprises.” (*Id.* at 200.)

23 **M. Senate Report 99-486 as to S. 430 (September 17, 1986)**

24 332. On September 17, 1986, the Senate Committee on Banking, Housing and
25 Urban Affairs reported S. 430 to the Senate. (**Exhibit 69.**)

26 333. Under the heading, “Need for the Legislation,” the Report states as follows:
27 “Defining permissible payments, the so-called facilitating payments which the drafters of
28 the FCPA intended to exempt, has been a major concern since the law was passed. The

1 FCPA dealt indirectly with this issue by defining the type of ‘official’ involved with a
2 payment. Payment can legally be made to ‘any employee of a foreign government or any
3 department, agency or instrumentality thereof whose duties are essentially ministerial or
4 clerical.’ This approach has been criticized as vague because it does not focus on the
5 intent of the payments themselves. Calman Cohen noted that even in the U.S.
6 Government it is difficult to know when an official has ‘essentially ministerial or clerical’
7 duties; in foreign countries, where duties are less clearly articulated and unavailable in
8 published form, the problem is much more serious. Business and Administration
9 witnesses have argued in favor of a definition of payments that focuses on the intent of
10 the payments themselves, the approach taken in S. 430, since the question of bribery
11 turns on why, rather than to whom, a payment is made.” (*Id.* at 4-5.)

12 334. Under the heading “Amendments to the Antibribery Provisions” the Report
13 states as follows: “[The relevant section in S. 430] is intended to eliminate the
14 ambiguities of the current law concerning facilitating or so-called ‘grease’ payments.
15 The FCPA contains an exemption for such payments by excluding from the definition of
16 the term ‘foreign official’ an employee ‘whose duties are essentially ministerial or
17 clerical.’ Unfortunately, that definition has proved arbitrary and difficult to apply in
18 practice, in part due to the multitude of relationships and responsibilities of employees of
19 foreign countries. The Committee bill presents a different approach to facilitating and
20 other payments not intended to be covered by the Act, than that embodied in current law.
21 While the FCPA seeks to define facilitating payments in terms of *recipients*, the
22 Committee bill would remove uncertainty about the facilitating payments exception by
23 defining such payments in terms of their *purpose*. It provides for the following
24 exceptions: facilitating or expediting payments to a foreign official, the purpose of which
25 is to expedite or secure the performance of a routine governmental action by a foreign
26 official; items lawful under the laws of the foreign official’s country; items which
27 constitute a courtesy, or a token of regard, or esteem, or in return for hospitality;
28 expenditures, including travel and lodging expenses, associated with the selling or

1 purchase of goods or services or with the demonstration or explanation of products;
2 ordinary expenditures, including travel and lodging expenses, associated with the
3 performance of a contract. The Committee wishes to emphasize that the exception for
4 facilitating and expediting payments should not be interpreted to undermine the basic
5 anti-bribery purpose of the statute. The Committee believes this greater precision is
6 needed in defining exceptions to the Act, given the widely differing interpretations of
7 legitimate facilitating or ‘grease’ payments over the past eight years and the divergent
8 situations which arise in foreign countries.” (*Id.* at 12, emphasis in original.)

9 335. Under the heading “Section-By-Section Analysis of the Bill,” the Report
10 states as follows: “Foreign official would be defined so as to include officers and
11 employees of foreign governments and agencies, political parties, party officials, and
12 candidates.” (*Id.* at 15.)

13 336. The Report also contains the “Additional Views of Senator Proxmire on S.
14 430.” (*Id.* at 19.) Under the heading “Why the FCPA Was Enacted,” Senator Proxmire
15 noted that the “Congress unanimously passed the FCPA in 1977 in response to
16 revelations about the worst domestic and foreign bribery scandals in American corporate
17 history.” (*Id.*) He stated as follows: “During our hearings on the Foreign Corrupt
18 Practices Act we in Congress concluded that corrupt payments to foreign officials caused
19 serious damage to America’s national interests in critical areas of the world. Lockheed
20 Corporation’s payment of \$1.6 million to Prime Minister Tanaka of Japan caused the
21 latter’s resignation and later his criminal conviction. Allegations about Lockheed
22 payments to Prince Bernhard of the Netherlands almost caused the monarchy to collapse
23 in that country. Exxon’s payments of more than \$50 million to Italian political
24 candidates resulted in a scandal that brought substantial election gains to the Communist
25 Party in Italy. A 1977 House report stated that alleged payments to official of the Italian
26 Government, ‘eroded public support for that government and jeopardized U.S. foreign
27 policy, not only with respect to Italy and the Mediterranean area, but with respect to the
28 entire NATO alliance as well.’ The question before the Congress in 1977 was whether

1 we should permit some dishonest corporations to harm our foreign policy interests in
2 their zeal for sales and profits. We answered ‘No’ unanimously. Congress considered
3 then that bribes are bad business because they distort free markets. Goods should be sold
4 on the basis of price, quality, and service – not on the basis of bribes. We also concluded
5 bribes were bad politically as they undermine confidence in America’s integrity and
6 corrupted other governments, including the developing democratic institutions in the
7 Third World. Congress in 1977 found no country where bribing officials to win sales
8 was not against the law. So the defense that bribes were a way of life in some countries –
9 did not mean the people of those countries wanted such behavior to be the norm. Just as
10 Americans do not want foreign corporations bribing our officials – so do people in other
11 countries resent such practices by our corporations in their countries.” (*Id.* at 19-20.)

12 337. Senator Proxmire’s statement continues: “Is it really in our national interest
13 to allow American corporations to contribute to corrupting the officials of foreign
14 governments in order to win a few more sales? In 1977 everyone in Congress said, ‘No’
15 – I hope this Congress will not reverse that judgment.” (*Id.* at 20-21.)

16 338. Senator Proxmire’s statement continues: “The FCPA is a good law. The
17 evidence indicates that it has stopped slush fund bookkeeping by American companies
18 and has stopped corruption of foreign government officials by U.S. corporations.” (*Id.* at
19 22.)

20 339. S. 430 did not result in the FCPA being amended in the 99th Congress.

21 **N. H.R. 4389 (99th Congress) (Introduced March 12, 1986)**

22 340. Also in the 99th Congress, on March 12, 1986, Representative Daniel Mica
23 introduced H.R. 4389, the “Foreign Trade Practices Act of 1986.” (**Exhibit 70.**)

24 341. H.R. 4389 sought to incorporate certain amendments being considered in the
25 99th Congress to the FCPA’s anti-bribery provisions into the Export Administration Act
26 of 1979. Those amendments would ultimately become the FCPA’s affirmative defenses
27 and facilitating payment exception by removing the “ministerial or clerical” language
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1 from the “foreign official” definition and creating an express facilitating payment
2 exception.

3 342. H.R. 4389 was referred to the House Committee on Foreign Affairs.

4 **O. Hearing Before the Subcommittee on International Economic Policy**
5 **and Trade of the Committee on Foreign Affairs, House of**
6 **Representatives, 99th Congress, Second Session on H.R. 4389 (April 16,**
7 **1986) (the “Foreign Trade Practices” hearing)**

8 343. On April 16, 1986, the House Subcommittee on International Economic
9 Policy and Trade held a hearing on H.R. 4389. (**Exhibit 71.**) In opening the hearing,
10 Representative Don Bonker noted that H.R. 4389 was incorporated into a larger omnibus
11 trade bill and that the purpose of the hearing was “specifically to consider reform of the
12 FCPA and to take testimony on [H.R. 4389].” (*Id.* at 1.)

13 344. During the hearing, Representative Howard Wolfe stated as follows: “We
14 must not lose sight of the primary purpose of the law. In 1977, Congress determined that
15 it is not in our national interest to have American foreign policy dictated by the private
16 interest of the U.S. multi-nationals overseas.” (*Id.* at 4.)

17 345. In a prepared statement, Representative Mica noted that “the FCPA was
18 implemented with noble intentions” and he stated as follows: “Following public
19 disclosure in the mid-1970’s that U.S. multinational corporations had paid bribes to high-
20 ranking foreign government officials, the Congress reacted.” (*Id.* at 18.)

21 **P. H.R. 4708 (99th Congress) (Introduced April 30, 1986)**

22 346. On April 30, 1986, Representative Don Bonker introduced H.R. 4708, the
23 Export Enhancement Act of 1986. Title IV of the Act (**Exhibit 72**) sought certain
24 amendments to the FCPA’s anti-bribery provisions, such as laying the foundation for
25 what would ultimately become the FCPA’s affirmative defenses and facilitating payment
26 exception by removing the “ministerial or clerical” language from the “foreign official”
27 definition and creating an express facilitating payment exception. H.R. 4708 was referred
28 to the House Committee on Foreign Affairs.

1 **Q. House Report No. 99-580 as to H.R. 4708 (May 6, 1986)**

2 347. On May 6, 1986, the House Committee on Foreign Affairs reported H.R.
3 4708 to the House. (**Exhibit 73.**)

4 348. A section of the Report titled “Protection of U.S. Business Interests Abroad
5 – foreign trade practices” discusses the passage of the FCPA in 1977 and states as
6 follows: “After considerable deliberation and debate, the Congress enacted, in 1977, the
7 Foreign Corrupt Practices Act. ... In hearings before the committee, the language of the
8 FCPA has been criticized as being inexact. Two particular standards have been the target
9 of criticism.... [A] number of witnesses contended that it was very difficult to define
10 which persons held a ‘clerical or ministerial’ position.” (*Id.* at 8.) The Report then states
11 as follows: “In an effort to make the FCPA a more effective prosecutorial tool and to
12 limit its potential negative economic effects, the bill makes two major changes in the
13 statute.... [T]he bill alters the definition of so-called facilitating or grease payments.
14 Rather than expressly permitting payments to individuals who hold clerical or ministerial
15 posts, the bill allows corporations and individuals to defend themselves from prosecution
16 by proving that the purpose of the payments was ‘routine,’ as defined in the bill.” (*Id.* at
17 9.)

18 349. Title IV of H.R. 4708 was incorporated into H.R. 4800, the Trade and
19 International Economic Policy Reform Act of 1986 which passed the House on May 22,
20 1986. However, H.R. 4800 did not result in the FCPA being amended in the 99th
21 Congress.

22 **R. Various Bills in the 100th Congress**

23 350. On January 6, 1987, Representative Richard Gephardt introduced H.R. 3, the
24 Omnibus Trade and Competiveness Act of 1987. Title VII (**Exhibit 74**) sought certain
25 amendments to the FCPA’s anti-bribery provisions, such as laying the foundation for
26 what would ultimately become the FCPA’s affirmative defenses and facilitating payment
27 exception by removing the “ministerial or clerical” language from the “foreign official”
28 definition and creating an express facilitating payment exception.

1 351. On February 19, 1987, Senator Robert Dole introduced S. 539, and
2 Representative Robert Michel introduced an identical bill, H.R. 1155 (**Exhibit 75**). Both
3 omnibus bills were titled “Trade, Employment, and Productivity Act of 1987.” Both bills
4 included a separate title, the “Business Practices and Records Act of 1987,” which sought
5 to amend the FCPA, including by renaming the FCPA the “Business Practices and
6 Records Act.”

7 352. Like the numerous bills introduced during the 96th, 97th, 98th and 99th
8 Congresses that sought to amend the FCPA, S. 539 and H.R. 1155 similarly began with a
9 “Findings and Conclusion” section which stated as follows: “The Congress finds that
10 [...] the enactment of the Foreign Corrupt Practices Act of 1977 was a positive and
11 significant step toward the important objective of prohibiting bribery of foreign
12 government officials by United States companies in order to obtain, retain, or direct
13 business.”

14 353. Like the numerous bills discussed above in the 96th, 97th, 98th and 99th
15 Congresses, S. 539 and H.R. 1155 sought certain amendments to the FCPA’s anti-bribery
16 provisions, such as laying the foundation for what would ultimately become the FCPA’s
17 affirmative defenses and facilitating payment exception by removing the “ministerial or
18 clerical” language from the “foreign official” definition and creating an express
19 facilitating payment exception.

20 354. In addition to S. 539 and H.R. 1155, several other related bills were also
21 introduced in the Senate or the House during the 100th Congress. See S. 636 (**Exhibit**
22 **76**), S. 651 (**Exhibit 77**), and H.R. 1493 (**Exhibit 78**). These bills were either stand-
23 alone bills or specific titles or sections to omnibus export and trade bills. Like the bills
24 referenced above from the 96th, 97th, 98th and 99th Congresses that sought to amend the
25 FCPA, these other bills also contained a “Findings and Conclusions” section which stated
26 as follows: “The Congress finds that ... the enactment of the Foreign Corrupt Practices
27 Act of 1977 was a positive and significant step toward the important objective of
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1 prohibiting bribery of foreign government officials by United States companies in order
2 to obtain, retain, or direct business.”

3 355. Like the numerous bills discussed above in the 96th, 97th, 98th and 99th
4 Congresses, S. 636, S. 651, and H.R. 1493 also sought certain amendments to the FCPA’s
5 anti-bribery provisions, such as laying the foundation for what would ultimately become
6 the FCPA’s affirmative defenses and facilitating payment exception by removing the
7 “ministerial or clerical” language from the “foreign official” definition and creating an
8 express facilitating payment exception.

9 356. During the legislative process, H.R. 1155 was incorporated into H.R. 3, the
10 Omnibus Trade and Competiveness Act of 1987, and S. 651 was incorporated in S. 1409,
11 the United States Trade Enhancement Act of 1987.

12 **S. House Report 100-40 as to H.R. 3 (April 6, 1987)**

13 357. On April 6, 1987, the House Committee on Energy and Commerce reported
14 H.R. 3 (renamed the “Trade and International Economic Policy Reform Act of 1987”) to
15 the full House. (**Exhibit 79.**)

16 358. As to Title VII of H.R. 3 concerning the FCPA, the Report states as follows:
17 “The bill also clarifies the FCPA’s meaning and Congressional intent. It is the intent of
18 the legislation that the vast majority of honest businesses be given clear guidance about
19 the scope of the law, while the small minority of unscrupulous businesses are constrained
20 by the law. This is accomplished through narrowly-drawn amendments to current law
21 with clearly-defined terms.” (*Id.* at 52.)

22 359. As to the provisions in H.R. 3 amending the “foreign official” definition and
23 creating an express facilitating payment exception for payments made to a “foreign
24 official” in connection with “routine governmental action,” the Report states as follows:
25 “The legislative history of the FCPA states that certain kinds of foreign payments are not
26 intended to be covered by its prohibitions. The legislative history states that the Act
27 ‘does not ... cover so-called ‘grease payments’ such as payments for expediting
28 shipments through customs or placing a trans-atlantic telephone call, securing required

1 permits, or obtaining adequate police protections, transactions which may involve even
2 the proper performance of duties.’ As the 1977 House Report made clear, although such
3 ‘grease payments’ may be reprehensible in the United States, they may be a way of life in
4 other parts of the world. In some cases, small payments may be demanded by relatively
5 low-level foreign government employees before they will even properly perform the
6 duties for which they are responsible, such as processing applications. The definition of
7 ‘foreign official’ under the FCPA was intended to further distinguish payments of this
8 nature. The FCPA explicitly states that the term ‘foreign official’ does not include ‘any
9 employee of a foreign government or any department, agency, or instrumentality thereof
10 whose duties are essentially ministerial or clerical.’ The legislative history notes that ‘in
11 defining ‘foreign official,’ the Committee emphasizes this crucial distinction (between
12 prohibited payments and ‘grease’ payments) by excluding from the definition of foreign
13 official government employees whose duties are essentially ministerial or clerical.’ The
14 policy adopted by Congress in 1977 remains valid, in terms of both U.S. law enforcement
15 and foreign relations considerations. Any prohibition under U.S. law against this type of
16 petty corruption would be exceedingly difficult to enforce, not only by U.S. prosecutors
17 but by company officials themselves. Thus while such payments should not be
18 condoned, they may appropriately be excluded from the reach of the FCPA. U.S.
19 enforcement resources should be devoted to activities having much greater impact on
20 foreign policy. Thus, payments for activities such as the awarding of contracts and
21 procurement of favorable legislation or favorable judicial or regulatory treatment should
22 be proscribed, as the FCPA now provides. However, there has been some criticism that
23 the current statutory language does not clearly reflect Congressional intent and the
24 boundaries of prohibited conduct. Critics have complained that ‘grease’ payments are not
25 clearly excluded, because the payments are defined primarily in terms of the official
26 receiving the payments (one whose duties are ‘essentially ministerial or clerical’), instead
27 of the purpose of the payment. The statutory change that would be accomplished by the
28 bill will reflect current law and Congressional intent more clearly. [The relevant section

1 of H.R. 3] states that it shall be a ‘defense’ to actions brought under the FCPA that a
2 payment was made ‘for the purpose of expediting or securing the performance of a
3 routine governmental action by a foreign official.’ The bill would further provide ... that
4 the term ‘routine governmental action’ means an action which is ordinarily and
5 commonly performed by a foreign official, including processing governmental papers,
6 loading and unloading cargoes and scheduling inspections and actions of a similar nature.
7 The bill further makes it clear that the term does not include ‘any decision by a foreign
8 official on the question of whether, or on what terms, to award new business to or to
9 continue business with a particular party, or the procurement of legislative, judicial,
10 regulatory, or other action in seeking more favorable treatment by a foreign
11 government.’” (*Id.* at 76-77.)

12 360. On April 30, 1987, H.R. 3 passed the House.

13 **T. Senate Report 100-85 as to S. 1409 (June 23, 1987)**

14 361. On June 23, 1987, the Senate Banking Committee reported S. 1409 to the
15 Senate. (**Exhibit 80.**)

16 362. Under the heading “History of the Legislation” the Report states as follows:
17 “In 1981, 1983, and 1986 the Committee reported our amendments to the Foreign
18 Corrupt Practices Act, although none were enacted into law.” (*Id.* at 2.) This sentence of
19 the Report is a reference to S. 708 and Senate Report 97-209 in the 97th Congress, S. 414
20 and Senate Report 98-207 in the 98th Congress ,and S. 430 and Senate Report 99-486 in
21 the 99th Congress.

22 363. Under the heading “Overview,” Senate Report 100-85 states as follows:
23 “Title VII of the bill makes amendments to the Foreign Corrupt Practices Act of 1977,
24 which was enacted to prevent U.S. corporations from using bribery of foreign officials as
25 a means of obtaining or retaining business abroad. The Committee’s amendments clarify
26 certain ambiguities in the present statute which have caused concerns among U.S.
27 businessmen without changing the basic intent or effectiveness of the law.” (*Id.* at 6.)
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1 364. Under the heading “Purposes of the Legislation,” the Report states as to Title
2 VII as follows: “The question before the Congress in 1977 was whether it should permit
3 some dishonest corporations to harm U.S. foreign policy interests in their zeal for sales
4 and profits. It answered ‘No’ unanimously. It was the view of Congress that bribes are
5 bad business because they distort free markets. Goods should be sold on the basis of
6 price, quality, and service, not on the basis of bribes. It was also the view of Congress
7 that a strong antibribery statute could help U.S. corporations resist corrupt demands, and
8 that bribes undermined confidence in America’s integrity, corrupted other governments,
9 and created severe foreign policy problems for the United States. Congress, in 1977,
10 found that bribes were illegal in most countries and were not necessary to do business
11 abroad. So the assertion that bribes were a way of life in some countries did not mean the
12 people in those countries wanted such behavior to be the norm. Just as Americans do not
13 want foreign corporations bribing our officials so do people in other countries resent the
14 use of bribery for foreign corporations in their countries. The amendments to the FCPA
15 in this title do not change Congress’ previous conclusions about the need to prohibit
16 corporate bribery as a means to win sales.” (*Id.* at 46-47.)

17 365. Under the heading “Criminalization of Foreign Bribery,” the Report states as
18 follows: “(c) Exceptions to Bribery Prohibitions. – Not all payments to employees of
19 foreign governments were contemplated by Congress to be considered illegal bribes
20 under the statute. First, the definition of ‘foreign official’ within the Act excludes those
21 employees of a foreign government ‘whose duties are essentially ministerial or
22 clerical.’... Second, the legislative history of the Act states specifically that the Act was
23 not intended to cover minor payments such as ‘payments for expediting shipments
24 through customs or placing a transatlantic telephone call, securing required permits, or
25 obtaining adequate police protection, transactions which may involve even the proper
26 performance of duties.” (*Id.* at 48.)

27 366. Under the heading “Amendments to Bribery Provisions,” the Report states
28 as follows: “3. Facilitating and Other Payments. – [the relevant section of S. 1409] which

1 the Committee's amendments add to the FCPA is intended to eliminate the ambiguities of
2 the current law concerning facilitating and other payments.... [T]he present FCPA
3 contains an exemption for such payments by excluding from the definition of the term
4 'foreign official' an employee 'whose duties are essentially ministerial or clerical.'...
5 Notwithstanding the intent to exempt facilitating payments from the FCPA's bribery
6 prohibition, the method chosen by Congress in 1977 to accomplish this has been difficult
7 to apply in practice. Calman Cohen explained at the June 6, 1986 hearing the difficulties
8 corporations encounter in determining whether a foreign official's duties are 'ministerial
9 or clerical.' The Committee's amendments to this provision of the FCPA, therefore,
10 focus the exception on the purpose of the payments rather than on the recipient. It
11 provides that the following types of payments are permissible under the FCPA: (1) any
12 facilitating or expediting payment to a foreign official the purpose of which is to expedite
13 or secure the performance of a routine governmental action by a foreign official; (2) any
14 nominal payment, gift, offer, or promise of anything of value to a foreign official which
15 constitutes a courtesy, a token of regard or esteem, or in return for hospitality; (3) any
16 reasonable and bona fide expenditures, including travel and lodging expenses, incurred
17 by or on behalf of a foreign official, which are associated with the selling or purchasing
18 of goods or services or with the demonstration of explanation of products; or (4) any
19 reasonable and bona fide expenditures, including travel and lodging expenses, incurred
20 by or on behalf of a foreign official, which are associated with the performance of a
21 contract with a foreign government or agency thereof." (*Id.* at 52-53.)

22 367. Under the heading "Conclusion," the Report states as follows: "The
23 Banking Committee believes that enactment of the FCPA was a positive and significant
24 step toward the important objective of prohibiting bribery of foreign government officials
25 by United States companies in order to obtain, retain or direct business. The Congress in
26 enacting the FCPA did not intend to restrict or discourage legitimate export transactions.
27 The Committee believes the amendments to the FCPA in title VII will clarify ambiguities
28 in the present statute and relieve legitimate concerns by U.S. businessmen without

1 changing the basic intent or effectiveness of the law. In fact, it is the Committee's hope
2 that by clarifying the law that its effectiveness and enforcement will be improved." (*Id.* at
3 54.)

4 368. Under the heading "Section by Section Analysis" the Report states as
5 follows: "[The relevant section of S. 1409] defines 'foreign official' so as to include
6 officers and employees of foreign governments and agencies, political parties, party
7 officials, and candidates." (*Id.* at 69.)

8 **U. S. 1420 (Introduced June 24, 1987)**

9 369. On June 24, 1987, Senator Robert Byrd introduced S. 1420, the Omnibus
10 Trade and Competitiveness Act of 1987. Title XVI of the bill was called the "Foreign
11 Corrupt Practices Act Amendments of 1987." (**Exhibit 81.**) Like the numerous bills
12 introduced during the 96th, 97th, 98th and 99th Congresses, and like other bills
13 introduced in the 100th Congress that sought to amend the FCPA, Title XVI of S. 1420
14 similarly began with a "Findings and Conclusion" section which stated as follows: "The
15 Congress finds that ... the enactment of the Foreign Corrupt Practices Act of 1977 was a
16 significant step toward the important objective of prohibiting bribery of foreign
17 government officials by United States companies in order to obtain, retain, or direct
18 business."

19 370. Like the numerous bills discussed above in the 96th, 97th, 98th, 99th, and
20 100th Congresses, S. 1420 sought certain amendments to the FCPA's anti-bribery
21 provisions, such as laying the foundation for what would ultimately become the FCPA's
22 affirmative defenses and facilitating payment exception by removing the "ministerial or
23 clerical" language from the definition of "foreign official" and creating an express
24 facilitating payment exception.

25 371. On July 22, 1987, the above referenced bill, S. 1409, was incorporated into
26 S. 1420. Also, on July 22, 1987, the Senate incorporated S. 1420 into H.R. 3. and the
27 Senate passed H.R. 3.

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1 372. In April 1988, the House and Senate held a Conference as to the different
2 versions of H.R. 3 passed, resulting in Conference Report 100-576. On May 13, 1988,
3 H.R. 3 was presented to President Reagan. President Reagan vetoed H.R. 3 on May 24,
4 1988. Congress failed to override the veto.

5 **V. H.R. 4848 and S. 2558 (June 1988)**

6 373. On June 16, 1988, Representative Don Rostenkowski introduced H.R. 4848,
7 the Omnibus Trade and Competiveness Act of 1988. On June 23, 1988, Senator Lloyd
8 Bentsen introduced S. 2558, the Omnibus Trade and Competiveness Act of 1988. S.
9 2558 was a companion bill to H.R. 4848. Both H.R. 4848 and S. 2558 indicate that the
10 legislative history of H.R. 3, referenced above, was applicable to the bills, with an
11 exception not relevant to the FCPA.

12 374. Title V, Subtitle A, Part I of both H.R. 4848 and S. 2558 were titled
13 “Foreign Corrupt Practices Act Amendments.” (**Exhibit 82.**)

14 375. Like the numerous bills discussed above in the 96th, 97th, 98th, 99th, and
15 100th Congresses to amend the FCPA, H.R. 4848 and S. 2558 sought certain
16 amendments to the FCPA’s anti-bribery provisions, such as creating certain affirmative
17 defenses and a facilitating payment exception.

18 376. In pertinent part, the bills amended the “foreign official” definition by
19 removing the “ministerial or clerical” language from the definition and creating an
20 express facilitating payment exception for “routine government action.”

21 377. The bills defined “foreign official” as follows: “The term ‘foreign official’
22 means any officer or employee of a foreign government or any department, agency, or
23 instrumentality thereof, or any person acting in an official capacity for or on behalf of any
24 such government or department, agency or instrumentality.”

25 378. The bills express facilitating exception for “routine governmental action”
26 stated as follows: “[The FCPA’s anti-bribery provisions] shall not apply to any
27 facilitating or expediting payment to a foreign official, political party, or party official the
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1 purpose of which is to expedite or to secure the performance of routine governmental
2 action by a foreign official, political party, or party official.”

3 379. On July 13, 1988, H.R. 4848 passed the House, and on August 3, 1988, it
4 passed the Senate. On August 11, 1988, H.R. 4848 was presented to President Ronald
5 Reagan. On August 23, 1988, President Reagan signed H.R. 4848. President Reagan’s
6 signing statement did not address the FCPA amendments contained in H.R. 4848.

7 **(Exhibit 83.)**

8 **W. Public Law 100-418 (1988)**

9 380. Public Law 100-418, the Omnibus Trade and Competitiveness Act of 1988,
10 contained Title V, Subtitle A, Part I, the “Foreign Corrupt Practices Act Amendments.”

11 **(Exhibit 84.)**

12 381. In pertinent part, the Act amended the FCPA’s “foreign official” definition
13 by removing the “ministerial or clerical” language from the original “foreign official”
14 definition and creating an express facilitating payment exception for “routine government
15 action.”

16 382. The Act defined “foreign official” as follows: “The term ‘foreign official’
17 means any officer or employee of a foreign government or any department, agency, or
18 instrumentality thereof, or any person acting in an official capacity for or on behalf of any
19 such government or department, agency or instrumentality.” (*Id.* at Section 5003.)

20 383. The Act’s express facilitating exception for “routine governmental action”
21 stated as follows: “[The FCPA’s anti-bribery provisions] shall not apply to any
22 facilitating or expediting payment to a foreign official, political party, or party official the
23 purpose of which is to expedite or to secure the performance of routine governmental
24 action by a foreign official, political party, or party official.” (*Id.*)

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VI.
LEGISLATIVE HISTORY RELEVANT TO THE FCPA'S 1998
AMENDMENTS

A. Organization for Economic Cooperation and Development Convention (November 21, 1997)

384. On November 21, 1997, the Organization for Economic Cooperation and Development (“OECD”), a Paris-based international organization of countries including the United States, Canada, much of Europe, and Japan (among other countries) founded in 1961 to stimulate economic progress and world trade, adopted The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the “OECD Convention”). (**Exhibit 85.**) The OECD Convention was signed on December 17, 1997 by the United States and thirty-two other nations.

385. Article 1 of the OECD Convention, titled “The Offence of Bribery of Foreign Public Officials,” states as follows: “Each Party shall take such measures as may be necessary to establish that it is a criminal offence 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.”

386. The OECD Convention defined “foreign public official” to mean “any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organization.”

387. The OECD also adopted various “Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.”

388. Commentary 14 stated as follows: “A ‘public enterprise’ is any enterprise, regardless of its legal form, over which a government, or governments, may, directly or

1 indirectly, exercise a dominant influence. This is deemed to be the case, *inter alia*, when
2 the government or governments hold the majority of the enterprise's subscribed capital,
3 control the majority of votes attaching to shares issued by the enterprise or can appoint a
4 majority of the members of the enterprise's administrative or managerial body or
5 supervisory board."

6 389. Commentary 15 stated as follows: "An official of a public enterprise shall
7 be deemed to perform a public function unless the enterprise operates on a normal
8 commercial basis in the relevant market, *i.e.*, on a basis which is substantially equivalent
9 to that of a private enterprise, without preferential subsidies or other privileges."

10 **B. DOJ Transmittal Letters (May 4, 1998)**

11 390. On May 4, 1998, Ann Harkins (Acting Assistant Attorney General, DOJ)
12 sent identical letters to Speaker of the House Newt Gingrich (**Exhibit 86**) and Vice
13 President Albert Gore as President of the Senate (**Exhibit 87**).

14 391. The letters stated in pertinent part as follows: "Enclosed herewith is a draft
15 bill, the 'International Anti-Bribery Act of 1998,' which contains legislative proposals to
16 implement the [OECD Convention]. This Convention was forwarded by the President to
17 the Senate on May 1, 1998, for its advice and consent. Administrations of both parties
18 have long urged our trading partners to criminalize bribery of foreign public officials by
19 their nationals, as the United States did in 1977 in the Foreign Corrupt Practices Act of
20 1997 (the 'FCPA'). These bipartisan efforts finally succeeded when thirty-three countries
21 signed the OECD Convention in Paris in December of last year. The OECD Convention,
22 when fully implemented by all parties, will help create the level playing field and
23 transparent contracting long sought by American businesses as they compete around the
24 world for public contracts."

25 392. The letters continued as follows: "The OECD Convention calls on all
26 parties to make it a criminal offense 'for any person intentionally to offer, promise or
27 give any undue pecuniary or other advantage, whether directly or through intermediaries,
28 to a foreign public official, for that official or for a third party, in order that the official

1 act or refrain from acting in relation to the performance of official duties, in order to
2 obtain or retain business or other improper advantage in the conduct of international
3 business.’ It further calls on all parties to exert territorial jurisdiction broadly and, where
4 consistent with national legal and constitutional principles, nationality jurisdiction.”

5 393. The letters continued as follows: “The draft bill would amend the FCPA to
6 conform to the requirements of and to implement the OECD Convention. First, the FCPA
7 currently criminalizes payments made to influence any decision of a foreign official or to
8 induce him to do or omit to do any act in order to obtain or retain business. The bill
9 would make explicit that payments made to secure ‘any improper advantage,’ the
10 language used in the OECD Convention, are prohibited by the FCPA. Second, the OECD
11 Convention calls on parties to cover ‘any person.’ The current FCPA covers only issuers
12 with securities registered under the 1934 Securities Exchange Act and domestic concerns.
13 The bill would, therefore, expand coverage to include all foreign persons who commit an
14 act in furtherance of a foreign bribe while in the United States. Third, the OECD
15 Convention includes officials of public international organizations within the definition
16 of ‘public official.’ Accordingly, the bill similarly expands the FCPA definition of public
17 officials to include officials of such organizations. Fourth, the OECD Convention calls on
18 parties to assert nationality jurisdiction over offenses committed abroad when consistent
19 with national legal and constitutional principles. Accordingly, the bill would provide for
20 jurisdiction over the acts of U.S. businesses and nationals in furtherance of unlawful
21 payments that take place wholly outside the United States. Fifth and finally, the bill
22 would amend the penalties applicable to employees and agents of U.S. businesses to
23 eliminate the current disparity between U.S. nationals and non-U.S. nationals employed
24 by or acting as agents of U.S. companies. In the current statute, such non-U.S. nationals
25 are subject only to civil penalties. The bill would eliminate this restriction and subject all
26 employees or agents of U.S. businesses to both civil and criminal penalties.”

27 394. While Harkin stated that the “International Anti-Bribery Act of 1998”
28 “would amend the FCPA to conform to the requirements of and to implement the OECD

1 Convention,” her transmittal letters note that the International Anti-Bribery Act of 1998
2 would only “expand[] the FCPA definition of public officials to include officials” of
3 “public international organizations.” This suggests that the DOJ did not view the
4 “International Anti-Bribery Act of 1998” as expanding the FCPA’s “foreign official”
5 definition (contrary to Harkins’ assertion, the FCPA did not contain a definition of
6 “public official”) beyond including “public international organizations.” Significantly,
7 the DOJ apparently did not view the International Anti-Bribery Act of 1998 as expanding
8 the FCPA’s “foreign official” definition to include the OECD’s express inclusion of
9 “public enterprises” in its operative definition of “foreign public official.”

10 395. As demonstrated below, even though enactment of the International Anti-
11 Bribery Act of 1998 by the 105th Congress was ostensibly to conform the FCPA to the
12 OECD Convention, it is clear that Congress was informed and understood that the OECD
13 Convention and the FCPA would not be identical, even after the International Anti-
14 Bribery Act of 1998 amendments. Rather, the OECD Convention was described as:
15 “closely model[ing]” the FCPA; being “very similar” to the FCPA; being “largely
16 consistent” with the FCPA; and closely tracking the FCPA.

17 396. Thus, despite numerous generic statements that the purpose of International
18 Anti-Bribery Act of 1998 was to conform the FCPA to the OECD Convention, the
19 legislative history demonstrates that the 105th Congress did not intend such a result by
20 passing the International Anti-Bribery Act of 1998. Rather, Congress incorporated
21 certain aspects of the OECD Convention into the FCPA, but not others.

22 397. As to the FCPA’s “foreign official” definition, the legislative history
23 relevant to the FCPA’s 1998 amendments demonstrates only that the 105th Congress
24 intended to amend the “foreign official” definition by expanding it to include the
25 OECD’s concept of “public international organizations.”

26 398. There is no express statement or information in the legislative history
27 relevant to the FCPA’s 1998 amendments to suggest that the 105th Congress intended to
28

1 further expand the “foreign official” definition to include employees of “public
2 enterprises” as found in the OECD Convention’s definition of “foreign public official.”

3 **C. S. 2375 (July 30, 1998)**

4 399. On July 30, 1998, Senator Alfonse D’Amato introduced S. 2375. (**Exhibit**
5 **88.**) Titled the “International Anti-Bribery and Fair Competition Act of 1998,” S. 2375
6 sought to amend the “Foreign Corrupt Practices Act of 1977 to improve the
7 competitiveness of American business and promote foreign commerce ...”

8 400. Among other changes to the FCPA, S. 2375 sought to change the “foreign
9 official” definition by adding the term “public international organization.” The definition
10 of “foreign official” contained in S. 2375 was as follows: “The term ‘foreign official’
11 means any officer or employee of a foreign government or any department, agency, or
12 instrumentality thereof, or of a public international organization, or any person acting in
13 an official capacity for or on behalf of any such government or department, agency, or
14 instrumentality, or for or on behalf of any such public international organization.” S.
15 2375 defined “public international organization” to mean: “(i) an organization that has
16 been so designated by Executive order pursuant to section 1 of the International
17 Organizations Immunities Act (22 USC 288).”

18 401. S. 2375 was referred to the Senate Committee on Banking, Housing, and
19 Urban Affairs.

20 **D. Senate Report 105-277 as to S. 2375 (July 30, 1998)**

21 402. The July 30, 1998 Senate Report as to S. 2375, under the section “History of
22 the Legislation” states as follows: “In the wake of the Watergate scandals, the Securities
23 and Exchange Commission discovered that many public companies were maintaining
24 cash ‘slush funds’ from which illegal campaign contributions were being made in the
25 United States and illegal bribes were being paid to foreign officials. Subsequently,
26 scandals involving payments by U.S. companies to public officials in Japan, Italy, and
27 Mexico led to political repercussions within those countries and severely sullied the
28 reputation of American companies throughout the world. In response, Congress passed

1 the Foreign Corrupt Practices Act of 1977 (the ‘FCPA’). Through this Act, the United
2 States declared its policy that American companies should act ethically in bidding for
3 foreign contracts and should act in accordance with the U.S. policy of encouraging the
4 development of democratic institutions and honest, transparent business practices....

5 [T]he FCPA required both issuers and all other U.S. nationals and companies (defined as
6 ‘domestic concerns’) to refrain from making any unlawful payments to public officials,
7 political parties, party officials, or candidates for public office, directly or through others,
8 for the purpose of causing that person to make a decision or take an action, or refrain
9 from taking an action, for the purpose of obtaining or retaining business.” (**Exhibit 89.**)

10 403. The Senate Report contains a detailed overview of the process that resulted
11 in the above described OECD Convention and specifically describes how S. 2375 would
12 amend the FCPA. The Senate Report states as follows: “In 1988, Congress directed the
13 Executive Branch actively to seek to level the playing field by encouraging our trading
14 partners to enact legislation similar to the FCPA. These efforts eventually culminated in
15 the [OECD Convention]. Thirty-three countries, comprising most of the significant
16 trading countries in the world, signed this Convention in Paris in December 1997. This
17 Convention was forwarded by the President to the Senate on May 1, 1998.”

18 404. The Senate Report continues as follows: “The OECD Convention calls on
19 all parties to make it a criminal offense ‘for any person intentionally to offer, promise or
20 give any undue pecuniary or other advantage, whether directly or through intermediaries,
21 to a foreign public official, for that official or for a third party, in order that the official
22 act or refrain from acting in relation to the performance of official duties, in order to
23 obtain or retain business or other improper advantage in the conduct of international
24 business.’ It further calls on all parties to assert territorial jurisdiction broadly and, where
25 consistent with national legal and constitutional principles, to assert nationality
26 jurisdiction. This Act amends the FCPA to conform it to the requirements of and to
27 implement the OECD Convention. First, the FCPA currently criminalizes payments made
28 to influence any decision of a foreign official or to induce him to do or omit to do any act.

1 The Act expands the FCPA's scope to include payments made to secure 'any improper
2 advantage,' the language used in the OECD Convention. Second, the OECD Convention
3 calls on parties to cover 'any person'; the current FCPA covers only issuers with
4 securities registered under the 1934 Securities Exchange Act and 'domestic concerns.'
5 The Act, therefore, expands the FCPA's coverage to include all foreign persons who
6 commit an act in furtherance of a foreign bribe while in the United States. Third, the
7 OECD Convention includes officials of public international organizations within the
8 definition of 'public official.' Accordingly, the Act similarly expands the FCPA's
9 definition of public officials to include officials of such organizations. Fourth, the OECD
10 Convention calls on parties to assert nationality jurisdiction when consistent with national
11 legal and constitutional principles. Accordingly, the Act amends the FCPA to provide for
12 jurisdiction over the acts of U.S. businesses and nationals in furtherance of unlawful
13 payments that take place wholly outside the United States. This exercise of jurisdiction
14 over U.S. businesses and nationals for unlawful conduct abroad is consistent with U.S.
15 legal and constitutional principles and is essential to protect U.S. interests abroad....
16 Fifth and finally, the Act amends the FCPA to eliminate the current disparity in penalties
17 applicable to U.S. nationals and foreign nationals employed by or acting as agents of U.S.
18 companies. In the current statute, foreign nationals employed by or acting as agents of
19 U.S. companies are subject only to civil penalties. The Act eliminates this restriction and
20 subjects all employees or agents of U.S. businesses to both civil and criminal penalties."

21 405. The above paragraph in the Senate Report is substantively similar to
22 Harkins' transmittal letters.

23 406. The "Section-By-Section" portion of the Senate Report states, in pertinent
24 part, as follows: "[S. 2375 amends the FCPA] to expand the definition of 'foreign
25 official' to include an official of a public international organization. *See* OECD
26 Convention, Art. 1, 4(a). Public international organizations are then defined by reference
27 to those organizations designated by Executive Order pursuant to the International
28 Organizations Immunities Act (22 U.S.C. 288)."

1 407. Significantly, the Senate Report does not state that S. 2375 sought to amend
2 the FCPA to expand the “foreign official” definition to include officials of “public
3 enterprises” – an express component of the OECD Convention’s definition of “foreign
4 public official.”

5 **E. H.R. 4353 (July 30, 1998)**

6 408. Also on July 30, 1998, Representative Tom Bliley introduced H.R. 4353.
7 **(Exhibit 90.)** Also titled the “International Anti-Bribery and Fair Competition Act of
8 1998,” H.R. 4353 also sought to amend the “Foreign Corrupt Practices Act of 1977 to
9 improve the competitiveness of American business and promote foreign commerce....”

10 409. Among other changes to the FCPA, H.R. 4353 sought to amend the “foreign
11 official” definition by adding the term “public international organization.” However,
12 H.R. 4353’s “foreign official” definition was not identical to the “foreign official”
13 definition in S. 2375.

14 410. The “foreign official” definition in H.R. 4353 was as follows: “The term
15 ‘foreign official’ means any officer or employee of a foreign government or any
16 department, agency, or instrumentality thereof, or of a public international organization,
17 or any person acting in an official capacity for or on behalf of any such government or
18 department, agency, or instrumentality, or for or on behalf of any such public
19 international organization.”

20 411. H.R. 4353 then defined “public international organization” to mean: “(i) an
21 organization that is designated by Executive order pursuant to section 1 of the
22 International Organizations Immunities Act (22 USC 288); or (ii) an international
23 organization providing commercial communications services, as defined in section 5(a)
24 [of the bill], except that the term ‘public international organization’ does not include any
25 such international organization providing commercial communications services that has
26 achieved a pro-competitive privatization.” Section 5(a) of H.R. 4353 stated as follows:
27 “The term ‘international organization providing commercial communication services’
28 means (1) the International Telecommunications Satellite Organization established

1 pursuant to the Agreement Relating to the International Telecommunications Satellite
2 Organization; and (2) the International Mobile Satellite Organization established pursuant
3 to the Convention on the International Maritime Organization.”

4 412. H.R. 4353 was referred to the House Committee on Commerce,
5 Subcommittee on Finance and Hazardous Materials.

6 **F. Senate Passes S. 2375 (July 31, 1998)**

7 413. On July 31, 1998, S. 2375 passed the Senate.

8 **G. Hearings Before the Subcommittee on Finance and Hazardous**
9 **Materials, House of Representatives, 105th Congress, Second Session**
10 **(September 10, 1998) (“The International Anti-Bribery and Fair**
11 **Competition Act of 1998” hearings)**

12 414. On September 10, 1998, the Subcommittee on Finance and Hazardous
13 Materials held a hearing on H.R. 4353. (**Exhibit 91.**) In opening the hearing,
14 Representative Michael Oxley noted that the “legislation before us today, the
15 International Anti-Bribery and Fair Competition Act, contains changes to our laws
16 necessary to implement the Convention on Combating Bribery of Foreign Public
17 Officials in International Business Transactions.” (*Id.* at 3.)

18 415. As to H.R. 4353’s amendment of the “foreign official” definition, Andrew
19 Pincus (General Counsel, Office of General Counsel, Department of Commerce) stated
20 that the OECD Convention “was modeled after our Foreign Corrupt Practices Act, so
21 there aren’t many changes that are needed to bring the FCPA in line with what the
22 [OECD] Convention requires.” (*Id.* at 7.) As to the changes, Pincus noted, in pertinent
23 part, as follows: “Third, the [OECD] Convention includes officials of public
24 international organizations within the definition of public officials. We have to expand
25 our definition to cover those officials as well.” (*Id.*)

26 416. During his testimony Pincus noted that within the OECD “there are
27 additional aspects of the bribery issue that will be discussed. ... For example, how do we
28 address the bribery of foreign political parties, party officials and candidates for office?

1 Our law covers bribes paid to all of these, but the [OECD] Convention covers only
2 some.” (*Id.*)

3 417. In his prepared statement, Pincus stated that the “[OECD] Convention is
4 very similar to our FCPA” and that the proposed amendments to the FCPA in H.R. 4353
5 “are tailored so that our law will have a scope similar to what we expect our major
6 trading partners to achieve as they enact their laws.” (*Id.* at 10.)

7 418. Paul Gerlach (Associate Director, Division of Enforcement, Securities and
8 Exchange Commission) also testified at the hearing. He stated that the OECD
9 Convention “is largely consistent with existing U.S. law, the Foreign Corrupt Practices
10 Act ...”. (*Id.* at 11.) Gerlach further testified that “[a]lthough the OECD Convention is
11 largely consistent with existing U.S. law, the FCPA, as well as Section 30A of the
12 Exchange Act, would need to be amended slightly to implement the Convention.” (*Id.* at
13 13.) Among the changes Gerlach noted was as follows: “Second, the OECD Convention
14 includes officials of international agencies within the definition of foreign official. Thus,
15 H.R. 4353 expands the definition of covered public official to include officials of public
16 international organizations.” (*Id.* at 14.)

17 419. In his prepared statement, Gerlach stated that the “OECD Convention is
18 largely consistent with existing U.S. law, the FCPA” (*Id.* at 17.)

19 420. During the hearing, Representative Oxley asked “what about payments
20 directly to foreign officials that are members of political parties, how does the [OECD
21 Convention] treat that?” (*Id.* at 21.) Both Pincus and Gerlach informed Representative
22 Oxley that the OECD Convention did not cover bribes directly to foreign political
23 entities.

24 421. During the hearing, Representative Thomas Manton and Gerlach engaged in
25 the following exchange. (*Id.* at 22-23.) Representative Manton: “The Act [the FCPA]
26 doesn’t cover bribes to non-governmental people; is that correct?” Gerlach: “That’s
27 correct. Foreign official is a defined term.” Representative Manton: “And that’s a
28 public official. It’s not someone who simply doesn’t hold an official position but is a

1 decisionmaker within a foreign company that some U.S. company might want to do
2 business with.” Gerlach: “Well there are some interesting legal issues if what you’re
3 talking about is a foreign state operated enterprise where the foreign government perhaps
4 has substantial ownership of the company. I can imagine certain scenarios where
5 substantial government involvement in a commercial enterprise could provide us the
6 basis for arguing that an official of that enterprise qualifies as a foreign government
7 officials.” Representative Manton said “thank you” and the exchange ended.

8 422. During the hearing, Representative Rick White and Pincus had the following
9 exchange. (*See id.* at 25.) Representative White: “What would you say are the two or
10 three key changes this bill will make in our law? In other words, what changes to our
11 existing law is this treaty [the OECD Convention] going to require us to make?” Pincus:
12 “I would say the key changes are expanding our law to include officials of public
13 international organizations which, as you know, have assumed prominence, especially in
14 development matters. They are not covered under our current law, but they will be
15 covered under the amendments. The other key change is, our law now only applies to
16 U.S. domestic persons and entities, and our law would be expanded to include foreign
17 companies and foreign nationals, and that’s an important change.”

18 **H. House Deliberations As to H.R. 4353 (September 1998)**

19 423. On September 16, 1998, the Subcommittee on Finance and Hazardous
20 Materials met in open markup session and approved H.R. 4353 for full committee
21 consideration.

22 424. On September 24, 1998, the House Committee on Commerce met in open
23 markup session and ordered H.R. 4353 reported to the House.

24 **I. House Report 105-802 as to H.R. 4353 (October 8, 1998)**

25 425. The October 8, 1998, House Report contains a section titled “Background
26 and Need for Legislation.” (**Exhibit 92.**) It states as follows: “Investigations by the
27 Securities and Exchange Commission (SEC) in the mid-1970s revealed that over 400
28 U.S. companies admitted making questionable or illegal payments in excess of \$300

1 million to foreign government officials, politicians, and political parties. Many public
2 companies maintained cash ‘slush funds’ from which illegal campaign contributions were
3 being made in the United States and illegal bribes were being paid to foreign officials.
4 Scandals involving payments by U.S. companies to public officials in Japan, Italy, and
5 Mexico led to political repercussions within those countries and damaged the reputation
6 of American companies throughout the world. In the wake of these disclosures, Congress
7 enacted the Foreign Corrupt Practices Act of 1977 (the FCPA). The FCPA amended the
8 Securities Exchange Act of 1934, 15 U.S.C. Sec. 78 *et seq.*, to require issuers of publicly
9 traded securities to institute adequate accounting controls and to maintain accurate books
10 and records. Civil and criminal penalties were enacted for the failure to do so. In
11 addition, the FCPA required both issuers and all other U.S. nationals or residents, as well
12 as U.S. business entities and foreign entities with their primary place of business in the
13 United States (defined as ‘domestic concerns’) to refrain from making any unlawful
14 payments to public officials, political parties, party officials, or candidates for public
15 office, directly or through others, for the purpose of causing that person to make a
16 decision or take an action, or refrain from taking an action, for the purpose of obtaining
17 or retaining business.”

18 426. Like the Senate Report as to S. 2375, the House Report also contains a
19 detailed overview of the process that resulted in the OECD Convention. It states, in
20 pertinent part, as follows: “Beginning in 1989, the U.S. government began an effort to
21 convince our trading partners at the OECD to criminalize the bribery of foreign public
22 officials. [...] Under the OECD Convention: The U.S. and its trading partners agreed to
23 criminalize bribery of foreign public officials, including officials in all branches of
24 government, and to criminalize payments to officials of public agencies and public
25 international organizations.”

26 427. The House Report, under the heading “Section-By-Section Analysis of the
27 Legislation,” states as follows: “[H.R. 4353] implements the OECD Convention by
28 amending [the FCPA] to expand the definition of ‘foreign official’ to include an official

1 of a public international organization. *See* OECD Convention, Art. 1, 4(a). Public
2 international organizations are then defined, first, by reference to those organizations
3 designated by Executive Order pursuant to the International Organizations Immunities
4 Act (IOIA) (22 U.S.C. 288), and second, by reference to any other international
5 organization that is designated by the President for the purposes of this section. The
6 Committee intends that citizens will be given adequate notice of such designations.”

7 428. Significantly, the House Report, like the Senate Report as to S. 2375, does
8 not state that H.R. 4353 would amend the FCPA to expand the “foreign official”
9 definition to include officials of “public enterprises” – an express component of the
10 OECD Convention’s definition of “foreign public official.”

11 **J. House / Senate Deliberations (October 1998)**

12 429. On October 9, 1998, H.R. 4353 was passed by the House.

13 430. On October 14, 1998, the Senate passed S. 2375 by inserting the language
14 from H.R. 4353, but deleting Section 5 dealing with “international organizations
15 providing commercial communications services.” (**Exhibit 93.**)

16 431. On October 20, 1998, the House amended the Senate amendments to the
17 House passed version of S. 2375 (i.e., H.R. 4353). The House action “reflect[ed] the
18 compromise reached with the Senate and the administration regarding” Section 5 of H.R.
19 4353 dealing with “international organizations providing commercial communications
20 services.” (**Exhibit 94.**)

21 432. On October 21, 1998, the Senate accepted the above referenced Section 5
22 into its bill, S. 2375.

23 433. On October 22, 1998, S. 2375 was presented to President William Clinton.

24 **K. President Clinton Signs S. 2375 (November 10, 1998)**

25 434. On November 10, 1998, President William Clinton signed S. 2375. His
26 signing statement reads as follows: “It is with great pleasure that I sign today S. 2375,
27 the ‘International Anti-Bribery and Fair Competition Act of 1998.’ This Act makes
28 certain changes in existing law to implement the Convention on Combating Bribery of

1 Foreign Public Officials in International Business Transactions, which was negotiated
2 under the auspices of the Organization for Economic Cooperation and Development
3 (OECD). The Convention was signed on December 17, 1997, by the United States and
4 32 other nations. On July, 31, 1998, the Senate gave its advice and consent to ratification
5 of the Convention. With enactment of this bill, the United States is able to proceed with
6 the deposit of its instrument of ratification, and it is my hope that the Convention will
7 enter into force by the end of 1998, the target date established by OECD Ministers. The
8 United States has led the effort to curb international bribery. We have long believed
9 bribery is inconsistent with democratic values, such as good governance and the rule of
10 law. It is also contrary to basic principles of fair competition and harmful to efforts to
11 promote economic development. Since the enactment in 1977 of the Foreign Corrupt
12 Practices Act (FCPA), U.S. businesses have faced criminal penalties if they engaged in
13 business-related bribery of foreign public officials. Foreign competitors, however, did
14 not have similar restrictions and could engage in this corrupt activity without fear of
15 penalty. Moreover, some of our major trading partners have subsidized such activity by
16 permitting tax deductions for bribes paid to foreign public officials. As a result, U.S.
17 companies have had to compete on an uneven playing field, resulting in losses of
18 international contracts estimated at \$30 billion per year. The OECD Convention – which
19 represents the culmination of many years of sustained diplomatic effort – is designed to
20 change all that. Under the Convention, our major competitors will be obligated to
21 criminalize the bribery of foreign public officials in international business transactions.
22 The existing signatories already account for a large percentage of international
23 contracting, but they also plan an active outreach program to encourage other nations to
24 become parties to this important instrument. The United States intends to work
25 diligently, through the monitoring-process to be established under the OECD, to ensure
26 that the Convention is widely ratified and fully implemented. We will continue our
27 leadership in the international fight against corruption. Section 5 of S. 2375 is unrelated
28 to the Convention. However, it can be implemented in manner that advances U.S.

1 objectives for the privatization of the international satellite organizations, and does not
2 put the United States in breach of its obligations under international agreements.”

3 **(Exhibit 95.)**

4 **L. Public Law 105-366**

5 435. Public Law 105-366, the International Anti-Bribery and Fair Competition
6 Act of 1998, “amended the Securities Exchange Act of 1934 and the Foreign Corrupt
7 Practices Act of 1977 to improve the competitiveness of American business and promote
8 foreign commerce, and for other purposes.” **(Exhibit 96.)**

9 436. In pertinent part, the Act amended the FCPA’s “foreign official” definition
10 to read as follows: “The term ‘foreign official’ means any officer or employee of a
11 foreign government or any department, agency, or instrumentality thereof, or of a public
12 international organization, or any person acting in an official capacity for or on behalf of
13 any such government or department, agency, or instrumentality, or for or on behalf of any
14 such public international organization.” For purposes of the “foreign official” definition,
15 the Act stated as follows: The term “public international organization” means (i) an
16 organization that is designated by Executive order pursuant to section 1 of the
17 International Organizations Immunities Act (22 USC 288); or (ii) any other international
18 organization that is designated by the President by Executive order for the purposes of
19 this section, effective as of the date of publication of such order in the Federal Register.”

20 437. The FCPA’s definition of “foreign official” remains the same today.

21 **VII.**

22 **POST-1998-AMENDMENT LEGISLATIVE HISTORY**

23 438. Since 1998, certain bills have been introduced in Congress that have sought
24 amendments to the FCPA, although not directly as to the “foreign official” element. For
25 instance, in April 1999, Representative Henry Waxman introduced H.R. 1370, Senator
26 John McCain introduced S. 803, and Senator John Ashcroft introduced S. 797. These
27 bills sought to amend the FCPA by restricting American corporate sponsorship of the
28 International Olympic Committee (“IOC”). In August 2007, Representative Gene Green

1 introduced H.R. 3405 to prohibit an “Executive agency” from entering into a contract for
2 the procurement of goods or services with any person or entity unless that person or
3 entity certified that it and its officers, employees, and agents have not violated the
4 FCPA’s anti-bribery provisions. Representative Green also introduced a similar bill,
5 H.R. 5837, in July 2010. In June 2008, Representative Edward Perlmutter introduced
6 H.R. 6188, and in April 2008, Representative Perlmutter introduced H.R. 2152,
7 substantively identical bills, authorizing certain private rights of action under the FCPA
8 for anti-bribery violations by foreign concerns that damage domestic businesses.

9 **A. H.R. 5366**

10 439. In May 2010, Representative Peter Welch introduced H.R. 5366, the
11 “Overseas Contractor Reform Act,” a bill providing that any person “found to be in
12 violation” of the FCPA’s anti-bribery provisions “shall be proposed for debarment from
13 any contract or grant awarded by the Federal Government” within 30 days after a final
14 judgment of such violation, unless such a proposal for debarment is waived by a Federal
15 agency. (**Exhibit 97.**) H.R. 5366 was referred to the House Committee on Oversight and
16 Government Reform.

17 **B. House Report No. 111-588 as to H.R. 5366 (September 14, 2010)**

18 440. On September 14, 2010, H.R. 5366 was reported by the House Committee
19 on Oversight and Government Reform to the full House. (**Exhibit 98.**)

20 441. Under the heading “Background and Need for Legislation” the Report states
21 as follows. “Federal government contractors have used bribes in the past to influence the
22 actions of foreign governments.” (*Id.* at 2.)

23 442. On September 15, 2010, H.R. 5366 passed the House and the bill was
24 referred to the Senate Committee on Homeland Security and Governmental Affairs.
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1 **C. Hearing Before the Subcommittee on Crime and Drugs of the Judiciary**
2 **Committee, Senate, 111th Congress, Second Session (November 30,**
3 **2010) (the “Examining Enforcement of the Foreign Corrupt Practices**
4 **Act” hearing)**

4 443. On November 30, 2010, the Judiciary Committee’s Subcommittee on Crime
5 and Drugs held a hearing titled “Examining Enforcement of the Foreign Corrupt Practices
6 Act.” (**Exhibit 99.**)

7 444. During the hearing, Senator Amy Klobuchar, a former prosecutor, stated as
8 follows: “[O]ne of the basic principles of due process is that people and companies have
9 to be able to know what the law is in order to comply with it and I will tell you I have
10 heard from many very good standing companies in my state that they do not always know
11 what behavior will trigger an enforcement action. As we know the goal is not just to
12 punish bad actors after a violation is committed but rather to prohibit actions from
13 happening in the first place.”

14 445. I was one of the witnesses to testify at the hearing. In both my oral
15 testimony and prepared statement (**Exhibit 100.**) I noted, as set forth in this declaration,
16 that the DOJ’s interpretation of the “foreign official” element to include employees of
17 alleged SOEs is contrary to the intent of Congress in enacting the FCPA.

18 446. Andrew Weissmann (Jenner & Block and the former Director of the DOJ’s
19 Enron Task Force) also testified at the hearing. In his prepared statement, Weissmann
20 noted that the “FCPA is ripe for much needed clarification and reform through
21 improvements to the existing statute.” (**Exhibit 101** at 4.) Among other things,
22 Weissmann stated that an “ambiguity in the FCPA that requires clarity is the definition of
23 “foreign official” in the anti-bribery provisions.” (*Id.* at 8.) He stated as follows: “The
24 DOJ and SEC have provided no specific guidance on what sorts of entities they believe
25 qualify as ‘instrumentalities’ under the FCPA. However, their enforcement of the statute
26 makes it clear that they interpret the term extremely broadly, and that this interpretation
27 sweeps in payments to companies that are state-owned or state-controlled.” (*Id.* at 9.)
28 Weissmann stated “although the government’s expansive interpretation of

1 'instrumentality' has not yet been tested in the courts and is unlikely to be tested in the
2 near future, this interpretation has served as a component in the majority of current FCPA
3 enforcement actions," and he specifically cited this case. (*Id.*). Weissmann further stated
4 as follows: "Taken to its logical conclusion, the government's position means that – if
5 the United States were a foreign government – employees of General Motors or AIG
6 could be considered 'foreign officials' of the United States government, because the
7 government owns portions of the company; so could employees of Bloomberg Media,
8 85% of which is owned by a government official (the Mayor of New York City, Mike
9 Bloomberg)." (*Id.* at 10.)

10 447. Michael Volkov (Mayer Brown) also testified at the hearing. In response to
11 a question from Senator Klobuchar, Volkov noted that all of his clients doing business in
12 China assume that everyone they deal with is a "foreign official" because they work for
13 an SOE. Volkov then stated, "I don't think that was the intent when the FCPA was
14 passed."

15 448. During the hearing, Senator Christopher Coons stated as follows. "I would
16 welcome an opportunity to work with the Committee on potential amendments to the
17 [FCPA] that would allow clarification of the definition of foreign official...."

18 I declare under penalty of perjury under the laws of the United States of America
19 that the foregoing is true and correct and that I executed this Declaration on February 21,
20 2011, at Indianapolis, Indiana.

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22 
23 _____
24 Professor Michael J. Koehler
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CERTIFICATE OF SERVICE

I hereby certify that on February 21, 2011, I electronically filed the foregoing **DECLARATION OF PROFESSOR MICHAEL J. KOEHLER IN SUPPORT OF DEFENDANTS’ MOTION TO DISMISS COUNTS ONE THROUGH TEN OF THE INDICTMENT** with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to the following:

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/s/Nicola T. Hanna
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