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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

STUART CARSON, et al.,

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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I, Michael J. Koehler, declare as follows:

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

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

I.
BACKGROUND AND ISSUE CONSIDERED

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

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

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

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

6. The FCPA does not define "department," "agency," or "instrumentality."

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

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

Procurement Managers, and Purchasing Officers, were 'foreign officials' within the meaning of the FCPA." (Indictment ¶ 12.)

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

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

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

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

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

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

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

II.
OVERVIEW OF OBSERVATIONS

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

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

However, there are several statements, events, and information in the FCPA's legislative history that demonstrate that Congress did not intend the "foreign official" definition to include employees of SOEs. These statements, events, and

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

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

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

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

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

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

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

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

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

17. Congress amended the FCPA in both 1988 and 1998, including the definition of "foreign official." In 1988, Congress removed the following sentence from the original definition of "foreign official" – "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" – and created an *express* facilitating payment exception for "routine governmental action." *See, e.g.*, ¶¶ 380-383, *infra*. In 1998, Congress amended the definition of "foreign official" to include officials of "public international organizations" following adoption of the Organization for Economic Cooperation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("OECD Convention"). *See, e.g.*, ¶¶ 435-37, *infra*. However, Congress did not amend the FCPA to include officials of "public enterprises," a term that was included (and defined) in the OECD Convention. *See, e.g.*, ¶¶ 385-89, 407, 428, *infra*.

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

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

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

III.
STRUCTURE OF DECLARATION

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

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

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

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

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

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

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

25. 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. These bills, either stand-alone bills or specific titles or sections of omnibus export or trade bills, included proposed amendments to the FCPA's "foreign official" definition. In 1988, the FCPA was amended in Title V of an omnibus trade act (Public Law 100-418), resulting from the passage and signing of **H.R. 4848**. Among other things, the 1988 amendments amended the FCPA's "foreign official" definition by removing the "ministerial or clerical" language from the original "foreign official" definition and creating an express facilitating payment exception for "routine governmental action." This declaration provides an overview of this post-enactment legislative history, including a summary of the various bills, Congressional hearings, and Senate and House Reports resulting in the 1988 amendments to the FCPA signed by President Ronald Reagan.

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

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

IV.
LEGISLATIVE HISTORY RELEVANT TO ENACTMENT OF THE FCPA IN 1977

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

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

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

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

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

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

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

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

31. On June 5, 1975, the House of Representatives, Committee on International Relations, Subcommittee on International Economic Policy, held hearings on "The Activities of American Multinational Corporations Abroad." (**Exhibit 4**.) Representative Robert N.C. Nix chaired the subcommittee and opened the hearings with the following statement: "During the last few weeks, charges that American corporations have maintained secret funds for the payment of gratuities to foreign government and 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

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

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

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

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

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

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

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

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

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

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

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

further alleged to have agreed to pay an additional $1.25 million the following spring." (*Id*. at 37, emphasis in original.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

F. Hearings Before the Subcommittee on International Trade of the Committee on Finance, United States Senate, 94th Congress, First Session (October 6, 1975) (the "Trade Abroad Hearings")

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

71. S. 3150 did not define the term "foreign government." S. 3150 was referred to the Senate Committee on Finance.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

O. Report of the Securities and Exchange Commission on Questionable and Illegal Corporate Payments and Practices (May 12, 1976) (the "SEC Report")

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

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

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

96. The SEC Report details the SEC's "enforcement efforts that produced the information set forth in the Exhibits." (*Id*. at 2.) The SEC Report explains as follows: "In 1973, as a result of the work of the Office of the Special Prosecutor, several corporations and executive officers were charged with using corporate funds for illegal domestic political contributions. The Commission recognized that these activities 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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

106. Senator Proxmire began the hearing by noting that "last week, the Commission provided the Banking Committee with the SEC's first comprehensive report on the corporate bribery scandal…." (*Id*. at 1.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ethical and in some cases legal standards of both the United States and foreign countries." (*Id*. at 40-41.)

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

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

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

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

U. President Ford's Remarks Regarding Questionable Corporate Payments Abroad (June 14, 1976)

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

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

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

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

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

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

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

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

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

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

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

132. S. 3664 did not define the terms "foreign government" or "instrumentality."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

AA. Secretary Richardson's Statement on the Proposed Foreign Payments Disclosure Act (August 3, 1976)

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

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

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

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

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

149. On August 6, 1976, Senator Warren Magnuson introduced S. 3741. (**Exhibit 32**.) S. 3741, based on the Ford Administration proposal described above, provided that "a person" shall report to the Secretary of Commerce "payments hereafter made on behalf of the person or the person's foreign affiliate to any other individual or entity in connection with an official action, or sale to or contract with a foreign government, for the commercial benefit of the person or his foreign affiliate."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

GG. 1976 Elections

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

181. H.R. 3815 defined "foreign official" to mean "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 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 ministerial or clerical." (*Id.*)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

196. On April 20 and 21, 1977, the House Subcommittee on Consumer Protection and Finance of the House Committee on Interstate and Foreign Commerce held hearings on H.R. 3815 and H.R. 1602 titled "Unlawful Corporate Payments Act of 1977." (**Exhibit 42**.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

242. This last sentence of the above referenced House Report excerpt (regarding the "[s]ectors of industry typically involved") is nearly identical to statements made by: (i) Representative Eckhardt on April 20, 1977 in opening hearings of the House Subcommittee on Consumer Protection and Finance on H.R. 3815 and H.R. 1602; (ii) Dr. Adams at the same hearing in describing the findings of CEP's analysis; and (iii) Representative Eckhardt on September 7, 1977 during the Corporate Business Practices Hearings. In all three instances, it is clear from the context of these statements, that

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

254. During floor debate, Representative James Broyhill asked Representative Eckhardt about the definition of "foreign official" contained in H.R. 3815 – specifically, the portion of the definition which states: "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." (*Id.* at 36306.) Representative Broyhill asked: "What the gentlemen [Representative Eckhardt] is saying is that it may be permissible to make a facilitating payment to a clerk for the purpose of getting goods off a dock, as long as the payment is to a person who spends most of his time performing so-called ministerial functions." (*Id.*) Representative Eckhardt responded as follows: "That is right. And I think the gentlemen [Representative Broyhill] should note that the exclusion is as to the person involved, rather than as to the act. So if a person's duties are essentially ministerial and clerical, the payment to him to do something like move goods off the dock, which he was probably under a ministerial duty to do anyway, would not constitute a bribe, because that person has no authority to do other than essentially ministerial and clerical duties. It may be that he has chosen not to do them, and in that sense his activity is by his volition. But the test is whether or not what he should do, that is, the duties assigned to him, are essentially ministerial and clerical. Payments to him,

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

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

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

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

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

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

SS. Conference Report

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

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

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

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

262. The text of the bill set forth in the Conference Report defined "foreign official" to mean "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 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." (*Id*.)

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

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

265. The Joint Explanatory Statement notes that the "Senate bill established the title … as the 'Foreign Corrupt Practices Act of 1977,'" the "House amendment established the title … as the 'Unlawful Corporate Payments Act of 1977,'" and the "House receded to the Senate." (*Id*. at 10.)

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

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

267. The Joint Explanatory Statement notes that the "Senate Bill contained no definitional section" whereas the House amendment defined the term "foreign official." (*Id*.) The Joint Explanatory Statement states: "[F]oreign official' was defined to mean 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 such government, department, agency, or instrumentality. The term did not include employees whose duties were primarily ministerial or clerical." (*Id*.) The Joint Explanatory Statement then states: "The Senate receded to the House." (*Id*.)

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

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

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

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

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

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

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

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

275. Representative Eckhardt also spoke on the House Floor. His statement begins as follows: "Mr. Speaker, the conference report before us today is one of the more important pieces of legislation to be considered by the Congress this year. It is legislation designed to prohibit bribery by U.S. companies of officials of foreign governments and is in response to recent disclosures by a large number of American companies of having paid over $300 million in corporate funds to foreign officials. While some funds were given simply for the privilege of doing business in a particular foreign country, other funds were given for the purpose of improperly obtaining business and influencing the decisions of foreign governments. The disclosure of these payments has tarnished the reputation of American business in the international community, and has created serious repercussions for the governments of a number of foreign countries." (*Id*.) Representative Eckhardt further stated that the "focal point of the legislation is the provision which would make it unlawful for any U.S. company to use the means of interstate commerce in furtherance of an offer, payment, promise to pay, or authorization of payment of anything of value directly or indirectly to any foreign official, foreign political party, or candidate for foreign political office. The purpose of the payment must be to influence any act or decision of a foreign government official or to induce such official to use his influence to affect a government act or decision so as to assist U.S. companies in obtaining, retaining, or directing business to any person." (*Id*. at 38778-79.)

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

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

TT. President Carter Signs S. 305

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

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

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

inducing such foreign official to use his influence with a foreign government or instrumentality therefore to affect or influence any act or decision of such government or instrumentality, in order to assist such issuer [or domestic concern] in obtaining or retaining business for or with, or directing business to, any person; (2) any foreign political party or official thereof or any candidate for foreign political office for purposes of – (A) influencing any act or decision of such party, official, or candidate in its or his official capacity, including a decision to fail to perform its or his official functions; or (B) inducing such party, official, or candidate to use its or his influence with a foreign government or instrumentality therefore to act or influence any act or decision of such government or instrumentality, in order to assist such issuer [or domestic concern] in obtaining or retaining business for or with, or directing business to, any person; or (3) any person, while knowing or having reason to know that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office, for purposes of (A) influencing any act or decision of such foreign official, political party, party official, or candidate in his or its official capacity, including a decision to fail to perform his or its official functions; or (B) inducing such foreign official, political party, party official, or candidate to use his or its influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality, in order to assist such issuer [or domestic concern] in obtaining or retaining business for or with, or directing business to, any person." (**Exhibit 56**.)

280. The Foreign Corrupt Practices Act of 1977 defined "foreign official" to mean "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 such government or department, agency or instrumentality. Such terms does not include any employee of a foreign government or any department, agency, or instrumentality thereof whose duties are essentially ministerial or clerical." (*Id.*)

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

"foreign official" definition and the creation of an express facilitating payment exception for "routine governmental action."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

301. Robert Eckhardt, described as "the principal author of the [FCPA] when it was offered, at least in the House of Representatives," testified at the hearing as to the circumstances that led to passage of the FCPA. Eckhardt, no longer a member of 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

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

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

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

304. During the hearing, Representative Wirth provided his understanding of the FCPA's "foreign official" definition. He stated as follows: "[T]he definition of the term 'foreign official' states '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 such government or department, agency, or instrumentality.' In other words, somebody acting on behalf of the government." (*Id.* at 109.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

that it should be changed. There are problems and areas where clarification is needed." (**Exhibit 66** at 1.)

319. William Brock (U.S. Trade Representative) testified at the hearing, and his testimony best captures the concern with the FCPA's then existing "foreign official" definition. He stated as follows. "The lack of clarity in drafting is most apparent in the case of so-called grease payments. Congress exempted the grease payments from the present act based upon the pragmatic realization that they are an unavoidable aspect of international commerce. The problem is that instead of describing the type and purpose of payments allowed under the statute, Congress defined the exemption by excluding low-level officials performing ministerial or clerical duties from the definition of foreign official. Thus, the exemption is buried in the act and gives no useful guidance to the average businessperson as to what is ministerial and what is not. It is difficult enough to deal with varieties of cultural practices and customs involved in international commerce, without having to deal with the added burden of trying to figure out what U.S. law means. In countries where many governmental officials and sales agents belong to the same family and where Government officials have a wide range of duties, the problem is even more complex. We have the responsibility to paint a bright line for our firms to follow so that they know exactly what Congress intended that they can and cannot do." (*Id.* at 20-21.)

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

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

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

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

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

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

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

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

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

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

326. On June 10, 1986, the Senate Committee on Banking, Housing, and Urban Affairs held hearings on S. 430. (**Exhibit 68**.) In opening the hearing, Senator Heinz noted that it is "with a distinct sense of déjà vu" that the Committee was once again turning attention "to the problems" of the FCPA. (*Id.* at 1.) As to the prior efforts to amend the FCPA discussed above, Senator Heinz stated as follows: "The recognition of these problems [with the FCPA] within the U.S. Government is not new. Both the Carter and Reagan administrations have supported changes in the Foreign Corrupt Practices Act. But despite the reporting of legislation by the Banking Committee with bipartisan support in both 1981 and then again in 1983 and Senate passage in 1981, the Congress has never succeeded in fixing the problems with the FCPA." (*Id.*) Senator Heinz stated that the "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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

341. H.R. 4389 sought to incorporate certain amendments being considered in the 99th Congress to the FCPA's anti-bribery provisions into the Export Administration Act of 1979. Those amendments would ultimately become the FCPA's affirmative defenses and facilitating payment exception by removing the "ministerial or clerical" language

from the "foreign official" definition and creating an express facilitating payment exception.

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

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

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

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

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

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

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

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

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

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

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

R. Various Bills in the 100th Congress

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

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

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

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

354. In addition to S. 539 and H.R. 1155, several other related bills were also introduced in the Senate or the House during the 100th Congress. See S. 636 (**Exhibit 76**), S. 651 (**Exhibit 77**), and H.R. 1493 (**Exhibit 78**). These bills were either stand-alone bills or specific titles or sections to omnibus export and trade bills. Like the bills referenced above from the 96th, 97th , 98th and 99th Congresses that sought to amend the FCPA, these other bills also contained a "Findings and Conclusions" section which stated as follows: "The Congress finds that … the enactment of the Foreign Corrupt Practices Act of 1977 was a positive and significant step toward the important objective of

prohibiting bribery of foreign government officials by United States companies in order to obtain, retain, or direct business."

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

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

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

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

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

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

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

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

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

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

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

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

363. Under the heading "Overview," Senate Report 100-85 states as follows: "Title VII of the bill makes amendments to the Foreign Corrupt Practices Act of 1977, which was enacted to prevent U.S. corporations from using bribery of foreign officials as a means of obtaining or retaining business abroad. The Committee's amendments clarify certain ambiguities in the present statute which have caused concerns among U.S. businessmen without changing the basic intent or effectiveness of the law." (*Id.* at 6.)

364. Under the heading "Purposes of the Legislation," the Report states as to Title VII as follows: "The question before the Congress in 1977 was whether it should permit some dishonest corporations to harm U.S. foreign policy interests in their zeal for sales and profits. It answered 'No' unanimously. It was the view of Congress that bribes are bad business because they distort free markets. Goods should be sold on the basis of price, quality, and service, not on the basis of bribes. It was also the view of Congress that a strong antibribery statute could help U.S. corporations resist corrupt demands, and that bribes undermined confidence in America's integrity, corrupted other governments, and created severe foreign policy problems for the United States. Congress, in 1977, found that bribes were illegal in most countries and were not necessary to do business abroad. So the assertion that bribes were a way of life in some countries did not mean the people in those countries wanted such behavior to be the norm. Just as Americans do not want foreign corporations bribing our officials so do people in other countries resent the use of bribery for foreign corporations in their countries. The amendments to the FCPA in this title do not change Congress' previous conclusions about the need to prohibit corporate bribery as a means to win sales." (*Id.* at 46-47.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

377. The bills defined "foreign official" 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."

378. The bills express facilitating exception for "routine governmental action" stated as follows: "[The FCPA's anti-bribery provisions] shall not apply to any facilitating or expediting payment to a foreign official, political party, or party official the

purpose of which is to expedite or to secure the performance of routine governmental action by a foreign official, political party, or party official."

379. On July 13, 1988, H.R. 4848 passed the House, and on August 3, 1988, it passed the Senate. On August 11, 1988, H.R. 4848 was presented to President Ronald Reagan. On August 23, 1988, President Reagan signed H.R. 4848. President Reagan's signing statement did not address the FCPA amendments contained in H.R. 4848. (**Exhibit 83**.)

W. Public Law 100-418 (1988)

380. Public Law 100-418, the Omnibus Trade and Competitiveness Act of 1988, contained Title V, Subtitle A, Part I, the "Foreign Corrupt Practices Act Amendments." (**Exhibit 84**.)

381. In pertinent part, the Act amended the FCPA's "foreign official" definition by removing the "ministerial or clerical" language from the original "foreign official" definition and creating an express facilitating payment exception for "routine government action."

382. The Act defined "foreign official" 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." (*Id*. at Section 5003.)

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

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

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

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

B. DOJ Transmittal Letters (May 4, 1998)

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

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

392. The letters continued as follows: "The OECD Convention calls on all parties to make it a criminal offense '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.' It further calls on all parties to exert territorial jurisdiction broadly and, where consistent with national legal and constitutional principles, nationality jurisdiction."

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

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

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

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

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

397. As to the FCPA's "foreign official" definition, the legislative history relevant to the FCPA's 1998 amendments demonstrates only that the 105th Congress intended to amend the "foreign official" definition by expanding it to include the OECD's concept of "public international organizations."

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

further expand the "foreign official" definition to include employees of "public enterprises" as found in the OECD Convention's definition of "foreign public official."

C. S. 2375 (July 30, 1998)

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

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

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

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

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

the Foreign Corrupt Practices Act of 1977 (the 'FCPA'). Through this Act, the United States declared its policy that American companies should act ethically in bidding for foreign contracts and should act in accordance with the U.S. policy of encouraging the development of democratic institutions and honest, transparent business practices.… [T]he FCPA required both issuers and all other U.S. nationals and companies (defined as 'domestic concerns') to refrain from making any unlawful payments to public officials, political parties, party officials, or candidates for public office, directly or through others, for the purpose of causing that person to make a decision or take an action, or refrain from taking an action, for the purpose of obtaining or retaining business." (**Exhibit 89**.)

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

404. The Senate Report continues as follows: "The OECD Convention calls on all parties to make it a criminal offense '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.' It further calls on all parties to assert territorial jurisdiction broadly and, where consistent with national legal and constitutional principles, to assert nationality jurisdiction. This Act amends the FCPA to conform it to the requirements of and to implement the OECD Convention. First, the FCPA currently criminalizes payments made to influence any decision of a foreign official or to induce him to do or omit to do any act.

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

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

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

407. Significantly, the Senate Report does not state that S. 2375 sought to amend the FCPA to expand the "foreign official" definition to include officials of "public enterprises" – an express component of the OECD Convention's definition of "foreign public official."

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

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

409. Among other changes to the FCPA, H.R. 4353 sought to amend the "foreign official" definition by adding the term "public international organization." However, H.R. 4353's "foreign official" definition was not identical to the "foreign official" definition in S. 2375.

410. The "foreign official" definition in H.R. 4353 was as follows: "The term 'foreign official' means any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

427. The House Report, under the heading "Section-By-Section Analysis of the Legislation," states as follows: "[H.R. 4353] implements the OECD Convention by amending [the FCPA] to expand the definition of `foreign official' to include an official

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

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

J. House / Senate Deliberations (October 1998)

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

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

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

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

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

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

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

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

objectives for the privatization of the international satellite organizations, and does not put the United States in breach of its obligations under international agreements." (**Exhibit 95**.)

L. Public Law 105-366

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

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

437. The FCPA's definition of "foreign official" remains the same today.

VII.
POST-1998-AMENDMENT LEGISLATIVE HISTORY

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

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

A. H.R. 5366

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

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

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

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

442. On September 15, 2010, H.R. 5366 passed the House and the bill was referred to the Senate Committee on Homeland Security and Governmental Affairs.

C. Hearing Before the Subcommittee on Crime and Drugs of the Judiciary Committee, Senate, 111th Congress, Second Session (November 30, 2010) (the "Examining Enforcement of the Foreign Corrupt Practices Act" hearing)

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

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

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

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

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

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

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

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

Professor Michael J. Koehler

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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