Attorney Liability Under the Foreign Corrupt Practices Act: Legal and Ethical Challenges and Solutions

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I. INTRODUCTION ........................................................................256
II. THE FOREIGN CORRUPT PRACTICES ACT ............................257
   A. Background of the FCPA..............................................257
   B. Legislative History.....................................................258
   C. Provisions of the FCPA...............................................259
      1. The Anti-Bribery Provisions...............................259
      2. Accounting Provisions.........................................262
      3. Exceptions and Affirmative Defenses to the FCPA........265
      4. Penalties for Violations of the FCPA....................266
III. ETHICAL CHALLENGES UNDER THE FCPA ..............267
    A. The FCPA and the ABA Model Rules of Professional Conduct........267
    B. In-House Counsel...................................................273
    C. Ethical Challenges for Attorneys—Hypothetical Situations........275
IV. GOVERNMENT REGULATION OF ATTORNEYS 
    UNDER THE FCPA ....................................................278
    A. SEC Regulation of Attorneys......................................278
       1. Rule 102(e) Proceedings.....................................278

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I. INTRODUCTION

The Foreign Corrupt Practices Act ("FCPA") was signed into law in December of 1977. It was enacted in response to several corporate scandals, much like the Sarbanes-Oxley Act of 2002 ("SOX"). The corporate bribery scandals during the 1970s shook public confidence in American corporations. Following inquiries

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4. Pamela J. Jadwin, Foreign Corrupt Practices Act, 31 AM. CRIM. L. REV. 677, 678 (1994). An example of corruption that the FCPA was enacted to curtail was a $1.4 million bribe that Lockheed gave to the Prime Minister of Japan; this bribe resulted in the conviction and imprisonment of the Japanese Prime Minister. Id. at 677 n.3. Also, "payments by Lockheed, Exxon, Mobil, Gulf, and other corporations to the Italian Government caused the Italian President to resign and strained United States relations with Italy . . . ." Laura E.
by both the United States Senate and the Securities Exchange Commission ("SEC"), Congress, concerned that the disclosure of these dishonest corporate practices would seriously undermine public confidence in the American business community, enacted the FCPA.  

This Article examines legal and ethical challenges attorneys face when counseling clients on the FCPA and makes suggestions on how to overcome those challenges. It also analyzes legal challenges for attorneys representing clients in FCPA actions brought by the SEC and the U.S. Department of Justice ("DOJ"), and proposes solutions and ideas to circumvent these challenges. This article also examines private remedies available for violations of the FCPA. In a world in which more and more U.S. businesses and corporations engage in cross-border transactions, attorneys must be mindful of the legal and ethical challenges arising from counseling clients on the FCPA.

II. THE FOREIGN CORRUPT PRACTICES ACT

A. Background of the FCPA

During the 1970's, the Office of the Watergate Special Prosecutor, while conducting investigations into the financial dealings behind the Watergate Scandal, found a widespread practice by U.S. companies of secretly using corporate money to bribe foreign officials to obtain business in different countries.  

These discoveries embarrassed the United States and threatened foreign relations. Politicians found that this practice would tarnish the reputation of


7. Longobardi, *supra* note 4, at 433. For example, “[P]ayments by Lockheed to the Prime Minister of Japan, forced his resignation and chilled relations between the two countries. Reports that Lockheed had paid Prince Bernhardt of the Netherlands one million dollars compelled him to relinquish his official functions.” *Id.* (citations omitted). The extensive media coverage of these events led the SEC to investigate a number of companies and institute a voluntary disclosure program. *Id.*
U.S. businesses around the world.\(^8\) Congress designed the FCPA as a "strong anti-bribery law urgently needed to bring these corrupt practices to a halt and to restore public confidence in the integrity of the American business system."\(^9\) This situation is analogous to the implementation of SOX to boost the confidence of investors and the American public after scandals such as Enron and WorldCom.\(^10\) Both measures can be seen as reactionary rather than preventive, even though they were created to deter this same type of conduct in the future.\(^11\)

B. Legislative History

Since its enactment in 1977, the FCPA has been amended three times.\(^12\) In the 1988 amendment, Congress made the mens rea requirement stricter\(^13\) and clarified the meaning of some of the original FCPA provisions, most notably the meaning of "retaining or obtaining business" under the statute.\(^14\) The 1988 amendment also added several affirmative defenses, including "lawful payment" and "reasonable and bona fide expenditure" defenses.\(^15\) The

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11. Congress's urgency in passing the FCPA is illustrated by the Senate reports leading to the passage of the Act. One of the reports states that "[c]orporate bribery is bad business" and also "[i]n our free market system it is basic that the sale of products should take place on the basis of price, quality, and service." These reports clearly show why the FCPA was desperately needed to curb corporate bribery and also restore the confidence of investors in America and abroad. S. REP. No. 95-114, at 4.
14. Id.
15. Juscelino F. Colares, The Evolving Domestic and International Law Against Foreign Corruption: Some New and Old Dilemmas Facing the Interna-
Foreign Corrupt Practices Act defenses and other statutory provisions will be discussed in greater detail later in this Article.\textsuperscript{16} The 1998 amendment also added 15 U.S.C. § 78dd-3, which expanded the scope of the FCPA to include foreign citizens and businesses “while in the territory of the United States.”\textsuperscript{17}

\section*{C. Provisions of the FCPA}

The FCPA has two types of enforcement mechanisms. These include the “anti-bribery provisions” and the “accounting and record-keeping provisions.”\textsuperscript{18} The FCPA’s anti-bribery and record-keeping provisions are different in their application and scope, but both comprise integral parts of the FCPA.\textsuperscript{19}

\subsection*{1. The Anti-Bribery Provisions}

The first mechanism, the anti-bribery provisions, was created “to prevent United States corporations from bribing foreign officials.”\textsuperscript{20} They prohibit “any promise, offer, or payment of anything of value if the offeror ‘knows’ that any portion will be offered, given, or promised to a foreign official, foreign political party, or candidate for public office for the purpose of influencing a governmental decision,”\textsuperscript{21} or “to assist in obtaining or retaining business.”\textsuperscript{22}

The FCPA’s anti-bribery provisions\textsuperscript{23} prohibit certain “corrupt” payments to foreign officials.\textsuperscript{24} The “corruptly” language is

\textit{tional Lawyer}, 5 Wash. U. Global Stud. L. Rev. 1, 6 (2006); see also 1998 Amendment.


20. Longobardi, \textit{supra} note 4, at 435.


24. David A. Gantz, \textit{The Foreign Corrupt Practices Act: Professional and Ethical Challenges for Lawyers}, 14 Ariz. J. Int’l & Comp. L. 97 (1997). The sections all contain basically the same language prohibiting “corrupt” payments to foreign officials, but each section applies to a different class of persons,
one of the most ambiguous terms in the FCPA.\textsuperscript{25} It presents many problems for attorneys counseling clients on the scope and application of the FCPA because the term "corruptly" is not specifically defined in the FCPA, although the legislative history of the Act provides some guidance.\textsuperscript{26} The legislative history signifies that Congress viewed the term "corruptly" as meaning an action that was done with a bad intent.\textsuperscript{27} The legislative history also indicates that "corruptly" connotes an evil motive and purpose.\textsuperscript{28}

The leading case that examines the meaning of "corruptly" under the FCPA is \textit{United States v. Liebo}.\textsuperscript{29} The \textit{Liebo} case involved an American arms dealer that was convicted of violating the FCPA by giving a Nigerien official airline tickets for his honeymoon.\textsuperscript{30} There was evidence that these tickets were given to obtain business and were also given "corruptly."\textsuperscript{31} The Eighth Circuit found the jury was properly instructed on the term "corruptly" as follows: "the offer, promise to pay, payment or authorization of payment, must be intended to induce the recipient to misuse his

\begin{thebibliography}{299}
    \bibitem{27} Id.
    \bibitem{28} See H.R. Rep. No. 100-576, at 918 (1988) (Conf. Rep.) ("The House receded to an amended Senate provision which would prohibit payments to any foreign official for the purpose of ‘influencing any act or decision of such foreign official in his official capacity, or inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official.’ This language conforms to the domestic bribery standard found at 18 U.S.C. § 201."). Congress, in a 1977 House Report, stated the word “corruptly” in the FCPA is intended to have the same meaning as in 18 U.S.C. § 201, which is the federal statute that criminalizes the bribery of a federal official. See H.R. REP. NO. 95-640 (1977) (Conf. Rep.); 18 U.S.C. § 201(b) (2006).
    \bibitem{29} United States v. Liebo, 923 F.2d 1308 (8th Cir. 1991).
    \bibitem{30} Id.
    \bibitem{31} Id. The evidence included the close relationship between the parties involved in the bribery scheme and the fact that the defendant, Liebo, classified the airline ticket for accounting purposes as a “commission payment.” Id. at 1312.
\end{thebibliography}
official position or to influence someone else to do so,” and that “an act is ‘corruptly’ done if done voluntarily [a]nd intentionally, and with a bad purpose of accomplishing either an unlawful end or result, or a lawful end or result by some unlawful method or means.”

The FCPA prohibits U.S. corporations from making corrupt payments to foreign officials. The definition of a foreign official is broad and is explicit as to who is a foreign official and who is not. The term is not limited by status level; the FCPA covers local as well as national government officials, including military officials.

Furthermore, the FCPA prohibits payments when the offeror “knows” the payment is made to influence a governmental decision. According to the FCPA definition, a person’s state of mind is “knowing” in respect to conduct when that person knows or has a firm belief that he or she is making an improper payment to influence a foreign official to secure an improper advantage. The knowing standard, as seen from the legislative history, is very broad and does not necessarily require “actual” knowledge. Additionally, the FCPA shows that “willful blindness” will suffice for the knowledge requirement, but recklessness alone does not. Even though “knowing” is defined in the FCPA, it can still lead to many legal and ethical challenges for attorneys. A critical question for courts in deciding whether a person has violated the FCPA is when does a person “know” that the payment will be made for such a purpose. It is also worth noting that the determination of “knowing” will be made in hindsight.

32. Id.
33. Longobardi, supra note 4, at 435. Foreign officials include “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.” 15 U.S.C. § 78dd-l(f)(1)(A) (2006).
34. Gantz, supra note 24, at 107.
37. Gantz, supra note 24, at 108.
38. When passing the 1998 Amendments to the FCPA, Congress eliminated the “reason to know” language and replaced it with a “knowing” standard. See H.R. REP. NO. 100-576 (1988) (Conf. Rep.). As stated in the House Report,
As another grey area in the statute's provisions, the FCPA prohibits corrupt payments made to assist in "obtaining" or "retaining" business. This prong states that there can only be a violation of the FCPA if the payment is made to obtain or retain business that would otherwise not have been available. This language is commonly referred to as the "business-purpose test." This title can be misleading, however, because in reality the business-purpose test is very broad. For example, in United States v. Kay, the Fifth Circuit found that the business-purpose test applies to obtaining favorable tax rulings and other favorable legislation and regulation. The Court stated that the FCPA's "prohibition against payments to foreign officials to obtain or retain business was sufficiently broad to include bribes meant to affect administration of revenue laws."

2. Accounting Provisions

The second mechanism consists of "accounting and record-keeping provisions." These provisions place an obligation on publicly traded companies to maintain proper records and also maintain an internal system of controls to properly monitor the record-keeping obligation. The requirements of the accounting provisions are not as widely applicable as the anti-bribery provisions, as they only apply to issuers registered under the Securities Exchange Act of 1934 or to issuers required to file reports under 15 U.S.C. § 78o(d).
The accounting provisions of the FCPA were discussed first in SEC v. World-Wide Coin Inv., Ltd. The court's opinion noted "the more significant addition of the FCPA is the accounting controls... provision, which gives the SEC authority over the entire financial management and reporting requirements of publicly held United States Corporations." In World-Wide Coin, the company had absolutely no internal accounting controls. Thus, the court held that the company violated the FCPA's accounting and booking keeping provisions.

As reflected in World-Wide Coin, the accounting provisions of the FCPA mandate record-keeping and disclosure requirements. Issuers must make and keep books, records, and accounts...

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49. Miller, supra note 17, § 2.
51. Id. at 746. World-Wide Coin also enumerated three basic objectives of the accounting provisions of the FCPA. The objectives state that: (1) "books and records should reflect transactions in conformity with accepted methods of reporting economic events;" (2) "misrepresentations, concealment, falsification, circumvention, and other deliberate acts resulting in inaccurate financial books and records are unlawful;" and (3) "transactions should be properly reflected on books and records in such a manner as to permit the preparation of financial statements in conformity with GAAP..." Id. at 748. These objectives reflect the urgent need for transparency lawmakers desired in the marketplace at the time of the enactment of the FCPA.
52. Id. at 752. To illustrate, the court stated, "All employees had access to presigned checks and there were no dollar amount limitations on employees' authority to write checks. Approximately $1.7 million in checks were written to the CEO, his affiliates, or cash without supporting documentation about their purpose." Id.
53. Id.
54. See Jadwin, supra note 4. The statute provides:
(2) Every issuer which has a class of securities registered pursuant to section 78l of this title and every issuer which is required to file reports pursuant to section 78o(d) of this title shall--
(A) make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer;
(B) devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that--
(i) transactions are executed in accordance with management's general or specific authorization;
which in reasonable detail account for the transactions of the issuer.55 They must also devise and maintain an internal system of control to monitor record keeping and to ensure transactions are authorized and recorded by the issuer in a manner that complies with generally accepted accounting principles ("GAAP").56 These provisions are mandated to maintain accountability for the disposition of assets and transactions of issuers.

The FCPA also contains limits on the liability of issuers under this section.57 For an issuer to be liable under the accounting provisions of the FCPA, the issuer must have acted "knowingly."58 In United States v. Jensen,59 the court considered whether willful conduct sufficed to fulfill this requirement. In Jensen, a jury convicted Stephanie Jensen of falsifying books, records, and accounts.60 Jensen moved for a new trial on five grounds. The first, and most pertinent to this Article, was that the Court’s jury instruction on "willful" was erroneous.61 The Court denied Jensen’s motion.62 The court held that Congress meant for “willfully” to have different meanings in different provisions of the FCPA.63 As the court reasoned, “Congress added the knowledge requirement to the Books & Records statute for a particular reason: ‘to codify current Securities and Exchange Commission enforcement policy that

(ii) transactions are recorded as necessary (I) to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and (II) to maintain accountability for assets; (iii) access to assets is permitted only in accordance with management’s general or specific authorization; and (iv) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.

63. Id. at 1192.
penalties not be imposed for insignificant or technical infractions
or inadvertent conduct.”  Therefore, “when Congress inserted a
knowledge requirement into the Books & Records statute . . . it did
not intend to impose a knowledge of unlawfulness mens rea.”
Jensen’s conviction was upheld, and her motion for a new trial was
denied.

3. Exceptions and Affirmative Defenses to the FCPA

The single exception to the FCPA is an exception for rou-
tine governmental action. The statute provides that the FCPA
anti-bribery provisions “shall not apply to any facilitating or expe-
diting payment to a foreign official, political party, or party official
the purpose of which is to expedite or to secure the performance of
a routine governmental action by a foreign official, political party,
or party official.” The FCPA defines a routine governmental ac-
tion that is ordinarily and commonly performed by a foreign official
to include: obtaining official documents to qualify one to do
business in a foreign country; processing visas or work orders;
providing protection; inspections, etc. There are several affirmative defenses under the FCPA. These affirmative defenses include payments that are legal under the written laws of the foreign official’s country and payments that are reasonable and bona fide expenditures. The first affirmative defense

65. Id.
66. Id. at 1200.
68. Id.
69. 15 U.S.C. § 78dd-l(f)(3)(A) (2006). This section of the FCPA also lists situations where the “routine governmental action” exception is excluded. The “routine governmental action” exception excludes any decision by a foreign official whether, or on what terms, to award new business to or to continue business with a particular party, or any action taken by a foreign official involved in the decision-making process to encourage a decision to award new business to or continue business with a particular party.
defense, payments legal under the written laws of the foreign official’s country, is explicit—the payment must be legal under laws that are codified in the foreign official’s country. The absence of written laws in a foreign official’s country means the defense does not apply. The second affirmative defense, for payments made as reasonable and bona fide expenditures, is also very explicit. Payments falling under this section include payments for travel and lodging expenses. To qualify for this affirmative defense, the payment must be directly related to the “promotion, demonstration, or explanation of products or services” or “the execution or performance of a contract with a foreign government or agency thereof.”

However, these are just affirmative defenses, not exceptions. The party charged with a FCPA violation must plead them. The party charged with a FCPA violation must show that the payment meets the requirements for an affirmative defense.

4. Penalties for Violations of the FCPA

Those violating the FCPA face various potential penalties. For example, any issuer may be subject to monetary and civil penalties in actions brought by the SEC and even imprisonment for willful violations. Any person who willfully violates the

72. See 1998 Amendment, at § 5003(c). This requirement was “designed to prevent defendants in FCPA prosecutions from arguing that, even though a payment was technically legal under local law, ‘everyone does it.’” Gantz, supra note 24, at 108.
75. This section includes issuers, officers, directors, stockholders, employees, or agents of issuers.
76. These monetary fines should not exceed $2,000,000. 15 U.S.C. § 78ff(c)(1)(A) (2006).
78. See Jed S. Rakoff, ‘Willful’ Intent in Criminal Securities Cases, N.Y.L.J., May 11, 1995 (col. 1); see also Jensen, 532 F. Supp. 2d at 1191 (stating § 78ff contains a “‘specific provision’ that governs false or misleading mis-statements of material facts contained in documents, applications, or reports which are required to be filed under the Act or any rule or regulation”).
79. Willful violations may invoke monetary penalties of $100,000 or five years imprisonment, or both. 15 U.S.C. § 78ff(c)(2)(A) (2006). There is also a
FCPA shall be fined or imprisoned, or both. However, a person shall not be subject to imprisonment under this section if he proves he had no knowledge of such rule or regulation.

III. ETHICAL CHALLENGES UNDER THE FCPA

Attorneys face many ethical challenges when counseling clients on the scope and application of the FCPA. One challenge is the interplay between the FCPA and the ABA Model Rules of Professional Conduct ("ABA Model Rules"). The actual language of the FCPA can also cause ethical challenges. Also, in-house counsel face different ethical challenges than outside counsel, because of their unique position as not only an attorney but also an employee of the company. These ethical challenges appear in many different forms, and the consequences can be tremendous.

A. The FCPA and the ABA Model Rules of Professional Conduct

The ABA Model Rules guide the actions of attorneys all across the United States. These are model rules, so they are not law per se but serve as models for many states when enacting their own ethics statutes. Because the ABA Rules are not law, even if there is an ethical issue that arises for attorneys, legal liability does not arise unless the same provision has been enacted by their State Bar.

All states have enacted the ABA Model Rules in some shape or fashion, and these rules at times will create tension with the ethical guidelines of the FCPA, which in turn raises federal penalty for issuers who fail to file required documents, including forfeiting to the United States $100 for every day the failure to file continues. 15 U.S.C. § 78ff(b) (2006).

80. These fines will not exceed $5,000,000 and imprisonment will not exceed twenty years. Also, a person who is not a natural person may be imposed a fine of $25,000,000. 15 U.S.C. § 78ff(a) (2006).
81. Id.
82. MODEL RULES OF PROF'L CONDUCT (2000).
84. Almost every state has incorporated provisions that mirror the Model Rules of Professional Conduct into its state ethics laws. Id.
preemption issues. Article VI, Clause 2 of the U.S. Constitution, the Supremacy Clause, states that "The Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." Under the Supremacy Clause, federal law will preempt state law in certain cases. The conflict necessary under the Supremacy Clause "requires more than a mere difference in legislation; a conflict will be found where compliance with both federal and state regulations is a physical impossibility, or where state law stands as an obstacle to the accomplishment and execution of full purposes and objectives of Congress." 

In the realm of securities laws, "absent explicit statutory preemption, the federal securities laws supersede state law only where there is a direct conflict." Additionally, since the Model Rules enacted by a state and the FCPA regulate different areas of the law, the FCPA would not preempt state ethical laws regulating attorneys. Also, the FCPA does not have any explicit provisions governing the behavior of attorneys and, therefore, would not preempt Model Rules enacted by a state in that regard either. Thus, an attorney may find himself or herself in violation of ethical rules while abiding by the provisions of the FCPA because the FCPA does not preempt the model rules pursuant to the Supremacy Clause.

One of the major points of contention between the FCPA and the Model Rules arises in the ABA Model Rule 8.4(e), which states that it is unethical to imply an ability to improperly influence a government agency or official. It seems the attorney may be held liable for violation of the ethics laws, even if under the FCPA there is no liability because the FCPA provides an exception for governmental payments and provides affirmative defenses.

85. U.S. CONST. art. VI, § 1, cl. 2.
87. WILLIAM MEADE FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 6777.50 (1919).
89. To date, there has never been a case (at least on the public record) in which an attorney was disciplined under state ethics laws when the advised conduct was technically legal under the "grease payment" exception of the FCPA.
Under the ABA Model Rules, there is not an affirmative defense of either a reasonable business expenditure or a legal payment under the written laws of the foreign government official. Theoretically, in either scenario, the attorney could still be violating his or her ethical duties by advising a client that the payment would be legal under the FCPA. In light of these rules, attorneys may advise their clients to not make certain payments because they would be implying an ability to improperly influence foreign government officials, even though the payment would be proper under the FCPA because it would fall under one of the affirmative defenses. However, since the attorney does not want to be reprimanded for an ethical violation, he or she will advise the client to not make the payment. This action may lead to the client suing the attorney for malpractice by advising them not to make a payment that could have closed a large business deal, but instead the advice has left the company in a poor financial position.

The first problem when analyzing the conflict between the FCPA and Model Rule 8.4(e) on attorney misconduct is that the Model Rules are silent about if they apply to an attorney who states or implies an ability to improperly influence a foreign government official. Looking at the language of the Model Rule, it applies to a “government agency or official.”\(^9\)\(^0\) There are several interpretations one can make from the silence of the Model Rules. One view is that foreign officials are included in the Model Rules because there is no explicit language precluding foreign government officials.\(^9\)\(^1\) The opposite view is that foreign government officials are specifically excluded because there is no language in the Model Rules including foreign government officials.\(^9\)\(^2\) However, it is also helpful to look at the context of the rules: the Model Rules are meant to regulate attorneys’ conduct. The Model Rules contain a provision on disciplinary authority that states “[a] lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer’s conduct occurs.”\(^9\)\(^3\) This language would seem to include the ability to improperly influence foreign government officials under the jurisdiction where the attorney is licensed.

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91. See id.
92. Id.
The next conflict is what does the language “improperly” mean under the Model Rules? Under the Model Rules, it is only an ethical violation if an attorney implies “an ability to influence improperly a government agency or official.” Logically, this means that it is not an ethical violation if an attorney implies an ability to properly influence a government official. Is it proper influence if the attorney takes an action that is legal under the FCPA? This argument leads to another question: does an action that is legal mean that it is also ethical? There cannot be a universal answer to this question because it is a judgment call based on a person’s own customs and values.

The FCPA can also affect a lawyer’s duty of confidentiality to his or her clients, which may conflict with Model Rule 1.6. The duty of confidentiality will primarily become an issue when a lawyer represents an issuer and is required to make certain financial disclosures to the SEC. Model Rule 1.6 covers the confidentiality of information. The attorney-client privilege protects from disclosure the “substance of communications made in confidence by a client to his attorney for the purpose of obtaining legal advice.”

Model Rule 1.6 and the FCPA may conflict when an attorney must make certain disclosures to the SEC or DOJ that would normally be protected by the attorney client privilege. The secrecy of corporate affairs is “diminished by a corporation’s disclosure obligations under the federal securities laws.” The primary purpose of securities law is “to substitute a philosophy of full disclosure for the philosophy of caveat emptor and thus achieve a high

95.  MODEL RULES OF PROF’L CONDUCT R. 1.6 (2000). When a client seeks to invoke the privilege, the attorney must prove all the requirements under Model Rule 1.6. These requirements include that the “(1) communication was initially made with an intention of confidentiality, (2) that the privilege was not subsequently waived, and (3) that the communication concerned an implied request for legal advice.” Steven M. Abramowitz, Disclosure Under the Securities Laws: Implications for the Attorney-Client Privilege, 90 COLUM. L. REV. 456, 458 (1990). The problem arises because the “assertion of the privilege presents a conflict between the competing policies of encouraging confidential communications to attorneys and having all relevant evidence before the fact finder.” Id. at 463.
96.  Abramowitz, supra note 95, at 457.
97.  Id. at 464.
standard of business ethics in the securities industry.” \(^{98}\) These policies parallel the Congressional intent in enacting the FCPA.

Another rule that attorneys may face in carrying out duties under the FCPA is Model Rule 1.13, which pertains to the representation of companies. \(^{99}\) This rule provides that general counsel represents the organization through its “authorized constituents,” but the lawyer’s allegiance is to the entity over these constituents. \(^{100}\) The rule also includes a presumptive reporting-up requirement, analogous to the up-the-ladder reporting in SOX, except unlike SOX, Model Rule 1.13 applies to all organizations, not just public corporations. \(^{101}\)

The reporting duty arises when a lawyer for the organization knows that a person associated with the organization is engaged in potentially unlawful action that might substantially affect the organization. The lawyer “shall proceed as is reasonably necessary in the best interest of the organization.” \(^{102}\) In such situations, the lawyer must refer the matter to a higher authority, unless he or she feels such action is unnecessary in the best interest of the organization. \(^{103}\) Model Rule 1.13(c) permits reporting information outside the corporation even if Model Rule 1.6 would not otherwise permit disclosure. \(^{104}\) The rule only permits disclosure when the highest authority that can act on behalf of the corporation fails to address the matter appropriately, or refuses to act in violation of law, resulting in threat of substantial injury to the corporation. \(^{105}\)

Model Rule 1.13’s application to the FCPA is unclear. Unlike SOX section 307, the reporting requirement under Model Rule 1.13 only requires reporting when the violation is going to result in “substantial injury to the organization.” \(^{106}\) It is unclear if a


\(^{100}\) Id.; see also Sarah Helene Duggin, The Pivotal Role of the General Counsel in Promoting Corporate Integrity and Professional Responsibility, 51 St. Louis U. L.J. 989 (2007).

\(^{101}\) See Duggin, supra note 100.

\(^{102}\) Id. at 1031.

\(^{103}\) Id. at 1030–31 (quoting Model Rules of Prof'l Conduct R. 1.13(b) (2000)).

\(^{104}\) See Model Rules of Prof'l Conduct R. 1.13 (2000).

\(^{105}\) Model Rules of Prof'l Conduct R. 1.13(c)(1), (2) (2000).

bribe paid to a foreign official is reasonably certain to cause substantial injury to an organization. An example of how a bribe could cause substantial injury to an organization is a bribe that causes the organization to be prosecuted under the FCPA. The organization would be subject to substantial fines, and members of the organization could be subject to conviction and prison. An example of how a bribe would not cause substantial injury to an organization would be if the bribe was made, and the organization was not subsequently prosecuted under the FCPA. Assuming the bribe was made to better the financial position of the organization, this would not cause substantial injury to the organization; if anything it would actually benefit the organization. There have been very few prosecutions under the FCPA, which might create doubt as to whether it is "reasonably certain" that a company will incur injury resulting from the bribe. This lack of clarity will invariably lead to ethical challenges for general counsel in deciding on what action to take when they learn of a bribe being paid to a foreign official.

As another point of contention, one can argue that under the Model Rules, it would be unethical for a U.S. lawyer to recommend a foreign lawyer to handle transactions where there is a likelihood that a FCPA violation will occur. Such conduct might violate Rule 8.4(a) of the Model Rules, which states that a lawyer commits professional misconduct when violating the Model Rules or knowingly assisting another in doing so. By recommending a foreign lawyer who would violate the FCPA, a U.S. lawyer would also be violating his or her ethical duties.

The recommendation of a foreign lawyer brings up another interesting ethical question. What is the duty of a lawyer who recommends a foreign lawyer to handle these types of transactions? The FCPA states that a person's mind set is "knowing" if the lawyer "is aware that such person is engaging in such conduct, that such circumstance exists, or that such result is substantially certain

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to occur." The FCPA also states "[w]hen knowledge of the existence of a particular circumstance is required for an offense, such knowledge is established if a person is aware of a high probability of the existence of such circumstance." This language illustrates that the recommending attorney cannot just wash his hands of the transaction once he recommends the foreign lawyer. He or she must use due diligence in recommending a foreign lawyer while maintaining an active role in the transaction after he or she recommends the foreign lawyer. If the recommending lawyer knows or has reason to know the foreign lawyer will take action to violate the FCPA, the recommending lawyer could also face prosecution.

B. In-House Counsel

In-house counsel (general counsel) faces unique challenges. The complexities of the role of being general counsel arise out of the obligation to provide advice to both directors and officers of the company. "This dual reporting responsibility can create tensions in situations that require general counsel to advise against actions recommended by senior managers, or to report troublesome acts or omissions by officers." General counsel’s ultimate responsibility "is to the client, and the highest authority capable of speaking on behalf of a corporate client is ordinarily its board of directors." This ultimate responsibility is readily seen from Model Rule 1.13, which states that an attorney’s ultimate duty is to the company and not any individual constituent.

Aside from the ABA Model Rules, a general counsel who represents an issuer encounters separate ethical obligations when serving as a chief legal officer under SEC regulations. As chief legal officer, general counsel is deemed to be a supervisory attorney appearing and practicing before the SEC and has a responsibility to make reasonable efforts to ensure that subordinate attorneys

112. Duggin, supra note 100, at 1003.
113. Id. at 1004.
114. Id.
conform to the reporting requirements under SOX. Problems may arise when an attorney serves as both counsel to the corporation and as an officer or director—in a “dual-capacity.” The main issue facing these attorneys is determining when a “dual-capacity” attorney is rendering “legal” advice as an attorney. This problem of “dual capacity” is very prevalent when attorneys are advising clients under the FCPA. Many times when in-house counsel are asked for advice on whether a payment will violate the FCPA, they will invariably be providing both business and legal advice. The court will have to determine whether the advice was given in a legal capacity or, if it was a request for legal advice, was it incidental to a request for business advice.

At one end of the spectrum, courts use an “all or nothing” approach categorizing the “lawyer as either an attorney or a businessman according to the relative time he devotes to legal and non-legal activities.” If the court finds the lawyer functions as a businessman, the lawyer is treated “as a businessman for all purposes and is forever precluded from arguing that he rendered privileged ‘legal’ advice.” At the other extreme, the court will perform an ad hoc analysis. The court will evaluate the protection accorded to each communication according to the nature of the advice sought. This approach protects communications to or from corporate counsel which relate primarily to the rendering of “legal” advice. “It does not protect a request for business . . .

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117. 17 C.F.R. § 205.4(a) (2007); see supra Part III(A) for a discussion on the ethical implications relevant when attorneys must report SOX violations.
119. Id.
120. Id.
121. Id. at 240; see United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 360–61 (1950) (holding that in-house patent attorneys should be treated as businessmen since they functioned primarily as policy makers and technical advisers, not legal counsel).
122. Wilczek, supra note 118, at 240.
124. Wilczek, supra note 118, at 240 (citing Zenith, 121 F. Supp. at 794) (holding that an attorney must give “predominantly” legal advice to retain the client’s privilege of nondisclosure); see also Burlington Indus. v. Exxon Corp., 65 F.R.D. 26, 39 (D. Md. 1974) (concluding that documents which are “primarily concerned” with legal advice remain privileged).
advice, [and it does not] protect a request for legal advice [that] is merely incidental to [a] request for business advice."\textsuperscript{125}

C. Ethical Challenges for Attorneys—Hypothetical Situations

The ethical and professional challenges attorneys face under the FCPA can be illustrated by using hypothetical situations:

\textit{Hypothetical A}\textsuperscript{126}: A U.S. company is selling widgets to a company in Estonia that needs the widgets for the product they manufacture. The order is worth $500,000, which is a substantial amount for the U.S. company. The Estonian company, however, wants the U.S. company to place a 15\% commission ($75,000) into one of their corporate bank accounts. The normal commission for transactions of this type is only 5-6\%, and such a high commission is a "red flag" under the company’s FCPA compliance procedures. The company seeks advice on the legality of the commission payment.

As counsel to U.S. company, you are being asked to render an opinion on the legality of the commission payment. You have talked to the manager in charge of this transaction and have found that this deal is very important to the company and that they would like a legal opinion that would allow them to pay the commission and permit the sale to go through. The company believes they should be allowed to make the commission payment because they are not aware that any of the commission money will be used to bribe a government official.

In this hypothetical, the action taken will be illegal but will also kill a sale that is very important to the company you represent. Even though the client has told you that they are not aware the commission will be paid as a bribe, this will not suffice under the knowledge requirement of the FCPA. The client is well aware that he has been solicited for a bribe. The legislative history and case law show that willful blindness is not an excuse under the knowledge requirement of the FCPA.\textsuperscript{127} The term "willful blindness" denotes a conscious disregard or deliberate ignorance of known circumstances that should reasonably alert one to the high prob-

\textsuperscript{125} Wilczek, \textit{supra} note 118, at 240; \textit{see also} Am. Cyanamid Co. v. Hercules Powder Co., 211 F. Supp. 85, 89–90 (D. Del. 1962) (discussing the non-privileged nature of communications by a patent attorney concerning the technical aspects of a patent).

\textsuperscript{126} \textit{See} Gantz, \textit{supra} note 24, at 111.

ability of a violation of the FCPA. Under this standard, a person will not be able to say that he had no idea that the alleged activity was taking place if the prosecution can prove that he should have been aware of it or was aware of it and chose to ignore it. The company will still be liable under the FCPA for the commission payment even though they do not have "actual" knowledge of a bribe being paid to a government official.

Hypothetical B: You represent a U.S. company that is doing business with companies in Zaire. A manager of the company tells you that in order to get contracts in Zaire, the company will need to give money to Zairian companies to pay foreign officials. He tells you without making these payments, the company will be unable to continue doing business in Zaire and will lose substantial profits. He has come to you for advice on the legality of these payments.

These payments will clearly violate the FCPA. It is only a defense under the FCPA if the payment is allowed under the written rules of the country. Even if the manager tells you that every business in the country is making these payments and that no one has been prosecuted, these payments still technically violate the FCPA. Custom or regular practices in a country are not a defense to the FCPA. Unless the rule or law is written, the defense can not be used.

The lack of prosecution for violations of the FCPA is also a great ethical challenge for attorneys. It is easy to counsel clients to take an action that is illegal when the chance that they will be prosecuted is low. This temptation is even greater for an in-house counsel, since theoretically they have more to gain from rendering a favorable opinion to the company. Prosecution of FCPA cases is also based on the location and amount of the payment, so companies giving payments in countries where bribery is almost nonexistent and payments of low monetary amounts are rarely prosecuted.

There is, however, a trend of aggressive enforcement of FCPA cases over the past few years. There are also larger penal-

128. Id.
129. Id.
131. See Newcomb, supra note 107, at 2, 4.
132. Id. at 3 (noting that both the SEC and DOJ have become more aggressive in pursuing FCPA violators). In 2002, there were seven new investiga-
ties being imposed on those who violate the FCPA. Attorneys must be aware of these trends when counseling clients on compliance under the FCPA, even when the payments being made are in countries where bribery is low, and the monetary amounts are low.

The pressure on the attorney to render a favorable opinion, especially if there has been a long-standing and mutually beneficial relationship, can be significant. Under the ABA Rules, "in rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation." You may tell the company that the payments will technically violate the FCPA, but also tell them about the lack of prosecutions for these payments. You cannot counsel them to make the payment because that would violate other rules of ethics, but you can explain the consequences of their actions and all other relevant circumstances of the transaction. Attorneys must use caution though: the line between counseling a client to engage in criminal conduct and discussing the legal consequences of the contemplated action is not always clear.

These hypothetical situations illustrate areas where the attorney can face ethical challenges that they must overcome. Attorneys must always be aware of their ethical duties to their clients and also to the profession. “They must help their clients distinguish between the client’s desires and what is allowable under the

In 2003, there were eleven new investigations. In 2004, there were twenty. New investigations dropped to eight in 2005, but then increased to eighteen in 2006. Currently, there are fifty-five open investigations reported. Id.

133. Id. at 4 (noting that in April 2007, Baker Hughes agreed to pay the largest fine in FCPA history—$44 million). Also in 2007, three subsidiaries of the company Vetco International paid $27 million in criminal fines. Id. In 2006, Statoil ASA agreed to a DOJ fine of $10.5 million and a SEC fine of $10.5 million. Id. From 1995–2000 the average SEC and DOJ penalties were under $1 million but from 2001–2006 the average rose to between $3 and $5 million. Id.

135. MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (2000) ("A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.").
FCPA and within the attorney’s professional responsibilities.”

They must also be aware of their own criminal liability, which will be discussed in the next section.

IV. GOVERNMENT REGULATION OF ATTORNEYS UNDER THE FCPA

Attorneys face many ethical challenges when counseling clients on the FCPA. Yet they also may face personal liability in the form of criminal and civil penalties. When counseling clients on the FCPA, attorneys must be mindful of not only their client’s liability but also of their own liability, both criminal and civil, including actions brought by the SEC and DOJ.

A. SEC Regulation of Attorneys

The SEC enforces the civil mechanism of the FCPA against issuers and also regulates attorneys who practice before it. The SEC may bring several types of actions against attorneys whose advice led a client to violate the FCPA. These include: Rule 102(e) proceedings, 15 U.S.C. § 78t(e) aiding and abetting violations, Rule 10b-5 aiding and abetting violations, SOX section 307 violations, and 15 U.S.C. § 78t(a)-(b) “controlling person” violations.

1. Rule 102(e) Proceedings

Rule 102(e) proceedings allow the SEC to censure attorneys who practice before it. The SEC can censure attorneys who do not possess the requisite qualifications to represent others, to be lacking in character or attorneys who willfully violate or willfully aid and abet violations of Federal Securities laws. Attorneys can be subject to Rule 102(e) proceedings for representing clients in front of the SEC. These proceedings can be brought against at-

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137. See infra, Part IV.
139. 17 C.F.R. § 201.102 (2007).
140. 17 C.F.R. § 201.102(e) (2007).
Attorneys who appear and practice before the commission.\textsuperscript{141} The legislative history illustrates that the creators of the FCPA intended for Rule 102(e) to apply to violations of the FCPA.\textsuperscript{142} Attorneys representing clients who are issuers under the FCPA are subject to these rules and can be prosecuted for violating them.

The SEC may censure an attorney if the advice he gives to a client leads to a violation of the FCPA. Following a determination of negligence or unethical conduct\textsuperscript{143} by the SEC, a Rule 102(e) proceeding may be convened.\textsuperscript{144} The SEC, however, is very reluctant to bring Rule 102(e) actions for negligence. The SEC tends to bring Rule 102(e) actions against attorneys who make misrepresentations in violation of disclosure requirements under federal securities laws.\textsuperscript{145} This makes Rule 102(e) particularly relevant under the accounting and record keeping provisions of the FCPA, rather than the anti-bribery provisions. Attorneys must be aware that bad advice given to clients on the scope and application of the FCPA, under both the anti-bribery and accounting provisions, can lead to Rule 102(e) proceedings being brought against them by the SEC. The penalties for violations of this rule can be

\textsuperscript{141} "The Commission may censure a person or deny, temporarily or permanently, the privilege of appearing or practicing before it." 17 C.F.R. § 201.102 (2007). The SEC can censure an attorney who is found by the Commission "(i) [n]ot to possess the requisite qualifications to represent others;" or "(ii) [t]o be lacking in character or integrity or to have engaged in unethical or improper professional conduct;" or "(iii) [t]o have willfully violated, or willfully aided and abetted the violation of any provision of the Federal securities laws or the rules and regulations thereunder." \textit{Id}.

\textsuperscript{142} \textit{See} S. REP. NO. 95-114, at 4110 (1977) ("The SEC's responsibilities would extend to conducting investigations, bringing civil injunctive actions, commencing administrative proceedings if appropriate . . . .").

\textsuperscript{143} \textit{See In re} William R. Carter & Charles J. Johnson, Jr., Exchange Act Release No. 17597, 22 SEC Docket 292 (Feb. 28, 1981) ("If a securities lawyer is to bring his best independent judgment to bear on a . . . problem, he must have the freedom to make innocent—or even, in certain cases, careless—mistakes without fear of legal liability or loss of the ability to practice before the Commission. Concern about his own liability may alter the balance of his judgment in one direction as surely as an unseemly obeisance to the wishes of his client can do so in the other. . . . Lawyers who are seen by their clients as being motivated by fears for their personal liability will not be consulted on difficult issues.").

\textsuperscript{144} Shabat, \textit{supra} note 138, at 1008.

\textsuperscript{145} \textit{Id}. at 1009.

Under 15 U.S.C. § 78t(e), the SEC may bring actions against attorneys whose conduct aids in the violations of federal securities laws.147 This provision contains a scienter requirement: the attorney must "knowingly provide substantial assistance."148 This clause makes it difficult to pursue a claim against an attorney for aiding and abetting liability.

3. Reporting Violations—SOX section 307149

Attorneys are required to report evidence of material violations of federal and state securities laws and any other fraudulent act to a company’s chief counsel or the CEO.151 A material violation of U.S. federal securities law would include a violation of the FCPA. The attorney must take the evidence “up-the-ladder” to the board of directors if appropriate action is not taken.153 The attorney has discretion to decide whether or not the company has appropri-

146. See 17 C.F.R. § 201.102(e) (2007).
147. See 15 U.S.C. § 78t(e) (2006); see also Shabat, supra note 138, at 1002. Conduct that is clearly open to SEC enforcement includes the use of non-public information and misleading and false reporting of documentation. MICHAEL J. KAUFMAN, SECURITIES LITIGATION: DAMAGES 10:04, at 10 (1997). The federal securities laws contain express and implied secondary liability provisions. Id.
148. Id.
150. A material violation is a violation of U.S. federal or state securities law, a material breach of fiduciary duty arising under U.S. federal or state law, or a similar material violation of any U.S. federal or state law. 17 C.F.R. § 205.2(i) (2007).
ately responded to the report.\textsuperscript{154} This rule applies to professional conduct for attorneys appearing and practicing before the SEC.\textsuperscript{155} In addition, the rule exempts non-appearing foreign attorneys.\textsuperscript{156}

Hypothetically, an attorney that is just retained as local counsel in another country will not be subject to the reporting rules laid out in SOX. However, an American attorney that relies on the foreign attorney’s advice and erroneously advises a client on an action that violates the FCPA, can still face liability. This is why American counsel must use due diligence when selecting local counsel.

Attorneys that are retained by an issuer to investigate violations of the FCPA are subject to the up-the-ladder reporting rules proscribed by SOX.\textsuperscript{157} The fact that an attorney does not discover a violation after conducting an investigation may not mean that the attorney will be exempt from liability if his advice was erroneous. If the attorney believes there is no violation of the FCPA to report, but the issuer is later found guilty of such a violation, the issuer

\begin{quote}
154. \textit{Id.} Appropriate response means a response to an attorney regarding reported evidence of a material violation as a result of which the attorney reasonably believes: “[t]hat no material violation . . . has occurred, is ongoing, or is about to occur” or that
the issuer has adopted appropriate remedial measures, including appropriate steps or sanctions to stop any material violations that are ongoing, to prevent any material violation that has yet to occur, and to remedy or otherwise appropriately address any material violation that has already occurred and to minimize the likelihood of its recurrence.

\textit{Id.}

155. \textit{Id.} at 340. For purposes of the FCPA, this rule applies only for violations of the record-keeping provisions of the Act and for the anti-bribery provisions under 15 U.S.C. § 78dd-1. This rule does not apply to domestic concerns and other persons outside the jurisdiction of the SEC. Just like under the FCPA, only the government can bring an action under SOX. 17 C.F.R. § 205.7(b) (2007). Although SOX does not provide a private right of action, an attorney may still be sued for malpractice for violations.

156. A non-appearing foreign attorney is an attorney: (1) “[w]ho is admitted to practice law in a jurisdiction outside the United States” and (2) “[w]ho does not hold himself or herself out as practicing, and does not give legal advice regarding, United States federal or state securities or other laws” or (3) “[i]s appearing and practicing before the Commission only in consultation with counsel, other than a non-appearing foreign attorney, admitted or licensed to practice in a state or other United States jurisdiction.” 17 C.F.R. § 205.2(j) (2007).

may be able to bring a malpractice action against the attorney for his erroneous advice. The attorney could also face other sanctions under SEC rules.

To illustrate the application of this rule, assume you represent an issuer. You learn that an agent of the issuer has made bribes to foreign officials in Turkey. You have not participated in this bribery scheme or made any statements concerning it, but you have knowledge that it has happened. Can you be liable for not reporting these actions to the issuer or other appropriate authorities? The answer is yes. Even though the person making the bribes is not an employee of the issuer, you still have to report the conduct to the company’s chief counsel or the CEO. You must report the violation when you become "aware of evidence of a material violation of securities law, or breach of fiduciary duty, by the company or any agent thereof."  

The reporting attorney’s duty does not end with a report up-the-ladder to an appropriate authority. If, within a reasonable time, the appropriate authority has not provided to the reporting attorney an appropriate response, then the attorney must report the evidence to an appropriate committee, such as an audit committee, or directly to the board of directors if the attorney believes it would be futile to report the evidence to the CEO or other appropriate authority. Once a reporting attorney has received an appropriate response, the attorney has no further obligations with respect to the matter.

As an alternative to reporting to the chief legal officer or CEO, an attorney can make a report of a material violation directly to a preexisting qualified legal compliance committee ("QLCC"). The QLCC must be given authority by the issuer’s board to: investigate evidence received, retain staff and outside advisors, recom-

158. PRACTICAL GUIDE, supra note 151, at 341 (emphasis added).
159. Id.
162. PRACTICAL GUIDE, supra note 151, at 342. A QLCC is a “committee of the issuer composed of at least one member of the issuer’s audit committee . . . and two more independent members of the issuer’s board of directors.” Id. at 343. A QLCC must adopt written procedures for the confidential receipt, retention, and consideration of any report of evidence of a material violation. Id. at 344.
mend appropriate responses, communicate findings as required by the regulations, and take all other appropriate action.\(^{163}\)

Problems can arise when an attorney submits a report of a material violation under the up-the-ladder reporting rules and fails to receive a timely response and believes that a violation is ongoing or about to occur.\(^{164}\) The SEC has proposed a regulation, a “noisy withdrawal” provision, for this situation that would “have permitted or requires attorneys to withdraw from representation of an issuer, to notify the [SEC] that they have done so, and to disaffirm documents filed or submitted to the [SEC] on behalf of the issuer.”\(^{165}\) The proposed regulation met strong resistance; therefore, the SEC proposed alternative regulations. Under the alternative proposed regulations, when an attorney does not receive an appropriate response to a report of a material violation “an outside attorney must withdraw from representation of the issuer, in writing, that the withdrawal is based on professional considerations.”\(^{166}\) Also, an in-house attorney “is to stop working on the matter concerning the violation, and notify the issuer, in writing, that he or she believes that the issuer has not provided an appropriate response in a reasonable time to his or her report.”\(^{167}\) The “noisy withdrawal” provision is still just a proposed rule and has not been enacted.

Another relevant issue involves the relationship between SOX and rules of other U.S. jurisdictions. SOX regulations are minimum standards and they preempt rules of other U.S. jurisdictions that are less strict than those contained in the SOX regulations.\(^{168}\) That is, SOX is simply a minimum level of regulation, and an attorney must still be aware if his or her state has higher standards.\(^{169}\)

\(^{163}\) 17 C.F.R. § 205.2(k) (2007).

\(^{164}\) PRACTICAL GUIDE, supra note 151, at 345.

\(^{165}\) Proposed 17 C.F.R. § 205.3(d) (2007); see SEC Release No. 33-8186, I.

\(^{166}\) PRACTICAL GUIDE, supra note 151, at 345.

\(^{167}\) Id.


\(^{169}\) Explicitly stated:

[T]his part does not preempt ethical rules in United States jurisdictions that establish more rigorous obligations than imposed by this part. At the same time, the [SEC] reaffirms that its rules shall prevail over any conflicting or inconsistent laws
Attorneys who violate these rules can be subject to a number of SEC sanctions, including temporary suspension or a permanent bar from practice before the SEC.\textsuperscript{170} SEC action can be brought in addition to actions against the attorney in the jurisdiction in which he or she practices.\textsuperscript{171} However, attorneys "who comply in good faith with the regulations shall not be subject to discipline for violations of inconsistent standards imposed by a state or other U.S. jurisdiction."\textsuperscript{172}

There is no private right of action under SOX. Just like under the FCPA, only the government can bring an action under SOX. The regulation explicitly states, "Nothing in this part is intended to, or does, create a private right of action against any attorney, law firm, or issuer based upon compliance or noncompliance with its provisions."\textsuperscript{173} The regulation also clearly states that "[a]uthority to enforce compliance . . . is vested exclusively in the [SEC]."\textsuperscript{174} However, just as under the FCPA, attorneys can still be liable in malpractice actions brought by their clients.

When representing issuers, attorneys must be aware that they have an obligation to report violations of the FCPA. This is true even if they have not counseled the client on the FCPA or had any participation in the alleged illegal activity. Mere knowledge that the issuer or an agent of the issuer is engaging in the conduct, gives rise to an obligation for the attorney to report the conduct to the proper authority.

4. Aiding and Abetting Violations—17 C.F.R. § 240.10b-5

Attorneys and accountants may be held liable for a violation of 17 C.F.R. § 240.10b-5. The statute prohibits fraud, misstatement or nondisclosure of material facts, and any business practices that serve to operate as fraud or deceit in the sale of a security. Rule 10b-5 has been used to hold outside professionals

\begin{footnotes}
\item[170] SEC Release No. 33-8185, II.
\item[172] \textit{Id.} at 345.
\item[173] 17 C.F.R. § 205.7(a) (2007).
\item[174] 17 C.F.R. § 205.7(b) (2007).
\end{footnotes}
liable for reckless representations and omissions, but not subject to private action under Rule 10b-5.\textsuperscript{175}

Liability under Rule 10b-5 has evolved since its enactment. Early cases greatly expanded liability under Rule 10b-5, but over time the Supreme Court began to pull in the reins by requiring a private party to prove that the securities law violator intended to deceive, manipulate, or defraud the injured party.\textsuperscript{176} The Supreme Court also held that "the term fraud in . . . Rule 10b-5 does not cover management's breach of fiduciary duties in connection with a securities transaction."\textsuperscript{177}

In \textit{Central Bank of Denver v. First Interstate Bank of Denver},\textsuperscript{178} the Court found that neither the language of Rule 10b-5 nor the legislative scheme of securities laws supported aiding and abetting liability in private litigation.\textsuperscript{179} Although \textit{Central Bank of Denver} seems to let attorneys off the hook, at least with respect to private actions under Rule 10b-5, attorneys must nevertheless realize that they can be subject to Rule 10b-5 proceedings brought by the SEC and also to private malpractice actions for reckless misrepresentations and advice given to clients on the FCPA.\textsuperscript{180} In sum, attorneys can still be liable for aiding and abetting under Rule 10b-5 but are not subject to private enforcement of Rule 10b-5.


\textsuperscript{178} 511 U.S. 164 (1994).

\textsuperscript{179} James D. Cox, \textit{Just Deserts for Accountants and Attorneys After Bank of Denver}, 38 ARIZ. L. REV. 519, 519 (1996). The Court reasoned that because the aider and abettor is not one who has engaged in such a proscribed act, but merely assisted in its commission, to permit recovery against such a defendant would allow the plaintiff to circumvent the reliance requirement which the Court has repeatedly held was a part of the plaintiff's case.

\textit{Id.} at 520.

\textsuperscript{180} See 17 C.F.R. § 240.10b-5 (2007).
Attorneys may be liable as a “controlling person” when giving advice that leads to a violation of the FCPA; however, this is unlikely. An attorney who is hired by an issuer to render advice on the FCPA probably will not meet the criteria for controlling person liability. To be considered a controlling person, the attorney will have to act in bad faith or at least play a more active role than just giving advice. Potential liability for attorneys as controlling persons is very unlikely but is possible and must always be considered when advising clients on the FCPA.

B. Conspiracy to Violate the FCPA

Attorneys may be held liable, in certain situations, for conspiracy to violate the FCPA. The conspiracy statute punishes any person who “commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.” Attorneys must be aware that when they counsel clients on proposed courses of action they may be held liable as principals.

In United States v. Bodmer, a Swiss lawyer, who represented U.S. nationals and others, was charged with conspiracy to

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181. See 15 U.S.C. § 78t(a) (2006). Controlling person liability attaches when any “person who, directly or indirectly, controls any person liable under any provision of this chapter or of any rule or regulation thereunder shall also be liable jointly and severally with and to the same extent as such controlled person” and also “to any person to whom such controlled person is liable, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action.” Id.

182. Shabat, supra note 138, at 1003.


185. United States v. Hewitt, 663 F.2d 1381, 1385 (11th Cir. 1981) (stating that “To convict a defendant of aiding and abetting, the government need not show that the defendant ‘participated in every phase of the criminal venture.’ . . . Rather, the government must show that the defendant ‘was associated with the criminal venture, participated in it as something he wished to bring about, and sought by his action to make it succeed.’” (citations omitted)).

violate the FCPA. Bodmer was charged pursuant to the FCPA as it existed before the 1998 amendments, and he defended on the grounds that he lacked notice that the FCPA applied to his conduct as a non-resident foreign national under the FCPA. Although Bodmer prevailed, his defense will not be successful today, as the 1998 amendments clarified the statute. Attorneys must look at the Bodmer case as clarification of the scope of the FCPA and that pleading lack of notice to the criminal liability provisions under the FCPA will fail. Although there has not been an attorney since the Bodmer case indicted for conspiring to violate the FCPA, attorneys must be aware that they can be held liable for conspiracy when counseling clients on the FCPA.

V. PRIVATE REMEDIES UNDER THE FCPA

This Article has examined where attorneys face ethical challenges under the FCPA and also where they face government regulation in the form of civil and criminal liability under the FCPA. It will now examine where attorneys are subject to private enforcement under the FCPA. These situations include private causes of action under securities laws and legal malpractice actions.

A. Private Enforcement Under the FCPA

As articulated in Lamb v. Phillip Morris, Inc., the FCPA does not create a private right of action. In Lamb, domestic tobacco growers brought an action against tobacco importers, alleging a violation of the FCPA. A Phillip Morris subsidiary was making donations to a children’s foundation in exchange for tax deductions and favorable price controls. In determining whether there was an implied right of action under the FCPA, the court looked to

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187. Bodmer allegedly paid bribes and authorized the payment of bribes to officials in Azerbaijan and drafted legal documents used in the payments. Id. at 179.
188. Id. at 181.
189. 915 F.2d 1024 (6th Cir. 1990).
190. See id.
191. Id. at 1025.
Congressional intent when enacting the statute.\textsuperscript{192} In doing so, the court looked to \textit{Cort v. Ash}.\textsuperscript{193}

\begin{quote}
[Is] the plaintiff "one of the class for whose especial benefit the statute was enacted"; (2) some "indication of legislative intent, explicit or implicit," suggests that Congress wanted "to create such a remedy [and not] to deny one"; (3) implying such a remedy for the plaintiff would be "consistent with the underlying purposes of the legislative scheme"; and (4) the cause of action is not "one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action."\textsuperscript{194}
\end{quote}

Using the \textit{Cort} test, the Court found that there is no implied right of action under the FCPA. The \textit{Lamb} case, however, did not cover legal malpractice actions brought by companies against attorneys whose advice led to a FCPA violation.

\textbf{B. Legal Malpractice Actions Brought for Advice Given Under the FCPA}

Attorneys can be liable for malpractice for giving erroneous advice on the FCPA. They may be held liable even when their client pleads guilty to a FCPA violation and admits they violated the FCPA. The only case to date of a malpractice action brought against an attorney for giving erroneous advice under the FCPA is the \textit{Schreiber}\textsuperscript{195} case, which held that shareholders of a company could maintain an action for legal malpractice against a company's legal counsel as a result of that company's criminal liability under the FCPA.\textsuperscript{196}

In \textit{Schreiber}, Saybolt North America ("Saybolt NA") was attempting to lease property in Panama. Saybolt NA, incorporated

\begin{itemize}
\item \textsuperscript{192} \textit{Id.} at 1028.
\item \textsuperscript{193} \textit{Cort v. Ash}, 422 U.S. 66 (1975).
\item \textsuperscript{194} \textit{Cairez v. U.S. I.N.S.}, 790 F.2d 544, 546 (6th Cir. 1986) (quoting \textit{Cort}, 422 U.S. at 78).
\item \textsuperscript{195} Stichting Ter Behartiging Van de Belangen Van Oudaandeelhouders in Het Kapitaal Van Saybolt Int'l B.V. v. Schreiber, 327 F.3d 173 (2d Cir. 2003) ("Stichting II").
\item \textsuperscript{196} Faucett, \textit{supra} note 3, at 219.
\end{itemize}
in Delaware, is a subsidiary of Saybolt International, a private Dutch limited liability company. All directors and officers of Saybolt NA are also directors of Saybolt International. The CEO of Saybolt NA, David Mead ("Mead"), also served as an officer and director of Saybolt International. Mead also controlled Saybolt de Panama. Saybolt International used its subsidiary in Panama, Saybolt de Panama, to acquire the lease.

Sometime in 1995, Mead was told that Saybolt de Panama had acquired suitable property to lease in the Panama Canal Zone. He was also told that the lease could only be acquired if the company paid a $50,000 bribe to a Panamanian government official. Mead brought the issue of the bribe to a Saybolt NA board meeting. Schreiber, an attorney licensed in New York, was present at the meeting. He served as a director of Saybolt NA and on occasion had provided legal service and advice to the company. Schreiber advised the board of directors at the meeting that Saybolt NA could not pay the proposed bribe without subjecting the corporation and directors to potential civil and criminal liability under the FCPA. Over the next few weeks, however, Schreiber allegedly told Saybolt NA that the "bribe payment could legally be made under U.S. law by [their] Dutch affiliate, Saybolt International." Schreiber led Saybolt NA to believe that it would not incur any liability as long as Saybolt International, their Dutch affiliate, made the payment.

An employee of Saybolt NA traveled to Panama to arrange the bribe. In 1995, Saybolt International wired $50,000 from their bank account in the Netherlands to a bank account controlled by Saybolt de Panama. The Saybolt NA employee directed an employee of Saybolt de Panama to deliver the $50,000 bribe to an individual acting as an intermediary for the Panamanian official. As a result of an investigation by U.S. Attorneys, originally investigating Saybolt NA for environmental crimes, Saybolt pleaded guilty to the charges of violating and conspiring to violate the

197. Stitching II, 327 F.3d at 175.
198. Id.
199. Id.
200. Id. at 176.
201. Id. at 177.
202. Id.
203. Stitching II, 327 F.3d at 176.
Mead was also charged with violating the FCPA. Mead pleaded not guilty and went to trial. At trial, Mead’s defense was that he relied on advice of Schreiber and believed that since the bribe payment came from Saybolt International, it was legal under the FCPA. The jury found Mead guilty of violation and conspiring to violate the FCPA. He was sentenced to four months in prison and fined $20,000.

The shareholders of Saybolt International, through the Foundation, brought a legal malpractice action against Schreiber for the advice that led to the payment of the bribe and criminal liability for the company. The complaint alleged that Schreiber’s malpractice “cost the former Saybolt International shareholders $4.2 million, mostly in criminal fines.” The complaint also alleged that without Schreiber’s malpractice “the bribe payment would not have been made, even at the cost of the entire Panama deal.” The complaint also alleged that “Schreiber also breached his lawyer’s fiduciary duty to Saybolt North America and breached his contract to provide competent professional services.”

The trial court threw out the legal malpractice action on the basis that Saybolt International’s guilty plea and Mead’s jury conviction estopped the shareholders from bringing their legal malpractice action. According to the trial court, this finding of guilt showed that Saybolt International and Mead did not rely on Schreiber’s advice. The court found to enter a guilty plea:

Saybolt [North America] had to affirm, as it did, that it undertook the misconduct in question with knowledge of the corruptness of its acts. Since, if it had in fact relied on Schreiber’s allegedly erroneous and misleading advice, Saybolt [North America]
would not have believed at the time that its misconduct was unlawful or corrupt, it could never have made this admission at its allocution or, indeed, entered its guilty plea at all.\textsuperscript{214}

The court also held, "[S]ince Saybolt did . . . plead guilty and admit its criminal intent, it is bound by those admissions, and therefore cannot now contend either that it relied on Schreiber’s alleged advice or that that advice, even if erroneous . . . proximately caused whatever damages . . . were incurred by Saybolt."\textsuperscript{215}

The jury, in the case against Mead, considered Mead’s defense that he relied on Schreiber’s advice and rejected it.\textsuperscript{216} The Second Circuit found that Saybolt International’s plea did not estop the shareholders from bringing suit against Schreiber.\textsuperscript{217} The six elements Saybolt International admitted by pleading guilty were that: it was a domestic concern, that it made use of a means or instrumentality of interstate commerce corruptly and in furtherance of an offer or payment of something of value to a person, while knowing that the money would be offered or given directly or indirectly to a foreign official for purposes of influencing an act or decision of that foreign official in his official capacity.\textsuperscript{218}

By pleading guilty, however,

Saybolt North America did not admit that at the time of the criminal act it knew that the act of arranging, rather than paying, such a bribe was criminal. Knowledge by a defendant that it is violating the FCPA—that it is committing all the elements of an FCPA violation—is not itself an element of the FCPA crime.\textsuperscript{219}

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\item \textsuperscript{215} \textit{Id.} at 358.
\item \textsuperscript{216} Faucett, \textit{supra} note 3, at 220.
\item \textsuperscript{217} \textit{Stichting II}, 327 F.3d at 179.
\item \textsuperscript{218} \textit{Id.} at 179–80.
\item \textsuperscript{219} \textit{Id.} at 180–81.
\end{itemize}
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Schreiber also argued that Saybolt NA, by admitting to acting “corruptly,” served as a bar to the legal malpractice claim. He argued Saybolt NA, by admitting that it acted “corruptly,” admitted it knew that arranging the bribe to the Panamanian official violated the FCPA. The Second Circuit disagreed and held “that an admission that an act was done ‘corruptly’ in this context is not equivalent to an admission that the person committing it knew that it violated the particular law at the time the act was performed.”

The court held that the shareholders were not estopped from bringing a legal malpractice claim against Schreiber. This holding does not mean the legal malpractice action will be successful, it just means that the shareholders could actually bring the malpractice claim against Schreiber. The court vacated the District court decision and remanded it for further proceedings.

On remand the district court dismissed the action, deciding that under applicable state law, which it determined to be that of New Jersey, “Plaintiff-Appellant Stichting Ter Behartiging Van De Belangen Van Oudaandeelhouders in Het Kapitaal Van Saybolt International B.V. (Foundation of the Shareholders’ Committee Representing the Former Shareholders of Saybolt International B.V.) (“Stichting”) was not the real party in interest and so could not bring suit.” The court ruled that New Jersey law prohibited assignment of legal malpractice claims such as the one brought by Stichting, and therefore Stichting was not the real party in interest. The [district] court further held that ratification of the action would not rectify the problem, because such a procedure would circumvent New Jersey’s substantive law prohibiting such assignments.

Stichting appealed the district court decision. On appeal, the Second Circuit upheld the district court decision that Stichting could not bring the malpractice claim, because

220. Id.
221. Id.
222. Id.
224. Id. at 42.
they were not the real party in interest.\textsuperscript{225} It found that under New Jersey law, the legal malpractice claim would not be assignable, but under New York law, it would be assignable.\textsuperscript{226} The court certified the question of whether New York or New Jersey law governs the assignability of the legal malpractice claim.\textsuperscript{227} The court also certified the question of whether an apparent authority relationship existed between Schreiber and the law firm of Walter, Conston, Alexander & Green\textsuperscript{228} for purposes of Schreiber’s representation of Saybolt.\textsuperscript{229} On August 12, 2005, the parties submitted a stipulation to withdraw their appeal with prejudice, based on settlement of the case.\textsuperscript{230} Because of the settlement of the case, the Second Circuit requested that the New York Court of Appeals withdraw the questions certified.\textsuperscript{231} Since the certified questions were withdrawn, there is no clear answer as to whether Schreiber’s firm can be liable for his erroneous advice given to Saybolt or whether the legal malpractice claim will be assignable.

The implications of the \textit{Stichting} proceedings are far reaching. This case illustrates that attorneys may be liable for malpractice for advising clients to take an action that violates the FCPA. Attorneys must be aware that their opinion on the FCPA can expose them to liability for legal malpractice actions. This is true even if their client pleads guilty or is found guilty at trial for violating the FCPA. Even though there is no private right of action under the FCPA, attorneys still face liability by advising clients on the scope and application of the FCPA.

\section*{VI. Solutions to Avoid Liability Under the FCPA}

This Article has established that there are many areas where attorneys face a wide range of ethical and legal challenges. This section discusses solutions so attorneys can avoid these obsta-

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\item \textsuperscript{225} Id. at 34.
\item \textsuperscript{226} Id. at 47.
\item \textsuperscript{227} Id. at 54.
\item \textsuperscript{228} Schreiber was “Of Counsel” for the firm Walter, Conston, Alexander & Green P.C. Id. at 39.
\item \textsuperscript{229} \textit{Stichting III}, 407 F.3d at 55–56.
\item \textsuperscript{230} \textit{Stichting Ter Behartiging Van de Belangen Van Oudaandeelhouders in Het Kapitaal Van Saybolt Int’l B.V. v. Schreiber}, 421 F.3d 124 (2d Cir. 2005) (“\textit{Stichting IV}”).
\item \textsuperscript{231} Id. at 125.
\end{itemize}
\end{footnotesize}
icles. Also, the following contains recommendations on how the FCPA can be amended to clear up many of the ambiguities that exist in the current law.

A. Solutions for Attorneys

The first solution for attorneys to avoid the ethical and legal obstacles that arise from the FCPA is for the attorney to familiarize himself or herself with the language of the Act. This seems like a very basic and primitive solution, but attorneys can avoid many of the ethical and legal dilemmas that arise by just carefully reading and studying the language of the FCPA. Attorneys must remember that "[c]ompetent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." However, attorneys must be aware that this is the lowest threshold for attorney competence.

Attorneys must report material violations of federal securities laws by their client. This obligation comes from SOX section 307. Attorneys are required to report evidence of federal securities violations and any other fraudulent act to a company’s chief counsel or the CEO. If an attorney even suspects a violation of the FCPA, he or she should report it immediately to the proper authority. However, note that the reporting obligation only applies to attorneys representing issuers; it would not apply to domestic concerns or other persons under the FCPA.

Attorneys must exercise due diligence in understanding and researching potential transactions involving the client and foreign government officials. The attorney must look at where the payment is being given and determine whether it is a country where bribery is widespread and condoned, or a country where it is strictly controlled. Attorneys must also exercise due diligence when selecting local counsel to represent them and give advice on local laws and customs.

The due diligence obligation applies whether the attorney handles the transaction personally or recommends a foreign attorney to handle the transaction. As discussed earlier, if an attorney recommends a foreign attorney to handle a potential transaction

234. PRACTICAL GUIDE, supra note 151, at 339.
and just washes his or her hands of it without researching the facts, an attorney may face many ethical and legal violations. If the recommending attorney knows or has reason to know that the foreign attorney will violate the FCPA, he or she can be held liable for a violation of the FCPA. Attorneys must be wary of the many ethical and legal challenges that arise from representing clients under the FCPA. Many of the problems that arise can be easily avoided with preparation and due diligence on part of the attorney.

B. Solutions Provided by the Government

The Government provides a solution to avoid liability under the FCPA. The DOJ offers a program, the Justice Department Review Procedure, which can help attorneys avoid ethical and legal dilemmas. The DOJ has long maintained a FCPA review procedure, where “a company or person that is concerned about potential liability under the FCPA may provide the relevant facts to the Department, which will respond—now within thirty days—by giving an opinion indicating it will take no enforcement action in a particular situation.”

The DOJ has been cautious in providing “no action” assurances. The information submitted to the DOJ is treated as confidential. The DOJ, however, can issue a press release, which names the requesting party, the affected country, and the “general nature and circumstances of the proposed conduct.” The DOJ also “reserves the right to retain any FCPA Opinion request, documents and information submitted to it under this procedure or otherwise and to use them for any governmental purposes, subject to the restrictions on disclosures in § 80.14.” This language suggests that the DOJ can retain the information for a subsequent

235. See supra Part IV.
236. Gantz, supra note 24, at 109 (quoting 28 C.F.R. § 80.8 (1994)).
237. The DOJ procedure states:
[A]ny document or other material which is provided to, received by, or prepared in the Department of Justice or any other department or agency of the United States in connection with a request by an issuer or domestic concern under the foregoing procedure shall be exempt from disclosure under 5 U.S.C. 552 and shall not, except with the consent of the issuer or domestic concern, be made publicly available.
prosecution.\textsuperscript{240} This review procedure is only for the anti-bribery provisions of the FCPA, not the accounting and record keeping provisions.

These non-prosecution agreements are not common for violations of the FCPA.\textsuperscript{241} Since 1990, DOJ prosecutions under the FCPA against sixty-six individual defendants and corporations have been resolved.\textsuperscript{242} Thirty-nine of the cases were resolved through plea agreements.\textsuperscript{243} Only eight of the FCPA cases, since 1990, have been resolved by non-prosecution agreements.\textsuperscript{244} These non-prosecution agreements contain elements similar to plea agreements, including fines and monitoring.\textsuperscript{245} An example of a non-prosecution agreement can be seen in the InVision case. In 2004, the company agreed to pay a fine of $800,000, accept their responsibility for the misconduct, and to adopt a FCPA compliance program and other internal controls to prevent future violations.\textsuperscript{246}

\section*{C. Solutions for Companies}

All companies that conduct business outside of the United States should create and implement a FCPA compliance program. A FCPA compliance program means “a single, documented, corporate plan designed to reduce the likelihood that the company will engage in violations of the anti-bribery provisions of the FCPA, and to detect such violations and bring them to the attention of senior management, if they occur.”\textsuperscript{247} A well-designed program educates “employees concerning their responsibilities . . . thereby protecting the company from the potential costs, liabilities, and repu-

\begin{itemize}
  \item \textsuperscript{240} Gantz, \textit{supra} note 24, at 109.
  \item \textsuperscript{241} Newcomb, \textit{supra} note 107, at 7.
  \item \textsuperscript{242} \textit{Id}.
  \item \textsuperscript{243} \textit{Id}.
  \item \textsuperscript{244} \textit{Id}. The DOJ has entered into non-prosecution, or deferred prosecution agreements, with companies Baker-Hughes, Aibel Group, Schnitzer Steel, Statoil, Monsanto, InVision, and the Micrus Corporation. \textit{Id}.
  \item \textsuperscript{245} Newcomb, \textit{supra} note 107, at 7.
  \item \textsuperscript{246} \textit{Id}. (discussing In re InVision Techs., Inc., Secs. Litig., No. C04-03181 MJJ, 2006 WL 538752 (N.D. Cal. Jan. 24, 2006)).
\end{itemize}
tional damage associated with violations of a high-profile, criminally-enforceable federal statute.\textsuperscript{248}

To implement an effective compliance program, companies must compile several basic categories of information.\textsuperscript{249} The three kinds of basic information that need collecting are the risks of FCPA violations, the existing controls within the company, and the resources available to implement and monitor the program.\textsuperscript{250} With this information, the company can identify the goals and objectives that they wish to accomplish through the program.\textsuperscript{251}

The first step the company must take is determining the risks the company wants the program to eliminate or at least minimize. This process includes understanding "how and where the company does business abroad" and what areas present more risk than others.\textsuperscript{252} Such sources of information include "SEC filings and other descriptions of the company's business operations; interviews with corporate officials; and securities analysts' reports, news articles, and other published sources of information."\textsuperscript{253}

The next step is to look at the existing controls the company has to prevent this type of behavior.\textsuperscript{254} This step is necessary not only to see what controls currently exist within the company but also expose the need for additional controls.\textsuperscript{255} The company must make sure to have both anti-bribery controls and also adequate accounting and record keeping controls. With these controls in place, the company will have a much better chance of avoiding liability under the FCPA.

Next, the company must consider the available resources for implementing and monitoring the controls.\textsuperscript{256} The company must look at the time and money it will cost to implement the compliance program that suits their needs. Companies must remember "[t]he most thoughtfully designed and engineered program, if not enforced or applied, is as bad as no program at all. Therefore, the program needs to match not only the risks of the

\textsuperscript{248} Id.
\textsuperscript{249} Id. at 293.
\textsuperscript{250} Id. at 294.
\textsuperscript{251} Id.
\textsuperscript{252} Id.
\textsuperscript{253} Goelzer, supra note 247, at 294.
\textsuperscript{254} Id.
\textsuperscript{255} Id. at 295.
\textsuperscript{256} Id. at 296.
business, but also the capabilities and resources of those who will
be implementing it." 257

Once these basic factors have been assessed, the company
must define what objectives and goals they wish to accomplish
with the compliance program. Each compliance program must be
tailored individually for each company but should address three
broad categories. These categories are documentation of company
policy, imposition of procedural controls, and monitoring compli-
ance. 258

The first broad category the program must address is the
documentation of company policy, also known as the "code of
conduct." This document will set forth the "company's expecta-
tion that employees will strictly adhere to the law." 259 This state-
ment should include provisions on both illegal payments and ac-
counting and record keeping procedures.

The next category is the implementation of procedural con-
trols. These are designed to prevent violation of the law or com-
pany policy. These controls might include: "due diligence with
respect to agents, consultants, joint venturers, and other foreign
partners; certifications or similar mechanisms to provide evidence
that employees are aware of and have adhered to corporate policy;
and devices to bring violations to management's attention." 260

The last category is monitoring compliance of the imple-
mented procedural controls. The level of monitoring will depend
upon the company's specific circumstances and the level of viola-
tion risk faced in certain areas. 261 Monitoring compliance could
include review of documentation, interviews with employees in-
volved in high-risk areas, review of supporting documentation for
cash expenditures, review of consultants and agents' contracts,
review of compliance with certification requirements, and review
of public information concerning business practices in certain ju-
risdictions. 262

With a FCPA compliance program in place, both the attor-
ney and company can avoid many of the FCPA's ethical and legal
challenges. The compliance program will greatly reduce the risk

257. Id.
258. Id.
259. Id. at 297.
260. Goelzer, supra note 7, at 298.
261. Id. at 300.
262. See id. at 300–01.
of a FCPA violation, instead of companies attempting to deal with misconduct after it arises. However, companies must realize that the compliance program will not eliminate the risk of violations of the FCPA. Companies must continually update their compliance program. Whenever a violation is discovered, the compliance program “should be reviewed with a view to determining why the violation occurred and whether changes should be made in the program to prevent a reoccurrence.” Also, companies must remember that a compliance program that tries to control every conceivable activity that may result in some type of misconduct is likely to be ineffective and unenforceable.

D. Suggested Amendments to the FCPA

The FCPA has many ambiguities in both its scope and application. By amending the FCPA, some of this confusion can be eliminated. This is not to suggest the FCPA can be written to cover every possible situation, but it can be modified to be less ambiguous.

The first amendment would be to add the definition of “corruptly” under the definitions section of the FCPA. If the FCPA included a definition of “corruptly” courts would not have to struggle with cases where companies believe they are innocent under the FCPA, because they believe their action was not “corrupt.” With this definition, courts would be able to use the language of the statute instead of having to judicially craft a definition. This would minimize splits in courts about when a payment is given “corruptly.” This will also minimize the liability of attorneys, who could advise clients exactly when a payment will be given “corruptly” and when it will not be.

The judicially crafted definition from Liebo states that “an act is ‘corruptly’ done if done voluntarily and intentionally, and with a bad purpose of accomplishing either an unlawful end or result, or a lawful end or result by some unlawful method or means.” It is also helpful to look at the legal definition of when an act is “corrupt.” “Corruption” is defined as “[d]epravity, perversion, or taint; an impairment of integrity, virtue, or moral prin-

263. Id. at 291.
264. Id.
266. United States v. Liebo, 923 F.2d 1308, 1312 (8th Cir. 1991).
ciple; esp., the impairment of a public official’s duties by bribery.” The definition also includes “[t]he act of doing something with an intent to give some advantage inconsistent with official duty and the rights of others; a fiduciary’s or official’s use of a station or office to procure some benefit either personally or for someone else, contrary to the rights of others.” With the addition of these definitions, the clarity of the FCPA will be improved.

These additions would have pros and cons. It would help clarify the language in the FCPA, but it would also add additional language that could lead to just as much ambiguity that exists in the FCPA as it is written. Also, courts could still interpret the new provisions differently, and the same split could occur. With these definitions, however, attorneys will be able to better counsel their clients on when an act is done “corruptly” and when it is not.

The next amendment would be to define what “obtaining or retaining business” is and what an “improper advantage” is in the statute. Courts have taken a very broad view of what these terms mean. Courts have found that payments given to foreign officials to avoid paying customs duties and import taxes could fall under the “obtaining or retaining business” test of the FCPA. The FCPA should define, or at least give a non-exhaustive list of what activities will violate the FCPA under the “obtaining or retaining business” prong of the statute. This would minimize confusion on part of the courts and also minimize attorney liability for advising clients on whether courts will find an action that is being used to retain or obtain business in a country.

The FCPA would also benefit from a new section defining attorney liability. This section would have multiple parts illustrating the duties of attorneys under the FCPA. This would clarify the duties attorneys have when advising clients on the scope and application of the FCPA.

The first part of the attorney liability section would include a non-exhaustive list of duties of the attorney. The most important duty would be due diligence. The attorney must look at all the circumstances surrounding the payment being made and also research the persons involved in the transaction. The attorney would not necessarily have to do all of this personally, but at least be pro-

268. Id.
269. See United States v. Kay, 359 F.3d 738, 749 (5th Cir. 2004).
vided with enough information to meet the due diligence obligation. The due diligence obligation would be even more important for attorneys engaging in transactions in countries that have high levels of corruption and also for American attorneys who recommend foreign lawyers to handle potential transactions.

Attorneys will argue that there is no need to place a due diligence obligation in the FCPA because attorneys should be conducting due diligence anyway. If they are supposed to be conducting due diligence anyway, it will only reinforce the responsibility of conducting due diligence if placed in the FCPA. One could argue that this due diligence obligation is already placed on attorneys by the ethical rules and that placing a legal obligation on attorneys would be redundant. Attorneys should have both an ethical and legal obligation to conduct due diligence either when investigating a potential transaction or when recommending a foreign lawyer to handle the transaction.

Another section added to 15 U.S.C. § 78dd-2 and § 78dd-3 of the FCPA could provide for an up-the-ladder reporting system analogous to the reporting system in SOX section 307 that is only applicable to issuers. This would place the same reporting burden on attorneys that represent non-issuers and individuals, but instead of reporting to the SEC, they would report to the DOJ. For individuals, there would be a reporting requirement directly to the DOJ.

This provision, if implemented, will generate controversy. It is foreseeable that there will be the same type of backlash to this provision that occurred when the up-the-ladder reporting obligation under SOX was enacted.\textsuperscript{270} Attorneys will argue that if they represent an issuer, they are already subject to the up the ladder reporting rules of SOX. Attorneys who do not represent issuers will be angry, arguing that because they do not represent issuers they should not be subject to any type of up-the-ladder reporting requirements. Also, for attorneys that represent individuals, the up-the-ladder reporting requirement will have no meaning.

As another consideration, a section, analogous to the pre-emption provision found in SOX, should be added to the FCPA that preempts state ethics laws. The provision in SOX states "[a]n attorney who complies in good faith with the [reporting] provisions of this part shall not be subject to discipline or otherwise liable

\textsuperscript{270} See SOX § 307.
under inconsistent standards imposed by any state or other United States jurisdiction where the attorney is admitted or practices.”

As stated earlier in this Article, the state ethics rules regulate a separate area than the FCPA and, therefore, would not conflict with each other in their application. However, a provision could be placed in the FCPA that explicitly states that in the event of a conflict between the FCPA and a state’s ethics laws, the FCPA, if complied with in good faith, would preempt a state’s ethics laws. There will be much less confusion for attorneys under the FCPA with the inclusion of a preemption provision.

Also, the FCPA should be amended to contain language that distinguishes between a bribe and a gift. The current FCPA lacks clarity on the issue; attorneys must make moral judgments on what they believe to be a gift or a bribe. The statute should not necessarily include a monetary amount of what constitutes a bribe; instead, it should contain factors to be looked at when making these payments. These factors could include the monetary amount of the payment, the timing of the payment, and also the tradition of gift giving in the country where that company is making the payment.

It is helpful to look at the definitions of both a gift and a bribe. A gift is “[t]he voluntary transfer of property to another without compensation.” A bribe is “[a] price, reward, gift, or favor bestowed or promised with a view to pervert the judgment of or influence the action of a person in a position of trust.” “The core concept of a bribe is an inducement improperly influencing the performance of a public function meant to be gratuitously exercised.”

The true distinction between a gift and a bribe is that a gift is given to another person with nothing expected in return. A bribe is specifically given to another person in the hope of gaining some sort of an advantage or to influence a person’s decision making. If the person making the payment can prove that the payment was made without expecting or receiving anything in return, then it would be a gift and not a bribe. The problem that arises is what

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271. 17 C.F.R. § 205.6(c) (2007).
273. ld. at 203.
274. ld. at 204 (alteration in original) (quoting JOHN T. NOOAN, JR., BRIBES, at xi (1984)).
standard will be used when looking to see if a payment was made as a bribe or as a gift. A reasonable person standard or a more likely than not standard would be sufficient. To require the person to prove beyond a reasonable doubt that a payment was meant as a gift and not a bribe would be too extreme.

These definitions, if included in the FCPA, would make it easier for attorneys to distinguish between when a payment, or anything of value given, is a bribe or a gift. The guidelines for distinguishing between a gift and a bribe and also a non-exhaustive list of what would qualify as a bribe would add clarity to the FCPA. These definitions would remove some of the ambiguity of the FCPA.

The FCPA would also benefit from a section that takes cultural differences into consideration. It would be a clause stating, “When looking at an action under the FCPA, authorities should take the target country’s culture into consideration when looking at the intent behind the payment.” This clause would help with some of the confusion associated with cultural differences faced under the FCPA.

There are pros and cons to adding a “cultural” provision to the FCPA. The first problem would be that the FCPA contains an exception for foreign laws but explicitly excludes customs and traditions unless they are written. It seems that the FCPA meant to exclude a certain country’s customs and traditions. The drafters did mean to limit the exception to written laws of a foreign country, but they did not close the door on a defense of custom and tradition, as long as it is within reason.

For example, there is a Korean practice of giving “ttokkap” or rice-cake expenses.275 These consist of gifts or payments, generally given during major Korean holidays.276 If these payments are made without receiving anything in return, there will not be a violation of the FCPA. In China, payments to government officials may be advanced in accordance with the traditional practice of “guanxi,” a practice that is analogous to the practice of networking

276. Id. at 561–62.
in America. In Japan, etiquette demands "that not unsubstantial gifts or bonuses are exchanged at the close of the business year among colleagues." These practices show that not all payments made to foreign officials will be characterized as bribes. However, as stated earlier, there needs to be a legal standard whereby a country's culture and tradition are respected under the FCPA. "Only by making this distinction will local customs be afforded adequate international recognition."

The problem with codifying morals is that different countries have different customs and values. As former Secretary of Commerce Elliot L. Richardson stated, "[T]he problem is defining what is a crime, what is moral and immoral, when you are dealing with a variety of societies and a variety of backgrounds." The other problem is defining when a custom or tradition is reasonable. Countries where bribery and corruption are rampant could abuse this defense. There will need to be guidelines for when a custom will be a valid defense under the FCPA. These guidelines can also be tied into the discussion of the distinction between a bribe and a gift.

VII. CONCLUSION

Attorneys face many ethical and legal pitfalls when counseling clients on the FCPA. Attorney liability under the FCPA is a hotly debated topic. It will continue to be contentious until Congress removes many of the ambiguities in the FCPA, a step that Congress should seriously consider because the vast differences in cultural norms of what qualifies as bribes. Many countries view the FCPA as just another example of cultural imperialism.

278. Id. at 611.
279. Id. at 613.
280. Id. at 608 (quoting Elliot L. Richardson).
Attorneys and companies face the dilemma of abiding by local tradition without breaking US law. 282

Legislation will not be enough, by itself, to swing the pendulum in the right direction. Companies and attorneys must take personal responsibility in restoring investor confidence in the United States market and also the global market. The FCPA is a step in the right direction, but attorneys must do everything in their power to deter corruption and restore confidence in markets where there is none.
