

Navigating the FCPA's Complex Scienter Requirements

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You are the general counsel of an international corporation headquartered in the United States. A low-level sales manager at a fifth-tier foreign subsidiary of your corporation authorizes a local agent to pay a bribe to a government bureaucrat in connection with a contract proposal. The agent invoices the foreign subsidiary, including the amount of the bribe payment, in a bill for otherwise legitimate services. Your corporation is awarded a contract by the government agency for which the foreign bureaucrat worked. Nobody in the United States or at a senior management level in any country knows about the improper payment. Two years later, the Securities and Exchange Commission (SEC) and the Department of Justice (DOJ) allege that your corporation violated the Foreign Corrupt Practices Act (FCPA). Did your corporation have the requisite knowledge and intent to violate the FCPA? The answer, though riddled with ambiguity, likely is yes.

The question of what level of knowledge and intent is necessary to violate the FCPA is a complicated one, in part because of the many different ways the FCPA operates—anti-bribery provisions versus accounting provisions, individual versus corporate liability, and civil versus criminal liability—and, in part, because so few FCPA cases have been litigated in court. The FCPA terrain, therefore, is largely plotted from SEC and DOJ settlements. And the government's view of what constitutes the requisite intent has been aggressive and expansive. This article attempts to navigate and explain the statute's scienter requirements.

The Foreign Corrupt Practices Act

Initially enacted in 1977 as a reaction to Watergate-era reports of corporate slush funds and foreign bribery, the FCPA consists of two distinct components: the anti-bribery provisions and the accounting provisions. The anti-bribery provisions make it illegal to offer or provide money or anything of value to officials of foreign governments, foreign political parties, or international organizations with the intent to obtain or retain business.¹ The anti-bribery provisions apply to “issuers,” “domestic concerns,” and “any person” that violates the FCPA while in the territory of the U.S. The term “issuer” covers any business entity that is registered under 15 U.S.C. § 78l or is required to file reports under 15 U.S.C. § 78o(d). Foreign issuers whose American Depository Receipts are traded on U.S. exchanges are “issuers” for purposes of the statute. The term “domestic concern” is even broader and includes any U.S. citizen, national, or resident, as well as any business entity that is organized under the laws of a U.S. state or that has its principal place of business in the U.S.²

The accounting provisions of the FCPA apply only to issuers and are divided into two parts: the “books and records” and “internal controls” provisions. They require issuers of securities to: 1) keep books and records which, in reasonable detail, accurately reflect the transactions of the issuer and 2) devise and maintain a system of internal controls sufficient to provide reasonable assurances that the issuer properly accounts for all assets and transactions.³

The Anti-Bribery Provisions

What The Statute Says About “Knowing”

There are three separate knowledge or scienter standards in the statute's anti-bribery provisions: 1) any violation must be done “corruptly”⁴; 2) for criminal penalties to be imposed on an individual, the individual must additionally have acted “willfully”⁵; and 3) if liability is premised on a payment to a third party, the payment must have been made “while knowing” that the money or thing of value would be directed in whole or part to a foreign official.⁶ Of the three, only one—the

requirement of knowledge that a payment to a third party will be directed to a foreign official—is defined in the statute. There is no definition of “corruptly” or “willfully.”

The statute provides that a person’s state of mind is “knowing” with respect to conduct, a circumstance, or a result if: a) the person is *aware* that he is engaging in the conduct, that the circumstance exists or that the result is substantially certain to occur; or b) the person has a *firm belief* that the circumstance exists or that the result is substantially certain to occur. Knowledge of the existence of a particular circumstance is established if the person is aware of a *high probability* of the existence of such circumstance, unless the person actually believes that the circumstance does not exist.⁷

The “high probability” standard was intended by Congress to ensure that “knowledge” encompassed the concepts of “conscious disregard” and “willful blindness.”⁸ The head-in-the-sand or “ostrich” concept is thus addressed: recklessly ignoring red flags can and will lead to a finding of knowledge under the anti-bribery provisions. This knowledge standard is important because very often a payment in violation of the FCPA is made to a foreign official by a third party, such as a foreign agent.

Thus, any money directed to a third party, whether styled as a commission, a success fee or compensation for services, can satisfy the FCPA’s knowledge standard if there are red flags that suggest—i.e., present a “high probability”—that the third party may use the payment or a portion of the payment to bribe foreign officials. But what about “corruptly” and “willfully”?

What ‘Corruptly’ And ‘Willfully’ Mean

To be held liable for any violation of the anti-bribery provisions, a person or entity must have acted “corruptly.” And to be criminally liable, an individual (as opposed to corporate entity) must have acted “willfully.” Although neither of these terms is defined in the statute, the legislative history of the FCPA provides guidance on the meaning of “corruptly.” The Senate indicated that the purpose of including the word “corruptly” was “to make clear that the offer, payment, promise, or gift, must be intended to induce the recipient to misuse his official position in order to wrongfully direct business to the payor or his client...The word ‘corruptly’ connotes an evil motive or purpose, an intent to wrongfully influence the recipient.”⁹

At least three U.S. Circuit Courts—the Second, Fifth and Eighth Circuits—have addressed the meaning of “corruptly,” “willfully” or both as those terms are used in the FCPA. In *United States v. Liebo*, the Eighth Circuit considered a claim that the district court improperly instructed the jury in a criminal case on the FCPA’s “corruptly” element.¹⁰ The *Liebo* case involved various bribes paid by Richard H. Liebo, a vice president of NAPCO International (NAPCO), to Nigerian officials in connection with contracts to supply parts for the maintenance of Nigerian military planes. Although the prosecution presented evidence at trial, among other things, that Liebo deposited \$30,000 into a bank account in the U.S. for the benefit of Nigerian officials and made payments totaling \$130,000 to three “commission agents” who served as intermediaries through whom payments were made to Nigerian officials, Liebo was convicted of only one count relating to paying \$2,028 for airline tickets for the honeymoon of a Nigerian official.

On appeal, Liebo argued in part that the evidence at trial was insufficient to establish that he acted “corruptly” by buying the airline tickets. Liebo pointed to the trial testimony of the Nigerian official who received the tickets who stated that he considered the tickets “a gift” from Liebo personally. Liebo asserted that “corruptly” required that the tickets must have been purchased with the intent “to induce the recipient to misuse his official position.” The Eighth Circuit found that there was sufficient evidence to establish that the airline tickets were given corruptly. The court noted that the airline tickets were given to the official shortly before a supply contract was approved, and that the official who received the tickets had a close relationship with another official—indeed they were cousins—who had an important role in the contract approval process. There also was evidence that Liebo classified the tickets for accounting purposes as a

“commission payment.” The Eighth Circuit also approved the district court’s jury instruction that “corruptly” meant that “the offer, promise to pay, payment or authorization of payment, must be intended to induce the recipient to misuse his official position or to influence someone else to do so,” and 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.”¹¹

The Second Circuit addressed the FCPA’s knowledge and “corruptly” requirements in *Stichting v. Schreiber*, which involved a civil legal malpractice claim alleging that the erroneous legal advice of Philippe E. Schreiber, a director and attorney for Saybolt North America (Saybolt), caused Saybolt to violate the FCPA.¹² According to the plaintiff, Schreiber advised Saybolt that it could legally pay a bribe to a Panamanian official to acquire property in the Panama Canal Zone if Saybolt’s Dutch affiliate made the payment. Thus, the plaintiff asserted, Schreiber’s legal advice led Saybolt to act without the knowledge that its conduct violated U.S. law. After the bribe was paid, but before the malpractice suit was brought, U.S. officials investigating possible environmental crimes by Saybolt executed a search warrant at its offices in New Jersey and uncovered evidence of the Panamanian bribe. Ultimately, Saybolt pled guilty to violating the FCPA’s anti-bribery provisions.¹³

In the subsequent malpractice suit, the district court granted summary judgment for Schreiber, finding that because Saybolt’s guilty plea constituted an admission that it acted with knowledge that its conduct was corrupt, plaintiffs in the malpractice suit were collaterally estopped from arguing that Schreiber’s advice caused Saybolt to believe its acts would not violate the FCPA. In overruling the district court’s decision, the Second Circuit found that although by pleading guilty Saybolt admitted that it acted “corruptly”, an admission that an act was done “corruptly” 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.” Noting that “[i]t is difficult to determine the meaning of the word ‘corruptly’ simply by reading it in context,”¹⁴ the Second Circuit looked to the legislative history of the statute, including the 1977 House Report, which provided that the word “corruptly” is intended to have the same meaning as in 18 U.S.C. § 201, the domestic bribery statute.¹⁵ The Second Circuit found that “case law defining the term ‘corruptly’ in federal bribery statutes . . . parallels the Senate Report’s explanation of the term as denoting an evil motive or purpose and an intent to induce an official to misuse his position.”¹⁶ But the court concluded that specific intent to violate the FCPA is not an element of an FCPA violation:

[T]he word “corruptly” in the FCPA signifies, in addition to the element of “general intent” present in most criminal statutes, a bad or wrongful purpose and an intent to influence a foreign official to misuse his official position. But there is nothing in that word or anything else in the FCPA that indicates that the government must establish that the defendant in fact knew that his or her conduct violated the FCPA to be guilty of such a violation.¹⁷

As a result, the question of whether Saybolt acted with knowledge that its conduct violated the FCPA, the court held, was not answered by the guilty plea and Saybolt was not collaterally estopped from litigating the issue in its malpractice suit.¹⁸ The court went on to suggest that even a generally “unlawful” intent is not required by the “corruptly” element.¹⁹

Most recently, in *United States v. Kay*, the Fifth Circuit also analyzed the criminal intent required to violate the FCPA’s anti-bribery provisions.²⁰ *Kay* involved the convictions of David Kay and Douglas Murphy, executives of American Rice, Inc. (ARI), for violating the FCPA by paying bribes to Haitian officials to reduce customs duties and sales taxes imposed on ARI’s rice imports to Haiti. The district court instructed the jury that an act is done “corruptly” if it is “done voluntarily and intentionally, and with a bad purpose or evil motive of accomplishing either an unlawful end or result, or a lawful end or result by some unlawful method or means.”²¹ The district court also instructed the jury that an act is done “knowingly” if it is “done voluntarily and intentionally, not because of accident or mistake.”²² Kay and Douglas appealed their convictions, arguing in part

that the judge failed to instruct the jury properly on the element of willfulness required to convict an individual under the FCPA's anti-bribery provisions.

In determining that the jury instructions were adequate, the Fifth Circuit noted that the FCPA does not define "willfully" and thus turned to the common law interpretation of the term. The court identified three levels of criminal willfulness: 1) the most general level of willfulness, present in the majority of criminal statutes, which simply requires that the defendant have knowledge of the act he is doing—there is no requirement that he has knowledge of the terms of the statute or even the existence of the statute; 2) the intermediate level of willfulness, which does not require the defendant to know that he is violating a specific statute, but which requires that he know his conduct is in some way "unlawful"; and 3) the strictest level of willfulness, which does not allow imposition of liability unless the defendant had actual knowledge of the statute prohibiting his conduct. The Fifth Circuit determined that the FCPA falls under the second, or "intermediate," category of criminal willfulness. Thus, a criminal violation of the FCPA by an individual requires that the defendant "knew he was doing something generally 'unlawful' at the time of his action."²³ The *Kay* court found that the district court's jury instructions captured this level of intent by requiring that the jury find that the defendants acted "with a bad purpose or evil motive."²⁴

Although the *Kay* court agreed with the *Stichting* court's conclusion that the FCPA does not require that the defendant knew he was violating "the specific provisions of a law,"²⁵ ultimately the Fifth and Second Circuits appear to disagree on what level of intent is necessary for an FCPA violation. The Fifth Circuit in *Kay* was explicit that the FCPA falls into the "intermediate" category of criminal willfulness, requiring a defendant to have known his conduct was in some way "unlawful." The Second Circuit in *Stichting* suggested that a defendant need only have acted with a bad purpose and an intent to influence a foreign official to misuse his official position; there is no requirement that the defendant knew his conduct to be generally "unlawful." The level of intent required by the Second Circuit thus appears to fall somewhere between the first and intermediate levels outlined in *Kay*. It may be possible to resolve the inconsistency by pointing out that in *Kay* the court purported to interpret the willfulness element, whereas in *Stichting* the court interpreted the corruptly element (the willfulness element not being applicable because *Stichting* involved a corporation rather than an individual). Thus, one might conclude that the corruptly element requires a bad purpose and intent to influence a foreign official to misuse his position, while the willfulness element requires knowledge of an unlawful means or end. But the *Kay* court determined that this willfulness requirement was satisfied by the district court's jury instruction requiring proof of "a bad purpose or evil intent" – the same language used by the *Stichting* court ("a bad or wrongful purpose") and indeed the Senate ("an evil motive or purpose") to explain the "corruptly" element.

What Does This Mean In Practice?

The vast majority of enforcement actions brought by the SEC and DOJ under the anti-bribery provisions are resolved out of court, by way of a settled civil complaint and/or an administrative cease-and-desist order (in the SEC's case), or a guilty plea, non-prosecution agreement, or deferred prosecution agreement (in DOJ's case). Due to the relative dearth of FCPA case law, the government generally has broad discretion to seek a settlement on facts that may not comport with a strict interpretation of the scienter standards.

The SEC's settlement of bribery charges with York International (York) in 2007 presents a good example. According to the SEC's complaint, York made improper payments to a number of government officials under a variety of scenarios, most of which evidenced clear knowledge of bribery. Relevant here, however, is the SEC's allegation that an employee of an agent that York utilized in India made a total of \$132,500 in small payments over the course of six years to Indian Navy officials to secure business for York's Indian subsidiary. The \$132,500 was taken from approximately \$180,000 in commission payments made by the York subsidiary to the Indian agent. The SEC's complaint contains no allegation, however, that York or its subsidiary directed,

authorized or was even aware of the payments.²⁶ Nevertheless, York settled these charges with the SEC.

Returning to our introductory hypothetical, it is unlikely that your U.S. corporation or any U.S. employee acted with the requisite corrupt intent or knowledge to violate the anti-bribery provisions. If the payment was not suspiciously recorded on the subsidiary's books, and if no one at the subsidiary ever reported or mentioned the payment to a U.S. employee, then the corporation and its U.S. personnel do not even have knowledge that the payment was made, much less the requisite bad purpose of accomplishing an unlawful end. However, your corporation's fifth-tier subsidiary and the low-level sales manager employed there *may* be held liable, assuming that they otherwise fall within the FCPA's jurisdiction—*e.g.*, where an act in furtherance of the improper payment was conducted while in the "territory" of the U.S. (such as a wire transfer through a U.S. bank). Indeed, in the criminal information filed by DOJ against Willbros Group in 2008, both counts alleging violations of the anti-bribery provisions are premised on single wire communications from the U.S. to another country: one was a bank wire transfer to Lebanon, and the other was an e-mail to Venezuela.²⁷ But the payment of fines and any reputational harm flowing from any settlement resolving allegations against the fifth-tier subsidiary may fall squarely upon your corporation.

The Accounting Provisions

The FCPA's "books and records" provision requires issuers to make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the issuer's transactions and disposition of assets. The "internal controls" provision requires that issuers devise and maintain reasonable internal accounting controls aimed at preventing and detecting FCPA violations. Like the anti-bribery provisions, the accounting provisions may be enforced both civilly and criminally.

Criminal Standards

The accounting provisions provide that criminal liability may be imposed only when a person (including the issuer itself) "knowingly" falsifies a book, record, or account of the issuer, or "knowingly" circumvents or fails to implement a system of internal controls.²⁸ The statute does not define "knowingly" as it is used in the accounting provisions. Given the limited number of FCPA-specific cases addressing this standard, courts likely will utilize the definition of "knowingly" developed in case law and commonly found in pattern jury instructions.

Legislative history also provides some guidance. Congress indicated that the "knowingly" language was "meant to ensure that criminal penalties would be imposed where acts of commission or omission in keeping books or records or administering accounting controls have the *purpose* of falsifying books, records, or accounts" or of circumventing internal controls.²⁹ Congress' focus on purposefulness suggests that "knowingly" connotes not simply an awareness of or reckless disregard for the circumstances, but also a willful intent to violate the accounting provisions.

In practice, however, DOJ has settled criminal allegations under the accounting provisions on facts suggesting less than full knowledge. Early in 2008, for instance, DOJ entered into a non-prosecution agreement with Westinghouse Air Brake Technologies Corporation (WABTEC),³⁰ settling allegations that payments to Indian officials by WABTEC's *fourth-tier* subsidiary, Pioneer Friction Ltd., were improperly recorded. There was no factual allegation that WABTEC had knowledge of the violation by its subsidiary. Liability seemingly was premised on the fact that Pioneer's tainted accounts were, "at the end of each fiscal year, consolidated into the books, records and accounts of WABTEC."³¹ This conclusion essentially amounts to strict liability, despite the knowledge requirement of the statute. Circling back to our introductory hypothetical, WABTEC demonstrates clearly that DOJ may attempt to hold your U.S.-based corporation strictly

liable for the books and records violations of its fifth-tier foreign subsidiary, simply by virtue of the consolidation of corporate-wide financial accounts at the end of each fiscal year.

Similarly, DOJ entered into a deferred prosecution agreement in 2008 with Flowserve Corporation (Flowserve) involving books and records and internal controls allegations stemming from the inaccurate accounting of payments by Flowserve's French subsidiary, Flowserve Pompes, under the U.N. Oil-for-Food Program. In a criminal information filed against Flowserve, DOJ did not allege knowledge on the part of Flowserve Corporation, but stated simply that Flowserve Pompes' accounts were incorporated into Flowserve Corporation's books and records.³² When it comes to criminal liability for the actions of a corporation's foreign subsidiaries under the accounting provisions, DOJ seems to have read the "knowingly" requirement out of the FCPA accounting provisions altogether.

Civil Standards

The books and records and internal controls provisions create strict civil liability for issuers—there is no requirement that an issuer have any knowledge of a violation before it can be held liable.³³ On the face of the statute, persons *other* than issuers are subject to the same knowledge standard for civil liability as for criminal liability—in order to be either civilly or criminally liable, persons other than issuers must "knowingly" falsify a book, record, or account of a company or "knowingly" circumvent or fail to implement internal controls.³⁴

Although the statute itself does not impose strict civil liability on persons other than issuers, under an SEC regulation, any person may be strictly liable for falsifying or causing to be falsified a book, record, or account of an issuer.³⁵ In effect, this regulation eliminates any knowledge requirement for non-issuers violating the books and records provision of the FCPA. However, a person other than an issuer circumventing or failing to implement a system of internal controls would still have to act "knowingly" to be held civilly liable.

Despite this strict civil liability for violations of the books and records provision of the FCPA, in 1981, Chairman Harold Williams of the SEC announced that "inadvertent recordkeeping mistakes will not give rise to Commission enforcement proceedings; nor could a company be enjoined for a falsification of which its management, broadly defined, was not aware and reasonably should not have known."³⁶ Chairman Williams went on to say that the "principal objective" of the accounting provisions "is to reach knowing or reckless conduct."³⁷ Unfortunately, recent settled enforcement actions demonstrate that Chairman Williams' assurances have not been heeded by the staff.

In the civil enforcement arena, it has become common for settled enforcement actions to be filed against issuers for conduct by their foreign subsidiaries of which the issuers had no knowledge. In 2007, for example, the SEC filed a settled complaint charging The Dow Chemical Company with books and records and internal controls violations. The charges stemmed from the improper accounting of several thousand dollars in payments to Indian government licensing officials by Dow's *fifth-tier* subsidiary, DE-Nocil. The SEC's complaint stated that "[t]he payments were made without knowledge or approval of any Dow employee."³⁸ The charges against Dow were civil, not criminal, so the "knowingly" standard did not apply, but clearly the SEC has abandoned the assurances provided by Chairman Williams in 1981.

A more recent example is the SEC's settlement with ITT Corporation (ITT) in February 2009. The SEC settled charges against ITT relating to improper accounting of payments to Chinese officials by ITT's Chinese subsidiary NGP. The complaint contains no allegation that ITT had knowledge of its subsidiary's accounting misconduct. For part of the time period covered by the allegations, NGP was not even a wholly-owned subsidiary of ITT, but rather a joint venture in which ITT had an interest. But because NGP's improper accounting entries were "consolidated and included in ITT's financial statements contained in its filings with the Commission," ITT was liable for books-and-records violations. ITT also settled internal controls charges with the SEC, despite the fact that the illicit payments were brought to light by an anonymous complaint lodged through ITT's

Corporate Compliance Ombudsman program.³⁹ These settlements demonstrate that under current SEC policy, strict liability means strict liability. Again returning to our hypothetical, the fact that your U.S.-based corporation had no knowledge of the improper accounting of its fifth-tier subsidiary will not prevent the SEC from bringing civil charges against it on a strict liability theory.

The SEC also has shown a willingness to premise individual civil liability for violations of the accounting provisions on facts constituting less than full knowledge. In the settled complaint against David Pillor, the Senior Vice President for Sales and Marketing of InVision, the SEC charged Pillor with books and records and internal controls violations in connection with the payment of commissions to third parties that were improperly accounted for by InVision. The complaint, however, does not allege any knowledge on the part of Pillor himself in relation to the violations. Although the SEC alleged that Pillor acted “knowingly or with extreme recklessness,” the only fact upon which this charge can be premised was Pillor’s receipt of certain e-mails regarding the third parties’ use of their commissions. The complaint specifically states that Pillor neither responded to these e-mails nor acknowledged their receipt, suggesting that he may never have read them.⁴⁰ This enforcement action, therefore, seems to be based more on a negligence standard than a standard of knowledge or “extreme recklessness.”

Conclusion

The scienter requirements of the FCPA are ill-defined, and their applicability is complex. Because so few FCPA cases have been litigated, the interpretation of these standards comes primarily from settled enforcement actions against companies and individuals. And the few cases that have addressed these requirements have been inconsistent. With the recent boom in FCPA enforcement actions, particularly against individuals, it is likely that more cases will be litigated in the near future. If and when more courts have the opportunity to interpret the FCPA’s provisions, we may see a narrower application of the standards set forth in the statute.

Given the complexity of the standards themselves and the nature of a settlement-based enforcement landscape, the best course to avoiding FCPA liability is to prevent violations in the first place. When violations do occur, at a fifth-tier subsidiary or elsewhere within your company, you need to be able to discover and remedy those violations immediately, so that you can present a strong policy argument against an enforcement action. Strict FCPA-specific policies, a workforce educated on those policies at every level, aggressive screening and post-engagement monitoring of third-party agents, and swift remediation, including employee termination where warranted, can help protect your corporation from an FCPA enforcement action.

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¹ 15 U.S.C. §§ 78dd-1, 78dd-2, 78dd-3.

² 15 U.S.C. § 78dd-2(h)(1).

³ 15 U.S.C. § 78m(b)(2).

⁴ 15 U.S.C. § 78dd-1.

⁵ 15 U.S.C. § 78ff(c)(2).

⁶ 15 U.S.C. § 78dd-1; 15 U.S.C. § 78dd-2.

⁷ 15 U.S.C. § 78dd-1(f)(2).

⁸ H.R. Rep. No. 100-576, at 919 (1988) (*citing United States v. Bright*, 517 F.2d 584 (2d Cir. 1975)).

⁹ S. Rep. No. 95-114, at 10 (1977).

¹⁰ 923 F. 2d 1308 (8th Cir. 1991).

¹¹ *Id.* at 1312.

¹² 327 F.3d 173, 183 (2d Cir. 2003).

¹³ Saybolt's former chief executive officer also was charged with violating the FCPA and convicted after trial.

¹⁴ *Id.* at 181.

¹⁵ *Id.* citing H.R. Rep. No. 95-640, at 7-8 (1977).

¹⁶ *Id.* at 182.

¹⁷ *Id.* at 183. In the FCPA case *United States v. Kozeny et al.* currently pending in the Southern District of New York, Judge Scheindlin recently issued an opinion indicating that her jury instructions will define "corruptly" as "'having an improper motive or purpose' and will explain that the payment must have been intended to 'induce the recipient to misuse his official position' in discharging an official act.'" No. 05-CR-518 (S.D.N.Y. Oct. 21, 2008). This language comports with the Second Circuit's opinion in *Stichting*.

¹⁸ *Id.* at 183-84. The case was remanded and ultimately settled in 2005.

¹⁹ The court opined that the rationale for the *Liebo* court's approval of the term "unlawful" in its jury instructions was that "the trial court wanted to indicate that the defendant violated the FCPA only if he sought to induce a foreign official to act 'unlawfully' by misusing his position." *Id.* at 183 n.9.

²⁰ 513 F.3d 432 (5th Cir. 2007). A prior Fifth Circuit decision in the same case, considering the government's appeal of the district court's decision to grant defendants' motion to dismiss, concluded that bribes paid to reduce customs duties and sales taxes fell within the scope of the FCPA's requirement that payments be made in order to obtain or retain business. See *United States v. Kay*, 359 F.3d 738 (5th Cir. 2004).

²¹ *Id.* at 446.

²² *Id.*

²³ *Kay*, 513 F.3d at 449-50.

²⁴ *Id.*

²⁵ *Id.* at 451.

²⁶ *SEC v. York Int'l Corp.*, Case No. 1:07-CV-01750 (D.D.C. Oct. 1, 2007).

²⁷ *United States v. Willbros Group*, Case No. 4:08-CR-00287 (S.D. Tex. May 14, 2008).

²⁸ 15 U.S.C. § 78m(b)(4)-(5).

²⁹ H.R. Rep. No. 100-576, at 916-17 (1988) (emphasis added).

³⁰ Non-prosecution Agreement between Westinghouse Air Brake Tech. Corp. and the DOJ (Feb. 8, 2008).

³¹ *Id.*

³² Deferred Prosecution Agreement between Flowserve Corp. and the DOJ (Feb. 21, 2008).

³³ 15 U.S.C. § 78m(b)(2).

³⁴ 15 U.S.C. § 78m(b)(5) ("No person shall knowingly circumvent or knowingly fail to implement a system of internal accounting controls or knowingly falsify any book, record, or account described in [§ 78m(b)(2)].").

³⁵ 17 C.F.R. 240.13b2-1. When Rule 13b2-1 was promulgated in 1979, the SEC explained that the rule contained no scienter requirement because "inclusion of such a requirement would be inconsistent with the language of new section 13(b)(2)(A) [15 U.S.C. § 78m(b)(2)(A)], which contains no words indicating that the Congress intended to impose a "*scienter*" requirement." 44 Fed. Reg. 10,968 (Feb. 23, 1979). Although Congress added § 78m(b)(5) in 1988, effectively imposing a scienter requirement for individuals, no corresponding modification was made to Rule 13b2-1. See Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 5002. However, courts and the SEC have indicated that a reasonableness standard is to be used in applying the rule. See Adoption of Rule 13b2-1, 44 Fed. Reg. 10,967, 10,968 (Feb. 23, 1979) ("standards [of] reasonableness are to be used"); *SEC v. Jorissen*, 470 F. Supp. 2d 764, 774 (E.D. Mich. 2007) (one "can only violate Rule 13b2-1 if he has acted unreasonably"); *SEC v. Softpoint, Inc.*, 958 F. Supp. 846 (S.D.N.Y. 1997) (Rule 13b2-1 has "no scienter requirement; liability is predicated on 'standards of reasonableness'").

³⁶ Remarks by Chairman Harold M. Williams, SEC Release No. 34-17500 (Jan. 29, 1981).

³⁷ *Id.*

³⁸ *SEC v. Dow Chemical Co.*, Case No. 1:07-CV-00336 (D.D.C. Feb. 12, 2007).

³⁹ *SEC v. ITT Corp.*, Case No. 09-CV-00272 (D.D.C. Feb. 11, 2009).

⁴⁰ *SEC v. Pillor*, Case No. C-06-4906 (N.D. Cal. Aug. 15, 2006).