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International Due Diligence Panel

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Retainer of Foreign Agents or Consultants and The Selection of Local Investors for Overseas Business.

Due Diligence Safeguards for Compliance with the FCPA

(*Can You Really Trust Your Foreign Agent or Partner?*)

Larry C. Wiese

"It shall be unlawful for any domestic concern … to make use of…. any means… of interstate commerce ***corruptly*** *in furtherance of an offer, payment, promise to pay or authorization of … of anything of value to…*

(1) any foreign official …
(2) *any foreign political party*
(3) ***any [third] person, while knowing*** *that all or a portion of such … thing of value will be offered, given, or promised, directly or indirectly to any foreign official … for the purpose of inducing such foreign official … to effect or influence any act or decision of such [foreign official's] government …in order to assist…. in obtaining or retaining business".*[1]

The focus of my presentation will be on the third of the general proscriptions listed in the above extract from the text of the Foreign Corrupt Practices Act ("FCPA"), that being the prohibition against an American company's use of a third-party intermediary to pay bribes to foreign government officials, in order to make the "business deal". Surely, with as much publicity as the FCPA has engendered since its passage over twenty years ago (in 1977), few American corporations would be so ignorant (or brazen) as to attempt to pay bribes to foreign government officials directly. But Congress (realizing that surreptitious means might be employed to "grease the wheel" so to speak) saw fit to criminalize the indirect bribery of foreign government officials by local agents, when those agents are found to have been acting on behalf of a U.S. company. This prohibition applies to bribery committed by the foreign agents, consultants, local representatives, or local equity partners of U.S. based companies, but for ease of reference in this discussion, I'll group all these entities under the single term "agent".

How, then, can American corporations ensure that their local agent in a foreign country does not make a prohibited payment to a government official, as a quid pro quo for the official's approval of the business venture, which the agent has been hired to promote? Common reasoning would suggest that an American company can never have perfect assurance of its foreign agent's compliance with the requirements of the FCPA, since the company will have imperfect oversight

[1] 15 U.S.C. Sec. 78dd-(a)(3), 78dd-2(a)(3)

of the agent's actions in his local environment. After all, the very contractual basis for the retainer of a local agent in a foreign jurisdiction is usually one whereby the agent is engaged as an independent contractor; and therefore, by legal definition, the agent is expected to have a great deal of discretion in determining the means of his performance. U.S. companies are not omnipotent. They cannot be expected to track the details of their foreign agent's day-to-day work. Indeed, often times local agents will be operating in foreign locations where the retaining U.S. company (at least initially) may not even have a permanent office. To make matters worse, the commercial terms under which U.S. corporations contract for a foreign agent's service may be such as to create an unintended incentive for the agent to pay bribes. This might be the case, for example, where all, or some large portion, of the agent's compensation is "tied" to the success or failure of the business venture which he has been hired to promote. For if the foreign agent is not to be paid unless the business venture goes forward, and if the business venture cannot go forward without the requisite approvals of a foreign government official, then the temptation for to the agent to pay a bribe becomes apparent. This temptation might be all the greater if the agent works in a society where bribe-paying is a societal norm.

True, the agent may give the U.S. company his (or her) written contractual assurance that bribes won't be, and haven't been, paid to promote the venture. But he also may be lying when he makes that representation. And yet the U. S. law may make an American company vicariously liable for the payment of a bribe by its local agent in a foreign jurisdiction – at least to the extent that it can be shown that the **American company was aware (at the outset of the agent's retainer) that money or value which it is to pay to the agent would most probably "pass through the agent's hands" (in a figurative sense) and into those of a foreign government official**. And there is the "rub". For what constitutes this advance state of knowledge or awareness, on the part of the company, that its foreign agent is likely to engage in bribe paying, using the company's money?

Certainly, the ambiguity in the law regarding this statutory element of knowledge was lessened in 1988, when the FCPA was amended to remove the much reviled "*reason to know*" standard. [2] The Conference Report to the 1988 amendments to the FCPA stated that it is a defense to an FCPA bribery charge (when the bribe has been paid by a foreign agent) if the company (or, more importantly, the company's employee who retained the agent) truly did not know, at the time of the retainer, that a bribe was going to be paid by the agent. But the Conference Report also said that **the requisite "state of mind" element in the statute might be satisfied if the defendant displayed a "conscious purpose to avoid learning the truth", such as by not asking the right questions at the outset**. When the word "knowing" is defined in light of this explanatory note of the Committee, it can be reasonably concluded that the **"reason to know standard" remains a part of the statute**, even though the 1988 amendments removed those specific words. If "knowledge" is a requisite part of the proof of the statute, then should it not naturally follow that "lack of knowledge" should be a defense; and it is. However, until a court case establishes otherwise, the term "**knowledge" will continue to be construed as meaning something more than actual knowledge**. Again, borrowing from the language of the Committee Report:

[2] Prior to the 1988 amendments, the text of the statute read as follows: *"... to give ... anything of value to ... (3) any person, while knowing, or having reason to know, that all or a portion of such ... thing of value, will be offered ... to any foreign official ...*".

"Corporate executives should not be able to avoid the purpose of the law by placing their 'heads in the sand'", so to speak. If their ignorance of the facts were shown to be due to "**willful blindness**" or "*deliberate ignorance*", or "*unwarranted obliviousness*" to any likely action or inaction by a third party under their charge, then "lack of knowledge" (as a defense) probably cannot be established. The suggestion of the Committee Report is that the *requisite "corrupt purpos*e", and the necessary "*knowledge*" by the company of the agent's intent to pay a bribe on its behalf, can be inferred from the decision of the company to hire the agent in the first place. For if the bribe-paying agent is shown to have been unreliable, unskilled, of questionable reputation, or to have close personal or family ties to a foreign government official, and if these facts could have been discovered by the company by reasonable investigation at the outset, then the scenario may be one whereby proof of the company's knowledge can be established by inference. Thus, the question to be asked is this. What level of advance diligence by a U.S. company, in reviewing the background of its local agent, must be displayed in order to prevent any such inference from being raised?

The consensus opinion of those lawyers who give advice on the subject of FCPA compliance seems to be that the most practical prophylactic measure, which U.S. companies can employ, is to conduct a thorough background check of the prospective foreign agent before he is retained. That background check is commonly referred to as a "due diligence investigation." But before moving into the topic of "due diligence", consider for a moment the overall environment in which our U.S. employers often try to develop their overseas businesses; and ponder why that environment may be one in which FCPA criminal liability exposures may arise.

The Overseas Environment

There are four points, which I wish to emphasize on this subject of why local environments may be conducive to the germination of FCPA problems for American companies.

First, an FCPA problem most probably won't arise in a foreign country unless the government of that foreign country has some large degree of control over your company's local activities. It is no coincidence that most of the FCPA enforcement actions have focused on several generic industries, notably defense sales, design and construction of public works, and oil and gas extraction. In order for U.S. companies in these industries to conduct business in a foreign country, they will have to procure foreign government authorizations, permits or licenses. This is because either the government is the customer (in the case of defense procurement or public works construction), or it is the steward of the natural resource (in the case of oil and gas exploration or mining). My point here is to emphasize that that FCPA does not prohibit the payment of commercial bribes to private individuals, but only to government officials. In the case of the industries mentioned above, the other contractual party is typically the government.

Second, in most of the developing world, the ethical standards for business and governmental transactions are vastly different than those to which we are accustomed in the United States. For example, in the oil exploration and production industry in which I work, the primary geographic areas where the search for hydrocarbons is being conducted are Africa, South America and the Middle East. More specifically, the group of countries with the most geologic promise includes

Russia, Indonesia, China, Nigeria, Ecuador, India, Brazil, Kenya, Bolivia, Argentina, Pakistan, Colombia, Vietnam, Qatar, Angola, Malaysia and Mexico. All have been listed as being high on the World Bank's annual "corruption percentage index". [3] To put it bluntly (with a few notable exceptions like the U.S., the U.K. and Norway), God seems to have placed oil in those parts of the world that are poor; and, as a general rule (although, again, there are exceptions), the central governments of poor countries are particularly receptive to "*corruption*" [4] While there may be statutes on the books which forbid corruption, in the developing world such statutes are often times routinely ignored (at least while the corrupt official, or the corrupt political party, which he represents, remains in power).

Third, in some developing countries, foreign companies cannot make a business "beachhead" unless they first retain a local consultant. Often, custom dictates that foreign entities do not engage in business without the association of a local agent. Indeed, in some states (such as Qatar) it is unlawful to conduct business until such time as a local agent has been retained and registered with the host country. Also, in the case of oil concessions, the terms for licensing may require that a "local equity content" be made a part of the licensing group. And, of course, there are the practical aspects of the situation. A U.S. company cannot hope to establish a foothold in a foreign county, in which it never before has engaged in business, without the guidance of a local advisor who is familiar with local customs, is skilled in licensing and other legal requirements, and who is well versed in dealing with the governmental bureaucracy.

Finally, the non-U.S. companies, with whom the American company is attempting to compete in a foreign locale, probably aren't faced with the same legal constraints. There is no counterpart to the FCPA in other countries. Indeed, in some European countries, a bribe payment is allowed as a tax deductible expense for the company paying the bribe. Until recently, the U.S. has been virtually alone among nations in prohibiting its corporate citizens from paying bribes to foreign government officials. Perhaps the much-vaunted OECD treaty (on which others will comment) will alleviate some of this competitive disadvantage, and "level the playing field", so to speak. I, for one, am somewhat skeptical. Suffice it to say that, at least in the oil industry, foreign based oil companies have paid, and do pay, bribes to foreign officials in exchange for oil concessions. They have historically done so with impunity; and, by doing so, they have taken business away from U.S. oil companies.

There's a flip-side to the conclusions reached in the Corruption Index mentioned above. While the governments of some developing countries are more likely to engage in corruption, so too are the private businesses operating out of certain counties more likely to pay bribes. According to that same survey, French, Italian, Belgian and Japanese companies rank high in their propensity to offer bribes. [5] To make matters worse, from a competitive standpoint, U.S. based oil

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[3] "Corruption Perception Index"; 1997 Report of Transparency International for the World Bank. That study concludes that there is a direct correlation between degree of "corruption" in the developing world, and the rate of foreign investment in the gross domestic product.

[4] The term "corruption" being used here in the sense of a government official's willingness to use the authority of his public office to promote his personal or private gain.

[5] Id. "Corruption Perception Index".

companies face other statutory trading restrictions which place them at a disadvantage, as compared to their non-American competitors.[6]

Due Diligence Investigations

The FCPA does not provide an absolute defense based on the argument that the defendant company was duly diligent in its investigation of the background of an agent, before it retained him. On the other hand, the fact that the American company did conduct a due diligence investigation, prior to retaining the agent (who later paid a bribe), may serve as a counter to any inference that the company had the requisite corrupt intent or purpose, at the time when decided to retain him. The basic goal of a U.S. company, in conducting this background check, should be to make a sufficient inquiry concerning the agent, that would serve as the basis for its conclusion (before it signs a commercial agreement) that it is improbable that the agent will thereafter make a prohibited payment.

So, what sorts of information needs to be gathered in compiling an FCPA due diligence investigative report, and how does one go about collecting that information? I like to approach the matter by posing a number of questions.

1. Does the project, on which the foreign agent is to advise (or provide other services for) your company, involve government contracts, permits or authorizations? This should be the threshold question. In order for house counsel to answer it, he (or she) must first have some fair degree of appreciation of the nature of project. Obviously there are very few foreign business activities one can envision that do not involve some level of government oversight. But if the answer is a qualified "no" (in the sense that the underlying success or failure of the project is not dependant on actions by foreign government approvals), then there may be no underlying rationale for the agent to pay bribes to those officials – in which case a full FCPA due diligence investigation may not be warranted.

2. What is the business purpose or justification for retainer of the consultant? Only your client can tell. I think it's preferable for the business client make this statement himself, rather than for the lawyer restate the justification after counseling with the client. Perhaps the client's reason is based on statutory requirements. Or perhaps its because the company has no in-country work force. Perhaps you wish to employ the consultant as a lobbyist to argue the merit of a proposal to the government. Perhaps your company lacks background and experience in the business culture of the foreign country. Any of these would be valid justifications.
   An internal form can be used to assist you client in answering this question. Attachment 1 is a copy of a due diligence questionnaire which I've prepared for completion by my house clients before they retain a foreign agent. You probably have a form of your own. Notably, I'm looking for the client's: *stated purpose for hiring a foreign agent, in terms of*

[6] Like the trade sanctions which are in place with respect to Iraq, Iran and Libya (all prime exploration and production areas), which further delivers business opportunities into the hands of their foreign competitors.

the specific duties which he is expected to perform and the time period during which he is to perform them.

3. Do the business background, experience and skill of the proposed agent match up with the job description or stated purpose of the retainer, and is there any apparent conflict of interest? The initial inquiry on this subject can be served by questioning the candidate himself. Again, this lends itself to the use of a standardized form. Attachment 2 is a copy of a form which I've developed. You may have a better one. The nature of the inquiry can be summarized as follows*: What is your education and experience? How large is the agent/consulting company? What resources do you bring to this job? What is the financial background of your company (banking references, annual reports)? What sort of similar jobs have you conducted and for whom (i.e., a listing of current and past representative clients)? Who are the owners and primary employees of the agent, and what sort of business, financial or personal relationships are there between any of those persons (or members of their immediate families) and government officials?* While on this topic, I would note that I would consider the client to have a questionable intent if he proposes the retainer of a foreign agent late in the business transaction. If most of the business process for which the agent supposedly brings value to the transaction has already occurred prior to the agent's being hired, the impression is easily formed that the motivation for his retainer is something other than his business acumen.

4. Is the candidate uniquely qualified for the job? The client has to answer this question, based on his survey of the market. I think that it's important to establish that the company did consider alternatives. Ideally, the client would provide a list of several candidates, which have been considered, with his conclusion as to why his chosen candidate was preferred over other possible consultants.

5. Can the proposed agent be trusted? This is the area where you may well need outside help, particularly if the proposed agent has no prior business relationship with your company? What are the possible sources for outside help? The country desks at the U.S. State and Commerce Departments in Washington, D.C. may be able to provide information on the candidate. Better still, you might inquire about the reputation of the candidate through the "commercial attaché" in the U.S. embassy where the agent resides. You can make inquiry of the banking and business references listed by the candidate in his disclosure statement. You might make inquiry of the equivalent of a local chamber of commerce (if there is such an organization). You can even try an Internet search of sources like local newspapers. If your company has a business office in the country, then your expatriate or local employees may be able to gather information on the candidate. All those types of efforts are relatively cost-free.

   Use of external, third parties to conduct a background investigation obviously involves an expense, sometimes a substantial expense. But there may be no substitute for this investment, particularly if you have no in-country personnel who are familiar with the business community and the power structure of the nation. To my mind, there are three possible types of outside investigators: local law firms or U.S. law firms with representative offices; U.S. accounting firms with local offices; and international

investigative firms with local offices or corresponding representatives. As you know, among the sponsors of this annual ACCA event are accounting and investigative firms which offer these types of services.

I have used local law firms and international accounting firms to conduct background investigations. Most work on an hourly rate, but I always have tried to get a semi-firm estimate of likely costs, up front (although the danger with this may be that the estimate becomes the minimum). I have had a mixed experience regarding the quality of the reports received, but on every occasion I did receive information which I would have been unable to develop myself.

These types of investigations may be very sensitive, from a political standpoint, and usually must be kept confidential. For instance, in my work, there has been at least one occasion (in Kenya) where the in-country expatriate who had prepared the report refused to use the local mails, the Internet or the telephone to report his findings to me, but instead posted the report to me after leaving the country. His reticence was, I think, a result of his fear of economic reprisal against his company, as well as bodily harm to himself, if his preparation of the report (which, in that case, was not particularly flattering) became known.

6. Is the proposed agent willing to sign a formal agreement which calls for full FCPA warranty and indemnity, representation as to the accuracy of prior factual disclosures, and a full listing of the amount of compensation to be earned? Here, it might be useful to include the agent's disclosure statement as an exhibit to the contract, to which you can make reference in the representation section. Attachment 3 lists some pattern types of FCPA certifications which I usually employ in my foreign agency contracts. It's important to note, however, that a perfectly drafted contract will not protect your company against FCPA exposures (arising from the agent's later payment of unlawful bribes). For, as stated previously, if it can be inferred that the contract was a mere sham, designed to cover-up what the company had every reason to believe (based on the information which it actually discovered, or with reasonable diligence could have discovered) would be a corrupt payment, then the "knowledge" element of the FCPA violation can most probably be factually established.

7. Is the proposed agent agreeable to a disclosure of the agency to the local governmental entity from which the company is seeking business, licenses, permits, etc.? My understanding is that the "transparency" of the retainer is a major factor taken into account during a prosecutor's review of bribe-paying incidents, which have been perpetrated by the foreign agent of a U.S. company. The suggestion of this is (I suppose) that, if the foreign government is made aware, at the outset, of the relationship between the local agent and the company, then the atmosphere is one which is less conducive to "under the table" transactions between the agent and the relevant government official. This of course also raises the implication that if the foreign government official is aware of a potential conflict between his duties and his relationship to the agent, that he would make this known to the U.S. company (which, of course, may not be the case).

8. Is the compensation scheme, which has been recommended by your client, structured so as to discourage opaque financial transactions, or incentives for bribes? There are several nuances on this theme.

First and foremost, is the level of compensation, which your client proposes be paid to the agent commensurate with the level of required effort (in terms of hours and manpower), with the level of his expertise, and with the market as a whole? Sometimes it will be difficult to determine the appropriateness of an agent's compensation. After all, if the agent is a well placed lobbyist, who can deliver a multimillion dollar contract for your company by the force of his persuasion and influence, without paying a bribe, then perhaps he should be rewarded accordingly. Or put another way, perhaps you can't hire him unless you pay him what seems, at least to the reviewing lawyer, to be an exorbitant fee. In that case, can he be paid on the basis of the true worth of his services to your company, in terms of the expected profits of the deal? And if you do have to base your decision on your subjective evaluation of the reasonableness of his charges, how can you determine the market rate in a foreign country for the services of an agent, when those services may be totally unique? Note that in certain countries (such as Qatar) the rate of pay for the local agent may be set by statute (5% of the import value of the good or service being imported by the U.S. company).

The second point on this issue of compensation deals with the manner of the intended payment. Again, I think that "transparency" should be the controlling factor. Needless to say, payments should be made by check (and never in cash). Checks should be made payable to the account of the agent, or his company. The check should either be delivered to the agent himself, or to his local bank account. The arrangement should never be one whereby the company agrees to deposit the check into a non-local bank account. Payment in a third country suggests a plan to divide his commission in the third country, away from the scrutiny of the government of the country where the services are being performed. And, of course, the company must record the details of the payment in its own records, in accordance with the accounting standards called for in the FCPA.

The third point on this issue of payment, which I would like to make, is that substantial up-front payments will most likely cause suspicion of intent and, therefore, I would discourage such a structure. Most companies would, I think, prefer to pay for performance anyway (but as I alluded to earlier, one can argue that a C.O.D. sort of arrangement might create an economic incentive for the agent to pay a bribe, if he realizes that he won't get paid without the action of the government official - who is demanding the bribe of him). This raises the question that, if the agent, unknown to the company, uses his own resources to pay a bribe, "betting on the come" so to speak (and planning to recoup his costs when the company makes its incentive payment to him), can it be argued that the company facilitated the bribe? Ideally, I think, it's best to arrange to pay the foreign agent through a multi-segmented formula, the first payment to be made when the deal is done (that is to say when the project is approved, the contract award made, etc.) and the second payment to be made several years after the deal has closed (when it's safe for the company to assume that no bribes were paid to government officials). I can also report that agents are not excited about deferred compensation schemes such as this.

The fourth, and final, point which I wish to make on the subject of the structure of the agent's payment is to emphasize the point of including an economic penalty against the agent, if he does engage in the payment of bribes. There could be several facets to this. Rights of contract termination should always be a consequence of the agent's violation of FCPA restrictions. Better still is to include a provision calling for rebate of all monies paid, plus indemnification of the company against the economic consequences which it suffers as the result of the bribe. And in the case of a joint venture partner with substantial assets, you might consider a "put" or "mandatory sale" option, on the part of the company, based on some pre-determined value (like 150% of investment cost) if the partner has paid a bribe involving the project.

9. Should local legal counsel be retained to review the proposed agreement with the agent, before it is signed? As you know, the legality of bribe paying under local law is a defense under the FCPA, but most experts on this law largely discount the practical value of this defense. This is because most developing countries have anti-corruption statutes on their books, even if they are largely ignored from an enforcement standpoint. So, it's unlikely that you will be able to procure an opinion of local counsel that a bribe that otherwise would be unlawful under the FCPA is permissible under local law. Rather, I think that the local lawyer's opinion may provide benefit in two other areas.

First, I want to be assured by the local lawyer that my company's exercise of its discretionary right to terminate the agent (an element of the contract which I recommend) cannot be countered by a claim by the agent of his entitlement to unknown statutory termination benefits. In certain Middle Eastern countries, contractual wording to the contrary notwithstanding, it is unlawful to terminate a local agent without just cause.

Second, I may want the local law firm to opine as to whether the familial or social standing of the proposed agent could create an unlawful conflict of interest with government officials? The nature of this question suggests that your due diligence investigation has revealed that the proposed agent (or one of its owners) is either a government official himself; or that a member of his immediate family is a government official; or that the proposed agent is a business partner with, or has other financial connections to, a government official. And this begs the question as to whether a U.S. company can ever employ such a potentially conflicted person as a foreign agent, without running afoul of the FCPA. I would submit to you that it may, so long as it can be established that the potentially conflicted agent (whom your company is paying) will play no role in the government's decision (which your company seeks).

In fact, in preparing for this presentation I reviewed the compliance brochure of one oil service company which specifically recognized that, under the circumstances described above, it may be permissible for a U.S. company to hire as its foreign agent a person who is a government official. That brochure noted that in certain business cultures (and I think that the allusion was to the Middle East), the lines between government and private activity are blurred, and often (because of the lack of a large, educated work force), there may be

> few qualified candidates who do not also hold a government position. Also, in small countries, there may be a wide web of interconnecting family relationships between the rulers of the country and the remainder of the upper income class.
>
> For my part, I would not give a "pass" to a client's recommendation that the company hire a government official, even if a local lawyer had opined as the legality of the retainer under local law – unless I also asked for and received an advance advisory opinion from the Department of Justice, concerning the proposed retainer. I am told that the DOJ has given these sorts of opinions (which I think are termed as being "non-enforcement" decisions), when it has determined (based on the facts presented to it by the company) that: *the agent has covenanted not to pass any part of his retainer fee on to third-parties*; and, the agent (in *his official capacity as a government official) will not make any discretionary decision regarding the company's business before the government.*

My final word of advice is to prepare and retain (for the period of your corporate records policy) a written due diligence file for each foreign agent, which will substantiate the nature of the background investigation which the company conducted. In addition to the agent's contract, that file should include the two disclosure forms, which I mentioned (one completed by the client, and the other by the candidate). If a background investigation is conducted, the written report of that investigation should also be kept in the file.

Attachment 1 to FCPA Presentation

Sample Due Diligence Questionnaire for Client

XXX Company
Employment of Foreign Agents
Internal Due Diligence Checklist

Name of proposed candate: _____
Business address of candidate: _____
Nationality of candidate: _____
Country where consultancy work is to be done: _____
Name of project(s): _____
_____
Project team leader: _____

1. Is there a statutory requirement that foreign companies retain a local agent as a condition for doing business in this country? Yes ____ No ____

2. Is the candidate "registered" to do business in the country where the project is being developed (if statutorily required)? Yes ____ No ____

   If your answer to Question #1 is "yes", then please provide the registration # of the candidate, and place a copy of his registration certificate in the "due diligence" file. _____

3. Has the candidate performed prior services for the Company? Yes ____ No ____

   If your answer to question # 3 is "yes", provide the name of the project, the year of employment, and the XXX "contact" person who was interviewed concerning the nature and quality of the prior representation of the Company:

   _____
   _____

   If your answer to question #3 is "no", then arrange for the reports set forth in paragraph 13(a) below.

4. Describe the specific nature of the services which are to be provided by the agent:

   _____
   _____
   _____

5. Has this candidate performed these services as an agent or representative for other companies?
   Yes ____ No ____

   If your answer to question # 5 is yes, then list the companies for whom the candidate has worked.

   _____
   _____
   _____

6. Were alternate candidates considered or interviewed? Yes ____ No ____

If your answer to question #6 is "yes" then provide names of alternate candidates and reasons why **not** selected:

_____ _____
_____ _____
_____ _____
_____ _____

If your answer to question # 6 is "no", then explain why a broader search was not conducted:

_____
_____

7. Explain the circumstances under which XXX first became aware of the consultancy services offered by the candidate. If referred by another individual, then list his name. If a Foreign Government official suggested that this agent be used, then so indicate.

_____
_____
_____

8. Please list the proposed basis for compensation of the candidate:

_____
_____

9. Was competitive information available for your assistance in determining the "market rate" customarily paid as compensation to an agent providing comparable services to be provided by the candidate?
Yes ____ No ____

If your answer to question #9 is "yes", then provide the source and the detail of such information (i.e. Offers made by other candidates, published materials, information from other U.S. businesses on compensation paid to "in country" agents).

_____
_____

10. Will the consultancy be made known to any officials of the Government of the Project country?
Yes ____ No ____. If no, then please explain reasons for not doing so.

_____
_____

11. ____ Confirm that all payments due to the agent will be made by company check made payable to the Agent's name, or by direct wire transfer to a bank in the country where the project is being developed.

12. ____ Confirm that normal accounting procedures will be employed (including a descriptive categorization of the compensation paid to the candidate) to record all payments which are to be made to the candidate.

13. Checklist of additional materials to be included in the candidates' "due diligence file":

a. Background Investigation:

_____ XXX "due diligence" questionnaire completed by candidate.

_____ External-source background investigation conducted and report received (from local law firm, local office of a U.S. accounting firm, or private investigative firm).

_____ Visit made to "Commercial attaché" or "commercial desk" of the U.S. embassy in capital city, to inquire of business reputation of candidate. "Memo to file" of meeting prepared.

b. _____ Copy of candidate's business registration certificate, certificate of good standing, or other documentary representation of its qualification to do business in the country where the project is being developed.

c. _____ Copy of most recent year "audited" financial statements for candidate (if a company) or copy of last year's tax filings (if an individual).

d. _____ Banking and business references listed by candidate have been contacted. Memo's to file (if contact is by telephone), or copies of responsive letters, are in file.

e. _____ Signed affidavit by candidate acknowledging receipt and review of a copy of the U.S. Foreign Corrupt Practices Act ("FCPA").

f. _____ Signed affidavit by candidate, acknowledging receipt and review of a copy of the XXX Code of Ethical Business Conduct and of the "XXX Policy on Compliance with the FCPA".

g. _____ Candidate's representation to conduct activities in conformity with the FCPA (either by affirmative representations in the consultancy agreement, or by separate letter representation) together with securing indemnity pledge for any violation of his FCPA representation, and provision of a contractual right by XXX to terminate consultancy in the event of false representations in consultancy agreement.

h. _____ The draft consultancy agreement which you propose for retainer of this Agent, and the "due diligence" background file, has been reviewed by the appropriate XXX attorney.

14. Name of XXX employee completing this form: _____

15. Name of XXX attorney reviewing the completed form: _____

**** This form must be completed and placed in the candidate's "Due Diligence" file prior to his retainer as the Company's agent The file must be retained for a minimum of five (5) years following termination of the consultancy agreement.***

Attachment 2 to FCPA Presentation

Sample Due Diligence Questionnaire for Proposed Agent

Foreign Corrupt Practices Act Disclosure Statement by Candidates Wishing to Serve as Agents or Consultants for XXX Company and Its Affiliates

As part of its compliance program for the United States Foreign Corrupt Practices Act, XXX Company (and its affiliated companies) requires that all candidates, wishing to be considered for retainer as a consultant or agent for the Company in locations outside the United States, provide the following information.

1. General Information:
   Name of Company or Individual: _____
   Business Address: _____
   Telephone Number: _____
   Facsimile Number: _____

   Type of Business Organization: (Check one box)
   _____ Individual Acting as a Sole Proprietorship
   _____ Corporation
   _____ Partnership
   _____ Limited Liability Company
   _____ Other Business Entity (Please describe type): _____

   Country Where you Seek to Represent the Company: _____

   Is registry with a Government official a requirement for your conduct of business in this country? Yes _____ No _____

   If "yes", then are you so registered? Yes _____ No _____
   If "yes", then please provide your registration or tax number: _____

2. Have you ever before provided services for XXX Company, or any of their affiliates? Yes _____ No _____

3. Have you represented other clients with respect to the conduct of the business of IPP development within this country? Yes _____ No _____

   If "yes", then please, list all such former or present clients:

   _____
   _____
   _____
   _____
   _____

4. Has the applicant (either individual or Company) or any employee of the applicant ever been the subject of an investigation of criminal law violations, or been convicted of a crime? Yes _____ No _____

   If "yes", then please give details below:

5. Please list all current and former directors, officers of applicant (if a business), and all current and former employees (if applicant has fewer than 10 employees).

   _____
   _____
   _____
   _____
   _____
   _____
   _____
   _____
   _____

6. Please list every former or current owner of equity in applicant.

   _____
   _____
   _____
   _____
   _____

7. Please list every company or other business entity, which is affiliated with applicant.

   _____
   _____
   _____
   _____
   _____

8. If applicant is a company, then has any owner, director, officer or employee (former or current) of applicant served in a salaried or appointive position within the Government of the country? Yes _____ No _____

   If "yes", then please give details:

9. The following is a correct statement (for individual applicants). Yes _____ No _____

   Neither applicant, applicant's spouse, nor any member of applicant's, nor applicant's spouse's family, is now serving, or ever has served, in a salaried or appointive position within the Government of the country?

If "no" has been checked, please provide details:

10. Has applicant ever conducted business under an alias, assumed name, trade name, or used any business name other than the one shown above? Yes _____ No _____

If "yes", then please list the same below:

_____
_____
_____

11. If applicant is an individual, please list:

(a) every other business for which applicant is now, or ever has been employed;

_____
_____
_____
_____
_____

(b) every publicly traded company in which applicant owns more than a 5% shareholder interest;

_____
_____
_____
_____
_____

(c) every non-publicly traded company or other business entity in which applicant holds an equity interest:

_____
_____
_____
_____
_____

12. Please list those business contacts, and at least one banking institution, which XXX may contact for reference purposes:

Name: _____
Address: _____
Telephone Number: _____

13. Name of person completing this form: _____

Signature: _____
Date: _____

Attachment 3 to FCPA Presentation

Sample FCPA Certifications for Inclusion in a Foreign Agent's Contract

4.1 Representations and Warranties of Agent

4.1.1 AGENT represents and warrants to COMPANY, as follows:

(a) All information supplied by AGENT to COMPANY, including the "Due Diligence Questionaire" completed by Agent (a copy of which is attached hereto as Exhibit ____, is complete, truthful and accurate.

(b) AGENT shall not obtain, on COMPANY's behalf, or provide to COMPANY, any information which is not legally available in [INSERT NAME OF COUNTY] or which is procurement-sensitive, proprietary or classified, where there is reason to believe that possession of such information is unauthorized, illegal or unethical.

(c) In performing the duties required under this Agreement, AGENT will comply with the laws, regulations and administrative requirements of _____ (except to the extent inconsistent with, or penalized under, United States law) and shall take no action which would subject COMPANY to penalties under United States or _____ laws, regulations and administrative requirements. AGENT shall not make, or permit to be made, or knowingly allow a third party to make, any improper payments, or to perform an unlawful act. To that end, AGENT will execute all the certifications required by this Agreement and agrees to furnish such further certificates as may be required by COMPANY, from time to time. Failure or refusal to promptly furnish any required certificate or disclosure upon request from COMPANY will be the basis for immediate termination of this Agreement, under Paragraph 11.2 hereof.

(d) AGENT is fully qualified to provide the services designated herein, and to assist COMPANY under the laws regulations and administrative requirements of _____, and to the extent required by applicable law, regulation or administrative requirement, AGENT has obtained licenses or completed such registrations in _____ as may be necessary or required (including, if applicable, registration as a lobbyist for a foreign national) to perform the duties of AGENT as set forth in this Agreement.

(e) In connection with its services to COMPANY hereunder, AGENT has not, and it will not, make any payments or gifts, or any offers or promises of payments or gifts, of any kind, directly or indirectly, to any official of the Government, or any agency or instrumentality thereof.

*(f) Neither AGENT, nor any of its employees or officers, is: an official, employee, or active member of the armed services of _____ (the **"Government");** an official or employee of the Government; an official of a political party, or a candidate for political office in _____; an officer, director, employee, or an "affiliate" (as defined in regulations under the U.S. Securities Exchange Act of 1934) of another company with whom COMPANY is otherwise engaged in a business relationship (as a supplier, customer, co-investor, or otherwise);*

(g) As of the date of execution of this Agreement and during the term of this Agreement, no Government official, and no official of an agency or instrumentality of the Government (whether local, state or federal) is, or will become associated with, or will own, or

presently owns, an interest, whether direct or indirect, in AGENT, or has, or will have, any legal or beneficial interest in this Agreement or the payments made by COMPANY hereunder.

(h) It has not, and will not, pay or tender, directly or indirectly, any commission or finders or referral fee to any person or firm in connection with its activities on behalf of COMPANY.

(i) It has not paid, or offered, or agreed to pay, any political contributions in respect of any business advice, consultation or services, which it provides, or may have provided, to COMPANY hereunder.

(j) It will complete, sign and return to COMPANY the attached FCPA Disclosure Statement (Appendix "A") with the executed Agreement, and AGENT will immediately provide COMPANY with any supplementary report pursuant to the requirements of Appendix "A". The Parties agree that this Agreement will have no binding effect until COMPANY has received the executed Agreement and the duly completed and signed FCPA Disclosure Statement.

*(k) It is familiar, and will comply in all respects, with U.S. laws, regulations, and administrative requirements applicable to COMPANY's relationship with AGENT, including, but not limited to, the United States Foreign Corrupt Practices Act (hereinafter the "**FCPA**"). AGENT acknowledges that COMPANY has furnished AGENT with copies of the FCPA, as provided in Appendix "B" hereto.*

(l) It will, at all times, act in the best interests of the COMPANY and will take no actions, which are, or may be, detrimental to COMPANY.

(m) It has not been convicted of, or pleaded guilty to, an offense involving fraud, corruption, or moral turpitude, and it is not now listed by any Government agency as being debarred, suspended, proposed for suspension or debarment, or otherwise ineligible for participation in Government procurement programs or other Government contracts.

(n) It hereby acknowledges receipt of a copy of the "Code of Ethical Business Conduct" (attached hereto as Exhibit "C") of COMPANY's parent corporation (which COMPANY has adopted), and by execution of this Agreement, AGENT warrants and certifies that it fully understands COMPANY's policy with respect to international sales transactions and relations with customers and suppliers, and that AGENT will do nothing in the performance of the services required under this Agreement which will be in conflict with COMPANY's Code of Ethics and Business Conduct.

4.1.2 Continuance of AGENT's Representations and Warranties.

Each of the representations and warranties made by AGENT above shall be of a continuing nature for the duration of this Agreement. The foregoing warranties shall survive the termination of this Agreement and shall continue in effect with respect to all business activities of COMPANY in _____ until all such activities have ceased.

4.1.3 AGENT'S Default of Representations and Warranties.

AGENT acknowledges that COMPANY has entered into this agreement based upon the presumption of the truth and accuracy of the representations and warranties made to it by AGENT. AGENT agrees to give prompt written notice to COMPANY in the event that, at any time during the term of this Agreement, AGENT has failed to comply with, or has breached, any of its warranties hereunder. In the event AGENT has not so complied, or has breached any of its

warranties hereunder, this Agreement shall be null and void from the time of such noncompliance or breach.

4.2 Warranty of COMPANY

COMPANY warrants that it does not desire, and will not request, any service or action by AGENT that would, or might, constitute a violation of the FCPA or any other law, regulation or administrative requirement of the United States or of _____.

12. DISCLOSURE OF OTHER INTERESTS

12.1 AGENT agrees to complete, sign and return the attached Appendix "E" ("Disclosure of Other Financial and Business Interests"), with the executed Agreement and AGENT will immediately provide COMPANY with any supplementary reports pursuant to the requirements of Appendix "E". The Parties agree that this Agreement will have no binding effect until COMPANY has received the executed Agreement and the duly completed and signed statement of "Disclosure of Other Financial and Business Interests".

13. FULL DISCLOSURE

13.1 Subject to U.S. laws and regulations, AGENT agrees that full disclosure of the existence and terms of this Agreement, including the compensation provisions, may be made at any time, and for any reason, be made to whomever COMPANY determines has a legitimate need to know such terms, including, without limitation, organizations within the Government or the U.S. government. AGENT shall disclose to all Parties with whom it deals on behalf of COMPANY that AGENT has been retained by the COMPANY to advise it in the promotion, marketing and operation of its _____ business in _____ with respect to the Project.

14. INDEPENDENT CONTRACTOR AND MEETINGS WITH GOVERNMENT

14.1 AGENT shall be considered for all purposes to be, and is, an independent Contractor in relation to COMPANY under this Agreement. This Agreement does not make either Party the agent or legal representative of the other for any purpose or grant any right or authority to assume or create, directly or indirectly, any obligation or responsibility expressed or implied, on behalf, or in the name of, the other, or to bind the other in any manner. AGENT holds no agency or attorney privileges on behalf of COMPANY, and AGENT shall never represent itself as having the authority to bind COMPANY. AGENT shall never negotiate terms, enter into agreements, accept notices, submit invoices, or accept or make payments to a third Party in its own name, or under its own signature, where doing so on behalf of COMPANY, or do anything else that might obligate COMPANY to third parties.

14.2 AGENT shall not contact, or otherwise meet with any Government official with respect to the Project without first having so advised COMPANY of its intention to do so, and (where COMPANY so requests) without the presence of COMPANY's other designated representative.

APPENDIX "A"

FCPA Disclosure Statement
For
International Consultancy Agreement

*Reference is made to that International Consultancy Agreement between _____ ("**AGENT**") and XXX Company, Ltd. ("**COMPANY**") dated _____, 19 ___, (hereinafter the "**Agreement**"). As an integral part of the Agreement, AGENT gives the following further certifications and representations to COMPANY:*

A-1 It has not, and will not, while in pursuit of its activities under the Agreement, undertake any activity which is illegal under the laws of _____, or the laws of any political subdivision within _____, or the laws of the United States.

A-2 It has not, and will not, offer to pay, promise to pay, authorize the payment of, or actually pay any money, or offer to give, promise to give, or authorize the giving of, or actually give, anything of value to an "official" (as such term is defined in the Foreign Corrupt Practices Act, a copy of which has been attached as Appendix "B" to the Agreement) of the Government (of any level, whether local, state or federal) of the _____ , to any _____ political party, or official thereof, or to any candidate for _____ political office, or to any person, while knowing, or being aware of a high probability, that all, or a portion, of such money or thing of value will be offered, given, or promised, directly or indirectly, to any "official" of the Government of the _____, to any _____ political party or official thereof, or to any candidate for _____ political office, for the purpose of:

A-2.1 influencing any act or decision of such Government official, political party, party official, or candidate in his or its official capacity, including a decision to fail to perform his or its official functions; or

A-2.2 inducing such Government official, political party, party official, or candidate to use his, or its, influence with the _____ government, or any instrumentality thereof, to affect or influence any act or decision of such government or instrumentality, in order to assist COMPANY or AGENT in obtaining or retaining business for or with, or directing business to COMPANY or AGENT.

A-3 It is lawful, under the laws of _____ , for AGENT to perform the services for COMPANY which are contemplated hereunder, including, but not limited to, the promotion to, or "lobbying" before, any official of the Government of _____, with respect to the "Project" (as defined in the Agreement).

A-4 In the event that it should come to COMPANY's attention that AGENT has engaged, or is engaging, in any activity which COMPANY reasonably believes to be in violation of the representations made by AGENT in this Appendix "A", or of the United States Foreign Corrupt Practices Act, then upon receipt of notice of the same by COMPANY, AGENT shall take such corrective action as the COMPANY may request, failure of which shall give rise by COMPANY to its right to immediately cancel this Agreement, at which time COMPANY shall be relieved of any further financial commitments to AGENT.

A-5 AGENT's business books and records will be maintained under "generally accepted accounting principles", and in a proper, responsible and honest manner, in order for AGENT and the COMPANY to comply with applicable United States laws. Such books and records will be made available, upon request to the Company, or to any accounting firm which it may designate.

A-6 *If required by COMPANY's legal department, AGENT (and any principle equity owner of AGENT) shall sign such sworn affidavits attesting to the fact that no discussions, representations or statements were made, whether verbally or in writing, which directly or indirectly conflict with the representations and certifications which it has made under this Appendix "A", and further attesting that all of the said representations and certifications remain true and in effect as of the date of the affidavit.*

A-7 *AGENT further agrees that if subsequent developments cause the certifications and information reported hereinafter to be no longer accurate or complete, then AGENT will immediately furnish COMPANY with a supplementary report detailing such change in circumstances*.

AGENT

(PRINTED NAME): _____
BY: _____
TITLE: _____
DATE: _____

APPENDIX "B"

United States Foreign Corrupt Practices Act
15 United States Code 78dd-1
(see attached)

*Reference is made to that International Consultancy Agreement between _____ ("**AGENT")** and XXX Company, Ltd. ("**COMPANY**") dated _____, 19____, (hereinafter the "**Agreement**"). As an integral part of that Agreement, AGENT hereby confirms and acknowledges its receipt, from COMPANY, of a copy of the text of the United States Foreign Corrupt Practices Act.*

AGENT		***XXX COMPANY***	
PRINTED NAME:	_____	***PRINTED NAME:***	_____
By:	_____	*By:*	_____
Title:	_____	*Title:*	_____

APPENDIX "C"

XXX Revised Code of Ethical Business Conduct
Regulations and Guidelines - 1990 Edition
(see attached)

*Reference is made to that International Consultancy Agreement between _____ ("**AGENT**") AND XXX Company, Ltd. ("**COMPANY**") dated _____, 19 ___, (hereinafter the "**Agreement**"). As an integral part of the Agreement, AGENT hereby confirms and acknowledges its receipt, from COMPANY, of a copy of the COMPANY'S Revised Code of Ethical Business Conduct.*

AGENT		***XXX COMPANY***	
PRINTED NAME:	_____	***PRINTED NAME:***	_____
By:	_____	*By:*	_____
Title:	_____	*Title:*	_____

APPENDIX "D"

Schedule of Compensation for AGENT's Services

*Reference is made to that International Consultancy Agreement between _____ ("**AGENT**") and XXX Company, Ltd. ("**COMPANY**") dated _____, 19____, (hereinafter the "**Agreement**"). This Appendix "D" is incorporated into, and is fully a part of, the Agreement.*

D-1 Subject to the provisions stated in Paragraph D-3 below, for each full month during which AGENT provides services hereunder, it shall be paid a fee, as follows:

D-1.1 during the period prior to the occurrence of all of the events specified in Paragraph D-3.5 hereof, AGENT shall be paid a monthly fee of United States dollars ($_____); or

D-1.2 during the period after the occurrence of all of the events specified in Paragraph D-3.5 which hereof, AGENT shall be paid a month fee of United States dollars ($ _____).

D-2 Upon the occurrence of the last of the events specified in Paragraph D-3.5 hereof, AGENT shall be paid a lump sum amount of _____ United States dollars ($_____).

D-3 COMPANY's obligation to make payment to AGENT of the amounts specified in Paragraphs D-1 and D-2 above shall be subject to the following:

D-3.1 AGENT shall provide COMPANY with its written invoice within ten days following the completion of such monthly service. Such invoice shall include the detailed report concerning the activities in which AGENT has engaged during said month while in COMPANY's service, as is required by Paragraph 5.4 of the Agreement. COMPANY may withhold payment of AGENT's invoice until receipt of this report.

D-3.2 Except as provided in Paragraph D-3.5, D-3.6, and D-3.7 below, the undisputed portion of said invoice shall be paid by COMPANY within ten (10) days following the receipt of the same. Disputed portions of the invoice shall be subject to resolution in accordance with Paragraph 20 of the Agreement.

D-3.3 Payments shall be made in United States dollars, either by check, or by wire transfer to any bank within _____, which has been designated, in advance, by AGENT.

D-3.4 Payments will only be made to AGENT, or to its designated account.

D-3.5 No payment will be made unless and until the occurrence of each of the following,

(a) COMPANY has been awarded exclusive right to develop the Project;

(b) COMPANY has executed the _____agreement, the _____ agreement and the _____ agreement (or agreements of different names which contain the provisions normally found in contracts of this type) for the Project; and

(c) COMPANY has participated in the "financial closing" for the Project, whereby debt funding has been arranged for some portion of the capital costs of the Project.

D-3.6 Except as provide in Paragraph D-3.7 below, all monthly invoices submitted by AGENT under Paragraph D-1 above, shall be held by COMPANY until such time as each of the events specified

in Paragraph D-3.5 has transpired, after which the total amount due under the outstanding invoices shall be paid within ten (10) days of the occurrence of the last of these events.

D-3.7 Company reserves the right to terminate this Agreement in accordance with the provisions of Paragraph 11 hereof. Subject to the provisions of Paragraph 11.2 of the Agreement, any amounts due AGENT for past services rendered under this Agreement shall be paid within ten days of termination by COMPANY. For the avoidance of doubt, where COMPANY terminates this Agreement prior to the completion of all of those conditions specified in Paragraph D-3.5 above, and except where such termination has been issued by AGENT for reasons specified in the applicable portion of said Paragraph 11.2, COMPANY will pay all undisputed invoices of AGENT then being held by it.

AGENT		***XXX COMPANY***	
PRINTED NAME:	_____	***PRINTED NAME:***	_____
By:	_____	*By:*	_____
Title:	_____	*Title:*	_____

Attachment 4 to FCPA Presentation

Sample FCPA Problems

U.S. corporations operating overseas appear to be among the least likely to pay bribes to foreign government officials (as compared to non-U.S. companies, and as measured by the World Bank's "*Corruption Perception Index*"). Still, arguments have been made that U.S. "internationals" sometimes engage in dubious practices which, while perhaps in technical compliance with the FCPA, may nevertheless run counter to the purpose of that statute. These practices may be defensive measures, taken by U.S. companies so as to enable them to compete against non U.S. companies, in countries where bribes flourish. (See attached copies of "Greasing Wheels", Page A-1 of 29 October W.S. Journal 1995; and "Fat Cats", Page A-18 of 2 August 1999 W.S. Journal). Those allegations of "loopholes" in the FCPA, include practices whereby U.S. corporations:

- Take foreign officials on expense-paid junkets to the U.S.
  Justification/defense: "*Marketing Purpose*".

- Create Scholarship Programs for local youths, including the children of government officials.
  Justification/defense: "*Philanthropic purpose*".

- Authorize numerous small payments to government officials, in order to get the job done.
  Justification/defense: "*Facilitating payments*".

- Hire a local "fixer", or middle man, or pair themselves with a local company, who knows how to "grease the skids" of the government bureaucracy, and is smart enough to know that its American partner cannot be advised of (or charged for) its efforts.
  Justification/defense: *Lack of knowledge of the action of the agent/partner.*

- Purchase the contract rights to the "deal" from a local company, which earlier (prior to the assignment to the U.S. company) paid bribes to a government official. (with the foreign seller being reimbursed for the cost of his bribe through the price charged to the U.S. company for the assignment).

  Justification/defense. *Non-participation in unlawful act*.

Are these allegations accurate, and are these practices lawful? Consider the factual situations described below, and determine whether an FCPA violation has, or likely will, occur:

FCPA Problem #1. A southeastern Asian country conducts a tax audit of a U.S. multinational oil company, to determine whether all operational expenses, which have been deducted in a given year, were proper. The audit remains open for years, significantly impeding the company's ability to make financial decisions. When the company presses for the foreign government to conclude its audit and reach their conclusions, the tax officials state that the audit cannot be completed until such time as they are allowed to review certain accounting records in the company's U.S. home office – but also report that they lack the funds to pay for the trip. May the U.S. company pay for the foreign auditors costs in conducting the U.S. audit?

FCPA Problem #2. The law of a Middle Eastern country requires that U.S. oil companies engage local representatives, before conducting business in that country. The laws of the country permit government officials to conduct private business, so long as it does not conflict with their official duties. One such government official in the foreign ministry offers to represent the oil company in its dealings with the petroleum ministry. The retainer of the government official as an agent or consultant will be officially reported to the government, and the petroleum ministry will openly know of the lobbying efforts of the official. May the government official be retained?

FCPA Problem #3. While the petroleum laws of a particular southeastern Asian country do not mandate that applicants for "production sharing contracts" include a "local equity content", the sad fact is that no U.S. oil company has ever been granted a PSC without having included a local entity on the application. The petroleum ministry has a habit of suggesting the names of preferred local equity partners, and such a suggestion is made to the U.S. company seeking the PSC. The prospective local partner claims that it lacks the capital to join the U.S. company in a "straight up" venture. Rather, the prospective local partner offers to lend its name to the application on the basis of customary commercial terms which are: a 15% fully carried equity interest, with the U.S. company taking all exploration risk, and the carried partner's "payback" of both exploration and development costs to come out of its share of future profits. It is discovered that the primary equity owner of the prospective partner (which is a corporation) is the husband of the niece of the president of the country. May the U.S. company sign a joint venture agreement with the local company on these terms?

FCPA Problem #4. An oil company holds an exploration permit on an onshore block in a South American county. As part of the licensing agreement, the oil company has committed to conduct certain exploration operations on the block, within a specified period. The company has done its seismic, has outlined its prospect and is ready to drill a well at a certain location, as soon as it contracts a rig. While the conditions of the license to not absolutely require that local contractors be employed, the Petroleum Minister makes it known to the company that this is his wish. The petroleum minister's brother owns the only drilling contracting company in the country. May the U.S. company contract with the foreign contractor at rates that are higher than those which would be charged by a foreign contractor?

FCPA Problem #5. A former Soviet republic (now an independent state) is set to license exploration rights, on a competitive basis, to a promising oil and gas region. The competition is keen. Your company wants to distinguish itself from the other bidders, insofar as its commitment to the country. As part of its effort to do so, may it endow a petroleum engineering department at the country's primary university, or offer to pay for scholarships for local students to attend U.S. universities of their choice and to which they can gain admissions (for reason of studying technical fields relating to the oil industry, such as engineering, geology, accounting, geophysics, etc)? May one of those scholarships be awarded to the son of the petroleum minister?

LCW/104624/12 August, 1999

The Wall Street Journal
2 August 1999
Summary of the WSJ Review & Outlook
"Fat Cats"

Since Indonesia's economy went belly up, the world's private power companies have been in a state of panic. Many power companies had hoped to make money by selling electricity they generated in Indonesia to the government through safe contracts denominated in U.S. dollars. By 1997, some 26 various contracts would supply more power than Indonesia needed.

After the rupiah and then the Suharto regime collapsed, the Indonesian government was responsible for more power at far more expensive prices in rupiah terms than it could afford. International power companies and the U.S. government just want the Indonesian government to pay for the power at the agreed upon price from the contracts.

The situation has turned into a battle of international power companies and their governments versus Indonesia's current government members of opposition parties and Indonesia's state utility company, PLN. For the former, their position is that regardless of the Indonesian economic situation, the current power contracts must be honored. In contrast, the Indonesian government has the support of opposition parties within the government because both want to know why future generations should be punished because of the actions of a dictator have resulted in contracts that will cripple Indonesia's economy. The state utility company, PLN, professes to be broke and unable to pay its debts.

None of the parties have a perfect case; however, the Indonesian people are the ones who stand to lose no matter what happens. If the expensive contracts are honored, the Indonesian treasury will have no money for decades. If the contracts are breached, foreign investors may stay away for years. In contrast, the international power companies seem to have the upper hand.

The power companies first took advantage of the risk insurance that Western governments, including the Clinton Administration, freely gave to companies to promote their business investments in Indonesia. Additionally, there was an absence of true "competitive" bidding. Instead, one might make an arrangement with a Suharto relative or friend and offer to "lend" them 15 percent equity, repayable only when the electricity started to flow. Of course, this arrangement took time while your partner looked around for the best deal. It was worth the wait because the power companies would receive higher kilowatt prices than they could receive elsewhere and "take-or-pay" clauses that guaranteed a steady income regardless of the demand. The people complained about corruption, but nothing was ever proven.

Since 1997, Indonesian government officials have made the situation worse by saying they will honor their contracts and then changing their minds and saying they won't. Even if they don't honor the contracts, the power companies still stand to win something because of their risk insurance. According to a Wall Street Journal report, CalEnergy says

it could claim $400 million in insurance from the U.S. government's Overseas Private Investment Corporation. If Indonesian government officials say they will honor their contracts, the question is where will the PLN get the tens of billions of dollars to pay for the overpriced and overabundant electricity? One settlement possibility would be for the PLN to give the power companies equity in the state utility. This forced privatization or "vulture" capitalism could lead to a situation where ordinary people and elected officials are upset with the West. However, the PLN is so inefficient that privatization might be a blessing. The result remains to be seen.

The Wall Street Journal
29 September 1995
Summary of "Greasing Wheels: How U.S. Concerns Compete in Countries Where Bribes Flourish"

The United States is virtually the only major economy that forbids its companies to pay bribes to win international business, regardless of what rivals do. To compete, U.S. companies have found new ways to influence people and win contracts.

Chubb Corp. is trying to tap into the potential Chinese insurance market. To do so, Chubb needs a license. The company has set up a $1 million program to teach insurance at Shanghai University and named some of the officials who will decide if and when Chubb gets a license as board members. This philanthropy contrasts the graft and bribery that is still common in much of the world. U.S. companies must be careful because violating U.S. laws against bribery carry hefty fines and prison sentences. This means that many U.S. companies lose to foreign competitors because they are unable to pay bribes.

A U.S. power generation company lost a $320 million dollar contract to a Japanese company in the Middle East. The American company had to walk away after government officials demanded a $3 million bribe.

Of course, there are companies that do violate the law and pay the consequences. In 1995, Lockheed-Martin Corp. pleaded guilty to making payments of $1.5 million to an Egyptian government official who helped it win a contract for three C-130H aircraft. Lockheed-Martin paid $24 million in fines, more than twice the profits from the sale.

However, on the whole, U.S. companies are much less likely to pay bribes than they were before the anticorruption law was enacted, according to Peter B. Clark, head of the Justice Department's anticorruption law enforcement. Additionally, since there are fewer corrupt dictators, there are fewer layers of bureaucracy to deal with to get a contract. It is more important to provide low-interest loans and promises to shift production to the country that grants a contract.

Struggling to compete in foreign markets, some U.S. companies have resorted to bestowing favors or special incentives that fall short of illegal "bribes."One of the most common favors made by U.S. companies is the foreign trip. To legalize and legitimize the trip, visiting officials or executives spend part of their time seeing factories and training facilities and meeting with company leaders. But, "side trips" are almost always part of the travel schedule. Disney World, Las Vegas and Atlantic City are all popular destinations. In Atlantic City, casinos often will give visitors $20 or $25 to play at the slot machines. That may not seem like much, but for many Chinese officials, for example, it is equivalent to a week's salary. The U.S. government does not object to paid travel. Other enticements include scholarships for family members, visa assistance, and expense reimbursements.

Additionally, many multinationals have built a network of joint ventures. It is not uncommon for U.S. companies to find out that their network or joint venture partner is paying bribes once the Americans have left the room. If a U.S. company legitimately does

not know that this is happening, it would not be liable as long as it fired the agent after finding out.
Another way American companies can win business is through buying a contract from another company. It is virtually impossible to trace if the company that was originally awarded the contract used bribes to secure the deal.

U.S. law does give companies some flexibility in distributing money to cover payments necessary to keep a business running. These "grease" payments can border on bribery. However, refusing to pay can be costly for the company and this requires a careful balancing of priorities and the current legalities of proposed business payments.