MEMORANDUM

**Morgan Lewis**

**ATTORNEY WORK PRODUCT**

TO: The File (FCPA)

FROM: Amy J. Conway-Hatcher

DATE: March 1, 2007

SUBJECT: Overview of the Foreign Corrupt Practices Act ("FCPA")

## I. Background of the FCPA

In 1977, as a result of SEC investigations during the mid-1970s, Congress enacted the Foreign Corrupt Practices Act ("FCPA" or "the Act") to address widespread bribery of foreign officials by U.S. companies. According to published reports, "over 400 U.S. companies [had] admitted [to] making questionable or illegal payments in excess of $300 million to foreign government officials, politicians, and political parties." *Foreign Corrupt Practices Act Antibribery Provisions* at 2, *available at* http://www.usdoj.gov/criminal/fraud/fcpa/dojdocb.htm. "The abuses ran the gamut from bribery of high foreign officials to secure some type of favorable action by a foreign government to so-called facilitating payments that allegedly were made to ensure that government functionaries discharged certain ministerial or clerical duties." *Id.* Congress responded by criminalizing the payment of bribes, directly or indirectly, to foreign officials for the purpose of gaining preferential treatment in obtaining or retaining business ("Antibribery provisions"), and imposing strict record-keeping and internal control requirements on all companies subject to the jurisdiction of the Securities and Exchange Commission ("SEC") ("Books and Records provisions"). *See* 15 U.S.C. §§ 78dd-1-3, 78m(b)(2)(A) and (B).

Congress later became concerned that U.S. businesses were at a disadvantage compared to other foreign companies that were not subject to the FCPA or similar local legislation and that

routinely paid bribes as a cost of doing business abroad.[1] In 1988, in addition to amending certain provisions of the FCPA, Congress directed the executive branch to work with its trading partners to reach agreements regarding the implementation of local legislation to level the playing field. Ten years later, in late 1998, Congress ratified the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("the OECD Convention")[2] and implemented revised legislation that expanded and strengthened, *inter alia*, the jurisdictional hook of the FCPA. As a result, the FCPA now covers: (1) any act within the United States in furtherance of a proscribed purpose by anyone, including foreign companies, foreign nationals, and international organizations; and (2) "issuers"[3] or U.S. persons who engage in acts outside of the United States in furtherance of a proscribed purpose. The Act further provides for broader criminal penalties and civil injunctive relief.

The Department of Justice is responsible for conducting criminal and civil investigations and enforcement actions for violations of the Antibribery provisions. The SEC may also institute civil enforcement actions against issuers for violations of the Antibribery or Books and Records provisions. Although the FCPA specifically provides for injunctive relief and significant criminal penalties (including fines of up to $2 million for a corporation and $100,000 for individuals, as well as incarceration of up to five years), the federal Sentencing Guidelines

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1 In fact, some businesses were permitted to deduct the bribes as a business expense on their tax returns. Foreign Corrupt Practices Act Antibribery Provisions at 2.

2 The "OECD" represents the Organization of Economic Cooperation and Development. In 1988, the United States and its major trading partners began meeting to discuss the implementation of legislation similar to the FCPA in other countries. As of April 2002, thirty- four countries had ratified the OECD Convention. Under the OECD Convention, bribery of a foreign public official is an extraditable offense for signatory countries. *See* OECD Convention, Art. 10, para. 1.

3 Under the Act, the term "issuers" applies to any issuer who has a class of securities that are registered pursuant to Section 12 of the Securities Exchange Act of 1934 ("Exchange Act"), or who are required to file reports under Section 15(d) of the Exchange Act.

provide for substantial enhancements of statutory penalties for both organizations and individuals. Moreover, the recently enacted Sarbanes-Oxley Act of 2002 ("Sarbanes"), overlaps with the FCPA and provides for penalties and possible reporting obligations where potential violations are found.[4] As such, all U.S. companies, senior management and in-house counsel must be aware of and sensitive to the FCPA prohibitions, and the responsibility those prohibitions place on them. This memo will focus on the FCPA and its two components: the Antibribery and the Books and Records provisions.

[4] This overlap is described briefly *infra* at 13-14.