QUESTIONABLE PAYMENTS IN THE MIDDLE EAST: POTENTIAL LIABILITY OF AMERICAN CORPORATIONS *

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1. Introduction

The practice of making payments of questionable legality and propriety by American corporations engaged in international business transactions is now a well-known fact. Since 1974 [1], over four hundred companies have admitted making questionable or illegal payments abroad involving hundreds of millions of dollars [2]. According to a U.S. Senate report, the revelation of these payoffs has had "severe adverse effects" on U.S. foreign policy and business:

Foreign governments friendly to the United States in Japan, Italy, and the Netherlands have come under intense pressure from their own people. The image of American democracy abroad has been tarnished. Confidence in the financial integrity of our corporations has been impaired. The efficient functioning of our capital markets has been hampered [3].

The gravity of the international payments problem in the mid-1970s prompted the United States Congress and several foreign governments to conduct independent re-examinations of existing anti-bribery laws and enforcement policies. By 1976, this re-examination in the United States had cast considerable doubt upon the efficiency of both domestic and foreign laws designed to deter corrupt behavior. Elliot Richardson, then Chairman of the President's Task Force on Corporate Payments Abroad, concluded that U.S. law, even when vigorously enforced, was inadequate to deal with the payments problem [4]. U.S. officials also believed that vague and imprecise foreign laws did not provide effective guidelines for U.S. corporations operating abroad. Testifying before a Senate hearing on prohibiting foreign bribes, SEC Chairman Roderick Hills stated:

I do not think that we have the capacity to decide what is or is not legal under foreign laws. I hate to say how many file cabinets of my former law firm were filled with opinions expressing no opinion as to whether a given transaction was legal or illegal .... We are concerned that companies that make an illegal action know they are acting at their peril [5].

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In response to concerns such as those expressed by Secretary Richardson and Chairman Hills, many nations, including the United States, have confronted the problem of questionable international business payments by enacting legislation designed to provide clearer guidelines for corporate behavior. These laws have taken two forms: (1) legislation prescribing criminal liability for those involved in a bribery scheme ("bribery laws") and (2) other laws and regulations which, although not directly prohibiting bribery, are designed to create an environment in which bribery cannot flourish. The latter category has typically included regulations which call for full disclosure of business activities and payments (e.g. securities laws), laws limiting the individuals and entities with whom one may have business dealings (e.g. commercial agents laws, civil servants regulations), and laws regulating the circumstances under which government contracts are awarded (e.g. tender regulations).

The most recent response of the American government to the bribery problem utilizes both of the above approaches. The Foreign Corrupt Practices Act (FCPA) [6] was enacted making it unlawful for "reporting companies and domestic concerns" directly or indirectly to bribe foreign government officials, foreign political parties and their officials, and candidates for foreign office [7]. In addition, the FCPA requires that accurate books and records be maintained and that a system of internal accounting controls be established by companies subject to the reporting requirements of the Securities Exchange Act of 1934 [8].

In foreign jurisdictions bribery historically has been subject to criminal prosecution under domestic penal codes [9]. The major response of foreign governments to the payments problem has been the promise of more effective enforcement of existing bribery laws. In recent years, however, the difficulty of enforcing criminal laws in a transnational context has become increasingly apparent. Consequently, many foreign governments have also endeavored to prevent bribery by prophylactic means.

This article discusses the potential effect of domestic and foreign law on American companies doing business in the Middle East. The Middle East has been chosen as a focal point because the practice of questionable payments by foreign corporations is thought to be particularly pervasive in that part of the world [10]. At one time or another, most American companies operating in the area are faced with the prospect of making payments which could result in criminal liability or other disciplinary action under the growing body of U.S. or Middle Eastern anti-bribery laws [11]. This article examines the relevant laws of seventeen Middle Eastern jurisdictions and the United States Foreign Corrupt Practices Act within the context of a number of business transactions which are common in the Middle East. Those jurisdictions examined are Morocco, Algeria, Tunisia, Libya, Egypt, Sudan, Israel, Jordan, Lebanon, Syria, Saudi Arabia, Abu Dhabi, Yemen Arab Republic, Kuwait, Iraq, pre-revolutionary Iran [12] and Turkey. Generally speaking, these anti-bribery laws
focus upon two types of payoffs: (1) payments made directly to public officials, and (2) payments made to a private individual where the payor has a reason to know that the payment may be passed on by that individual to a public official.

Notwithstanding the post-Watergate efforts to provide clearer guidelines for corporate behavior, ascertaining the legality of business payments under Middle Eastern law or the FCPA continues to be a troublesome matter for American businessmen and lawyers. Generally speaking, these laws are fraught with vaguely drafted provisions, the parameters of which have yet to be defined in the courts [13]. In a few cases the statutory ambiguities may be clarified by an examination of legislative history, interpretative or implementing regulations, and enforcement trends within each jurisdiction. More often than not, however, a businessman is left with little more than bare statutory language as a guide. Recognizing the need for further guidance, some Middle Eastern governments have made it possible to obtain a clearer definition of statutory language from the government ministry involved. In the United States the Department of Justice has issued regulations creating the Foreign Corrupt Practices Act Review Procedure whereby companies covered under the Act can receive a statement as to whether a proposed transaction would violate the FCPA anti-bribery provisions or whether the department would bring any enforcement action [14]. For various reasons, however, recourse to such procedures has proved an unpopular alternative, and companies continue to rely on their own case-by-case interpretations of these laws despite the ambiguities and potential liabilities involved.

In addition to the difficulties encountered in ascertaining the scope and intent of the laws treated here, there remains the question of whether the applicable statute will be enforced. Even in instances in which Middle Eastern law appears unambiguous, the existence of erratic enforcement precedent within a given jurisdiction is not uncommon. Although the FCPA was enacted with a view toward compensating for this inability or unwillingness of foreign governments to enforce their anti-bribery laws, many of the jurisdictional and policy based obstacles must be overcome by those responsible for enforcing the Act.

Given these uncertainties accompanying business transactions in the Middle East, it is not surprising that American businessmen continue to view Middle Eastern law and the FCPA as sources of confusion rather than guidance. This article attempts to alleviate some of this confusion by clarifying the legal issues raised by various types of business payments in the Middle East.

In an effort to provide guidance in these matters, Appendices I to IV offer affirmative or negative answers to relevant questions regarding the permissibility of payments in each of the eighteen jurisdictions examined here. Where possible, the resolution of issues is achieved by reference to judicial decision, enforcement trends and interpretive regulations issued by local authorities.
However, even in cases where government guidance has been noted, the reader should be aware that interpretations of administering authorities in the Middle East often change quickly and may not be universal in their application. In those instances where statutory language alone serves as a guide, the author is content simply to make the laws known and point out any ambiguities contained therein. The information provided in these pages, therefore, is offered not as a definitive checklist of the jurisdictions where certain types of payments are legal. Rather, the appendices and discussion below are intended to serve as a broad overview and comparative assessment of current Middle Eastern bribery law from which an informed businessman can ascertain the legal issues and sources of law relevant to a given transaction.

2. Bribery statutes: Scope and content

Bribery of public officials is expressly prohibited by statute in each of the seventeen Middle Eastern nations. Although the definition of the illicit conduct varies considerably in scope and content from jurisdiction to jurisdiction, the statutes are consistent with respect to the nature of their general proof requirements. Under each nation’s bribery laws the legality of a given payment will depend upon (1) the legal status of the recipient of the payment [15], (2) the type of consideration [16], and (3) the motive of the payor [17]. Thus, the following issues are raised by each of the bribery laws examined in this article:

1. Which persons are prohibited from receiving a payment?
   (a) Public officials? Is the term public official defined or is it a vague category?
   (b) Intermediaries, agents or middlemen?
   (c) Must the action requested of the official be within the scope of his official duties?

2. Which types of consideration are prohibited?
   (a) Specifically mentioned methods only (e.g. money payments, property, services, political contributions)?
   (b) “Any benefit” granted to the recipient? If so, is the statute explicit as to what constitutes a benefit?
   (c) Can the payments legally be made for the benefit of a related third party (e.g. the recipient’s spouse, children, friends or “favorite charity”)?

3. Does the purpose of the payor render the payment unlawful?
   What is the law with respect to:
   (a) Aggressive payments?
   (b) Defensive payments?
   (c) “Grease” payments?

In addition to these factual determinations, the penalties to which the payor
may be subject are also examined. Appendices I to IV contain answers to the above questions with respect to each jurisdiction examined.

2.1. Which persons are prohibited from receiving payments?

2.1.1. Public officials

Virtually every Middle Eastern country has anti-bribery laws [18] prohibiting “public officials” from receiving benefits (other than those that the official has a legal right to receive) for the performance or non-performance of their official duties. Beyond this general rule, however, certain definitional problems arise: Who is a “public official”? Can the law be avoided by simply using an intermediary to transmit a payment? Must the act requested fall within the scope of the recipient’s official duties? In many cases the legality of a given payment will turn on the answers to these questions.

In at least six of the nations examined, the term “public official” is left undefined by the bribery statutes [19]. For instance, chapter 13 of the Criminal Code of Sudan (entitled “Crimes Committed by Public Officials or Concerning Them: The Public Official Who Collects a Gift for his Public Duty”) states only that: “Anyone who is a public official or expects to be one and accepts or takes for himself or another (a bribe) ... shall be punished ...” [20]. Undoubtedly, the term public official includes high level government officials, and in the case of Sudan, anyone who expects to be elected or appointed to such a position. A broader reading of the law, however, would forbid any payments to low-level government employees in clerical positions, employees of government-owned corporations, political organizations and candidates, agents, and other representatives of the government. Were the issue to be litigated in a jurisdiction such as Sudan, it is unclear whether such a broad interpretation would prevail. In those Middle Eastern nations where the term “public official” has been defined [21], the definition invariably encompasses all individuals entrusted with a public service. The Egyptian code, for instance, defines “public officials” as

(1) all employees of the agencies dependent on the state or placed under its jurisdiction; (2) all elected, or appointed members of the general and local representative councils; (3) arbiters, experts, syndics, liquidators, and judicial trustees; (4) every individual entrusted with a public service [22].

In contrast to the Sudanese code, the Egyptian provision leaves less room for doubt in the mind of the potential payor as to the questionable nature of his contemplated payment.

A more difficult question, raised at the opposite end of the “public official” spectrum, concerns the status of royal family members under local bribery laws. Although the term “public official” is defined in the bribery statutes of
four of the six monarchies treated here [23], none of these definitions explicitly refers to royal family members. While it is clear that a prince who holds a governmental position is a “public official”, those royal family members who do not perform governmental functions arguably are not “public officials”. Thus, under this argument, payments to such persons would not be prohibited by anti-bribery laws. The issue is most likely to arise where a royal family member (who is otherwise not connected with the government) solicits or requests payments in return for his real or alleged personal influence with his relatives in government. Theoretically, a foreign company bidding on a government contract has contact only with the government agency approving the contract. In fact, however, it is not uncommon for members of royal families not associated with a government ministry to intervene in the bidding process. Although such an arrangement is apparently not prohibited by bribery laws, it should be noted that royal family members as well as the paying companies may be punished under other local laws. Most Middle Eastern nations have regulations that prohibit such “influence peddling” and provide that the payor, the intermediary and the recipient may be criminally liable even where no payment is ever made or offered to a “public official” [24].

The FCPA prohibits the awarding of payments or gifts to foreign officials, foreign political parties or candidates and any intermediary between the paying American business and any “foreign official” [25]. A “foreign official” is defined in the Act as “any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or any person acting in an official capacity for or on behalf of such government or department, agency or instrumentality” [26]. As in the Middle East, it appears likely that domestic courts will interpret the term broadly. The phrase “acting on behalf of” is taken from the U.S. domestic bribery statute [27] in which context it has been given a broad construction; for example, it has been held to apply to a municipal employee engaged in administering a federal program [28]. Although the terms “agency” and “instrumentality” are likewise not defined in the FCPA, they arguably include most state-run enterprises [29]. Such broad definition of public officials would increase the significance of the Act in the Middle East where industries are owned by the state in many countries.

The FCPA specifically excludes from the class of forbidden recipients “any employee of a foreign government or any department, agency or instrumentality thereof whose duties are essentially ministerial or clerical” [30]. The clear intent of Congress was to exclude from the coverage of the Act payments designed to persuade low level government officials to perform functions or services that they are obliged to carry out as part of their governmental responsibilities, but that they may refuse or delay unless compensated. In its report, the House Committee concluded that while such “grease” payments would be considered “reprehensible” in the U.S., they may be neither uncommon nor undesirable in other nations [31]. It is important to note, however,
that grease payments are almost always illegal under Middle Eastern law, because of its generally broader definition of public official. Thus, when contemplating making such payments, an American corporation should not rely solely on the fact that it will not be engaging in activity that is prohibited by the FCPA.

2.1.2. Agents and intermediaries

U.S. corporations abroad commonly make business payments to local agents and intermediaries. In the Middle East the use of a local business agent frequently makes good business sense [32]. Indeed, many Middle Eastern nations require that foreign businesses employ a local agent when doing business with the host government. Agents are well acquainted with Middle Eastern business practice and often have considerable influence in government through family or friendship ties. Not surprisingly, U.S. corporations have been willing to pay large “commissions” and “fees” for the services of an influential “agent” [33]. These practices, however, raise significant legal questions. Depending upon who the agent is and how he “influences” the host government, such payments may be illegal.

A payment to a local agent will usually take one of three forms: (1) payments to local agents who are also public officials; (2) payments to local agents who are private businessmen; or (3) payments to local agents who are private businessmen serving as conduits for payments to a public official. In the first case, where the local agent is a public official, the question arises as to whether local law permits public officials to act as commercial agents in matters unrelated to their official duties. As noted above, most Middle Eastern nations penalize any influence peddling by public officials and private individuals. In this situation, however, the official ostensibly is not selling his influence, but merely representing a foreign company in the host country by acting as that company’s agent. Generally speaking, local bribery statutes and commercial agents regulations do not prohibit such “moonlighting” activities on the part of public officials or royal family members. A notable exception is Iraq where a public official who acts as an agent “for a fee or commission or for any material benefit, shall be sentenced to death or life imprisonment” [34].

Again, however, other local laws may come into play. Article 13 of the Saudi Arabian Civil Service Regulations, for instance, provides that “government employees” must refrain from:

(A) engaging directly or indirectly in commercial activities, (B) establishing or forming companies or accepting to be a member on their Boards of Directors or accepting employment by such companies or in a commercial activity unless ... appointed by the government to represent the latter in the company. However, by special implementing regulations to be issued by the Council of Ministers, government employees may be permitted to work and be employed in the private sector outside government business hours [35].
Notwithstanding provisions such as article 13, which greatly limit the commercial activities of government employees, "moonlighting" remains an accepted practice in Saudi Arabia and other Middle Eastern nations. Public officials rarely "moonlight" as commercial agents however. Local authorities apparently take the view that "moonlighting" is permissible where it does not present a conflict of interest and does not involve the selling of "influence" as it might in an agency context. In furtherance of this view, Saudi Arabia's article 13 provides that government employees may receive special permission from their ministries to work in the private sector.

The second and more common situation involves payments to an agent who is a private businessman. As noted above, such payments are not considered bribes but the lawful collection of "fees" which are paid in consideration for services rendered in jurisdictions where the use of agents is not prohibited. In the third situation, however, the commercial agent acts as a "conduit" for payments which will eventually settle in the hands of a public official. Here the agent typically transfers part of his commission to the government official who awards the contract. As a practical matter, local enforcement authorities may be unable to determine when an agent has passed on to a public official part of what would otherwise be a legal payment for services rendered by the agent. Thus, by using a private businessman as a go-between the foreign corporation insulates itself from having to deal directly with the official and disguises its bribe in the form of agents "fees" or "commissions". In recognition of this tactic, most Middle Eastern nations have provisions in their bribery laws explicitly or implicitly prohibiting the use of intermediaries as "conduits" for illegal payments. However, because the second payment is not often discussed by the agent and his principal (whether or not it is understood), a corporation might try to circumvent Middle Eastern bribery laws by simply not asking questions once the "legal" commission is paid to its agent. Most Middle Eastern statutes do not explicitly impose a duty upon the principal to inquire into the post-payment activities of its commercial agents. The question whether a Middle Eastern statute would be read to reach a principal's "constructive knowledge" has not arisen and the outcome would be difficult to predict were the issue to be raised.

The FCPA forbids payments by a U.S. corporation to its foreign agents if the corporation, its officers or directors know or have "reason to know" that the agent will offer all or part of the payment to a foreign official for any of the corrupt purposes identified in the Act. Unfortunately, both the Act and its legislative history provide little guidance on the question of whether a U.S. company has "reason to know" that a proposed business relationship contravenes the Act. Using the securities laws as an analogy, two constructions of the phrase are plausible. The first would require an affirmative refusal to act on known facts suggesting that a payment will in fact be made. An alternative standard, applied in the context of criminal prosecutions under the FCPA and other anti-bribery laws, would require a showing of actual knowledge or "reason to know" that a payment is being made for a corrupt purpose.
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...securities laws, would impose the FCPA's criminal sanctions for a negligent failure to exercise due diligence to uncover material facts [41]. The "reason to know" language, however, must be read in conjunction with the FCPA's requirement that the company have acted "corruptly" [42]. Because that language seems to impose a specific intent requirement independent of any notion of "reason to know", it is therefore arguable that a conviction under the bribery provisions of the Act could not be based solely on the negligent failure of a corporation to uncover facts suggesting that its payments to a local agent may be channeled to a foreign official.

In any event, a finding that a U.S. company has failed to exercise due diligence may serve as an indication to the SEC that proper internal accounting controls have not been implemented. Thus, even where a company successfully avoids liability under the anti-bribery provisions of the Act, it may find that it has backed into a section 102 accounting violation if it is a reporting company [43].

The kinds of facts which the paying company would have a duty to ascertain under the second standard, or, alternatively, would be forbidden from disregarding under the first standard, are suggested in a pre-FCPA SEC report to the Proxmire Committee [44]. These include the size and nature of the payment, the services to be performed by the agent, the method and manner of payment, and the relationship of the agent to the governmental entity or contracting party.

The size of commission payments or consultant's fees provides a useful illustration of the two standards discussed above. Thus, fees that are substantially in excess of the going rate for particular services may suggest that a portion of the fee is being passed on to foreign officials. Under the first reading of "reason to know", requiring actual knowledge of corrupt practices, an awareness of "large" fees seldom would give rise to a violation of the FCPA. Under the second reading, however, an offense might be predicated on a negligent failure to pursue such facts.

A recent development might provide some guidance for companies even under the second reading of "reason to know". A few Middle Eastern nations have placed ceilings on the commissions payable to local agents involved in certain government contracts. These ceilings, of course, indicate the market rate for particular services. Arguably, payments within the limits prescribed by foreign law would not be suggestive of bribes being passed on to foreign officials. Enforcement authorities, however, may take the view that the size of payments may be a very small percentage of a transaction and yet an extremely large absolute sum of money for an individual and thus a very strong suggestion of improper influence. Nonetheless, it seems that if the paying company can demonstrate that the payments are commensurate with market sales for comparable projects, then even the second reading should not give rise to a violation of the Act.
In addition to their concern with the size of a payment, FCPA enforcement authorities may take the view that payments designated as "finders fees" are more suspect than those paid in consideration for conventional sales and promotional services provided by agents in the normal course of selling a product or service. The payment of "finders fees", however, is a legitimate and accepted practice in most Middle Eastern jurisdictions. Indeed, in several nations a foreign contractor must have a local agent in order to do business in that jurisdiction. Presumably, if it can be shown that the "finders fee" is paid in one of these jurisdictions at the "going rate" a company would not be vulnerable to a charge that the paucity of services performed by its agent makes the payments economically unjustifiable. In those countries that do not permit local agents to act as intermediaries for the foreign company and the contracting government ministry, but do allow the agent to provide valuable technical and consulting advice to the foreign company, the economic justification for the size of the commission payment should be made by reference to what is customary in the area on comparable projects.

It is not unlikely that the SEC would also discourage American firms from complying with requests by agents that their fees be paid in numbered but otherwise unidentified bank accounts. Some observers have suggested that such a request may constitute a "red flag" under U.S. law whereby a U.S. corporation would have a duty at least to inquire as to the reason behind such accommodation requests [45]. Among the other precautionary measures that practitioners and commentators have recommended is the inclusion of clauses in the agency contract whereby the agent agrees not to contravene the FCPA or local bribery laws [46]. It has also been suggested that pre-employment screening procedures be undertaken whereby the "reputation" of the local agent could be ascertained [47].

2.2. Actions beyond the scope of the recipient's official duties

At common law, when a questionable payment is linked with an act entirely outside the official function of the public employee, it is held that bribery has not been committed [48]. Although this rule is apparently followed in some Middle East countries [49], most have incorporated into their bribery statutes provisions broad enough to cover certain acts outside the scope of the recipient's official duties. The Saudi Arabian regulations against bribery, for instance, provide:

Any public official who solicits or accepts for himself or another a promise or gift in order to use his genuine or alleged influence to try to get from any public authority, works, ordinances, decisions, commitments, concessions, procurements contracts, or a job, service, or any kind of privilege is guilty of bribery and shall be punished ... [50].
Similarly, under the FCPA it is unlawful for an American corporation to give anything to a foreign official for the purposes of:

(A) influencing any act or decision of such foreign official in his official capacity including a decision to fail to perform his official functions; or (B) inducing such foreign official to use his influence with a foreign government or instrumentality [51].

Thus, the combined effect of the FCPA and Middle Eastern bribery statutes is to prohibit American corporations from rewarding a foreign official for many actions only tenuously related with his governmental functions.

2.3. Which types of consideration are prohibited?

The methods resorted to by corporations making international payoffs are numerous and can be complex. The following list, compiled by one author, names the principal types of payments:

(a) Cash.
(b) Deposits in numbered foreign bank accounts.
(c) Overbilling of sales with kickback to the buyer.
(d) Gifts of property (watches, jewelry, paintings, “free” samples).
(e) Gifts of service (use of automobiles, aircraft, hunting lodges, payments of rent on homes, country club club dues, etc.).
(f) Payment of travel and entertainment expenses.
(g) Making unsecured loans – never collected.
(h) Putting relatives on the payroll as “consultants”.
(i) Providing scholarships and educational expenses for children.
(j) Making contributions to charities of the payee’s choice.
(k) Purchasing property from the payee at an inflated price.
(l) Selling property to payee at a deflated price [52].

In most Middle Eastern states a public official is prohibited from receiving “any benefit” (other than his salary, etc.) for the performance or non-performance of his duties [53]. In these jurisdictions the term “any benefit” could be broadly construed to cover any of the payments listed above. A few bribery statutes such as Sudan’s specify certain common modes of bribery that fall under the rubric of a “benefit” [54]. In certain jurisdictions, however, it is arguable that the form of payment alone may exempt otherwise guilty parties from liability under local bribery laws. In pre-revolutionary Iran, for instance, only the acceptance of goods or money was explicitly prohibited, thus opening up a whole range of payments in “services” which would have been out of the range of the Iranian anti-bribery law [55].

A related question concerns payments or gifts not directly benefiting the public official. Such payments are commonly made to or for the benefit of the official’s spouse, children or a related third party. In most middle Eastern
states these awards are arguably bribes under language that forbids the official from requesting or accepting a benefit either “for himself or another” in return for his performance of an act [56]. A literal reading of this language, however, suggests that the public official has not acted illegally as long as he has not actually requested or physically accepted a benefit on behalf of a third party. For instance, has an official acted illegally when he awards a contract to a company that has recently given his wife expensive diamond jewelry? In such a factual setting, a court applying local bribery laws, in all likelihood, would determine the legality of the gift by reference to its effect on the bidding process. Where the bid is high and would not otherwise have been granted but for the gift, the payment would be a bribe. Where the company would have obtained the bid in any event, no criminal behavior would be found. This analysis makes sense in the context of Middle Eastern bribery laws that forbid the acceptance of gifts only where those gifts are tied to the performance of some official or semi-official act. Other local laws, such as civil service regulations, may prohibit a public official (or his relatives) from accepting any gift that might be perceived as presenting a conflict of interest [57].

The language of the FCPA is equally vague with respect to the types of payments that are prohibited. Neither the specific language of the Act nor the legislative history addresses the issue of whether payment by services or gifts to relatives would violate the Act. The FCPA forbids “the payment of anything of value [to a] foreign official... for the purpose of... influencing any act or decision of such foreign official... in order to assist [a corporation] in obtaining or retaining business...” [58]. Broadly construed, the Act might prohibit the use of entertainment or services as a means to obtain a contract [59]. Payments and gifts to the relatives of the official, when made with “corrupt” intent, are even more likely to fall within the scope of the Act. Such payments, of course, are completely contrary to the policy underlying the legislation and courts are likely to construe the Act broadly when confronted with payments to third parties.

2.4. Does the purpose of the payor render the payment unlawful?

Successful prosecution of bribery under the FCPA and Middle Eastern law requires a showing that the payor’s purpose was to induce a public official to misuse his official position in some way. Most Middle Eastern anti-bribery statutes begin by defining what is “corrupt” behavior on the part of public officials [60] (e.g. the acceptance of cash for the non-performance of a duty). Under a clause which usually follows, the person who makes the payment for the purpose of corrupting that official is guilty of giving a bribe [61]. The FCPA requires that payments must be made “corruptly” [62] in order to be prohibited. Although “corruptly” is not defined in the Act, the legislative history states:
The word "corruptly" is used in order to make clear that the offer, payment, promise, or gift, must be intended to induce the recipient to misuse his official position in order to wrongfully direct business to the payor or his client, or to obtain preferential legislation or a favorable regulation. The word "corruptly" connotes an evil motive or purpose, an intent to wrongfully influence the recipient. It does not require that the act be fully consummated, or succeed in producing the desired outcome [63].

Thus, payments made solely for the purpose of establishing goodwill between a corporation and a Middle Eastern government are not likely to be considered "corrupt" under either set of laws and would therefore not give rise to liability as illegal bribes [64].

Notwithstanding their common requirement of "corrupt" behavior, Middle Eastern anti-bribery law and the FCPA differ markedly in scope. This difference results from the Act's further refinement of the legal significance of the payor's purpose. The bribery laws of the Middle East naturally focus upon the impact that illegal payments make on the social and political system of a given country. Understandably, therefore, Middle Eastern law does not contemplate an analysis into the reasons underlying the payor's desire to corrupt the public official. The FCPA, however, places strong emphasis on the motivation behind the business payment. The Act incorporates a "business purpose" test which makes it clear that, in order to be prohibited, a payment must not only be "corrupt" but must be made to "assist [the corporation or business] in obtaining or retaining business..." [65]. Given this added limitation, the FCPA criminalizes a significantly smaller number of corporate payments than its Middle Eastern counterparts which arguably apply to all payments that have the effect of "corrupting" public officials, even where those payments are not made to obtain or retain business. Thus, a corrupt payment made to a public official in order to avoid criminal prosecution of a corporate employee is probably not prohibited by the FCPA because of the "business purpose" limitation. The same payment, however, is illegal in most Middle Eastern jurisdictions [66].

An American businessman abroad may make a questionable payment for a variety of reasons. He may seek to obtain or retain business, reduce political risks, avoid harassment, reduce taxes, or simply induce official action [67]. When classified according to the underlying purpose of the payor, the payments fall into three major categories: aggressive payments, defensive payments, and facilitating or "grease" payments [68].

2.4.1. Aggressive payments

Simply defined, an aggressive payment is one made directly in exchange for new business [69]. A typical example of an aggressive payment would involve a U.S. aircraft corporation making a large contribution to a Middle Eastern minister of defense in order to secure a government contract to purchase airplanes. Under Middle Eastern law such a payment would invariably be
illegal as its purpose is to “corrupt” the foreign official (i.e. influence his decision). The “business purpose” test of the FCPA is also satisfied because the “aggressive payment”, by definition, is made to assist the corporation in “obtaining business”.

Because the definition of “corrupt” behavior may vary from nation to nation, it has been suggested that under the FCPA a “relative definition” of the term should be devised which would be flexible enough to comply with the laws of that nation whose official has been bribed [70]. The “multinational context of the FCPA”, it is stated, “mandates that ‘corruptly’ should mean knowingly and wilfully intending to influence a foreign nation’s decision-making through a payment forbidden by that nation’s laws” [71]. Such an interpretation, however, is flawed in two respects. First, it is clear that the intent of Congress was to avoid the incorporation of foreign law into the FCPA. As originally introduced by Senator Proxmire, the Act would have forbidden any payments that were “illegal under the laws of a foreign government having jurisdiction over the transaction” [72]. Recognizing the difficulty of interpreting foreign bribery laws, Congress enacted the FCPA into law without the foreign law provision. This course of action would also make sense in light of the fact that local bribery laws generally prohibit a wider range of “corrupt” activity than does the FCPA. A definition of “corrupt” behavior based on foreign law would, contrary to congressional intent, expand rather than limit the scope of the FCPA.

2.4.2. Defensive payments

Although aggressive payments will ordinarily be unlawful, payments which are defensively motivated are often much more difficult to classify. Defensive payments are defined as those which are motivated by a wish to avoid threatened adverse governmental action [73]. When accompanied by an element of duress (such as in true extortion situations) payments may well be lawful. For instance, money paid in order to avoid physical or personal harassment is not generally criminal under the laws of most Middle East nations and the FCPA because the payments are not corrupt [74]. Construed broadly, certain Middle Eastern bribery statutes arguably would exonerate payments made in response to threats of a physical or economic nature. Article 143 of the Iranian Criminal Code, for instance, provided that:

Should it be established that the person offering a bribe was forced to bribe in order to protect his legitimate rights he shall be exempt from punishment [75].

Other statutes, such as Morocco’s, arguably rule out any defense of physical or economic coercion:

Any person, who, in order to obtain the performance or non-performance of an act ... yields to solicitations leading to bribery, even though not initiated by him, and regardless of the effect thereof, he shall also be punished by the same punishment given to bribed persons ... [76].
However, in most Middle Eastern jurisdictions it is unclear whether economic coercion will serve as a defense. When faced with a threat of economic coercion by Middle Eastern officials, a U.S. corporation may consider making the requested payment and immediately confessing to higher authorities since several Middle Eastern nations have laws which exonerate a briber who subsequently confesses [77]. The advisability of this action, of course, assumes the existence of a higher authority who is willing to prosecute the official who made the threats.

The status of coerced payments under the FCPA is not clear from the language of the Act. Under the U.S. domestic bribery statutes, proof of economic coercion is not allowed as a complete defense, although the defendant is entitled to have the jury consider the coercion as bearing on his "intent" [78]. Similarly, the FCPA "corrupt" intent requirement was apparently intended to exempt only payments made in response to true extortionist threats. This view was clarified in the Senate Report:

The defense that the payment was demanded on the part of a government official as a price for gaining entry into a market or to obtain a contract would not suffice since at some point the U.S. company would make a conscious decision whether or not to pay a bribe ... On the other hand true extortion situations would not be covered by this provision since a payment to an official to keep an oil rig from being dynamited should not be held to be made with the requisite corrupt purpose [79].

It remains to be seen whether the Act will be held to prohibit payments made in response to threats of an economic nature that are made after a business has obtained a government contract abroad but before it has been paid. A spokesman for the Department of Justice, however, has indicated that the Department intends to prosecute despite any claims of economic extortion by the paying company [80].

2.4.3. "Grease" payments

"Grease" payments are made for the purpose of facilitating the performance of non-discretionary actions by low-level public officials and are not intended to secure new business. The typical grease payment, therefore, is made to persuade the civil servant to carry out a function or service which he is obliged to perform as part of his government responsibilities, but which he may refuse or delay unless compensated. Examples of facilitating payments set forth in the congressional reports include payments for (i) expediting shipments through customs; (ii) placing transatlantic phone calls; (iii) securing required permits; and (iv) obtaining adequate police protection.

Congress included three clauses in the FCPA, any one of which would probably exclude such payments from coverage under the Act. First, as discussed above, the Act does not apply to payments to low-level government employees [81]. Secondly, grease payments would be exempt since, by defini-
tion, they are only indirectly intended to "obtain or retain business" [82]. Finally, a grease payment is not "corrupt" because it does not involve the performance of "discretionary actions" by a public official [83]. As noted above, however, grease payments are illegal in every Middle Eastern jurisdiction. Notwithstanding this prohibition, however, the practice remains widespread in that area of the world.

3. Penalties

In most Middle Eastern states the offer or payment of a bribe is punishable by fines and imprisonment usually not exceeding five years' imprisonment [84]. Noteworthy exceptions here are Egypt, where the penalty can be life imprisonment at hard labor [85], and Tunisia, where the bribery statute never mentions a punishment for bribers [86]. In many Middle Eastern nations such as Saudi Arabia, provisions exist that call for lesser penalties should the bribe go unaccepted [87]. Penalties may be increased in some jurisdictions if the public official has been requested to refrain from performing an official duty [88] as opposed to merely performing a duty. Finally, if the purpose of the bribe was the commission of an act punishable by a penalty more severe than the one for bribery, then the person offering the bribe may be punished by the penalty prescribed by law for that crime [89].

In addition to fines and imprisonment, a U.S. corporation offering a bribe may find itself subject to potentially more damaging penalties. In Saudi Arabia, for instance, a foreign firm was recently banned from operating in the Kingdom [90]. The penalty was apparently imposed pursuant to article 12 of the Saudi Arabian bribery regulations which provide that anyone convicted of bribery "shall be denied ... admittance to any adjudication, public import license, public work contracts, government contracts or any other public authority, whether through practice or contracting" [91]. Although the imposition of such a penalty would appear to be a more effective bribery deterrent than imprisonment or fines, few Middle Eastern governments have included such a provision in their bribery laws.

The sections setting forth the penalties imposed for violation of the anti-bribery provisions of the FCPA state that a corporation or business (i.e. not an individual) can be fined up to $1 million. An individual who is either a "domestic concern" or an officer, director, or shareholder acting on behalf of an enterprise can be fined up to $10,000, and imprisoned for a maximum of five years [92]. In order to protect lower level employees from being scapegoats for the corporation, these individuals can be punished for violating the Act only if it is found that the company itself has done so [93]. Finally, the FCPA prohibits the corporation from indemnifying any individual convicted of violating the Act [94].
The final topic of this subsection concerns the crime of offering a bribe. In all but two of the Middle East jurisdictions a businessman who offers an illegal payment will be liable as a briber regardless of whether or not the payment is accepted [95]. More often than not, however, the mere offering of a bribe will be less severely punished if the bribe is not accepted [96].

4. Bribery statutes: Enforcement

The enforcement record of the bribery laws examined herein has been inconsistent at best. Despite the evidence of widespread questionable payments to high level officials in the Middle East in the past decade, there have been relatively few publicized investigations regarding the propriety of these payments [97]. Enforcement against lower level bribery, on the other hand, has been fairly common in countries such as Saudi Arabia.

For a variety of reasons, a government may choose not to initiate or follow through with the prosecution or investigation of a company, agent, or public official who has apparently violated bribery laws. Very often such governmental restraint is the result of pressing political interests which are likely to be endangered by the publicity accompanying a major bribery scandal. In other instances the authorities simply may be unable to meet the burden of proof imposed by bribery laws because of the difficult questions of international law and comity that the gathering of evidence is likely to entail [98].

4.1. The Middle East nations

In the Middle East political considerations will often dictate the intensity with which local anti-bribery laws are enforced. Operating on weak political foundations, many Middle Eastern governments could not survive a bribery scandal of the magnitude experienced in the Netherlands, Japan or Italy [99]. Indeed, it is widely recognized that, until the rash of bribery disclosures in the mid-1970s, Middle Eastern governments tended to overlook questionable payments. In recent years, however, a number of Middle Eastern nations have undertaken well publicized anti-corruption campaigns designed to boost the political image of the government at home and abroad [100]. Although such investigations have not resulted in major criminal convictions of U.S. businessmen, the apparent shift in enforcement policies indicates that the possibility is no longer a remote one.

Despite indications of a growing willingness to prosecute violations of anti-bribery laws, local authorities in the Middle East face significant jurisdictional obstacles raised because suspected bribers and evidence are often located outside of the prosecuting country. As demonstrated by an application of Middle Eastern law to the following hypothetical case, obtaining and
enforcing a judgment against a foreign corporation or individual often involves questions that extend beyond the realm of domestic law and domestic enforcement policy.

An American employee of a large U.S. corporation, following the instructions of "high level" officers of the corporation makes a large cash payment to a cabinet member of State X while he is travelling outside of X. The payment induces the official to award the corporation a lucrative government contract. The official, however, confesses to the crime and implicates the employee and the corporation. Claiming a violation of its bribery laws, the government of X seeks to prosecute the employee, the officers and the corporation.

In the analysis which follows, the above case is examined throughout in the context of Turkish law.

Assuming that the evidence obtained from the official is sufficient to meet the government's burden of proof under the local anti-bribery law, the initial question is whether, under the law of X, a corporation can be criminally liable for the payment of a bribe. Unlike many modern European penal codes [101], the Turkish code, for example, contains nothing which explicitly provides for criminal liability of a corporation. Notwithstanding this omission, however, corporations in Turkey are legal persons capable of doing anything in law that a natural person can do [102]. Thus, it is likely this initial question will be resolved in favor of the government prosecutor.

A second major consideration concerns the application of the law of State X to criminal behavior outside of X. Again, an application of Turkish law is instructive. Although the Turkish criminal code has adopted the "principle of territoriality" as its general rule [103], it contains exceptions that arguably extend its jurisdiction to prescribe laws regarding the actions of corporate officers who have never set foot in Turkey and corporate employees who make payments to Turkish officials outside of Turkey. The question of the extraterritorial payments is covered by article 4 of the Turkish penal code which states that "[w]hoever commits a felony [e.g. bribery] during and in connection with the performance of an officer or mission on behalf of Turkey in foreign countries shall be prosecuted in Turkey" [104]. The application of Turkish law to the corporate officers is provided for in article 6 of the code:

A foreigner who commits a felony ... in a foreign country, against Turkey or a Turk, entailing punishment restricting liberty for a minimum authorized period of one year under Turkish law, shall be punished according to Turkish laws, if he is in Turkey [105].

The final phrase in article 6 suggests that Turkey does not have jurisdiction to enforce its bribery laws against an American corporation and employees who are not in Turkey. Of the Middle Eastern nations examined here, Turkey is among those three that have signed an extradition treaty with the United
States that includes bribery as an extraditable offense [106]. However, the treaty provides for extradition only where the offense was committed in a territory subject to the jurisdiction of the requesting party (i.e. Turkey). Assuming the reference to “jurisdiction” here means “enforcement jurisdiction”, then the U.S. would not be bound to extradite because the payments were made outside Turkey. Moreover, article V of the Turkish treaty provides that the signatories are not bound to extradite one of their own nationals under the treaty [107]. It seems likely that, even if the illicit acts were committed in Turkey, the Department of Justice would prosecute under the FCPA rather than extradite since the hypothetical payment is clearly forbidden by the Act [108].

Assuming that it is impossible to extradite the Americans, and that service of a summons upon them would be useless, Turkish law permits the authorities to try the defendants in absentia [109]. Under this procedure, service of process is achieved by simply attaching a copy of the summons to the courthouse wall for two weeks [110]. Turkish law also provides that the defendants may be represented in absentia by counsel of their own choice [111]. While no punishment of imprisonment can be declared upon a judgment rendered in absentia, any property of the corporation or the other defendants can be attached and disposed of upon the death of the absentee [112]. Finally, if the Americans are subsequently arrested in Turkey, they may be entitled to a trial de novo [113]. In the unlikely event that the Turkish government seeks to enforce the above judgment in the United States, it is probable that any American court would refuse to act as an enforcement organ for the criminal legislation of another jurisdiction [114].

Notwithstanding this lack of judicial assistance, a judgment rendered in Turkey may have various legal consequences in the United States [115]. The most important of these involves the question of double jeopardy [116]. Under the circumstances described above, the double jeopardy principle arguably would not bar a prosecution of the same defendants under the FCPA for the same act since neither the U.S. Constitution nor the FCPA requires that a Turkish criminal judgment be given greater effect [117]. The reverse situation is covered by the Turkish Criminal Code which gives the Minister of Justice the authority to try the Americans in Turkey even after a successful prosecution under the FCPA [118]. If the punishment imposed in the U.S. is less than that required by the Turkish code, then the difference will be served in Turkey should the Americans ever return there [119].

4.2. Enforcement of the FCPA

The responsibility for enforcing the anti-bribery provisions of the FCPA is divided between the SEC and the Department of Justice [120]. As the House of Representatives indicated in its report, the SEC is in charge of investigations of
violations under section 103 (violations by issuers and reporting companies) [121]. Should the case require criminal prosecution, it is placed in the hands of the Department of Justice. Violations of section 104 of the Act (by non-reporting domestic concerns) are both investigated and prosecuted by the Justice Department. In addition to the efforts of these bodies, the prosecution of U.S. companies abroad is augmented by an Executive Order that provides that senior officials of American foreign intelligence agencies must report to the Attorney General any evidence of possible violations of federal criminal laws such as the FCPA [122]. Such reports cannot be the result of an active search for evidence, but would arguably come from the “passive” receipt of evidence which comes to the attention of the agency [123]. The mechanisms available to the SEC to enforce the Act are the same as those provided by other securities laws and include the use of civil injunctions and administrative hearings [124].

In spite of the competent enforcement machinery that exists under the FCPA, the government has initiated relatively few prosecutions under the bribery provisions of the Act [125]. This is attributable, in part, to the stringent nature of the required proof. As noted above, the Act requires proof that the payor had “reason to know” that the payment would be used for corrupt purposes. Given the nature of the behavior prohibited by the FCPA, it is likely that important evidence will be located abroad in the hands of U.S. nationals, foreign subsidiaries of U.S. corporations, or foreign nationals [126]. Under U.S. law, an American citizen residing abroad may be served with a subpoena requiring him to appear in court and, if necessary, produce relevant documents in his possession [127]. Similarly, any documents over which a U.S. parent corporation has control may be subpoenaed from a foreign subsidiary or branch office abroad [128]. However, the courts have modified such subpoenas in the name of “international comity” where compliance would violate foreign law and where there has been a good faith effort to comply [129].

Obtaining testimony and other evidence from a foreign national who is located outside of the United States may be somewhat more difficult. In most cases, the investigation of questionable payments abroad will depend, in large part, on the cooperation of foreign individuals or governments [130]. For instance, in order to obtain documentary evidence from a foreign national, the U.S. government would seek judicial assistance through a letter rogatory [131]. It is a generally accepted principle of international law, however, that a nation is not compelled to provide such judicial assistance in criminal matters [132]. Moreover, there are no treaties between the United States and Middle Eastern nations that provide for judicial assistance in criminal matters. Thus, a Middle Eastern government’s compliance with such a request is likely to depend upon the sensitivity of the documents requested and the political stability of the government in question. In the event that the United States is unable to compel a foreign witness to testify in a FCPA enforcement proceeding, serious
constitutional questions may be raised concerning the accused’s right to confront adverse witnesses [133].

Although the major criterion for choosing among cases to prosecute will ultimately be the strength of the available evidence and the chances for obtaining additional needed evidence [134], the government may refrain from prosecution on policy grounds. The SEC, for instance, has reportedly dropped cases or investigations for reasons of national security. On April 8, 1980, the Wall Street Journal reported that, at the request of the CIA, the SEC had decided to drop foreign bribery charges brought in 1978 against Page Airways Inc. According to the Journal the charges against Page and six corporate executives were dropped and the case settled in order to avoid the risk of exposing an overseas intelligence-gathering mission in which Page participated by paying large sales commissions to foreign officials deemed friendly to the U.S. [135]. Page reportedly agreed to a settlement that included an order prohibiting it from future violations of the securities laws, and also requiring it to conduct an internal study of the payments [136]. In addition to the concern for considerations of national security, enforcement priorities are apparently determined by the nature of the competition abroad and the general attitude of the foreign country whose officials the payment is designed to influence. In a recent speech, Assistant Attorney General Philip B. Heymann indicated that the Department of Justice will consider payments to be less serious (and presumably less likely to be prosecuted) where an American company is not in direct competition with other American companies, but with foreign companies who also make illegal payments but are not subject to the FCPA [137]. Heymann also indicated that the Department of Justice will be more likely to prosecute when bribes are being offered in a country which is trying to “clean up” its own act [138].

A less expensive method of enforcing the FCPA is to allow the private sector to regulate itself. Although the Act does not explicitly create a private right of action, federal courts could create such a right or Congress could amend the FCPA to allow for such actions [139]. The creation of such a right is unlikely, however, and strong arguments against establishing a private right of action have been put forward [140].

5. Other laws designed to reduce the incidence of bribery

5.1. The Middle East

The problems encountered by Middle Eastern governments in drafting and enforcing domestic bribery statutes has prompted attempts to reduce corruption in these nations through non-criminal legislation. In contrast to the penal codes which define and explicitly prohibit corrupt behavior, these relatively
recent measures are designed to help businessmen and public officials avoid the occasion to sin by discouraging those situations in which bribery is most likely to flourish. For instance, it has been noted that the use of commercial agents by companies seeking government contracts can present serious obstacles to both the application and enforcement of criminal bribery statutes. With this in mind, certain Middle Eastern governments in recent years have taken steps to de-emphasize the importance of local agents. Although this method constitutes the most popular complement to the criminalization of bribery, other methods of reducing bribery have also been employed and are discussed below.

The analysis that follows is based on the following set of inquiries applied primarily to the commercial agency laws of each of the Middle Eastern nations surveyed:

1. Must a foreign company employ a local commercial agent before conducting business in that country?
2. Is there a law or regulation prohibiting the use of commercial agents in certain government or non-government contracts? Is the law or regulation limited to contracts which call for the government to purchase certain goods (e.g. weapons)?
3. Is there a law or regulation that limits the amount or place of payment of a commercial agent’s commission or fee?
4. What other methods are employed to provide a disincentive to bribery? Are sealed bids and public tenders required in government contracts? Does the law reward employee integrity? Are “no bribery” affidavits required in government contracts?
5. Other methods?

As noted above, foreign businesses operating in the Middle East may be required to employ a local commercial agent. Foreign businesses seeking government contracts may be required to retain a local agent in five Middle Eastern countries [141]. Those companies seeking to sell goods or services in the private sector may also be required to act through an agent in five of the jurisdictions surveyed here [142]. The use of an agent is completely forbidden in only one Middle Eastern jurisdiction [143]. In those nations where agents may be retained, it is usually required that the agency relationship be registered with the government [144]. In addition, these same governments often empower a cabinet-level official to prohibit, at his discretion, the use of agents in transactions with his particular ministry [145].

In the hope of reducing corruption, several Middle Eastern governments, in recent years, have amended their commercial agency laws by prohibiting the use of or payment to commercial agents or their functional equivalents in certain situations [146], such as the purchase and service of military goods [147]. The scope of these laws varies widely. For instance, the Saudi Arabian
Regulation on Service Agents [148] requires that foreign contractors who have no Saudi partner must appoint Saudi agents to represent them in their dealings with the Saudi government. Article 4 of the Regulation, however, prohibits the use of agents in "armament contracts and services related thereto" [149]. In Algeria the law is applied broadly to cover all contracts whether or not the government is a party. Any violation of these decrees will often subject the foreign corporation and its agent to the penalties provided for in the bribery or corruption articles of the penal code [150].

In addition to the prohibition of certain agency relationships, Middle Eastern nations have used other methods to encourage more direct relations between government entities and foreign firms. Saudi Arabia, for instance, has recently established a new licensing procedure which allows foreign firms already doing business in the Kingdom to establish a local "representative office" [151]. While these offices are prohibited from conducting any commercial activity other than liaison work, such developments may even further reduce the activity of commercial agents and possibly the incidence of bribery.

These recently promulgated rules concerning the use of agents, like the bribery laws, have given rise to some important problems in interpretation. Jordan, for instance, recently amended its commercial agency law to prohibit the use of an agent in the purchase, import or sale of any arms or spare parts to the military [152]. The law, however, does not define "arms or spare parts." The question has arisen, therefore, whether the use of an agent is prohibited in the sale of goods that, strictly speaking, are not arms but that nonetheless will be used by the military. Common examples of such goods include trucks and communications equipment destined for military use. The Jordanian government recently removed this uncertainty by interpreting the law to apply only to firearms, and not to other equipment [153]. A similar problem arises concerning the Saudi Arabian regulation that prohibits the use of agents in armament contracts "and services related thereto" [154]. Due to a lack of any governmental interpretation as to the scope of the term "related services," cautious companies would be well advised to refrain from employing an agent in situations that arguably relate to armament contracts.

Another method designed to discourage large payoffs (part of which might be passed on to public officials) is the imposition of ceilings on the amount of "commissions" or "fees" that can be paid to commercial agents. To date, only Saudi Arabia and Abu Dhabi have enacted such rules. The Saudi regulation, for instance, states that such "fees" cannot "exceed five percent of the total cost of the contract the foreign contractor is executing" [155]. In Abu Dhabi ceilings range from 2% on transactions not exceeding $2.64 million to 1% on transactions exceeding $13.2 million [156].

Predictably, local agents in the Gulf have not been content with these limitations and have devised ways to avoid them [157]. First, an agent may attempt to distinguish his agency fee from other "extra" services which would
not be subject to the ceiling [158]. Under such a view, higher remuneration would be allowable for the performance of identified services that are above and beyond those “sponsorship” services specifically tied to the acquisition and performance of a government contract. A second and related method is for the agent to seek the maximum commission allowable for pre-contract services and later increase the percentage for post-contract logistical support (e.g. visas, housing, etc.) [159]. Other tactics include attempts to conceal the agency relationship and thereby avoid the ceilings which do not apply to other business relationships such as “local distributorships” or “joint ventures” [160].

Under Saudi Arabian law, for instance, there is no limit on the percentage of profits which a Saudi co-adventurer can take from a business enterprise with a foreign corporation. Because joint ventures are exempt from the requirement that foreign businesses employ an agent, a situation is created whereby the “agent” takes his fee (at over 5%) as a co-adventurer [161].

With respect to the first two methods of avoiding a ceiling on agency fees, the law and practice in Abu Dhabi and Saudi Arabia create some uncertainty. Current local practice and usage in Abu Dhabi, for instance, seem to indicate that there may be circumstances in which it would be permissible to compensate local agents in an amount in excess of the 2% limitation. It has been reported that contracts calling for amounts in excess of 2% have been accepted for registration by local authorities with respect to the performance of duties that are not strictly of a sponsorship nature. Thus, under this view, if the local sponsor/agent agrees to perform functions beyond those generally regarded as being sponsorship services, the 2% limitation would not apply thereto. The validity of this distinction seems questionable, however, since the Abu Dhabi regulation uses the word “agent” rather than “sponsor”. It would appear, therefore, that a broader reading of the term to include all services performed by the agent is more appropriate.

Even assuming the applicability of the above distinction, it is often unclear whether services are of a strictly sponsorship nature. With respect to the application of article 8 of the Abu Dhabi law there is agreement among local practitioners only as to which services are obviously in the nature of strict sponsorship and those which obviously fall outside that category. First, the 2% limitation will be applied to services directly tied to an acquisition of a specific government contract. These include the use by a foreign company of its local agent’s name to qualify for a government tender, as well as the identification of the tender, the obtaining of the tender documents and the submission of the tender. At the other extreme, it would appear that a foreign company may reimburse its agent in amounts in excess of the maximum, for direct out-of-pocket expenses of the agent, incurred for example in providing temporary office space for the foreign company.

With respect to types of services that fall between these two extremes, there is no definite method for distinguishing pure sponsorship from the broader
notion of agency services the payment for which is arguably not subject to the 2% limitation. Once one accepts the "sponsorship" distinction, then, it appears that as the services become less specifically identified to particular government tenders, a stronger case can be made in support of the permissibility of additional compensation.

In addition to limiting the amounts payable to local agents, some Middle Eastern governments have sought to discourage payments into foreign bank accounts by enacting laws that restrict the places in which commissions may be paid. Jordan, for instance, does not limit commission rates, but has a strict foreign exchange control law that prohibits the payment of commissions to Jordanian nationals outside of the home country [162]. Thus, in such jurisdictions payments should be made by bank transfer or by check mailed to the address of the agent in his home country. In other jurisdictions, such as Kuwait, Saudi Arabia, and Abu Dhabi, the place of payment is irrelevant. These countries are without foreign exchange laws; and their nationals are permitted to maintain foreign bank accounts and are not required to report the same or to sell foreign currency to any entity at home. Even in nations such as Egypt where foreign exchange laws are in force [163] a foreign company would not violate the law if it paid a local agent in foreign currency by depositing funds in the agent's account outside of Egypt. However, it may be shown that the company intended to aid in the evasion of taxes by the agent, thereby violating Egyptian law.

Although most efforts to reduce corruption by prophylactic means have focused on the behavior and use of commercial agents, some Middle Eastern governments have sought other ways to discourage those situations in which bribery is most likely to flourish. One such method is to reduce the amount of administristerial discretion involved in the awarding of government contracts. Where a single government representative is granted the sole power to negotiate and award large government contracts a climate favorable to bribery has been created [164]. In response to this common practice in the Middle East, commentators have suggested that local authorities require that competing foreign businesses submit sealed bids to be opened publicly by a committee of officials who would then act on the bids [165]. This is the practice in Kuwait, for instance, where extensive regulations require such public tenders in all contracts with government ministries and departments [166]. However, in other Middle Eastern states, such as Saudi Arabia, public tenders are often required on an ad hoc basis.

Other efforts to reduce corruption include a Saudi Arabian law that requires that the government reward persons who provide information leading to a bribery conviction as well as those public officials who refuse bribes in the course of their duties [167]. Middle Eastern nations have also increased their efforts to publicize their bribery laws and alert foreign businesses to rules regarding questionable payments. Iran, for instance, required foreign compa-
nies selling to the government to complete and sign a form affidavit stating, among other things, that no money or fees were paid to secure the contract. In Syria, foreign companies may be asked to submit a written declaration that no “broker or mediator” has been employed. Similarly, in Algeria every foreign company that concludes a contract with the Algerian government or with any organization controlled by the Algerian government must provide in its contract a clause entitled “exclusion of intermediaries”. This clause must state specifically that the contract was entered into without the mediation of an agent. Under Algerian law failure to include this clause in the contract renders the contract null and void. Moreover, the use of an agent in contravention of these provisions may subject the foreign company to criminal sanctions [168].

5.2. The United States

The remainder of this article is devoted to a brief outline of the additional existing U.S. law that is relevant to the question of U.S. corporate payments in the Middle East [169]. Although many of these provisions are of great importance to American businesses operating abroad, the list is too long and the provisions too complex to be treated in detail here.

A major piece of legislation in this area concerns the second prong of the FCPA regulation of corporate misconduct abroad [170]. Under subsection (A) of that provision SEC registrants and reporting companies are required to “make and keep books, records, and accounts, which in reasonable detail, accurately and fairly reflect the transactions and disposition of assets” [171]. Subsection (B) requires those companies to “devise and maintain a system of internal accounting control sufficient to provide assurances that ... transactions are recorded as necessary to maintain accountability for assets” [172]. Although the policy underlying the accounting provisions is the elimination of bookkeeping devices designed to conceal illegal payments abroad [173], this section of the Act is not limited to payments abroad but is applicable to wholly domestic business activities devoid of foreign bribery implications [174]. If a company fails to comply with the accounting provisions, the enterprise, along with its officers, may be subject to criminal liability [175] and a civil action may be brought by the SEC [176]. Anyone acting in cooperation with the head of any federal department or agency in matters concerning the national security will be exempt from the accounting provisions in certain instances [177].

Unfortunately, it is not always clear what constitutes compliance with the accounting provisions of the Act. In a speech outlining SEC policy on compliance and enforcement of the accounting provisions, Chairman Harold Williams acknowledged that ambiguities in the statute were causing some businesses to be overly cautious in seeking compliance with the Act [178]. Noting the “debilitating effect” that this uncertainty has had on business
resources, Williams indicated that the SEC will not challenge “reasonable business decisions” on compliance with the Act and that “inadvertent record keeping mistakes” will not give rise to Commission enforcement proceedings [179]. Notwithstanding Chairman Williams’ remarks, however, there is growing pressure to amend the FCPA accounting requirements [180].

With the exception of the FCPA, no U.S. law is aimed directly at preventing international payoffs by American corporations. Although legislation does exist that, in certain limited cases, could give rise to civil or criminal liability for bribery abroad, the legislative history of the FCPA indicates that Congress believes even the most vigorous application of these laws would not significantly deter payoffs by U.S. corporations abroad. The most important of these non-FCPA laws are the disclosure requirements of the 1933 and 1934 Acts [181]. Although these have been used by the SEC in actions against U.S. corporations making payments abroad [182], their effectiveness in this area has been limited. In a letter to Senator William Proxmire (the sponsor of the FCPA) the President's Task Force on Questionable Corporate Payments Abroad outlined the reasons supporting this view [183].

First, SEC disclosure requirements apply only to public companies registered under the 1934 Act or to those making a public offering. According to the Task Force letter, this extends to less than one-third of all U.S. companies doing business abroad [184]. Secondly, the disclosure requirements apply only to the extent that the questionable payment is “material”. After considering the broad SEC interpretations of the term the Task Force expressed serious doubts as to the legality of the views of the Commission [185]. The final point noted in the letter was the fact that the SEC does not require a corporation to disclose the names of the recipients of questionable payments. Based on these considerations, the Task Force concluded that the disclosure requirements were “not an appropriate mechanism to deal with the full array of national concerns caused by the problem of questionable payments” [186].

In addition to the securities laws, the anti-trust and tax laws are also applicable to foreign payoffs. The usefulness of these laws is limited, however, in that they apply only to the extent that the questionable payment is a violation of the specific statute in question. Section 162(c) of the Internal Revenue Code provides that taxpayers may not deduct bribes and kickbacks in computing their taxable income if the payment would be unlawful in the U.S. Thus, by limiting its scope to the narrow tax-related problem of business expense deductions, the federal tax law does not actually prohibit the improper payments. Similarly, anti-trust laws are not applicable to foreign payments, unless there has been an anti-competitive effect on U.S. commerce abroad [187]. The Task Force further noted “substantial constraints on the justiciable and enforceability of the application of the antitrust laws to foreign transactions” [188]. Ironically, these constraints are very similar to those limiting the effectiveness of the FCPA and include the sovereign immunity of
foreign governments and considerations of comity between nations [189].

Other areas of U.S. law that bear on the question of international payoffs are found in the sections relating to the Export–Import Bank of the United States (Eximbank), the Agency for International Development (AID) and the International Security Assistance and Arms Export Control Act of 1976. The regulations of the Eximbank require U.S. firms to file a report detailing the commissions paid on any sale financed with loans from that institution [190]. American exporters who make a sale under the AID program must file a supplier’s certificate which asserts that no kickbacks or commissions were paid [191]. Under the 1976 amendments to the Foreign Military Sales Act, a U.S. corporation selling military material abroad must fully disclose all information regarding any “payment, contribution, gift, commission or fee” paid in consideration for such a sale. The amendments also grant the President the power to limit or prohibit the conditions of such sales [192].

6. Conclusion

Anti-bribery legislation has proliferated in the United States and the Middle East during the years since Chairman Hills expressed concern regarding the legal uncertainties facing U.S. corporations operating abroad [193]. As a result, American businessmen making payments in the Middle East must be aware of the particular mandates of a growing body of domestic and foreign law. Although promulgating governments have made efforts to provide clearer guidelines for corporate behavior, many areas of U.S. and Middle Eastern law remain vague and uncertain. This uncertainty poses a danger to U.S. businessmen conducting business in the Middle East. While the attending anxieties can be eliminated only through further clarification by the governmental organs charged with their enforcement, the problem may be alleviated pending such action by obtaining a working familiarity with the language of the relevant statutes in their present form, coupled with a knowledge of prevailing patterns of enforcement. This article, it is hoped, has contributed to achievement of these goals.
Notes


[5] Hearings on S.305 Before the Comm. on Banking, Housing and Urban Affairs, 95th Cong., 2d Sess. (1977) (Statement of Roderick M. Hills, Chairman, SEC). The statement by Mr. Hills was made in response to the Committee Chairman's question as to whether or not Hills would support a flat legislative requirement that any payment which is illegal under "foreign law" should be prohibited by U.S. law. As introduced by Senator Proxmire, S.3133 would have incorporated foreign bribery law, by making a violation of foreign law punishable in the U.S. Section 3 of that bill would make it "unlawful for any issuer [of a registered security to]... pay or agree to pay any money or give or agree to give anything of value in a manner or for a purpose which is illegal under the laws of a foreign government having jurisdiction over the transaction". S.3133, 94th Cong., 2d Sess. §30A(3) (1976). This requirement was subsequently left out of the Foreign Corrupt Practices Act of 1977 as adopted. 15 U.S.C. §§78a, 78m, 78dd-1, 78dd-2, 78ff (Supp. III 1979).

[6] Id.


[10] It is not uncommon for Western observers to attribute this high incidence of bribery in the Middle East to historical, cultural and legal traditions which are peculiar to the Islamic world. See McLaughlin, The Criminalization of Questionable Foreign Payments by Corporations: A Comparative Legal Systems Analysis, 46 Fordham L. Rev. 1071 (1978). Some would argue strenuously with this conclusion, however.

[11] The term "Middle Eastern Law" hereinafter will refer only to statutes, regulations, ministerial decrees, and other governmental proclamations currently in force in the jurisdictions treated here. The reader should note, however, that the application of Islamic law (Shari'ah) cannot be ruled out in any legal matter in jurisdictions purporting to conform with the religious law.

[12] On April 1, 1979, Ayatollah Ruhollah Khomeini proclaimed the establishment of the Islamic Republic of Iran. Since that time, measures have been taken by the Government to bring the country's laws into strict conformity with Islamic Law. See Keesings Contemporary Archive, March 21, 1980, at 30147. The status of the bribery provisions of the Penal Code in force under the previous government is unclear.

[13] However, some payments clearly constitute bribes in all countries. John J. McCloy, Chairman of the Gulf Oil Special Review Committee investigating that corporation's overseas payments, testified before the Senate Committee on Banking, Housing and Urban Affairs that his committee "could not identify a single country where a bribe of a government official to induce a
government to enter into a contract for the supply of its product to that government was not illegal in that country". See Foreign and Corporate Bribes: Hearings on S.3133 Before the Senate Committee on Banking, Housing and Urban Affairs, 94th Cong., 2d Sess. 6 (1976) [hereinafter cited as Senate Hearings].


[16] Id. at 97–101.


[18] Although the subject of bribery (rashwah) is not mentioned in the Koran, Islamic law nonetheless prohibits bribery in many circumstances. For instance, according to at least one school of law, a judge (Qādi) in an Islamic court is formally forbidden to receive any gifts. Ruxton, Malikī Law (1916) at 280. The appointment of a Qādi secured by bribery is also invalid. Schacht, An Introduction to Islamic Law (1964) at 188.

[19] Note that the term may be defined elsewhere in the applicable penal code. The results here are based solely on the bribery sections of these codes. See Appendix I.


[21] See Appendix I.

[22] Law No. 58 of July 31, 1937, art. 111, supra note 9.


[29] See also The Foreign Sovereign Immunities Act, 28 U.S.C. §1603(b) (1976), which provides:

An "agency or instrumentality of a foreign state" means any entity –
(1) which is a separate legal person, corporate or otherwise, and
(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state of political subdivision thereof, and
(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.
[34] Iraq, "Law for Punishment of Illegal Intermediaries", Law No. 8 of 1976.
[36] It is common knowledge that almost every civil servant supplements his paycheck with private commercial activity ranging from operating a taxi to actively managing a large contracting and trading firm. Saudi Government employees run businesses, put deals together, solicit business from foreign firms, and form joint ventures. Registrations of new companies, published in the Commercial Register and in various journals occasionally include the names of well known Saudi Government officials as founding members. A closer examination of the names of the owners of other firms reveals that the nominal owner is the wife, child, or other relative of a prominent Government employee." Mid. East Exec. Repts. (April 1979) at 3.
[37] Saudi Arabian Civil Service Regulations, art. 13, supra note 35.
[38] The bribery laws of Sudan, supra note 20, state:

Art. 129. Anyone who accepts, takes or agrees to accept or tries to take any kind of gift, for himself or another, as an incentive or reward to induce a public official, by corruption and illegal means, to:

a. perform or refrain from performing any official act;

b. show, in the performance of his duty, partiality for or against any individual or,

c. render any service to any person, or cause him damage, or attempt to cause any of these to any government agency or public official,

shall be punished by imprisonment for a period not exceeding 5 years, or a fine, or both penalties.

Art. 131. Whoever offers, gives or agrees to give any kind of reward, whether cash or otherwise, under the circumstances and for the purposes stated in Articles 128 or 129, shall be punished by imprisonment for a period not exceeding 5 years, or a fine, or both penalties.

[39] 15 U.S.C. §§78-dd-1(a)(3) -2(a)(3)(Supp III 1979). In choosing to criminalize payments made with a "reason to know", Congress rejected a bill which would have required public disclosure of all payments in excess of $1,000 whether legal or illegal to sale agents abroad if made for the purpose of promoting business with a foreign government or obtaining favorable legislation. See S.3133 reprinted in Senate Hearings, supra note 13, at 4. The bill was criticized by the SEC and others who objected to the large costs and burden which such requirements would impose upon the corporation and the administering agency. In response to this criticism, Senator Proxmire introduced a new bill which dropped the disclosure requirements of S.3133 and incorporated the accounting control provisions suggested by the SEC which are now codified at 15 U.S.C. 78(m).


[43] 15 U.S.C. §78m(b)(2) B.

[44] Report of the Securities and Exchange Commission on Questionable and Illegal Corporate
Payments and Practices, p. 27. Submitted to the Senate Banking, Housing and Urban Affairs Committee, May 12, 1976.


[50] Saudi Arabia, Regulations against Bribery, art. 5, supra note 23.


[53] See Appendix II.

[54] Criminal Code of Sudan, arts. 128, 132, supra note 20. See also, Kuwait, Crimes Violating the Duty of a Public Official, art 114(3), supra note 23; and Iran, Iranian Criminal Code, art. 147, supra note 40.

[55] Iranian Criminal Code, arts. 139, 147, supra note 49.

[56] The bribery statutes of all Middle Eastern nations examined except Morocco, Sudan, Iran and Turkey contain this language. See Appendix II.


Every public official who obtains for his personal benefit, either directly or by any other means, or by any fictitious acts, any advantage from any of the public administrative duties exercised by him by virtue of his office shall be punished by a penalty of imprisonment for a period not exceeding two years.

See also, Sudan, Criminal Code of Sudan, art. 132, supra note 20:

Art. 132. Every public official who accepts, takes or agrees to accept, or tries to take anything valuable for free or for which he pays an insufficient price, for either himself or someone else, from:

a. any individual whom the public official knows had been in the past, or is now, or may be later involved with an act or measure that he has taken or is about to take, or he knows that his action is related to his official duties, or to the duties of any public official under his authority,

b. any individual, whom the public official knows and is interested in the action or measure connected with that individual, or there is a relationship tie between both,

shall be punished by imprisonment for a period not exceeding 2 years, or a fine, or both penalties.


[59] See, discussion in section 2.4, infra, regarding the “purpose of the payor”.

[60] See, e.g., Saudi Arabia, Regulations against Bribery, arts. 1–4, supra note 23.

[61] See, e.g., Sudan Criminal Code of Sudan, art 131, supra note 20. While the Sudanese code carries the same penalty for both performance and non-performance of duties, many anti-bribery statutes such as Egypt’s impose greater penalties on the official and the briber when the official has accepted a bribe in consideration for the non-performance of a duty. Egypt, Law no. 58 of July 31, 1937, arts. 103–4, supra note 9.

It shall be unlawful for (a corporation or business) ... to make use of the mails ... corruptly in furtherance of an offer, payment ... of any money (etc.) ... to any foreign official for the purposes of ... influencing (the official) ... in order to assist such (corporation or business) in obtaining or retaining business ... [emphasis added].


[64] Interpretive problems may still exist regarding goodwill payments, however, and many commentators have noted the existence of a potential loophole if the “corruptly” requirement of the FCPA is construed too narrowly. See, e.g., Note, Accounting For Corporate Misconduct Abroad: The Foreign Corrupt Practices Act of 1977, 12 Cornell Int'l. L.J. 293 (1979) at 299–300.


[68] These categories are suggested by Coffee, Jr., supra note 17, at 1118–23.

[69] See, Coffee, Jr., supra note 17, at 1118.


[71] Id.


[73] Coffee, Jr., supra note 17, at 119.


[75] Iranian Criminal Code, art. 743, supra note 49.


[77] See Appendix II.


[83] H.R. Rep. No. 640, 95th Cong. 1st Sess. at 8. Examples of such “discretionary actions” include business referrals to the payor, non-performance of official functions and legislative acts preferable to the payor. Payments for the performance of non-discretionary actions, on the other hand, are not corrupt in that they merely expedite an otherwise inevitable act or decision.

[84] While most impose both a fine and imprisonment, the bribery laws of some countries such as Lebanon, Syria and Saudi Arabia, state the penalties in the alternative. See, e.g., Saudi Arabia, Regulations against Bribery, arts. 1, 6, supra note 23.

[85] Egypt, Law No. 58 of July 31, 1937, art. 103, supra note 9.


[87] Compare Saudi Arabia, Regulations against Bribery, arts. 1, 6 and 8, supra note 23.


[89] See, e.g., id. art. 108.

[90] The Saudi Gazette (English) April 30, 1980; Al-Riyadh (Arabic) May 1, 1980.

[91] Saudi Arabia, Regulations against Bribery, art. 12, supra note 23.


[95] The two exceptions are Iran and Tunisia, whose bribery statutes do not mention the briber at all. Iran, Iranian Criminal Code, supra note 49; Tunisian Penal Code, supra note 86.
[96] Compare the Jordanian law where the penalty is less severe, Criminal Code of Jordan, art. 173, supra note 23, and the Criminal Code of Morocco, art. 251, supra note 23, where the penalty is the same.


[98] See discussion in section 4.1. infra.


[100] As recently as December 16, 1979, four Iraqis were hanged and two others sentenced to life imprisonment after being convicted of receiving bribes in return for restricted information. Two of the men executed were senior public officials while the other two were private businessmen. Those receiving life sentences were a government legal adviser and an attorney in the private sector. The severe penalties apparently were the result of the fact that the acts requested of the bribed officials were subject to penalties greater than those prescribed for bribery. Reported in Mid. E. Exec. Repis. (February 1980) at 8.

[101] The Dutch Penal Code, Wetboek Van Strafrecht, art. 51, for instance states:

1) Natural persons and legal entities can commit crimes.

2) If a legal entity commits a crime, the prosecution and statutory punishment and measures, if appropriate can be directed:
   a) against such legal entity, or
   b) against those who have given an order for the fact and those who have actually been in charge of the prohibited action, or,
   c) against those mentioned under a) and b) jointly.

[102] Ansay and Wallace, Jr., Introduction to Turkish Law (Ankara, 1978) at 100.

[103] "Whoever commits a crime in Turkey shall be punished in accordance with Turkish law ...", Turkish Criminal Code of March 1, 1926, art. 3.

[104] Id. art. 4.

[105] Id. art. 6.

[106] The others are Egypt, Israel and Iraq. Of these, only the treaties with Israel and Iraq include bribery as an extraditable offense. See Extratdiction Treaty with Turkey, August 18, 1934, 49 Stat. 2692, T.S. No. 872; Extratdiction Treaty with Israel, December 5, 1963, T.I.A.S. No. 5476, 484 U.N.T.S. 283; Extratdiction Treaty with Iraq, April 23, 1936, 49 Stat. 3380, T.S. No. 907; Extratdiction Treaty with the Ottoman Empire (Egypt), April 22, 1875, 59 Stat. 572; T.S. No. 270.

[107] Extratdiction Treaty with Turkey, art. V, supra note 106. Only the treaty with Israel requires the signatories to extradite their own nationals.

[108] See discussion in section 2.2.1 supra regarding "aggressive payments".


[110] Id. art. 271.

[111] Id. art. 273.

[112] Id. arts. 276–66, 283–86.

[113] Id.


[115] For instance, the defendants may suffer the consequences of a domestic multiple offender statute. See Pye, id. at 127.

[116] Id. at 117–24.

[117] Id.
The following cases have been brought under the anti-bribery provisions of the Act. See Foreign Corrupt Practices and Domestic and Foreign Investment Disclosure: Hearings on S.305 Before the Senate Comm. on Banking, Housing and Urban Affairs, 95th Cong. 1st Sess. 117 (1977) at 121–22.

[122] United States Foreign Intelligence Activities, Exec. Order No. 12036, supra note 3, at 11-12; H.R. Rep. 640, supra note 2, at 9-10. Believing that the existing securities laws were adequate to require disclosure of questionable payments abroad, the SEC expressed initial reluctance to expand its duties to enforce the anti-bribery provisions of the Act. See Foreign Corrupt Practices and Domestic and Foreign Investment Disclosure: Hearings on S.305 Before the Senate Comm. on Banking, Housing and Urban Affairs, 95th Cong. 1st Sess. 117 (1977) at 121–22.


[125] U.S. v. First National City Bank, 396 F. 2d 897, 900-01 (2d Cir. 1968); see Lashbrooke, supra note 126, at notes 62-67 and accompanying text at p. 237.

[126] In his letter to Senator Proxmire, Eliot Richardson noted that “(s)uccessful prosecutions of offenses would typically depend on witnesses and information beyond the reach of U.S. judicial process. Other nations, rather than assist in such prosecutions might resist cooperation because of considerations of national preference or sovereignty.” Task Force Letter, supra note 4.

[127] See 6 Whiteman, Digest of International Law (1968) at 204.


[130] Speech by Assistant Attorney General Philip B. Heymann, supra note 80, at 1504.

[131] See 6 Whiteman, Digest of International Law (1968) at 204.


[133] For a brief discussion of the applicability of the Sixth Amendment to this problem, see Lashbrooke, supra note 126, at 238, 239.

[134] Speech by Assistant Attorney General Philip B. Heymann, supra note 80, at 1504.

[135] SEC Seen Dropping Foreign Payoff Case Against Page Airways at CIA’s Request, The Wall St. J., April 8, 1980. According to the Journal, the Justice Department did not prosecute top executives of Lockheed and ITT because of a similar fear of disclosure of national security secrets.


[137] Id. at 1503.

[138] Id.

[139] Id.

[140] Id. at 70-80.


[145] Id. art. 2(c).


[149] Id. art. 4. It has recently been reported that the Saudi government is likely to prohibit the use of agents in all Saudi government and agency contracts. Mid. East Exec. Repts. (November 1980) at 2.

[150] See, e.g., Algeria, supra note 143, chap. 2, art. 9.


[152] Jordan, Law No. 23 of 1979, art. 3(e), supra note 146.


[155] Id.


[158] Id. at 16.

[159] Id.

[160] Id. at 16–17.

[161] Id.


[167] Saudi Arabia, Regulations against Bribery, arts. 15, 16, supra note 50.


[169] The relevant pre-FCPA U.S. law is summarized and analyzed with respect to its effectiveness in deterring questionable payments by American companies abroad in a letter from Task Force Chairman Richardson to Senator Proxmire, supra note 4.


PJ. Suse / Questionable payments in the Middle East


[175] "[a]ny person who willfully violates any provisions of [the Exchange Act] ... shall upon conviction be fined not more than $10,000 or imprisoned not more than five years, or both... ", 15 U.S.C. §78ff (Supp. III 1979).


[177] Such cooperation must be at the direction of the head of the department involved and pursuant to Presidential authority to issue such directives. 15 U.S.C. §78m(b)(3)(A).


[179] Id.


[184] Id. at 54.

[185] Id. at 55.

[186] Id. at 56.


[189] See id.

[190] Id. at 51.


[193] Hearings on S. 305, supra note 5.

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Appendix I

Which persons are prohibited from receiving payments under bribery provisions of penal code?

<table>
<thead>
<tr>
<th></th>
<th>Public officials?</th>
<th>“Public official” defined?</th>
<th>Intermediaries who pass on payments to public officials?</th>
<th>Must act be within the scope of recipient’s official duties?</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>FCPA (15 U.S.C.)</td>
<td>yes, but not low level</td>
<td>yes (dd-1b)</td>
<td>no (dd-1a1b)</td>
</tr>
<tr>
<td>2</td>
<td>Morocco</td>
<td>yes (248)</td>
<td>yes</td>
<td>yes (249)</td>
</tr>
<tr>
<td>3</td>
<td>Algeria</td>
<td>—</td>
<td>—</td>
<td>—</td>
</tr>
<tr>
<td>4</td>
<td>Tunisia</td>
<td>yes (83)</td>
<td>no (83)</td>
<td>yes (83)</td>
</tr>
<tr>
<td>5</td>
<td>Libya *</td>
<td>yes (226)</td>
<td>no</td>
<td>yes (226)</td>
</tr>
<tr>
<td>6</td>
<td>Egypt</td>
<td>yes (103)</td>
<td>yes (111)</td>
<td>no (985)</td>
</tr>
<tr>
<td>7</td>
<td>Sudan</td>
<td>yes (128)</td>
<td>no</td>
<td>yes (108 bis.)</td>
</tr>
<tr>
<td>8</td>
<td>Israel</td>
<td>yes (1)</td>
<td>no</td>
<td>no (103 bis., 104 bis.)</td>
</tr>
<tr>
<td>9</td>
<td>Jordan</td>
<td>yes (170)</td>
<td>yes (1970)</td>
<td>yes (172)</td>
</tr>
<tr>
<td></td>
<td>Lebanon</td>
<td>yes (351)</td>
<td>yes (351)</td>
<td>yes (170–73)</td>
</tr>
<tr>
<td></td>
<td>Syria</td>
<td>yes (341)</td>
<td>yes (341)</td>
<td>yes (341)</td>
</tr>
<tr>
<td>12</td>
<td>Saudi Arabia</td>
<td>yes (1)</td>
<td>yes (9)</td>
<td>yes (10)</td>
</tr>
<tr>
<td>13</td>
<td>United Arab Emirates</td>
<td>—</td>
<td>—</td>
<td>—</td>
</tr>
<tr>
<td>14</td>
<td>Yemen Arab Republic</td>
<td>yes (51)</td>
<td>no</td>
<td>yes (57)</td>
</tr>
<tr>
<td>15</td>
<td>Kuwait</td>
<td>yes (114) [1960]</td>
<td>yes (43) [1970]</td>
<td>yes (115) [1960]</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(35) [1970]</td>
<td></td>
<td>(39) [1970]</td>
</tr>
<tr>
<td>16</td>
<td>Iraq</td>
<td>yes</td>
<td>—</td>
<td>—</td>
</tr>
<tr>
<td>17</td>
<td>Iran **</td>
<td>yes (1)</td>
<td>no</td>
<td>yes (147)</td>
</tr>
<tr>
<td>18</td>
<td>Turkey</td>
<td>yes (211)</td>
<td>yes (211)</td>
<td>yes (226)</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>yes (211–13)</td>
</tr>
</tbody>
</table>

* Does not reflect law regarding economic crimes of April 29, 1979.

** Pre-revolutionary Iran.

( ) section of penal code; [year code amended].
### Appendix II

**What types of payments are prohibited?**

<table>
<thead>
<tr>
<th></th>
<th>Special types only?</th>
<th>Any benefit to offeree?</th>
<th>Explicit re &quot;benefits&quot;?</th>
<th>To third parties?</th>
<th>Must payment be accepted before payee can be liable?</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>FCPA</td>
<td>yes</td>
<td>no</td>
<td>?</td>
<td>no (15 U.S.C. 78dd-1a)</td>
</tr>
<tr>
<td>2</td>
<td>Morocco</td>
<td>yes</td>
<td>no</td>
<td>no</td>
<td>no (251)</td>
</tr>
<tr>
<td>3</td>
<td>Algeria</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>4</td>
<td>Tunisia</td>
<td>yes</td>
<td>no</td>
<td>yes</td>
<td>-</td>
</tr>
<tr>
<td>5</td>
<td>Libya *</td>
<td>yes</td>
<td>no</td>
<td>yes</td>
<td>no (226)</td>
</tr>
<tr>
<td>6</td>
<td>Egypt</td>
<td>yes</td>
<td>no</td>
<td>yes</td>
<td>no (109 bis.)</td>
</tr>
<tr>
<td>7</td>
<td>Sudan</td>
<td>yes</td>
<td>yes (132)</td>
<td>yes</td>
<td>no (131)</td>
</tr>
<tr>
<td>8</td>
<td>Israel</td>
<td>“bribes”</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>9</td>
<td>Jordan</td>
<td>yes</td>
<td>no</td>
<td>no</td>
<td>no (568)</td>
</tr>
<tr>
<td>10</td>
<td>Lebanon</td>
<td>yes</td>
<td>no</td>
<td>yes</td>
<td>no (355)</td>
</tr>
<tr>
<td>11</td>
<td>Syria</td>
<td>yes</td>
<td>no</td>
<td>yes</td>
<td>no</td>
</tr>
<tr>
<td>12</td>
<td>Saudi Arabia</td>
<td>yes</td>
<td>no</td>
<td>yes</td>
<td>no (8)</td>
</tr>
<tr>
<td>13</td>
<td>United Arab Emirates</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>14</td>
<td>Yemen Arab Republic</td>
<td>yes</td>
<td>no</td>
<td>yes</td>
<td>no (61)</td>
</tr>
<tr>
<td>15</td>
<td>Kuwait</td>
<td>yes</td>
<td>yes (114.3)</td>
<td>yes</td>
<td>no (117)</td>
</tr>
<tr>
<td>16</td>
<td>Iraq</td>
<td>yes</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>17</td>
<td>Iran **</td>
<td>“money or goods”</td>
<td>no</td>
<td>yes (147)</td>
<td>no</td>
</tr>
<tr>
<td>18</td>
<td>Turkey</td>
<td>yes</td>
<td>no</td>
<td>no</td>
<td>no (223)</td>
</tr>
</tbody>
</table>

* Does not reflect law regarding economic crimes of April 29, 1979.

** Pre-revolutionary Iran

( ) section of penal code.
### Appendix III

**What penalties is the briber subject to?**

<table>
<thead>
<tr>
<th></th>
<th>Imprisonment</th>
<th>Fines</th>
<th>Other</th>
<th>Can briber/intermediary avoid penalties by confessing?</th>
<th>Treaty with U.S. calling for mutual assist. in criminal matters?</th>
<th>Extradition Treaty with U.S.?</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>FCPA</td>
<td>5 max</td>
<td>corp/$1mil indiv/$10,000</td>
<td>no</td>
<td>no</td>
<td></td>
</tr>
<tr>
<td>2</td>
<td>Algeria</td>
<td>—</td>
<td>—</td>
<td>—</td>
<td>no</td>
<td></td>
</tr>
<tr>
<td>3</td>
<td>Tunisia</td>
<td>no mention briber</td>
<td>—</td>
<td>—</td>
<td>no</td>
<td></td>
</tr>
<tr>
<td>4</td>
<td>Libya</td>
<td>5 max</td>
<td>yes</td>
<td>yes</td>
<td>no</td>
<td>yes, but bribery not extrad.</td>
</tr>
<tr>
<td>5</td>
<td>Egypt</td>
<td>life</td>
<td>yes</td>
<td>yes</td>
<td>no</td>
<td>yes, 14 UST 1707</td>
</tr>
<tr>
<td>6</td>
<td>Sudan</td>
<td>5 max</td>
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<td>no</td>
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<td>7</td>
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<td>3 max</td>
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<td>no</td>
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<td>8</td>
<td>Jordan</td>
<td>6mo-2yr</td>
<td>yes</td>
<td>yes</td>
<td>no</td>
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</tr>
<tr>
<td>9</td>
<td>Lebanon</td>
<td>3 mo or</td>
<td>yes</td>
<td>yes</td>
<td>no</td>
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</tr>
<tr>
<td>10</td>
<td>Syria</td>
<td>3 mo or</td>
<td>yes</td>
<td>yes</td>
<td>no</td>
<td></td>
</tr>
<tr>
<td>11</td>
<td>Saudi Arabia</td>
<td>1-5</td>
<td>yes</td>
<td>yes</td>
<td>no</td>
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</table>

- Loss of right to do business in SA

| 12 | U.A.E. | — | — | — | no | |
| 13 | Yemen Arab Republic | unspecified | yes | yes | no | yes, 49 Stat. 3380 |
| 14 | Kuwait | 7 max | yes | yes | no | |
| 15 | Iraq | — | — | — | no | |
| 16 | Iran | 2 mo-1 yr | yes | yes | no | |
| 17 | Morocco | 2-5 yr | yes | no | no | yes, 49 Stat. 2692 |
| 18 | Turkey | — | yes | no | no | |

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Appendix IV

*Other laws designed to discourage bribery*

<table>
<thead>
<tr>
<th></th>
<th>Agents required in</th>
<th>Agents prohibited in</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Private sector?</td>
<td>Gov't contracts?</td>
<td>Private sector?</td>
</tr>
<tr>
<td>1</td>
<td>Morocco</td>
<td>no</td>
<td>no</td>
</tr>
<tr>
<td>2</td>
<td>Algeria</td>
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<td>3</td>
<td>Tunisia</td>
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<tr>
<td>4</td>
<td>Libya</td>
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<tr>
<td>5</td>
<td>Egypt</td>
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</tr>
<tr>
<td>6</td>
<td>Sudan</td>
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<tr>
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<td>Israel</td>
<td>—</td>
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</tr>
<tr>
<td>8</td>
<td>Jordan</td>
<td>yes (if no local branch or office)</td>
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<tr>
<td>9</td>
<td>Lebanon</td>
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<td>no</td>
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<tr>
<td>10</td>
<td>Syria</td>
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<td>no</td>
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</table>
Other laws designed to discourage bribery (continued)

<table>
<thead>
<tr>
<th></th>
<th>Agents required in</th>
<th>Agents prohibited in</th>
<th>% limitation of agents' &quot;fees&quot; or &quot;commiss.&quot; in govt c'acts?</th>
<th>Restriction on place of payments?</th>
<th>Other?</th>
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<tr>
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<td>Private sector?</td>
<td>Gov't contracts?</td>
<td>Private sector?</td>
<td></td>
<td></td>
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<tr>
<td>11</td>
<td>Saudi Arabia</td>
<td>yes</td>
<td>no</td>
<td>yes (5%)</td>
<td>reward integrity</td>
</tr>
<tr>
<td></td>
<td>(if no direct sale from outside &amp; no Saudi partner)</td>
<td>yes (if no Saudi partner)</td>
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<td></td>
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<tr>
<td>12</td>
<td>Abu Dhabi</td>
<td>no</td>
<td>no</td>
<td>yes</td>
<td>no</td>
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<tr>
<td></td>
<td>(except goods imported for resale)</td>
<td>yes</td>
<td>no</td>
<td></td>
<td></td>
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<tr>
<td>13</td>
<td>Yemen Arab Republic</td>
<td>no</td>
<td>no</td>
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<td></td>
</tr>
<tr>
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<td>(except for road and farm vehicle imports)</td>
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<td>no</td>
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<td></td>
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<td>Kuwait</td>
<td>yes</td>
<td>no</td>
<td>no</td>
<td>sealed bids</td>
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<td>yes (arms only)</td>
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<td>yes (military sales/service only)</td>
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<td>16</td>
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<td>no</td>
<td>yes (military sales/service only)</td>
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<td>17</td>
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<td>—</td>
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