

# RECENT DEVELOPMENTS

## INCOME TAX—DEDUCTIONS FOR FACILITATING PAYMENTS TO FOREIGN GOVERNMENT OFFICIALS

Section 288(a) of the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA)<sup>1</sup> amends section 162(c)(1) of the Internal Revenue Code (I.R.C.)<sup>2</sup> to allow business expense deductions for payments made to foreign government officials where such payments do not violate the Foreign Corrupt Practices Act of 1977 (FCPA).<sup>3</sup> The purpose of the amendment is to replace the separate standards of deductibility and legality previously applicable to such payments with a single standard.<sup>4</sup> The change allows deductions

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<sup>1</sup> Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, § 288(a), 96 Stat. 324, 571 (1982) (to be codified at I.R.C. §§ 162(c)(1), 952(a), 964(a)) [hereinafter cited as TEFRA]. One description of TEFRA states that its goal is

to produce some \$98.3 billion in additional revenue over a three-year period through a combination of federal spending cuts and tax increases and reform measures.

The revenue provisions of the Act call for tightening up on a series of tax preferences, improving tax collection and enforcement, and increasing certain excise taxes.

[1983] 35 STAND. FED. TAX REP. (CCH) Special No. 4, at iv.

<sup>2</sup> I.R.C. § 162(c)(1) (1976). The new provision reads, in relevant part:

No deduction shall be allowed under subsection (a) [ordinary and necessary business expense deductions] for any payment made, directly or indirectly, to an official or employee of any government, if the payment constitutes an illegal bribe or kickback or, if the payment is to an official or employee of a foreign government, the payment is unlawful under the Foreign Corrupt Practices Act of 1977.

<sup>3</sup> Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78a, 78m(b)(2), 78dd-1 to 78ff (1976 & Supp. V 1981) [hereinafter cited as FCPA].

The amendment to I.R.C. § 162(c)(1) (1976) became effective when signed into law, Pub. L. No. 97-248, § 288(c), 96 Stat. 324, 571 (1982), by President Reagan on September 3, 1982. Atlanta Journal and Constitution, Sept. 5, 1982, at 9-D, col. 1.

The amendment does not change the provision in I.R.C. § 162(c)(1) (1976) that the burden of proof is on the Secretary of the Treasury to prove nondeductibility of challenged payments. This burden requires clear and convincing evidence, which is the same burden required with regard to the proof of fraud under I.R.C. § 7454 (1976). See, e.g., *Toledano v. Comm'r*, 362 F.2d 243 (5th Cir. 1966); *Gromacki v. Comm'r*, 361 F.2d 727 (7th Cir. 1966).

<sup>4</sup> The Senate Report on TEFRA explains the purpose of section 288 in a paragraph labelled "Reasons for Change" as follows: "The committee believes that a single standard of legality for payments to foreign government personnel is appropriate for both the Foreign Corrupt Practices Act and the Internal Revenue Code. In some cases, the current tax law test may be overly harsh." S. REP. No. 494, 97th Cong., 2d Sess. 164 (1982), reprinted in [1982] 30 STAND. FED. TAX REP. (CCH) Special No. 1, at 164 [hereinafter cited as TEFRA]

for facilitating or "grease" payments made to foreign government officials "whose duties are essentially ministerial or clerical."<sup>5</sup> A facilitating payment is not a bribe because it is made to induce the recipient to perform his official duties properly rather than to abuse his office.<sup>6</sup> On the other hand, a payment legal in the jurisdiction in which it is made is not necessarily deductible under the amendment.<sup>7</sup>

Section 288(b) of TEFRA allows reductions in earnings and profits for all legal payments made to foreign government officials by controlled foreign corporations.<sup>8</sup> Also, the amount of any legal payment will no longer be included in the subpart F income of these corporations.<sup>9</sup> Section 288(a) will cause a similar reduction in

SENATE REPORT].

<sup>5</sup> This is the standard of legality provided by the FCPA in 15 U.S.C. §§ 78dd-1(b) & 78dd-2 (Supp. V 1981). "However the Act gives no guidance as to what 'ministerial or clerical' means." Atchinson, *The Foreign Corrupt Practices Act—A Practical Look*, 53 N.Y. St. B.J. 342, 344 (1981). For an in-depth discussion of the deductibility of facilitating payments prior to the amendment to I.R.C. § 162(c)(1), see Chu & Magraw, *The Deductibility of Questionable Foreign Payments*, 87 YALE L.J. 1091 (1978).

<sup>6</sup> An example of a facilitating payment is one made to a porter or dock attendant who refuses to unload perishable goods unless he receives a "tip." For an explanation of the custom, see *infra* note 34 and accompanying text.

<sup>7</sup> The legality and consequent deductibility of a facilitating payment is determined by the present FCPA standard. See *supra* notes 3-5 and accompanying text. This standard makes no reference to the payment's legality under foreign law. See *infra* text accompanying notes 20-21.

<sup>8</sup> TEFRA SENATE REPORT, *supra* note 4, at 165. The amended I.R.C. § 964(a) (Supp. V 1981) only denies reductions in earnings and profits by controlled foreign corporations for payments nondeductible under the amended I.R.C. § 162(c)(1) (1976). I.R.C. § 957(a) (Supp. V 1981) defines "controlled foreign corporation" as "any foreign corporation of which more than 50 percent of the total combined voting power of all classes of stock entitled to vote is owned . . . by United States shareholders on any day during the taxable year of such foreign corporation."

<sup>9</sup> I.R.C. § 952(a)(4) (1976), as amended, increases the subpart F income of controlled foreign corporations, *supra* note 8, by the amount of payments made by such corporations only to the extent they are nondeductible under the new section 162(c)(1) (1976). I.R.C. § 952(a) (Supp. V 1981) defines "subpart F income," in the case of any controlled foreign corporation, as the sum of:

- 1) the income derived from the insurance of United States risks (as determined under section 953),
- 2) the foreign base company income (as determined under section 954),
- 3) an amount equal to the product of
  - A) the income of such corporation other than income which
    - i) is attributable to earnings and profits of the foreign corporation included in the gross income of a United States person under section 951 (other than by reason of this paragraph), or
    - ii) is described in subsection (b),

multiplied by

taxable dividend income to United States shareholders of Domestic International Sales Corporations (DISCs).<sup>10</sup> On the whole, the new tax benefits arising from the amendment should significantly affect the conduct of foreign trade.<sup>11</sup> *Tax Equity and Fiscal Responsibility Act of 1982*, § 288, H.R. CONF. REP. NO. 760, 97th Cong., 2d Sess. 263 (1982), reprinted in [1982] 35 STAND. FED. TAX REP. (CCH) Special No. 4, at 263.

Before 1958, the I.R.C. contained no provision regarding the deduction of payments to foreign government officials, and their treatment appears to have been handled on a case-by-case basis.<sup>12</sup> In 1958, Congress amended section 162(c)(1) to deny business expense deductions for any such payments which would have been unlawful if made to a United States official.<sup>13</sup> The Tax Reform Act of 1976<sup>14</sup> further penalized businesses making these payments by

B) the international boycott factor (as determined under section 999), and

4) the sum of the amounts of any illegal bribes, kickbacks, or other payments (within the meaning of section 162(c)) paid by or on behalf of the corporation during the taxable year of the corporation directly or indirectly to an official, employee, or agent in fact of a government.

<sup>10</sup> While section 288 of TEFRA does not amend I.R.C. § 995(b)(1)(F)(iii) (1976) to conform to the new I.R.C. § 162(c)(1) (1976), the Senate Report specifically states that the change in section 162(c)(1) (1976) will similarly change the DISC provisions. TEFRA SENATE REPORT, *supra* note 4, at 165. I.R.C. § 992(a) (1976) defines a "DISC" as a corporation in which 95 percent of gross receipts and assets relate to qualified exports, which has only one class of stock—the par value of which must be at least \$2500 on each day of the taxable year—and which makes a proper election in the taxable year. DISC treatment exempts corporate income from all subtitle A taxes except transfers to avoid income tax under chapter 5 of subtitle A. I.R.C. § 991 (1976).

<sup>11</sup> See *infra* notes 33-52 and accompanying text.

<sup>12</sup> Commissioner Harrington made these comments on treatment of illegal foreign bribes in 1957 in response to an inquiry by Senator Williams:

In view of the secrecy provisions of the Internal Revenue Code, it would not be proper for me to furnish the information which you have requested . . . .

. . . .

Although sharply defined Federal or State policies are not in issue when bribes are paid to officials of a foreign government, the expenditures must still be "ordinary and necessary" business expenses to be deductible. The illegitimate expenses of a legal business are generally considered unnecessary, even though expedient . . . . Where, however, it is the foreign government itself which demands or acquiesces in the payment, so that legal recourse is not available to the taxpayer in the operation of his legal business, the Service would find it difficult to sustain the position that the expenses were not ordinary and necessary to the taxpayer's business.

Letter from Commissioner Harrington to Senator Williams (March 11, 1957), reprinted in 103 CONG. REC. 12,418 (1957) (statement of Sen. Williams).

<sup>13</sup> 26 U.S.C. §162(c) (Supp. IV 1958) (amending 26 U.S.C. §162(c) (1954)).

<sup>14</sup> Pub. L. No. 94-455, § 1065, 90 Stat. 1520, 1653 (1976).

providing that those amounts would be treated as subpart F income to controlled foreign corporations<sup>15</sup> and as "deemed distributions" to the United States shareholders of DISCs.<sup>16</sup> That act also provided that controlled foreign corporations could not reduce their earnings and profits by the amount of such payments.<sup>17</sup>

In 1976, a Securities and Exchange Commission report disclosed hundreds of millions of dollars in bribes paid by over 300 large corporations to foreign government officials.<sup>18</sup> In response, Congress enacted the FCPA to impose criminal penalties on any United States company paying a foreign government official to direct business or legislation in its favor through abuse of his office.<sup>19</sup> Nevertheless, Congress intended facilitating payments to remain legal.<sup>20</sup> However, the FCPA accomplished this by excluding from the definition of "foreign official" any employee "whose duties are essentially ministerial or clerical," rather than by identifying the noncorrupt purpose of the payment.<sup>21</sup> This standard has been difficult for businesses to apply, and some prefer to avoid all trade in certain countries rather than risk violations and incur the costs of

<sup>15</sup> I.R.C. § 952(a)(4) (1976).

<sup>16</sup> I.R.C. § 995(b)(1)(F)(iii) (1976).

<sup>17</sup> I.R.C. § 964(a) (Supp. V 1981) (amending I.R.C. § 964(a) (1972)).

<sup>18</sup> SEC Report on Questionable and Illegal Corporate Payments and Practices to the Senate Comm. on Banking, Housing and Urban Affairs, reprinted in 642 FED. SEC. L. REP. (CCH) pt. II (May 12, 1976); see also S. REP. No. 114, 95th Cong., 1st Sess. 1, 3, reprinted in 1976 U.S. CODE CONG. & AD. NEWS 4098, 4101 (referring to the SEC report as evidence of the need for the FCPA) [hereinafter cited as FCPA SENATE REPORT].

<sup>19</sup> 15 U.S.C. §§ 78a, 78m(b)(2), 78dd-1 to 78ff (1976 & Supp. V 1981). Penalties for each violation may reach \$1 million for corporations, and \$10,000 or five years imprisonment or both for individuals. 15 U.S.C. § 78ff (1976 & Supp. V 1981). *But see* Chu & Magraw, *supra* note 5, at 1091-92 n.3 (explaining the limitations on FCPA applicability to the use of the mails and to interstate commerce and the ways facilitating payments are excluded from these categories in certain cases).

The Senate Report on the FCPA described the need for the FCPA in this way:

Corporate bribery is bad business. In our free market system it is basic that the sale of products should take place on the basis of price, quality, and service. Corporate bribery is fundamentally destructive of this basic tenet . . . .

. . . .  
 . . . A strong antibribery law is urgently needed to bring these corrupt practices to a halt and to restore public confidence in the integrity of the American business system.

FCPA SENATE REPORT, *supra* note 18, at 4101.

<sup>20</sup> FCPA SENATE REPORT, *supra* note 18, at 4108.

<sup>21</sup> *Id.*; 15 U.S.C. § 78dd-2 (Supp. V 1981); S. REP. No. 209, 97th Cong., 2d Sess. 6, 18-19 (1981) (for a discussion of this legislative history and its relevance to section 288 of TEFRA, see *infra* notes 23-32 and accompanying text) [hereinafter cited as FCPA AMENDMENT REPORT]; Chu & Magraw, *supra* note 5, at 1092 n.3.

complying with the FCPA's requirements.<sup>22</sup>

The United States Senate passed an amendment to the FCPA in 1981 which would clarify the standard of legality on which section 288 relies by defining it in terms of the payment's purpose.<sup>23</sup> The bill was not voted out of committee in the House of Representatives before the Congressional session ended,<sup>24</sup> but it has been re-introduced in the Senate for consideration in the first session of the 98th Congress.<sup>25</sup> The amendment specifically excludes "any facilitating or expediting payment to a foreign official which is customary in the country where made and the purpose of which is to facilitate or expedite performance by such foreign official of his official duties" from the prohibited acts under the FCPA.<sup>26</sup> In addition, the amendment exempts three related types of payments.<sup>27</sup> First, the definition of "payments" excludes an item of value constituting or intended as a tip.<sup>28</sup> Second, any expenses for business presentations associated with the selling or purchasing of goods or services are exempted.<sup>29</sup> The third exemption is for payments legal in the country where made.<sup>30</sup> There has been substantial bipartisan political support for revision of the FCPA since early 1980,<sup>31</sup>

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<sup>22</sup> The complexity and interrelation of duties of foreign officials often make the determination of whether the recipient's duties are "essentially ministerial or clerical" difficult. FCPA AMENDMENT REPORT, *supra* note 21, at 6-10. For example, an official's duties might be "essentially" discretionary, and yet the payment may pertain to a clerical function. See generally Chu & Magraw, *supra* note 5 (treating the difficulty of classifying foreign payments in terms of United States law).

<sup>23</sup> S. 708, 97th Cong., 1st Sess. § 5(b) (1981) (would rewrite § 104(c) of FCPA) [hereinafter cited as S. 708], reprinted in *Business Accounting and Foreign Trade Simplification Act: Joint Hearings on S. 708 Before the Subcomm. on Securities and the Subcomm. on International Finance and Monetary Policy of the Senate Comm. on Banking Housing and Urban Affairs*, 97th Cong., 1st Sess. 11, 17-18 (1981) [hereinafter cited as *Joint Hearings on S. 708*]. For the voting record, see 127 CONG. REC. S13,983 (daily ed. Nov. 23, 1981).

The TEFRA Senate Report clarifies that any future amendments to the FCPA which change the standard of legality will also change tax deductibility because the tax provision relies on legality under the FCPA. TEFRA SENATE REPORT, *supra* note 4, at 165.

<sup>24</sup> The House of Representatives Committee on Energy and Commerce, to which S. 708 was referred, retained it for further investigation and did not report the bill to the House before that session of Congress ended. See H.R. REP. No. 466, 97th Cong., 2d Sess. 130-31 (1982).

<sup>25</sup> Business Accounting and Foreign Trade Simplification Act, S. 414, 98th Cong., 1st Sess. (1983), see [Senate 1983-84] CONG. INDEX (CCH) 14,168 and 21,005.

<sup>26</sup> S. 708, *supra*, note 23, § 5(b) (new § 104(c) of FCPA; would be codified at 15 U.S.C. § 78dd-2).

<sup>27</sup> *Id.* §§ 5(b), 6(b).

<sup>28</sup> *Id.* § 6(b) (would add subsection (g) to 15 U.S.C. § 78dd-2).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* (would add subsection (h) to 15 U.S.C. § 78dd-2).

<sup>31</sup> FCPA AMENDMENT REPORT, *supra* note 21, at 4.

and representatives of United States businesses involved in foreign trade strongly support the proposed amendment.<sup>32</sup>

Section 288 of TEFRA should benefit existing foreign trade and encourage future overseas ventures for several reasons.<sup>33</sup> In many countries, it has long been recognized that facilitating payments are considered legitimate business expenses.<sup>34</sup> Although such payments are legal under the FCPA, the prior tax provisions acted as penalties for these customary and necessary practices.<sup>35</sup> This hindered the ability of United States firms to compete abroad because it presented the dilemma of omitting payments required to complete routine transactions or making the payments and suffering adverse tax consequences. On the other hand, most foreign companies could make the payments with impunity.<sup>36</sup> Since the new pro-

<sup>32</sup> See *id.* at 5-10; 1981-1982 *Miscellaneous Tax Bills, XII, Hearing Before the Subcomm. on Taxation and Debt Management of the Comm. on Finance, United States Senate, on S. 1081, S. 1594, S. 1749, and S. 1764, 97th Cong., 1st Sess. 48-49 (1981)* (statement of Sen. John H. Chafee) [hereinafter cited as *Hearings on S. 1749*] (for a discussion of this legislative history and its relevance to section 288 of TEFRA, see *infra* note 54); *Joint Hearings on S. 708, supra* note 23, at 140-41 (testimony of Robert L. McNeill, Executive Vice Chairman, Emergency Committee for American Trade); *id.* at 148-56 (statement of the Emergency Committee for American Trade); *id.* at 255-77 (testimony of Mark B. Feldman, Donovan, Leisure, Newton & Irvine). *But see Joint Hearings on S. 708, supra* note 23, at 408-10 (testimony of William A. Dobrovir, Dobrovir, Oakes & Gebhardt).

<sup>33</sup> See FCPA AMENDMENT REPORT, *supra* note 21, at 4; *Hearings on S. 1749, supra* note 32, at 48-49 (statement of Sen. John H. Chafee); *id.* at 65-66 (statement of Donald deKeiffer, General Counsel, Office of U.S. Trade Representative).

<sup>34</sup> FCPA AMENDMENT REPORT, *supra* note 21, at 6-10, 18-19; *Joint Hearings on S. 708, supra* note 23, at 42 (testimony of U.S. Ambassador William E. Brock, U.S. Trade Representative); *id.* at 153-54 (statement of the Emergency Committee for American Trade); *id.* at 254-55 (testimony of Mark B. Feldman, Donovan, Leisure, Newton & Irvine).

In a great many developing countries civil servants are poorly paid, and it is a customary practice to provide them gratuities. The name varies from country to country but the idea is the same. Such payments may be required to process papers, to clear goods through customs, or even to make an overseas phone call. Whatever the moral validity of this practice, it would be impossible to do business in large areas of the world without such payments.

*Joint Hearings on S. 708, supra* note 23, at 263-64 (statement of Mark B. Feldman, Donovan, Leisure, Newton & Irvine). "Many companies have indicated that 'facilitating' payments to low-level officials are customary and legal in certain parts of the world and that continuation of such payments is necessary in order to transact business." *Hearings Before the Subcomm. on Consumer Protection and Finance of the House Comm. on Interstate and Foreign Commerce, 94th Cong., 2d Sess. 20 (1976)* (testimony of Roderick Hills, Chairman, Securities and Exchange Commission).

<sup>35</sup> *Hearings on S. 1749, supra* note 32, at 48-49 (statement of Sen. John H. Chafee); *id.* at 66-68 (testimony of Donald deKeiffer, General Counsel, Office of U.S. Trade Representative); see *supra* notes 13-17 and accompanying text.

<sup>36</sup> See *Hearings on S. 1749, supra* note 32, at 65-68 (statement and testimony of Donald deKeiffer, General Counsel, Office of U.S. Trade Representative).

visions remove the penalties on these payments, United States firms will be more competitive with foreign firms.<sup>37</sup> The export disincentives resulting from the former tax consequences will also be eliminated.<sup>38</sup> The previous treatment, under the Tax Reform Act of 1976,<sup>39</sup> of any nondeductible payment as income to the business or to its owners and the denial of a corresponding reduction in earnings and profits were more burdensome than the nondeductibility of the payment itself.<sup>40</sup> With the amendment, however, controlled foreign corporations no longer have to pay tax on any legal payment as if it were income,<sup>41</sup> and they are allowed to reduce their earnings and profits by the amount of all legal payments.<sup>42</sup> Similarly, DISC shareholders will not have to pay tax on any legal payment as if it were a dividend distributed to them.<sup>43</sup>

The provisions in section 288 of TEFRA will also eliminate other problems caused by the previously differing standards of legality and deductibility.<sup>44</sup> Since a legal payment is a deductible payment under the new law,<sup>45</sup> the extra bookkeeping previously required to differentiate between legal payments and deductible payments will be eliminated.<sup>46</sup> Taxpayers will thus more easily avoid the tax

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<sup>37</sup> FCPA AMENDMENT REPORT, *supra* note 21, at 3-10.

<sup>38</sup> *Id.*; *Hearings on S. 1749, supra* note 32, at 48 (statement of Sen. John H. Chafee); *Joint Hearings on S. 708, supra* note 23, at 81-83 (statement of U.S. Ambassador William E. Brock, submitted by Sen. John H. Chafee).

<sup>39</sup> Pub. L. No. 94-455, § 1065, 90 Stat. 1520, 1653 (codified as amended in scattered sections of 26 U.S.C.); *see supra* notes 14-17 and accompanying text.

<sup>40</sup> *Hearings on S. 1749, supra* note 32, at 66-68 (testimony of Donald deKeiffer, General Counsel, U.S. Trade Representative).

<sup>41</sup> *See supra* note 9 and accompanying text.

<sup>42</sup> *See supra* note 8 and accompanying text.

<sup>43</sup> *See supra* note 10 and accompanying text. The prior treatment impaired the value of obtaining DISC treatment. "As for the reduction or elimination of DISC benefits, such an adverse consequence could run into the millions of dollars for individual companies." *Hearings on S. 1749, supra* note 32, at 66 (statement of Donald deKeiffer, General Counsel, Office of U.S. Trade Representative).

<sup>44</sup> TEFRA SENATE REPORT, *supra* note 4, at 164-65; *Hearings on S. 1749, supra* note 32, at 48-49 (statement of Sen. John H. Chafee); *id.* at 66 (statement of Donald deKeiffer, General Counsel, Office U.S. Trade Representative); *Joint Hearings on S. 708, supra* note 23, at 61 (testimony of U.S. Ambassador William E. Brock, U.S. Trade Representative); *id.* at 140-41 (testimony of Robert L. McNeill, Executive Vice Chairman, Emergency Committee for American Trade); *id.* at 148-56 (statement of the Emergency Committee for American Trade); *id.* at 255-57 (testimony of Mark B. Feldman, Donovan, Leisure, Newton & Irvine).

<sup>45</sup> TEFRA SENATE REPORT, *supra* note 4, at 164-65; *Hearings on S. 1749, supra* note 32, at 48-49 (statement of Sen. John H. Chafee); *id.* at 66 (testimony of Donald deKeiffer, General Counsel, U.S. Trade Representative).

<sup>46</sup> Formerly, legal payments had to be accounted for separately because they may have been nondeductible. *See Hearings on S. 1749, supra* note 32, at 48-49 (statement of Sen. John H. Chafee); *id.* at 66 (testimony of Donald deKeiffer, General Counsel, U.S. Trade

fraud penalties for improper deduction of payments.<sup>47</sup>

Section 288 leaves some problems unsolved, however.<sup>48</sup> Determining which payments are legal under the FCPA will continue to cause difficulties unless its provisions are clarified by the proposed amendment.<sup>49</sup> The risk to taxpayers will be that an incorrect determination of legality of a payment under the FCPA and the consequent improper deduction under the amended section 162(c)(1) might result in penalties under both the I.R.C. and the FCPA.<sup>50</sup> In addition, it could be argued that the new tax benefits will add to the temptation to make borderline and even truly illegal bribes.<sup>51</sup> While this may be so, the FCPA's deterrence of foreign bribery has generally been thought to be sufficient, if not excessive.<sup>52</sup>

Finally, it must be emphasized that payments legal in the jurisdiction where made are not necessarily deductible.<sup>53</sup> The Senate Report on section 288 of TEFRA incorrectly states that such payments are deductible under the amendment.<sup>54</sup> Foreign law is pres-

Representative).

<sup>47</sup> *Hearings on S. 1749, supra* note 32, at 48-49 (statement of Sen. John H. Chafee); *id.* at 66 (testimony of Donald deKeiffer, General Counsel, U.S. Trade Representative).

<sup>48</sup> *See supra* notes 21 and 22 and accompanying text (referring to the difficulty of determining legality under the FCPA, which is the basis for deductibility under section 288).

<sup>49</sup> *Hearings on S. 1749, supra* note 32, at 67 (testimony of Donald deKeiffer, General Counsel, U.S. Trade Representative); FCPA AMENDMENT REPORT, *supra* note 21, at 6-10; *Joint Hearings on S. 708, supra* note 23, at 61 (testimony of U.S. Ambassador William E. Brock, U.S. Trade Representative); *id.* at 140-41 (testimony of Robert L. McNeill, Executive Vice Chairman, Emergency Committee for American Trade); *id.* at 148-56 (statement of the Emergency Committee for American Trade); *id.* at 255-57 (testimony of Mark B. Feldman, Donovan, Leisure, Newton & Irvine). *See also supra* notes 23-32 and accompanying text (discussion of this proposal to amend the FCPA).

<sup>50</sup> The I.R.C. penalizes negligent omissions from income at five percent of the deficiency, and fraudulent omissions are fined 50 percent of the deficiency. I.R.C. § 6653(a), (b) (1976 & Supp. V. 1981). For FCPA penalties, *see supra* note 19.

<sup>51</sup> In this respect it is noteworthy that the burden on the Secretary of the Treasury to prove nondeductibility of challenged payments by clear and convincing evidence is unchanged. *See supra* note 2. The vagueness of the FCPA (*see supra* notes 21 and 22 and accompanying text) and the overseas location of material facts may make clear and convincing evidence difficult to produce.

<sup>52</sup> FCPA AMENDMENT REPORT, *supra* note 21, at 3-11; *see Joint Hearings on S. 708, supra* note 23, at 255-57 (testimony of Mark B. Feldman, Donovan, Leisure, Newton & Irvine).

<sup>53</sup> *See supra* note 7 and accompanying text.

<sup>54</sup> *See supra* note 4, at 165. The explanation for this error would seem to be that the amendment to I.R.C. § 162(c)(1) (1976) allowing deductions for payments legal under the FCPA was first introduced as part of S. 708, *supra* note 23, by Senator Chafee. S. 708 would have made payments, legal in the jurisdiction where made, legal also under the FCPA and therefore deductible under the amended I.R.C. § 162(c)(1) (1976). *See supra* note 23 and accompanying text. The amendment to I.R.C. § 162(c)(1) (1976) was also introduced as a separate bill, S. 1749, 97th Cong., 1st Sess. (1981), by Senator Chafee, and hearings were held on it at that time. *Hearings on S. 1749, supra* note 32. The description of that bill,

ently irrelevant to a determination of legality under the FCPA<sup>55</sup> and, consequently, to a determination of deductibility under the IRC.<sup>56</sup> However, the proposed amendment to the FCPA would make this type of payment legal, and therefore, deductible.<sup>57</sup>

Section 288 of TEFRA achieves conformity between the Internal Revenue Code and the FCPA.<sup>58</sup> Once Congress passed the FCPA specifically legalizing facilitating payments to foreign government officials, there was no justification for I.R.C. treatment penalizing these payments.<sup>59</sup> The amendment eliminates this discrepancy by conforming deductibility under the I.R.C. to legality under the FCPA.<sup>60</sup> However, confusion as to the underlying standard of legality of facilitating payments persists.<sup>61</sup> If Congress adopts the proposed amendment to the FCPA, the standard will be clarified.<sup>62</sup>

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prepared by the staff of the Joint Committee on Taxation for the use of the Finance Committee, is substantially identical to the description of the amendment to I.R.C. § 162(c)(1) (1976) given in the Senate Report on TEFRA, *supra* note 4, at 164-65. Thus, the error regarding the deductibility of payments, legal in the jurisdiction where made, originated with this description which accompanied the separate S. 1749 and mistakenly relied on the earlier proposed amendment to the FCPA which would have legalized such payments. Then the erroneous description was retained in the Senate Report on TEFRA describing the provision, *supra* note 4, at 164-65. This error does not appear in the shorter description of the amendment given in the final Conference Report on TEFRA since it does not raise the issue of payments legal in the jurisdiction where made. H.R. CONF. REP. No. 760, 97th Cong., 2d Sess. 669 (1982), reprinted in [1982] 35 STAND. FED. TAX REP. (CCH) Special No. 4, at 669.

<sup>55</sup> See *supra* note 7 and accompanying text.

<sup>56</sup> See I.R.C. §§ 162(c)(1), 952(a), 964(a) (1976 & Supp. V 1981); see *supra* notes 3-5 and accompanying text.

<sup>57</sup> See *supra* notes 23 and 30 and accompanying text.

<sup>58</sup> TEFRA SENATE REPORT, *supra* note 4, at 164-65.

<sup>59</sup> *Hearings on S. 1749*, *supra* note 32, at 48-49 (statement of Sen. John H. Chafee); *id.* at 65-66 (statement of Donald deKeiffer, General Counsel, U.S. Trade Representative); see TEFRA SENATE REPORT, *supra* note 4, at 164-65.

<sup>60</sup> TEFRA SENATE REPORT, *supra* note 4, at 164-65.

<sup>61</sup> FCPA AMENDMENT REPORT, *supra* note 21, at 4-10; *Hearings on S. 1749*, *supra* note 32, at 49 (statement of Sen. John H. Chafee); *id.* at 65-67 (statement and testimony of Donald deKeiffer, General Counsel, U.S. Trade Representative).

<sup>62</sup> See *supra* notes 23-32 and accompanying text.

