GETTING THE DEAL THROUGH

Anti-Corruption Regulation

in 46 jurisdictions worldwide

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Overview

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Corruption, including corruption of public officials, dates from early in human history and countries have long had laws to punish their own corrupt officials and those who pay them bribes. But national laws prohibiting a country's own citizens and corporations from bribing public officials of other nations are a new phenomenon, less than a generation old. Over the course of perhaps the last 15 years, anti-corruption law has established itself as an important, transnational legal speciality, one that has produced multiple international conventions and scores of national laws, as well as an emerging jurisprudence that has become a prominent reality in international business and a well-publicised theme in the media.

This volume undertakes to capture the growing anti-corruption jurisprudence that is developing around the globe. It does so first by summarising national anti-corruption laws that have implemented and expanded treaty obligations that some 140 countries have now assumed. These conventions oblige their signatories to enact laws that prohibit paying bribes to foreign officials. Dozens of countries have already done so, as this volume confirms. These laws address both the paying and receiving of illicit payments – the supply and the demand sides of the official corruption equation – as well as mechanisms of international cooperation that have never before existed.

Second, this volume addresses national financial record keeping requirements that are increasingly an aspect of foreign bribery laws because of their inclusion in anti-corruption conventions and treaties. These requirements are intended to prevent the use of accounting practices to generate funds for bribery or to disguise bribery on a company's books and records. Violations of record keeping requirements can provide a separate basis of liability for companies involved in foreign as well as domestic bribery.

Finally, because the bribery of a foreign government official also implicates the domestic laws of the country of the corrupt official, this volume summarises the more well-established national laws that prohibit domestic bribery of public officials. Generally not a creation of international obligations, these are the laws that apply to the demand side of the equation and may also be brought to bear on payers of bribes who, although foreign nationals, may be subject to personal jurisdiction, apprehension and prosecution under domestic bribery statutes.

The growth of anti-corruption law can be traced through a number of milestone events that have led to the current state of the law, which has most recently been expanded by the entry into force in December 2005 of the sweeping United Nations International Convention against Corruption. Spurred on by a growing number of high-profile enforcement actions, investigative reporting and broad media coverage, ongoing scrutiny by non-governmental organisations and the appearance of an expanding cottage industry of anti-corruption compliance programmes in multinational corporations, anti-corruption law and practice is rapidly coming of age.

The US 'questionable payments' disclosures and the FCPA

The roots of today's legal structure prohibiting bribery of foreign government officials can fairly be traced to the serendipitous discovery in the early 1970s of a widespread pattern of corrupt payments to foreign government officials by US companies. First dubbed merely 'questionable' payments by regulators and corporations alike, these practices came to light in the wake of revelations that a large number of major US corporations had used off-book accounts to make large payments to foreign officials to secure business. Investigating these disclosures, the US Securities and Exchange Commission (SEC) established a voluntary disclosure programme that allowed companies that admitted to having made illicit payments to escape prosecution on the condition that they implement compliance programmes to prevent the payment of future bribes. Ultimately, more than 400 companies, many among the largest in the United States, admitted to having made a total of more than US$300 million in illicit payments to foreign government officials and political parties. Citing the destabilising repercussions in foreign governments whose officials were implicated in bribery schemes – including Japan, Italy and the Netherlands – the US Congress, in 1977, enacted the Foreign Corrupt Practices Act (FCPA), which prohibited US companies and individuals from bribing non-US government officials to obtain or retain business and provided for both criminal and civil penalties.

In the first 15 years of the FCPA, during which the US law was unique in prohibiting bribery of foreign officials, enforcement was steady but modest, averaging one or two cases a year. Although there were recurring objections to the perceived impact that this unilateral law was having on the competitiveness of US companies, attempts to repeal or dilute the FCPA were unsuccessful. Thereafter, beginning in the early- to mid-1990s, enforcement of the FCPA sharply escalated, and, at the same time, a number of international and multinational developments focused greater public attention on the subject of official corruption and generated new and significant anti-corruption initiatives.

Transparency International

In hindsight, a different type of milestone occurred in Germany in 1993 with the founding of Transparency International, a non-governmental organisation created to combat global corruption. With national chapters and chapters-in-formation now in more than 90 countries, Transparency International promotes transparency in governmental activities and lobbies governments to enact anti-corruption reforms. Transparency International's annual Corruption Perceptions Index (CPI), which it began publishing in 1995, has been uniquely effective in publicising and heightening public awareness of those countries in which official corruption is perceived to be most rampant. Using assessment and opinion surveys, the CPI currently ranks 180 countries by their perceived levels of corruption and publishes the results annually. In 2009, New Zealand, Denmark, Singapore and Sweden represented the countries seen to be the least corrupt in the world, while Somalia, followed by Afghanistan and Myanmar, topped the index as those perceived to be the most corrupt.

Transparency International has also developed and published the Bribe Payers Index (BPI), a similar index designed to evaluate the

supply side of corruption and rank the 22 leading exporting countries according to the propensity of their companies to bribe foreign officials. In the 2008 BPI, Belgian and Canadian firms were seen as the least likely to bribe, while Russian firms, followed closely by Chinese and Mexican firms, were seen as the worst offenders.

Through these and other initiatives, Transparency International has become recognised as a strong and effective voice dedicated solely to combating corruption worldwide.

The World Bank

Three years after the formation of Transparency International, the World Bank joined the battle to stem official corruption. In 1996, James D Wolfensohn, then president of the World Bank, announced at the annual meetings of the World Bank and the International Monetary Fund that the international community had to deal with 'the cancer of corruption'. Since then, the World Bank has launched more than 600 programmes designed to curb corruption globally and within its own projects. These programmes, which have proved controversial and have encountered opposition from various World Bank member states, include debarring consultants and contractors that engage in corruption in connection with World Bank-funded projects. Since 1999, the World Bank has sanctioned over 350 firms and individuals for fraud and corruption, and referrals from the Integrity Vice Presidency of findings of fraud or corruption to national authorities for prosecution have resulted in 28 criminal convictions to date.

In 2006, the World Bank established a voluntary disclosure programme (VDP) which allows firms and individuals who have engaged in misconduct – such as fraud, corruption, collusion or coercion – to avoid public debarment by disclosing all past misconduct, adopting a compliance programme, retaining a compliance monitor and ceasing all corrupt practices. The VDP, which was two years in development under a pilot programme, is administered by the World Bank's Department of Institutional Integrity. The World Bank's prestige and leverage promise to be significant forces in combating official corruption, although the World Bank continues to face resistance from countries in which corrupt practices are found to have occurred.

More recently, the World Bank announced that it would begin publishing the names of companies that have been blacklisted or debarred from participating in World Bank procurement programmes. Prior to this, the World Bank had only published the names of companies banned from participating in World Bank-funded projects. Immediately after the January 2009 announcement, the World Bank published the names of three Indian companies, including two prominent software firms, which had been debarred over the past two years for providing 'improper benefits to bank staff'.

International anti-corruption conventions

Watershed developments in the creation of global anti-corruption law came with the adoption of a series of international anti-corruption conventions between 1996 and 2005. Although attention in the early 1990s was focused on the Organisation for Economic Cooperation and Development (OECD), the Organisation of American States (OAS) was the first to reach agreement, followed by the OECD, the Council of Europe and the African Union. Most recent, and most ambitious, is the United Nations International Convention against Corruption, adopted in 2003. The events unfolded as follows.

On 29 March 1996, OAS members initialled the Inter-American Convention against Corruption (IACAC) in Caracas. The IACAC entered into force on 6 March 1997. Thirty-three of the 34 signatories have now ratified the IACAC. The IACAC requires each signatory country to enact laws criminalising the bribery of government officials. It also provides for extradition and asset seizure of offending parties. In addition to emphasising heightened government ethics, improved financial disclosures and transparent bookkeeping, the IACAC facilitates international cooperation in evidence gathering.

In 1997, 28 OECD member states and five non-member observers signed the Convention on Combating Bribery of Foreign Officials in International Business Transactions (OECD Anti-Bribery Convention), which was subsequently ratified by the requisite number of parties and entered into force on 15 February 1999. Thirty-eight countries in all, including eight countries not currently members of the OECD, have now signed and ratified the OECD Anti-Bribery Convention, most recently Israel, which became the first Middle-Eastern country to join the Convention in December 2008.

States that are parties to the OECD Anti-Bribery Convention are bound to provide mutual legal assistance to one another in the investigation and prosecution of offences within the scope of the OECD Anti-Bribery Convention. Moreover, such offences are made extraditable. Penalties for transnational bribery are to be commensurate with those for domestic bribery, and in the case of states that do not recognise corporate criminal liability (eg, Japan), the OECD Anti-Bribery Convention requires such states to enact 'proportionate and dissuasive non-criminal sanctions'.

In terms of monitoring implementation and enforcement, the OECD has set the pace. An OECD working group monitors state parties' enforcement efforts through a regular reporting and comment process. In phase I of the monitoring process, examiners assess whether a country's legislation adequately implements the OECD Anti-Bribery Convention. In phase II, examiners evaluate whether a country is enforcing and applying this legislation. After each phase, the examiners' report and recommendations are forwarded to the government of each participating country and are posted on the OECD's website.

On 26 November 2009, the OECD Council issued its first resolution on bribery since the adoption of the OECD Anti-Bribery Convention. Entitled the 'Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions', the resolution urges member countries to continue to take meaningful steps to deter, prevent and combat the bribery of foreign public officials, not only on a national level, but on a multinational level, with rigorous and systemic follow-up. Among other things, the resolution recommends that member countries 'encourage companies to prohibit or discourage the use of small facilitation payments', and to always require accurate accounting of any such payments in the companies' books and records. The resolution was supplemented by two annexes setting forth 'Good Practice Guidance', one for member countries and one for companies.

On 4 November 1998, following a series of measures taken since 1996, the member states of the Council of Europe and eight observer states, including the United States, approved the text of a new multilateral convention – the Criminal Law Convention on Corruption. A year later, the parties adopted the Civil Law Convention on Corruption. Forty-two countries have ratified the Criminal Convention, which entered into force on 1 July 2002, while 34 countries have ratified the Civil Convention, which entered into force on 1 November 2003.

The Criminal Convention covers a broad range of offences including domestic and foreign bribery, trading in influence, money laundering and accounting offences. Notably, the Criminal Convention also addresses private bribery. The Criminal Convention sets forth cooperation measures and provisions regarding the recovery of assets. Similar to the OECD Anti-Bribery Convention, the Criminal Convention establishes a monitoring mechanism, the Group of States against Corruption (GRECO), to conduct mutual evaluations.

The Civil Convention provides for compensation for damages that result from acts of public and private corruption. Other measures include civil law remedies for injured persons, invalidity of corrupt contracts and whistle-blower protection. Compliance with the Civil Convention is also subject to peer evaluation.

The African Union Convention on Preventing and Combating Corruption was adopted on 11 July 2003. Thirty-one of the 44 signatories have ratified the African Union Convention. The Convention covers a wide range of offences including bribery

(domestic and foreign), diversion of property by public officials, trading in influence, illicit enrichment, money laundering and concealment of property. The Convention also guarantees access to information and the participation of civil society and the media in monitoring it. Other articles seek to ban the use of funds acquired through illicit and corrupt practices to finance political parties and require state parties to adopt legislative measures to facilitate the repatriation of the proceeds of corruption.

Most aggressive, and potentially most important, of all of the international conventions is the United Nations International Convention against Corruption. One hundred and forty countries have signed this Convention, which was adopted by the United Nations General Assembly on 31 October 2003. The Convention entered into force on 14 December 2005 and 143 countries are now party to it.

The United Nations International Convention against Corruption addresses seven principal topics: mandatory and permissive preventive measures applicable to both the public and private sectors, including accounting standards for private companies; mandatory and permissive criminalisation obligations, including obligations with respect to public and private sector bribery, trading in influence and illicit enrichment; private rights of action for the victims of corrupt practices; anti-money laundering measures; cooperation in the investigation and prosecution of cases, including collection actions, through mutual legal assistance and extradition; and asset recovery.

Enforcement

Public dispositions of anti-corruption enforcement actions, media reports of official and internal investigations, disclosures in corporate filings with securities regulatory agencies and stock exchanges, private litigation between companies and former employees, monitoring reports by international organisations, voluntary corporate disclosures, occasional confessions or exposés of implicated individuals, public statements by enforcement officials, statistics compiled by NGOs and international organisations, findings of anti-corruption commissions, World Bank reports and academic studies all provide windows into the fast-changing landscape of enforcement of anti-corruption laws and conventions. Although public knowledge of official investigations and enforcement activity often lags behind, sometimes by years, the available indicators suggest ever-increasing enforcement activity. Without going beyond the public domain, a few recent examples indicate the breadth and diversity of anti-corruption enforcement, including international cooperation, extra-territorial or parallel enforcement, the use of liberalised bank secrecy laws and a growing array of penalties and sanctions.

Germany

In December 2009, two divisions of a major German industrial services company agreed to pay a combined fine of €150 million to resolve an investigation of bribery allegations. The settlement brought to a close a seven-month investigation by German authorities that had, according to press accounts, uncovered evidence that the two units made suspicious payments totalling €51.6 million to potential customers – including foreign officials and companies – in exchange for business. Several executives and employees have resigned or been fired because of the scandal, including the company's CEO and CFO, and two executive board members from one of the units. The former CEO of one of the units was indicted by German prosecutors in December on eight counts of bribery in connection with these allegations. He is accused of coordinating the payment of a €9 million bribe to secure a gas pipeline modernisation contract in Kazakhstan. The bribe was reportedly mischaracterised as a 'market-entry fee'. Other former executives and employees at the company reportedly remain under scrutiny for their parts in the alleged bribery. The company is considering whether to sue the former employees for breach of statutory and company regulations for making suspicious payments to third-party advisers and agents.

United Kingdom

In 2009, the United Kingdom continued its stepped up enforcement efforts. After years of intense criticism by the OECD and others regarding its failure to prosecute incidents of foreign bribery, in July 2009 the SFO issued official guidance related to the new US-style plea bargaining system the SFO implemented in 2008. The new system allows companies to voluntarily disclose corruption violations and then enter formal settlement negotiations. In exchange for voluntary self disclosures, the SFO has pledged to use civil fines instead of criminal penalties wherever possible. Notably, the SFO also indicated that it would rely on the independent monitoring system which the DoJ has used for years. In July 2009, the UK's Financial Services Authority (FSA) announced that, beginning in February 2010, it would increase the fines imposed on parties that violate FSA regulations, which mirror some of the FCPA's regulations on anti-bribery, internal controls and accounting. In 2010, the UK is expected to pass a long-debated bribery bill, which would make the prosecution of foreign bribery much easier under UK law. The draft legislation contains a new offence that would impose corporate liability for a company's negligent failure to prevent bribery by its employees and agents. In August 2009, the United Kingdom secured its first ever conviction of a company on charges of foreign bribery when a UK-based firm pleaded guilty to improperly attempting to influence government decision-makers in an effort to obtain bridge building contracts in Jamaica and Ghana. The firm also admitted to making more than €422,000 in illicit payments to the former government of Iraq under Saddam Hussein in violation of the UN's Oil for Food Programme. The case arose after an internal investigation and a 2008 voluntary disclosure to the SFO. The company was required to pay penalties and reparations totalling £6.6 million and to submit its compliance programme for review by an SFO-approved independent monitor. Five of the company's directors have resigned since the original disclosure was made. In December 2009, the SFO charged a UK medical company executive with making corrupt payments to Greek healthcare professionals to facilitate sales of orthopaedic products. Notably, the case resulted from a referral from the US DoJ in March 2008. In 2010, the SFO also concluded a lengthy and controversial investigation into alleged bribery by a prominent UK defence, security and aerospace company several years after an investigation into these allegations was shut down. In a parallel enforcement proceeding with US authorities, the SFO settled a negotiated set of charges with the firm and imposed a £30 million penalty. Beyond the SFO, the Overseas Anti-Corruption Unit (OACU) of the City of London Police also continued to crack down on corruption abroad. In June 2009, the OACU brought its second case, charging a UK solicitor with conspiracy to corrupt, conspiracy to launder money and conducting fraudulent trades as part of a £21 million scheme connected with a United Nations programme to provide life-saving HIV and anti-malarial drugs to the Democratic Republic of Congo. The OACU has also increased its cooperation with enforcement authorities abroad, recently assisting the United States with a landmark sting operation involving alleged foreign bribery that resulted in the arrest and indictment of 22 individuals.

Namibia

In July 2009, prosecutors in Namibia arrested three individuals, including one Chinese national, in connection with a bribery investigation involving a Chinese state-owned company that makes advanced security scanners. The individuals – a company representative and two consultants – are accused of illicitly securing a N$55 million contract to install scanners at airports and ports across Namibia. The investigation reportedly began after a new money-laundering law in Namibia resulted in the detection of a N$12.8 million transfer to the three defendants, money which had initially been paid by the government of Namibia to the Chinese company as part of the scanner contract. Unrelated to this investigation, in 2009 Namibia also suspended the chief of the Namibia Defence Force

for allegedly taking a N$250,000 kickback on a Chinese arms deal and is looking into potential corruption involving another Chinese company that allegedly paid a 10 per cent kickback to secure a deal to build a N$61-million rail link in Namibia.

United States

In 2009, the US Department of Justice (DoJ) and the SEC resolved 35 enforcement dispositions. These cases involved both US and non-US individuals and corporations, imposed civil and criminal fines of hundreds of millions of dollars, and introduced a new variety of sanctions. Corporate defendants resolved these cases by entering into deferred prosecution agreements, non-prosecution agreements and plea agreements. In many instances, a condition of settlement has been that the company retain and pay for an 'independent compliance monitor', who is given broad authority under these agreements. At a recent FCPA conference, a high-ranking US enforcement official also revealed that upwards of 140 additional corporations and individuals are currently under active investigation.

In 2009, four individuals were convicted in an unprecedented three FCPA trials. The first defendant, a wealthy investor on trial for his involvement in a scheme designed to manipulate the planned privatisation of the state-owned oil company in Azerbaijan, was convicted in July 2009 of conspiracy to violate the FCPA and making false statements to US authorities. In addition to fleshing out the contours of the FCPA's local law affirmative defence, the pretrial decisions in this case provided rare instruction on the types of evidence necessary to prove the knowledge element of a conspiracy violation and gave useful insight into judicial interpretation of the conscious avoidance doctrine of the FCPA. The second defendant, a former US Congressman accused of soliciting bribes in exchange for helping to promote products and services to various government officials in Africa, was convicted in August 2009 on 11 of 16 counts, including conspiracy to solicit bribes, deprive citizens of honest services by wire fraud and violate the FCPA, but not the substantive FCPA charge against him. The third and fourth defendants, a married pair of movie producers who allegedly conspired to bribe a Thai tourism official in exchange for lucrative contracts to run a Bangkok film festival, were convicted in September 2009 on a count of conspiracy to violate the FCPA and US money laundering laws, eight counts of violating the FCPA's anti-bribery provisions and seven counts of money laundering. This is the first FCPA case focused on the entertainment industry and, given the FCPA risks involved in producing films and events abroad, it could signal future enforcement activity in this area. The defendant from the first trial was sentenced in November 2009 to a year and a day in prison and assessed a US$1 million penalty. The defendant from the second trial was sentenced to 13 years in prison. Both have appealed these sentences. The defendants from the third trial are due to be sentenced later this year. These trials reflect a heightened emphasis on individuals by the DoJ in recent years. As one prominent US enforcement official noted, 'as we focus on the prosecution of individuals, we will not shy away from tough prosecutions, and we will not shy away from trials. We are ready, willing, and able to try FCPA cases in any district in the country – as we demonstrated with our three FCPA trial victories just last year.'

In January 2010, the DoJ indicted 22 executives and employees of the defence and law enforcement products industry for violations of the FCPA and related conspiracy and money laundering statutes. The individuals, eight of whom are non-US nationals, represent 19 companies and were arrested as part of a landmark undercover sting operation. They allegedly schemed to pay bribes to the minister of defence of an unnamed African country to win a US$15 million contract to provide law enforcement and defence equipment to the country's presidential guard, including items such as grenade launchers, body armour, and night-vision goggles. Undercover FBI agents posed as intermediaries for the fictitious defence minister, and the DoJ collaborated at length with the OACU of the UK's City of London Police in bringing these charges. The operation represents the largest single FCPA investigation and prosecution of individuals to date, with the number of individuals involved surpassing the total number of individuals charged with FCPA violations in any prior year. US authorities have openly stated their intent to continue the use of such tactics in FCPA enforcement, signalling that companies and individuals should consider the real possibility that intended recipients of bribes, or their intermediaries, may in fact be undercover federal agents.

In March 2010, the DoJ imposed a US$400-million penalty on a prominent UK defence, security and aerospace company. As noted earlier, the company also had an additional £30 million assessed by the UK's SFO in a parallel proceeding. Beyond the staggering penalties involved, this case is notable for the differences between the UK and US settlements, the oblique nature of the violations charged, and the allegations that are not made in the public settlement documents, all of which provide a glimpse of the political undercurrents, legal manoeuvring, and policy objectives that underlie the case. The DoJ settlement largely focused on over £1 billion in payments the company allegedly made to members of the Saudi royal family for help in brokering the sale of jet fighters to Saudi Arabia, while the SFO settlement, for political reasons, largely focused on US$12 million in illicit payments the company allegedly made to a 'marketing adviser' to secure an air-traffic control system contract in Tanzania. Although the allegations in the case centre on bribery, the plea agreements with the DoJ and SFO do not charge the company with actually paying or authorising the payment of unlawful bribes to government officials. Instead, they charge the company with one count of conspiring to make false statements and violate US export controls and one count of accounting violations, respectively. The negotiated pleas provided grounds for the imposition of the massive monetary penalty while at the same time deferring to the enormous political sensitivities that both the US and the UK faced in prosecuting the company and sidestepping charges that could increase the likelihood of debarment.

The US has also continued to prosecute a number of matters arising out of the UN's Oil for Food Programme and the investigations of the UN Independent Inquiry Committee. These cases are typically based on alleged violations of the books and records provisions of the FCPA, together with a mix of internal controls, conspiracy and wire fraud charges. The charges generally involve improper payments made by foreign subsidiaries in the form of kickback payments related to the sale of humanitarian goods to Iraq. For jurisdictional reasons, and because kickbacks were paid to Iraqi entities rather than individual Iraqi officials, these cases do not allege that the subsidiaries violated the anti-bribery provisions of the FCPA. Worldwide, the United States has been by far the most aggressive country in pursuing these cases. From February 2007 to February 2010, US authorities brought FCPA enforcement actions against 12 US and non-US companies (along with a number of their subsidiaries) involved in the scandal, with penalties ranging from US$2.9 million to more than US$30 million.

Despite this activity, the number of companies prosecuted for violations documented in the UN Independent Inquiry Committee's report on the scandal has remained small, notwithstanding the large number (more than 2,000) implicated.

This small sample of the diverse array of investigations and prosecutions underway or pending, reflects a revolutionary shift in anti-corruption law and a dramatic escalation of enforcement activity compared with only a decade ago.

As yet untested is the provision in article 35 of the United Nations International Convention against Corruption, which creates a private right of action for entities or persons who have suffered damage as a result of bribery of public officials or other acts of corruption covered by the United Nations Convention against Corruption. The United States provides no private right of action consistent with article 35, as it maintained a reservation against this requirement when ratifying the UN Convention. However, a private right of action can be available within the United States through other means. For instance,

US law allows those injured in certain circumstances to bring a cause of action and seek compensation under the Racketeering Influenced and Corrupt Organisations Act (RICO) or as part of a civil securities suit; recent examples of such litigation include *Aluminum Bahrain BSC v Sojitz*, *Johnson v Siemens AG*, *Deccan Value Advisers Fund v Panalpina World Transport*, and *Policemen and Firemen Retirement System of the City of Detroit v Cornelison* (Halliburton and KBR), all of which were filed last year based in part on alleged FCPA violations.

Anti-corruption compliance programmes

The rapid changes in legal structures and enforcement have, in turn, contributed to a new corporate phenomenon and legal discipline – the widespread institution of anti-corruption compliance programmes within multinational corporations. Programmes that would have been innovative and exceptional in the early 1990s are becoming de rigueur. 'Best practices' have become a standard by which many companies seek to measure their own efforts and that standard continues to rise. Spurred by government pronouncements, regulatory requirements, voluntary corporate codes and the advice of experts as to what mechanisms best achieve their intended purposes, anti-corruption compliance programmes have become common, and often sophisticated, in companies doing business around the world. As a result, anti-corruption codes and guidelines, due diligence investigations of consultants and business partners or merger targets, contractual penalties, extensive training, internal investigations, compliance audits and discipline for transgressions have become familiar elements of corporate compliance programmes. The OECD's recent 'Good Practice Guidance on Internal Controls, Ethics and Compliance', issued on 18 February 2010, is directed squarely at companies, business organisations and professional associations, and identifies a number of recognised elements of effective compliance programmes:

- a strong commitment from senior management;
- a clearly articulated anti-bribery policy;
- accountability and oversight;
- specific measures applicable to subsidiaries that are directed at the areas of highest risk;
- internal controls;
- documented training;
- appropriate disciplinary procedures; and
- modes for providing guidance and reporting violations.

This guidance is noteworthy both because it is one of the first treaty-based articulations of effective anti-bribery compliance standards and because, on close reading, it emphasises some elements that have received less attention in traditional compliance programmes.

Against this backdrop, the expert summaries of countries' anti-corruption laws and enforcement policies that this volume comprises are becoming an essential resource. It is within this legal framework that the implementation of anti-corruption conventions and the investigations and enforcement actions against those suspected of violations will play out. Our thanks to those firms that have contributed to this volume for their timely summaries and for the valuable insights they provide.

United States

Homer E Moyer Jr, James G Tillen, Jeffrey Hahn and Marc Alain Bohn

Miller & Chevalier Chartered

1 International anti-corruption conventions

To which international anti-corruption conventions is your country a signatory?

The United States is a signatory to and has ratified the OECD Anti-Bribery Convention, the OAS Convention and the United Nations International Convention against Corruption, all with reservations or declarations. The most significant reservations involve declining to specifically provide the private right of action envisioned by the United Nations International Convention against Corruption and not applying the illicit enrichment provisions of the OAS Convention.

The United States is also a signatory to the Council of Europe Criminal Law Convention (Criminal Convention) but has not ratified it.

2 Foreign and domestic bribery laws

Identify and describe your national laws and regulations prohibiting bribery of foreign public officials (foreign bribery laws) and domestic public officials (domestic bribery laws).

The principal US law prohibiting bribery of foreign public officials is the Foreign Corrupt Practices Act (FCPA), 15 USC sections 78m, 78dd-1, 78dd-2, 78dd-3, 78ff, enacted in 1977. The principal domestic public bribery law is 18 USC section 201, enacted in 1962. There are no implementing regulations for either statute, other than the regulations governing the Department of Justice's (DoJ) FCPA opinion procedure, under which the DoJ issues non-precedential opinions regarding its intent to take enforcement action in response to specific inquiries. See 28 CFR part 80.

Foreign bribery

3 Legal framework

Describe the elements of the law prohibiting bribery of a foreign public official.

The FCPA prohibits the following:

- a covered person or entity;
- corruptly;
- committing any act in furtherance of;
- an offer, payment, promise to pay or authorisation of an offer, payment or promise;
- of money or anything of value to:
  - any foreign official;
  - any foreign political party or party official;
  - any candidate for foreign political office; or
  - any other person;
- while 'knowing' that the payment or promise to pay will be passed on to one of the above;
- for the purpose of:
  - influencing an official act or decision of that person;
  - inducing that person to do or omit to do any act in violation of his or her lawful duty;
  - inducing that person to use his or her influence with a foreign government to affect or influence any government act or decision; or
  - securing any improper advantage;
- in order to obtain or retain business, or direct business to any person.

See 15 USC sections 78dd-1(a), 78dd-2(a), 78dd-3(a).

Jurisdiction

Jurisdiction exists over US persons and companies acting anywhere in the world, companies listed on US stock exchanges (issuers) and non-US persons and companies whose actions take place in whole or in part within the territory of the United States (see question 14).

Prohibited acts

Prohibited acts include promises to pay, even if no payment is ultimately made. The prohibitions apply to improper payments made indirectly by third parties or intermediaries, even without explicit direction by the principal.

Corrupt intent

Corrupt intent, described in the legislative history as connoting an evil motive or purpose, is readily inferred from the circumstances, from the existence of a quid pro quo, from conduct that violates local law and even from surreptitious behaviour.

Improper advantage

Added to the statute following the OECD Anti-Bribery Convention, an 'improper advantage' does not require an actual action or decision by a foreign official.

Business purpose

A US court has confirmed that the 'business purpose' element (to obtain or retain business) is to be construed broadly to include any benefit to a company that will improve its business opportunities or profitability.

4 Definition of a foreign public official

How does your law define a foreign public official?

The FCPA defines a 'foreign official' as 'any officer or employee of' or 'any person acting in an official capacity for or on behalf of' 'a foreign government or any department, agency, or instrumentality thereof, or of a public international organization' such as the World Bank. This can include part-time workers, unpaid workers, officers and employees of companies with government ownership or control, as well as anyone acting under a delegation of authority from the government to carry out government responsibilities. The FCPA also applies to 'any foreign political party or official thereof or any candidate for foreign political office'.

In many instances, these persons are not treated as government officials by their own governments. For purposes of the FCPA, however, it is legally irrelevant whether a person is considered a government official by the government at issue. The US law definition is adhered to.

5 Travel and entertainment restrictions

To what extent do your anti-bribery laws restrict providing foreign officials with gifts, travel expenses, meals or entertainment?

The FCPA criminalises providing 'anything of value', including gifts, travel expenses, meals and entertainment, to foreign officials, where all the other requisite elements of a violation are met.

In addition, less obvious items provided to 'foreign officials' can violate the FCPA. For example, in-kind contributions, investment opportunities, subcontracts, stock options, positions in joint ventures, favourable contracts, business opportunities, and similar items provided to 'foreign officials' are all things of value that can violate the FCPA.

The FCPA includes an affirmative defence, however, for reasonable and bona fide expenses that are directly related to product demonstrations, tours of company facilities or 'the execution or performance of a contract' with a foreign government or agency. The defendant bears the burden of proving the elements of the asserted defence.

6 Facilitating payments

Do the laws and regulations permit facilitating or 'grease' payments?

The FCPA permits 'facilitating' or 'grease' payments. This narrow exception applies to payments to expedite or secure the performance of 'routine governmental action[s]', which are specifically defined to exclude actions involving the exercise of discretion. As such, the exception generally applies only to small payments used to expedite the processing of permits, licences, or other routine documentation; the provision of utility, police or mail services; or the performance of other non-discretionary functions.

7 Payments through intermediaries or third parties

In what circumstances do the laws prohibit payments through intermediaries or third parties to foreign public officials?

The FCPA prohibits making payments through intermediaries or third parties while 'knowing' that all or a portion of the funds will be offered or provided to a foreign official. 'Knowledge' in this context is statutorily defined to be broader than actual knowledge: a person is deemed to 'know' that a third party will use money provided by that person to make an improper payment or offer if he or she is aware of, but consciously disregards, a 'high probability' that such a payment or offer will be made. The DoJ has identified a number of 'red flags' – circumstances that, in its view, suggest such a 'high probability' of a payment.

8 Individual and corporate liability

Can both individuals and companies be held liable for bribery of a foreign official?

Both individuals and companies can be held liable for bribery of a foreign official. A corporation may be held liable (even criminally) for the acts of its employees in certain circumstances, generally where the employee acts within the scope of his or her duties and for the corporation's benefit. A corporation may be found liable even when an employee is not and vice versa. In recent years, the DoJ has increasingly made the prosecution of individuals a cornerstone of its FCPA enforcement strategy.

9 Civil and criminal enforcement

Is there civil and criminal enforcement of your country's foreign bribery laws?

There is civil and criminal enforcement of the United States' foreign bribery laws. See question 15.

10 Agency enforcement

What government agencies enforce the foreign bribery laws and regulations?

Both the DoJ and the Securities and Exchange Commission (SEC) have jurisdiction to enforce the anti-bribery provisions of the FCPA. The DoJ has the authority to enforce the FCPA criminally and, in certain circumstances, civilly; the SEC's enforcement authority is limited to civil penalties and remedies for violations by issuers of certain types of securities regulated by the SEC.

11 Leniency

Is there a mechanism for companies to disclose violations in exchange for lesser penalties?

The FCPA does not require self-reporting of FCPA violations. Under US securities laws, including the Sarbanes-Oxley Act (SOX), corporations are sometimes required to disclose improper payments or internal investigations into possible improper payments, thereby effectively notifying or reporting to the government.

Following the enactment of SOX, the number of voluntary disclosures of actual or suspected FCPA violations has sharply increased. Enforcement authorities encourage voluntary disclosure of actual or suspected violations and publicly assert that voluntary disclosure, and subsequent cooperation with enforcement authorities, may influence the decision of whether to bring an enforcement action and the choice of penalties sought to be imposed. In short, voluntary disclosure can result in more lenient treatment than if the government were to learn of the violations from other sources. The benefits of voluntary disclosure, however, are not statutorily guaranteed or quantified in advance by enforcement officials.

12 Dispute resolution

Can enforcement matters be resolved through plea agreements, settlement agreements, prosecutorial discretion or similar means without a trial?

FCPA enforcement matters are most often resolved without a trial through plea agreements and settlement agreements such as deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs). As a matter of prosecutorial discretion, some investigations or disclosures are not pursued. While once rare, with the recent uptick in the prosecution of individuals, jury trials are becoming more frequent.

13 Patterns in enforcement

Describe any recent shifts in the patterns of enforcement of the foreign bribery rules.

FCPA enforcement has accelerated in recent years, with the number of enforcement actions steadily rising. Sanctions have also become much more severe, with monetary penalties (including fines, disgorgement of profits, and payment of pre-judgment interest) significantly eclipsing those imposed by previous FCPA settlements. In addition to monetary penalties, in recent years companies have consistently been required to retain independent compliance monitors for up to four years and submit to probationary periods under DPAs. Individuals have increasingly been targets of prosecution and have been sentenced to prison terms, fined heavily, or both. In 2009 alone, 32 individuals either were charged with or convicted on FCPA-related violations. Many recent prosecutions have been based on expan-

sive interpretations of substantive and jurisdictional provisions of the FCPA, and foreign entities have been directly subjected to US enforcement actions.

SOX has encouraged voluntary disclosures, and a number of recent cases have arisen in the context of proposed corporate transactions. US enforcement agencies have also benefited from the cooperation of their counterparts overseas; including coordination that has contributed to some of the most high-profile DoJ enforcement activities to date. Enforcement agencies' expectations for compliance standards continue to rise, as reflected in the compliance obligations imposed on companies in recent settlements.

14 Prosecution of foreign companies

In what circumstances can foreign companies be prosecuted for foreign bribery?

A foreign company that is listed on a US stock exchange or raises capital through US capital markets, and is thus an 'issuer', may be prosecuted for violations of the anti-bribery provisions if it uses any instrumentality of US commerce in taking any action in furtherance of a payment or other act prohibited by the FCPA.

Any foreign person or foreign company, whether or not an 'issuer', may be prosecuted under the FCPA if it commits any act in furtherance of an improper payment while in the territory of the United States.

15 Sanctions

What are the sanctions for individuals and companies violating the foreign bribery rules?

Criminal and civil penalties may be imposed on both individuals and corporations for violations of the FCPA's anti-bribery provisions.

Criminal penalties for wilful violations

Corporations can be fined up to US$2 million per anti-bribery violation. Actual fines can exceed this maximum under alternative fine provisions of the Sentencing Reform Act (18 USC section 3571(d)), which allow a corporation to be fined up to an amount that is the greater of twice the gross pecuniary gain or loss from the transaction enabled by the bribe. Individuals can face fines of up to US$100,000 per anti-bribery violation or up to five years' imprisonment, or both. Likewise, under the alternative fine provisions of the Sentencing Reform Act, individuals may also face increased fines of up to $250,000 per anti-bribery violation or the greater of twice the gross pecuniary gain or loss the transaction enabled by the bribe.

Civil penalties

Corporations and individuals can be civilly fined up to US$10,000 per anti-bribery violation. In addition, the SEC or the DoJ may seek injunctive relief to enjoin any act that violates or may violate the FCPA. The SEC may also order disgorgement of ill-gotten gains and assess pre-judgment interest.

Collateral sanctions

In addition to the statutory penalties, firms may, upon indictment, face suspension and debarment from US government contracting, loss of export privileges and loss of benefits under government programmes, such as financing and insurance. The SEC and the DoJ have also recently required companies to implement detailed compliance programmes and appoint independent compliance monitors (who report to the US government) or self-monitor for a specified period in connection with the settlement of FCPA matters.

16 Recent decisions and investigations

Identify and summarise recent landmark decisions or investigations involving foreign bribery.

Recent FCPA cases illustrate a number of trends, including increasing penalties and the pursuit of individuals and non-US persons.

As of 10 February 2010, the largest financial sanction imposed for FCPA violations was an US$800 million penalty (including a fine and disgorgement of profits) levied against the German engineering company Siemens Aktiengesellschaft (Siemens) and its wholly owned subsidiaries in December 2008. This enforcement action was followed shortly by another landmark settlement imposing a combined US$579 million penalty against Halliburton Co (Halliburton), KBR Inc (KBR), and Kellogg, Brown & Root LLC. And on 6 February 2010, the DoJ imposed another large fine of US$400 million in an FCPA-related settlement with the British defence, security and aerospace firm BAE Systems plc.

On 5 March 2009, the DoJ unsealed the indictments of two UK citizens for their alleged participation in a decade-long scheme to make over US$180 million in illicit payments to Nigerian government officials to obtain engineering, procurement and construction contracts. Specifically, the DoJ accused these individuals of being middlemen hired by a joint venture consortium, which included Halliburton's former subsidiary, Kellogg, Brown & Root, Inc, to funnel the illicit payments via sham 'consulting' and 'services' agreements in exchange for contracts in Nigeria worth over US$6 billion. The DoJ asserted jurisdiction over these UK citizens because of their agency relationship with various parties involved in the bribery scheme. The US is currently trying to obtain extradition of these men. If convicted, each faces penalties of up to 55 years' imprisonment and the forfeiture of approximately US$132 million, which represents the proceeds traceable to the alleged violations.

On 31 July 2009, Control Components Inc (CCI), a California based subsidiary of the British engineering firm IMI plc, pleaded guilty to charges of conspiracy to violate FCPA anti-bribery provisions and the Travel Act, and two substantive FCPA anti-bribery violations. From 1998 through 2007, CCI allegedly made a series of corrupt payments to employees of state-owned and privately owned customers around the world to obtain or retain business for service control valves it designs and manufactures for use in the nuclear, oil and gas, and power generations industries. Specifically, CCI made approximately 236 payments in over 30 countries totaling approximately US$6.85 million and realised approximately US$46.5 million in profit as a result. In pleading, CCI agreed to pay an US$18.2 million fine, implement and maintain a comprehensive anti-bribery compliance programme, retain an independent compliance monitor for three years, and serve a three-year term of probation.

On 19 January 2010, 22 executives and employees of the defence and law enforcement products industry were arrested for violations of the FCPA and related conspiracy and money laundering statutes. The sting operation, carried out in conjunction with the United Kingdom's City of London Police, represents the largest single FCPA investigation and prosecution of individuals to date and the most extensive use of undercover tactics yet seen. The indictments allege that the 22 individuals, representing 19 companies, engaged in a scheme to bribe the Minister of Defense of an unnamed African country in connection with a US$15 million contract to outfit the country's presidential guard. The scheme was actually part of an undercover operation conducted by the Federal Bureau of Investigation (FBI), with an FBI informant making the initial introductions and undercover FBI agents posing as intermediaries for the fictitious Minister. Among those indicted were eight non-US nationals, including five UK citizens, two Israeli citizens and one Peruvian citizen, who were charged on the basis of a 'test sale' arranged and entered into within the United States. The maximum sentence faced by each of these defendants for each conspiracy count and FCPA violation is five years in prison and a US$250,000 fine or twice the value of the transaction, whichever is greater.

On 1 March 2010, the DoJ imposed a US$400 million penalty on the British firm BAE Systems plc. The company also had an additional £30 million assessed by the UK's Serious Fraud Office (SFO) in a parallel proceeding. The DoJ settlement largely focused on over £1 billion in payments the company allegedly made to members of the Saudi royal family for help in brokering the sale of jet fighters to Saudi Arabia, while the SFO settlement, for political reasons, primarily focused on US$12 million in illicit payments the company allegedly made to a 'marketing adviser' to secure an air-traffic control system contract in Tanzania. Although the allegations in the case centre on bribery, the plea agreements with the DoJ and SFO did not charge the company with actually paying or authorising the payment of unlawful bribes to government officials. Instead, they charge the company with one count of conspiring to make false statements about its FCPA compliance programme and violate US export controls and one count of accounting violations, respectively. The negotiated pleas provided grounds for the imposition of the massive monetary penalty, while at the same time deferring to the enormous political sensitivities that both the US and the UK faced in prosecuting the company and sidestepping charges that could increase the likelihood of debarment.

Financial record keeping

17 Laws and regulations

What legal rules require accurate corporate books and records, effective internal company controls, periodic financial statements or external auditing?

The FCPA, in addition to prohibiting foreign bribery, requires issuers to keep accurate books and records and to establish and maintain a system of internal controls adequate to ensure accountability for assets. Specifically, the accounting provisions require issuers to make and keep books, records and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the issuers' assets. Issuers must also devise and maintain a system of internal accounting controls that assures that transactions are executed and assets are accessed only in accordance with management's authorisation; that accounts of assets and existing assets are periodically reconciled; and that transactions are recorded so as to allow for the preparation of financial statements in conformity with GAAP standards. Issuers are strictly liable for the failure of any of their owned or controlled foreign affiliates to meet the books and records and internal controls standards for the FCPA.

SOX imposes reporting obligations with respect to internal controls. Issuer CEOs and CFOs (signatories to the financial reports) are directly responsible for and must certify the adequacy of both internal controls and disclosure controls and procedures. Management must disclose all 'material weaknesses' in internal controls to the external auditors. SOX also requires that each annual report contain an internal control report and an attestation by the external auditors of management's internal control assessment. SOX sets related certification requirements (that a report fairly presents, in all material respects, the financial condition and operational results) and provides criminal penalties for knowing and wilful violations.

The securities laws also impose various auditing obligations, require that the issuer's financial statements be subject to external audit and specify the scope and reporting obligations with respect to such audits. SOX also established the Public Company Accounting Oversight Board (PCAOB) and authorised it to set auditing standards.

18 Disclosure of violations or irregularities

To what extent must companies disclose violations of anti-bribery laws or associated accounting irregularities?

The accounting provisions of the FCPA do not themselves require disclosure of a violation (see question 11). US securities laws do, however, prohibit 'material' misstatements and otherwise may require disclosure of a violation of anti-bribery laws. The mandatory certification requirements of SOX can also result in the disclosure of violations.

19 Prosecution under financial record keeping legislation

Are such laws used to prosecute domestic or foreign bribery?

Although part of the FCPA, the accounting provisions are not limited to violations that occur in connection with the bribery of foreign officials. Rather, they apply generally to issuers and can be a separate and independent basis of liability. Accordingly, there have been many cases involving violations of the recordkeeping or internal controls provisions of the FCPA that are wholly unrelated to foreign bribery.

At the same time, charges of violations of the accounting provisions are commonly found in cases involving the bribery of foreign officials. In situations in which there is FCPA jurisdiction under the accounting provisions but not the anti-bribery provisions, cases have been settled with the SEC under the accounting provisions with no corresponding resolution under the anti-bribery provisions.

20 Sanctions for accounting violations

What are the sanctions for violations of the accounting rules associated with the payment of bribes?

For accounting violations of the FCPA, the SEC may impose civil penalties, seek injunctive relief, enter a cease and desist order and require disgorgement of tainted gains. Civil fines can range from either US$5,000 to US$100,000 per violation for individuals and US$50,000 to US$500,000 per violation for corporations or the gross amount of pecuniary gain per violation. Neither materiality nor 'knowledge' is required to establish civil liability: the mere fact that books and records are inaccurate, or that internal accounting controls are inadequate, is sufficient. Through its injunctive powers, the SEC can impose preventive internal control and reporting obligations.

The DoJ has authority over criminal accounting violations. Persons may be criminally liable under the accounting rules if they 'knowingly circumvent or knowingly fail to implement a system of internal accounting controls or knowingly falsify any book, record, or account' required to be maintained under the FCPA.

Penalties for criminal violations of the FCPA's accounting provisions are the same penalties applicable to other criminal violations of the securities laws. 'Knowing and wilful' violations can result in fines up to US$25 million for corporations and US$5 million for individuals, along with up to 20 years imprisonment. Like the anti-bribery provisions, however, the accounting provisions are also subject to the alternative fine provisions (see question 15).

21 Tax-deductibility of domestic or foreign bribes

Do your country's tax laws prohibit the deductibility of domestic or foreign bribes?

US tax laws prohibit the deductibility of domestic and foreign bribes. See 26 USC section 162(c)(1).

Domestic bribery

22 Legal framework

Describe the individual elements of the law prohibiting bribery of a domestic public official.

The domestic criminal bribery statute prohibits:

- directly or indirectly;
- corruptly giving, offering or promising;
- something of value;
- to a public official;
- with the intent to influence an official act.

See 18 USC section 201(b)(1).

Directly or indirectly
The fact that an individual does not pay a bribe directly to a public official, but rather does so through an intermediary, does not allow that individual to evade liability.

Something of value
'Anything of value' can constitute a bribe; accordingly, a prosecutor does not have to establish a minimum cost of the item or service at issue or the exact value of the bribe. Rather, the focus is on the subjective value the recipient places on the item or service.

Public official
The recipient may be either a 'public official' or a person selected to be a public official (see question 24.)

Official act
The prosecutor must prove a quid pro quo, that is, something that is given or offered in exchange for the performance of a specific official act. An 'official act' includes duties of an office or position, whether or not statutorily prescribed. For members of Congress, for example, an 'official act' is not strictly confined to legislative actions but can encompass a congressman's attempt to influence a local official on a constituent's behalf.

23 Prohibitions

Does the law prohibit both the paying and receiving of a bribe?

In addition to punishing the payment of a bribe, the federal bribery statute prohibits public officials and those who are selected to be public officials from soliciting or accepting a bribe, or both, with the intent to be influenced in the performance of an official act (see 18 USC section 201(b)(2)).

24 Public officials

How does your law define a public official and does that definition include employees of state-owned or state-controlled companies?

The bribery statute broadly defines 'public official' to include members of Congress, as well as officers and employees of all branches of the federal government, which includes federal judges. An individual need not be a direct employee of the government to qualify as a public official, as the statute includes in its definition 'a person acting for or on behalf of the United States'. The Supreme Court has explained this to mean someone who 'occupies a position of public trust with official federal responsibilities'. In the spirit of this expansive definition, courts have deemed a warehouseman employed at an Air Force base, a grain inspector licensed by the Department of Agriculture, and an immigration detention centre guard employed by a private contractor as falling within the ambit of 'public official'.

Because the bribery statute applies only to the bribery of federal public officials, officials of the various state governments are exempt from the statute's reach. However, there are other federal statutory provisions which can be used to prosecute bribery of state public officials, as well as those attempting to bribe them. Specifically, the federal mail and wire fraud statutes prohibit the use of the mail system, phone or internet to carry out a 'scheme to defraud', which includes a scheme to deprive another of 'honest services'. Under these provisions, state public officials who solicit bribes, and private individuals who offer them, can be prosecuted for defrauding the state's citizens of the public official's 'honest services'. In addition, the bribing of state public officials is also prohibited by the laws of each state.

25 Public official participation in commercial activities

Can a public official participate in commercial activities while serving as a public official?

The extent to which public officials may participate in outside commercial activities while serving as a public official varies by branch of government. For 2010, members of Congress are prohibited by statute from earning more than US$26,550 in outside income. Members of Congress are also prohibited by statute from receiving any compensation from an activity that involves a fiduciary relationship (eg, attorney-client) or from serving on a corporation's board of directors. With respect to the executive branch, presidential appointees subject to Senate confirmation – such as cabinet secretaries and their deputies – are prohibited from earning any outside income whatsoever. Senior-level presidential appointees who are not subject to Senate confirmation may earn only US$26,550 in outside income per year and may not receive compensation from an activity involving a fiduciary relationship. Career civil servants in the executive branch who are not presidential appointees are not subject to any outside earned income cap. However, no executive branch employee – whether a presidential appointee or not – may engage in outside employment that would conflict with his or her official duties. For example, a civil servant working for an agency that regulates the energy industry may not earn any outside income from work related to the energy industry.

26 Travel and entertainment

Describe any restrictions on providing domestic officials with gifts, travel expenses, meals or entertainment. Do the restrictions apply to both the providing and receiving of such benefits?

The giving of gifts, or 'gratuities', to public officials is regulated by a criminal statute applicable to all government officials and by regulations promulgated by each branch of government that establish specific gift rules for its employees. The criminal gratuities statute applies to those who provide or receive improper gifts, while the regulations apply only to the receiving of gifts. However, ethics reform legislation enacted in 2007 now makes it a crime – for the first time – for registered lobbyists and organisations that employ them to knowingly provide a gift to a member of Congress that violates legislative branch ethics rules.

The statutory provision that prohibits the payment and solicitation of gratuities is contained within the same statute that prohibits bribery (18 USC section 201). The basic elements of the statute's gratuities provision overlap substantially with the elements of bribery, except that a gratuity need not be paid with the intent to influence the public official. Rather, a person can be convicted of paying a gratuity if he or she gives or offers anything of value to the public official 'for or because of' any official act performed or to be performed. Thus, for example, a gift given to a senator as an expression of gratitude for passing favourable legislation could trigger the gratuities statute, even if the gift was not intended to influence the senator's actions (since it was given after the legislation was already passed).

In addition to the criminal gratuities statute, each branch of government regulates the extent to which its employees may accept gifts. In effect, these regulations prohibit certain gifts that would otherwise not be prohibited by the criminal gratuities statute. With respect to the executive branch regulations, employees of any executive branch department or agency are prohibited from soliciting or accepting anything of monetary value from any person who does or seeks to do business with the employee's agency, performs activities regulated by the employee's agency, seeks official action by the employee's agency, or has interests that may be substantially affected by the performance or non-performance of the employee's official duties. Unlike the criminal gratuities statute, which requires some connection with a specific official act, the executive branch gift regulations can be implicated even where the solicitation of a gift from an interested party is unconnected to any such act. In addition, career civil servants may not accept gifts having an aggregate market value of US$20 or more per occasion, and may not accept gifts having an aggregate market value of more than US$50 from a single source in a given year. The gift rules are even stricter for presidential appointees: under an Executive Order signed by President Obama during his first week in office, Executive Branch officials appointed by the President cannot accept any gifts from regis-

tered lobbyists, even those having a market value of less than US$20.

Under the Rules of the Senate and House of Representatives, members of Congress may not accept a gift worth US$50 or more, or multiple gifts from a single source that total US$100 or more, for a given calendar year. These limits also apply to gifts to relatives of a member, donations by lobbyists to entities controlled by a member, donations made to charities at a member's request and donations to a member's legal defence fund. Under recently passed ethics reform legislation in both the House and the Senate, however, the US$50 gift exceptions are no longer available to registered lobbyists, entities that retain or employ lobbyists, or agents of a foreign government (but the foreign government itself may still provide such gifts). This legislation also imposed additional restrictions on gifts from lobbyists, including prohibiting members from receiving reimbursement or payment in kind for travel when accompanied by a registered lobbyist, or for trips that have been organised by a lobbyist. In addition, the House of Representatives barred members from accepting refreshments from lobbyists in a one-on-one setting. Most significantly, registered lobbyists can face up to a five year prison term for knowingly providing gifts to members of Congress in violation of either the House or Senate ethics rules.

27 Gifts and gratuities

Are certain types of gifts and gratuities permissible under your domestic bribery laws and, if so, what types?

As noted in the answer to question 26, members of Congress may accept gifts that are worth less than US$50 (except from lobbyists or agents of a foreign government), but the aggregate value of such gifts from a single source in a given calendar year must be less than US$100. In addition to gifts under the US$50 dollar limit, the House and Senate Rules exempt contributions to a member's campaign fund from the restrictions on gifts, food and refreshments of nominal value other than a meal, and informational materials like books and videotapes, among other low-value items. Finally, the House and Senate ethics rules also contain a 'widely attended event' exception that allows members (and their staffers) to attend sponsored events, free of charge, where at least 25 non-congressional employees will be in attendance and the event relates to their official duties.

The executive branch regulations similarly include exceptions for nominal gifts, such as those having a market value of US$20 or less (although presidential appointees may not accept any gift from a registered lobbyist), gifts based on a personal relationship and honorary degrees. De minimis items such as refreshments and greeting cards are also excluded from the definition of 'gift.' Like the House and Senate Rules, the executive branch regulations also contain a 'widely-attended gathering' exception, although a key difference is that the employing agency's ethics official must provide the employee with a written finding that the importance of the employee's attendance to his or her official duties outweighs any threat of improper influence. The executive branch regulations also permit officials travelling abroad on official business to accept food and entertainment, as long as it does not exceed the official's per diem and is not provided by a foreign government. Under the recent Executive Order signed by President Obama, however, neither the widely-attended gathering exception nor the exception for food and entertainment in the course of foreign travel are available to presidential appointees.

28 Private commercial bribery

Does your country also prohibit private commercial bribery?

Private commercial bribery is prohibited primarily by various state laws, among which there is considerable variation. New York, for example, has a broad statute that makes it an offence to confer any benefit on an employee, without the consent of his employer, with the intent to influence the employee's professional conduct.

While there is no federal statute that specifically prohibits commercial bribery, there are a handful of statutes that can be used by prosecutors to prosecute commercial bribery cases. First, the mail and wire fraud statutes prohibit the use of the mail system, phone or internet to carry out a 'scheme to defraud', which includes a scheme to deprive another of 'honest services'. A bribe paid to an employee of a corporation has been classified as a scheme to deprive the corporation of the employee's 'honest services', and thus can be prosecuted under the mail and wire fraud statutes. Second, the so-called 'federal funds bribery statute' prohibits the payment of bribes to any organisation -- which can include a private company -- that in any one year receives federal funds in excess of US$10,000, whether through a grant, loan, contract, or otherwise. Finally, a federal statute known as the 'Travel Act' makes it a federal criminal offence to commit an 'unlawful act' – which includes violating state commercial bribery laws – if the bribery is facilitated by travelling in interstate commerce or using the mail system. Thus, if an individual travels from New Jersey to New York in order to effectuate a bribe, that individual can be prosecuted under the federal Travel Act for violating New York's commercial bribery law. A violation of the Travel Act based on violating a state commercial bribery law can result in a prison term of five years and a fine. Finally, commercial bribery is also actionable as a tort in the civil court system.

29 Penalties and enforcement

What are the sanctions for individuals and companies violating the domestic bribery rules?

Under the federal bribery statute, both the provider and recipient of a bribe in violation of the federal bribery statute can face up to 15 years' imprisonment. Moreover, either in addition to or in lieu of a prison sentence, individuals who violate the bribery statute can be fined up to the greater of US$250,000 (US$500,000 for organisations) or three times the monetary equivalent of the bribe. Under the gratuities statute, the provider or recipient of an illegal gratuity is subject to up to two years' imprisonment or a fine of up to US$250,000 (US$500,000 for organisations) or both.

Senior presidential appointees and members of Congress who violate the statute regulating outside earned income can face a civil enforcement action, which can result in a fine of US$10,000 or the amount of compensation received, whichever is greater. Government employees who violate applicable gift and earned income regulations can face disciplinary action by their employing agency or body. Registered lobbyists can face up to a five year prison term for knowingly providing gifts to members of Congress in violation of either the House or Senate ethics rules.

30 Facilitating payments

Have the domestic bribery laws been enforced with respect to facilitating or 'grease' payments?

The domestic bribery statute does not contain an exception for grease payments. The statute covers any payment made with the intent to 'influence an official act' and the statutory term 'official act' includes non-discretionary acts. Courts have held, however, that if an official demands payment to perform a routine duty, a defendant may raise an economic coercion defence to the bribery charge.

31 Recent decisions and investigations

Identify and summarise recent landmark decisions and investigations involving domestic bribery laws, including any investigations or decisions involving foreign companies.

The highest-profile public bribery case in the United States this past year was the conviction of former Congressman William Jefferson of Louisiana. The government accused Congressman Jefferson of soliciting and receiving bribes from a variety of individuals and

businesses in exchange for promoting their products and services to various government officials in Africa. In particular, the government alleged that Congressman Jefferson used his position as chairman of an influential congressional subcommittee to promote the ventures of those who had paid him bribes – including by leading congressional delegations to Africa and writing letters to American and African officials. Congressman Jefferson was also charged with attempting to directly bribe a Nigerian government official in violation of the FCPA. The most notorious piece of evidence associated with the Congressman's scheme was US$90,000 in cash the government found in his home freezer. Congressman Jefferson was found guilty on 11 of the 16 counts against him (although not the substantive FCPA count), was ordered to forfeit nearly US$500,000 in ill-gotten gains, and was sentenced to 13 years in prison – the longest prison sentence ever handed down to a former member of Congress for crimes committed while in office.

A second significant development in 2009 was the Supreme Court's decision to hear three cases concerning the 'honest services fraud' statute (discussed in question 28). The statute, which is vaguely written, broadly requires public and corporate officials to act in the best interests of their constituents and employers. The law has been used by federal prosecutors to sweep in a broad swath of unethical behaviour – ranging from violations of state ethics laws to corporate fraud – and has not surprisingly been the source of significant controversy. In 2009, the Supreme Court heard argument in two honest services fraud cases. The first involved the conviction of media mogul Conrad Black for defrauding his company, Hollinger International; Mr Black argued that he should not have been convicted because he did not intend to economically harm his company. The second involves an Alaska state legislator convicted of honest services fraud for failing to disclose a conflict of interest in violation of Alaska law; he argued that using state law as a predicate for a federal honest services fraud charge violates principles of federalism. Finally, the Supreme Court set a March 2010 argument date to hear a third honest services fraud case, this one involving former Enron executive Jeffrey Skilling, who has argued that the honest services fraud statute is unconstitutionally vague. With all of these cases before it, the Supreme Court will no doubt soon be adding clarity to a murky area of US anti-corruption law.

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