NEW ANTIBRIBERY RULES FOR INTERNATIONAL BUSINESS TO CREATE NEW COMPLIANCE RESPONSIBILITIES

By

Lucinda A. Low
John E. Davis[1]

I. INTRODUCTION

In 1977, following revelations of massive payoffs by literally hundreds of U.S. companies seeking business in overseas markets, the United States enacted the Foreign Corrupt Practices Act (the "FCPA" or the "Act").[2] The FCPA, using domestic antibribery legislation as its guide, criminalized the bribery by U.S. persons and companies -- U.S. and foreign -- with publicly-traded stock on American securities exchanges ("issuers") of foreign government officials, political party officials, and candidates for political office in order to obtain business.[3] It also mandated that issuers adhere to prescribed standards of recordkeeping, maintain internal controls, and take other steps to ensure that investors could obtain a true and complete financial picture of those companies' activities.[4] Coupled with a prior amendment to U.S. tax laws denying any tax deduction for bribes (Internal Revenue Code, 26 U.S.C. § 162(c)), the FCPA provided the U.S. government with a potent arsenal for combating improper payments in the overseas business activities of U.S. companies. U.S. companies found themselves scrambling in the late 1970s to understand the new rules of the game and to develop internal programs and procedures to ensure compliance with the law.

A particular challenge in this regard was third-party relationships. Because the FCPA made U.S. companies liable for the actions of their agents, joint venture partners, and other third parties under some circumstances, U.S. companies were forced to assume new policing responsibilities vis-à-vis third parties in other countries to ensure that they would not be found liable for having ignored "red flags" or having put their "heads in the sand."[5]

Despite the controversy engendered by the FCPA -- particularly its unilateral application and vicarious liability provisions -- it has proved to be an enduring element of the regulatory landscape for U.S. companies doing business abroad. Efforts to abolish or weaken it have failed, although one set of amendments in 1988 clarified it in certain respects.[6] U.S. industry has gradually adapted itself to the FCPA's requirements, despite a lack of detailed guidance from enforcement officials on many issues. The 1990s have found U.S. companies in a "second generation" adjustment process, responding to higher compliance standards recently articulated by enforcement officials and the challenges of doing business in new and in some cases difficult foreign markets.[7]

At the same time this "second generation" of FCPA compliance issues has played out in the U.S., dramatic changes have occurred in the international landscape. Developed and developing countries alike, as well as international institutions, have become far less tolerant of

corrupt activity by and toward government officials. New non-governmental watchdogs (NGOs) have highlighted the economic problems created by corruption and spearheaded reform efforts at the national and international levels.[8]

The result -- achieved in a remarkably short time -- has been a substantially altered legal landscape. Although much remains to be done, the achievements to date clearly represent the establishment of new international "rules of the game" with respect to business conduct and ethics and will require the development of new compliance measures on the part of international businesses.

II. THE NEW RULES OF THE GAME

The most significant developments in the international area to date are three: new anticorruption rules in international financial institutions; new anticorruption rules for Members of the Organization of American States (OAS); and new anticorruption rules for OECD Member States.

A. International Financial Institutions

In 1996, two World Bank affiliates, IBRD and IDA, adopted new procurement guidelines.[9] In a nutshell, the Bank made the absence of corruption a condition of lending. Under the guidelines, the Bank will not provide financing to projects in which it has evidence of corruption and will cancel any credits in which corruption is found to have occurred. These guidelines were strengthened in 1997, with procedures to help Bank officials police for possible corrupt activities, such as project audit rights. Also in 1997, the Bank declined to provide new credits to Kenya, citing concerns about corruption.[10]

The Bank's new focus on corruption has prompted regional international financial institutions to address this issue; virtually all of them have developed or are in the process of developing rules.[11]

B. Organization of American States

In 1996, delegates to a Specialized Conference of the Organization of American States (the "OAS") negotiated an Inter-American Convention Against Corruption (the "Inter-American Convention").[12] Signed by the thirty-two Member States of the OAS, including the U.S., Canada, Mexico, Brazil and Argentina, this Convention entered into force on March 20, 1997.

The Inter-American Convention, like the FCPA, requires a State party to criminalize the offering or payment of a bribe in order to obtain business (so-called "active" bribery). It also goes beyond the FCPA in several important respects, requiring criminalization of the receipt of a bribe and other acts of "passive" bribery. Most innovatively, it requires criminalization of the "illicit enrichment" of a public official during his or her term of office. Finally, it establishes mechanisms for international cooperation in investigations and enforcement. The Inter-American Convention is remarkable not only for its scope, but also as a reflection of a

hemispheric consensus regarding the need to combat official corruption in order to promote economic and social development and the rule of law.[13]

C. OECD

The most recent major international development comes from the Organization for Economic Cooperation and Development (OECD). Following several years of work on corruption by OECD bodies, on December 17, 1997, the twenty-eight Member States of the OECD and five non-member state observers to its Working Group on Bribery in International Business Transactions (Argentina, Brazil, Bulgaria, Chile, and the Slovak Republic) signed the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("Convention").[14]

The OECD Convention is substantially narrower in scope than either the Inter-American Convention or U.S. antibribery laws. Its major elements are: (1) a requirement that signatory countries criminalize the bribery of foreign public officials; and (2) a commitment by countries to cooperate in the investigation and enforcement of transnational antibribery laws. Its implementation will mean that for the first time, Germany, France, the U.K., Japan, and other major trading countries will be required to impose legal restrictions on their companies similar to those imposed on U.S. companies by the FCPA.

The terms of the OECD Convention, although not identical to the FCPA, incorporate many of the same concepts and principles.

1. Category of Payors Covered

The Convention requires that signatories prohibit corrupt payments by "any person," a broader category of bribe payors than under U.S. law.[15] Consequently, any person, natural or legal (regardless of his or her citizenship or domicile), acting within a country's territory will be covered.[16] Each country will also apply its law extraterritorially in accordance with its own legal principles.[17]

2. Categories of Payors Covered

The Convention applies to payments to officials in any branch of government.[18] It does not, however, cover political parties, party officials, or candidates for political office, except in certain circumstances relating to officials of political parties in one-party states.[19] The Convention therefore creates a narrower category of bribe recipients than the FCPA.

3. Who Is an "Official"

The OECD Convention, like the Inter-American Convention and the FCPA, has an autonomous definition of "public official."[20] As a result, individuals who may not be considered "public officials" under national law could be treated as officials for purposes of the OECD Convention. Part-time or unpaid officials, private individuals carrying out official (government) functions, and, as discussed in point 4 below, officials of state-owned enterprises, will all be covered, along with the more readily identifiable categories of "officials."

4. Definition of State-Owned Enterprises

As noted above, bribes to officials of state-owned enterprises (parastatals) and other instrumentalities are covered by the Convention.[21] State ownership or control is defined to include traditional indicia of control, including majority stock ownership (a less aggressive test than that currently applied by U.S. enforcement officials), but privately-held companies could be treated as parastatals if they carry out public functions or receive government subsidies.[22]

5. More Than Transfers of Money Covered

As in U.S. law, not just money payments but other transfers of value to public officials (such as gifts or entertainment) are prohibited, and no *de minimis* monetary "safe harbors" are provided.[23] While the Convention text does not expressly exclude "facilitating" or "grease" payments from its coverage as does U.S. law (see 15 U.S.C. §§ 78dd-1(b), dd-2(b)), the accompanying Commentary indicates that they are not prohibited on the basis that they are not designed "to obtain or retain business . . . ."[24]

6. Scope of Business Activity Covered

Under the Convention, the offense covers payments to "obtain or retain business" and to secure any "other improper advantage in the conduct of international business."[25] While functionally equivalent to the U.S. Justice Department's interpretation of similar language in the FCPA, the additional language clarifies the Convention's application to a wide range of business activities beyond the procurement context.

7. Vicarious Liability Standard

Indirect as well as direct payments to officials are covered.[26] However, the Convention does not incorporate the FCPA's "knowledge" test that allows liability to be imposed vicariously for payments by third parties in cases of "willful blindness" or disregard of "red flags" indicating that a corrupt payment is probable. It instead requires a showing that a person made a payment to a third party with the intent that it be passed on to an official. Id. (it is an offense "intentionally" to offer a prohibited payment). While it remains to be seen how this vicarious liability standard will be implemented by OECD Member States, the OECD Convention appears at first blush to establish a lower risk of vicarious liability than the FCPA.

8. Corporate Criminal Responsibility

Countries that do not recognize corporate criminal responsibility (such as Japan) are not required to change their laws to include this concept, but are required to penalize corporate violations "dissuasively" under civil laws.[27]

9. Standards of Prosecution

Investigation and prosecution will be subject to the applicable rules and principles of each signatory governing prosecutorial discretion. The Convention specifically forbids

consideration of national economic interest and the identity of the persons involved in the offense in the exercise of those principles.[28]

10. Books and Records

Although the Convention does not mandate the elimination of tax deductibility of bribes, still common in Europe, it does call for signatories to enact unspecified accounting and record-keeping rules necessary to prevent the keeping of off-the-books accounts or false records, or other accounting practices, for the purpose of bribing foreign officials or hiding such bribery.[29] The Convention Commentary references a set of recommendations adopted by the OECD in 1997.[30]

III. IMPLEMENTATION AND ENFORCEMENT OF THE NEW RULES AND THEIR COMPLIANCE IMPLICATIONS

A. Implementation and Enforcement

The Inter-American Convention, although in effect, is only partially self-executing. Many provisions -- especially those requiring the establishment of new criminal offenses -- require implementing legislation at the national level. Efforts are underway in the OAS to ensure some consistency and uniformity in implementation among States party. Until that implementation is more fully accomplished, the precise compliance burdens companies will face under this Convention are difficult to determine.

The OECD Convention is likewise a treaty that will require ratification by its signatories to become effective. The compromise entry into force provision[31] requires ratification by five of the ten countries with the largest export shares, representing 60 percent of exports in the aggregate. If this test is not met by December 31, 1998, any state that has then ratified the Convention may declare its intention to be bound, and once two states do so, the Convention will enter into force as to those states. Reservations to the Convention appear to be permitted.

Ratifying states must adopt national legislation to implement the OECD Convention's antibribery provisions. Proper implementing legislation should assure a common minimum standard of conduct, although national laws will not be identical.[32] Once the Convention is in effect, investigations and prosecutions will take place under national laws; States will be required to provide each other mutual assistance; and bank secrecy (as in the OAS Convention) will not justify a refusal to cooperate.[33] The Convention further provides for "systematic follow-up," including monitoring, although there is no complaint procedure among the parties.[34]

B. Compliance Implications

Thus, while the new World Bank rules, and the Inter-American and OECD Conventions, establish new rules of the game for international businesses, some important aspects relevant to determining the specific compliance standards of enterprises remain to be developed. Because the main contours are clear, however, it is not too early for companies that have not previously been concerned with antibribery law compliance to begin to focus on this issue. Companies

should anticipate the need to develop compliance policies and procedures -- including appropriate internal controls -- on financial transactions, due diligence and contract review mechanisms for third parties, and other compliance elements appropriate to their business. Likewise, they should anticipate the need to educate company personnel about the new standards and train them in the company's selected compliance procedures. Finally, companies will need to adopt internal mechanisms for reviewing the efficacy of their compliance efforts and for addressing problems that may arise.

While implementation and compliance on an international plane will not simply replicate the U.S. model -- national laws and systems will play an important role in shaping the necessary compliance elements -- the U.S. approach, as the world's only experience with transnational antibribery laws, will necessarily be a touchstone for the international efforts to come.

IV. CONCLUSION

Unilateral efforts to combat transnational bribery, such as the U.S. FCPA, have ceded center stage to multilateral and international initiatives. The World Bank, the OAS, and the OECD actions of the past two years are just three of the many recent developments that are dramatically rewriting the rules of the game regarding corruption in international business. While the new rules will take some time to implement, companies engaged in international business should anticipate that they will need to develop strategies and programs to comply with these new rules without forgoing their ability to compete.

g:\intl.lib\IBA Article re New Anti-Bribery Rules

---

1 Lucinda A. Low is a member and John E. Davis is an associate of the Washington, D.C. law firm of Miller & Chevalier. Both have extensive experience counseling U.S. companies on compliance with international business regulations, including the U.S. Foreign Corrupt Practices Act.

2 15 U.S.C. §§ 78m, 78dd-1, 78dd-2, 778ff (1994).

3 See 15 U.S.C. §§ 78dd-1, 78dd-2.

4 15 U.S.C. § 78m (1994).

5 15 U.S.C. §§ 78dd-1, 2(h)(3)(A), (B); see H.R. Conf. Rep. No. 576, 100th Cong., 2d Sess. 920 (1988).

6 Pub. L. No. 100-418, 102 Stat. 1107 (1988).

7 L. Low and C.S. Wellington, "The Foreign Corrupt Practices Act: Avoiding the Pitfalls," 13 Preventive L. Rep. 13 (1994).

8 The leading NGO in this area is Transparency International, a Berlin-based group founded by former World Bank officials. Transparency International publishes each year a "Corruption Perception Index" ranking countries on the basis of their perceived levels of corruption. See Transparency International, "1997 Corruption Perception Index," TI Press Release (July 3, 1997) (found at www.transparency.de).

9 World Bank, Guidelines: Procurement under IBRD Loans and IDA Credits (Aug. 1996), as amended Sept. 19, 1997.

10 See M. Wrong and M. Hilman, "World Bank Warns Kenya About Corruption," Financial Times, Aug. 9, 1997, at 3.

11 See L.A. Low and K.C. Atkinson, "Led by the U.S., the World Wages War on Corruption, Nat'l L. J., Mar. 3, 1997, at B1, B14-16.

12 Signed March 29, 1996, reprinted in 35 I.L.M. 724 (1996).

13 See L.A. Low, A.K. Bjorklund and K.C. Atkinson, "A Comparison of the Inter-American Convention Against Corruption and the U.S. Foreign Corrupt Practices Act," ___ VA. J. INT'L L. ___ (1998) (forthcoming April 1998).

14 Text of the Convention and Agreed Commentary found at www.oecd.org/daf/cmis/bribery.

15 Convention, Art. 1.1.

16 Convention, Art. 4.1.

17 Convention, Arts. 4.2, 4.4.

18 Convention, Art. 1.4(a).

19 See Commentary, ¶ 16.

20 Convention, Art. 1(4).

21 Convention, Art. 1.4(a).

22 See Commentary, ¶¶ 14, 15.

23 Convention, Art. 1.1.

24 Commentary, ¶ 9.

25 Convention, Art. 1.1 (emphasis added).

26 Convention, Art. 1.1 (covering payments "through intermediaries").

27 Convention, Arts. 2, 3.2.

28 Convention, Art. 5; Commentary, ¶ 27.

29 Convention, Art. 8.

30 Commentary, ¶ 29.

31 Convention, Art. 15.

32 See Commentary, ¶ 3.

33 Convention, Arts. 9.1, 9.3.

34 Convention, Art. 12; Commentary, ¶¶ 34-36 (incorporating notifications and regular reviews).