GETTING THE DEAL THROUGH

Anti-Corruption Regulation

in 37 jurisdictions worldwide

2008

Contributing editor: Homer E Moyer Jr

Published by
Getting the Deal Through
in association with:

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Anti-Corruption Regulation 2008
Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 7908 1188
Fax: +44 20 7229 6910

ISSN 1754-4874

Printed and distributed by Encompass Print Solutions. Tel: 0870 897 3239

The Official Research Partner of the International Bar Association

Anti-Corruption Regulation

Contents 2008

Preface

Getting the Deal Through is delighted to publish the second edition of *Anti-Corruption Regulation*, a volume in the ***Getting the Deal Through*** series of annual special reports, designed to inform subscribers – general counsel, company executives, government agencies and private practice lawyers – on increasingly complex anti-bribery rules around the world.

In the format adopted throughout the ***Getting the Deal Through*** series, the same key questions are answered by leading practitioners in 37 jurisdictions.

Every effort has been made to ensure that matters of concern to readers are covered. However, specific legal advice should always be sought from experienced local advisers. *Anti-Corruption Regulation* is updated annually, and readers are urged to always ensure that they are referring to the current edition.

Getting the Deal Through gratefully acknowledges the contributions of the authors of *Anti-Corruption Regulation 2008*, who have been selected for their recognised expertise in the area. We would particularly like to thank the contributing editor, Homer E Moyer Jr, for his assistance in planning and devising this volume.

Getting the Deal Through
London
April 2008

THE QUEEN'S AWARDS
FOR ENTERPRISE
2006

Global Overview

Homer E Moyer Jr
Miller & Chevalier Chartered

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 transpar-

ency 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 ranks more than 150 countries by their perceived levels of corruption and publishes the results annually. In 2007, Denmark, Finland and New Zealand tied as the countries seen to be the least corrupt in the world, while Somalia and Myanmar, followed closely by Haiti and Iraq, 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 30 leading exporting countries according to the propensity of their companies to bribe foreign officials. In the 2006 BPI, India received the worst ranking, closely followed by China and Russia.

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 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 335 firms and individuals for fraud and corruption.

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 release of a massive internal report finding widespread indicators of corruption in five health-care sectors in India has focused further attention on the Bank and its anti-corruption initiatives. Coincident with this report, leadership of the World Bank itself and of its Department of Institutional Integrity has been in transition, further intensifying scrutiny of the Bank and its commitment to fighting official corruption.

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 Organization 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, the 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 ratified by the requisite number of parties and entered into force on 15 February 1999. Thirty-seven countries in all, including seven countries not members of the OECD, have now signed and ratified the OECD Anti-Bribery Convention.

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 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. Thirty-nine countries have ratified the Criminal Convention, which entered into force on 1 July 2002. The Civil Convention entered into force on 1 November 2003, and has been ratified by thirty-two countries.

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 whistleblower 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. Eleven of the 39 signatories have ratified the African Union Convention. This 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 African Union Convention 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 107 countries are now parties 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 exposes of implicated individuals, 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, extraterritorial or parallel enforcement, the use of liberalised bank secrecy laws and a growing array of penalties and sanctions.

France

In France, a multi-year trial of more than two dozen executives of a major French multinational corporation led to further revelations that have triggered investigations of other companies in multiple jurisdictions. Press accounts have asserted that a consortium of companies paid approximately US$180 million in commissions to a British intermediary who, in turn, allegedly passed money to officials in West Africa in connection with a major energy project. The country in which the project is located, as well as the United States, France and the United Kingdom, are reportedly investigating various aspects of this case and possible violations of their respective national foreign bribery laws.

Norway

In October 2006, in Norway, a Norwegian company partially owned by the state admitted to improper payments in Iran and agreed to a US$3 million settlement of an enforcement action. As its shares are listed on the New York Stock Exchange, the company also agreed in 2006 to a disposition with the US government of alleged violations of the FCPA for the same improper payments, agreeing to pay US$21 million in fines and disgorgement of profits, to establish an anti-corruption compliance programme and to retain an anti-corruption compliance monitor for three years.

United Kingdom

In early 2007 in the United Kingdom, the Serious Fraud Office announced that the UK government had decided to terminate an ongoing, highly publicised investigation into allegations of widespread bribery by a major UK company in connection with projects in Saudi Arabia. The stated reason for the decision was a determination that continuing the investigation would be contrary to the UK's national security. This decision was widely condemned, prompted a demand from the OECD that the UK offer some explanation for its failure to abide by its OECD Anti-Bribery Convention obligations and worsened the UK's image as a country hesitant to prosecute its own corporations for foreign bribery. The decision to terminate that investigation has since been challenged by NGOs in UK courts, and the United States is reportedly proceeding with an FCPA probe of the UK company with cooperation from Swiss federal prosecutors, who, according to press accounts, have agreed to share key financial records linked to the Saudi royal family.

Germany

In October 2007, in Germany, a court fined a large German multinational company €201 million for making more than €1.3 billion in questionable payments. The court action highlights the change in a country that less than a decade ago permitted companies to deduct bribes paid to foreign officials as ordinary business expenses. The prosecution of the company and investigation several of its current and former executives also highlights the effect of the mutual legal assistance provisions of the OECD Anti-Bribery Convention, as German prosecutors are reportedly receiving assistance from Swiss and Italian authorities. The German investigation has also led to parallel investigations in the United States, Italy, France, China, Hungary, Indonesia and Norway.

India

In January 2008, the World Bank and the Government of India (GoI) made public a Detailed Implementation Review (DIR) of India health sector projects, conducted by the World Bank's Department of Institutional Integrity in 2007, that found serious indicators of fraud and corruption. As a result of the India DIR, in March 2008, the World Bank launched nine investigations. The GoI has referred three cases to its criminal authorities, launched a number of follow-up investigations, and vows to punish anyone found guilty of fraud and corruption.

United States

In the United States, the US Department of Justice (DoJ) and the SEC resolved more than 35 cases in 2007. Those cases involved both US and non-US individuals and corporations, imposed civil

and criminal fines in the tens of millions of dollars, and introduced a new variety of sanctions. Corporate defendants resolved these cases by agreeing to deferred prosecution agreements and non-prosecution agreements, as well as 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. Approximately one-third of the DoJ prosecutions in 2007 resulted from voluntary disclosures by the companies involved. US authorities also announced that dozens of additional corporations and individuals are under active investigation.

Among last year's cases in the United States were several matters arising out of the UN's Oil for Food Program and the investigations of the UN Independent Inquiry Committee. These cases were typically based on alleged violations of the books and records provisions of the FCPA, together with a mix of allegations of internal controls, conspiracy and wire fraud charges. The charges generally related to 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 did 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 March 2008, US authorities brought eight FCPA enforcement actions against US and non-US companies involved in the scandal, with penalties ranging from US$2.9 million to 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 Organizations Act (RICO); the recent RICO case brought by Bahrain Alumina BSC against Alcoa Inc based on alleged FCPA violations is an example of such litigation.

Anti-corruption compliance programmes

The rapid changes in the legal structure and in 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.

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 M Hahn and Marc Alain Bohn
Miller & Chevalier Chartered

International anti-corruption conventions

1 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.

Foreign and domestic bribery laws

2 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 Describe the individual 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 (i) any foreign official, (ii) any foreign political party or party official, (iii) any candidate for foreign political office, or (iv) 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 (i) influencing an official act or decision of that person, (ii) inducing that person to do or omit to do any act in violation of his or her lawful duty, (iii) inducing that person to use his or her influence with a foreign government to affect or influence any government act or decision, or (iv) securing any improper advantage;
- 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 13).

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 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 organisation' 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 controls.

5 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 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 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 What are the penalties for individuals and companies violating the foreign bribery laws and regulations?

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 violation. Actual fines can exceed these maximums 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 gain or twice the gross loss of the pecuniary gain or loss from the transaction enabled by the bribe. Individuals can face fines of up to US$100,000 per violation or up to five years' imprisonment, or both.

Civil penalties

Corporations and individuals can be civilly fined up to US$10,000 per violation. In addition, the Securities and Exchange Commission (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.

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) in connection with settlements of FCPA matters.

9 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.

10 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 8.

11 Which government agencies enforce the foreign bribery laws and regulations?

Both the DoJ and the 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.

12 Describe any recent shifts in the patterns of enforcement of the foreign bribery laws and regulations.

FCPA enforcement has accelerated in recent years, with the number of enforcement actions steadily rising. Penalties have become more severe, and disgorgement of profits and a probationary period through the use of deferred prosecution agreements (DPAs) have been required in recent settlements. Individuals have increasingly been targets of prosecution – 16 enforcement actions were brought against individuals in 2007 alone – and sentenced

to prison terms or fined heavily, or both. Many recent prosecutions have been based on expansive interpretations of substantive and jurisdictional provisions. Foreign entities have been directly subjected to US enforcement actions under the FCPA.

The Sarbanes-Oxley Act (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. Enforcement agencies' expectations for compliance standards continue to rise, as reflected in the compliance obligations imposed on companies in recent settlements. Numerous recent enforcement actions have required that the company retain an independent compliance monitor for up to three years.

13 In what circumstances can foreign companies be prosecuted for foreign bribery under your legal system?

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.

14 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 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.

15 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 DPAs and non-prosecution agreements (NPAs). As a matter of prosecutorial discretion, some investigations or disclosures are not pursued.

16 Identify and summarise recent landmark decisions or investigations concerning violations of your laws prohibiting bribery of foreign officials.

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

As of 23 February 2008, the largest financial penalty imposed for FCPA violations was a US$44 million penalty (including a fine and disgorgement of profits) levied against the Baker Hughes Corporation in April 2007. The largest criminal fine for an FCPA anti-bribery violation, a US$26 million aggregate fine, was imposed in February 2007 against three wholly owned subsidiaries of Vetco International Ltd, two of which were non-US subsidiaries.

On 7 June 2007, a former Alcatel CIT executive pleaded guilty to conspiring to violate and violating the FCPA's anti-bribery provisions. This former executive was a French citizen subject to the FCPA through links to US interstate commerce. He is currently awaiting sentencing, but faces up to 10 years in prison, a US$250,000 fine and US$330,000 in forfeiture.

On 20 December 2007, the DoJ and the SEC concluded FCPA investigations into Akzo Nobel, NV, a foreign issuer that had no US operations but was listed on the New York Stock Exchange. For illicit payments made to secure business in Iraq under the United Nations Oil for Food programme, the company agreed to pay a US$2.9 million penalty.

Financial record keeping

17 Which laws and regulations require accurate corporate books and records, effective internal company controls, periodic financial statements and 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 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 record-keeping 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.

19 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 14). 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.

20 What are the penalties for violations of the accounting laws and regulations 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 may be up to a maximum of US$500,000 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. Like the anti-bribery provisions, however, the accounting provisions are also subject to the alternative fine provisions (see question 8).

21 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. 26 USC section 162(c)(1).

Domestic bribery

22 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 – the bribery statute is violated only where something 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 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 Are any public officials not covered or accorded different treatment under these laws?

All federal public officials are subject to the criminal bribery statute. The term 'public official' includes 'a person acting for or on behalf of the United States', which the Supreme Court has defined as someone who 'occupies a position of public trust with official federal responsibilities.' Accordingly, lower courts have broadly construed 'public official' to include low-level officials and private contractors working for the government.

It is important to note, however, that the bribery statute – being federal law – applies only to the bribery of federal public officials. The bribing of state public officials is prohibited by the laws of each state.

25 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 2008, Members of Congress are prohibited by statute (5 USC app. section 501) from earning more than US$25,830 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 – such as cabinet secretaries and their deputies – are prohibited from earning any outside income whatsoever. While career civil servants in the executive branch who are not presidential appointees may earn an outside income, they may not engage in outside employment that would conflict with their 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 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 gratuity rules for its employees. The criminal gratuities statute applies both to the providing and receiving of gifts, while the regulations apply only to public officials receiving gifts.

The domestic criminal bribery statute (18 USC section 201) also prohibits the payment and solicitation of gratuities. 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 though 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 also 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 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, executive branch employees may not accept gifts having an aggregate market value of more US$20 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.

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). Recent reform 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 recently barred Members from accepting refreshments from lobbyists in a one-on-one setting.

27 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 (but multiple gifts from a single source may not exceed US$50 in a calendar year), 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' (see 5 CFR section 2635.203(b)). Executive branch officials may accept such gifts even if they are given because of his or her official position. 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. Unlike the House and Senate rules, however, informational materials are not included in the list of permissible exceptions.

28 Does your country also prohibit private commercial bribery?

Private commercial bribery is prohibited 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. In addition, a federal statute known as the 'Travel Act' (18 USC. section 1952) makes it a federal criminal offence to commit an 'unlawful act' – which includes violating state commercial brib-

Update and trends

Foreign bribery

FCPA enforcement actions brought by the US authorities rose dramatically in 2007, shattering the previous record for enforcement actions brought in one year. Between the DoJ and SEC, there were a total of 38 actions brought this past year, 23 more actions than were brought in 2006, which had been the busiest year on record. Significantly, this increase in enforcement has been characterised by the government as 'just the tip of the iceberg'. Several noteworthy trends in the year's caseload, settlements, and investigations include:

- more enforcement actions against individuals;
- continued prosecution of non-US companies;
- larger penalties for repeat offenders;
- more industry-wide investigations; and
- growing mutual legal assistance between the US and international enforcement agencies.

Domestic bribery

The last few years have seen a spike in the DoJ investigation and prosecution of domestic corruption cases, many of which ensnared prominent Members of Congress and high-profile lobbyists. In response, both the Senate and the House of Representatives passed internal ethics reform legislation that places further restrictions on the relationship between lobbyists and Members of Congress. With the leading candidates for President identifying public corruption as a central issue, the investigation and prosecution of domestic bribery cases is only likely to increase.

ery 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 What are the penalties for individuals and companies violating the domestic bribery laws and regulations?

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.

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

The last few years have seen a number of bribery scandals involving Members of Congress and lobbyists, including the investigation of former House Majority Leader Tom Delay, the

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convictions of Representative Randy 'Duke' Cunningham, Representative Bob Ney, and lobbyist Jack Abramoff, and the indictments of Representative William Jefferson and Representative Rick Renzi.

Congressman Cunningham was sentenced to an eight-year term of imprisonment for soliciting and accepting over US$2.4 million in bribes, including flights on private jets and vacations at luxury resorts, in return for steering federal projects toward favoured contractors. In addition, one of the contractors to whom Congressman Cunningham steered contracts in exchange for bribes was recently sentenced to a 12-year term of imprisonment based in part on bribery charges. Mr Abramoff was investigated for promoting legislation favourable to his clients by providing gifts to congressmen, one example of which was a lavish golf excursion to Scotland with Members of Congress, including Congressman Ney. Abramoff pleaded guilty and was sentenced to a five-year term of imprisonment for fraud, tax, evasion and conspiracy to bribe public officials. Congressman Ney pleaded guilty to violations of the bribery statute, in part for accepting the trip to Scotland and for performing certain official acts in return, such as directing a multimillion-dollar contract to one of Mr Abramoff's technology clients. Mr Ney was sentenced to a 30-month prison term. Congressman Jefferson has been indicted, but not yet convicted, on charges of soliciting more than US$400,000 in bribes in connection with his attempts to broker business deals in Africa. Finally, Congressman Renzi was indicted on 35 counts of bribery, fraud, money laundering, extortion, and other crimes for facilitating land swaps involving federally-owned mining land in exchange for payments from business associates who benefited from his actions.