

United States

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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 briefly 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than the regulations governing the Department of Justice's (DoJ) FCPA opinion procedure, under which the DoJ issues non-precedential opinions regarding its intent to take enforcement action in response to specific inquiries. 28 CFR part 80.

FOREIGN BRIBERY

Legal framework

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

Jurisdiction: jurisdiction exists over US persons acting anywhere in the world, companies listed on US stock exchanges (issuers) and non-US 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.

Definition of a foreign public official

- 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". The FCPA also applies to "any foreign political party or official thereof or any candidate for foreign political office". State-owned companies will normally be considered instrumentalities.

Travel and entertainment restrictions

- 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.

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.

Facilitating payments

- 6** Do the laws and regulations permit facilitating or ‘grease’ payments (ie, small payments to officials for performing non-discretionary duties)?

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 paperwork; the provision of utility, police or mail services; or the performance of other non-discretionary functions.

Payments through intermediaries or third parties

- 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.

Penalties and sanctions

- 8** What are the penalties and sanctions 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.

Liability

- 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.

Civil and criminal enforcement

- 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.

Agency enforcement

- 11** What 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.

Patterns in enforcement

- 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 – 11 in 2006 alone – and sentenced to a term of imprisonment. 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 obliga-

tions 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.

Prosecution of foreign companies

- 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.

Self-disclosure of violations

- 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 the 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 the 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.

Dispute resolution

- 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, settlement agreements and DPAs. As a matter of prosecutorial discretion, some investigations or disclosures are not pursued.

Recent decisions and investigations

- 16** Identify and briefly summarise recent landmark decisions or investigations involving 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 1 April 2007, the largest financial penalty imposed for FCPA violations was a US\$28.5 million penalty (including a fine and disgorgement of profits) levied against the Titan Corporation in 2005. 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.

On 5 July 2006, the SEC charged four former employees of ABB, a Swiss corporation, with violating the FCPA’s anti-bribery and accounting provisions. The three individuals, who were not US citizens but who were subject to the FCPA through links to US interstate commerce, paid fines, disgorgement and pre-judgment interest.

On 13 October 2006, the DoJ and the SEC concluded FCPA investigations against Statoil, ASA, a foreign issuer that had no US operations but was listed on the New York Stock Exchange. For payments to an Iranian official in connection with gas field development contracts, the company agreed to pay a US\$21 million penalty and to retain an independent compliance consultant. Three million US dollars of the penalty was deemed satisfied by penalties previously paid to Norwegian enforcement authorities.

DOMESTIC BRIBERY

Legal framework

- 17** Briefly describe the individual elements of the law prohibiting bribery of a domestic public official.

The domestic criminal bribery statute prohibits:

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

18 USC section 201(b)(1).

Something of value: because ‘anything of value’ can constitute a bribe, 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 19.)

Official act: the prosecutor must also prove a quid pro quo: something must have been given or solicited 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.

Prohibitions

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

In addition to punishing the payment of a bribe, the 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. 18 USC section 201(b)(2).

Public officials

- 19** Are any public officials not covered or accorded different treatment under these laws?

All federal public officials – in all three branches of government – are subject to the criminal bribery statute. The term ‘public offi-

cial' also 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, courts have broadly construed 'public official' to include low-level officials and private contractors working for the government.

The federal statute, 18 USC section 201, applies only to the bribery of federal public officials. The bribing of state public officials is prohibited by state law.

Public official participation in commercial activities

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

The extent to which a public official can participate in commercial activities is governed by a statute – 5 USC app sections 501 and 502 – that limits the income of members of Congress and senior executive branch appointees. In addition, internal ethics rules promulgated by each branch of government supplement the statute. Because these rules differ, different categories of public officials are subject to different rules on outside commercial activities.

The executive branch regulations, 5 CFR section 2635.804 et seq, prohibit cabinet-level presidential appointees, such as the secretary of state, from earning any income from outside employment. Other senior appointees may not earn more than 15 per cent of the annual rate of pay for deputy cabinet secretaries (15 per cent is equal to approximately US\$25,200 for 2007). These officials are also prohibited by statute from receiving any compensation derived from an activity that involves a fiduciary relationship or from serving on a corporation's board of directors. Career civil servants who are not political appointees are not prohibited outright from outside earned income but they may not engage in outside employment that would conflict with their official duties.

The ethics rules of the House of Representatives and the standing rules of the Senate limit the amount of yearly income that its members may earn from outside sources. As with senior executive branch appointees, this limit amounts to US\$25,200 for 2007. Members of Congress may not earn any income, however, for providing professional services involving a fiduciary relationship (except for medical services) or for serving on a corporation's board of directors.

Travel and entertainment

21 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 domestic criminal bribery statute (18 USC section 201) also prohibits the payment and solicitation of gratuities. The basic elements of the provision regarding gratuities 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. The Supreme Court recently clarified that while it is not necessary to prove that the donor intended to influence an official act, it must be shown

that the gift was conferred in connection with, or as a reward for, a specific official act.

Each branch of government also regulates the extent to which its employees may accept gratuities. These regulations supplement the criminal gratuity statute and prohibit certain gratuities that would otherwise be permissible under the statute.

Employees of any executive branch department or agency are prohibited from soliciting or accepting gifts – any item or service having 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 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 regulation can be implicated even where the solicitation of a gift from an interested party is unconnected to any such act.

Under the Rules of the Senate and House of Representatives, congressmen may not accept a gift worth US\$50 or more or multiple gifts from a single source that exceed US\$100 for a given calendar year (compared to US\$50 for executive branch employees). These limits apply to gifts to relatives of a congressman, donations by lobbyists to entities controlled by congressmen, donations made to charities at a congressman's request and donations to a congressman's legal defence fund. Reform legislation enacted by the House of Representatives following a number of highly publicised public corruption scandals imposed additional limits applicable to lobbyists, including prohibitions against receiving reimbursement or payment in kind for travel when accompanied by a registered lobbyist, or for trips that have been organised by a lobbyist.

Gifts and gratuities

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

In addition to gifts under the US dollar limits noted in question 21, the House and Senate Rules exempt contributions to a congressman's campaign fund from the restrictions on gifts.

The executive branch regulations 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". 5 CFR section 2635.203(b).

Private commercial bribery

23 Does your country also prohibit private commercial bribery?

Private commercial bribery is not addressed by federal criminal statutes. It is prohibited, however, by various state laws, among which there is considerable variation. Commercial bribery is also actionable as a tort in the civil court system.

Penalties and enforcement

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

Under the federal bribery statute, both the provider and recipient of a bribe who violate the federal bribery statute can face up to 15 years' imprisonment or a fine of US\$250,000 (US\$500,000 for organisations) or the greater of three times the monetary equiva-

lent of the bribe, or some or all of these. Under the gratuities statute, the provider or recipient of a 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.

Facilitating payments

- 25** 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.

Recent decisions and investigations

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

2006 saw a number of bribery investigations of members of Congress, including former House Majority Leader Tom Delay, and the convictions of Representative Randy 'Duke' Cunningham, lobbyist Jack Abramoff and Representative Bob Ney.

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 certain contractors. Jack Abramoff was investigated for his tactics in promoting legislation favourable to his clients, one 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.

FINANCIAL RECORD-KEEPING

Laws and regulations

- 27** What laws and regulations exist requiring 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 the preparation of financial statements in conformity with GAAP standards. Issuers are strictly liable for the failure of any of its owned or controlled foreign affiliates to meet the books and records and internal controls standards for the FCPA.

The 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. The 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. The 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. The SOX also established the Public Company Accounting Oversight Board (PCAOB) and authorised it to set auditing standards.

Prosecution under financial record-keeping legislation

- 28** 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.

Disclosure of violations or irregularities

- 29** 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 disclosure of violations.

Penalties and sanctions for accounting violations

- 30** What are the penalties and sanctions 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

order 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 securities laws violations. '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).

Update and trends

Key trends in US anti-corruption laws include:

- increased enforcement activity, including prosecution of individuals and foreign persons;
- higher penalties;
- focus on 'lobbying' activities;
- heightened expectations for compliance and pressure to disclose violations.

For more details, see questions 12, 16, 21 and 26.

Deductibility of domestic or foreign bribes

- 31** 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).

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