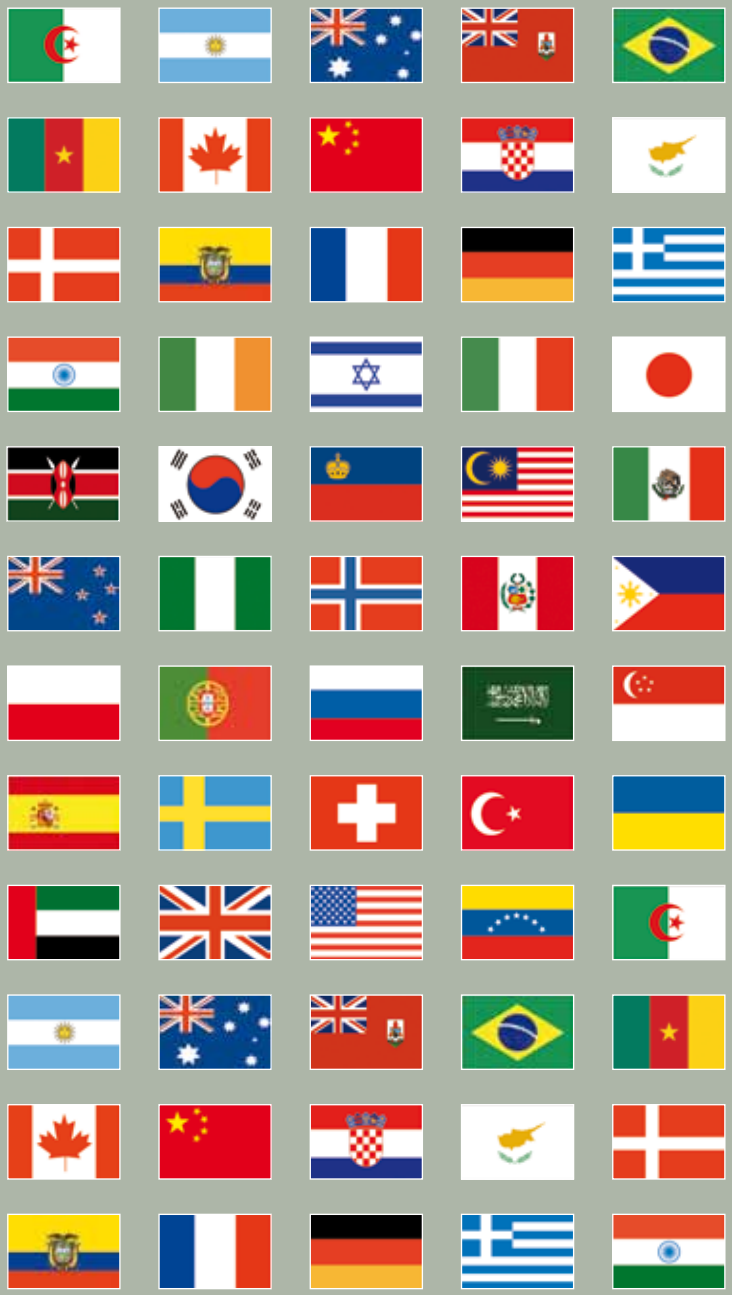
GETTING THE DEAL THROUGH

Anti-Corruption Regulation

in 44 jurisdictions worldwide

2014

Contributing editor: Homer E Moyer Jr



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Getting the Deal Through is delighted to publish the eighth edition of *Anti-Corruption Regulation*, a volume in our series of annual reports that provide international analysis in key areas of law and policy for corporate counsel, cross-border legal practitioners and business people.

Following the format adopted throughout the series, the same key questions are answered by leading practitioners in each of the 44 jurisdictions featured. New jurisdictions this year include Algeria, Bermuda, Cameroon, Denmark, Ecuador, Malaysia, Peru and Portugal. There is also a new chapter on asset recovery, in addition to a global overview and the perspectives of Transparency International and the OECD.

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. *Getting the Deal Through* publications are updated annually in print. Please ensure you are referring to the latest print edition or to the online version at www.GettingTheDealThrough.com.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We would also like to extend special thanks to contributing editor Homer E Moyer Jr of Miller & Chevalier Chartered for his continued assistance with this volume.

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Global Overview

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Corruption, including corruption of public officials, dates from early in human history and countries have long had laws to punish their own corrupt officials and those who pay them bribes. But national laws prohibiting a country's own citizens and corporations from bribing public officials of other nations are a new phenomenon, less than a generation old. Over the course of perhaps the past 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 the treaty obligations that more than 150 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 better-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 Convention against Corruption. Spurred on by a growing number of high-profile enforcement actions, investigative reporting and broad media coverage, ongoing scrutiny by non-governmental organisations and the appearance of an expanding cottage industry of anti-corruption compliance programmes in multinational corporations, anti-corruption law and practice is rapidly coming of age.

The US 'questionable payments' disclosures and the FCPA

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

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

Transparency International

In hindsight, a different type of milestone occurred in Germany in 1993 with the founding of Transparency International, a non-governmental organisation created to combat global corruption. With national chapters and chapters-in-formation now in more than 90 countries, Transparency International promotes transparency in governmental activities and lobbies governments to enact anti-corruption reforms. Transparency International's annual Corruption Perceptions Index (CPI), which it began publishing in 1995, has been uniquely effective in publicising and heightening public awareness of those countries in which official corruption is perceived to be most rampant. Using assessment and opinion surveys, the CPI currently ranks 177 countries and territories by their perceived levels of corruption and publishes the results annually. In 2013, Denmark and New Zealand, followed by Finland, topped the index as the countries seen to be the least corrupt in the world, while Afghanistan, North

Korea and Somalia, followed by Sudan, South Sudan and Libya, were 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 28 leading exporting countries according to the propensity of their companies to bribe foreign officials. In the 2011 BPI, Dutch and Swiss firms were seen as the least likely to bribe, while Russian firms, followed closely by Chinese and Mexican firms, were seen as the worst offenders.

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

The World Bank

Three years after the formation of Transparency International, the World Bank joined the battle to stem official corruption. In 1996, James D Wolfensohn, then president of the World Bank, announced at the annual meetings of the World Bank and the International Monetary Fund that the international community had to deal with 'the cancer of corruption'. Since then, the World Bank has launched more than 600 programmes designed to curb corruption globally and within its own projects. These programmes, which have proved controversial and have encountered opposition from various World Bank member states, include debarring consultants and contractors that engage in corruption in connection with World Bank-funded projects. Since 1999, the World Bank has sanctioned over 540 firms and individuals for fraud and corruption, and referrals from the Integrity Vice Presidency of findings of fraud or corruption to national authorities for prosecution have resulted in dozens of criminal convictions. In September 2013, the World Bank announced that during the 2013 fiscal year (ending 30 June 2013) it debarred 47 firms and individuals for wrongdoing, honoured 295 additional cross-debarments under a 2010 multilateral agreement (see below), entered into several high-profile negotiated resolution agreements in which companies acknowledged misconduct related to a number of World Bank-financed projects, and cooperated with authorities from numerous countries to quickly address corruption identified during ongoing World Bank investigations. The World Bank maintains a listing of firms and individuals it has debarred for fraud and corruption on its website and, in an effort to increase the transparency and accountability of its sanctions process, the World Bank recently began publishing the full text of sanction decisions issued by its Sanctions Board.

In August 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.

In April 2010, the World Bank and four other multilateral development banks (MDBs) – the African Development Bank, the Asian Development Bank, the European Bank for Reconstruction and Development and the Inter-American Development Bank Group – each agreed to cross-debar any firm debarred by one of the other MDBs for engaging in corruption or fraud on an MDB-financed development project. Mutual enforcement is subject to several criteria, including that the initial debarment is made public and the debarment decision is made within 10 years of the misconduct. The agreement also provides for wider enforcement of cross-debarment procedures by welcoming other international financial institutions to join the agreement after its entry into force.

In October 2010, the World Bank announced the creation of the International Corruption Hunters Alliance to connect anti-corruption authorities from different countries and to aid in the tracking and resolving of complex corruption and fraud investigations that are cross-border in nature. In June 2012, the World Bank convened its second large-scale gathering of the Alliance. According to the World Bank, the Alliance has succeeded in bringing together more than 280 senior enforcement and anti-corruption officials from 134 countries to date in an effort to inject momentum into global anti-corruption efforts.

Finally, the World Bank has significantly expanded its partnerships with national authorities and development organisations in recent years to increase the impact of World Bank investigations and increase the capacity of countries throughout the world to combat corruption. For example, since 2010, the World Bank has entered into more than a dozen cooperation agreements with authorities such as the UK Serious Fraud Office (SFO), the European Anti-Fraud Office, the International Criminal Court, the United States Agency for International Development (USAID), the Australian Agency for International Development, the Nordic Development Fund, the Ministry of Security and Justice of the Netherlands, the Liberian Anti-Corruption Commission and the Ombudsman of the Philippines.

In the coming years, 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.

International anti-corruption conventions

Watershed developments in the creation of global anti-corruption law came with the adoption of a series of international anti-corruption conventions between 1996 and 2005. Although attention in the early 1990s was focused on the Organisation for Economic Co-operation 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 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 book-keeping, the IACAC facilitates international cooperation in evidence-gathering.

In 1997, 28 OECD member states and five non-member observers signed the Convention on Combating Bribery of Foreign Officials in International Business Transactions (OECD Anti-Bribery Convention), which was subsequently ratified by the requisite number of parties and entered into force on 15 February 1999. Forty countries in all, including six countries not currently members of the OECD, have now signed and ratified the OECD Anti-Bribery Convention, most recently Colombia, which ratified the country's accession to the convention on 20 November 2012.

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

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

report and recommendations are forwarded to the government of each participating country and are posted on the OECD's website.

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

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

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

The Civil Convention provides for compensation for damage that results 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 review.

The African Union Convention on Preventing and Combating Corruption was adopted on 11 July 2003. To date, 34 of the 48 signatories have ratified the African Union Convention. The convention covers a wide range of offences including bribery (domestic and foreign), diversion of property by public officials, trading in influence, illicit enrichment, money laundering and concealment of property. The convention also guarantees access to information and the participation of civil society and the media in monitoring it. Other articles seek to ban the use of funds acquired through illicit and corrupt practices to finance political parties and require state parties to adopt legislative measures to facilitate the repatriation of the proceeds of corruption.

Most aggressive, and potentially most important, of all of the international conventions is the United Nations 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 169 countries are now party to it, though not all are signatories.

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

Enforcement

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

Greece

In August 2012, a large German engineering firm agreed to pay the Greek Ministry of Finance €330 million to resolve longstanding bribery allegations involving the firm's Greek subsidiary. According to Greek authorities, the subsidiary paid millions of euros in bribes from 1997 to 2002 to win contracts with Greece's state-owned telecommunications company. Under the terms of the settlement, the engineering firm will reportedly satisfy its monetary penalty through a combination of writing off debt the firm is owed by the Greek government, investing in the local Greek economy and covering the Greek government's legal costs. The Greek government will also reportedly appoint a committee to oversee the engineering firm's compliance programme. Over the past few years, the engineering firm has settled related bribery charges with a number of other countries, including the United States and Germany.

In February 2013, Greek prosecutors announced criminal charges against five executives of the orthopaedic medical device subsidiary (orthopaedic subsidiary) of a global US health-care company. The executives are accused of paying €16 million in bribes to doctors at government-owned hospitals in Greece. The alleged bribes were reportedly paid between 1998 and 2006 to secure the assistance of these doctors in promoting the company's products. In addition to charging these executives, Greek prosecutors have also formally accused eight government-employed doctors – mostly orthopaedic specialists – of taking bribes and money laundering in connection with the same allegations. The charges by Greek authorities come approximately two years after the orthopaedic subsidiary and its US parent resolved related charges in parallel actions brought by enforcement authorities in the UK and the US, respectively.

Switzerland

In November 2011, the Swiss Office of the Attorney General announced a summary punishment order against the Swiss subsidiary of a global, Paris-based power and engineering firm, assessing a total penalty of 38.9 million Swiss francs against the company. The engineering firm allegedly paid hundreds of millions of euros in bribes to public officials throughout the world to obtain civil-engineering contracts. The questionable payments were first discovered by an accounting firm during an audit of a small private Swiss bank. After a two-year investigation encompassing 15 countries, Swiss authorities charged the engineering firm with corporate negligence, stating that the company 'did not take all necessary and reasonable organisational precautions to prevent bribery of foreign public officials in Latvia, Tunisia and Malaysia'. Consultants engaged by the company allegedly forwarded a significant portion of their success fees to foreign officials to influence the award of state contracts. In February 2012, the World Bank announced the three-year debarment of two

of the engineering firm's subsidiaries for alleged bribery related to a Bank-financed hydropower project in Zambia. The subsidiaries also agreed to pay US$9.5 million in restitution pursuant to a negotiated resolution agreement with the Bank. Authorities in the United States, France, Brazil and the United Kingdom are also reportedly investigating the engineering firm in connection with these and other bribery allegations against the company. In March 2010, the UK's Serious Fraud Office arrested three of the company's directors on an array of corruption-related charges. This prosecution is ongoing.

In November 2013, Swiss prosecutors entered into a settlement with a Germany-based global engineering and electronics firm after the company admitted that it failed to prevent a Swedish subsidiary from making illicit payments to senior executives of Russia's state-owned gas company in exchange for contracts related to the construction of a large-scale gas pipeline. In pleading guilty to 'organisational offences', the engineering company agreed to make a US$136,000 donation to the Red Cross and disgorge US$10.6 million in unlawful profits.

Canada

In recent years, the Canadian government has increased its efforts to investigate and prosecute violations of the country's Corruption of Foreign Public Officials Act (CFPOA) and has enhanced and strengthened the act's enforcement provisions.

In June 2011, Canadian authorities brought their first sizeable case under the CFPOA, a C$9.5 million anti-bribery enforcement action against a publicly held Canadian oil and gas exploration company. Canadian prosecutors followed up on this enforcement action in January 2013, when they secured a guilty plea from a privately held, Calgary-based oil and gas exploration company in connection with efforts to improperly secure exclusive contracts to explore and develop oil and gas reserves in southern Chad. Among other things, the Calgary company acknowledged providing direct and indirect benefits to the wife of the Chadian ambassador in an attempt to induce the ambassador to use his position to influence the award of these contracts. After initially contemplating an agreement with a consulting company owned by the Chadian ambassador, the Calgary company instead entered into a C$2 million agreement with a consulting company owned by the ambassador's wife. The Calgary company also allowed the ambassador's wife and the wife of another diplomat to purchase 'founders' shares' in the company. In mid-2011, during due diligence conducted in anticipation of a planned IPO, the Calgary company's new management team uncovered the scheme, initiated an internal investigation, and made a voluntary disclosure to Canadian and US authorities. As part of its settlement with Canadian authorities, the Calgary company agreed to pay C$10.35 million in penalties. Canadian prosecutors are still trying to recoup the proceeds of the bribery scheme from the ambassador's wife, whose shares in the Calgary company may end up being worth over C$30 million.

In June 2013, Canada amended the CFPOA to include a new books and records offence, enhance the jurisdictional scope over and stiffen penalties for foreign bribery, eliminate the previous exception for facilitation payments and the words 'for profit' from the definition of business, and centralise the authority to investigate the corruption of Canadian and foreign officials with the Royal Canadian Mounted Police.

In August 2013, Canadian authorities convicted the first individual under the CFPOA for attempting to bribe officials associated with India's state-owned airline, Air India, in an effort to secure a contract for an Ottawa-based technology company to provide facial recognition software and other related security systems. The individual, an agent for the technology company, made arrangements to provide two bribes to Air India officials totalling C$450,000, both of which ultimately failed to secure the desired contract for the technology company. This conviction comes in the midst of the prominent, ongoing prosecution of two executives from a Montreal-based engineering firm that is currently under investigation for allegedly bribing foreign officials in over 10 African and Asian countries in connection with large-scale international construction projects. Earlier in 2013 the World Bank debarred this engineering company and 100 of its affiliates from working on World Bank-funded projects for 10 years due to alleged misconduct in Bangladesh, Cambodia and elsewhere.

United Kingdom

On 1 July 2011, the UK Bribery Act 2010 (Bribery Act) entered into force after years of debate. The legislation banned both the payment and receipt of an 'advantage' provided to induce a person to improperly perform a function or activity or reward a person for such an improper performance, regardless of whether it is a public function or a private business activity.

In August 2013, the UK's Serious Fraud Office (SFO) charged three British individuals with, among other things, 'making and accepting a financial advantage' in violation of the Bribery Act. While other UK agencies have previously brought cases under the Bribery Act, this represents the first formal criminal prosecution by the SFO, which is the UK enforcement body charged with investigating high-value and more complex cases of bribery and corruption. The charges in this matter stem from an alleged £23 million fraud related to the sale of biofuel investment products to be grown on land purchased in Cambodia. The individuals involved are all connected to a UK biofuel investment company that has since been placed in administration (a procedure similar to bankruptcy); they include the company chairman, who was arrested in Cambodia earlier this year on charges of forgery related to the allegations. UK authorities are reportedly seeking his extradition.

Since the Bribery Act applies only to conduct occurring after its implementation, UK authorities have continued to prosecute foreign corruption that predates the act using a patchwork of civil and criminal corruption laws the UK has long had in place. For example, in July 2012, the SFO announced an enforcement action against a UK-based publisher for alleged unlawful payments made by its wholly owned Kenyan and Tanzanian subsidiaries. From 2007 to 2010, the subsidiaries allegedly offered and made corrupt payments intended to induce recipients to award them publishing contracts to supply foreign governments with textbooks. Upon learning of the potentially improper payments, the publishing company initiated an internal investigation and voluntarily reported the concerns to the SFO. As part of its settlement with the SFO, the publishing company agreed to pay £1.9 million in civil recovery and court costs and will have a corporate monitor imposed. In a parallel proceeding, the World Bank also announced a negotiated resolution agreement with the publishing company that requires the company to pay US$500,000 in restitution, debars its two subsidiaries for a period of three years, and obliges the publishing company's monitor to report its review findings to the Bank, in addition to and separate from its report to the SFO.

The SFO has also continued to press forward with the prosecution of individuals implicated in foreign bribery schemes that predate the Bribery Act. For example, in 2012, a former director and the former CEO of a UK-based chemical manufacturer pleaded guilty to allegations by the SFO that they conspired to bribe Indonesian and Iraqi government officials to induce the award of government contracts and ensure that government tests of a competitor's product resulted in unfavourable ratings. The sentencing of both former executives has been adjourned. Two other former senior executives of the chemical manufacturer have also been charged by the SFO, both of whom are scheduled to go to trial in April 2013. US and UK enforcement officials resolved charges with the chemical manufacturer in connection with these allegations in March 2010.

In April 2013, the UK enacted the Crime and Courts Act 2013, which permits the SFO and the Crown Prosecution Service (CPS) to enter into deferred prosecution agreements (DPAs) with cooperating corporate defendants to settle prosecutions for fraud, bribery and

economic crimes. While UK law already permitted DPAs in the prosecution of individuals, the adoption of corporate DPAs mirrors a common approach by the US government for prosecuting corporate misconduct in the anti-corruption area. According to a draft Deferred Prosecution Agreement Code of Practice issued by the SFO and CPS, these agencies intend to use DPAs as 'an alternative to prosecution' and see the agreements as 'a discretionary tool… to provide a way of responding to alleged criminal conduct'. DPAs will not be offered in every prosecution. Instead, the draft code of practice outlines when the SFO and CPS will offer to negotiate a DPA and how such negotiations will proceed.

United States

In 2013, the US Department of Justice (DoJ) and the SEC resolved 26 FCPA-related enforcement dispositions. These cases involved both US and non-US individuals and corporations and imposed a range of civil and criminal penalties, including fines into the hundreds of millions of dollars. Corporate defendants resolved these cases by entering into deferred prosecution agreements, non-prosecution agreements and plea agreements. In some 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. In other instances, the company has been required to 'self-report' at periodic intervals on the status of its remediation and compliance efforts. And, in a recent development, the US enforcement agencies on several occasions have imposed a hybrid of the two, requiring companies to retain and pay for an 'independent compliance monitor' during the first half of their probationary period and 'self-report' at periodic intervals during the second half. At a recent FCPA conference, a high-ranking US enforcement official also revealed that more than 150 additional corporations and individuals are currently under active investigation.

While still high by historical standards, overall enforcement levels in the United States fell in 2013 for the third consecutive year after reaching record heights in 2010. Despite this downward trend, however, the level of enforcement activity against individuals (as opposed to corporations) has only dipped slightly over this period and actually saw an uptick in 2013, with the DoJ and SEC announcing FCPA-related charges against 13 individuals in 2013 compared with only five in 2012. This is indicative of the agencies' continued emphasis on the prosecution of individuals and may explain, in part, why overall enforcement has declined, since individuals are much more likely to demand trials that divert the agencies' limited resources.

A record four criminal trials involving 15 defendants charged with FCPA-related violations took place from 2011 to 2012, resulting in two convictions, two mistrials (involving seven individual defendants) and six acquittals. While the DoJ recently decided to abandon its ongoing prosecution of 16 individuals indicted as part of a highly publicised sting operation, there are well over a dozen other individuals currently involved in some stage of pretrial, trial or post-trial proceeding with the DoJ and SEC. Included among this backlog of individual defendants is a large group of former executives and contractors from a global, Germany-based engineering firm. The individuals, who were charged by the DoJ and SEC in mid-December 2011, allegedly conspired with intermediaries to pay more than US$100 million in bribes to Argentine government officials, initially to secure a US$1 billion contract to replace Argentina's national identity cards, then to get the project reinstated after it was terminated, and finally as part of an effort to recoup revenues that would have been due under the contract. The charges came three years after the engineering firm and several of its subsidiaries entered into historic settlements with the DoJ, SEC and General Prosecutor's Office in Munich over related conduct and agreed to pay US$1.6 billion in combined penalties and disgorgement. The co-conspirators allegedly used a variety of mechanisms to generate funds and conceal payments, including offshore companies, sham invoices and contracts for services never performed, and off-books accounts. The defendants include, among others, a former member of the company's management board and the central executive committee, several senior executives from the company's Argentine subsidiary and two intermediaries. All of the defendants are non-US citizens, many of whom would require extradition to be criminally prosecuted, a fact which has complicated the DoJ's efforts and presented the courts with jurisdictional questions about the extraterritorial reach of US law. In February 2013, the former CEO of the company's Argentine subsidiary actually succeeded in obtaining a dismissal of the civil charges against him on grounds that the alleged misconduct was 'far too attenuated' from the resulting harm to satisfy the necessary jurisdictional requirements under US law. As of February 2014, the charges brought by the SEC against the seven individual defendants had all been resolved, either through settlement, default judgment or dismissal; by contrast, the DoJ had not resolved any of the parallel charges it brought against six of those defendants.

Also likely to be contributing to the drop in enforcement are the resources the DoJ and SEC diverted into the drafting of new written guidance designed to provide additional clarity on the FCPA's key elements and the agencies' enforcement priorities. Following a recommendation of the OECD that the United States consider issuing consolidated public guidance on the FCPA and calls from the US Chamber of Commerce and other stakeholder groups for statutory amendments to the Act, the enforcement agencies issued a 120-page 'Resource Guide on the US Foreign Corrupt Practices Act' (the Guide) in November 2012. The Guide addresses each element of the statute in depth and contains narrative discussions of key issues, hypotheticals, case summaries, 'anonymised' examples of declinations, examples of violations, enforcement principles, over 400 footnotes, and 'practical tips' for reducing risk or complying with the law. While the Guide makes no sharp departures from current practice, it does confirm some previously unwritten enforcement policies and practices and explicitly clarifies the government's view of provisions that may appear ambiguous to companies new to the statute and counsel who do not regularly practise in the area.

This small sample of the diverse array of investigations and prosecutions under way or pending reflects a pronounced 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 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 Racketeer Influenced and Corrupt Organizations Act or as part of a civil securities suit; recent examples of such litigation include actions against Avon Products Inc, Juniper Networks Inc, Net 1 UEPS Technologies Inc and Archer Daniels Midland Co, all of which were filed in recent years, based in part on alleged FCPA violations.

Anti-corruption compliance programmes

The rapid changes in legal structures and enforcement have, in turn, contributed to a new corporate phenomenon and legal discipline – the widespread institution of anti-corruption compliance programmes within multinational corporations. Programmes that would have been innovative and exceptional in the early 1990s are becoming de rigueur. 'Best practices' have become a standard by which many companies seek to measure their own efforts and that standard continues to rise. Spurred by government pronouncements, regulatory requirements, voluntary corporate codes and the advice of experts as to what mechanisms best achieve their intended purposes,

anti-corruption compliance programmes have become common, and often sophisticated, in companies doing business around the world. As a result, anti-corruption codes and guidelines, due diligence investigations of consultants and business partners or merger targets, contractual penalties, extensive training, internal investigations, compliance audits and discipline for transgressions have become familiar elements of corporate compliance programmes. The OECD's recent 'Good Practice Guidance on Internal Controls, Ethics and Compliance', issued on 18 February 2010, is directed squarely at companies, business organisations and professional associations, and identifies a number of recognised elements of effective compliance programmes:

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

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

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

United States

Homer E Moyer Jr, James G Tillen, Marc Alain Bohn and Amelia Hairston-Porter
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1 International anti-corruption conventions
To which international anti-corruption conventions is your country a signatory?

The United States is a signatory to and has ratified the OECD Anti-Bribery Convention, the OAS Convention and the United Nations 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 Convention against Corruption and not applying the illicit enrichment provisions of the OAS Convention.

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

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

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

Foreign bribery

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

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

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

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

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

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

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

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

4 Definition of a foreign public official
How does your law define a foreign public official?

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

for the purposes of the FCPA requires a 'fact-specific analysis'. In a series of recent cases, US courts have instructed juries to consider a range of non-exclusive factors in making this determination, including:

- the foreign government's extent of ownership of the entity;
- the foreign government's degree of control over the entity (including whether key officers and directors of the entity are, or are appointed by, government officials);
- the foreign government's own characterisation of the entity and its employees;
- the circumstances surrounding the entity's creation;
- the purpose of the entity's activities;
- the entity's obligations and privileges under foreign law;
- the exclusive or controlling power vested in the entity to administer its designated functions;
- the level of financial support provided by the foreign government (including subsidies, special tax treatment, government-mandated fees, and loans);
- the entity's provision of services to the jurisdiction's residents;
- whether the governmental end or purpose sought to be achieved is expressed in the policies of the foreign government; and
- the general perception that the entity is performing official or governmental functions.

The FCPA also applies to 'any foreign political party or official thereof or any candidate for foreign political office'.

5 Travel and entertainment restrictions

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

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

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

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

Guidance recently issued by the DoJ and Securities and Exchange Commission (SEC) underscores that anti-bribery violations require a corrupt intent and states that 'it is difficult to envision any scenario in which the provision of cups of coffee, taxi fare, or company promotional items of nominal value would ever evidence corrupt intent'. The guidance also notes that, under appropriate circumstances, the provision of benefits such as business-class airfare for international travel, modestly priced dinners, tickets to a baseball game or a play would not create an FCPA violation.

6 Facilitating payments

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

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

7 Payments through intermediaries or third parties

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

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

8 Individual and corporate liability

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

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

9 Civil and criminal enforcement

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

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

10 Agency enforcement

What government agencies enforce the foreign bribery laws and regulations?

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

11 Leniency

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

The FCPA does not require self-reporting of FCPA violations. However, under US securities laws, including the Sarbanes-Oxley Act (SOX), corporations are sometimes required to disclose improper payments or internal investigations into possible improper payments, thereby effectively notifying or reporting to the government (see question 18). 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, the scope of any government investigation, and the choice of penalties sought to be imposed. In short, voluntary disclosure can result in more lenient treatment than if the government were to learn of the violations from other sources. The benefits of voluntary disclosure,

however, are not statutorily guaranteed or quantified in advance by enforcement officials.

12 Dispute resolution

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

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

13 Patterns in enforcement

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

The pace of FCPA enforcement accelerated greatly over the past decade, with the number of enforcement actions brought by the DoJ and SEC reaching record heights in 2010. Since 2010, the number of FCPA dispositions resolved annually, while still historically high, has declined each year and now sits at its lowest levels since 2006. However, sanctions, in recent years, have become much more severe, with monetary penalties (including fines, disgorgement of profits and payment of pre-judgment interest) significantly eclipsing those imposed by earlier FCPA settlements. In addition to monetary penalties, companies are now consistently required either to retain independent compliance monitors, usually for a period of two to three years, or to agree to self-monitor and file periodic progress reports with US enforcement agencies for an equivalent length of time. In recent years, the agencies have also introduced a hybrid approach that imposes an abbreviated monitorship, generally ranging from a year to 18 months, followed by a similarly abbreviated period of self-monitoring and self-reporting. Companies entering into DPAs or NPAs typically submit to probationary periods under these agreements. Individuals have increasingly been targets of prosecution and have been sentenced to prison terms, fined heavily, or both. Since 2011, over 50 individuals have either been charged with or convicted of FCPA-related violations. Many recent prosecutions have been based on expansive interpretations of substantive and jurisdictional provisions of the FCPA, and foreign entities have been directly subjected to US enforcement actions. US authorities have also targeted specific industries for enforcement, including the oil and gas, the medical device and the pharmaceutical industries and, most recently, the financial industry.

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

14 Prosecution of foreign companies

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

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

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

Recent guidance from the DoJ and SEC also asserts that a foreign company may be held liable for aiding and abetting an FCPA violation (18 USC, section 2, or 15 USC sections 78t(e) and u-3(a)) or for conspiring to violate the FCPA (18 USC, section 371), even if the foreign company did not take any act in furtherance of the corrupt payment while in the territory of the United States. In conspiracy cases, the United States generally has asserted jurisdiction over all the conspirators where at least one conspirator is an issuer, domestic concern, or commits a reasonably foreseeable overt act within the United States.

15 Sanctions

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

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

Criminal penalties for wilful violations

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

Civil penalties

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

Since 2008, US enforcement authorities have imposed over US$5 billion in criminal and civil fines, disgorgement, and pre-judgement interest in connection with FCPA enforcement actions, including 11 cases in which the combined penalties exceeded US$100 million.

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 also generally require companies to implement detailed compliance programmes and appoint independent compliance monitors (who report to the US government) and/or self-monitor for a specified period in connection with the settlement of FCPA matters.

16 Recent decisions and investigations

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

US enforcement authorities resolved 26 FCPA-related enforcement actions in 2013, which, while high by historical standards, marks the third consecutive year that enforcement levels have fallen after reaching record heights in 2010. Despite this overall downward trend, the level of enforcement activity against individuals (as opposed to corporations) has only dipped slightly over this period and actually

saw an uptick in 2013, with the DoJ and SEC announcing FCPA-related charges against 13 individuals in 2013 compared with only five in 2012. This is indicative of the agencies' continued emphasis on the prosecution of individuals and may explain, in part, why overall enforcement has declined, since individuals are much more likely to demand trials that divert the agencies' limited resources. These cases illustrate a number of trends, including US enforcement authorities' renewed emphasis on the prosecution of individuals, a rise in the severity of sentences being imposed on those convicted, and an increasing willingness by individuals to contest the charges against them in court.

Terra Telecommunications executives

On 25 October 2011, Joel Esquenazi, the former president of Terra Telecommunications Corporation, was sentenced to 15 years in prison for his role in a conspiracy to pay and conceal bribes to employees of Haiti's state-owned telecommunication company, Telecommunications D'Haiti (Haiti Teleco). Former Terra executive vice-president Carlos Rodriguez was also sentenced to seven years in prison for his participation in the scheme. Esquenazi and Rodriguez were convicted at trial in August 2011.

According to the indictment, Esquenazi and Rodriguez authorised bribes to Haiti Teleco officials to secure business advantages for Terra, which included preferential telecommunications rates, a reduced number of minutes for which payment was owed (effectively reducing the per-minute rate), and a variety of credits toward sums owed. Thereafter, Esquenazi and Rodriguez allegedly caused Terra to falsely record the bribes as 'commissions' or 'consulting fees' on financial, banking and accounting documents.

In addition to their prison terms, Esquenazi and Rodriguez were also ordered to pay a total assessment of US$2,100 and restitution of US$2.2 million, the latter jointly and severally among Esquenazi, Rodriguez and another Haiti Teleco defendant, Juan Diaz (an intermediary used by Terra who was sentenced to 57 months in prison in June 2010 after pleading guilty to conspiring to violate the FCPA and commit money-laundering). Both Esquenazi and Rodriquez have appealed against their convictions to the US Court of Appeals for the Eleventh Circuit, which heard arguments in October 2013 on whether Haiti Teleco properly falls within the definition of an 'instrumentality' under the FCPA. While there is no precise timetable for the court to rule on this matter, the court is widely expected to issue a decision in this case in 2014, which could establish a new judicial precedent for the interpretation of 'foreign official.'

Former employees and contractors of Siemens

On 13 December 2011 the DoJ charged eight former employees and contractors of Siemens Aktiengesellschaft (Siemens AG) and its Argentinian subsidiary, Siemens SA (Siemens Argentina) for their roles in an alleged scheme to secure, implement and recoup the profits from a US$1 billion contract with the Argentinian government. The defendants include a former member of the Siemens management board and the central executive committee of Siemens AG, five former executives of Siemens Argentina and Siemens Business Services, and two facilitators allegedly used by the executives to pass payments to government officials.

In a parallel proceeding related to the same allegations, the SEC also brought charges against the six aforementioned executives as well as a former CFO for Siemens Business Services. The charges came three years after Siemens AG, along with several subsidiaries, entered into settlements with the SEC, DoJ, and General Prosecutor's Office in Munich over some of the same underlying conduct and agreed to pay US$1.6 billion in combined penalties and disgorgement. The current pleadings allege that, from 1996 to 2007, the defendants, with the help of intermediaries, conspired to pay more than US$100 million in bribes to Argentinian government officials, initially to secure a contract to replace Argentina's national identity cards, then to get the project reinstated after it was terminated, and finally as part of an effort to recoup revenues that would have been due under the contract.

The co-conspirators allegedly used a variety of mechanisms to generate funds and conceal payments, including offshore companies, 'sham' invoices and contracts for services never performed, and off-books accounts. The agencies have asserted jurisdiction over the matter on the basis of payments channelled through US bank accounts, meetings relevant to the alleged conspiracy taking place in the United States and Siemens AG's status as a US issuer. The charges brought by the DoJ and SEC include a mix of civil and criminal counts (both substantive and conspiracy) related to the FCPA's anti-bribery and accounting provisions and money-laundering and wire fraud statutes.

In December 2011, Bernd Regendantz, the former CFO of Siemens Business Services who was charged exclusively by the SEC, settled the civil charges against him, agreeing to pay a US$40,000 fine (which was 'deemed satisfied' by his payment of US$30,000 to the General Prosecutor's Office in Munich). After reaching an agreement in principle with the SEC in 2012, Uriel Sharef, the former member of the Siemens management board, finalised the settlement in April 2013, agreeing to pay a US$275,000 penalty to resolve the civil charges against him. Former Siemens Argentina CFO Andres R Truppel similarly finalised a tentative agreement with the SEC in February 2014, consenting to the charges against him and agreeing to pay a US$80,000 penalty.

In contrast to Regendantz, Sharef and Truppel, Herbert Steffen, the former CEO of Siemens Argentina, filed a motion to dismiss the SEC's charges against him, contending that the court lacked personal jurisdiction over him and that the SEC's claims were time-barred under the FCPA's five-year statute of limitations. In February 2013, the US District Court for the Southern District of New York dismissed the civil charges against Steffen on the grounds that it had no personal jurisdiction over him because Steffen's alleged misconduct was 'far too attenuated' from the resulting effect in the US to satisfy the applicable minimum contacts standard, as Steffen 'neither authorized the bribe, nor directed the cover up, much less played any role in the falsified filings' made by Siemens under relevant SEC rules.

In October 2013, the SEC moved for default judgment against Truppel (a move that probably precipitated his settlement) and two former executives of Siemens Business Services, Ulrich Bock and Stephan Signer, while seeking to dismiss the charges against Carlos Sergi, a former Siemens Argentina board member. In February 2014, the District Court entered a default judgment against Bock and Signer, ordering the pair to pay a combined US$1.46 million in fines and disgorgement.

On the DOJ side, Truppel is currently contesting an extradition request by the United States, while the status of the pending criminal case against the other defendants charged is unclear, with most defendants reportedly choosing to ignore the indictment.

Former Magyar Telekom executives

On 29 December 2011, the SEC charged three former senior executives from the Hungarian telecommunications provider Magyar Telekom PLC (Magyar Telekom) for their roles in a scheme to channel millions of dollars in payments through intermediaries to government officials and political party officials in Macedonia and Montenegro in an effort to secure business and regulatory benefits for the company. At the time of the alleged FCPA violations, Magyar Telekom and its parent company, Deutsche Telekom AG (Deutsche Telekom), had securities listed on the New York Stock Exchange and thus qualified as issuers within the meaning of the FCPA. The complaint against the former executives was brought contemporaneously with a US$95.2 million settlement that Magyar Telekom and Deutsche Telekom entered into with the SEC and DoJ to resolve related allegations.

The executives involved – former Chairman and CEO Elek Straub, former Director of Central Strategic Organisation Andras Balogh, and former Director of Business Development and Acquisitions Tamas Morvai – are all Hungarian citizens who chose to contest the charges against them, filing a motion to dismiss the complaint in October 2012 based on a lack of personal jurisdiction, the charges

being time-barred by the statute of limitations and a failure of the complaint to adequately state the claims alleged.

In February 2013, the US District Court for the Southern District of New York rejected the motion on the grounds that:

- the alleged conduct by the defendants satisfied the minimum contacts standard because they had authorised and helped to structure the misconduct and later served key roles in falsifying Magyar Telekom's SEC filings by signing management certifications and representation letters;
- the applicable statute of limitations is suspended as long as a defendant is not 'physically present in the United States'; and
- the complaint adequately stated the alleged claims.

In response, the defendants filed a request for an interlocutory appeal, which the court denied in August 2013. The case now appears to have stalled, as it is unclear whether the foreign defendants will agree to come to the US to stand trial.

Financial record keeping

17 Laws and regulations

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

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

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

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

18 Disclosure of violations or irregularities

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

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

19 Prosecution under financial record keeping legislation

Are such laws used to prosecute domestic or foreign bribery?

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

20 Sanctions for accounting violations

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

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

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

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

21 Tax-deductibility of domestic or foreign bribes

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

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

Domestic bribery

22 Legal framework

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

The domestic criminal bribery statute prohibits:

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

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

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

'Something of value'
'Anything of value' can constitute a bribe. Accordingly, a prosecutor does not have to establish a minimum value of the bribe in order to secure a conviction. Rather, it is enough that the item or service offered or solicited has some subjective value to the public official.

'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 that the bribe was given or offered in exchange for the performance of a specific official act – in other words, a quid pro quo. 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 (such as casting a vote), but can encompass a congressman's attempt to influence a local official on a constituent's behalf.

23 Prohibitions

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

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

24 Public officials

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

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

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

25 Public official participation in commercial activities

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

The extent to which public officials may participate in outside commercial activities while serving as a public official varies by branch of government (see 5 USC App 4 sections 501–502). At present, members of Congress are prohibited by statute from earning more than US$26,955 in outside income. Members of Congress are also prohibited by statute from receiving any compensation from an activity that involves a fiduciary relationship (eg, attorney–client) or from serving on a corporation's board of directors. With respect to the executive branch, presidential appointees subject to Senate confirmation – such as cabinet secretaries and their deputies – are prohibited from earning any outside income whatsoever. Senior-level presidential appointees who are not subject to Senate confirmation may earn only US$26,955 in outside income per year and may not receive compensation from an activity involving a fiduciary relationship. Career civil servants in the executive branch who are not presidential appointees are not subject to any outside earned income cap. However, no executive branch employee – whether a presidential appointee or not – may engage in outside employment that would conflict with his or her official duties. For example, a civil servant working for an agency that regulates the energy industry may not earn any outside income from work related to the energy industry.

26 Travel and entertainment

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

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

The statutory provision that prohibits the payment and solicitation of gratuities (18 USC section 201(c)) is contained within the same section that prohibits bribery (18 USC section 201(b)). The basic elements of a gratuities violation 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. For example, a gift given to a senator as an expression of gratitude for passing favourable legislation could trigger the gratuities statute, even if the gift was not intended to influence the senator's actions (since it was given after the legislation was already passed).

In addition to the criminal gratuities statute, each branch of government regulates the extent to which its employees may accept gifts. In effect, these regulations prohibit government officials from accepting certain gifts that would otherwise not be prohibited by the criminal gratuities statute. With respect to the executive branch regulations, employees of any executive branch department or agency are prohibited from soliciting or accepting anything of monetary value from any person who does or seeks to do business with the employee's agency, performs activities regulated by the employee's agency, seeks official action by the employee's agency, or has interests that may be substantially affected by the performance or non-performance of the employee's official duties. Unlike the criminal gratuities statute, which requires some connection with a specific official act, the executive branch gift regulations can be implicated even where the solicitation

of a gift from an interested party is unconnected to any such act. In addition, career civil servants may not accept gifts having an aggregate market value of US$20 or more per occasion, and may not accept gifts having an aggregate market value of more than US$50 from a single source in a given year. The gift rules are even stricter for presidential appointees: under an executive order signed by President Obama, executive branch officials appointed by the president cannot accept any gifts from registered lobbyists, even those having a market value of less than US$20.

Under the Rules of the Senate and House of Representatives, members of Congress may not accept a gift worth US$50 or more, or multiple gifts from a single source that total US$100 or more, for a given calendar year. These limits also apply to gifts to relatives of a member, donations by lobbyists to entities controlled by a member, donations made to charities at a member's request and donations to a member's legal defence fund. Importantly, the US$50 gift exceptions are not 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). Members are also prohibited 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 bars members from accepting refreshments from lobbyists in a one-on-one setting. Registered lobbyists can face up to a five-year prison term for knowingly providing gifts to members of Congress in violation of either the House or Senate ethics rules.

27 Gifts and gratuities

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

As noted in question 26, members of Congress may accept gifts that are worth less than US$50 (except from lobbyists or agents of a foreign government, from whom they are prohibited from accepting any gifts), 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 from the restrictions on gifts contributions to a member's campaign fund, 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 allow for nominal gifts, such as those having a market value of US$20 or less (although presidential appointees may not accept any gift from a registered lobbyist), gifts based on a personal relationship and honorary degrees. De minimis items such as refreshments and greeting cards are also excluded from the definition of 'gift.' Like the House and Senate Rules, the executive branch regulations also contain a 'widely attended gathering' exception, although a key difference is that the employing agency's ethics official must provide the employee with a written finding that the importance of the employee's attendance to his or her official duties outweighs any threat of improper influence. The executive branch regulations also permit officials travelling abroad on official business to accept food and entertainment, as long as it does not exceed the official's per diem and is not provided by a foreign government. Under an executive order signed by President Obama, however, neither the widely attended gathering exception nor the exception for food and entertainment in the course of foreign travel are available to presidential appointees.

28 Private commercial bribery

Does your country also prohibit private commercial bribery?

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

While there is no federal statute that specifically prohibits commercial bribery, there are a handful of statutes that can be used by prosecutors to prosecute commercial bribery cases. First, the mail and wire fraud statutes prohibit the use of the mail system, phone or internet to carry out a 'scheme to defraud', which includes a scheme to deprive another of 'honest services'. A bribe paid to an employee of a corporation has been classified as a scheme to deprive the corporation of the employee's 'honest services', and thus can be prosecuted under the mail and wire fraud statutes.

Second, the so-called 'federal funds bribery statute' prohibits the payment of bribes to any organisation – which can include a private company – that in any one year receives federal funds in excess of US$10,000, whether through a grant, loan, contract or otherwise.

Finally, a federal statute known as the 'Travel Act' makes it a federal criminal offence to commit an 'unlawful act' – which includes violating state commercial bribery laws – if the bribery is facilitated by travelling in interstate commerce or using the mail system. Thus, if an individual travels from New Jersey to New York in order to effectuate a bribe, that individual can be prosecuted under the federal Travel Act for violating New York's commercial bribery law. A violation of the Travel Act based on violating a state commercial bribery law can result in a prison term of five years and a fine. Finally, commercial bribery is also actionable as a tort in the civil court system.

29 Penalties and enforcement

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

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

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

30 Facilitating payments

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

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

31 Recent decisions and investigations

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

The last Congress introduced two bills intended to substantially enhance a number of federal anti-corruption laws, in particular the criminal gratuities and bribery statutes.

The first bill, as introduced in the House of Representatives, is known as the Clean Up Government Act of 2011 (Clean Up Act). As explained above, the gratuities statute (18 USC section 201(c)) currently prohibits giving or offering anything of value to a public official 'for or because of' any official act performed or to be performed. Thus, the gratuities statute is triggered only if something of value is given or offered to a public official in connection with a specific official act. In fact, the Supreme Court has specifically held that the gratuities statute does not reach gifts given to public officials simply because of their official positions, such as gifts aimed at currying favour with officials in case their official assistance is needed in the future. Rather, the court made clear that in order to violate the gratuities statute, 'the Government must prove a link between a thing of value conferred upon a public official and a specific official act for or because of which it was given'. See *United States v Sun-Diamond Growers of California*, 526 US 398 (1999).

The Clean Up Act, however, would do away with the gratuities statute's 'official act' requirement. If enacted into law, the Clean Up Act would make it illegal to give a gratuity solely because of 'the official's or person's official position'. In effect, the Clean Up Act would overrule the Supreme Court's decision in the *Sun-Diamond* case. Should this change take effect, it would significantly expand the scope of conduct covered by the statute. Virtually any gift given to a public official because of the mere fact that he or she is a public official – which surely describes the vast majority of gifts given to public officials – could run afoul of the gratuities statute, as potentially amended by the Clean Up Act. The only exceptions would be gifts that are expressly allowed by the congressional and executive branch gift regulations. In addition, a violation of the gratuities statute (as potentially amended by the Clean Up Act) could result in a five-year prison term, a substantial increase from the current version of the law, which carries a maximum two-year sentence. In addition, the Clean Up Act proposes a minor change to the bribery statute (18 USC section 201(b)) by expanding the existing definition of 'official act' to cover any conduct that falls within the range of official duty of a public official, including a single act, more than one act, or a course of conduct.

The second bill, as introduced in the House of Representatives, is called the Restore Public Trust Act of 2012 (Restore Act). The Restore Act includes the Clean Up Act's amendment to the bribery statute, but softens the language with regard to the gratuities statute. Instead of doing away with the statute's 'official act' requirement, as the Clean Up Act proposes to do, the Restore Act only prohibits a gift to a public official based solely on the person's official position when the value of the gift has an aggregate value of US$1,000 or more. The Restore Act otherwise maintains the existing statutory prohibition on gratuities to public officials 'for or because of' any official act performed or to be performed.

At the time of this writing, both bills are inactive and are awaiting reintroduction in the current Congress.

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