Anti-Corruption Regulation

Contributing editor
Homer E Moyer Jr

2017

GETTING THE DEAL THROUGH

GETTING THE DEAL THROUGH

Anti-Corruption Regulation 2017

Contributing editor

Homer E Moyer Jr

Miller & Chevalier

Publisher
Gideon Roberton
gideon.roberton@lbresearch.com

Subscriptions
Sophie Pallier
subscriptions@gettingthedealthrough.com

Senior business development managers
Alan Lee
alan.lee@gettingthedealthrough.com

Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com

Law Business Research

THE QUEEN'S AWARDS FOR ENTERPRISE: 2012

Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3708 4199
Fax: +44 20 7229 6910

First published 2007
Eleventh edition
ISSN 2042-7972

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

Global overview

Homer E Moyer Jr

Miller & Chevalier Chartered

Corruption, including corruption of public officials, dates from early in human history and countries have long had laws to punish their own corrupt officials and those who pay them bribes. But national laws prohibiting a country's own citizens and corporations from bribing public officials of other nations are a new phenomenon, less than a generation old. Over the course of perhaps the past 20 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 (the 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 (the 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 100 countries, Transparency International promotes transparency in governmental activities and lobbies governments to enact anti-corruption reforms. Transparency International's annual Corruption Perceptions Index (the 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 168 countries and territories by their perceived levels of corruption and publishes the results annually. In 2015, Denmark and Finland, followed by Sweden and New Zealand, topped the index as the countries perceived to be the world's least corrupt, while Somalia and North Korea, followed by Afghanistan and Sudan, were seen as the most corrupt.

Transparency International has also developed and published the Bribe Payers Index (the 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 debarred or otherwise sanctioned over 900 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 over 60 criminal convictions. In 2016, the World Bank announced that during the 2016 fiscal year (ending 30 June 2016) it debarred or otherwise sanctioned 58 firms and individuals for wrongdoing, including 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. As part of the World Bank's effort to curb corruption, the Integrity Compliance Office (the ICO) also works to strengthen anti-corruption initiatives in companies of all sizes, including assisting debarred companies to develop suitable compliance programmes and fulfil other conditions of their sanctions.

In July 2004 and August 2006, the World Bank instituted a series of reforms that established a two-tier administrative sanctions process that involves a first level of review by a chief suspension and debarment officer (SDO) followed by a second level review by the World Bank Group's Sanctions Board in cases where the sanctions are contested. In August 2006, the World Bank also 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 mid-2015, the World Bank's Office of Suspension and Debarment (the OSD) published a report with case processing and other performance metrics related to 368 sanctions imposed on firms and individuals in World Bank-financed projects from 2007 to 30 June 2015 (not including cross-debarments or sanctioned affiliates). Per the OSD report, most of these sanctions resulted in debarments.

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. According to recent annual updates issued by the World Bank Group Integrity Vice Presidency, the World Bank has crossed-debarred hundreds of entities over the past six years, including 38 in the fiscal year 2016 alone.

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. According to the World Bank, the Alliance, which organises biennial meetings, has succeeded in bringing together over 350 enforcement and anti-corruption officials from more than 130 countries 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 (the SFO), the European Anti-Fraud Office, the International Criminal Court, the United States Agency for International Development, 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 (the OECD), the Organisation of American States (the 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 (the IACAC) in Caracas. The IACAC entered into force on 6 March 1997. Thirty-three of the 34 signatories have now ratified the IACAC. The IACAC requires each signatory country to enact laws criminalising the bribery of government officials. It also provides for extradition and asset seizure of offending parties. In addition to emphasising heightened government ethics, improved financial disclosures and transparent bookkeeping, the IACAC facilitates international cooperation in evidence-gathering.

In 1997, 28 OECD member states and five non-member observers signed the Convention on Combating Bribery of Foreign Officials in International Business Transactions (OECD Anti-Bribery Convention), which was subsequently ratified by the requisite number of parties and entered into force on 15 February 1999. Forty-one countries in all, including six countries not currently members of the OECD, have now signed and ratified the OECD Anti-Bribery Convention, most recently Latvia, which ratified the country's accession to the convention on 31 March 2014. After amending its anti-corruption legislation to meet with OECD standards, Peru renewed its request to join the OECD Anti-Bribery Convention in June 2016 and is poised to become the next signatory to the Convention.

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

In terms of monitoring implementation and enforcement, the OECD has set the pace. The OECD Working Group on Bribery (Working Group) monitors member countries' enforcement efforts through a regular reporting and comment process. After each phase, Working Group examiners will issue a report and recommendations, which are forwarded to the government of each participating country and are posted on the OECD's website. 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. In phase III, examiners evaluate the progress a country has made in addressing weaknesses identified during phase II, the status of the country's ongoing enforcement efforts, and any issues raised by changes in domestic legislation or institutional framework. Since nearly all signatories to the OECD Anti-Bribery Convention had undergone these three phases of monitoring, in March 2016 the Working Group launched phase IV, which is focused on key group-wide cross-cutting issues; the progress made on addressing any weaknesses identified in previous evaluations; enforcement efforts and results; and any issues raised by changes in the domestic legislation or institutional framework of each participating country. According to the OECD, phase IV seeks to take a tailored approach, considering each country's unique situation and challenges, and reflecting positive achievements.

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-five countries have ratified the Criminal Convention, which entered into force on 1 July 2002, while 35 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, 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 whistle-blower 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, 35 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 181 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, extraterritorial and parallel enforcement, the use of liberalised bank secrecy laws and a growing array of penalties and sanctions.

Brazil

In the spring of 2014, the Federal Police of Brazil launched a money laundering investigation into, among other things, allegations of corruption at Petroleo Brasileiro SA (Petrobras), Brazil's state-controlled oil company. In less than two years, the investigation had gone global, with enforcement authorities from countries around the world, including the United States, joining Brazil in investigating alleged improper payments to Petrobras personnel, as well as to a range of other Brazilian officials, including several high-ranking politicians and officials from other Brazilian state-owned or controlled entities. The investigation, known in Portuguese as 'Operação Lava Jato', has already led to criminal indictments against 259 individuals, and has expanded to include many non-Brazilian companies. Since mid-2015, Brazilian authorities have succeeded in securing a large number of prominent convictions related to these indictments.

For example, on 20 July 2015, a Brazilian court handed down substantial sentences to three top executives from a Brazilian construction conglomerate for their involvement in a vast price-fixing scheme that resulted in the channelling of improper payments to Petrobras. The executives, including the former CEO, former vice president, and former chairman, were convicted and sentenced on charges of active corruption, money laundering and conspiracy related to the construction of a Petrobras refineries in the states of Pernambuco and Paraná. The former CEO and the vice president, both of whom entered into plea agreements, each received a sentence of 15 years' imprisonment and 10 months' house arrest. The former chairman, who apparently did not cooperate with the prosecution, was sentenced to nine years and six months' imprisonment. The executives were convicted alongside three other defendants – a former Petrobras executive, a black-market banker and a federal police officer who were also connected to the scheme.

On 17 August 2015, a Brazilian court sentenced the former director of Petrobras's international division to 12 years' imprisonment on charges of corruption and money laundering. The former director was convicted alongside two other defendants for helping to facilitate bribes from a Korean shipbuilding company in exchange for two drillship contracts awarded by Petrobras and its partners. Brazilian prosecutors also charged the president of the Chamber of Deputies of Brazil with accepting US$5 million in bribes related to these contracts.

On 8 March 2016, a Brazilian court sentenced the former CEO of another major Brazilian construction conglomerate (and one of Brazil's wealthiest businessmen) to 19 years and four months' imprisonment for various offences, including money laundering, corruption and criminal association, for his role in the payment of bribes to Petrobras officials to win favourable contracts. Several other executives of the conglomerate, along with several Petrobras officials, have also been convicted and sentenced for their participation in the scheme.

On 14 September 2016, Brazilian prosecutors charged Brazil's former president with several offences, including money laundering and passive corruption, for allegedly receiving personal benefits in exchange for facilitating lucrative contracts with Petrobras and for participating in a scheme that involved using bribes paid by Petrobras contractors for political gain. And in the months following this initial indictment, prosecutors have added to the list of charges against the former president as Operação Lava Jato has continued to develop.

Finally, on 21 December 2016, Brazilian authorities, alongside their US and Swiss counterparts, announced a coordinated global settlement with one of the Brazilian construction conglomerates and its petrochemical unit in connection with the underlying misconduct outlined above. To resolve criminal and civil charges at the corporate level, the companies agreed to pay at least US$3.5 billion in fines and disgorgement to government authorities in Brazil, Switzerland, and the United States, making it the largest collective foreign bribery resolution in history.

According to Brazil's Federal Public Prosecutor's Office, as of 19 December 2016, Operação Lava Jato has led to 120 international cooperation requests and the convictions of 120 individuals.

Netherlands

In November 2014, a Dutch oilfield services provider entered into an out-of-court settlement with the Openbaar Ministerie, the Dutch Public Prosecutor's Service to resolve a variety of anti-corruption allegations. Under the terms of the settlement, the company agreed to pay a fine of US$40 million along with US$200 million in disgorgement, for a total monetary assessment of US$240 million. According to the Openbaar Ministerie, the company voluntarily disclosed tens of million dollars in potentially suspect commission payments that it had made to foreign sales agents for services in a range of countries, including Angola, Equatorial Guinea and Brazil, from 2007 to 2011. The company's internal investigation into the matter found that certain of the company's agents had provided local government officials with significant 'items of value', including rerouted commission payments, travel, education costs, cars, and a building. In the opinion of the Openbaar Ministerie, these payments were made with the knowledge of company employees. As part of the settlement, and in recognition of the company's voluntary disclosure, cooperation and remediation, the company will not face criminal prosecution in the Netherlands. The company also announced that the US Department of Justice (DOJ), which had been conducting its own investigation into the allegations, informed the company it had decided to close its inquiry without bringing an enforcement action. On 22 January 2016, the company's CEO and a member of its supervisory board entered into out-of-court settlements with Brazilian authorities related to the underlying allegations. As part of these settlements, the defendants each accepted a fine of 250,000 reais to be paid by the company, with no admission of guilt.

In February 2016, a Netherlands-based global telecommunications provider entered into a joint settlement with the Openbaar Ministerie and the US DOJ and the SEC to resolve corruption allegations relating to the company's activities in Uzbekistan. According to the Openbaar Ministerie, the company, operating through its Uzbek subsidiary, made more than US$114 million in improper payments to a foreign official in Uzbekistan in exchange for that official's understood influence over the telecommunications regulator in Uzbekistan. Under the terms of its settlement with Dutch authorities, the company agreed to pay a US$100 million criminal fine and disgorge US$167.5 million in profit. In its parallel settlement with US authorities, the company and its Uzbek subsidiary further agreed to a US$460.3 million criminal fine and a US$375 million disgorgement, approximately US$397.5 million of which was collectively offset in recognition of the company's payments to Dutch authorities.

France

On 8 November 2016, France adopted Sapin II, legislation that significantly strengthens the country's anti-corruption regime, which had been criticised by the OECD as being out of step with the country's treaty obligations. The new law does not significantly change existing prohibitions on corruption, but instead eliminates certain prerequisites that greatly curtailed the jurisdictional reach of the prior law, including provisions that permitted jurisdiction only when:

- a victim or wrongdoer was a French citizen;
- the conduct at issue was an offence in both France and in the place where the conduct occurred; and
- the complaint was filed by either a victim or a relevant foreign authority (the 'dual criminality' requirement).

The new law also requires companies and presidents, directors and managers of companies with over 500 employees and annual gross revenues exceeding €100 million to implement an anti-corruption compliance programme containing a variety of components, including a code of conduct, accounting controls, and training programs for high-risk employees.

Sapin II establishes the 'Agence Française Anti-Corruption' (AFA), a new anti-corruption agency with expanded enforcement powers beyond those of the Service Central de Prévention de la Corruption, the former agency responsible for enforcement. Among other things, the AFA will be in charge of:

- assisting in preventing and detecting corruption;
- verifying that companies required to adopt compliance programmes have such programmes in place;
- reporting possible violations of the law to prosecutors; and
- overseeing corporate monitorships.

Of note, article 22 of the new law enables French authorities to negotiate US-style deferred prosecution agreements (DPAs) in cases of domestic and foreign corruption, a new development within the French legal system. Although cooperating companies will have to agree to the facts enumerated in the DPA, they will not be required to admit guilt. Under these new DPAs, companies can be fined an amount equal to the benefit secured through the illicit activity up to 30 per cent of the company's average revenue for the past three years.

United Kingdom

In April 2013, the UK enacted the Crime and Courts Act 2013, which permits the SFO and the Crown Prosecution Service (the CPS) to enter into 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.

On 30 November 2015, the SFO announced that a prominent African bank had entered into the UK's first DPA over charges of failing to prevent bribery under section 7 of the Bribery Act. Specifically, the bank had failed to prevent its former sister company from making a US$6 million payment to a local partner in Tanzania, allegedly intended to induce members of the Tanzanian government to award a contract that later generated US$8.4 million for Standard and its sister company. As part of the DPA, the bank agreed to pay a fine of US$25.2 million to the UK government, US$7 million in restitution to the government of Tanzania, and £330,000 in 'reasonable costs' the SFO incurred in connection with the investigation. In a parallel settlement in the United States, the bank agreed to pay a US$4.2 million penalty to the SEC for making materially misleading statements to investors related to the transaction, although the SEC conceded that it did not have jurisdiction to charge the bank under the FCPA.

On 4 April 2016, a Glasgow-based logistics group entered into a civil settlement with the Civil Recovery Unit of the Scottish Crown Office and Procurator Fiscal Service (the COPFS), the entity responsible for enforcing the Bribery Act in Scotland. Under the terms of the settlement, the company agreed to pay a £2.2 million fine to resolve alleged violations of the Bribery Act. The company self-reported after an internal investigation uncovered unlawful payments related to two freight-forwarding contracts entered into by its local subsidiary:

- payments to a customer's employee that were funded by the dishonest inflation of the customer's invoices and provided via an account the employee used for personal expenses, including travel and gifts; and
- a secret profit-sharing agreement with the director of another customer, which rewarded the director for contracts placed with the company.

United States

In 2016, the DOJ and the SEC resolved 57 FCPA-related enforcement actions. These cases involved both US and non-US individuals and corporations and imposed a range of civil and criminal penalties. Corporate defendants resolved these cases by entering into DPAs, 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. On several occasions, the US enforcement agencies have also 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.

The 57 FCPA-related dispositions in 2016 represent the second-highest annual total on record and comes just a year after enforcement had fallen to a 10-year low in 2015. This increase was largely driven by the SEC, which entered into substantially more corporate FCPA dispositions in 2016 than the DOJ, which has shifted its focus toward larger cases involving more serious misconduct. Over the past decade, the DOJ and SEC have averaged more than 35 enforcement actions a year compared with approximately four a year during the first 28 years following the statute's enactment. Accompanying this increase in overall enforcement, the sanctions pursued by the agencies have also increased in severity, particularly in recent years, with monetary penalties (including fines, disgorgement of profits, and payment of pre-judgment interest) significantly eclipsing those imposed by earlier FCPA settlements. For example, from 2005 to 2007, the DOJ and SEC imposed approximately US$272 million in FCPA-related corporate penalties, with the average combined penalty coming to nearly US$11 million. In the ensuing nine years, these figures have skyrocketed, with the agencies imposing approximately US$4.35 billion in FCPA-related corporate penalties from 2014 to 2016, bringing the average combined penalty to more than US$89 million.

Individuals have increasingly been targets of prosecution by US authorities and have been sentenced to prison terms, fined heavily, or both. Since 2011, over 90 individuals have been charged with or convicted of criminal or civil violations of the FCPA, and this emphasis by US enforcement authorities on the prosecution of individuals shows no signs of letting up. On 9 September 2015, Deputy Attorney General Sally Yates issued a memorandum entitled 'Individual Accountability for Corporate Wrongdoing' to federal prosecutors nationwide detailing new DOJ policies that require a corporation that wants to receive credit for cooperating with the government to provide 'all relevant facts' about employees at the company who were involved in the underlying corporate wrongdoing. The new FCPA enforcement 'pilot program', an initiative the DOJ launched in April 2016 to promote the self-disclosure of potential FCPA violations, furthers these aims, explicitly requiring that companies comply with the Yates Memo directives to receive full cooperation credit.

Among other notable developments this past year, several companies entered into substantial 'global' settlements to resolve FCPA-related charges in multiple jurisdictions simultaneously, including the aforementioned Brazil-based construction company and Netherlands-based global telecommunications provider, reflecting levels of coordination and international cooperation heretofore not seen between the United States and a variety of other countries.

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 Wal-Mart Stores Inc, Alcoa Inc, Avon Products Inc, and Bio-Rad Laboratories, Inc, 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 '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.

In September 2016, the International Organization for Standardization (ISO) published the final version of its new standard on anti-bribery management systems, ISO 37001, which was developed over the course of four years with the active participation of experts from 37 countries. The standard is designed to be used as a benchmark by independent, third-party auditors to certify compliance programmes. In terms of substance, the standard largely tracks the OECD's 'Good Practice Guidance' and guidance previously published by UK and US enforcement authorities. Thus, the key substantive aspects of ISO 37001 will be largely familiar to experienced compliance professionals. What is as yet unclear, however, is the level of deference that enforcement authorities around the world will provide to the new standard. Although seeking to obtain an ISO 37001 certification may help to demonstrate a company's commitment to compliance, such a certification is unlikely to shield a company facing an investigation by enforcement authorities. Furthermore, there are a host of questions surrounding the new standard, which lacks detail on certain areas of concern. For instance, how responsive will ISO 37001 be to the evolving compliance expectations of relevant enforcement authorities? At the very least, companies that have yet to establish mature compliance environments should find the ISO 37001 standard to be useful metric as should vendors aiming to work for multinational companies, which can use an ISO certification to help establish their anti-corruption credentials during corporate due diligence.

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

Miller & Chevalier Chartered

1 International anti-corruption conventions

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

The United States is a signatory to and has ratified the OECD Anti-Bribery Convention, the OAS Convention and the United Nations 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. In November 2012, however, the DOJ and the Securities and Exchange Commission (SEC) jointly issued *A Resource Guide to the U.S. Foreign Corrupt Practices Act*. While this written guidance explicitly states that it 'is non-binding, informal, and summary in nature, and the information contained herein does not constitute rules or regulations', it nonetheless serves to clarify the FCPA and how it is applied by the enforcement agencies, expressly confirming pre-existing enforcement practices and policies, and consolidating current agency thinking in a single, comprehensive reference source.

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 15).

Prohibited acts
Prohibited acts include promises to pay, even if no payment is ultimately made. The prohibitions also 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. US courts have held that determining whether an entity is a government 'instrumentality' for the purposes of the FCPA requires a 'fact-specific analysis'. The US Court of Appeals for the Eleventh Circuit, the only federal appellate court to have considered the issue, set forth a two-part test for making such a determination: An entity is an 'instrumentality' if it is controlled by the government of a foreign country and performs a function that the controlling government treats as its own. The court then outlined a list of non-exhaustive factors that 'may be relevant to deciding the issue'.

First, to determine if the government of a foreign country controls an entity, courts and juries should look to:

- the government's formal designation of the entity;
- whether the government has a majority interest;
- the government's ability to hire and fire the entity's principals;
- the extent to which the government profits or subsidises the entity; and
- the length of time these indicia have existed.

Second, to determine whether an entity performs a function that the government treats as its own, courts and juries should consider:

- whether the entity has a monopoly over the function;
- whether the government subsidises costs associated with the entity providing services;
- whether the entity provides services to the public; and
- whether the public and the government perceive the entity to be performing a governmental function.

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 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 Successor liability

Can a successor entity be held liable for bribery of foreign officials by the target entity that occurred prior to the merger or acquisition?

It is a well-established principle of US law that acquiring companies generally assume the civil and criminal liabilities of the companies they acquire, including liabilities under statutes such as the FCPA. US enforcement authorities view successor liability as an integral component of corporate law that, among other things, prevents companies from avoiding liabilities through reorganisation.

Successor liability does not, however, create liability where none existed before. Where a company acquires a foreign entity that was not previously subject to the FCPA, the acquirer cannot be held retroactively liable under the FCPA for improper payments that the acquired entity may have made prior to the acquisition – though it could face liability for such conduct under applicable foreign laws. The protection offered by this principle is limited in scope though. For instance, if the improper conduct continues following the acquisition of a company not previously subject to the FCPA, it could create FCPA or related criminal liability for the new combined company in the United States.

While there are no fail-safe means of avoiding successor liability, US enforcement authorities have indicated that companies that conscientiously seek to identify, address and remedy bribery issues at the target company – either before or soon after closing – will be given considerable credit for doing so, and that the result may be a decision to take no enforcement action. Such enforcement decisions, however, will depend on the facts and circumstances, considered on a case-by-case basis.

10 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 16.

11 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.

12 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 19). 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.

On 5 April 2016, the DOJ launched a one-year FCPA enforcement 'pilot program', which provides incentives for companies to self-report potential FCPA-related misconduct. For a company to be eligible to participate, the DOJ requires: the voluntary self-disclosure of the underlying FCPA violations; full cooperation with the Department's subsequent investigation (including the disclosure of 'all facts related to involvement in the criminal activity by the corporation's officers, employees, or agents'); the taking of appropriate remediation measures; and the disgorgement of all profits resulting from the FCPA violations. If a company takes all these steps, the Fraud Section 'may accord up to a 50 percent reduction off the bottom end of the Sentencing Guidelines fine range' and 'generally should not require appointment of a monitor'. In addition, where a company fulfils these same conditions, 'the Fraud Section's FCPA Unit will consider a declination of prosecution'.

13 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. Although still a fairly rare occurrence, an increase in the number of individuals prosecuted has resulted in more defendants holding out for jury verdicts in recent years.

14 Patterns in enforcement

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

The pace of FCPA enforcement has accelerated greatly over the past decade, with the DOJ and SEC averaging more than 35 enforcement actions a year during this time period compared with approximately four a year over the first 28 years following the statute's enactment. Along with this increase in overall enforcement, the sanctions imposed have also increased in severity, particularly in recent years, with monetary penalties (including fines, disgorgement of profits, and payment of pre-judgment interest) significantly eclipsing those imposed by earlier FCPA settlements. For example, from 2005 to 2007, the SEC and DOJ imposed approximately US$272 million in FCPA-related corporate penalties, with the average combined penalty coming to nearly US$11 million. In the ensuing nine years, these figures have skyrocketed, with the agencies imposing approximately US$4.35 billion in FCPA-related corporate penalties from 2014 to 2016, bringing the average combined penalty to more thanUS$89 million. In addition to monetary penalties, companies are now frequently 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 90 individuals have been charged with or convicted of criminal or civil violations of the FCPA, and this emphasis by US enforcement authorities on the prosecution of individuals shows no signs of letting up. On 9 September 2015, Deputy Attorney General Sally Yates issued a memorandum entitled 'Individual Accountability for Corporate Wrongdoing' to federal prosecutors nationwide detailing new DOJ policies that require a corporation that wants to receive credit for cooperating with the government to provide 'all relevant facts' about employees at the company who were involved in the underlying corporate wrongdoing. The DOJ's new FCPA enforcement 'pilot program', discussed in question 12, furthers these aims, explicitly requiring that a company comply with the Yates Memo directives to receive full cooperation credit.

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.

15 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.

16 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. In fact, in recent years, disgorgement has become a common component of most FCPA dispositions, with the amount disgorged frequently exceeding the total value of the civil and criminal fines imposed.

Since 2008, US enforcement authorities have imposed over US$5 billion in criminal and civil fines, disgorgement, and pre-judgment 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.

17 Recent decisions and investigations

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

The SEC and DOJ resolved 57 FCPA-related enforcement actions in 2016, which represents the second-highest annual total on record and comes just a year after enforcement had fallen to a 10-year low in 2015. This increase was largely driven by the SEC, which entered into substantially more corporate FCPA dispositions in 2016 than the DOJ, which has shifted its focus toward larger cases involving more serious misconduct.

Among other notable developments this past year, several companies entered into substantial 'global' settlements to resolve FCPA-related charges in multiple jurisdictions simultaneously, reflecting levels of coordination and international cooperation heretofore not seen between the US and a variety of other countries.

In February 2016, the Netherlands-based global telecommunications provider VimpelCom Ltd agreed to a joint settlement with the SEC, DOJ and Dutch authorities to resolve FCPA-related allegations that VimpelCom entities made more than US$114 million in improper payments to a foreign official in Uzbekistan in exchange for that official's understood influence over the telecommunications regulator in Uzbekistan. As part of its resolution, VimpelCom agreed to pay a total of US$795 million in fines and disgorgement to US and Dutch authorities and retain an independent compliance monitor for three years. For its part, the SEC agreed to offset more than US$207 million of Vimpelcom's US$350 million disgorgement in recognition of the company's US$167.5 million disgorgement payment to Dutch authorities and US$40 million forfeiture to the DOJ. VimpelCom's resolution may signal not only increasing international coordination with respect to resolutions, but also with respect to fact-gathering and case-building. In its press release, the SEC thanked agencies of 14 other countries for assisting in its investigation. The DOJ noted that it was 'one of the most significant coordinated international and multi-agency resolutions in the history of the FCPA'.

In September 2016, New York-based hedge fund Och-Ziff Capital Management Group LLC (Och-Ziff) entered into a parallel settlement with the SEC and DOJ to resolve a five-year investigation into allegations that Och-Ziff paid agents and business partners while knowing that some or all of the underlying funds would be used to bribe high-level government officials in the Democratic Republic of Congo and Libya to secure hundreds of millions of dollars in investment opportunities. In settling, Och-Ziff agreed to pay US$412 million in fines and disgorgement and retain a compliance monitor for three years. Although this matter does not constitute another joint multijurisdictional settlement, the DOJ still acknowledged extensive international cooperation in its investigation, including assistance from authorities in a number of jurisdictions with prominent offshore banking industries, such as Switzerland, the British Virgin Islands, Malta, Cyprus, Gibraltar, Jersey, Guernsey and the United Kingdom. The involvement and cooperation of so many countries signals a growing willingness by anti-corruption authorities worldwide to help the US track down evidence related to corrupt transactions.

In October 2016, the Brazilian aircraft manufacturer Embraer SA likewise entered into a joint settlement with the SEC, DOJ and Brazilian authorities to resolve a six-year investigation into FCPA-related allegations that the company paid millions in bribes to government officials in the Dominican Republic, Mozambique, India, and Saudi Arabia to secure hundreds of millions of dollars in aircraft contracts between 2008 and 2010. Embraer frequently sought to conceal the illicit payments by channelling them through third parties, including consultants with no relevant expertise or experience, whose services were unnecessary, and who were retained without meaningful scrutiny. As part of its resolution, Embraer agreed to pay a total of US$205 million in fines, disgorgement, and prejudgment interest to US and Brazilian authorities and retain an independent compliance monitor for three years. For its part, the SEC agreed to offset more than US$20 million of Embraer's US$98 million disgorgement in recognition of the company's US$20 million disgorgement payment to Brazilian authorities. According to the DOJ, Brazilian authorities have also charged 11 individuals to date for their alleged roles in the Dominican Republic misconduct, while Saudi Arabian authorities have reportedly charged two local officials based on their alleged involvement in the Saudi scheme.

In November 2016, the global financial services firm JPMorgan Chase and Co and its Chinese subsidiary entered into a parallel settlement with the SEC and DOJ to resolve allegations that the Chinese subsidiary created a client-referral programme in 2006 called the 'Sons and Daughters Program' as a means of providing the relatives of local officials with internships and paid positions in exchange for favourable business deals that reportedly generated at least US$35 million profit for the company. From the outset, the alleged purpose of the programme was to generate business for the Chinese subsidiary, as the candidates hired to the client-referral programme were typically less qualified in terms of grades, language skills and quantitative ability than the regular pool of candidates, who had to go through a competitive interview process. Additionally, the departments that hired these candidates generally expected less from them in terms of competency, workload and number of hours worked, and provided them with 'special consideration' in terms of work assignments, promotions, and protection from heavy workloads. As part of its resolution, JPMorgan Chase and its Chinese subsidiary agreed to pay more than US$264 million in fines, disgorgement and prejudgment interest to US authorities.

Financial record keeping

18 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 (the PCAOB) and authorised it to set auditing standards.

19 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 12). US securities laws do, however, prohibit 'material' misstatements and otherwise may require disclosure of a violation of anti-bribery laws. The mandatory certification requirements of SOX can also result in the disclosure of violations.

20 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.

21 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 16).

22 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

23 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 or third party, 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 25).

'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.

24 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 either soliciting or accepting anything of value with the intent to be influenced in the performance of an official act (see 18 USC section 201(b)(2)).

25 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), officers and employees of all branches of the federal government, as well as federal jurors. 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 a US Air Force base, a grain inspector licensed by the Department of Agriculture, and an immigration detention centre guard employed by a private contractor as falling within the ambit of 'public official'.

Because the bribery statute applies only to the bribery of federal public officials, officials of the various state governments are exempt from the statute's reach. However, there are other federal statutory provisions which can be used to prosecute bribery of state public officials, as well as those attempting to bribe them. Specifically, the federal mail and wire fraud statutes prohibit the use of the mail system, phone or internet to carry out a 'scheme to defraud', which includes a scheme

Update and trends

The past several years have seen not only the continued use of independent compliance monitors or consultants as a condition of settlement in certain cases, but also the growth of such alternative dispositions as deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs), with the agencies giving increasing attention and publicity most recently to 'declinations'. Disgorgement with prejudgment interest has become a common, and sometimes significant, sanction by the SEC. The DOJ and SEC resolved several prominent enforcement actions this past year in parallel with foreign enforcement authorities, highlighting a dramatic rise in cooperation and coordination in global anti-corruption efforts. And, as noted in question 32, the prosecution of individuals has been recently reaffirmed as an enforcement priority.

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.

26 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 earn income from 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$27,495 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 (senior non-career personnel) – such as cabinet secretaries and their deputies – are prohibited by executive order from earning any outside income whatsoever. Senior-level, non-career presidential appointees who are not subject to Senate confirmation may earn up to US$27,495 in outside income per year and may not receive compensation from any 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.

27 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 federal criminal statute applicable to all government officials and by regulations promulgated by each branch of government that establish specific gift and travel rules for its employees. The criminal gratuities statute applies to those who either 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 an illegal 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 an illegal 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 by the official. 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). There is no requirement that the gift actually produce the intended result. The mere act of giving can be enough to trigger the statute.

In addition to the federal criminal gratuities statute, each branch of government regulates the extent to which its employees may accept gifts from outside sources. 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, including gifts, travel, lodging or meals from a 'prohibited source', that is, anyone 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 a prohibited source is unconnected to any such act. In addition, federal employees 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. Limited exceptions exist for certain de minimis gifts, such as gifts motivated by a family relationship. However, 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 (which includes travel or lodging) 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). A member of Congress is wholly prohibited from receiving a gift of any kind from a registered lobbyist and their affiliates. In addition, members are 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. The House of Representatives specifically 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.

A recent bill introduced by Senators Michael Bennet and Al Franken would ban members of Congress from working as a lobbyist at any time after they leave office. Current law prohibits senators from lobbying for two years after leaving Congress and House members have a one-year ban. Under the proposed Close the Revolving Door Act of 2015, both House and Senate members would be permanently banned from lobbying after leaving office. In addition, the proposed law would increase the one-year restrictions on congressional staff to six years and increase the disclosure requirements for lobbying activities.

28 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 27, 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 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.

29 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.

30 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.

31 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.

32 Recent decisions and investigations

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

As noted in the answer to question 25, the federal bribery statute does not apply directly to state public officials. However, other federal laws can be used to reach the actions of state officials engaged in corruption. A recent prominent action against former Virginia governor Bob McDonnell and his wife Maureen illustrates this point. In September 2014, a federal jury convicted the McDonnells of multiple counts of both conspiracy and substantive 'honest services' wire fraud for accepting monetary and other gifts from a prominent local

Miller & Chevalier

Homer E Moyer Jr	**hmoyer@milchev.com**
James G Tillen	**jtillen@milchev.com**
Marc Alain Bohn	**mbohn@milchev.com**
Amelia Hairston-Porter	**ahairstonporter@milchev.com**

900 16th Street NW	Tel: +1 202 626 5800
Washington, DC 20006	Fax: +1 202 626 5801
United States	www.millerchevalier.com

businessman in exchange for official acts and the prestige of the governor's office, which defrauded the state's citizens of the governor's 'honest services'. On 6 January 2015, a federal judge sentenced Bob McDonnell to two years in prison, substantially less than the six-and-a-half-year term sought by prosecutors. His wife Maureen was sentenced on 20 February 2015 to one year and a day in prison. On 10 July 2015, Bob McDonnell's conviction was upheld by the Fourth Circuit Court of Appeals. He subsequently requested review by the US Supreme Court, which granted his petition on 15 January 2016. Arguments were heard on 27 April 2016 and on 27 June 2016, the Supreme Court, in a unanimous opinion, vacated the governor's conviction on grounds that the definition of 'official act' relied on by the prosecution was overinclusive and erroneous. The Court held that for an action to qualify as an 'official act' under the federal bribery statute, a public official must proactively take an action or make a decision on a question or issue that involves a formal exercise of governmental power. Setting up a meeting, talking to another official, or organising an event – without more – does not rise to the level of an 'official act' within the meaning of the statute. As a result of the decision, lawyers for Maureen McDonnell requested that the Fourth Circuit Court of Appeals vacate her conviction as well. On 8 September 2016, the DOJ announced that it would not seek to retry either Bob or Maureen McDonnell on federal bribery charges. On 23 September 2016, a federal district court granted motions from both parties to dismiss all charges against the former governor and his wife.

A recent action against a federal public official demonstrates that enforcement of the domestic bribery laws continues to be a high priority for the DOJ. In April 2015, Senator Robert Menendez (New Jersey) was indicted on a total of 14 counts of corruption-related offences for allegedly accepting gifts, travel, and legal donations valued at nearly US$1 million from a wealthy Florida donor in exchange for intervening on behalf of the donor's business and personal interests. Among others, the charges included one count of conspiracy, one count of violating the Travel Act, eight counts of bribery and three counts of honest services fraud. Senator Menendez has pleaded not guilty, and on 13 September 2016, the Third Circuit Court of Appeals rejected his application to have the bribery and corruption charges dismissed on grounds that his constitutional protections as a senator were violated. In light of the recent Supreme Court decision in the McDonnell case, Senator Menendez has indicated that he will request that the Court review his appeal and grant his request to dismiss the charges against him.

Similarly, on 12 December 2016, former Pennsylvania congressman, Chaka Fattah, was sentenced to 10 years in federal prison after being convicted of multiple counts of wire and mail fraud, honest services fraud, bribery and money laundering relating to a series of elaborate criminal schemes, including misappropriation of funds and accepting bribes. The sentence is one of the longest ever imposed on a member of Congress.

Getting the Deal Through

Acquisition Finance
Advertising & Marketing
Agribusiness
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Arbitration
Asset Recovery
Aviation Finance & Leasing
Banking Regulation
Cartel Regulation
Class Actions
Commercial Contracts
Construction
Copyright
Corporate Governance
Corporate Immigration
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Dispute Resolution
Distribution & Agency
Domains & Domain Names
Dominance
e-Commerce
Electricity Regulation
Energy Disputes
Enforcement of Foreign Judgments
Environment & Climate Regulation
Equity Derivatives
Executive Compensation & Employee Benefits
Financial Services Litigation
Fintech
Foreign Investment Review
Franchise
Fund Management
Gas Regulation
Government Investigations
Healthcare Enforcement & Litigation
High-Yield Debt
Initial Public Offerings
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Labour & Employment
Legal Privilege & Professional Secrecy
Licensing
Life Sciences
Loans & Secured Financing
Mediation
Merger Control
Mergers & Acquisitions
Mining
Oil Regulation
Outsourcing
Patents
Pensions & Retirement Plans
Pharmaceutical Antitrust
Ports & Terminals
Private Antitrust Litigation
Private Banking & Wealth Management
Private Client
Private Equity
Product Liability
Product Recall
Project Finance
Public-Private Partnerships
Public Procurement
Real Estate
Restructuring & Insolvency
Right of Publicity
Securities Finance
Securities Litigation
Shareholder Activism & Engagement
Ship Finance
Shipbuilding
Shipping
State Aid
Structured Finance & Securitisation
Tax Controversy
Tax on Inbound Investment
Telecoms & Media
Trade & Customs
Trademarks
Transfer Pricing
Vertical Agreements

Also available digitally

Online

www.gettingthedealthrough.com

Anti-Corruption Regulation
ISSN 2042-7972

THE QUEEN'S AWARDS FOR ENTERPRISE: 2012

Official Partner of the Latin American Corporate Counsel Association

Strategic Research Sponsor of the ABA Section of International Law