Anti-Corruption Regulation 2018

Contributing editor
Homer E Moyer Jr

2018

GETTING THE DEAL THROUGH

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Miller & Chevalier

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For further information please contact editorial@gettingthedealthrough.com

Publisher
Tom Barnes
tom.barnes@lbresearch.com

Subscriptions
James Spearing
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

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87 Lancaster Road
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Preface

Anti-Corruption Regulation 2018

Twelfth edition

Getting the Deal Through is delighted to publish the twelfth edition of *Anti-Corruption Regulation*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Portugal.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

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

GETTING THE DEAL THROUGH

London
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United States

Homer E Moyer Jr, James G Tillen, Marc Alain Bohn and Amelia Hairston-Porter
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1 International anti-corruption conventions

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

The United States is a signatory to and has ratified the Organisation for Economic Co-operation and Development Anti-Bribery Convention (OECD Convention), the Organization of American States' (OAS) Inter-American Convention against Corruption, and the United Nations Convention against Corruption (the UNCAC), all with reservations or declarations. The most significant reservations involve declining to specifically provide the private right of action envisioned by the UNCAC and not applying the illicit enrichment provisions of the OAS Convention.

The US 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, 78 ff, 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 (the SEC) jointly issued A Resource Guide to the US 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 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.

The covered person must act while 'knowing' (see question 7) that the payment or promise to pay will be passed on to one of the above, for the purpose of obtaining or retaining business, or directing business to any person via:

- 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.

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 US. (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
- from surreptitious behaviour.

Improper advantage
Added to the statute following ratification of the OECD 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:

> *[A]ny 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 . . .*

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 in the entity;
- 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. These include:

- in-kind contributions;
- investment opportunities;
- subcontracts;
- stock options;
- positions in joint ventures;
- favourable contracts; and
- business opportunities.

The FCPA includes an affirmative defence, however, for reasonable and genuine 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 the SEC underscores that anti-bribery violations require a corrupt intent and states that:

> *[I]t 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 the 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. 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 US.

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 American foreign bribery laws. See question 16.

11 Agency enforcement

What government agencies enforce the foreign bribery laws and regulations?

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

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 and have traditionally not been quantified in advance by enforcement officials.

In 2016, the DOJ began experimenting with a more formal system of incentives to encourage voluntary disclosures. On 5 April 2016, the DOJ launched a one-year FCPA enforcement pilot programme which provided incentives for companies to self-report potential FCPA-related misconduct. For a company to be eligible to participate, the DOJ required:

- a voluntary self-disclosure 'prior to an imminent threat of disclosure or government investigation';
- full cooperation with the DOJ'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 took all these steps, the Fraud Section stated that it 'may accord up to a 50 per cent reduction off the bottom end of the Sentencing Guidelines fine range', the entity 'generally should not require appointment of a monitor' and the DOJ would 'consider a declination of prosecution'. The pilot programme was provisionally extended in March 2017 and then revised and made permanent as part of an official FCPA Corporate Enforcement Policy addition to the US Attorneys' Manual on 29 November 2017. Of note, the new policy significantly strengthens the incentives provided to companies who satisfy the self-reporting requirements: instead of a promise that the DOJ will 'consider' a declination, these companies can rely on a 'presumption' of declination in all cases that do not involve 'aggravating circumstances', such as misconduct by senior executives, pervasive wrongdoing within the company, significant profits stemming from the corruption, or criminal recidivism. (See question 14.)

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 the 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$268 million in FCPA-related corporate penalties, with the average combined penalty coming to approximately US$11.1 million. In the ensuing nine years, these figures have skyrocketed, with the agencies imposing approximately US$3.6 billion in FCPA-related corporate penalties from 2015 to 2017, bringing the average combined penalty to more than US$72.2 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 monitoring period, generally ranging from 12 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, more than 110 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 2016 FCPA enforcement pilot programme (see question 12), furthered this aim by explicitly requiring that a company comply with the Yates Memorandum directives to receive full cooperation credit. The FCPA Corporate Enforcement Policy, which formally incorporated the primary components of the pilot programme into the US Attorneys' Manual on 29 November 2017, similarly requires that companies disclose 'all relevant facts' about any individuals involved in the misconduct to receive full cooperation credit, but without explicit mention of the Yates Memorandum.

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, medical device and 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 the 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 US. In conspiracy cases, the US 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 US.

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 prejudgment 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 more than 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.

Of note, on 5 June 2017, the US Supreme Court issued a unanimous opinion in *Kokesh v* the SEC, holding that the SEC's imposition of disgorgement constitutes a penalty under federal law, as opposed to an 'equitable remedy', and is therefore subject to a five-year statute of limitations. The restriction on the SEC's ability to seek disgorgement outside of the five-year window is forcing a shift in the SEC's enforcement strategies in a range of cases, particularly those involving older conduct approaching the end of the statute of limitations period or complicated schemes that often require substantial resources and time to investigate.

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 34 FCPA-related dispositions in 2017 come just a year after FCPA enforcement levels approached all-time highs with 58 resolved enforcement actions in 2016. This decline in enforcement was driven by a drop in the number of resolved corporate enforcement actions from 40 in 2016 to 17 in 2017, while the number of actions against individuals has largely kept pace, with 17 in 2017 compared with 18 in 2016.

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

Rolls-Royce

On 17 January 2017, UK-based Rolls-Royce Holdings plc agreed to pay more than US$800 million as part of a global settlement with the US DOJ, UK Serious Fraud Office (SFO) and Brazilian prosecutors (see Brazil and United Kingdom chapters). The company's DPA with the DOJ accounts for US$169 million of this total, resolving allegations that Rolls-Royce's US-based energy subsidiary made millions of dollars in unlawful payments to officials at state-owned oil and gas companies in Angola, Azerbaijan, Brazil, Iraq, Kazakhstan and Thailand in exchange for assistance in providing confidential information and awarding contracts to the company and its affiliates.

A parallel settlement with Brazilian prosecutors for Brazil-related misconduct accounts for another US$25 million (which the DOJ took into account in calculating the penalties it collected).

Finally, a DPA with the SFO imposed the remaining US$604 million, resolving allegations that the company's energy and aerospace business units made millions more in unlawful payments to officials in China, India, Indonesia, Malaysia, Nigeria, Russia and Thailand.

Of note, Rolls-Royce represents the SFO's largest bribery-related enforcement action to date and reflects the SFO's increased reliance on US-style strategies to prosecute foreign corruption.

Telia Company AB

On 21 September 2017, the Swedish telecommunications giant Telia Company AB agreed to pay more than US$965 million in fines and disgorgement as part of a global settlement with the DOJ, the SEC, Dutch Public Prosecutor's Office and the Swedish Prosecution Authority to resolve allegations of corruption in Uzbekistan. (See the Netherlands and Denmark chapters.)

According to US enforcement authorities, Telia, operating through its Uzbek subsidiary, made more than US$331 million in improper payments to a foreign official in Uzbekistan in exchange for that official's understood influence over the telecommunications regulator in Uzbekistan, an arrangement that provided Telia with unlawful access to government-owned telecommunications frequencies. As part of the settlement, Telia will pay US authorities at least US$483 million in criminal fines and disgorgement.

Telia's resolution, the third-largest global settlement to date, is the latest example of international coordination on FCPA-related matters that extends not only to settlement amounts, but to fact-gathering and case-building. In their press releases, the DOJ and the SEC each thanked more than a dozen other agencies and countries for assisting in their investigations.

SBM Offshore NV

On 29 November 2017, the Netherlands-based company SBM Offshore NV – which designs and manufactures offshore oil drilling

equipment – agreed to pay a criminal penalty of US$238 million under a DPA with the DOJ, while one of the company's US subsidiaries simultaneously pled guilty to corruption charges (see the *Netherlands* chapter).

According to the DPA, from 1996 until at least 2012, high-level executives at SBM Offshore paid millions of dollars to government officials at state-owned oil companies in Angola, Brazil, Equatorial Guinea, Iraq, and Kazakhstan, in an effort to obtain and retain contracts for offshore drilling facilities. While the DOJ acknowledged the company's initial self-report, the agency also made clear the company did not provide a 'complete disclosure' for approximately one year. This failure to fully disclose at the outset is likely why SBM Offshore received only a 25 per cent reduction off the bottom of the US Sentencing Guidelines fine range rather than the 50 per cent promised to companies that properly self-report. It may also explain why the DOJ initially declined to prosecute the company in 2014, only to reopen the investigation two years later.

In contrast to the highly coordinated nature of a string of recent multi-jurisdictional resolutions, SBM Offshore's resolutions seem a little more scattershot, with the company initially settling related allegations with the Dutch Public Prosecutors Service for US$240 million in 2014 then entering into its US$238 million DOJ disposition in November 2017, before reportedly agreeing to a tentative US$340 million settlement with Brazilian authorities in early December 2017.

Keppel Offshore & Marine Ltd.

On 22 December 2017, Singapore-based Keppel Offshore & Marine Ltd (KOM) and its wholly owned US subsidiary Keppel Offshore & Marine USA Inc (KOM USA) agreed to pay more than US$422 million in criminal penalties as part of a global settlement with the DOJ, Brazil's Federal Public Prosecutor (MPF), and Singapore's Attorney General's Chambers (AGC). On the US side, the DOJ charged KOM and KOM USA with conspiracy to violate the FCPA's anti-bribery provisions and imposed a total of US$105.5 million in criminal penalties, after offsets, under the companies' respective DPA and guilty plea.

According to the pleadings, KOM and its subsidiaries made approximately US$55 million in bribe payments to Brazilian government and political party officials in connection with 13 projects tendered by Petrobras and the vessel company Sete Brasil. KOM allegedly sought to hide the bribes by paying 'outsized commissions' to an intermediary for purported 'consulting' services. The intermediary then passed the money to Petrobras officials and to a Brazilian political party.

Parallel settlements with the MPF and the AGC accounted for another US$211 million and US$105.5 million in criminal fines, respectively, which the US credited against the original US$422 million its agreements had imposed. Of note, the KOM resolution represents the first time the US has publicly coordinated an FCPA settlement with enforcement authorities in Singapore.

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 generally accepted accounting principles (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 chief executives and chief financial officers (signatories to the financial reports) are directly responsible for and must certify the adequacy of both internal controls and disclosure controls and procedures.

Management must disclose all 'material weaknesses' in internal controls to the external auditors.

SOX also requires that each annual report contain an internal control report and an attestation by the external auditors of management's internal control assessment.

SOX sets related certification requirements (that a report fairly presents, in all material respects, the financial condition and operational results) and provides criminal penalties for knowing and wilful violations.

The securities laws also impose various auditing obligations, require that the issuer's financial statements be subject to external audit and specify the scope and reporting obligations with respect to such audits.

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

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 (ie, in an official capacity) 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.

The Supreme Court has recently narrowed the definition of 'official act', ruling that routine political acts, such as making phone calls, arranging meetings, and hosting events, do not meet the definition of an 'official act' without some accompanying formal exercise of power or substantive action. It should be noted, however, that the Speech or Debate Clause of the Constitution, which protects legislators from prosecution for certain 'legislative acts' taken when legislating, could complicate a prosecutor's ability to demonstrate whether an action qualifies as an 'official act'.

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 that 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 the internet to carry out a 'scheme to defraud', which includes a scheme to deprive another of 'honest services'. Under these provisions, state public officials who solicit bribes, and private individuals who offer them, can be prosecuted for defrauding the state's citizens of the public official's 'honest services' (bribery of federal public officials can also be prosecuted under the same theory). In addition, the laws of each state also prohibit the bribing of state public officials.

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$27,765 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$27,765 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 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

Updates and trends

On 5 June 2017, the US Supreme Court issued a unanimous opinion in *Kokesh v the SEC*, holding that the SEC's imposition of disgorgement constitutes a penalty under federal law, as opposed to an 'equitable remedy', and is therefore subject to a five-year statute of limitations.

Because many FCPA enforcement actions brought by the SEC have involved disgorgement amounts that dwarf the civil penalties, the Court's ruling is of significant interest to companies and individuals facing scrutiny by the SEC. In the past five years alone, the SEC's FCPA enforcement actions against companies have yielded well over US$2 billion, more than 80 per cent of which was from disgorged profits, a trend facilitated in part because equitable remedies were not seen as subject to the five-year statute of limitations.

This new restriction on the Commission's ability to seek disgorgement outside of the five-year window is already forcing a shift in the SEC's enforcement strategies in a range of cases, particularly those involving older conduct approaching the end of the statute of limitations period or complicated schemes that often require substantial resources and time to investigate.

On 1 December 2017, the DOJ unveiled a new addition to the United States Attorneys' Manual entitled the 'FCPA Corporate Enforcement Policy', which codified in part and extended the DOJ's pilot programme for encouraging voluntary disclosures of FCPA violations. While previously, the DOJ had promised to 'consider' a declination for organisations that voluntarily disclosed FCPA violations, the new policy now promises a 'presumption' of declination for all such companies, which may be overcome only if there are 'aggravating circumstances'. The new presumption signals a meaningful shift in the department's enforcement posture, with a declination representing a much more consequential incentive than the previous promise of a 50 per cent penalty reduction under the pilot programme.

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 small 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, Corey Gardner 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 2017, 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.

A related bill, the Banning Lobbying and Safeguarding Trust (BLAST) Act, has been introduced in the House by Congressman Trey Hollingsworth and similarly proposes a lifetime ban on members of Congress from working as a lobbyist.

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, such as 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. Minor 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 ($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 ($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.

Bob and Maureen McDonnell

A recent prominent action against former Virginia governor Bob McDonnell and his wife Maureen McDonnell 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 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 6.5-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 over inclusive 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.

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
Washington, DC 20006
United States

Tel: +1 202 626 5800
Fax: +1 202 626 5801
www.millerchevalier.com

Senator Robert enendez

In the first major post-*McDonnell* case, a federal jury was unable to reach a verdict in the trial of New Jersey Senator Robert Menendez, who was charged in April 2015 with 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.

After a two-month trial, jurors were unable to come to unanimous decision and on 16 November 2017 the judge declared a mistrial. In the wake of the Supreme Court's narrowing of the type of conduct that constitutes an 'official act', the *Menendez* result suggests that public corruption prosecutions may in the future be more difficult to pursue.

Several smaller actions demonstrate however, that prosecutors will continue to charge officials with bribery-related offences. On 6 March 2017, the former Chairman of the Port Authority of New York and New Jersey, David Samson, was sentenced to four years of probation after pleading guilty to using his influence as a Port Authority official to withhold approval of an aircraft hangar at Newark Airport. In delaying approval of the hangar, Samson successfully pressured United Airlines to implement a special flight route, dubbed the 'Chairman's Flight', from Newark to Columbia, South Carolina in order to facilitate access to his vacation home.

Seth Williams

Similarly, on 21 March 2017, Philadelphia District Attorney Seth Williams was indicted on multiple counts of bribery, fraud and extortion for allegedly accepting gifts and travel from two Philadelphia business owners in exchange for his intervention in a criminal case against an associate of one business owner and appointing the other business owner as a special adviser in the district attorney's office.

During the trial, Williams abruptly decided to plead guilty, and was sentenced on 24 October 2017 to five years in prison. And, on 5 October 2017, in light of the *McDonnell* decision, a federal judge vacated all but three convictions on charges of corruption for former Louisiana congressman William J Jefferson.

At the time of the judge's decision, Jefferson had served less than half of his 13-year sentence. Prosecutors have decided not to retry him.

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