Anti-Corruption Regulation 2020

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LEXOLOGY
Getting The Deal Through

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Lexology 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 Lexology 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 Australia, China, Denmark, Greece, Hong Kong, Portugal and Russia.

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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.

Lexology 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, James G Tillen of Miller & Chevalier Chartered, for his assistance with this volume.

LEXOLOGY
Getting The Deal Through

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Contents

United States

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RELEVANT INTERNATIONAL AND DOMESTIC LAW

International anti-corruption conventions

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

The United States is a signatory to and has ratified the Organisation for Economic Co-operation and Development Anti-Bribery Convention (the OECD Convention), the Organization of American States' (OAS) Inter-American Convention against Corruption, and the United Nations Convention against Corruption (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 United States is also a signatory to the Council of Europe Criminal Law Convention (the Criminal Convention), but has not ratified it.

Foreign and domestic bribery laws

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

US law criminalises bribery of foreign and domestic public officials.

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 and 78ff, enacted in 1977. The principal law prohibiting bribery of domestic federal officials is 18 USC section 201, enacted in 1962. In addition, each US state has laws criminalising bribery of their respective state officials.

There are no implementing regulations for either the FCPA or the federal domestic bribery 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 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.

Successor liability

3 Can a successor entity be held liable for violations of foreign and domestic bribery laws 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 and 18 USC 201(b). 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. For example, 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.

Although there are no failsafe means of avoiding successor liability, US enforcement authorities have indicated that companies that conscientiously seek to identify, address and remedy FCPA issues at the target company – either before or soon after closing – and disclose those issues to the authorities, may avoid an enforcement action.

Civil and criminal enforcement

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

There is civil and criminal enforcement of the FCPA and criminal enforcement of 18 USC 201(b). (See questions 15, 18, 38, and 39.)

Dispute resolution and leniency

5 Can enforcement matters involving foreign or domestic bribery be resolved through plea agreements, settlement agreements, prosecutorial discretion or similar means without a trial? Is there a mechanism for companies to disclose violations of domestic and foreign bribery laws in exchange for lesser penalties?

Foreign bribery

FCPA enforcement matters involving corporations 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, including four in 2019.

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. 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.

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 that 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.

Domestic bribery

Domestic bribery charges may also be resolved through plea and settlement agreements based on prosecutorial discretion.

FOREIGN BRIBERY

Legal framework

6 Describe the elements of the law prohibiting bribery of a foreign public official.

The FCPA prohibits a covered person or entity from 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 acting in an official capacity for or on behalf of a foreign government.

The covered person must act while 'knowing' 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) and 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 agents and 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.

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.

Definition of a foreign public official

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

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 and unpaid workers, as well as anyone acting under a delegation of authority from the government to carry out government responsibilities.

With respect to employees state-owned or state-controlled companies, 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'.

Gifts, travel and entertainment

8 | 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 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.

Facilitating payments

9 | Do the laws and regulations permit facilitating or 'grease' payments to foreign officials?

The FCPA permits 'facilitating' or 'grease' payments to foreign officials. 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.

Payments through intermediaries or third parties

10 | 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.

Individual and corporate liability

11 | 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.

Private commercial bribery

12 | To what extent do your foreign anti-bribery laws also prohibit private commercial bribery?

The FCPA's Anti-Bribery provisions, 15 USC sections 78dd–1(a), 78dd–2(a), 78dd–3(a), do not apply to private commercial bribery. However, in negotiated settlements with public companies, US enforcement authorities have asserted that the failure to accurately record commercial bribes resulted in inaccurate books and records and an inadequate system of internal accounting controls in violation of the FCPA's accounting provisions (see question 19).

In addition, domestic and foreign commercial bribery may violate other federal and state laws. For example, the Travel Act, 18 USC 1952, criminalises the use of interstate or foreign travel and the US mail for the purpose of engaging in certain specified unlawful activities, including state commercial bribery.

Defences

13 | What defences and exemptions are available to those accused of foreign bribery violations?

The FCPA includes two affirmative defences referred to as 'local law defence' and the 'reasonable and bona fide business expenditure defence'.

The local law defence requires the defending party to prove that 'the payment, gift, offer, or promise of anything of value that was made, was lawful under the written laws and regulations of the foreign official's, political party's, party official's, or candidate's country'.

The reasonable and bona fide business expenditure defence requires the defendant to establish that the expenses are directly related to demonstrations of products or services, tours of company facilities or 'the execution or performance of a contract' with a foreign government or agency.

In addition, the FCPA includes an exception for 'facilitating 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.

In addition, common law defences are available consistent with US law.

Agency enforcement

14 | What government agencies enforce the foreign bribery laws and regulations?

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

Patterns in enforcement

15 | 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 15 years as have the sanctions imposed, 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 12 years, these figures have skyrocketed, with the agencies imposing approximately US$4.6 billion in FCPA-related corporate penalties from 2017 to 2019 to date, bringing the average combined penalty to more than US$109.9 million during that time period.

In addition to monetary penalties, companies may be 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. The agencies have also imposed a hybrid approach that requires 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 2010, 147 individuals have been charged with 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.

On 29 November 2018, the DOJ announced important limitations to the Yates Memorandum in an effort to address elements of the policy that had proven problematic in practice, most significantly the requirement that cooperating companies provide information on all individuals involved in some way in the underlying misconduct being investigated. As revised, the policy, now incorporated into the FCPA Corporate Enforcement Policy, requires cooperating corporations to provide information relating to individuals who were 'substantially' involved in or responsible for the misconduct.

SOX has encouraged voluntary disclosures, as has the DOJ's FCPA Corporate Enforcement Policy, which was implemented in part to incentivise such disclosures. A number of cases have arisen in the context of proposed corporate transactions, as the due diligence associated with such deals frequently surfaces potential FCPA violations. 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.

Prosecution of foreign companies

16 | 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'.

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.

Sanctions

17 | 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.

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) or self-monitor for a specified period in connection with the settlement of FCPA matters.

Recent decisions and investigations

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

The pace of FCPA enforcement has increased with 40 resolutions in 2019, as compared to the first two years of the Trump administration, with 35 dispositions in 2017 and 32 dispositions in 2018. The recent increase in enforcement has been driven by a spike in the number of resolved actions against individuals, from 11 in 2018 to 17 in 2019, with a slight increase in the number of corporate enforcement actions from 21 in 2018 to 23 in 2019.

Among other notable developments this past year, US enforcement authorities recovered more in monetary penalties (including fines, disgorgement of profits and payment of prejudgment interest) in corporate FCPA cases in 2019 than in any other year since the enactment of the FCPA for a total of US$2.65 billion. Resolved corporate settlements with telecommunications companies Mobile Telesystems PJSC and Telefonaktiebolaget LM Ericsson account for US$1.9 billion of the US$2.65 billion recovered in 2019.

Mobile TeleSystems PJSC

On 6 March 2019, the DOJ announced a DPA and the SEC announced a cease-and-desist order with the Russian telecommunications provider Mobile TeleSystems PJSC (MTS) and its Uzbek subsidiary Kolorit Dizayn Ink LLC (Kolorit). According to the DOJ, MTS and its subsidiary conspired to violate the criminal anti-bribery and books-and-records provisions of the FCPA. According to the SEC, MTS violated the civil anti-bribery, books-and-records, and internal-accounting-control provisions of the FCPA. The charges against MTS arose out of alleged payments to Gulnara Karimova, the daughter of the former president of Uzbekistan, in exchange for support for business operations in Uzbekistan. The MTS disposition is the third major FCPA case, after *Telia Company AB* and *VimpelCom Ltd*, involving telecommunications companies making unlawful payments to Karimova. Under the DOJ's DPA and SEC order, MTS agreed to pay total penalties and forfeiture of US$850 million – the second-largest amount ever paid to the US government in an FCPA action behind Ericsson.

Telefonaktiebolaget LM Ericsson

On 6 December 2019, the DOJ and SEC announced that Sweden-based telecommunications company Ericsson and its Egyptian subsidiary, Ericsson Egypt Ltd, agreed to pay US$1.06 billion in fines to resolve criminal and civil charges relating to improper payments in Djibouti, China, Vietnam, Indonesia, Kuwait and Saudi Arabia. Specifically, Ericsson resolved violations of the FCPA's anti-bribery, books and records, and internal accounting controls and Ericsson Egypt Ltd pleaded guilty to conspiracy to violate the anti-bribery provisions of the FCPA. The charging documents alleged that Ericsson relied on third-party agents and consultants to make bribe payments to government officials and managed off-the-books slush funds. This resolution is the largest ever penalty amount recovered by US enforcement authorities in an FCPA matter.

US v Hoskins

On 8 November 2019, a jury convicted Lawrence Hoskins, a former senior executive of French-based Alstom, of six counts of violating the FCPA, three counts of money laundering, and two counts of conspiracy for his role in a scheme to pay bribes to officials in Indonesia to secure a US$118 million contract to build a power plant. Hoskins previously challenged the FCPA charges and, in 2018, the US Court of Appeals for the Second Circuit ruled that Hoskins – a UK citizen who was employed by a UK subsidiary of a French company, and who acted entirely outside the United States – could be found liable if he fell within the statue's jurisdictional scope. Consequently, whether Hoskins was an agent of Alstom's US subsidiary became a dispositive issue during trial. As the FCPA does not define 'agent', the trial court issued a pretrial ruling describing an agency relationship as '(1) a manifestation by the principal that the agent will act for him; (2) acceptance by the agent of the undertaking; and (3) an understanding between the parties that the principal will be in control of the undertaking'. Notably, the trial court held that control need only be exercised over the agent's actions taken on the principal's behalf and that '[o]ne may be an agent for some business purposes and not others.' The DOJ ultimately persuaded the jury that Hoskins acted as agent of Alstom's US subsidiary, arguing that even though Hoskins was an employee of a UK subsidiary of Alstom, the US subsidiary controlled his conduct with respect to the bribery scheme at issue.

FINANCIAL RECORD-KEEPING AND REPORTING

Laws and regulations

19 | 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 accounting controls adequate to ensure accountability for assets. Specifically, the accounting provisions require issuers to make and keep books, records and accounts that, 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;
- accounts of assets and existing assets are periodically reconciled; and
- transactions are recorded so as to allow for the preparation of financial statements in conformity with generally accepted accounting principles standards.

Issuers are strictly liable for the failure of any of their owned or controlled foreign affiliates to meet the internal accounting controls standards for the FCPA. Where an issuer holds 50 per cent or less of the voting power with respect to an affiliate, the issuer must 'proceed in good faith to use its influence, to the extent reasonable under the issuer's circumstances, to cause such domestic or foreign firm to devise and maintain a system of internal accounting controls'.

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 and authorised it to set auditing standards.

Disclosure of violations or irregularities

20 | 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. 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.

Prosecution under financial record-keeping legislation

21 | 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.

Sanctions for accounting violations

22 | 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 of 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.

Tax-deductibility of domestic or foreign bribes

23 | 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

Legal framework

24 | 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; or
- 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 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.

'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 congressperson'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.

Scope of prohibitions

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

In addition to punishing the payment of a bribe (see question 24), 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)).

Definition of a domestic public official

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

The federal 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 warehouse worker 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.

Gifts, travel and entertainment

27 | Describe any restrictions on providing domestic officials with gifts, travel expenses, meals or entertainment. Do the restrictions apply to both the providing and the 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 (as 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, and extended by President Trump, 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.

Facilitating payments

28 | 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.

Public official participation in commercial activities

29 | What are the restrictions on a domestic public official participating in commercial activities while in office?

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$28,440 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$28,440 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.

Payments through intermediaries or third parties

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

18 USC 201(b)(1) provides that payments covered by the statute include payments that are made 'directly or indirectly.' Therefore, 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.

Individual and corporate liability

31 | Can both individuals and companies be held liable for violating the domestic bribery rules?

18 USC 201 (b)(1) provides that '[w]hoever' engages in bribery as defined by the law shall be held liable.' Under the rules of construction provided for in 1 USC section 1, 'whoever' is defined to include individuals and companies or corporations.

Private commercial bribery

32 | To what extent does your country's domestic anti-bribery law 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 '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.

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 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.

Defences

33 | What defences and exemptions are available to those accused of domestic bribery violations?

Defendants prosecuted under 18 USC 201 have frequently raised two defences. First, defendants argue that they were entrapped into committing the violation. To rebut this defence, the government must only show that the defendant was predisposed to commit the crime. Second, defendants raise the argument that the government coerced or pressured them into committing the violation. This defence requires establishing three elements: an immediate threat of death or serious bodily injury, a well-grounded fear that the threat will be carried out, and no reasonable opportunity to avoid the threatened harm.

Agency enforcement

34 What government agencies enforce the domestic bribery laws and regulations?

The DOJ is responsible for enforcing 18 USC 201 and state prosecutors are responsible for enforcing the respective state laws.

Patterns in enforcement

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

See questions 38 and 39.

Prosecution of foreign companies

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

As noted in question 31, 18 USC 201 can apply to companies or corporations, including foreign companies where the US can establish jurisdiction.

Sanctions

37 What are the sanctions for individuals and companies that violate the domestic bribery rules?

Both the provider and recipient of a bribe in violation of 18 USC 201(b) can face up to 15 years' imprisonment per violation. 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, 18 USC 201(c), 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.

Recent decisions and investigations

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

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.

In the wake of the Supreme Court's *McDonnell* decision narrowing of the type of conduct that constitutes an official act under the federal bribery statute, large-scale public corruption prosecutions have arguably become more difficult to pursue. As discussed in past editions, *McDonnell* vacated the conviction of Bob McDonnell, former governor of Virginia, who had been charged with multiple counts of conspiracy and 'honest services' fraud for accepting money and other gifts from a prominent local businessman in exchange for official acts and the prestige of the governor's office. 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.

The first major post-*McDonnell* case resulted in a mistrial, where after a two-month trial, a federal jury was unable to come to a unanimous decision as to whether Robert Menendez, the New Jersey Senator, committed bribery and honest services fraud when he allegedly accepted nearly US$1 million from a wealthy Florida donor in exchange for intervening on behalf of the donor's business and personal interests. In January 2018, the DOJ declined to retry Menendez on any remaining bribery counts after a federal judge dismissed seven of the 18 charges against him, including one count of honest services fraud and three counts of bribery.

Similarly, former Pennsylvania congressman Chaka Fattah was granted a new trial after the Third Circuit ruled that *McDonnell*'s redefinition of official act meant that jurors had received improper instructions on the government's burden of proof, and that several of the charged acts were not actually unlawful. Fattah had previously been convicted in 2016 of accepting a string of bribes in exchange for official favours, as well using his position on the House Appropriations Committee to secure a US$15 million earmark for a fake advocacy group in exchange for paying off a campaign debt. He is currently serving a 10-year sentence for related convictions, including money laundering, campaign fraud and racketeering, which will not be impacted should the government decide to retry Fattah on the bribery counts.

Former New York State Assembly Speaker Sheldon Silver was convicted for the second time on charges of bribery, corruption, honest services fraud, extortion and money laundering after being granted a retrial in the wake of *McDonnell*. He had first been convicted in 2012 and was serving a 12-year sentence when the Second Circuit vacated the convictions and ordered a retrial on the grounds that the jury received improper instructions regarding the definition of 'official act'. Silver's second conviction resulted in a seven-year sentence, which he is currently appealing. Along with Silver, in 2018, a jury convicted Dean Skelos, former Majority Leader of the New York State Senate. In 2019, Skelos appealed his conviction, which was denied. Skelos's prior conviction was vacated and remanded for retrial given the Supreme Court's decision in *McDonnell v United States*, clarifying what constitutes an official act.

Finally, Joseph Percoco, a close aid of New York governor Andrew Cuomo, was sentenced to six years in prison for accepting bribes in exchange for steering energy and real estate projects to prominent businessmen in the New York area. Percoco has appealed his conviction on grounds that the government failed to meet its burden of proof under *McDonnell*, arguing that prosecutors could not show that he did anything more than make various referrals and set up meetings with local businesspeople. The conviction is the result of a long-standing bribery probe by the Manhattan US Attorney's office into corruption and bid-rigging in Governor Cuomo's office. Juries convicted six other individuals in connection with the scheme and one person pleaded guilty.

UPDATE AND TRENDS

Key developments of the past year

39 Please highlight any recent significant events or trends related to your national anti-corruption laws.

With respect to domestic bribery enforcement, despite the Supreme Court's 2016 decision in *McConnell*, which narrowed the definition of 'official act', federal prosecutors continue to successfully prosecute bribery-related charges. In addition to 18 USC 201, federal prosecutors have frequently relied on a handful of related statutes, such as the 'honest services fraud statute', 18 USC section 1346, to prosecute domestic bribery.

Enforcement of the FCPA in 2019 was marked by an increase in the number of resolved actions against individuals, with a total of 17 as of 9 December 2019. The DOJ matched its record of jury convictions in FCPA-related cases in a calendar year with four, including the conviction of Lawrence Hoskins, a former senior executive of French-based Alstom. As discussed in question 18, Hoskins was convicted of six counts of violating the FCPA, three counts of money laundering, and two counts of conspiracy for his role in a scheme to pay bribes to officials in Indonesia to secure a US$118 million contract to build a power plant. The jury concluded that Hoskins fell within the jurisdictional scope of the FCPA despite the fact that he was a UK citizen who was employed by a UK subsidiary of a French company, and who acted entirely outside the United States. Notably, the jury found that Hoskins acted as agent of Alstom's US subsidiary, arguing that even though Hoskins was an employee of a UK subsidiary of Alstom, the US subsidiary controlled his conduct with respect to the bribery scheme at issue. Open questions remain regarding the way the DOJ will leverage the verdict in *Hoskins* to charge as 'agents' individuals and entities that have seemingly tenuous connections to the United States. On 4 December 2019, in addressing concerns related to the *Hoskins* verdict, Assistant Attorney General Brian Benczkowski stated that 'the [DOJ] is not looking to stretch the bounds of agency principles beyond recognition, or even push the FCPA statute towards its outer edges.' He added, '[e]ach case and application of agency liability will need to be evaluated on its own and be based on a provable facts that align with agency principles.'

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