ANTI-CORRUPTION REGULATION

USA

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Getting The Deal Through

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Anti-Corruption Regulation

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Quick reference guide enabling side-by-side comparison of local insights, including into relevant domestic and international law, agencies, enforcement and sanctions; recent landmark investigations and decisions; and other recent trends.

Generated 15 February 2022

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RELEVANT INTERNATIONAL AND DOMESTIC LAW

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 (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.

Law stated - 13 January 2022

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).

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 United States Code (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than the regulations governing the Department of Justice's (DOJ) FCPA opinion procedure, under which the DOJ issues non-precedential opinions regarding its intent to take enforcement action in response to specific inquiries.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.)

On 3 July 2020, the US Department of Justice (DOJ) and Securities and Exchange Commission (SEC) released a second edition of the Resource Guide to the US FCPA (the Guide), which the agencies originally released in November 2012. The Guide summarises the key aspects of the FCPA, sets out the agencies' positions related to interpretation of statutory provisions and relevant legal principles, and discusses the agencies' enforcement policies and priorities, including as to the requirements and benefits of an effective FCPA compliance programme and related controls.

Overall, the second edition of the Guide does not substantially change the agencies' positions on the interpretation of the FCPA or their enforcement priorities. Rather, the new edition is an update that accounts for almost eight years of developments – including some international developments – since the original's issuance. As stated in the Guide's new Foreword: '[a]lthough many aspects of the Guide continue to hold true today, the last eight years have also brought new cases, new law, and new policies', including 'new case law on the definition of the term "foreign official" under the FCPA, the jurisdictional reach of the FCPA, and the FCPA's foreign written laws affirmative defense'. The Foreword notes that the update also 'addresses certain legal standards, including the mens rea requirement and statute of limitations for criminal violations of the accounting provisions'; 'reflects updated data, statistics, and case examples'; and 'summarises new policies applicable to the FCPA that have been announced in the DOJ's and SEC's continuing efforts to provide increased transparency'.

Law stated - 13 January 2022

Successor liability

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.

Law stated - 13 January 2022

Civil and criminal enforcement

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).

Law stated - 13 January 2022

Out-of-court disposal and leniency

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.

Law stated - 13 January 2022

FOREIGN BRIBERY

Legal framework

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

The Foreign Corrupt Practices Act (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 United States Code (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 Organisation for Economic Co-operation and Development Anti-Bribery Convention (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.

Law stated - 13 January 2022

Definition of a foreign public official

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 definition 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'.

Law stated - 13 January 2022

Gifts, travel and entertainment

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.

Law stated - 13 January 2022

Facilitating payments

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.

Law stated - 13 January 2022

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, the vast majority of FCPA-related enforcement actions involve third-party intermediaries.

Law stated - 13 January 2022

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.

Law stated - 13 January 2022

Private commercial bribery

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.

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.

Law stated - 13 January 2022

Defences

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.

Law stated - 13 January 2022

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.

Law stated - 13 January 2022

Patterns in enforcement

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

The pace of enforcement over the past two years was below historical highs, with 25 FCPA-related enforcement actions in 2020 and 11 in 2021, after 34 dispositions in 2018 and 42 dispositions in 2019. The decline in 2020-2021 enforcement actions reflected a drop in the number of both resolved corporate enforcement actions (from 24 in 2019 to 18 in 2020 and six in 2021) and the number of actions against individuals (from 18 in 2019 to seven in 2020 and five in 2021).

The slowed pace of enforcement is likely due, in part, to the continued effects of the covid-19 pandemic and the transition in administrations. However, we expect to see an upturn in enforcement, both as pandemic-related restrictions are lifted, and because the Biden administration has made clear that anti-corruption efforts are a centrepiece of its national security and foreign policy strategies. Key enforcement officials have noted that the DOJ and SEC have a strong pipeline of enforcement actions, are not waiting for companies to self-disclose, and are continuing to partner with other governments to investigate suspected misconduct. For example, in October, SEC Director of Enforcement Gurbir Grewal highlighted that SEC enforcement activity would increase in accordance with a number of priorities and indicated that the SEC expects companies to be aware of violations and risk patterns that arise in other enforcement actions and to proactively address similar issues if they arise in companies' own business activities.

Law stated - 13 January 2022

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'.

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.

Law stated - 13 January 2022

Sanctions

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

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

Criminal penalties for wilful violations

Corporations can be fined up to US$2 million per anti-bribery violation. Actual fines can exceed this maximum under alternative fine provisions of the Sentencing Reform Act (18 USC section 3571(d)), which allow a corporation to be fined up to an amount that is the greater of twice the gross pecuniary gain or loss from the transaction enabled by the bribe.

Individuals can face fines of up to US$100,000 per anti-bribery violation or up to five years' imprisonment, or both. Likewise, under the alternative fine provisions of the Sentencing Reform Act, individuals may also face increased fines of up to US$250,000 per anti-bribery violation or the greater of twice the gross pecuniary gain or loss the transaction enabled by the bribe.

Civil penalties

Corporations and individuals can be civilly fined up to US$10,000 per anti-bribery violation. In addition, the SEC or the DOJ may seek injunctive relief to enjoin any act that violates or may violate the FCPA. The SEC may also order disgorgement of ill-gotten gains and assess pre-judgment interest. In fact, in recent years, disgorgement has become a common component of most FCPA dispositions, with the amount disgorged frequently exceeding the total value of the civil and criminal fines imposed.

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.

Law stated - 13 January 2022

Recent decisions and investigations

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

Among other notable developments this past year, several companies entered into substantial settlements to resolve FCPA-related charges. The last resolution under the Trump administration, Deutsche Bank AG, and the first under the Biden administration, Amec Foster Wheeler Energy Limited, did not reflect overwhelming differences in approach. Notably, neither resolution involved the imposition of a compliance monitor, which is true of all resolutions in 2021. Nonetheless, we expect a return to the use corporate monitors in 2022 and beyond due to a lower standard for the imposition of monitors announced in Deputy Attorney Lisa Monaco's October 2021 policy memorandum.

Deutsche Bank AG

On 8 January 2021, the DOJ and SEC announced German financial services company Deutsche Bank AG (Deutsche Bank) agreed to pay more than $130 million to resolve alleged violations of the FCPA's accounting provisions. The FCPA misconduct allegedly took place between 2009 and 2016, during which time, according to the case documents, Deutsche Bank improperly engaged and used many third-party intermediaries, sometimes serving as conduits for bribes to foreign officials, to obtain and retain business for the Bank, often with approval of senior management.

The DOJ significantly increased the Bank's criminal penalty due, in part, to the Bank's prior resolutions, including its August 2019 FCPA resolution with the SEC. We expect corporations with records of past misconduct to continue to face heightened penalties, as Deputy Attorney General Lisa Monaco's 28 October 2021 memorandum on DOJ corporate criminal enforcement policies directed prosecutors to consider ' all misconduct by the corporation' when making determinations about criminal charges and resolutions for a corporate target.

Amec Foster Wheeler Energy Limited

On 25 June 2021, UK-based construction engineering company Amec Foster Wheeler Energy Limited (Foster Wheeler) agreed to pay more than $41 million to the DOJ and SEC to settle criminal and civil charges related to FCPA's anti-bribery and accounting provisions. The resolution formed part of a global settlement with US authorities, the UK Serious Fraud Office, and Brazilian authorities, one of several cases involving coordination with non-US enforcement authorities in recent years. According to the DOJ and SEC settlement papers, between 2011 and 2014, Foster Wheeler arranged to pay bribes to state-owned oil company Petróleo Brasileiro SA (Petrobras) officials through a number of third-party agents in order to win a contract to design a Brazilian chemicals complex, which it ultimately won, generating millions in profits for the company.

Foster Wheeler received full cooperation credit for its cooperation and the cooperation of its parent company, UK-based global engineering company John Wood Group plc. Despite the nature and seriousness of the offence, the criminal penalty reflected a 25 per cent reduction off the applicable US Sentencing Guidelines fine.

Law stated - 13 January 2022

FINANCIAL RECORD-KEEPING AND REPORTING

Laws and regulations

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

The Foreign Corrupt Practices Act (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'.

The Sarbanes-Oxley Act (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 andprocedures.

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.

Law stated - 13 January 2022

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. 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.

Law stated - 13 January 2022

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.

Law stated - 13 January 2022

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 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.

Law stated - 13 January 2022

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 United States Code (USC) section 162(c)(1).

Law stated - 13 January 2022

DOMESTIC BRIBERY

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;

- anything of value;
- to a public official; or
- with the intent to influence an official act.

See 18 United States Code (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.

‘Anything 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. The phrase 'anything of value' has consistently been given broad meaning. For example, courts have held that promises of future employment, stocks that had no objective value at the time of transfer but were intended to have value in the future, and even campaign contributions are things of value.

‘Public official’

The recipient may be either a public official or a person selected to be a public official (ie, any person nominated or appointed, such as a federal judge), as discussed below.

‘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.

Law stated - 13 January 2022

Scope of 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)).

Law stated - 13 January 2022

Definition of a domestic public official

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). Another federal statute prohibits bribery concerning programmes receiving public funds, which encompasses many state government functions and can often be used to reach state officials. In addition, the laws of each state also prohibit the bribing of state public officials.

Law stated - 13 January 2022

Gifts, travel and entertainment

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

The giving of gifts, travel expenses, meals, or entertainment can implicate a range of US laws. As noted above, each of those things can be deemed a "thing of value" and can result in bribery liability if given as part of a quid pro quo exchange. Additionally, such gifts are 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 first signed by President Obama, and extended by President Trump and President Biden, 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.

Law stated - 13 January 2022

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.

Law stated - 13 January 2022

Public official participation in commercial activities

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$29,525 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$29,525 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.

Law stated - 13 January 2022

Payments through intermediaries or third parties

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.

Law stated - 13 January 2022

Individual and corporate liability

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.

Law stated - 13 January 2022

Private commercial bribery

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.

Law stated - 13 January 2022

Defences

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

Most commonly, individuals prosecuted under 18 USC 201 challenge whether the payments were made with a corrupt intent as opposed to for legal purposes, including gaining access to government officials in order to lobby for policy or regulatory changes. In addition, and particularly after McDonnell , much of the focus of Defendants has been on whether the public official took or agreed to take an official act as opposed to a ministerial act, such as setting up a meeting or talking with another official. In addition, though it is not a defence to argue that the public official might have made the same recommendation without the bribe, defendants often argue that the things of value were provided without an agreement to take any official act.

In addition, a couple affirmative defences are frequently raised. 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. Finally, with regard to the presentation of evidence, the Speech or Debate Clause of the Constitution protects legislators from prosecution for certain legislative acts taken when legislating and prevents inquiry into a legislator's motive and intent. As a result, defendants are sometimes thwarted when trying to present exculpatory evidence and raise challenges grounded in the Constitutional right to present a defence.

Law stated - 13 January 2022

Agency enforcement

What government agencies enforce the domestic bribery laws and regulations?

The Department of Justice is responsible for enforcing 18 USC 201, often through its Fraud and/or Public Integrity Sections, and state prosecutors are responsible for enforcing the respective state laws.

Law stated - 13 January 2022

Patterns in enforcement

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

Federal prosecutors continued to successfully enforce US domestic bribery statutes in 2021, despite the Supreme Court's 2016 decision in McDonnell , which narrowed the definition of 'official act'. In addition to 18 USC section 201, federal prosecutors have frequently relied on a handful of related statutes to prosecute domestic bribery, such as the 'honest services fraud statute', 18 USC section 1346, and the US Racketeer Influenced and Corrupt Organizations (RICO) Act, 18 USC sections 1961-1968.

Law stated - 13 January 2022

Prosecution of foreign companies

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

18 USC 201 can apply to companies or corporations, including foreign companies where the US can establish jurisdiction.

Law stated - 13 January 2022

Sanctions

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.

Law stated - 13 January 2022

Recent decisions and investigations

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

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. Following McDonnell , appellate courts around the country have considered whether jury instructions that could be read to include informal acts are grounds for reversal of convictions.

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 sentenced again to 10 years of incarceration after a new trial granted by the Third Circuit, which 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.

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 unsuccessfully appealed. 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 in light of McDonnell , but the Second Circuit affirmed Skelos's conviction.

Finally, in 2018, 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 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. In September 2021, the Second Circuit held that the jury instructions regarding quid pro quo must convey that the defendants could not be convicted of honest-services fraud unless they promised to undertake official action on a specific question or matter. However, the Second Circuit affirmed the conviction because it found that a rational jury would have found that the defendants entered into the quid pro quo understanding that Percoco was expected 'to influence specific, focused, and concrete' questions or matters. The conviction was 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.

Law stated - 13 January 2022

UPDATE AND TRENDS

Key developments of the past year

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

With respect to domestic bribery enforcement, courts have continued to shape the post- McDonnell definition of 'official act.' For example, in June 2021, the Sixth Circuit held that a former jail guard's action of smuggling contraband into jail amounted to an 'official act'.

Also, in addition to 18 United States Code (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. For example, in August 2020, Greg Lindberg, the founder and chairman of Eli Global LLC and the owner of Global Bankers Insurance Group, was sentenced to 87 months in prison for his role in an honest services wire fraud. Lindberg and his consultant John Gray, who was sentenced to 30 months, were convicted of a scheme to pay millions of dollars in donations to the North Carolina Insurance Commissioner in an attempt to benefit Lindberg's businesses.

Federal prosecutors have also, on occasion, used the US Racketeer Influenced and Corrupt Organizations (RICO) Act to prosecute bribery rings. In July 2020, the DOJ charged five individuals, including the Speaker of the Ohio House of Representatives, Larry Householder, with RICO violations for honest services wire fraud, in what was described as 'likely the largest bribery, money laundering scheme ever perpetrated against the people of the state of Ohio'. According to the indictment, between 2017 and 2020, the criminal enterprise received millions of dollars in exchange for help in passing a billion-dollar bailout of power plants in the state. Two of the five individuals have resolved the government's case against them through plea agreements and one has passed away; the remaining two individuals, including Householder, have pleaded not guilty and are progressing toward trial in 2022.

Federal prosecutors also commonly charge multiple defendants with conspiracy to defraud the United States. In November 2020, the DOJ charged four individuals, including the former CEO of Commonwealth Edison Company (ComEd), with conspiracy to bribe former Speaker of the Illinois House of Representatives. All four defendants have pleaded not guilty.

With respect to foreign bribery, perhaps the most significant development in enforcement of bribery and corruption laws in the United States has been the election of President Joseph R Biden. By all accounts, white-collar criminal prosecutions were down significantly between 2016 and 2020 under President Donald J Trump, both in terms of the number of prosecutions and the total fines. Since becoming president, President Biden has highlighted the fight against corruption as a fundamental component of his administration's national security strategy.

On 6 December 2021, the Biden administration released the first-ever 'United States Strategy on Countering Corruption' (SCC), the result of the White House's national security staff actions and coordination across the US government, as directed by President Biden in his 3 June 2021 National Security Study Memorandum (NSSM), which designated corruption as a 'core U.S. national security interest.' The SCC establishes 'five mutually-reinforcing pillars' of actions to be taken by the US government to curb corruption 'in a manner that is both systemic and tailored to local conditions':

- 'Modernizing, coordinating, and resourcing US Government efforts to fight corruption';
- 'Curbing illicit finance' by 'addressing vulnerabilities in the US and international financial systems';

- 'Holding corrupt actors accountable' 'through a combination of diplomatic engagement, foreign assistance, and enforcement actions' and 'bolstering international best practices, regulations and enforcement efforts';
- 'Preserving and strengthening the multilateral anti-corruption architecture' and the actions of non-governmental actors; and
- 'Improving diplomatic engagement and leveraging foreign assistance resources to advance policy goals.'

Additionally, the SCC states that the US government 'will continue to vigorously enforce the Foreign Corrupt Practices Act (FCPA) and other statutory and regulatory regimes via criminal and civil enforcement actions.' The SCC does not contain proposals for new laws or regulations or amendments to existing laws related to the 'supply side' of corruption, including the FCPA; instead, the focus is on better coordination among US and international authorities and the continued and expanded use of pendant laws, such as anti-money laundering laws. The SCC portends more significant action on enforcement related to the 'demand side' of corruption, including many proposed actions that are focused on potential recipients of improper payments, such as foreign public officials, and the intermediaries that assist such recipients in obtaining and hiding their corruptly obtained assets.

The Biden administration has also made significant changes to DOJ's corporate criminal enforcement policies. On 28 October 2021, Deputy Attorney General Lisa Monaco issued a memorandum titled 'Corporate Crime Advisory Group and Initial Revisions to Corporate Criminal Enforcement Policies', which announced changes, with immediate effect, in three key areas.

First, where the current Justice Manual states that '[p]rosecutors may consider a corporation's history of similar conduct ' when making charging and disposition decision, the new memorandum states that 'prosecutors are [now] directed to consider all [prior] misconduct by the corporation' in making these determinations. The inclusion of foreign 'criminal, civil, or regulatory enforcement actions' against the company or any of its affiliates, could, at least in theory, substantially expand the universe of a company's 'record' of behaviour under consideration.

Second, the memorandum reinstates the requirement from the 2015 Yates Memorandum, which had been somewhat relaxed under the previous administration, that, 'to qualify for any cooperation credit, corporations must provide to the Department all relevant facts relating to [all of] the individuals responsible for the misconduct.' The reimposition of this requirement likely will significantly increase the financial costs of cooperation for companies under investigation and the challenges facing companies under investigation raised by data privacy and national security laws in other countries.

Lastly, the memorandum establishes that monitors should be used in cases of 'demonstrated need' and where there will be a 'clear benefit.' This is a lower standard for the imposition of corporate monitorships than under the 2018 Benczkowski Memorandum, which stated that, for example 'the imposition of a monitor will not be necessary in many corporate criminal resolutions.' While this policy revision likely presages more monitors in future cases, it does not change the best protection a company can have against the imposition of a monitor – having in place a risk-based, fully implemented, rigorously monitored, and regularly tested compliance programme and related controls, as well as a supportive corporate culture and tone at the top.

Law stated - 13 January 2022

LAW STATED DATE

Correct on

Give the date on which the information above is accurate.

13 January 2022.

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Jurisdictions

Australia	Holding Redlich
China	Herbert Smith Freehills LLP
France	Bougartchev Moyne Associés AARPI
Greece	ANAGNOSTOPOULOS
Hong Kong	Herbert Smith Freehills LLP
Israel	Herzog Fox & Neeman
Italy	Studio Legale Pisano
Japan	Anderson Mori and Tomotsune
Netherlands	Sjöcrona Van Stigt
Russia	Noerr PartGmbB
Singapore	Norton Rose Fulbright
Sweden	NORDIA LAW
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United Kingdom	White & Case LLP
USA	Miller & Chevalier Chartered