

Global anti-corruption standard and enforcement: Implications for energy companies[†]

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I. Introduction

While every country has laws, usually of a criminal nature, prohibiting bribery – particularly in the public sector – until recently, laws prohibiting foreign bribery were relatively rare. The US Foreign Corrupt Practices Act (FCPA) stood for almost 20 years as the only transnational bribery statute in the world, focusing only on the ‘supply side’ of the bribery equation, and leaving the ‘demand side’ and lower-level corruption, to domestic enforcement. The last 10 years have, however, seen dramatic changes in this landscape. With the adoption of a series of international treaties, some highly targeted and others far-reaching, today dozens of countries have laws criminalizing the bribery of foreign public officials in international business. Some of these countries have extended their laws to purely commercial conduct as well. Moreover, these treaties create a legal infrastructure to facilitate cross-border investigations and enforcement. International financial institutions such as the World Bank, which previously turned a blind eye to corruption in projects they financed, are now investigating and sanctioning firms and their personnel found to have engaged in improper practices. As exemplified by the *Siemens* case, multijurisdictional investigations are on the rise, as are the penalties for violations, particularly where so-called ‘grand’ corruption is concerned.

Although enforcement is still quite uneven across countries, where there is the political will and capacity to enforce, the level of enforcement activity is rising rapidly. In the United States, enforcement of the FCPA is at an all-time high, with cases focusing not only on grand corruption in the procurement or business development context, but in many cases on lower-level operational corruption, in dealings with customs, tax, immigration and other regulatory authorities. In the last year, the United Kingdom went from being an enforcement laggard to apparent aggressive regulator and enforcer engaged in close cooperation with the United States.

And even on the ‘demand’ side in countries that are recipients of investment activity there are signs of a new era, whether from Lesotho’s prosecution of multinational engineering companies involved in the Lesotho Highlands Water Project, to the Nigerian Economic and Financial Crimes Commission’s activities, to Indonesia’s Corruption Eradication Commission.

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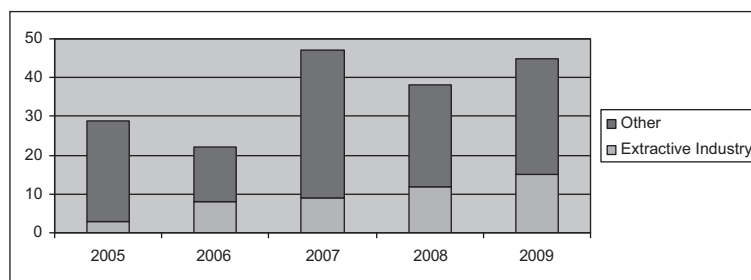


Fig. 1. Extractive industry FCPA prosecutions.

These efforts are spotty. For each example of enforcement, other countries that have failed to act can be identified. And yet despite the uneven picture, movement in the direction of greater harmonization and increased enforcement is unlikely to abate.

These developments affect extractive industries and their contractors and suppliers to perhaps a greater extent than any other group of industries. The natural resource industry cannot choose where to locate its core operations, but must go where the resources are. And in many cases those resources are in places that are among the most challenging – with weak and frequently changing governments, underdeveloped and often opaque laws and institutions, and inadequate government resources. Extractive companies, while not traditionally thought of as regulated industries, must deal with ‘government’ (as defined in transnational bribery laws) at every turn – in the process of securing the basic rights to a resource, and in developing and operating the business as well as in exiting it. They tend to intersect with all branches of government – the executive, the legislative, the courts and the security forces – and at all levels, as well as with state-owned enterprises such as national oil and mining companies.

The last few years in the United States have seen a high number of enforcement actions against energy-related companies and their personnel, from the record penalties against a US company (\$579 million US) in the *Halliburton/KBR* case in 2009, to the multijurisdictional cases such as *Statoil*, to the Oil-for-Food cases that have snared energy and non-energy companies alike, to the cases (with more to come) involving service companies and suppliers (Fig. 1).¹

This article briefly outlines the emergence of international standards and then reviews the foreign bribery laws in the United States, Canada and the United Kingdom where

¹ Number of extractive industry FCPA prosecutions

	2005	2006	2007	2008	2009
Extractive industry	3	8	9	12	15
Other	26	14	38	26	30

many of the multinational energy and mining companies of the world are headquartered, as well as the standards of international financial institutions. The final section addresses compliance standards that have emerged, not only at the national, but also at the international level.

2. The developing web of international anti-corruption conventions

The last 15 years have seen the adoption and rapid acceptance of a series of international conventions focused on combating corruption, particularly in the public sector. These conventions include the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, sponsored by the Organization for Economic Cooperation and Development (OECD Convention),² the Criminal Law Convention Against Corruption of the Council of Europe (CoE Convention),³ the Inter-American Convention Against Corruption, adopted by the Organization of American States (OAS Convention),⁴ the African Union's Anti-Corruption Convention,⁵ and, most recently, the United Nations Convention Against Corruption (UN Convention), a global instrument.⁶ In addition to establishing new international standards for countries that participate in these conventions, each of the conventions includes provisions to facilitate cross-border investigations and enforcement among countries that are party to the Convention's regimes. Other countries are beginning to bring enforcement actions under their laws implementing these treaties.⁷

OECD convention

The most significant foreign bribery convention is from the OECD. The OECD Convention was concluded in 1997 and entered into force on 15 February 1999. To date, 38 countries, including most of the world's major capital-exporting countries, have ratified it.⁸

The OECD Convention is short and focused – it consists of only 17 articles covering the offense of transnational bribery, ancillary or related offenses, jurisdiction and penalties, international cooperation in the investigation and prosecution of transnational bribery (including, uniquely, standards for addressing jurisdictional conflicts), a process for

² Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (17 December 1997) <http://www.oecd.org/document/21/0,2340,en_2649_201185_2017813_1_1_1_1,00.html>.

³ Criminal Law Convention on Corruption (27 January 1999), Council of Europe, European Treaties, ETS No 173 <<http://conventions.coe.int/Treaty/EN/Treaties/Html/173.htm>> [hereinafter CoE Criminal Convention].

⁴ Inter-American Convention Against Corruption (29 March 1996) <<http://www.oas.org/juridico/english/Treaties/b-58.html>>.

⁵ African Union Convention on Preventing and Combating Corruption (11 July 2003) <http://www.africa-union.org/Official_documents/Treaties_%20Conventions_%20Protocols/Convention%20on%20Combating%20Corruption.pdf>.

⁶ United Nations Convention Against Corruption, UN Doc A/58/422 (9 December 2003) <http://www.unodc.org/pdf/crime/convention_corruption/signing/Convention-e.pdf>.

⁷ See Transparency International, Progress Report 2009: OECD Anti-Bribery Convention (2009 Progress Report) <http://www.transparency.org/content/download/44447/712572/file/2009_OECD_Progress_Report_final.pdf>.

⁸ See 'OECD Convention: Ratification Status as of March 2009' (visited 9 January 2010) <<http://www.oecd.org/dataoecd/59/13/40272933.pdf>>. Recent non-member adherents include South Africa and Israel.

monitoring implementation, and entry into force, reservations and implementation. It is accompanied by official commentaries that expand on the text.⁹

The main purpose of the OECD Convention is to require countries to prohibit the bribery of foreign public officials in the same way that countries prohibit the bribery of their domestic officials. To this end, the OECD Convention requires that parties enact national laws criminalizing the bribery of foreign public officials with the focus on the supplier of funds – the person who promises or gives the bribe, in contrast to the offense committed by the official who receives the bribe.¹⁰

The key provisions of the OECD Convention mirror in most ways the FCPA, with a few exceptions, such as the Convention's lack of an express exception for 'facilitating' payments.¹¹ On the penalty side, the OECD Convention requires parties to institute 'effective, proportionate and dissuasive criminal penalties' comparable to those applicable to bribery of the party's own domestic officials.¹² Where a party's domestic law does not subject non-natural persons (eg, corporations) to criminal responsibility (eg, Japan), the OECD Convention requires the party to ensure that legal persons are 'subject to effective, proportionate, and dissuasive non-criminal sanctions, including monetary sanctions'.¹³ In all cases, the OECD Convention requires each party to take such measures as are necessary to ensure that the bribe and the proceeds of the bribery of the foreign public official are subject to seizure and confiscation, or that monetary sanctions of 'comparable effect' are applicable.¹⁴ The Commentaries define the 'proceeds' of bribery as 'the profits or other benefits derived by the briber from the transaction or other improper advantage'.¹⁵ Finally, the OECD Convention requires each party to consider the imposition of additional civil or administrative sanctions, including exclusion from public benefits or aid, temporary or permanent disqualification from participation in public procurement, judicial supervision and judicial 'winding-up'.¹⁶

The Convention also includes a mandatory peer review/monitoring mechanism, the OECD Working Group on Bribery, which reviews States Parties' implementation and enforcement.¹⁷

⁹ Commentaries to the OECD Convention on Combating the Bribery of Foreign Public Officials in International Business Transactions (21 November 1997) available at <<http://www.oecd.org>> (with the Convention) (Commentaries).

¹⁰ For a detailed discussion of the OECD Convention and its effects, see LA Low, 'The New Global Legal Framework: The OECD, OAS, and Council of Europe Antibribery Conventions: New International Standards and National Anti-Corruption Laws: Challenges for Effective Implementation and Enforcement', Conference of the International Bar Association, International Chamber of Commerce, and Organization for Economic Cooperation and Development, *The Awakening Giant of Anti-Corruption Enforcement*, Paris, France, 22–3 April 2004.

¹¹ The Convention's commentary suggests that conformity with local law would be considered a defense and that small 'facilitating' payments are not prohibited, both of which are consistent with the FCPA. See Commentaries, ¶ 1(8). Recently, however, the OECD has called on States Parties to eliminate such payments. See, OECD, Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions (26 November 2009) available at <<http://www.oecd.org/dataoecd/11/40/44176910.pdf>>.

¹² OECD Convention, art 3(1).

¹³ *Ibid*, art 3(2).

¹⁴ *Ibid*, art 3(3).

¹⁵ Commentaries, ¶ 21.

¹⁶ *Ibid*, ¶ 24.

¹⁷ LA Low, 'Milestones in mutual evaluation: The phase 2 review of the United States under the OECD antibribery convention' (May 2003) *Int'l L FORUM Droit Int*.

Regional conventions

There are several regional anti-bribery conventions in Europe, Latin America and Africa.

Council of Europe criminal and civil law conventions

The CoE has adopted two conventions related to transnational corruption. The Criminal Law Convention on Corruption entered into force on 1 July 2002.¹⁸ A more ambitious Civil Law Convention on Corruption devoted to the issue of civil liability for corrupt practices entered into force on 11 January 2003.¹⁹ The CoE has also established the 'Group of States Against Corruption – GRECO', whose purpose is to improve the capacity of its members to fight corruption by following up on compliance with their undertakings.²⁰

The Criminal Law Convention requires the criminalization of both active and passive (ie, receipt) domestic bribery. Going beyond the OECD Convention and prior regional conventions (ie, the OAS Convention discussed below), it also requires criminalization of both bribery in the private sector, both 'active' and 'passive'.²¹ The convention also requires criminalization of transnational bribery of officials.²² Article 12 of the convention requires criminalization of 'trading in influence', and recordkeeping issues are addressed using criminal law provisions, a unique approach among the international conventions.²³

The Criminal Law Convention has explicit provisions regarding corporate liability. Under these provisions, parties are required to adopt measures necessary to ensure that non-natural persons can be held responsible for the offenses of active bribery, trading in influence and money laundering, when the offenses are committed for their benefit by a natural person, 'who has a leading position within the legal person – based on a power of representation, or decision making or control authority'.²⁴ Where such natural persons are accessories or instigators, corporate liability should accrue as well. In addition, parties are required to take measures to ensure that a legal person can be held liable where the lack of supervision or control by a natural person referred to in paragraph 1 has made possible the commission of the criminal offenses mentioned in paragraph 1 for the benefit of that legal person by a natural person under its authority.²⁵

Such corporate liability does not exclude the possibility of individual liability for the perpetrators, instigators or accessories.²⁶

¹⁸ ETS No 173, opened for signature on 27 January 1999. As of the date of this paper, 42 countries have ratified the CoE Criminal Law Convention. An additional Protocol to the Criminal Law Convention on Corruption (ETS No 191, opened for signature on 15 May 2003, entered into force on 1 February 2005) currently has 25 parties.

¹⁹ Civil Law Convention on Corruption (11 November 1999), Council of Europe, European Treaties, ETS No 174 <<http://conventions.coe.int/Treaty/en/Treaties/Html/174.htm>>. As of the date of this paper, 34 countries have ratified or acceded to this convention.

²⁰ See Council of Europe, *Final Communiqué of the 102d Session of the Committee of Ministers* (4–5 May 1998) (announcing adoption of Resolution (98) 7 creating the GRECO) <<https://wcd.coe.int/ViewDoc.jsp?id=55485&BackColorInternet=B9BDEE&BackColorIntranet=FDC864&BackColorLogged=FDC864>>. GRECO was activated in the summer of 1999; at present it has 46 members, plus observers from the EU and several international organizations.

²¹ CoE Criminal Convention, arts 7, 8.

²² *Ibid.*, arts 5–6, 9–11.

²³ *Ibid.*, art 14.

²⁴ *Ibid.*, art 18(1).

²⁵ *Ibid.*, art 18(2).

²⁶ *Ibid.*, art 18(3).

Inter-American convention

The Inter-American Convention Against Corruption, which entered into force in 1997, was the first international treaty to address corruption.²⁷ The OAS Convention obliges states, among other things, to criminalize the bribery of both domestic and foreign officials as well as the solicitation or receipt of a bribe. The OAS Convention also requires criminalization of 'illicit enrichment' of or by a public official.²⁸ It also provides for extradition and asset seizure of offending parties. In addition to emphasizing heightened government ethics, improved financial disclosures and transparent bookkeeping through non-mandatory provisions, the OAS Convention facilitates international cooperation in the gathering of evidence and asset seizure and forfeiture actions.²⁹ It explicitly limits the use of bank secrecy laws as a defense to such cooperation. The addition of a monitoring mechanism subsequent to the Convention's entry into force has served to strengthen accountability of countries for implementation.³⁰

Other regional conventions – EU and AU

The European Union and the African Union have also adopted broad anti-corruption conventions.³¹ The EU Convention has been in force since the late 1990s, while the African Union Convention, adopted only in 2003, has been ratified by 31 countries and entered into force in August 2006. These regional instruments make Asia the only region not to have embraced the regional convention approach.³² However, the adoption of a global convention, described in the next section, makes the absence of an Asian regional convention less significant to the extent countries in the region become parties to it.

Global instruments – UN convention

The most recent, and conceptually the most ambitious, international convention addressing transnational corruption is the United Nations Convention Against Corruption, which was opened for signature on 9 December 2003, and entered into force on 14 December 2005. Currently, 143 countries are party to the Convention, including several

²⁷ See Inter-American Convention Against Corruption (29 March 1996), reprinted in 35 ILM 724 (1996). All but one of the 34 OAS member states have become party to this treaty. Barbados, which has signed the treaty, has not yet deposited its instrument of ratification.

²⁸ Some countries, including the United States, have opted out of the illicit enrichment provisions for constitutional reasons related to the presumption of guilt. See Resolution of Ratification of the Inter-American Convention Against Corruption, § (a)(4), reprinted in S Exec Rpt 106-15, Report of the Committee on Foreign Relations, at 9 (2000).

²⁹ For an overview of the Convention and a comparison to the FCPA, see Low, Atkinson and Bjorklund, 'A comparison of the Inter-American Convention against corruption and the US Foreign Corrupt Practices Act' (1998) 38 Va J Int'l L 243.

³⁰ This mechanism was ratified by the OAS General Assembly in June 2001. The first country reviews began in February 2003.

³¹ See European Union Convention on the Fight Against Corruption Involving Officials of the European Communities or Officials of the Member States of the European Union, 1997 OJ (C195) 1 (26 May 1997); African Union Convention on Preventing and Combating Corruption, n 4.

³² Instead, APEC has agreed on a series of measures to promote transparency and reduce corruption. See APEC Course of Action on Fighting Corruption and Ensuring Transparency (September 2004) <http://www.apecsec.org.sg/apec/apec_groups/other_apec_groups/anti-corruption.html>.

major emerging market countries – notably Brazil, China, Russia and Indonesia – a number of which are not party to any other anti-corruption treaty.³³

The UN Convention addresses six principal topics:

- Mandatory and permissive preventive measures applicable to both the public and private sectors, including accounting standards and the promotion of codes of conduct and compliance programs for private companies;
- Mandatory and permissive criminalization obligations, including obligations with respect to public and private sector bribery, trading in influence and illicit enrichment;
- The availability of private rights of action for the victims of corrupt practices;
- Extensive anti-money laundering measures;
- Cooperation in the investigation and prosecution of cases, including collection actions, through mutual legal assistance and extradition; and
- Asset recovery.

The UN Convention's asset recovery provisions, which are unique to this Convention, primarily focus on strengthening intergovernmental mechanisms for the recovery of assets plundered by corrupt governments (such as efforts by Nigeria to recover assets deposited by members of the former Abacha regime in banks in various countries, including the United Kingdom and the United States).³⁴

In addition, the UN Convention contains a number of other provisions not found in other treaties. Article 34 obliges states to take measures to address the consequences of corruption, including through the annulment or rescission of contracts, withdrawal of concessions or other similar instruments that may have been tainted by corrupt practices. Although written in mandatory terms, the provisions direct states to give due regard to the rights of third parties acquired in good faith, as well as to fundamental principles of the host state's domestic law.³⁵

Article 35 of the UN Convention requires states to take such measures as may be necessary, in accordance with their domestic law principles, "to ensure that entities or persons who have suffered damage as a result of an act of corruption have the right to initiate legal proceedings against those responsible for that damage in order to obtain compensation". The mandatory language of this article appears to require states to establish private rights of action in civil proceedings for damages. Although corruption issues have represented increasingly fertile ground for private civil litigation in recent years,

³³ United Nations Convention Against Corruption, UN Doc A/58/422 (9 December 2003) <http://www.unodc.org/pdf/crime/convention_corruption/signing/Convention-e.pdf>, entered into force 15 December 2005.

³⁴ See UN Asset Recovery Project in Nigeria <http://www.unodc.org/unodc/en/corruption_projects_nigeria_project2.html>.

³⁵ However, the article is not limited by its terms to sanctions against offenders – that is, those convicted of violations of the offenses prescribed by the UN Convention. The absence of such a limitation may enable this article to be applied in a wider variety of situations than has traditionally been the case in enforcement actions, potentially even to third party investors. Thus, companies that do business abroad or at home through government contracts, concessions, licenses and permits (upon which substantial investments are often predicated) should be aware that this provision may prompt more widespread efforts by host countries to revoke acquired rights than has historically been the case.

recognizing private rights of action from criminal anti-corruption statutes such as the FCPA³⁶ would almost certainly expand the scope of such actions.³⁷

Whether these new remedies called for by the UN Convention are good or bad depends very much on which side of a claim one expects to be on, and one's views about the importance of private actions as a supplement or complement to public enforcement. The *travaux préparatoires* to the Convention make it clear that countries are free to determine to what extent to implement this provision,³⁸ and it is still too early to have a sense of how these provisions are likely to be implemented at the national level.

That is the treaty network of international anti-corruption laws. The article now focuses on the transnational anti-bribery laws of the US, Canada and the UK, which are the primary capital markets of natural resource companies and therefore the primary *situs* for determining applicable anti-corruption laws to their activities.

3. Transnational anti-corruption laws

US anti-corruption law

The United States is a party to the OECD, OAS and UN Conventions. It is also a member of GRECO, but is not a party to either of the African Union or CoE Conventions, although it does have observer status in the CoE and has signed the Criminal Law Convention. The US's transnational bribery legislation, the FCPA, predates any of these Conventions. The FCPA was enacted in 1977 to address what were perceived as corrupt practices used by US companies in obtaining business in foreign countries. Typical examples historically included large bribes to foreign government officials to secure government contracts and the payments of large fees to 'consultants' who performed no services, but passed money through to government officials. These payments were often masked by slush funds, off-book accounts and other financial practices, both in the United States and abroad, which led to the enactment of the accounting provisions.

³⁶ The FCPA has been traditionally held not to confer such rights. See *Lamb v Phillip Morris, Inc*, 915 F.2d 1024 (6th Cir 1990), *cert denied* 111 S Ct 961 (1991); *JS Serv Ctr v GE Tech Servs Co*, 937 F.Supp. 216 (SDNY 1996).

³⁷ This is not likely to happen in the United States, because the *travaux préparatoires* to the Convention make it clear that countries are free to determine to what extent to implement this provision, and the US Government does not intend to adopt new legislation in this regard and has declared the Convention to be largely non-self-executing. Moreover, while questions have been raised about the possibility the Convention would provide a basis for action under the treaty prong of the Alien Tort Claims Act, a recent US Supreme Court decision, *Sosa v Alvarez-Machain*, 542 US 692 (2004), has clarified and limited the scope of this statute. As a result of this decision, the risk of such suits would appear to be extremely low in the United States, though such suits may become more common abroad.

³⁸ The specific language of the *travaux* is as follows:

[t]his article is intended to establish the principle that States Parties should ensure that they have mechanisms permitting persons or entities suffering damage to initiate legal proceedings, in appropriate circumstances, against those who commit acts of corruption (for example, where the acts have a legitimate relationship to the State Party where the proceedings are to be brought). While article 35 does not restrict the right of each State Party to determine the circumstances under which it will make its courts available in such cases, it is also not intended to require or endorse the particular choice made by a State Party in doing so.

Report of the Ad Hoc Committee for the Negotiation of a Convention Against Corruption on the work of its first to seventh sessions, Addendum, Interpretative notes for the official records (*travaux préparatoires*) of the negotiation of the United Nations Convention Against Corruption, A/58/422/Add.1, n 37 (7 October 2003) <http://www.unodc.org/unodc/en/corruption/session_7/422f.pdf> .

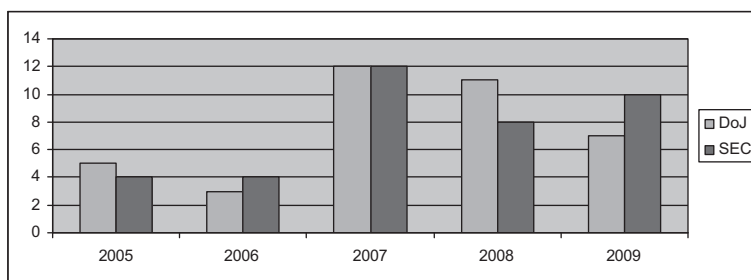


Fig. 2. Corporate FCPA prosecutions.

The FCPA criminalizes the bribery by covered persons of foreign government officials, political party officials and candidates for political office, in order to obtain business.³⁹ It also mandates that US or foreign companies with publicly traded securities in the United States adhere to prescribed standards of recordkeeping, maintain internal controls and take other steps to ensure that investors could obtain a true and complete financial picture of those companies' activities.⁴⁰ Coupled with a prior amendment to US tax laws denying any tax deduction for bribes,⁴¹ and the normal panoply of criminal laws addressing fraud (such as mail and wire fraud prohibitions, money laundering statutes, prohibitions on interstate travel, and of racketeering and conspiracy laws), the FCPA has provided the US Government with a range of tools for combating improper payments in the overseas business activities of the companies and individuals to which it applies.

The 1998 amendments to the FCPA, adopted in anticipation of US accession to the OECD Convention, significantly expanded the law in certain respects, including its jurisdictional reach against foreign as well as US persons.⁴² In their wake, both the US Department of Justice (DoJ) and the Securities and Exchange Commission (SEC), the two agencies that share enforcement responsibilities, have stepped up their enforcement efforts against both US and foreign persons, and articulated higher compliance standards for subject companies.

The figures above and below show FCPA enforcement and penalty trends (Figs. 2–5).

Anti-bribery prohibitions

Elements of a violation

The anti-bribery provisions of the FCPA – which consist of three distinct but largely parallel provisions⁴³ reaching different but overlapping universes of persons discussed more fully below⁴⁴ – criminalize bribery of a foreign official to secure business. Bribery is defined under the FCPA based on the following elements:

³⁹ 15 USC §§ 78dd-1(a), 78dd-2(a), 78dd-3(a).

⁴⁰ *Ibid* § 78m.

⁴¹ IRC § 162(c) (26 USC § 162(c)).

⁴² International Anti-Bribery and Fair Competition Act of 1998, Pub L No 105-366, 112 Stat 3302.

⁴³ See n 38, above.

⁴⁴ See subsection Jurisdictional reach of the CFPOA.

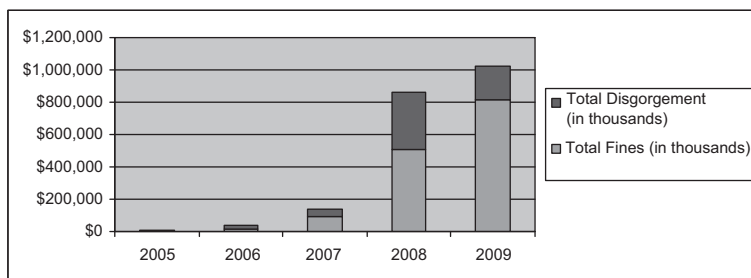


Fig. 3. Corporate FCPA fines and disgorgement.

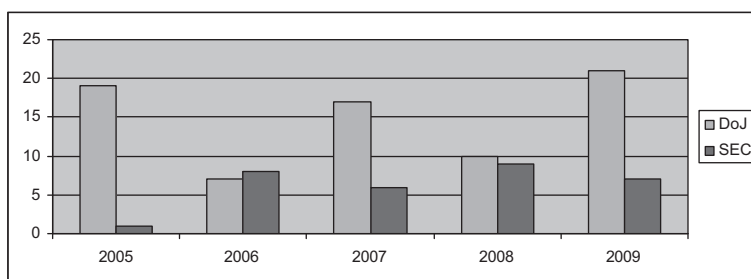


Fig. 4. Individual FCPA prosecutions.

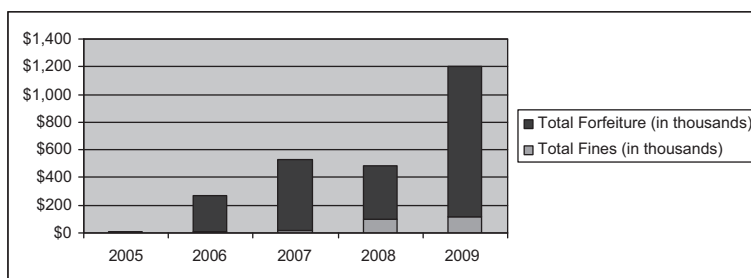


Fig. 5. Individual FCPA fines and forfeiture.

- a covered person, with a nexus to US commerce (when required),
- takes an action in furtherance of
- a payment of – or an offer, authorization or promise to pay money or the giving of anything of value

- to (a) any ‘foreign official’,⁴⁵ (b) any foreign political party or party official, (c) any candidate for foreign political office, or (d) any official of a public international organization, or (e) any other person while ‘knowing’⁴⁶ that the payment or promise to pay will be passed on to one of the above
- ‘corruptly’
- for the purpose of (a) influencing an official act or decision of that person, (b) inducing that person to do or omit to do any act in violation of his or her lawful duty, (c) securing any improper advantage or (d) inducing that person to use his influence with a foreign government to affect or influence any government act or decision,
- in order to obtain, retain or direct business to any person.⁴⁷

Scope of the FCPA

While the ‘classic’ FCPA cases involve a monetary payment to a government official having decision-making authority over the award of a contract, even a quick perusal of the foregoing elements of a violation reveals their potential application to a much wider set of circumstances. ‘Anything of value’ can, for instance, include a stock interest in a joint venture company, a contractual right or interest, real estate, personal property or other interests arising from business relationships. Gifts, entertainment, sponsorship and hosting,⁴⁸

⁴⁵ The statute defines the term ‘foreign official’ to include any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization. 15 USC §§ 78dd-1(f)(1)(A), 78dd-2(h)(2)(A), 78dd-3(f)(2)(A).

⁴⁶ Under this vicarious liability provision, the definition of ‘knowing’ is broader than actual knowledge: a company is deemed to ‘know’ that its agent will use money provided by the company to make an improper payment or offer if it is aware of a ‘high probability’ that such a payment or offer will be made. 15 USC §§ 78dd-1(f)(2)(B), 78dd-2(h)(3)(B), and 78dd-3(f)(3)(B). The purpose of this standard is to prevent companies from adopting a ‘head in the sand’ approach to the activities of their foreign agents and partners. See HR Conf Rep No 100-576, at 920 (1988).

⁴⁷ 15 USC §§ 78dd-1(a), 78dd-2(a) and 78dd-3(a).

⁴⁸ Numerous recent enforcement actions have focused on travel and travel-related expenses, gifts and entertainment. The *Lucent* case, cited in n 52 below, is perhaps the most prominent of these cases. The *ABB* case, also discussed in n 52 below, involved a host of alleged benefits, including travel, shopping sprees, the use of automobiles and gifts to officials in Nigeria. Although few cases are brought strictly based on travel expenses, *Lucent* shows that repeated instances of the provisions of benefits the government considers to be improper will be prosecuted. Both this case and the *Metcalf & Eddy* case from 1999 suggest that prosecution will occur for travel benefits alone when they are viewed as being provided for an improper purpose. They do not undercut the vitality of the statute’s affirmative defense for certain types of sponsorship activities. *Metcalf & Eddy*, a civil case brought by the DoJ in 1999, involved allegations that the company had provided travel advances and hotel upgrades for two trips to the US and Europe by the Chairman of an Egyptian municipal sanitation and drainage organization, and his wife and two children, in return for his influence over the review of bids for a project with the US Agency for International Development. The company was charged with violations of the anti-bribery and books and records provisions of the FCPA. The case was settled with the company’s agreement to pay a fine of \$400,000 and to reimburse the costs of the investigation. The company also agreed to implement a compliance program, financial and accounting controls, and conduct periodic reviews of these programs at least every 5 years. *Metcalf & Eddy* further consented to cooperate with continued investigation, promptly investigate and report any alleged FCPA violations itself, and include in future joint venture agreements a representation and undertaking by each partner on FCPA matters. Finally, the company received a permanent injunction against future FCPA violations. *United States v Metcalf & Eddy*, Case No CV9912566 (D Mass 1999).

charitable contributions⁴⁹ and political contributions⁵⁰ can also raise FCPA issues and have been the subject of several enforcement actions in recent years, as have operational issues, such as customs, immigration, tax and regulatory actions.⁵¹

FCPA issues can arise at any stage of trade or investment activity – not only during the formative stage, but during the course of operations, or while winding up or terminating an activity. The ability of a company in the extractive sector to operate in a host country, for instance, and the success of those operations, often turns on discretionary government decisions, including foreign investment or trade approvals; the obtaining of concessions, contracts, permits, or licenses, tax or customs rulings and other regulatory actions or benefits. As a condition to doing business, the government may require the foreign investor to partner with a local firm, subcontract certain work to local firms, meet specified local employment standards, build infrastructure, support the local community or satisfy other performance conditions. The process of positioning oneself to do business in a foreign country thus typically offers a variety of opportunities for government approvals that fall under the broad rubric of ‘obtaining business’ as that element of the FCPA has been developed.⁵²

Mergers and acquisitions of companies doing business, especially in risky countries, raise risks of successor liability for the past activities of the acquiree, and, even more troublesome, of direct liability for any improper activities that may be ongoing at the time of

⁴⁹ In June 2004, Schering-Plough Corporation settled SEC allegations that the company had violated the FCPA’s books and records provisions by making payments of \$76,000 between 1999 and 2002 to a Polish charity headed by the Director of the Silesian Health Fund, in exchange for the official’s influence on the government’s decision to purchase Schering-Plough products for the health fund. In the settlement, the company agreed to a cease-and-desist order and a civil penalty of \$500,000. *In the Matter of Schering-Plough Corp*, SEC Admin Proc File No 3-11517 (9 June 2004); *SEC v Schering-Plough Corp*, Case No 04CV945 (DDC 2004).

⁵⁰ The *Titan* case, cited in n 52 below, involved such contributions ultimately used for the Presidential re-election campaign in the country of Benin. In addition, in 2001, US authorities also brought a series of related prosecutions involving a port project in Costa Rica, which involved a political contribution scheme in that country by officials of a US company seeking to pave the way for the project. See *United States v Halford*, Case No 01 Cr No 221 (WD Mo 2001); *United States v Reitz*, Case No 01 Cr No 222 (WD Mo 2001); *United States v King and Barquero-Hernandez*, Case No CR-01-190 (WD Mo 2001).

⁵¹ *In the Matter of Baker Hughes, Inc*, SEC Admin Proc File No 3-10572 (12 September 2001); *United States v Baker Hughes Services Int’l, Inc*, Case No 07CR129 (SD Tex 2007); *SEC v Baker Hughes Inc* and Fearnley, Case No 07CV1408 (SD Tex 2007); *In the Matter of Bristow Group Inc*, Admin Proc File No 3-12833, SEC Exch Act Rel No 56533 (26 September 2007); *United States v Willbros Group, Inc* and *Willbros Int’l, Inc*, Case No 08CR287 (SD Tex 2008); *SEC v Willbros Group, Inc*, Steph, Jansen, Biggers and Galvez, Case No 08CV1494 (SD Tex 2008); *SEC v NATCO Group Inc*, Case No 10CV98 (SD Tex 2010); *In the Matter of NATCO Group, Inc*, Admin Proc No 3-13742 (11 January 2010).

⁵² The more ministerial of these approvals may well fall under the exception for routine governmental action, discussed below in Section II.A.1.d.(1); the discretionary decisions do not. The line between ministerial and discretionary is not always a clear one. The scope of the ‘obtain or retain business’ element has been challenged recently in US courts. In the case of *United States v Kay*, 200 F.Supp.2d 681 (SD Tex 2002), a federal district court held, as a matter of law, that bribes to customs officials in order to reduce import taxes did not meet the statute’s definition of ‘obtaining or retaining business’. On 4 February 2004, the US Court of Appeals for the Fifth Circuit reversed that decision, holding that the District Court erred in holding as a matter of law that such payments could never fall within the scope of the FCPA; rather, the inquiry is factual, examining whether ‘the bribery was intended to produce an effect – here, through tax savings – that would “assist” in obtaining or retaining business’. *United States v Kay*, 359 F.3d 738, 756 (5th Cir 2004). On remand, the defendants were convicted. A further appeal to the Fifth Circuit was decided in favor of the Government in 2007, and the US Supreme Court declined to hear the case. *United States v Kay*, 513 F.3d 423 (5th Cir 2007), *cert denied*, 129 S Ct 42 (2008).

the acquisition and continue post-closing. How much due diligence is sufficient in the M&A context, and what other steps an acquirer can take to reduce the risk of liability, is one of the hottest issues in FCPA compliance today.⁵³

FCPA issues can also arise in post-formation operational decisions, in either the context of direct dealings with foreign government or third-party relationships, including agents, distributors and joint ventures with either a private partner or a government official/entity.⁵⁴ Joint venture partners not themselves subject to the FCPA can, by their actions, trigger FCPA liability in the same way an agent or consultant might if they take actions within the United States or if there is 'knowledge' or authorization of their improper actions by the US partner. The risk that the FCPA-subject party may acquire 'knowledge' or authorize risky actions may be even greater in a shared enterprise than in the agency context.⁵⁵

Finally, although less frequently, exiting a trade or investment activity may trigger issues. The process of winding up a project may involve government approvals, the resolution of outstanding issues with the government and other activities that may trigger requests for payments.⁵⁶

Jurisdictional reach of the anti-bribery provisions

The FCPA's three parallel anti-bribery prohibitions apply, respectively, to 'domestic concerns', 'issuers' and 'any person' acting in US territory.⁵⁷ Each of these prohibitions has

⁵³ See *SEC v Delta & Pine Land Co*, Case No 1:07CV01352 (DDC) (complaint filed 25 July 2007); *In re Delta & Pine Land Co*, Admin Proc File No 3012712 (cease-and-desist order, filed 26 July 2007). See Teleglobe 10-Q (filed 15 October 2004); *United States v Amoako*, Case No 3:06CR00702-GEB (DNJ 2005) (plea agreement of 6 June 2006); *United States v Ott* (DNJ) (plea agreement of 13 February 2006, filed 25 July 2007); *United States v Young* (DNJ) (plea agreement of 9 February 2006, filed 25 July 2007); *SEC v Ott and Young*, Case No 3:06CV04195-GEB-TJB (DNJ 2006) (complaint); *United States v Titan Corp*, Case No 05CR0314-BEN (SD Ca 2005) (plea agreement); *SEC v Titan Corp*, Case No CV050411 (DDC 2005) (complaint); SEC Lit Rel No 19107 (1 March 2005); *GE/InVision*, SEC Exch Act Rel No 51199 and Acctg Rel No 2186, Lit Rel No 19078, and Acctg Rel No 2187 (all 14 February 2007); *United States v ABB Vetco Gray, Inc and ABB Vetco Gray UK, Ltd*, Case No 04CR27901 (SD Tex 2004). See ABB Press Release, 'ABB concludes compliance review of upstream Oil, Gas and Petrochemicals business' (7 July 2004) (discussing due diligence aspects); *SEC v Syncor Int'l Corp*, Case No 1:02CV02421 (DDC 2002), Lit Rel No 17887 (10 December 2002); DoJ Press Release (10 December 2002) (announcing criminal fine in *United States v Syncor Taiwan, Inc*, Case No 02CR1244-ALL (CD Cal 2002)). In addition to the foregoing cases, several other recent FCPA enforcement actions also have been brought after a merger or acquisition in part due to payment activity associated with the acquired or merged company prior to the merger or acquisition. See, eg, *SEC v Tyco Int'l Ltd* (SDNY 2006) (citing Tyco for inadequate due diligence in acquisitions into improper payment activity in companies acquired in Brazil and South Korea); *SEC v York Int'l Corp* (DDC) (Complaint of 1 October 2007) (prosecution based upon payments by subsidiary in business unit later acquired by Johnson Controls, Inc); *United States v York Int'l Corp* (DDC) (Deferred Prosecution Agreement announced on 1 October 2007) (same); *SEC v Lucent Technologies, Inc* (DDC) (Complaint of 21 December 2007) (prosecution related to sponsorships of foreign officials by Lucent Technologies prior to its merger with Alcatel SA); *United States v Lucent Technologies, Inc* (Non-Prosecution Agreement of 14 November 2007) (same); *In the Matter of Baker Hughes Inc*, SEC Acctg and Auditing Enf Rel No 1444 (12 September 2001) at 13. See also DoJ FCPA Op Rel 08-02 (13 June 2008) (opinion release in response to request by Halliburton Co) available at <<http://www.justice.gov/criminal/fraud/fcpa/opinion/2008/0802.html>> (last accessed on 19 January 2010).

⁵⁴ See, eg, *GE/InVision*, see n 52; *In the Matter of Diagnostic Products Corp*, Admin Proc File No 3-11933, SEC Exch Act Rel No 51724 (20 May 2005) (cease-and-desist order finding DPC in violation of anti-bribery provisions for improper payment activity by its subsidiary in China).

⁵⁵ *United States v Kozeny and Bourke*, Case No 05CR518 (SDNY 2005). In this case, Mr Bourke, a private investor, was convicted of bribery based upon jury instructions that could have allowed the jury to infer 'willful blindness' to bribery by the investment promoter. For further discussion, see Steptoe & Johnson LLP, International Law Alert (November 2009) available at <<http://www.stepto.com/publications-6447.html>>.

⁵⁶ See, eg, *United States v Vitusa Corp*, Case No 94CR253 (DNJ 1994).

⁵⁷ 15 USC §§ 78dd-1(a), 78dd-1(g), 78dd-2(a), 78dd-2(i), 78dd-3(a), 78dd-3(f)(1).

a different jurisdictional scope. These terms encompass both US and non-US persons, although US jurisdiction over the former is more ample than that over the latter.

For its first 20 years, the FCPA's jurisdiction was exclusively territorial. For either 'issuers' or 'domestic concerns', anti-bribery jurisdiction was predicated on some use of the US mail or other instrumentality of interstate or foreign commerce in furtherance of the bribe. This jurisdictional nexus requirement – a modest standard, satisfied by a fax, email or phone call of an interstate or international character – meant that conduct that was largely extraterritorial could be subject to the FCPA. However, as the FCPA did not treat foreign subsidiaries as US persons (in contrast to some other US regulatory compliance legislation of that era),⁵⁸ even the broadly-drawn territorial nexus requirement described above excluded significant areas of international business activity from the statute's reach.

The 1998 amendments to the FCPA dramatically expanded the jurisdictional reach of the statute over both US and foreign persons. In their wake, proof of a US territorial nexus for US individuals and companies is no longer required.⁵⁹ Thus, a violation by these 'US persons' can occur even if the prohibited activity takes place entirely outside of the United States and does not involve the use of any instrument of US interstate commerce.⁶⁰ Non-US persons covered either as foreign 'issuers' or under the 'any person' prohibition must still act with the necessary territorial nexus to the United States for there to be US jurisdiction.⁶¹ Although foreign subsidiaries continue not to be treated as 'US persons', they are potentially liable under the new 'any person' prohibition discussed below or on other theories.

The definition of 'domestic concern' covers a large universe of persons and entities, including individual US citizens (wherever located), US resident aliens,⁶² corporations and other business entities (including partnerships) organized under the laws of a state of the United States or having their principal place of business in the United States, and officers, directors, employees and agents of any of these entities, regardless of their nationality.⁶³

'US persons' includes the same business entities as 'domestic concerns', but covers only US nationals, and not foreign nationals who reside in the United States.⁶⁴

The category of 'issuers' constitutes a narrower universe defined as companies that register securities in accordance with 15 USC § 781 or are required to file reports under 15

⁵⁸ See HR Conf Rep No 95-831, at 14 (1977), reprinted in 1977 USCCAN 4098, 4126; *Dooley v United Techs Corp*, 803 F.Supp. 428, 439 (DDC 1992) (legislative history excludes foreign subsidiaries from *per se* FCPA coverage).

⁵⁹ 15 USC §§ 78dd-1(g), 78dd-2(i).

⁶⁰ *United States v Salam*, Case No 06CR00157 (DDC 2006) (criminal complaint of March 2006) (FCPA anti-bribery prosecution against a naturalized US citizen with respect to conduct in Iraq; based on alternative nationality jurisdiction under 15 USC § 78dd-2(i)(2)).

⁶¹ See 15 USC §§ 78dd-1, 78dd-3.

⁶² 'Residency' is not defined in statute; presumably the test for jurisdiction would use the immigration standards for permanent residency. See, eg, 8 USC § 1101(a)(20).

⁶³ 15 USC § 78dd-2(h)(1). There are some jurisdictional limits to the law's coverage. Any non-US citizens subject to the FCPA's coverage would have to be subject to the personal jurisdiction of the United States before they could be prosecuted. An FCPA conspiracy charge was dismissed against a Swiss attorney allegedly acting as an agent for a US domestic concern based on the court's interpretation of the pre-1998 amendment FCPA, which excluded such agents from criminal penalties if they were not 'otherwise subject to the jurisdiction of the United States'. *United States v Bodmer*, 342 F.Supp.2d 176, 192–3 (SDNY 2004).

⁶⁴ 15 USC §§ 78dd-1(g)(2), 78dd-2(i)(2).

USC § 780(d), or any officer, director, employee or agent of such company. This definition captures those selected foreign companies that issue stock (including ADRs) on a US securities exchange and their personnel, in addition to certain US companies (which are already subject to the statute as 'domestic concerns'). The individuals caught by the 'issuer' provisions can include non-US citizens and residents as well as US citizens.⁶⁵

Finally, any 'person' (no matter what nationality) acting within US territory is covered by the FCPA.⁶⁶ Foreign individuals who are not officers, directors, employees or agents of either a US company, a subsidiary acting on behalf of a covered person or a foreign issuer generally are not covered by the anti-bribery provisions. However, as noted above, if either a foreign subsidiary or a foreign person not otherwise covered performs any acts in furtherance of a prohibited payment within the United States, they could be directly liable under the FCPA's territorial jurisdiction prong. Moreover, the 1998 amendments made officers, directors, shareholders, employees and agents of covered persons potentially subject to criminal prosecution even if they were not otherwise subject to US jurisdiction.

In addition, due to the potential for liability for acts of a third party under the third element of an anti-bribery violation set forth above (the 'knowledge' or 'vicarious liability' provisions), reliance on foreign incorporation where there is US management and control can be a weak shield.⁶⁷ Indeed, the legislative history affirms that US parent corporations may remain indirectly liable for FCPA violations by a foreign subsidiary.⁶⁸ The US Congress enacted these provisions to prevent companies from adopting a 'head-in-the-sand' approach to the activities and identities of their foreign agents and business partners.⁶⁹ This problem also has been characterized as 'willful blindness' or 'unwarranted obliviousness' to any action or fact, including applicable 'red flags' (discussed in more detail below) that should reasonably alert a company's management to a 'high probability' of an FCPA violation.⁷⁰ In such cases, 'knowledge' may be inferred even if a company does not have actual knowledge of a payment. Moreover, as discussed in Section B.2, below, parent companies subject to the accounting provisions of the FCPA (US and foreign 'issuers') have direct responsibility for the books and records and internal controls of the majority-owned and controlled subsidiaries, US or foreign.

⁶⁵ Again, any non-US citizen would have to be subject to the personal jurisdiction of the United States.

⁶⁶ 15 USC § 78dd-3(a).

⁶⁷ See, eg. *In the Matter of Schnitzer Steel Industries, Inc.*, SEC Admin Proc File No 3-12456 (16 October 2006) (cease-and-desist order against parent relating to payments from accounts controlled by subsidiary); Deferred Prosecution Agreement with Schnitzer Steel (October 2006) (same); *United States v Titan Corporation*, Case No 05CR0314 (SD Ca 2005) (Information) (prosecuting The Titan Corporation for improper payments, some of which were funded by its African affiliate); *SEC v Titan Corp.*, Case No 05CV0411 (DDC 2005) (Complaint) (same); *In the Matter of Monsanto Co.*, SEC Admin Proc File No 3-11789, SEC Exch Act Rel No 50978 (6 January 2005) (cease-and-desist order finding Monsanto Co in violation of anti-bribery provisions for improper payments, including payments made by affiliates in Indonesia); *In the Matter of Diagnostic Products Corp.*, Admin Proc File No 3-11933, SEC Exch Act Rel No 51724 (20 May 2005) (cease-and-desist order finding DPC in violation of anti-bribery provisions for improper payment activity by its subsidiary in China).

⁶⁸ HR Conf Rep No 95-831, at 14 (1977) (the conferees intend to make clear that any issuer or domestic concern which engages in bribery of foreign officials indirectly through any other person or entity would itself be liable under the [FCPA]).

⁶⁹ See HR Conf Rep No 100-576, at 920 (1988).

⁷⁰ *Ibid.*

Exceptions and affirmative defenses

Exceptions. The sole statutory exception in the FCPA is for gratuities to government officials who perform ‘routine governmental action’.⁷¹ The statutorily enumerated examples of such action are: (1) obtaining business permits (that do not involve the obtaining of business); (2) processing governmental papers such as visas; (3) providing police protection, mail delivery or scheduling inspections associated with contract performance or the shipment of goods; (4) providing phone, power or water service, loading and unloading cargo or protecting perishable products from deterioration; or (5) other similar activities which are ordinarily and commonly performed by an official. These so-called ‘facilitating’ or ‘grease’ payments – which are used to expedite the processing of permits, licenses or other routine documentation or action – are not prohibited by the anti-bribery provisions of the FCPA.

This exception is not mirrored in many countries’ domestic or transnational anti-bribery laws, raising conflict-of-law issues. As international standards have evolved, the pressure to reduce or even eliminate such payments has increased. Moreover, there is no parallel exception on the accounting side of the statute for such payments. Accordingly, such payments must be properly recorded and adequately controlled to ensure they fall within the scope of the exception.

Affirmative defenses. The FCPA contains two affirmative defenses for certain types of payments. First, the statute provides for an affirmative defense where the payment at issue “was lawful under the *written* laws and regulations of the foreign official’s . . . country”.⁷² The second affirmative defense is for certain payments made to reimburse foreign officials for expenses directly associated with visits to product demonstrations or tours of company facilities or in connection with the execution or performance of contracts.⁷³

The facts of most cases rarely support the application of the first defense, especially if it is construed in accordance with its literal terms. Nevertheless it may be applied – at least by analogy – to transactions or activities which are legally compelled by host country’s written laws and authorities – for example, the requirement that a parastatal entity participate in a project, or that the investor satisfy other terms or conditions mandated by the government.⁷⁴ The second defense is much more frequently used in practice.

Official guidance

Despite the age of the FCPA, only limited guidance exists on how to comply with its provisions. Except for the Opinion Procedure regulations,⁷⁵ which provide limited

⁷¹ 15 USC §§ 78dd-1(b), 78dd-2(b), 78dd-3(b).

⁷² 15 USC §§ 78dd-1(c)(1), 78dd-2(c)(1), 78dd-3(c)(1) (emphasis added). The legislative history of this provision states that “the absence of written laws in a . . . country would not by itself be sufficient to satisfy” the defense. HR Rep No 100-576, at 922 (1988). In litigation, the defense also has been construed narrowly. See *United States v Kozeny and Bourke*, Case No 05CR518 (SDNY 2005) (Opinion and Order dated 21 October 2008).

⁷³ 15 USC §§ 78dd-1(c)(2), 78dd-2(c)(2), 78dd-3(c)(2).

⁷⁴ Such requirements may not fully insulate companies from FCPA risks; for example, a law might require participation by a local company, but may not call for one owned by a foreign official.

⁷⁵ 28 CFR Part 80 (2009).

substantive guidance and only a trickle of review and opinion procedure releases, there are no implementing regulations and no guidelines issued by the DoJ.⁷⁶ Most cases are settled rather than litigated, especially where companies are involved. Thus, even though the statute has been in force for almost 30 years, many unresolved issues, even of a basic character, remain. The 2004 *Kay* case referred to earlier⁷⁷ involved construction of the ‘obtain or retain business’ element – a key aspect of the statute present since its inception. As another example, the question often arises as to how much government ownership or control is necessary for an entity to qualify as an ‘instrumentality’, making a payment to its employees or a payment to a government official. Clearly, national oil companies (NOCs) or other wholly owned enterprises, even if functioning on a commercial basis, qualify. But what about ‘golden shares’? Partially privatized entities? 50/50 joint ventures? Neither the statute nor the case law answers these questions.⁷⁸

⁷⁶ The DoJ has identified several factors as ‘red flags’ that should warn US companies of potential FCPA violations. The existence of one or more of these factors in a transaction could be considered sufficient to alert a US company to the ‘high probability’ of an improper payment or offer by a foreign agent:

- a history of corruption in the country in question;
- unusually high commissions or ‘unusual payment patterns or financial arrangements’;
- the agent or venture partner is related to a government official or the agent’s company is owned in part by a government official or his family, or has been recommended by an official;
- a refusal by the venture partner or representative to certify that they will not make payments or cause the principal to violate the FCPA;
- the agent or venture partner has an apparent lack of qualifications or resources to perform the work agreed upon; or
- there is a lack of transparency in accounting and expense records, or the agent or venture partner has requested that the company prepare false invoices or any other type of false documentation.

‘Foreign Corrupt Practices Act: Antibribery Provisions’ <<http://www.usdoj.gov/criminal/fraud/FCPA/dojdocb.html>> (11 September 2006).

⁷⁷ See n 51, above.

⁷⁸ The FCPA itself provides no definition of ‘instrumentality’. The OECD Convention, which the FCPA was designed to implement when amended in 1998, in its official Commentaries defines state ownership to include those ‘public enterprise[s]’, regardless of legal form, over which a government may, directly or indirectly, ‘exercise a dominant influence’. Commentaries, see n 8, ¶ 14. The Commentaries provide further,

[t]his is deemed to be the case, *inter alia*, when the government or governments hold the majority of the enterprise’s subscribed capital, control the majority of votes attaching to shares issued by the enterprise or can appoint a majority of the members of the enterprise’s administrative or managerial body or supervisory board. *Ibid.*

The Commentaries thus look not only to ownership, but to functional control. Applying their definition to the privatization scenario, they appear to treat an entity as a public enterprise until the moment when the government gives up control. Although the Commentaries do not address explicitly the issue of negative control – veto power – the ‘dominant influence’ language appears to suggest affirmative rather than negative control. If correct, this interpretation would mean, for example, that 50/50 joint ventures, or ‘golden share’ arrangements, would not confer public enterprise status under the OECD Convention, and thus under the FCPA.

The OECD Commentaries also look to another factor to determine whether officials or employees of ‘public enterprises’ fall within the scope of the OECD Convention’s prohibitions: whether officials of such enterprises should be deemed to perform a ‘public function’. This analysis reflects the common sense notion that, when governments enter into private enterprise, not all of the enterprise’s actions should be deemed to be ‘public functions’. Sometimes these state-owned enterprises are just commercial actors and the prohibitions on corruption of public officials should not extend to such actors just because some countries choose, unlike the US, to be commercial actors. The OECD Commentaries state that “[a]n official of a public enterprise shall be deemed to perform a public function unless the enterprise operates on a normal commercial basis in the relevant market, ie, on a basis which is substantially equivalent to that of a private enterprise, without preferential subsidies or other privileges”. *Ibid.*, ¶ 15.

Accounting provisions

In addition to the anti-bribery prohibitions, the FCPA requires companies that issue shares on US exchanges (issuers) to maintain certain recordkeeping standards and internal accounting controls. These are designed to fight accounting devices – which include off-book accounts and slush funds – designed to hide the existence of bribery payments. The internal controls requirements are intended to ensure that shareholders receive an accurate picture of the company's expenditures.

Requirements of the recordkeeping and internal control provisions

The recordkeeping provision of the statute requires companies to make and keep books and records 'which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer'.⁷⁹ All the transactions of issuers are covered, not just transactions that raise FCPA issues, or even their foreign transactions.⁸⁰ The internal accounting controls provisions require companies to 'devise and maintain a system' that, among other things, "provide[s] reasonable assurances that . . . transactions are executed in accordance with the management's general or specific authorization".⁸¹ Unlike the anti-bribery provisions, which by definition can only apply to transactions involving payments by foreign officials, the accounting provisions apply without regard to the existence or extent of a company's foreign operations (although several enforcement actions, such as *Monsanto*,⁸² *Triton Energy*⁸³ and *IBM*,⁸⁴ involved operations of a foreign subsidiary). They have no materiality threshold and no *scienter* requirement.

The provisions do require 'reasonable' rather than absolute assurance that accounting controls are adequate.⁸⁵ The records must be sufficient to 'satisfy prudent officials [as in] the conduct of their own affairs'.⁸⁶ The Senate Report accompanying the original FCPA recognizes that 'standards of reasonableness must apply' and that 'management must necessarily estimate and evaluate the cost/benefit relationship' in establishing a system of controls.⁸⁷ However, where improper payments are believed to have been made, the enforcement approach of the SEC, the agency with primary authority over the accounting provisions, is to consider the records and controls to be definitive.

Jurisdictional reach of the accounting provisions

Unlike the anti-bribery provisions, the accounting provisions apply only to 'issuers', US or foreign.⁸⁸ The issuer's responsibility is broad, however, extending not just to

⁷⁹ 15 USC § 78m(b)(2)(A).

⁸⁰ In 2007, for example, the SEC has used the accounting provisions to prosecute companies making payments to the Iraqi government in connection with the Oil-for-Food Program. See Attachment 2.

⁸¹ 15 USC § 78m(b)(2)(B)(i).

⁸² *SEC v Monsanto Co*, Case No 1:05CV00014 (DDC 2005); SEC Lit Rel No 19023 (6 January 2005) (Indonesian subsidiary).

⁸³ *SEC v Triton Energy Corp, Keever and McAdoo*, Case No 97CV00401 (DDC 1997) (Complaint and Undertakings) (Indonesian subsidiary).

⁸⁴ *In the Matter of Int'l Business Machines*, SEC Exch Act Rel No 34-43761 (2000) (Argentine subsidiary).

⁸⁵ 15 USC § 78m(b)(2)(B).

⁸⁶ *Ibid* § 78m(b)(7).

⁸⁷ S Rep No 95-114, at 8, reprinted in 1978 USCCAN 4106.

⁸⁸ 15 USC § 78m(b).

its domestic operations but also to foreign subsidiaries that are majority-owned. Where an issuer holds 50 percent or less of the voting power of a foreign subsidiary, however, a 1988 amendment to the accounting provisions requires only that the issuer make a 'good faith' effort to cause the affiliated company to comply with the accounting provisions.⁸⁹

Penalties

Violations of the anti-bribery provisions can carry significant penalties, principally under 15 USC §§ 78dd-2(g), 78dd-3(e), 78ff(a), 78ff(c) and 18 USC § 357. These include the following:

- For criminal violations by companies, statutory fines of up to \$2 million per violation (more if gain from bribe or loss to another), restitution, forfeiture.
- For criminal violations by individuals, statutory fines of up to \$250,000 per violation (more if gain from bribe or loss to another) which cannot be reimbursed by an employer, and imprisonment. Authorities also may seek restitution and forfeiture.
- In cases involving public companies, the SEC may impose consent decrees, civil fines, orders to disgorge profits or orders debarring individuals from certain roles in public companies. Authorities also may seek costs of prosecution and civil forfeiture.
- Potential collateral sanctions: loss of export, procurement, immigration, financing or other government privileges, publicity, foreign enforcement, etc.

Violations of the accounting provision may result in the following penalties, principally under 15 USC § 78ff(a):

- Civil penalties under the securities laws including disgorgement or fines of up to \$500,000 for corporations and \$100,000 for individuals per violation.
- Criminal penalties for knowing and willful falsification of books and records and knowing circumvention of controls of up to \$25 million for issuers of securities and \$5 million for persons acting on their behalf (more if gain from the falsification or loss to another person), restitution, forfeiture, jail time.
- Authorities also may seek costs of prosecution and civil forfeiture.

Additional penalties can be imposed for related charges, such as money laundering, money laundering conspiracy, conspiracy and the like.

⁸⁹ See *Ibid* § 78m(b)(6). Where a minority shareholder has effective management control, it will be held responsible for the affiliate's compliance, notwithstanding its minority status. *In the Matter of BellSouth Corp*, Admin Pro File No 3-10678 (15 January 2002); *SEC v BellSouth Corp*, Case No 02CV113 (ND Ga 2002), SEC Exch Act Rel No 45279.

Penalties in recent cases have far outstripped those of past years. The highest penalty assessed to date is \$800 million paid by Siemens in connection with settlements with both the DoJ and the SEC in December 2008. This number does not even include the comparable amount paid to foreign authorities or the cost of the investigation and remediation. The second highest fine to date was paid in February 2009, when KBR and Halliburton agreed to pay combined penalties and disgorgement of profits of \$579 million, the highest penalty to date against US persons. In May 2008, Willbros settled SEC and DoJ prosecutions for combined penalties of \$32.3 million, the fourth largest criminal fine for an FCPA violation, after the *Baker Hughes* settlement in 2007.⁹⁰

Other relevant laws

The reach of the FCPA effectively is extended by other statutes that can be used in place of, or in addition to, the FCPA in cases involving allegedly corrupt conduct. These include conspiracy laws, the federal law prohibition on interstate travel in aid of racketeering, mail and wire fraud laws, and, especially in recent years, anti-money laundering laws. These laws are used to pursue conduct not covered by the FCPA – for example, commercial bribery.⁹¹

Federal anti-money laundering (AML) laws now include corruption-related offenses in the list of ‘specified unlawful activities’ (SUAs) that serve as predicate offenses: felony violations of the FCPA and foreign bribery, whether or not a violation of the FCPA. 18 USC § 1956(c)(7)(B)(iv). Moreover, AML laws can be used to prosecute the funding of a transaction, including monetary transfers, through 18 USC § 1956(a)(2), which criminalizes the international transfer of funds to *further* an SUA. This provision permits enforcement actions against transactions that would not otherwise be caught by the AML laws because they do not involve proceeds of crime.

Limitation periods

There is no special limitation period for FCPA violations. Rather, the generally applicable statute of limitations for violations of federal criminal laws – 5 years – applies.⁹² However, use of the federal conspiracy statute to prosecute FCPA cases allows the DoJ to go back much farther in time. That is because conspiracy is a continuing conduct crime. Prosecution can attach to the entire course of conduct if at least one overt act in furtherance of the conspiracy occurred within the limitation period. For example, in the

⁹⁰ Steptoe & Johnson LLP, International Client Alert (21 May 2008), available at <<http://www.steptoelaw.com/publications-5329.html>>; Steptoe & Johnson LLP, International Client Alert (8 January 2009), available at <<http://www.steptoelaw.com/publications-5819.html>>; Steptoe & Johnson LLP, International Client Alert (19 March 2009), available at <<http://www.steptoelaw.com/publications-5996.html>>.

⁹¹ *Schmitzer Steel*, see n 66; CCI.

⁹² 18 USC § 3282(a) (2006), cited in *United States v Kozeny*, 493 F.Supp.2d 693, 701 (SDNY 2007).

KBR/Halliburton case details.⁹³ At least half of the FCPA cases brought by the Department are prosecuted as conspiracy cases.

The limitation for SEC cases is also 5 years.⁹⁴ However, the SEC relies on its equitable authority, which is not subject to any limitation period, to seek certain remedies, including disgorgement of profits. As a result, it too has asserted penalties for conduct going back more than 5 years.⁹⁵

Enforcement trends

FCPA enforcement has been at record levels for the past several years. Since 1998, there have been dozens of FCPA prosecutions (most resulting in settlements), and many more investigations are in the pipeline. Both the DOJ and the SEC are actively enforcing the FCPA and investigating possible violations, and many companies have faced parallel enforcement actions by both entities. The number of penalties, and number of cases involving foreign persons, are increasing; and the authorities are actively targeting individuals as well as corporations.⁹⁶ Many cases have involved the extractive industries, particularly companies (US and foreign) operating in the oil and gas sector,⁹⁷ as well as

⁹³ On the other hand, cases have been dismissed or limited due to limitations issues. For example, in the recent trial of Frederic Bourke, prosecuted for his participation in a scheme to make improper payments in connection with the privatization of the State Oil Company of Azerbaijan (SOCAR), certain claims of the government were dismissed by the judge as time-barred. The case went to trial on the reduced set of charges, resulting in a guilty verdict. *United States v Kellogg, Brown & Root LLC*, Case No 09cv71 (SD Tex indictment 17 February 2009) (information of 6 February 2009, 20).

⁹⁴ 28 USC § 2462, cited in SEC Enforcement Manual § 3.1.2 (13 January 2010).

⁹⁵ In its enforcement action filed in February 2009 against Halliburton Company and KBR, Inc., the SEC obtained \$177 million in disgorgement for alleged FCPA violations in a payment scheme taking place from 1995 to 2004, almost entirely outside of the five years preceding the SEC action. *SEC v Halliburton Co. and KBR, Inc.*, Case No 09cv399 (SD Tex compl filed 2009).

⁹⁶ See, eg, *United States v Stanley*, Case No 08CR597 (SD Tex 2008); *SEC v Stanley*, Case No 08CV2680 (SD Tex 2008); *United States v Sapsizian and Acosta*, Case No 06CR20797 (SD Fla 2006).

⁹⁷ See, eg, *In the Matter of Statoil, ASA*, SEC Lit Rel No 54599 (13 October 2006) (cease-and-desist order); *United States v Statoil, ASA*, Case No 1-06CR00960 (SDNY 2006) (deferred prosecution agreement of 11 October 2006 against a foreign issuer). In October 2006, the DOJ and SEC announced FCPA enforcement settlements with Statoil. According to stipulated facts, Statoil made two payments in 2002 and 2003 totaling \$5.2 million to an offshore intermediary company with ties to an Iranian official who was the head of the Iranian Fuel Consumption Optimizing Organization (IFCOO) and known by Statoil to be an advisor to the Minister of Oil. Statoil sought to induce the official to help Statoil obtain participation interests in the South Pars oil and natural gas field – one of the largest such fields in the world – and to gain an improper advantage vis-à-vis other projects in Iran. Statoil allegedly knew of corruption allegations against the family of the official, but did not perform due diligence on the official. After Statoil paid \$200,000 in June 2002, the official allegedly provided Statoil with non-public information on oil and gas projects in Iran and disclosed copies of competitor bid documents, and Statoil obtained a participation interest in the South Pars field in October 2002. Statoil then made a \$5 million payment in January 2003. Statoil made both payments through a New York bank account to an account in Switzerland in the name of a third-party company. On its books, Statoil characterized both payments as relating to consulting services under a contract with another offshore company. Statoil terminated its contract, which called for ten additional \$1 million payments, after its September 2003 disclosure in the press. The DOJ charged Statoil with criminal violations of the anti-bribery and books and records provisions of the FCPA. The SEC alleged that Statoil had violated the anti-bribery provisions and the accounting (books and records and internal controls) provisions. Statoil entered into a deferred prosecution agreement with the DOJ and consented to an SEC administrative cease-and-desist order. Statoil agreed to pay \$21 million to resolve these actions, half as a fine payable to the DOJ and half as disgorgement and prejudgment interest to the SEC. The DOJ agreed to treat a \$3 million fine that Statoil had paid to the Norwegian authorities in 2004 relating to the same payments as an offset. Statoil also agreed to retain a compliance consultant for 3 years to review its FCPA compliance program and prepare three reports with binding recommendations to be disclosed to the SEC and the DOJ.

companies providing goods and services to the sector.⁹⁸

In 2008, prosecutions were brought against 10 companies and 13 individuals. In 2009, individual prosecutions outpaced corporate prosecutions (28 and 13, respectively).⁹⁹ This includes the record fines in the *Siemens* and *KBR/Halliburton* cases (\$800 and \$579 million, respectively).¹⁰⁰ The precise number of investigations is unknown, but reportedly includes at least 130,¹⁰¹ including more than a dozen investigations recently spawned

⁹⁸ *United States v ABB Vetco Gray, Inc and ABB Vetco Gray UK, Ltd*, Case No 04CR27901 (SD Tex 2004). See ABB Press Release, 'ABB concludes compliance review of upstream Oil, Gas and Petrochemicals business' (7 July 2004) (discussing due diligence aspects). The *ABB* case from 2004 featured enforcement actions by both the DoJ and SEC, involved ABB, a foreign issuer and two of its subsidiaries. This case arose out of a voluntary disclosure by ABB in late 2003 reportedly derived from internal due diligence performed in advance of an agreement between ABB and a consortium of private equity investors to sell two ABB subsidiaries to the consortium. To resolve allegations that its affiliates had made over \$1.1 million in improper payments to government officials in Nigeria, Angola and Kazakhstan through cash, gifts, entertainment and sham consulting contracts, ABB, Ltd, a Swiss-based foreign issuer, agreed to a settlement requiring it to disgorge \$5.9 million in allegedly ill-gotten earnings including interest and pay a \$10.5 million civil penalty to the SEC. At the same time, the two ABB subsidiaries that engaged in the illicit transactions, ABB Vetco Gray, Inc and ABB Vetco Gray (UK) Ltd, each agreed to plead guilty to a related two-count felony information in a plea agreement with the DoJ and were each assessed \$5.25 million criminal fines. The SEC's \$10.5 million civil fine against the parent was deemed satisfied by the subsidiaries' payment of the criminal fines. Resolution of the potential liability and completion of internal due diligence reportedly were conditions of the Purchase and Sale Agreement, announced in January 2004, and these requirements were expressly acknowledged in the plea agreements entered into by ABB's subsidiaries.

In July 2006, the SEC brought settled civil actions against four former employees of subsidiaries of ABB Ltd, which had reached a corporate settlement in 2004. All but one of these individuals are UK nationals residing outside the United States. The SEC action cites the alleged roles each of the four played between 1999 and 2001 in a scheme to pay bribes to Nigerian officials in furtherance of ABB's bid to obtain a contract to provide equipment for Nigeria's offshore Bonga Oil Field. The SEC alleged that each of the four violated the FCPA anti-bribery and accounting provisions, among other violations. All four agreed to be permanently enjoined from such conduct. Messrs. Munro, Campbell and Whelan (the sole US national in the group) each agreed to pay a \$40,000 civil penalty. Mr Samson agreed to a \$50,000 penalty and to pay \$64,675 in disgorgement and prejudgment interest. *SEC v Samson, Munro, Campbell and Whelan* (DDC) (July 2006 settled civil actions against former employees of ABB Ltd subsidiaries, after ABB Ltd and its subsidiaries settled SEC and DoJ enforcement actions brought in 2004). Three of the defendants in the latter case – Messrs. Samson, Munro and Campbell – were foreign nationals.

⁹⁹ This is compared to overall prosecutions of 28 in 2009, 21 in 2008, 38 in 2007, 13 in 2006, 12 in 2005 and 9 in 2004. Response to 2008 Transparency International (TI) Progress Report on OECD Convention Enforcement, Questionnaire for United States Chapter (May 2009) (unpublished report prepared by Steptoe & Johnson LLP) (2004–08 data); *The FCPA Year in Review: Recent FCPA Investigations and Prosecutions*, Presentation by Lucinda Low at ACI FCPA Conference (17 November 2009) (data regarding first 11 months of 2009).

¹⁰⁰ See n 89. Prior to those cases, the record fine was \$44 million, paid by Baker Hughes in connection with a settlement in April 2007. *United States v Baker Hughes* (SD Tex 2007) (Deferred Prosecution Agreement of 11 April 2007); *United States v Baker Hughes Servs Int'l, Inc*, Case No H-07CR129 (Information and Plea Agreement unsealed 26 April 2007); DoJ Press Release (26 April 2007); *SEC v Baker Hughes Incorporated and Fearnley*, Case No H-07CV1408 (SD Tex) (Complaint filed 26 April 2007); SEC Lit Rel No 20094 (26 April 2007); SEC Press Release (26 April 2007). *United States v Baker Hughes* (SD Tex 2007) (Deferred Prosecution Agreement of 11 April 2007); *United States v Baker Hughes Servs Int'l, Inc*, Case No H-07CR129 (Information and Plea Agreement unsealed 26 April 2007); DoJ Press Release (26 April 2007); *SEC v Baker Hughes Incorporated and Fearnley*, Case No H-07CV1408 (SD Tex) (Complaint filed 26 April 2007); SEC Lit Rel No 20094 (26 April 2007); SEC Press Release (26 April 2007). This was the company's second FCPA case since 2000; the first case resulted only in a cease-and-desist order against the company. Other penalties that held (in some cases briefly) the record for fines were \$28.5 million in the *Titan* case in July 2004, and \$26 million assessed against the Vetco Gray companies (also their second case in recent years) in February 2007. *United States v Vetco Gray Controls, Inc, Vetco Gray Controls, Ltd and Vetco Gray UK Ltd* (SD Tex announced 6 February 2007). The year 2006 brought the highest penalty against a foreign issuer apart from Siemens, \$21 million, in the *Statoil* case. Schnitzer Steel paid over \$15 million in penalties in October 2006, and ABB paid \$16.4 million in penalties in 2005. The *Willbros* case, settled in May 2008, resulted in a fine of \$32.3 million. SEC Lit Rel No 20571, 14 May 2008, *SEC v Willbros Group, Inc*, CA No 4:08CV01494 (SD Tex 2008).

¹⁰¹ This is compared to 80 investigations reported in 2007, 18 investigations reported in 2006, 10 investigations reported in 2005 and 18 investigations reported in 2004. Response to 2008 Transparency International (TI) Progress Report on OECD Convention Enforcement, Questionnaire for United States Chapter (May 2009) (unpublished report prepared by Steptoe & Johnson LLP).

by the 2007 *Vetco Gray* case involving a well-known freight forwarder.¹⁰² These substantial increases in enforcement and investigative activity are due in part to an increase in voluntary disclosures. According to DoJ officials, such disclosures account for approximately one-third of reported cases in recent years.¹⁰³

The *Siemens* settlement represented the first time the US authorities coordinated the resolution of a case with foreign authorities. The German prosecution, which had started in 2006, triggering world-wide investigations, was resolved at the same time; aggregate fines paid to the German authorities totaled \$800 million US, making the total penalties to those two authorities alone amount to \$1.6 billion. Because of the level and extent of the bribery admitted to by Siemens, the US penalties could have been even higher than were actually assessed, but the company was credited for extraordinary cooperation and remediation.¹⁰⁴

The *KBR/Halliburton* case was preceded by prosecution of KBR's former CEO, Jack Stanley, *United States v Stanley*, Case No 08CR597 (SD Tex 2008). Mr Stanley agreed to disgorgement of \$10.8 million and a jail term of not less than 7 years. In settling the case, US prosecutors noted the cooperation of foreign authorities in 'Europe, Asia, Africa and the Americas'.¹⁰⁵ The size of the penalties against the companies, which included \$402 million in fines and \$177 million in disgorgement of profits, reflected the fact the large value of the contracts secured through payments (\$6 billion US), the profits earned by the company and other factors. Subsequent to the corporate settlement, two UK nationals, one the principal of a former agent of the company and one a former employee of a UK subsidiary of KBR, were prosecuted by the US, and their extradition is being sought.

It is important to emphasize that to date, no companies prosecuted for FCPA violations have litigated with enforcement authorities. The corporate cases discussed in this section – including the *Siemens* and *KBR/Halliburton* cases – all reflect consensual dispositions of different types. The absence of litigation is one reason for the lack of clarity regarding certain key provisions of the statute and has contributed to increasingly aggressive interpretations of the statute on the part of enforcement officials.

There are, however, some litigated cases involving individuals. One 2009 case has been particularly significant in construing several aspects of the statute. The *Bourke* case,¹⁰⁶

¹⁰² In 2007, several *Vetco Gray* companies formerly affiliated with ABB agreed to pay criminal penalties of \$26 million to settle FCPA violations arising from their business activities in Nigeria, through an agent, in particular activities in connection with the clearance of goods through Nigerian customs. This case has spawned a large number of offshoot investigations of companies using the agent in question, as well as an investigation of Panalpina, a Swiss-based freight forwarder. See, eg, 'US Targets Bribery Overseas', *Washington Post*, 5 December 2007, p D1.

¹⁰³ Statements of Fraud Section personnel at various FCPA conferences, Spring 2008. For a discussion of the pros and cons of voluntary disclosure, see LA Low, O Bonheimer and DS Lorello, 'The Uncertain Calculus of FCPA Voluntary Disclosures', 16th National American Conference Institute Conference on the Foreign Corrupt Practices Act, 8–9 November 2006, Washington, DC.

¹⁰⁴ Subsequently, Siemens settled a case with the World Bank, agreeing to a 2-year ban on participation in Bank-financed contracts and to dedicate \$100 million US to anti-corruption work over the next several years. More information on the settlement is available on the website of the World Bank at <<http://www.worldbank.org/integrity>>; see also Siemens Aktiengesellschaft Form 20-F (4 December 2009) and Part III below.

¹⁰⁵ Lit Rel No 20700 (3 September 2008) announcing *SEC v Stanley*, Case No 08CV2680 (SD Tex 2008).

¹⁰⁶ *United States v Kozeny and Bourke*, Case No 05CR518 (SDNY 2005).

which resulted in a victory for the government, is part of a series of cases involving a scheme authored by Victor Kozeny to secure the privatization of the SOCAR and to obtain control of SOCAR once it was privatized. Mr Bourke was one of several investors in a consortium recruited by Mr Kozeny when his own resources proved inadequate to acquire the vouchers and option instruments necessary to secure control of SOCAR upon its privatization. The consortium collectively invested more than \$200 million US in such instruments, only to see their value plummet when the Azeri government failed to implement the privatization. Mr Bourke, along with several others,¹⁰⁷ was prosecuted for his role in an alleged conspiracy to make improper payments and transfers of value (including stock in Kozeny's company what would hold the assets once privatized) to various Azeri officials. He was convicted after a jury trial of investing on the basis of willful ignorance of Mr Kozeny's scheme.¹⁰⁸

A number of these cases reflect greater cooperation between national governments in anti-corruption cases, cooperation facilitated by the recently established network of international treaties. At the same time, information about ongoing investigations suggests that these treaties, and the national laws implementing them, are bringing about an increase in foreign enforcement activity. As a result, it is becoming increasingly common for companies to be subjected to simultaneous or sequential investigations by US authorities and foreign authorities, as well as investigations by international institutions.

Canadian anti-bribery law

Canada is a signatory to three international anti-bribery treaties: the OECD Convention, the Inter-American Convention and the UN Convention. The *Corruption of Foreign Public Officials Act* (CFPOA)¹⁰⁹ was enacted in 1998 in implementation of the OECD and Inter-American Conventions. In addition to the CFPOA, several provisions of the *Criminal Code*¹¹⁰ and the *Income Tax Act*¹¹¹ are also applicable to bribery of foreign public officials in an ancillary manner.

¹⁰⁷ An earlier prosecution in the case involving the Swiss lawyer Hans Bodmer is also an illustration of the new dynamic in FCPA cases. *United States v Bodmer*, Case No 03CR947 (SDNY 2003). Although the FCPA conspiracy count (based on the pre-1988 FCPA) failed on jurisdictional grounds, he was convicted on the money laundering conspiracy count which was based on the FCPA. Korean authorities arrested Mr Bodmer while he was on a business trip in that country, and, after spending some time in confinement in Korea, rendered him to US authorities for trial in the United States (the FCPA conspiracy charge against him was dismissed in part because he was not given access to counsel at the time of his being rendered).

¹⁰⁸ *United States v Kozeny and Bourke*, Case No 05CR518 (SDNY 2005) (Jury verdict of 10 July 2009, discussed in Steptoe & Johnson LLP International Client Alert (November 2009), available at <<http://www.steptoe.com/publications-6447.html>>). In the alternative, the government had asserted he had actual knowledge of the scheme, but emphasized at trial his lack of due diligence on the investment opportunity and other facts suggesting he had put his head in the sand. The case was the first conviction on that basis; the judge also had occasion to construe the local law affirmative defense, see n 71, statute of limitations issues, see *United States v Kozeny and Bourke* (Opinion and Order of 21 June 2007), and other issues.

¹⁰⁹ SC 1998, c 34, as amended.

¹¹⁰ RSC 1985, c C-46, as amended.

¹¹¹ SC 1985, c 1 (5th Supp), as amended.

The CFPOA is a criminal statute comprising a single prohibition against the bribery of foreign public officials.¹¹² It is enforced strictly by way of criminal prosecution. The CFPOA does not have books and records requirements or any other civil or administrative provisions.

The corruption of foreign public officials act

Elements of the bribery offense

Section 3(1) of the CFPOA establishes the bribery offense as follows:

3. (1) Every person commits an offense who, in order to obtain or retain an advantage in the course of business, directly or indirectly gives, offers or agrees to give or offer, a loan, reward, advantage or benefit of any kind to a foreign public official or to a person for the benefit of a foreign public official

- (a) as consideration for an act or omission by the official in connection with the performance of the official's duties or functions; or
- (b) to induce the official to use his or her position to influence any acts or decisions of the foreign state or public international organization for which the official performs duties or functions.

Section 3 draws its substance from both the OECD Convention and the domestic bribery offense in section 121 of the *Criminal Code*.¹¹³ The mental element (or *mens rea*) required to complete the offense is that the accused have knowledge of the circumstances corresponding to the elements of the offense and the intention of achieving the prohibited result.¹¹⁴ Moreover, the requisite mental element is not limited to actual knowledge,

¹¹² At the time of its enactment, the CFPOA contained two additional offenses with regard to the laundering of the proceeds of bribery and the possession of the proceeds of bribery. These offenses were repealed in 2001 and the money-laundering and possession offenses in the *Criminal Code* were extended to apply to the proceeds of bribery contrary to the CFPOA (see *Criminal Code*, ss 354 and 462.31).

¹¹³ Sections 121–5 of the *Criminal Code* set out a number of corruption-related offenses with respect to public officials. The core domestic bribery offense is found in s 121(1)(a) which provides as follows:

121. (1) Every one commits an offense who

(a) directly or indirectly

(i) gives, offers or agrees to give or offer to an official or to any member of his family, or to any one for the benefit of an official, or

(ii) being an official, demands, accepts or offers or agrees to accept from any person for himself or another person, a loan, reward, advantage or benefit of any kind as consideration for cooperation, assistance, exercise of influence or an act or omission in connection with

(iii) the transaction of business with or any matter of business relating to the government, or

(iv) a claim against Her Majesty or any benefit that Her Majesty is authorized or is entitled to bestow,

Whether or not, in fact, the official is able to cooperate, render assistance, exercise influence or do or omit to do what is proposed, as the case may be.

¹¹⁴ The *mens rea* for the CFPOA bribery offense is similar to that required by Canada's domestic bribery offense under s 121 of the *Criminal Code*. The Supreme Court of Canada held in *R v Cogger*, [1997] 2 SCR 845, that the *mens rea* of s 121 of the *Criminal Code* consists of the intent to cause the external circumstances of the offense. It is enough that the accused party intentionally committed the prohibited act (*actus reus*). See also Department of Justice (Canada), *The Corruption of Foreign Public Officials Act: A Guide*, 1999, at 3 (the 'Justice Guide').

but can be inferred from willful blindness of the accused to the danger that the conduct could bring about the prohibited result.¹¹⁵

The conduct element (or *actus reus*) of the CFPOA bribery offense comprises seven elements. A person¹¹⁶ – Canadian or non-Canadian – must:

- (i) give, offer or agree to give or offer
- (ii) directly or indirectly
- (iii) a loan, reward, advantage or benefit of any kind
- (iv) to a foreign public official or to any person for the benefit of a foreign public official
- (v) as consideration for an act or omission by the official in connection with the official's duties or functions, or to induce the official to use his or her position to influence any acts or decision of the government for which the official performs duties or functions
- (vi) in order to
- (vii) obtain or retain business or to retain or obtain an advantage in the course of business.

The CFPOA establishes a broad 'conduct' offense. There is no requirement to prove that any result flowed from the doing of the prohibited act; for example, that business was obtained or retained, or even to prove that an offered bribe was accepted. Liability flows from a mere offer or a promise to pay where all of the elements of the offense are present.

By prohibiting payments, offers or promises made 'directly or indirectly', the CFPOA makes it clear the offense includes bribery implemented through an intermediary. This is particularly significant in view of the fact that the requisite mental element includes willful blindness. The explicit coverage of 'indirect' payments underscores the importance of adequate due diligence in the engagement of third parties such as agents and representatives, and continuous monitoring in the course of subsequent dealings with third parties.

The consideration given, offered or promised may be anything of value. The CFPOA refers to 'a loan, reward, advantage or benefit of any kind'. This phrase has been broadly construed by the Supreme Court of Canada in the context of domestic bribery.¹¹⁷ Benefits such as travel, hospitality and entertainment, and other non-pecuniary benefits could be caught by the statute provided the other elements of the offense are also present.

¹¹⁵ See *R v Hinchey*, [1996] 3 SCR 1128, per Cory J at 1185, in relation to the domestic bribery offense in s 121 of the *Criminal Code*. Although willful blindness is sufficient to establish the required mental element, mere recklessness is not (see *R v ACS Public Sector Solutions Inc*, 207 ABPC 315 (Alberta Prov Ct)).

¹¹⁶ 'Person' is defined in the CFPOA by reference to the *Criminal Code*, where it is broadly defined to include "Her Majesty and public bodies, bodies corporate, societies, companies and inhabitants of counties, parishes, municipalities or other districts in relation to the acts and things that they are capable of doing and owning respectively" (*Criminal Code*, s 2). The prohibition therefore applies to individuals, corporations and other legal persons, as well as public bodies (eg, state enterprises), and is not limited to Canadian nationals.

¹¹⁷ In *R v Hinchey* (see n 115), the Supreme Court of Canada held that the phrase 'advantage or benefit of any kind' is intended to catch a myriad of non-pecuniary benefits. Examples include travel and expense payments, overpayment for legitimate goods and services, loans (at favorable interest rates) and scholarships. The Ontario Court of Appeal also considered the phrase 'advantage or benefit of any kind' in *R v Greenwood*, (1991), 5 OR (3d) 71, where it held that the language was intended to capture all gifts which could potentially compromise that integrity in the eyes of a reasonable person.

In order to be caught by the CFPOA, the benefit must be given, offered or promised to a 'foreign public official'¹¹⁸ as consideration for an act or omission on the part of the official. The act or omission is not limited to the official's formal duties, but also extends to the use of the official's influence in matters unrelated to his or her official duties. Moreover, a benefit need not be made or offered directly to a foreign public official for liability to accrue under the CFPOA. A benefit given or offered to someone else 'for the benefit' of a foreign public official will also entail liability. For example, a gift or benefit conferred on a family member or a business associate of a foreign public official would likely be viewed as benefiting the official and would therefore be caught by the CFPOA.

The benefit must be given, offered or promised 'in order to obtain or retain business or to retain or obtain an advantage in the course of business'. The phrase 'in order to' imparts a *quid pro quo* element to the CFPOA bribery offense. In *Hinchey*,¹¹⁹ the Supreme Court of Canada stated in connection with the domestic bribery offense that the words 'in order to' do not require that the person making the gift or the offer have some further or additional 'corrupt' intent beyond the *quid pro quo* element.

'Advantage in the course of business' is not qualified in any way in the CFPOA. This stands in contrast with the approach of the OECD Convention and the FCPA, both of which refer to an 'improper advantage'. A mere 'advantage in the course of business' is potentially broader than 'improper advantage'. For example, the phrase 'advantage in the course of business' could be interpreted to capture the general good will engendered by hospitality or entertainment that would be viewed as excessive or extraordinary in the particular circumstances in question even in the absence of a specific advantage such as a particular contract award or regulatory intervention. Nevertheless, given the broad interpretation of the FCPA bribery offense by US courts and enforcement agencies, it is unlikely that for practical purposes there will be any significant difference between the standards imposed by the CFPOA and the FCPA.

Scope of the CFPOA

The CFPOA bribery offense, like its FCPA counterpart, potentially applies to a very broad range of activities. Thus, the bribery offense can be committed at any stage in the context of trade or investment activity, from pre-contractual activities (eg, negotiating or bidding for a government contract or concession), through to the implementation completion of a commercial transaction (eg, clearing customs and delivery of product in an export sale), or in the day-to-day operation of an investment (eg, obtaining favorable tax or regulatory treatment).¹²⁰

¹¹⁸ CFPOA, s 2: 'foreign public official' means (a) a person who holds a legislative, administrative or judicial position of a foreign state; (b) a person who performs public duties or functions for a foreign state, including a person employed by a board, commission, corporation or other body or authority that is established to perform a duty or function on behalf of the foreign state, or is performing such a duty or function; and (c) an official or agent of a public international organization that is formed by two or more states or governments, or by two or more such public international organizations.

¹¹⁹ *Hinchey*, see n 115.

¹²⁰ See the discussion of the scope of the FCPA at Part II.A.1.b of this chapter.

There is no limitation period applicable to the bribery offense under the CFPOA. As such, any matters arising after 14 February 1999 (the date the CFPOA entered into force) that potentially constitute bribery of a foreign public official may attract liability under the CFPOA.

Jurisdictional reach of the CFPOA

The Supreme Court of Canada established the jurisdictional test for criminal matters in *Libman v The Queen*, [1985] 2 SCR 178, where it held that Canadian courts have jurisdiction where there is a ‘real and substantial connection’ between the offense and Canada. The court described the test as requiring that a ‘significant portion of the activities constituting the offense took place in Canada’ without specifying what a ‘significant portion’ might constitute. It specifically rejected quantitative formulations leaving it open to be determined whether any particular factual connection with Canada could be viewed as ‘significant’ on a case-by-case basis.

The fact that the CFPOA implements an international convention that inherently deals with matters occurring principally outside of Canada suggests that a court would likely apply the ‘real and substantial connection’ test in a manner so as not to defeat the purpose of the legislation. Specifically, the jurisdiction where the foreign public official exercises influence is, by definition, a foreign jurisdiction and therefore outside of Canada. Also, the CFPOA defines ‘business’ in reference to a business or undertaking ‘carried on in Canada or elsewhere for profit’. In these circumstances, it is likely that a court would find set a relatively low threshold for ‘significance’ where the offense involved a Canadian company and there was involvement in or acquiescence to the prohibited conduct by a corporate official in Canada with authority over the business in question.

In May 2009, the Government of Canada introduced Bill C-31 with a view to closing a potential gap in the CFPOA by establishing nationality jurisdiction over the conduct abroad of Canadian citizens, permanent residents or legal entities (including corporations, partnerships, trusts, etc) that are incorporated in, formed or otherwise organized under the laws of Canada or a province of Canada.¹²¹ This is similar to amendments made to the FCPA in 1988 (see footnotes 42 and 59).

Exceptions and defenses

Paralleling the US FCPA, the CFPOA establishes several defenses and exceptions to the application of the bribery offense, as follows.

First, pursuant to section 3(3)(a), a person is not guilty of an offense contrary to the CFPOA if the ‘loan, reward, advantage or benefit’ is permitted or required under the laws of the foreign jurisdiction for which the foreign public official performs duties or functions. Moreover, the defense is not limited to ‘written laws’ permitting or requiring the payment in question. Thus, if certain arrangements that are potentially caught within the scope of the CFPOA but are permitted under the ‘common law’ of a given jurisdiction

¹²¹ Bill C-31 died on the order paper when Parliament was prorogued in December 2009. It is expected, however, that the CFPOA amendments proposed by Bill C-31 will be re-introduced by the Government when Parliament reconvenes.

and acknowledged by the judiciary despite not being expressly set out in the written laws of a jurisdiction, those arrangements may qualify for the defense under section 3(3)(a) of the CFPOA. By contrast, arrangements that are merely tolerated (ie, not prosecuted) despite the fact that they are formally prohibited under local law would not qualify for this defense.

Second, it is not an offense if the 'loan, reward, advantage or benefit' was offered or paid to cover reasonable expenses incurred in good faith by the foreign public official directly in relation to (a) the promotion, demonstration or explanation of the payer's products or services; or (b) the execution or performance of a contract between the payer and the foreign jurisdiction for which the official performs duties or functions.

Third, the CFPOA creates an express exception for 'facilitation payments' made to expedite or secure the performance by a foreign public official of any act of a routine nature that is part of the foreign public official's duties or functions. The CFPOA does not define 'facilitation payments', but provides a non-exhaustive list of examples, as follows: (a) the issuance of a permit, license or other document to qualify a person to do business; (b) the processing of official documents, such as visas and work permits; (c) the provision of services normally offered to the public, such as mail pick-up and delivery, telecommunications services and power and water supply; and (d) the provision of services normally provided as required, such as police protection, loading and unloading of cargo, the protection of perishable products or commodities from deterioration or the scheduling of inspections related to contract performance or transit of goods.¹²²

Penalties

Contravention of the CFPOA can result in significant penalties. In the case of an individual, section 3(2) provides that the maximum penalty is imprisonment for a term of up to 5 years. In the case of a corporation, the CFPOA does not set a maximum fine and a convicted corporation is subject to a fine at the discretion of the court.¹²³

Other relevant laws

As noted above, there are several offenses and other provisions under Canadian statutes other than the CFPOA that potentially apply to bribery of foreign public officials in an ancillary fashion. These include the offenses of paying secret commissions, money-laundering, possession of the proceeds of crime and conspiracy, all under the *Criminal Code*. In addition, the *Income Tax Act* contains specific provisions with regard to the tax treatment of bribes paid to foreign public officials. Each of these is discussed in turn below.

Secret commissions

Pursuant to section 426 of the *Criminal Code*, it is an offense to give, offer or agree to give or offer to an agent (defined to include an employee) of a person any 'reward, advantage

¹²² CFPOA, s 3(4).

¹²³ See s 735 of the *Criminal Code*.

or benefit of any kind' as consideration for an act or omission, or to show favor or disfavor to any person in relation to the business of the principal (defined to include an employer). Similarly, it is an offense for an agent (or employee) to demand, accept or agree to demand or accept any such payment or offer. Benefits offered or given to an agent or employee that are disclosed to the principal do not constitute an offense under section 426. The secret commission offense is similar in scope to the domestic bribery offense in section 120 of the *Criminal Code*. However, it covers a broader range of circumstances and payees, including private parties and foreign officials. Indeed, section 426 has been used to prosecute a foreign official who accepted a bribe from a Canadian company while he was posted in Canada.¹²⁴

Money-laundering and possession of proceeds of bribery

Section 462.31 of the *Criminal Code* makes it an offense for a person to transfer, deliver, transport, transmit, alter or dispose of any property or proceeds of property with an intent to conceal or convert the property or proceeds, knowing that the property or proceeds were derived from the commission of a designated offense in Canada (including contravention of the CFPOA), or an act or omission anywhere that, if it had occurred in Canada, would have constituted a designated offense. In other words, even if the bribery of a foreign official does not satisfy the jurisdictional threshold under the CFPOA (ie, the real and substantial offense test), it is likely that any dealing with the proceeds of the bribery in Canada would constitute the offense of money-laundering.

Similarly, pursuant to section 354 of the *Criminal Code*, it is an offense for a person to be in possession of any property, thing or proceeds of any property or thing knowing that it was obtained by or derived from the commission of an indictable offense (including contravention of the CFPOA), or an act or omission anywhere that, if it had occurred in Canada, would have constituted an indictable offense. It is therefore an offense to knowingly possess in Canada the proceeds of bribery of a foreign public official regardless of whether the bribery would have constituted an offense under the CFPOA. Possession of the proceed of bribery in a foreign location or in a foreign bank account, however, does not constitute an offense under section 354, although it may well give rise to a conspiracy offense if the other elements of the offense discussed in the next section are present.

Money-laundering and possession of the proceeds of bribery of a foreign public official are each punishable by imprisonment for up to 10 years in the case of an individual, and a fine at the discretion of the court in the case of a corporation.

Conspiracy

Pursuant to the conspiracy provisions of section 465 of the *Criminal Code*, it is an offense to conspire with another person in Canada to commit a contravention of the CFPOA. In addition, anyone who conspires with another person in Canada to do anything in a place outside of Canada that is an offense under the laws of that place is deemed to have conspired to do that thing in Canada. The effect of this provision would be that two or more

¹²⁴ See *R v Garcia*, 2002 ABPC 156 (Alberta Prov Ct).

persons who conspire in Canada to bribe a foreign public official outside of Canada would likely be deemed to be committing the offense of conspiracy to contravene the CFPOA.

Denial of income tax deduction

Section 67.5(1) of the *Income Tax Act* prohibits deductions with respect to expenses incurred for the purpose of doing anything that violates the CFPOA. For the purpose of implementing the denial of tax deductibility of bribes, the Minister of National Revenue may re-assess taxes payable, interest and penalties for any taxation year, and is not restricted by the generally applicable limitation periods for tax assessments, reassessments and additional assessments.¹²⁵

Enforcement

When the CFPOA was enacted in 1998, the government chose not to assign investigatory or prosecutorial responsibility for CFPOA offenses on any particular agency. Rather, it was left to municipal, provincial and federal police forces across Canada to investigate potential CFPOA offenses. Prosecutorial authority was vested in the federal Attorney General and the 10 provincial Attorneys General. Unsurprisingly, the absence of dedicated resources resulted in virtually no enforcement of the CFPOA for many years. Indeed, in the 11 years since the CFPOA was enacted, there has been only one prosecution resulting in a guilty plea and a nominal fine.¹²⁶ The limited enforcement of the CFPOA is due, in part, to the inherent difficulty of proving criminal offenses on the higher 'beyond a reasonable doubt' standard rather than the lower 'balance of probabilities' standard applied in civil matters. Although recommendations were made to the Government of Canada to include civil or administrative measures in the CFPOA at the time that the statute was being drafted, the Government chose to limit the Act to criminal enforcement only.

As a result of criticisms within the OECD peer-review process regarding the paucity of Canadian enforcement, the Government of Canada in 2007 established a dedicated International Anti-Corruption Team within the Royal Canadian Mounted Police (RCMP), the federal police force. The 14-officer RCMP team is comprised of two units based in Ottawa and Calgary, respectively, and reports directly to the head of the RCMP's commercial crime division. No charges have yet been laid under the CFPOA since the establishment of the RCMP team, however, it has been confirmed that there are several investigations currently under way involving, *inter alia*, payments by Canadian businesses to foreign officials, payments made by foreign businesses to a Canadian official and money

¹²⁵ *Income Tax Act*, s 67.5(2).

¹²⁶ In January 2005, Hydro Kleen Group pleaded guilty to one count of violating s 3 of the CFPOA in connection with certain payments made to a US Immigration and Naturalization Service official to facilitate the issuance of work permits to its employees to travel to the US, and to raise obstacles to the entry of its competitor's employees into the US. The company was fined approximately \$25,000, being approximately the amount of the bribe paid to the US official. The US official was also convicted in separate proceedings under s 426 of the *Criminal Code* for accepting secret commissions from Hydro Kleen. See n 124 above.

laundering of proceeds in Canada by a foreign official of proceeds of bribery. There have also been recent steps to initiate closer cooperation between the RCMP teams in Ottawa and Calgary, and prosecutorial authorities with the Prosecution Service of Canada and the Attorney General of Alberta, respectively. In addition, the RCMP team has confirmed that it is providing assistance to foreign anti-corruption enforcement agencies pursuant to mutual legal assistance requests.

UK anti-corruption law

At present, UK anti-bribery law is comprised of a combination of common law standards and a series of laws dating from the late 19th and early 20th centuries. The UK laws have been criticized roundly by commentators, in particular by the OECD Working Group on Bribery, for many reasons, including their antiquated and unclear structure and terminology, and for challenges that the UK laws present in prosecuting corporations for bribery. However, in the past 12 months there have been a number of significant developments. A new bribery bill has been submitted to Parliament; the regulators have taken a revised approach to foreign bribery by UK companies and there have been several landmark decisions relating to the activities of well-known UK companies. Thus, while it is fair to conclude that the UK is some way behind the US in terms of the rigor and efficiency with which regulators pursue foreign bribery, times have certainly changed and UK companies now operate in a very different environment.

Basic framework

English law relating to the crime of bribery includes the common law offense of bribery¹²⁷ and a series of statutory offenses, found in at least 12 statutes. The key statutes are the Public Bodies Corrupt Practices Act 1889 (1889 Act), the Prevention of Corruption Act 1906 (1906 Act), the Prevention of Corruption Act 1916 (1916 Act) and the Anti-Terrorism, Crime and Security Act 2001 (2001 Act).

The 1889 Act codified the crime of corruption making bribery of a member, officer or servant of a public body, a criminal offense. Sections 1(1) and (2) of the 1889 Act prohibit any person either alone or in conjunction with any other person, from either corruptly soliciting, receiving or agreeing to receive, for him or herself or for any other person or from giving, promising or offering to give, any gift, loan, fee, reward or advantage whatsoever as an inducement to, or reward for, or otherwise on account of any member, officer or servant of a public body doing or forbearing to do anything in respect of any matter or transaction whatsoever, actual or proposed, in which the public body is concerned.

The Court of Appeal in *Whitaker*¹²⁸ rejected the argument that the common law offense applied only to judicial and ministerial officers and that the defendant army officer belonged to neither category. A public officer was defined as ‘an officer who

¹²⁷ The common law offense of bribery is most commonly defined as follows: “The receiving or offering [of] any undue reward by or to any person whatsoever, in a public office, in order to influence his behaviour in office, and incline him to act contrary to the known rules of honesty and integrity”. (Russell on Crime, 1964, p 381).

¹²⁸ [1914] 3 KB 1283.

discharges any duty in the discharge of which the public are interested, more clearly so if he is paid out of a fund provided by the public'.¹²⁹ This includes persons discharging ad hoc public duties, such as electors at parliamentary¹³⁰ or local government elections.¹³¹ Embracery (bribery of jurors) is also an offense at common law, though now considered obsolete.

Section 7 of the 1889 Act defines 'person' as including a body of persons, incorporated or unincorporated. A 'public body' is defined (also in section 7) as meaning any council of a county, city or town, any council of a municipal borough, also any board, commissioners, select vestry, or other body which has power to act under and for the purposes of any act relating to local Government, or the public health, or to poor law or otherwise to administer money raised by rates in pursuance of any public general act. As discussed below, the law was extended in 2001 to criminalize the bribing of foreign officials. Accordingly, the definition of 'public body' in the 1889 Act was extended to include any body which exists in a country or territory outside of the UK and is equivalent to anybody described above.

The 1906 Act extended the law of corruption into the private sector, making it a crime to bribe *any* agent, whether in the public or private sector. 'Agent' is defined in the 1906 Act (section 1(2)) as including any person employed by or acting for another. 'Principal' is defined in the 1906 Act (section 1(2)) as including an employer.¹³² While the 1906 Act does not expressly refer to a person giving, agreeing to give or offering any gift or consideration through an intermediary, a person who gives, agrees to give or offers a bribe to a foreign official via an intermediary would be guilty of an offense as well as the intermediary because the offense is aimed at any person who corruptly gives, agrees to give or offers any gift or consideration to any agent.

The 1916 Act introduced the presumption of corruption. In any proceedings brought against a person for an offense under either the 1889 Act or 1906 Act, if it is proved that any money, gift or other consideration has been paid or given to or received by a public official, the money, gift or consideration shall be deemed to have been paid or given and received corruptly unless the contrary is proved. The presumption shifts the burden of proof so that it is for the defense to prove (on a balance of probabilities)¹³³ that a given

¹²⁹ Ibid at 1296, by Lawrence J.

¹³⁰ *Pitt and Mead* (1762) 3 Burr 1335, 97 ER 861.

¹³¹ *Worrall* (1890) 16 Cox CC 737.

¹³² Pursuant to s 1(1) of the 1906 Act it is an offense for: 'any agent to accept, obtain or agree to accept or attempt to obtain, from any person, for himself or for any other person, any gift or consideration as an inducement or reward for doing any act in relation to his/her principal's affairs or business, or showing favour or disfavour to any person in relation to his/her principal's affairs or business; or any person to corruptly give, agree to give or offer any gift or consideration to any agent as an inducement or reward for doing an act in relation to his or her principal's affairs or business or for showing favour or disfavour to any person in relation to his or her principal's affairs or business; or any person knowingly giving to any agent or for any agent knowingly to use with intent to deceive his or her principal, any receipt, account, or other document which contained any statement which is false, erroneous or defective in any material particular, which is intended to mislead the principal'.

¹³³ *Carr-Briant* [1943] KB 607.

payment was not corrupt. It applies only to payments made to employees of the Crown, Government departments or public bodies,¹³⁴ and only to cases involving contracts.¹³⁵

While this presumption remains law, the Law Commission has recommended the presumption be abolished and its enforcement has been abandoned by the Crown Prosecution Service given the human rights implications. The Government has indicated that this law will be repealed when the laws relating to corruption are revised (the planned revision is discussed in general terms below).

The 1916 Act also expanded the definition of 'public body' as set out in the 1889 Act, to include local and public authorities of all descriptions (section 4(2)).

Corporate liabilities

In general, the criminal liability of a legal person (eg, a corporation) is the same as that of a natural person. A corporation may be convicted of common law and statutory offenses, including those requiring *mens rea*, ie, an awareness of the fact that the conduct is criminal.¹³⁶ Both companies and individuals may be liable for bribery of a foreign official, although there is presently no express corporate criminal liability for bribery and a corporation is not automatically liable for a corrupt act performed by a person acting on behalf of the corporation.

A corporation will be liable where an offense is committed in the course of its business by a person whose control of the corporation's affairs is such that the corporation may be said to think and act through this person. In this case the natural person's actions and intent are deemed to be actions and the intent of the corporation. Despite the actions and intent of the person being attributed to the corporation, the person is also liable.¹³⁷

Whether a person's conduct is imputed to the corporation is not necessarily determined by their position. Not every manager, responsible agent or high executive can make a company criminally responsible by his or her actions. The key is whether or not the person who performed, directed or authorized the prohibited act was part of the corporation's 'directing mind and will'.¹³⁸ The main considerations are the relative position in the company which the person holds and the extent to which, as a matter of fact, the person is in actual control of its operations or a section of them without

¹³⁴ It does not apply therefore to agents who are not so classified, such as employees of private companies engaged in contracted-out work or private sector secondees to Government departments.

¹³⁵ *Asseling*, *The Times* (10 September 1916). Low J considered it impossible to prosecute a civil servant found in possession of banknotes traced to a contractor with whom he had had official dealings, because the prosecution was unable to prove why the money was paid. This case helps to explain the restricted application of the presumption of corruption.

¹³⁶ Halsbury's Laws of England, 'Criminal Law, Evidence and Procedure', vol 11(1) (2006 Reissue), para 38.

¹³⁷ *Ibid.*

¹³⁸ See the judgment of Denning LJ in *H L Bolton (Engineering) Co Ltd v T J Graham & Sons Ltd* ([1957] 1 QB 159 at 172, [1956] 3 All ER 624 at 630). He said:

A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such.

effective superior control. There are a number of factors which may be considered, including the constitution of the corporation and the extent to which it identifies the natural persons who, by the memorandum and articles of association, are entrusted with the exercise of the powers of the corporation.¹³⁹ It is also relevant to consider whether the board of directors has delegated some part of their functions of management, giving to the person who committed the prohibited act full discretion to act independently of instructions from them.¹⁴⁰ It is a question of law whether, once the facts have been ascertained, a person in doing particular things is to be regarded as the corporation itself or merely as the corporation's servant or agent. In the latter case, any liability of the corporation can only be a statutory or vicarious liability.

It is not necessary to demonstrate that there was an intention to benefit the corporation or any of its leading personnel. Further, a corporation can in theory be convicted of an offense even though no proceedings have been brought against the natural person. Commentators have noted, however, that it is in fact rare in England for legal persons to be prosecuted for offenses such as corruption and instead it is often the case that natural person are prosecuted for their individual criminal acts.¹⁴¹

Penalties

The penalties for foreign and domestic bribery are the same. For offenses under the 1889 Act and 1906 Act, the penalties include:

On summary conviction, a maximum of 6 months' imprisonment or a fine to the statutory maximum, which is currently set at £5,000; or

On indictment, 7 years' imprisonment, an unlimited fine or both.

A person convicted of an offense under either the 1889 Act or the 1906 Act may also be made the subject of a financial reporting order, whereby a person convicted of an offense is obliged to make reports to the relevant authorities with respect to their financial position.

The common law bribery offenses have no prescribed or maximum penalties, although sanctions for the comparable statutory offenses can guide the courts. There is no mandatory minimum sentence for any bribery offense. The penalties for attempting or conspiring to commit a bribery offense are the same as for the offense itself.

Generally, the UK courts may not impose any administrative or civil sanctions on persons convicted of bribery. Pursuant to the Company Directors Disqualification Act 1986, however, a director may be disqualified for general misconduct in connect with the corporation.

¹³⁹ *Tesco Supermarkets Ltd v Natterass* [1971], 2 All ER 127, at 155; *R v Andrews Weatherfoil Ltd* [1972] 1 All ER 65.

¹⁴⁰ *Tesco Supermarkets Ltd v Natterass*, at 132.

¹⁴¹ C Nicholls, QC, *Corruption and Misuse of Public Office* (Oxford University Press 2006) at para 2/85.

Jurisdiction

Prior to the 2001 Act coming into force on 14 February 2002, courts in the UK had no jurisdiction with respect to acts of bribery and corruption that took place outside of the UK. The 2001 Act, which seeks to implement the UK's obligations under the OECD Convention, introduced new provisions to give courts in the UK jurisdiction over crimes committed abroad by UK nationals and UK companies, in particular, it extended the criminal offense of bribery to cover the bribing of foreign public officials and other acts of bribery outside of the UK.

Section 108(1) of the 2001 Act states that for the purposes of the common law offense of bribery, it is immaterial if the functions of the person who receives or is offered a reward have no connection with the UK and are carried out in a country or territory outside of the UK. Section 108(2) amends the 1906 Act with respect to corrupt transactions with agents so that it is immaterial if the principal's affairs or business, or the agent's functions, have no connection with the UK and are carried out in a country or territory outside of the UK. Section 108(3) expands the definition of 'public body' as set out in the 1889 Act and 1916 Act to include authorities existing in a country or territory outside of the UK.

It should be noted that the presumption of corruption, as set out in section 2 of the 1916 Act, has not been correspondingly extended with respect to the foreign offense of bribery (section 110 of the 2001 Act).

Pursuant to section 109 of the 2001 Act, the courts in the UK will have jurisdiction with respect to acts of bribery that take place outside of the UK if a national of the UK or a body incorporated under the laws of any part of the UK does anything in a country or territory outside of the UK and the act performed would, if done in the UK, constitute a corruption offense.¹⁴² This means that the UK courts can presently establish jurisdiction on nationality and are not limited to territorial restrictions, for the purposes of this offense.

Although the 2001 Act has extended the domestic courts' jurisdiction to acts of bribery committed abroad by UK nationals or bodies incorporated under UK law, this extension does not apply to foreign nationals committing bribery offenses abroad, even if those nationals are domiciled or habitually resident in England and Wales.

The English Courts do not however have jurisdiction over foreign corporations for actions which take place entirely in a foreign country. Accordingly, while the 2001 Act criminalizes corruption by English companies abroad, it does not appear to cover the acts of their wholly owned foreign subsidiaries although there is a danger that an English company may still be prosecuted for acts related to its subsidiaries, such as in the *Balfour Beatty* case described below.

¹⁴² The 'corruption offenses' are defined in the 2001 Act as follows (s 109(3)): 'Any common law offense of bribery'; The offenses under s 1 of the 1889 Act (corruption in office); The first two offenses under s 1 of the 1906 Act (bribes obtained by or given to agents).

Enforcement of foreign bribery laws

The Serious Fraud Office (SFO) is the primary government agency handling foreign bribery allegations in the UK. The SFO has created a special unit to investigate such allegations. A foreign bribery case that is not dealt with by the SFO may be dealt with by the Crown Prosecution Service, the main prosecution authority in England and Wales.

There are also a number of other agencies that have prosecutorial functions, including HM Revenue & Customs and the Department of Business, Enterprise and Regulatory Reform. In addition, the City of London Police has created an Overseas Anti-Corruption Unit to increase the capacity to investigate foreign bribery allegations.

Despite a number of agencies having prosecutorial power with respect to foreign bribery allegations, a prosecution for a statutory bribery offense cannot be instituted in England, Wales or Northern Ireland without the consent of the Attorney General or Solicitor General. Consent is only given after the public interest has been considered, in light of the factors set out in the Code for Crown Prosecutors (eg, whether or not there is a risk to international relations or national security). This requirement has been criticized by the OECD and is under review.

It should be noted that there are no time limits for bringing prosecutions under the UK bribery laws. Therefore, companies and individuals should be careful to consider past actions and not fall into a trap of thinking that long since forgotten conduct cannot be pursued.

Recent cases

Balfour Beatty

Following amendments to the Proceeds of Crime Act 2002 (POCA), which came into effect in April 2008, the SFO now has the power to recover property obtained by unlawful conduct by obtaining a Civil Recovery Order. There is no requirement for a specific offense to be established against any particular company or individual, merely that the property sought is the proceeds of unlawful conduct.

The SFO has recently demonstrated that it will use its new powers under the POCA to penalize improper corporate behavior. The SFO brought proceedings for a Civil Recovery Order against the UK construction group, Balfour Beatty. On 6 October 2008, the SFO and Balfour Beatty agreed a Consent Order before the High Court after Balfour Beatty had agreed to make a settlement payment of £2.25 million together with a contribution toward the costs of the Civil Recovery Order proceedings. Balfour Beatty also voluntarily agreed to introduce certain compliance systems and to submit these systems to a form of external monitoring for an agreed period.

Balfour Beatty had itself brought the matters at issue to the attention of the SFO. Balfour Beatty admitted to having inaccurate accounting records arising from certain payment irregularities, which occurred within a subsidiary entity, during the construction of the Bibliotheca Project in Alexandria, Egypt, completed over 7 years ago. The project was undertaken by a Balfour Beatty subsidiary in a joint venture with an Egyptian company.

The unlawful conduct related to entries in the subsidiary's records. These records demonstrated payment irregularities arising from the initial execution of the contract. The documentation prepared in connection with these payments did not comply with the requirements for accurate business records to be kept in accordance with section 221 of the Companies Act 1985.

Balfour Beatty discovered and investigated these payments, then immediately notified the SFO, which in turn conducted a detailed investigation of its own. Balfour Beatty cooperated throughout this investigation. The SFO investigation concluded that there was no financial benefit to any individual employee and most of the relevant individuals had long since left the company. The main work undertaken by the joint venture took place between 1998 and 2000, with the project being completed in 2001.

In a statement on the SFO website, the SFO welcomed what it referred to as 'Balfour Beatty's transparent and responsible approach' in self-reporting this issue. The SFO stated that it was satisfied that, through its actions, the current management of Balfour Beatty had demonstrated its desire to address these issues and had already taken comprehensive steps to review and improve its control processes.

Aon

On 6 January 2009, the UK Financial Services Authority (FSA), which regulates the financial services industry in the UK, imposed a £5.25 million fine (approximately \$7.2 million) on Aon Limited (Aon Corporation's principal UK subsidiary) (Aon), for failing to implement effective systems and controls for countering bribery risks. The FSA found that Aon's practices violated Principle 3 of the FSA's Principles for Businesses, which sets forth a general requirement for FSA-regulated entities to 'take reasonable care to organize and control its affairs responsibly and effectively, with adequate risk management systems'.

The FSA determined that limitations in Aon's pre-existing anti-corruption compliance program contributed to the company making 66 'suspicious' payments between January 2005 and September 2007. Those payments amounted to \$2.5 million and €3.4 million, and were made to third-party representatives who assisted Aon in obtaining or retaining business in various countries presenting high bribery risks (including Bahrain, Bangladesh, Bulgaria, Burma, Indonesia and Vietnam). Notably, the FSA did not view Aon's conduct as 'deliberate or reckless', but found that Aon '*should have been aware of the risks*' associated with payments to third-party representatives in the countries in question. It is therefore not only the presence or absence of knowledge of misconduct that matters, but also that companies have evaluated their anti-corruption risks on a proactive basis and taken adequate measures to protect against those risks.

The Aon fine represents the most assertive enforcement action the FSA has taken to date in the area of corrupt practices. The fact that the FSA was able to secure a fine of this magnitude from a major UK entity demonstrates the UK Government's increasing focus and success in securing compliance and deterrence through civil settlements, rather

than full trials and administrative enforcement proceedings (which challenge governmental enforcement resources and take longer to achieve resolution).

Mabey & Johnson

On 25 September 2009, UK bridge-building company Mabey & Johnson Ltd received a £6.6 million fine in the UK's first successful prosecution of a company for foreign bribery offenses. The fine includes £4.6 million in criminal penalties and an additional £2 million in reparations and costs. Mabey & Johnson pled guilty to two counts of conspiracy to corrupt relating to the payment of bribes, through local agents, to public officials in Jamaica and Ghana. Mabey & Johnson also pled guilty to one count of 'making funds available' in connection with illegal kickbacks to the Saddam Hussein regime in Iraq through contracts awarded under the UN Oil-for-Food Program.

The Mabey & Johnson prosecution represents a significant milestone for the SFO and had a number of notable characteristics. First, the company pleaded guilty following plea discussions with the SFO. The Court appears to have endorsed all of the key elements of the plea settlement agreed upon by the SFO and Mabey & Johnson. Whether that will continue to be the case, or if judges will play a guiding role in defining the terms of settlements, remains to be seen.

Second, the underlying violations involved former senior managers of Mabey & Johnson, which at the time had implemented only limited corporate controls to prevent bribery. The Director of the SFO observed that the company's remedial measures included replacement of five of eight members of its board of directors and the implementation of a comprehensive anti-corruption compliance program, and that the company therefore was 'to a notable extent, no longer the company that committed these crimes'. Third, Mabey & Johnson had disclosed the Jamaica and Ghana violations voluntarily to the SFO. The SFO recently issued detailed guidance (in a paper titled the 'Approach of the Serious Fraud Office to Dealing with Overseas Corruption') in which it has encouraged companies to self-disclose violations of the foreign bribery laws,¹⁴³ and outlined the SFO's terms of reference for dealing with parties who submit voluntary disclosures. Commenting on the Mabey & Johnson sentence, the SFO Director upheld the case as offering a practical insight into the SFO's voluntary disclosure approach.¹⁴⁴

The sentence also exhibits many features that have become common in US prosecutions and settlements under the FCPA: an investigation conducted by independent outside counsel, voluntary disclosure, individual prosecutions, a seven-figure penalty and the requirement of a corporate compliance program and independent monitoring. Indeed, the documents filed with the Court signal the SFO's explicit adoption, 'where

¹⁴³ See Steptoe & Johnson LLP, International Law Alert (30 July 2009) (discussing the SFO document), available at <http://www.stepto.com/publications-pdf.html/pdf/?item_id=6265>. The SFO document is available at <<http://www.sfo.gov.uk/media/28313/approach%20of%20the%20sfo%20to%20dealing%20with%20overseas%20corruption.pdf>>.

¹⁴⁴ In particular he stated that: 'The offenses are serious ones but [Mabey & Johnson] has played its part positively by recognising the unacceptability of those past business practices and by coming forward to report them and engage constructively with the SFO. I urge other companies who might seek some parallels for them, to come and talk to us and have the matter dealt with quickly and fairly'.

appropriate', of the US DoJ's practices in imposing corporate compliance monitors as a condition of settlement in FCPA prosecutions. Notably, however, the SFO appears to have adopted, in some respects, a more aggressive position than the DOJ with respect to what it considers full cooperation in an overseas corruption investigation. It has suggested, for instance, that it will not consider a company to have cooperated to the best of its ability – and therefore be eligible for full 'cooperation credit' in mitigating potential penalties – unless it shares attorney-client privileged interview memoranda and other privileged investigation materials. This practice proved controversial in the United States (to the extent that DOJ eventually abandoned it) and may prove similarly so as the SFO brings further prosecutions for voluntarily disclosed conduct in the United Kingdom. It also may serve as a significant deterrent to companies weighing whether or not to self-disclose. Directors and other individuals should also be cautious if their companies are prosecuted. In January 2010, the SFO brought charges against David Mabey, the former head of Mabey & Johnson, for false accounting and breaching United Nations sanctions in connection with Mabey & Johnson transactions relating to the UN's Iraq Oil-for-Food Program.

BAE settlement

The US and UK authorities' multiyear investigations of BAE Systems plc (**BAE**), Europe's largest and the US's fourth largest defense contractor, were settled on 5 February 2010. The BAE matter represents the most significant collaboration to date between the US and UK enforcement authorities in a bribery-related investigation. BAE agreed with the SFO to pay £30 million and pled guilty to one count of breach of duty to keep accounting records in connection with commission payments it had made to a marketing advisor used to secure the sale of sophisticated radar systems to the Government of Tanzania. A significant part of that settlement was the SFO's agreement to drop all pending or contemplated prosecutions of any individuals. Upon reaching the settlement with BAE, the SFO retracted corruption-related charges it had brought a few days earlier against a former BAE marketing agent in Austria in connection with payments in the Czech Republic and Hungary.

In the US, BAE simultaneously agreed with the DoJ to plead guilty to one count of conspiracy to make false statements to the US Government, and pay a \$400 million fine, in connection with false representations BAE made to the US Department of Defense and Department of State in 2000 and 2002 regarding its adoption of anti-corruption compliance controls, and in connection with BAE's failure to make required disclosures of commissions and payments of other fees to marketing agents and advisors under the US International Traffic in Arms Regulations. The DoJ's criminal information cited payments to third-party agents made in connection with the Czech and Hungarian governments' Gripen fighter jet leases, and in connection with BAE's sale of Tornado aircraft and ongoing support services through the UK Ministry of Defense to the Kingdom of Saudi Arabia beginning in the mid-1980s, that were not subject to the anti-corruption controls BAE had represented to the DoJ in 2000 and 2002 that it had implemented.

The Saudi payments were made to a member of the royal family and had been the subject of intense scrutiny by the DoJ and SFO throughout the agencies' investigations. The Saudi matter also has been one of the primary reasons the UK has been strongly criticized for its wider failure to prosecute overseas corruption, on account of the Blair government's termination of the SFO's investigation into those payments in late 2006. That decision was challenged in court by a UK non-governmental organization, but the government's termination of the investigation ultimately was upheld by the House of Lords, the highest court in the UK at the time (since replaced by the Supreme Court of the United Kingdom), in July 2008.

The SFO aspect of the BAE settlement has been the subject of considerable scrutiny by commentators as well as non-governmental organizations, and there have been judicial challenges contesting the settlement. At the time of writing this article, Corner House Research and the Campaign Against Arms Trade, two pressure groups, had obtained an interim injunction preventing the SFO from taking any further steps in its settlement with BAE. The BAE settlements follow a model utilized in late 2008 by the DoJ and the German authorities in the Siemens settlement. Similar to Siemens, BAE entered into simultaneous settlement agreements in both jurisdictions. Moreover, the criminal charges in both the Siemens and BAE settlements were tailored carefully to relate not to bribery, but to accounting violations and, in the case of BAE, false statements. Criminal charges relating to bribery would have increased the risk of BAE and Siemens facing debarment under US and EU government procurement laws.

UK bribery bill

On 26 March 2009, the UK Ministry of Justice submitted draft legislation on bribery to Parliament. The bill would, if enacted, represent a substantial re-casting of the UK anti-bribery laws, including both domestic and foreign bribery.

The Law Commission in November 2008 published a report on Reforming Bribery, which included a draft bill that would consolidate the UK anti-bribery laws into a single body of legislation.

The draft bill closely patterns the Law Commission's recommendations. The main features of the draft are as follows:

- (1) The bill would create separate offenses prohibiting the offering/giving of bribes, and the solicitation of bribes. Those provisions abandon the concept of the agent/principal relationship which was featured in some aspects of existing UK anti-bribery law (which had been criticized for, among other reasons, potentially creating a defense where a person receiving a bribe had obtained consent from someone deemed to be his or her 'principal'). Instead, the core elements of the new offenses would, in keeping with similar laws in other OECD countries, prohibit payments or offers thereof that are intended to induce improper conduct.
- (2) The bill creates a new crime, applicable directly to commercial organizations, of failing to prevent bribery. This offense would be committed when (a) a person

performing services for the commercial organization bribes another person and (b) does so intending to obtain or retain business or an advantage for the organization. The bill contains an affirmative defense in cases where the the company had 'adequate procedures' in place to prevent bribery from being committed on its behalf.

- (3) The offenses set forth in the bill would carry both financial penalties (including an unlimited fine for violations of the new corporate offense for negligent failure to prevent bribery) and/or 10 years' imprisonment.

It would be premature to draw definitive conclusions over what the ultimate bribery reform law will look like. The draft is now undergoing scrutiny. The bill was included in the Queen's Speech (which set forth Parliament's legislative agenda for the coming legislative session) on 18 November 2009 and introduced in the House of Lords the following day. It had its third and final reading in the House of Lords on 9 February, the same day on which it had its first reading in the House of Commons. The bill is now being reviewed by the House of Commons, with the date of its second reading in March 2010. Once the Commons' review process is completed, any amendments to the bill will be considered and the final bill will be voted upon.

Given that none of the major parties in the UK oppose the bill, it seems likely that the bill will be passed – the House of Commons is expected to complete its review in April or May. Final voting should occur shortly thereafter, as it is the Government's objective to pass the bill before the next general election, which is anticipated for June of 2010.

International financial institutions

Also significant in the expanded enforcement picture is the adoption by the World Bank and other international financial institutions (IFIs) and other public bodies engaged in procurement of new anti-corruption rules applicable both to Bank personnel and to outside contractors and consultants in connection with Bank-financed projects.¹⁴⁵ These rules are being applied and enforced, resulting in sanctions, including debarment leading to losses of business opportunities and criminal referrals to national authorities.¹⁴⁶

Within the World Bank Group, the International Development Association (IDA) and the International Bank for Reconstruction and Development (IBRD) have issued revised

¹⁴⁵ These include procurement rules for the World Bank and the Inter-American Development Bank, anti-corruption guidelines for companies doing business with the European Bank for Reconstruction and Development and the Asia Development Bank, and the actions of the European Union to develop protocols and a convention in this area. See World Bank, 'Guidelines: Procurement under IBRD Loans and IDA Credits' §§ 1.14, 1.15 (May 2004) <<http://siteresources.worldbank.org/INTPROCUREMENT/Resources/Procurement-May-2004.pdf>>; Inter-American Development Bank, 'Basic Procurement Policies and Procedures,' § 1.4 <<http://www.iadb.org/ros/prm/english/docs/Policies.pdf>>; European Bank for Reconstruction and Development, 'Guidelines for Sound Business Standards and Corporate Practices', Pub No 2829, 27/08/97 (September 1997); Asia Development Bank, 'Integrity Guidelines and Principles' (November 2006) (referring to definition of corrupt practice) <<http://www.adb.org/Documents/Guidelines/Integrity-Guidelines-Procedures/default.asp>>. See also Joint Statement of Multilateral Development Banks, 'The Fight Against Corruption' (9 December 2004) <http://www.iadb.org/oii/joint_statement.cfm/English.htm>.

¹⁴⁶ See, eg, List of Debarred Firms: Fraud and Corruption <<http://web.worldbank.org/external/default/main?contentMDK=64069844&menuPK=116730&pagePK=64148989&piPK=64148984&querycontentMDK=64069700&theSitePK=84266>>.

guidelines for procurement under IBRD loans and IDA credits and for the use of consultants by borrowers that included anti-corruption provisions.¹⁴⁷ The procurement guidelines delineate immediate and specific consequences for violations. Upon discovery of fraudulent or corrupt conduct by a bidder or, once financing has been granted, by a borrower the guidelines state that the Bank will reject the bidder's proposals for awards, cancel the remaining portions of loans already granted to the borrower, and debar the borrower from future World Bank financing, either for a specified time period or indefinitely. To help Bank officials in policing possible corrupt activities, the guidelines give the Bank the right to inspect the books and records of any suppliers and contractors involved in the performance of a bank-financed contract, and to submit the records to outside auditors appointed by the Bank. Similar requirements are created by the consultant guidelines, which include provisions for canceling financing to borrowers if it is determined that their consultants engaged in corrupt or fraudulent behavior.

The International Finance Corporation and other IFIs involved in project lending also have adopted, or are adopting in this area, new rules and contractual standards to enforce these rules. For example, during its first year of operation, the Office of Institutional Integrity of the Inter-American Development Bank (IDB) handled more than 200 active cases. Most of the allegations received by that office in 2004 related to fraud or corruption. The IDB also has established a sanctions committee to impose penalties on those persons found to have violated the IDB standards.

Siemens, as noted above, entered into a comprehensive settlement with the Bank in July 2009 that was designed to prevent it from being informally sanctioned. As part of that settlement, it voluntarily agreed to a 2-year stand-down.¹⁴⁸ Other cases have resulted in sanctions proceedings, following on the heels of investigations and referrals to the sanctioning body of the Bank. Some of the highest-profile sanctions cases have involved the Lesotho Highlands Water Project in Southern Africa. In that case, civil proceedings in Lesotho against an official who had headed the project for a number of years led to Swiss bank accounts and the discovery of evidence of payments to that official by agents of project contractors, and sometimes by the contractors directly. This led in turn to criminal prosecutions in Lesotho and to investigations by the World Bank of those project contractors who had received Bank-financed contracts. Although initial proceedings before the Bank against several contractors resulted in a finding of insufficient evidence of corrupt practices to justify the imposition of a sanction, two of the contractors, Acres International Ltd and Lahmeyer International GmbH, subsequently were convicted of bribery in Lesotho. The Bank reopened its proceedings, and both companies have been debarred for periods of time. Other major companies have been sanctioned by the World Bank as well.¹⁴⁹

¹⁴⁷ World Bank, *Guidelines: Procurement under IBRD Loans and IDA Credits*, §§ 1.14, 1.15 (May 2004) <<http://siteresources.worldbank.org/INTPROCUREMENT/Resources/Procurement-May-2004.pdf>>; *Guidelines: Selection and Employment of Consultants by World Bank Borrowers*, §§ 1.22, 1.23 (May 2004) <<http://siteresources.worldbank.org/INTPROCUREMENT/Resources/Consultant-May-2004.pdf>>.

¹⁴⁸ See n 99 above.

¹⁴⁹ See, eg, List of Debarred Firms: Fraud and Corruption <<http://web.worldbank.org/external/default/main?contentMDK=64069844&menuPK=116730&pagePK=64148989&piPK=64148984&querycontentMDK=64069700&theSitePK=84266>>.

In August 2006, the World Bank also adopted a voluntary disclosure program,¹⁵⁰ and other IFIs may do the same. The World Bank program provides immunity from sanctions under certain conditions.¹⁵¹ However, the requirements of this program are stringent.¹⁵² To the extent investments involve IFI financing or funding, the risks of running afoul of the IFIs' new anti-corruption standards must be taken into account. As IFIs begin to move toward cross-debarment, the effects of non-compliance will be magnified.

The World Bank has made at least two criminal referrals to US authorities. Both involved Bank personnel based in the United States involved in questionable activities. These referrals resulted in the *Sengupta* and *Basu* prosecutions and pleas.¹⁵³

5. Compliance

The increased enforcement of anti-corruption laws in the last decade has prompted a greater focus on programs to prevent violations of law. In the US, listed companies have focused on ethics and compliance programs and internal controls with new urgency since the enactment of the Sarbanes-Oxley legislation in 2002¹⁵⁴ and amendments to the Federal Sentencing Guidelines for Corporations (which took effect in November 2004) that provide substantial new detail regarding the US Government's view of an 'effective compliance program'.¹⁵⁵ At the same time, foreign companies, especially those with publicly traded stock in the United States, have devoted increased attention to FCPA compliance in the wake of the first enforcement actions against them and the beginnings of enforcement of the FCPA's counterpart laws in foreign countries.

Standards for compliance programs have been developed by a number of different institutions, including Transparency International, the International Chamber of Commerce and industry-specific bodies. A significant number of major multinational

¹⁵⁰ Steptoe & Johnson LLP, International Law Advisory – 'World Bank Implements Voluntary Disclosure Program for Corrupt Practices in Bank-Financed Contracts' (25 August 2006) <<http://www.steptoe.com/publications-3453.html>>.

¹⁵¹ The voluntary disclosure program is described on the web site of the Bank at <<http://www.worldbank.org/vdp>>.

¹⁵² Eligibility requirements include: (1) investigation of all of a contractor's or consultant's World Bank contracts and contract bids during the past 5 years; (2) submission to verification of the results of the investigation; (3) acceptance of a compliance monitor for 3 years (all three at the contractor or consultant's expense); and (4) effective ongoing submission by the company to the regulatory oversight of the Bank, with mandatory 10-year debarment for any future violations of Bank rules that are not disclosed to the Bank. See World Bank, Dept. of Institutional Integrity (INT), Voluntary Disclosure Program (VDP), Terms and Conditions (16 August 2006).

¹⁵³ *United States v Sengupta*, Case No 02-40 (DDC 2002); Africa News (6 February 2004). *United States v Basu*, Case No 02-475 (DDC 2002). Mr Sengupta allegedly entered into an agreement to cause World Bank-funded business to be awarded to a Swedish consultant in return for a kickback. He also allegedly received a related request for money from a Kenyan official, which he relayed to the Swedish consultant, which paid the Kenyan official. Mr Basu admitted to facilitating the payment of a \$50,000 bribe to a Kenyan government official via an American and a Swedish consultant. Both were charged with conspiracy to commit wire fraud and violation of the FCPA's anti-bribery prohibitions.

¹⁵⁴ See, eg, LA Low, 'Consequences for FCPA Compliance: What Sarbanes Oxley Has Wrought' (September 2003) Corp Comp & Reg New; Sarbanes-Oxley Act of 2002, Pub L 107-204, 116 Stat 745.

¹⁵⁵ See Sentencing Guidelines for United States Courts, 69 Fed Reg 28994 (19 May 2004). On 12 January 2005, the Supreme Court determined that mandatory application of the Sentencing Guidelines was unconstitutional, though the Guidelines would remain as one of many potential advisory factors that judges could use in determining an actual sentence. *United States v Booker*, 543 US 220 (2005). Even though the Guidelines are now considered advisory, US enforcement officials likely will continue to look to the Guidelines' standards for effective compliance programs in weighing decisions to prosecute in individual cases.

companies have subscribed to the *Business Principles for Countering Bribery*, among others, which provide a framework for compliance program development.¹⁵⁶

With laws imposing liability based on willful ignorance for the acts of another, companies increasingly are adopting measures to prevent violations and mitigate the risk of violations. Third-party relationships—whether partners, agents, consultants, lobbyists, brokers, finders or contractors—remain a significant source of potential liability. Risk-mitigation strategies for third parties may include limiting their use or limiting their activities, or, where they are used, conducting pre-engagement due diligence, ensuring that the relationship is governed by a contract containing significant anti-corruption safeguards, and monitoring and overseeing performance, including responding to any red flags that may be presented.

For a company's own employees, risk-mitigation strategies typically include the establishment of policies and procedures (tailored to the particular risks and structure of the company), controls, training, monitoring and oversight. For multinational companies operating in multiple foreign jurisdictions through subsidiaries, affiliates and branches, this is not a small undertaking. For extractive industry companies, the challenges of the operating environments they confront make the undertaking even more substantial.

With the costs of violations growing – Siemens is reported to have spent in excess of US\$1 billion on investigations and remediation, in addition to the fines and penalties reported above – many companies are concluding that prevention, although not inexpensive, is the most cost-effective approach.

6. Hypothetical scenario

To illustrate the application of the foregoing laws, consider the following scenario:

A Canadian-headquartered company engaged in the upstream and downstream oil and gas business (Maple Leaf International) is listed on the New York Stock Exchange. It has subsidiaries and affiliates in various parts of the world, including several joint ventures with national oil companies. Its EMEA (Europe, Middle East and Africa) upstream business has been spun off as a separate unit (Maple Leaf Consolidated UK), with 25% of the equity floated on the AIM exchange in London. The headquarters for that business is in London as well.

Maple Leaf Consolidated UK is the indirect owner of 33% and operator of a large deepwater offshore block in Nigola, a country in sub-Saharan Africa. The concessionaire is Nigola National Oil Company (NNOC), the national oil company of Angola; and its partners in the block include several other international oil companies. The project is financed by the World Bank, with the African Development Bank also providing some financing as well. Certain project equipment has been financed by the Export-Import Bank of the United States and its UK counterpart, the Export Credit Guarantee Department. The project has been in production and has been highly profitable – so profitable,

¹⁵⁶ World Economic Forum, Partnering Against Corruption Initiative CPAC (July 2004), available at <<http://www.weforum.org/en/initiatives/paci/index.htm>>. Currently, 145 companies, including many extractive industries and construction companies, have subscribed to the *Business Principles*.

in fact, that in recent years Nigola has become the single most important market in financial terms for Maple Leaf. Nigola is preparing to auction some additional deepwater blocks later in the year, and Maple Leaf hopes to have the opportunity to bid on certain of those blocks.

Maple Leaf UK is approached by a local company (Nigola Service Co) seeking to provide certain oilfield services to it. There are rumors that a senior official of NNOC has an interest, through a silent partner, in Nigola Service Co. NNOC officials make it plain to Maple Leaf's local affiliate, Maple Leaf Nigola Ltd, that they are eager to see Nigola Service Co engaged. Maple Leaf Nigola Ltd's Managing Director (a US national), its Legal Counsel (a Canadian) and a London-based colleague from Maple Leaf UK begin negotiations with Nigola Service Co. Nigola Service Co asks for terms that are economically very favorable to it; it also asks that all payments made under the contract be made in London. The Maple Leaf Nigola and UK personnel, eager to please the NNOC, overcome their misgivings over the price and agree to the requested terms, without looking into the rumors regarding a possible silent partner. The contract commitment is reported up to Canadian management, and, given the amount involved, is also the subject of a securities filing in the United States. Shortly thereafter Maple Leaf Nigola is given the opportunity to bid on several of the blocks.

This hypothetical scenario raises compliance issues and risks under all of the laws discussed in this paper. It appears that Maple Leaf Nigola, assisted by personnel of Maple Leaf UK, have engaged an entity in circumstances where it is possible that the transaction is an inducement to a foreign official (any NNOC official who is a silent partner in Nigola Service Co or may benefit from the transaction) to provide a discretionary thing of value to Maple Leaf Nigola, namely, the opportunity to bid on new blocks. We will discuss the application of US, Canadian, UK and local laws, as well as IFI rules, to this scenario.

US Law. Because Maple Leaf International is a listed company in the United States, the FCPA applies fully to its activities in Nigola. If only foreign entities and foreign nationals are involved in the business in Nigola, the FCPA's anti-bribery provisions may not be triggered. However, if payments to Nigola Service Co are funded from the US, or if there are communications about the transaction involving means of communication touching the US, including telephones, emails, and the like, there may be anti-bribery jurisdiction. And regardless of whether there is jurisdiction on the anti-bribery side of the statute, the hypothetical scenario will implicate the FCPA's accounting provisions, even if Maple Leaf Nigola Ltd is a remote affiliate of Maple Leaf International. Moreover, it is possible other US federal laws – securities laws and others – could apply to this transaction. The SEC may consider the accuracy of disclosure of the Nigola Service Co transaction, as well as the adequacy of oversight by the senior management of Maple Leaf with respect to this transaction. And the individuals involved have potential FCPA risks as well, even if working for a foreign entity. The US citizen is subject to the anti-bribery provisions on a worldwide basis, while the others face slightly more limited jurisdictional application of the statute. Maple Leaf's partners in the block may also have FCPA exposure (although the facts here do not indicate enough about their potential knowledge, authorization, participation, or furtherance of or in the conduct to assess this fully. And finally, even

Nigola Service Co and its principals may have some exposure under US laws, again depending on jurisdictional issues.

Canadian Law. The application of Canadian law will depend on whether the facts establish a sufficient nexus with Canada to give jurisdiction to a Canadian court. The key issue will be whether the facts establish a 'real and substantial connection' with Canada. Canadian law does not currently provide for jurisdiction based on nationality. As a result, the fact that Maple Leaf Nigola Ltd's Legal Counsel is a Canadian is not enough on its own to determine whether counsel would be subject to the CFPOA. Nor is the fact that the ultimate parent of Maple Leaf Nigola Ltd is a Canadian corporation. The determination of potential liability under the CFPOA or other Canadian laws will depend on the degree of involvement of Canadian management and the activities in Canada taken in furtherance of the negotiations. If Canadian management is actively involved in the negotiations, is aware of these elements and does nothing, it may be sufficient to establish that Canadian management acquiesced in the conduct and, through its silence, tacitly authorized the conduct. In that eventuality, Maple Leaf International would be potentially liable under the CFPOA, as would those of its senior executives who were involved in the negotiations and had knowledge of the relevant facts.

UK Law. With respect to UK law, as Maple Leaf Consolidated UK appears to be a UK company, the UK's bribery laws will apply to it and to its activities in Nigola. In particular, there is the offense of bribing a foreign official. Whether or not Maple Leaf Consolidated UK will have exposure will depend on a number of factors, such as the position of the London-based colleague within the organization (is he/she a senior manager or director and therefore likely to be a directing mind and will) and which entity is making the payments in London. Moreover, it is possible that other UK laws may apply to this transaction, for instance, anti-money laundering legislation. For example, under POCA, certain 'relevant persons' (such as banks, lawyers, accountants and auditors) are obliged to report transactions to the UK Serious Organised Crime Agency where any such organization '(a) knows or suspects or (b) has reasonable grounds for knowing or suspecting, that another person is engaged in money laundering'. As for the London-based colleague, assuming he is a UK national, the UK courts would have jurisdiction over him, even when he is in Nigola. If he is a foreign national living in the UK, the UK courts would not have jurisdiction over him abroad but should he visit the UK and/or continue corrupt activities in the UK, he would be subject to the jurisdiction of the UK courts. If he is a foreign national, the laws of his national country may apply to him in Nigola or even in the UK. Finally, as the payments are being made in the UK, even the non-UK entities may be exposed to the UK law should the bribes be paid to or from them in the UK.

Local Law. In addition to the transnational laws discussed above, the local laws of Nigola apply to the activities of Maple Leaf. To what extent they would apply beyond Maple Leaf Nigola and persons located in Nigola is beyond the scope of this paper, but some host countries have attempted to apply their laws extraterritorially, including to the parent company. Relevant local laws would include the anti-bribery or anti-corruption laws, and possibly others.

IFI Rules. IFI rules would also likely apply to this hypothetical scenario. The transaction with Nigola Service Co would likely be considered to have been entered into in connection with the performance of a project financed by the IFC and ADB. It is less clear on the facts presented whether the rules of export credit agencies might be implicated.

Risk Mitigation. Under the compliance standards discussed above, Maple Leaf Nigola could mitigate risks in a variety of ways. First, documented risk-based due diligence on Nigola Service Co, focused in particular on whether any NNOC or other government officials are silent partners or have some economic interest in Nigola Service Co, and the qualifications and reputation of Nigola Service Co, would signal to enforcement authorities that Maple Leaf is not putting its head in the sand with respect to the benefits from the transaction. Ensuring that the level of compensation can be defended as reasonable and appropriate, and that payments are being made to an appropriate place and person, are also key risk-mitigation steps if the transaction goes forward. The transaction documents should also contain other anti-corruption safeguards, and performance should be subject to oversight going forward. Finally, steps to ensure that any linkage to future business is not present would be important. As this scenario underscores, the risk-mitigation steps that are appropriate are heavily dictated by the facts and circumstances. Simply inserting a boilerplate ‘no bribery’ clause is unlikely to be adequate in a transaction presenting any significant risks.

7. Conclusions

This paper has traced the emergence of international standards for anti-corruption, through both international treaties and the rules of international financial institutions. It has also reviewed the national legislation of three key capital-exporting countries – the United States, Canada and the United Kingdom – all of which have important links to the extractive industries, and the growing enforcement and international cooperation in enforcement. By virtue of where they operate, the economic values involved and the extent of host government interaction, the extractive industries may confront the widest range of corruption risks of any group of industries to operate internationally. Adoption and implementation of effective compliance and other risk-management strategies for this industry is an imperative.