UNITED STATES

REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 RECOMMENDATION

A. IMPLEMENTATION OF THE CONVENTION

Formal Issues

The Convention was signed by the United States on December 17, 1997 and ratified on November 10, 1998. The U.S. deposited its instrument of ratification with the OECD on December 8, 1998.

Congress responded to the signature of the Convention by amending the Foreign Corrupt Practices Act (the "FCPA") on October 21, 1998. The new legislation, which entered into force on November 10, 1998, extends the FCPA to any person who engages in any act while in the territory of the U.S. and to any U.S. national and company engaged in an act outside the U.S. in furtherance of a proscribed purpose; adds "securing any improper advantage" to the list of improper purposes for payments to foreign officials; expands the term "a foreign official" to include any person acting for or on behalf of "public international organisation"; and allows the U.S. Attorney General to seek injunctive relief against foreign citizens or residents and entities other than "issuers" or "domestic concerns" that have engaged in or are about to engage in a violation of the FCPA.

The Convention as a whole

Since 1977, the United States has outlawed bribery of foreign officials in commercial transactions by its nationals and companies organised under its laws. The FCPA, as amended, has kept the same structure since its enactment in 1977. It contains two distinct sets of provisions: the anti-bribery provisions and the books and records and internal controls provisions. Thus, in addition to criminalising bribery of foreign officials by persons and companies in order to obtain or retain business and to providing for significant civil and penal remedies, including injunctions, fines, and imprisonment, the FCPA also mandates that companies with publicly-traded stock keep detailed books and records that accurately reflect corporate payments and transactions and take other steps to ensure that investors can obtain a complete financial picture of those companies' activities. The Act is also coupled with a prior amendment to US tax laws denying the tax deductibility of bribes.

According to US authorities, the passage of the FCPA in 1977 encouraged American companies engaged in international business to develop comprehensive corporate compliance programs, in which corporations establish procedures to prevent the payment of bribes, conduct internal investigations when allegations of bribery are brought to management's attention, and voluntarily disclose to the government any bribery uncovered as a result of their investigation.

1. ARTICLE 1. THE OFFENCE OF BRIBERY OF FOREIGN PUBLIC OFFICIALS

The structure of the definition of the offence of bribery of foreign public officials in the FCPA is similar to that in the Convention. The specific elements are covered as follows:

1.1 Elements of the Offence

1.1.1 any person

Prior to its 1998 amendments, the FCPA prohibited bribes and attempted bribes by "issuers" and "domestic concerns"[1]. The 1998 amendments extend coverage of the FCPA to all other persons, natural or juridical, who take any act within the U.S. in furtherance of a bribe.[2]

> "Issuers" are essentially publicly-traded companies --any corporation (domestic, or foreign) that has registered a class of securities with the SEC or is required to file reports with the SEC, *e.g.* any corporation with its stocks, bonds, or American depository receipts traded on U.S. stock exchanges or the NASDAQ Stock Market, as well as their officers, directors, employees, agents, and their shareholders acting on behalf of the issuer.
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> "Domestic concerns other than issuers" are any US citizen, national or resident, as well as any corporation, partnership, association, joint-stock company, business trust, unincorporated organisation, or sole proprietorship that has its principal place of business in the United States, or that is organised under the laws of the United States, or a territory, possession, or commonwealth of the United States.
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> "Any person other than an issuer or a domestic concern" is any natural person who is not a US citizen, national or resident, and any business entity that is organised under the laws of foreign countries and does not trade on the U.S. stock-exchange.

1.1.2 intentionally

The FCPA requires that the person charged has undertaken an act in furtherance of the unlawful payment "corruptly." The requirement that the person charged have a corrupt intent applies to all of the four purposes prohibited by the FCPA: (i) to influence any act or decision of a foreign official; (ii) to induce such official to violate his lawful duty; (iii) to secure any improper advantage; and (iv) to induce such official to use his influence with the foreign government or instrumentality.

"Corruptly" requires intent. The requirement that the payer have a corrupt intent applies to all of these purposes. In some instances, such as a payment to induce an official to *misuse* his official position, the corrupt intent is apparent from the purpose for which the payment is made. In other instances, however, it is not as apparent that the official is violating his/her duty. Indeed, the evidence may be that the official did no more than he/she would have done without the payment . The United States interprets the FCPA as prohibiting all payments to foreign officials to accomplish the purposes set forth in the statute, regardless of whether that official would have acted or not acted without the payment being made.[3] In such instances, the government is required to prove that the payer acted with a specific intent to accomplish something that the law prohibits.

The word "corruptly", as stated in the legislative history of the FCPA, is used in order to make clear that the offer, payment, promise, or gift, must be intended to induce the recipient to misuse his/her official position. "An act is 'corruptly' done if done voluntarily and intentionally, and with a bad purpose of accomplishing either an unlawful end or result, or a lawful end or result by some unlawful method or means"[4]. It does not require that the act be fully consummated, or succeed in producing the desired outcome.

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1 15 U.S.C. §§ 78dd-1, 78dd-2(a).

2 15 U.S.C. §§ 78dd-3.

3 The sole exception is when the *written* law of the foreign country *explicitly* permits the foreign official to accept the payment. *See* 15 U.S.C. § 78dd-1(c)(1), 78dd-2(c)(1), 78dd-3(c)(1).

4 See *United States v. Liebo*, 923 F.2d 1308, 1312 (8th Cir. 1991).

Furthermore, under the FCPA penalty provisions in relation to natural persons, there is a requirement that there has been a wilful violation of the FCPA.[5] The U.S. authorities explain that this does not introduce a further *mens rea* element into the offence, nor does it place a further burden on the prosecution. In a recent case, the defendant argued that "wilful" imposed some greater burden on the government. The judge did not rule on this issue, but in the instructions given to the jury defined "wilful" in the same terms as "corruptly", so that in fact it imposed no greater a burden on the government.

1.1.3 to offer, promise, or give

The FCPA, proscribes acts "in furtherance of an offer, payment, promise to pay, or authorisation of the payment of any money, or offer, gift, promise to give, or authorisation of the giving of anything of value". The "act in furtherance" element is intended to ensure that the defendant does more than merely conceive the idea of paying a bribe without actually undertaking to do so. Proof of an act in furtherance establishes that the defendant did not merely think about and then reject the idea of paying a bribe but instead committed himself/herself to doing it and thereafter took some act to accomplish his/her objective.

The FCPA distinguishes between U.S. companies and nationals, and foreign companies and nationals, with respect to the act that must be taken in furtherance of an offer, etc. For bribery that takes place in the U.S., U.S. companies and nationals must have made use of interstate commerce or instrumentalities, while foreign companies and nationals may have done "any act". For bribery that takes place abroad, U.S. companies and nationals may also have done "any act". The U.S. explains that the basis of this distinction is the limited jurisdiction granted to the federal government in the U.S. Constitution "to regulate commerce with foreign Nations, and among the several States."[6] As set forth in the legislative history for the 1998 amendments, this interstate commerce nexus is satisfied for non-U.S. nationals and businesses who, by their very nature, are acting in international commerce when they enter the U.S. to take an action in furtherance of a bribe overseas. Similarly, according to the U.S. Department of Justice, when a U.S. national or business acts abroad, it necessarily acts in international commerce[7].

The U.S. states that in practice, the requirement that an interstate commerce nexus be proven has not been an issue, due in part to the expansive definition of interstate commerce as codified in the FCPA and other statutes. For instance, an instrumentality of interstate commerce includes an airport, and within the state uses of the telephone, fax and e-mail. The U.S. states further that in practice it is virtually impossible to put into effect a plan to bribe a foreign public official without doing some act involving either use of the mails or means or instrumentality of interstate commerce. The U.S. provides that even in the situation where all the elements of the offence take place in-person, face to face, without the use of mails or any means of interstate commerce, the travel taken by the foreign public official back to his/her country would at least in part be caused by the corrupt offer of the U.S. company or national, thus satisfying the jurisdictional requirement.

1.1.4 any undue pecuniary or other advantage

The FCPA prohibits two categories of improper benefits: (i) the offer, payment, promise to pay, or authorisation of the payment of *any money*; (ii) the offer, gift, promise to give, or authorisation of the giving of *anything of value*. The United States views "anything of value" as being as comprehensive as

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[5]. See 15 U.S.C. §§ 78dd-2(g)(2)(A), 78dd-3(e)(2)(A).

[6] U.S. Const., Art. I, sec. 8. cl.3; *see also* U.S. Const., amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

[7] *See* S. Rep. 277, 105th Cong., 2nd Sess. (1998); H. Rep. 802, 105th Cong., 2nd Sess. (1998).

"other advantage". "Anything of value" means any thing that is of value to the recipient and encompasses anything that is given to an official to obtain an improper advantage[8].

The FCPA contains two "affirmative defences". The first affirmative defence for a payment which "was lawful under the written laws and regulations of the foreign official's ... country" seems consistent with the Convention (see Commentary 8 on Article 1 of the Convention).

The second affirmative defence, for which there is no equivalent in the Convention, relates to a payment which was a "reasonable and bona fide expenditure, such as travel and lodging expenses", incurred by or on behalf of a foreign official and "directly related" to the "promotion, demonstration, or explanation of products or services" or "the execution or performance of a contract with a foreign government or agency thereof"[9]. The U.S. states that a reasonable and bona fide expenditure as described in the FCPA is clearly not corrupt. It states, however, that the existence of the defence is justified because by making it an affirmative defence, the FCPA makes it clear that the court cannot require the government to prove that a payment was not bona fide as part of its case in chief. Case law does not exist to illustrate the operation of these provisions. However, the Department of Justice has, pursuant to a procedure governed by regulations, issued some Opinion Releases on the application of these particular provisions to questions submitted by issuers and domestic concerns as to whether certain conduct would conform with the provisions[10].

To date, no payment that the U.S. authorities have investigated has fallen within this exception. The U.S. explains that a company could attempt to disguise a bribe as one of these accepted payments, but the characterisation that the company makes is not controlling.

(An affirmative defence under U.S. law is one that assumes that the government has established the elements of the crimes but then offers a recognised defence to that crime. Generally, a defendant bears the burden of proving an affirmative defence[11]. In some states, the burden remains on the government but only after the defendant produces evidence supporting the defence[12].)

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8 For instance, in the very first FCPA prosecution, *U.S. v. Kenny Int'l Corp.* (D.D.C. 1979), the bribe was provided to pay the cost of chartering an aircraft to fly voters to the Cook Islands to re-elect the Premier.

9 15 U.S.C §§ 78dd-1(c), 78dd-2(c) and 78dd-3(c). However, if the government proves a corrupt intent, the payment cannot be deemed to be bona fide: "If a payment or gift is corruptly made, in return for an official act or omission, then it cannot be a *bona fide*, good-faith payment, and this defense would not be available." *See* H. Conf. Rep. 576, 100th Cong. 2nd Sess. 922 (1988).

10 As an example, in Release 81-02 (December 11, 1981), the Department stated it would take no enforcement action where the requester wished to provide samples of its products to officials of the Soviet Ministry of Foreign Trade. The Department stated that the FCPA was not implicated where (i) the samples were intended for the officials' inspection, testing, and sampling; (ii) the samples were not intended for their personal use; and (iii) the Soviet government had been informed that the company intended to provide the samples. In Release 83-02 (July 26, 1983), the Department stated that it would take no enforcement action where an American company proposed to invite the general manager of a foreign government entity to extend his vacation in the United States to take a promotional tour of the company's facilities. The company would pay the reasonable and necessary actual expenses of the general manager and his wife during the time he spent touring its facilities. The Department concluded that the FCPA was not implicated where the expenses would be paid directly to the service providers and not to the general manager and the expenses would be accurately recorded in the company's books and records.

11 *See Patterson v. New York*, 432 U.S. 197, 210 (1977) (due process requires the government to prove the elements of the crime; the legislature may allocate the burden of proof on affirmative defenses to the defendant). *See also* 4 W. Blackstone, *Commentaries* 201 (burden of proving "all . . . circumstances of justification, excuse, or alleviation" rests on the defendant); M. Foster, *Crown Law* 255 (1762).

12 *See* Model Penal Code (Am. Law Inst.) § 1.12 (1997).

1.1.5 whether directly or through intermediaries

The FCPA prohibits payments or gifts, or offers thereof, either directly or through intermediaries. An unlawful payment under the FCPA includes payments made to "any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly" to a foreign official[13]. The FCPA defines the knowledge requirement as follows[14]:

(A) A person's state of mind is "knowing" with respect to conduct, a circumstance, or a result if: (i) such person is aware that such person is engaged in such conduct, that such circumstance exists, or that such result is substantially certain to occur; or (ii) such person has a firm belief that such circumstances or that such result is substantially certain to occur.

(B) When knowledge of the existence of a particular circumstance is required for an offence, such knowledge is established if a person is aware of a high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist.

The legislative history reflects a decision by the Congress that a state of mind less than between actual knowledge and greater than simple negligence was required. The standard is one of deliberate disregard or wilful blindness. A business may be found to have known that a result was "substantially certain to occur" when it consciously chose not to find out. "In such cases, knowledge of a fact may be inferred where the defendant has notice of the high probability of the existence of the fact and has failed to establish an honest, contrary disbelief. The inference cannot be overcome by the defendant's 'deliberate avoidance of knowledge,' his or her 'wilful blindness,' or his or her 'conscious disregard' of the required circumstance or result. As such, it covers any instance where 'any reasonable person would have realised' the existence of the circumstances or result and the defendant has "consciously chosen not to ask about what he had reason to believe he would discover."[15]

1.1.6 to a foreign public official

Foreign official and country

As amended, the FCPA definition of "foreign official" includes "any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organisation, 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 organisation."[16] The U.S. authorities point out that "foreign official" is defined independently, so that it doesn't depend on the foreign government's classification of who is an official. In addition, U.S. case law has confirmed coverage of individuals whose official status may not be readily apparent. The definition would, for example, cover judges, even though they are not expressly included, and even though in a particular country the judiciary might be independent to a degree, which could call into question whether judges were foreign public officials.

The FCPA also specifically prohibits payments to "any candidate for foreign political office" and "any foreign political party or official thereof" to influence that party's or individual's decision-making or to

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13 15 U.S.C. §§ 78dd-1(a)(3), 78dd-2(a)(3), 78dd-3(a)(3).

14 15 U.S.C. §§ 78dd-1(f)(2), 78dd-2(h)(3), 78dd-3(f)(3).

15 H. Conf. Rep. No. 576, 100th Cong., 1st Sess. 921 (1988).

16 15 U.S.C. §§ 78dd-1(f)(1), 78dd-2(h)(2), 78dd-3(f)(2).

induce that party or individual to take any act or to use its or his influence in connection with obtaining or retaining business. In this regard the FCPA has a broader scope than the Convention.

Although the FCPA does not define "foreign country," other provisions of the U.S. Code provide guidance, for instance, the Foreign Agent Registration Act, which has been incorporated into other statutes.

Public enterprises

As regards public enterprises, the FCPA does not contain an explicit reference to "public enterprises" or any definition thereof. At the same time, the Act applies to payments to foreign officials who are employees of "instrumentalities" of foreign governments -- a provision which would cover officers, directors and employees of state enterprises. According to the Department of Justice, which enforces the criminal provisions of the FCPA, state-owned business enterprises may, *in appropriate circumstances*, be considered instrumentalities of a foreign government and their officers and employees to be foreign officials. Among the factors that it considers are the foreign state's own characterisation of the enterprise and its employees, *i.e.*, whether it prohibits and prosecutes bribery of the enterprise's employees as public corruption, the purpose of the enterprise, and the degree of control exercised over the enterprise by the foreign government. Although there is no case law on this issue, in several FCPA Review Procedure Releases the Department of Justice has treated entities that were owned or controlled by a foreign government as instrumentalities of the foreign government[17].

Public International Organization

The term "foreign official" also includes any officer or employee of a "public international organization" or any person acting in an official capacity for or on behalf of any such "public international organization". "Public international organization" is defined in the FCPA[18] as:

> *(i) an organization that is designated by Executive Order pursuant to section 1 of the International Organizations Immunities Act; or*
> *(ii) any other international organization that is designated by the President by Executive order for the purposes of this section.*

This aspect of the definition of "foreign official" differs from its counterpart in the Convention in that the FCPA refers to public international organizations that have been designated by Executive Order, not just generally to public international organizations. The U.S. explains that the *International Organizations and Immunities Act*[19] covers practically all the international public organizations that were intended to be covered by the FCPA, except for a few. For example, the European Union is not included in the list under the Act. In order to address these deficiencies, a mechanism was built in to the amendment in order to be able to add an organization under the *International Organizations Immunities Act* by presidential action, or by asking the President to make a designation independently for the purpose of the FCPA. It is the intention that this will be done with respect to the European Union, and the U.S. will consider any other public international organization for designation under that process.

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17 *See* Release 80- 04 (October 29, 1980) (Saudia, the Saudi government-owned airline), Release 83-2 (July 26, 1983) (expenses of a general manager of a foreign entity that was owned and controlled by the foreign government); Release 93-01 (April 20, 1993) (a quasi- commercial entity wholly owned and supervised by a foreign government); Release 96-02 (November 26, 1996) (state-owned enterprise).

18. 15 U.S.C. §§ 78dd-1(f)(1)(B); 78dd-2(h)(2)(B); 78dd-3(f)(2)(B).

19. 22 U.S.C. 288

Official capacity vs. public function

The FCPA does not use the term "public function"; rather it uses, without defining it, the term of "official capacity". While the Commentaries to the Convention offer guidance to companies and individuals seeking to determine when an individual may exercise a public function for purposes of the anti-bribery prohibitions, U.S. laws do not provide extensive guidance on when a private individual may be acting in an official capacity. However, the U.S. explains that that the term "official capacity" is intended to distinguish between acts that an official does or is able to do because he holds a position as a public official as opposed to acts that he may do as a private person.

1.1.7 for that official or for a third party

The FCPA focuses strictly on offers, payments, etc. to foreign public officials. However, the U.S. confirms that the benefit does not have to be paid directly into the hands of the foreign public official. For instance, if the government official agrees to award a contract to a company in exchange for the conferring of a benefit by that company on a third person, the foreign public official is considered to have received a benefit. The ability to designate a third party as the beneficiary of the benefit, however intangible that benefit might be, is also a benefit to the foreign public official and is sufficient for the purpose of the FCPA.

1.1.8 in order that the official act or refrain from acting in relation to the performance of official duties

The FCPA prohibits payments that are intended to "influenc[e] any act or decision of [a] foreign official in his official capacity, or [to] induc[e] such foreign official to do or omit to do any act in violation of the lawful duty of such official, or [to] induc[e] such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality."[20]. The 1998 amendments added "or to secure any improper advantage".

The FCPA includes payments to induce a foreign public official to use his influence, whether or not the award of specific business is within his authorised duties.

1.1.9 in order to obtain or retain business or other improper advantage

The Convention prohibits bribes to foreign officials not only to "obtain or retain business" but also to secure any "other improper advantage". The Commentaries define "improper advantage" as "something to which the company concerned was not clearly entitled, for example, an operating permit for a factory which fails to meet the statutory requirements."

The 1998 amendments to the FCPA add the element of "improper advantage" to the three other objectives that were already set forth. This formulation differs from the one in the Convention, because in the Convention this element is part of the final element of the offence (i.e. "to obtain or retain business or other improper advantage…"). The U.S. explains that the rational for its formulation was to avoid doing anything by virtue of the amendment that would take away from the historic broad interpretation of the offence. If this element had been placed at the end there would have been the possibility of an adverse retrospective effect. Defendants in older cases that predated the amendment might have argued that, by amending the statute to add "any improper advantage" to the overall element of "obtaining or retaining business", the statute must necessarily prior to the amendment have been unclear or not applicable to payments to secure improper advantages.

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[20] 15 U.S.C. §§ 78dd-1(a); 78dd-2(a); 78dd-3(a).

Under the FCPA, gratuities given to foreign public officials are allowed under the FCPA as long as they are used to expedite the processing of non-discretionary permits or licenses or other routine documentation[21]. The FCPA provides an illustrative list of what qualifies as "routine governmental action."[22]

Case law does not exist to illustrate the operation of the provisions on routine governmental actions. However, in a recent case[23], the U.S. prosecuted a company under the theory that payment to Panamanian officials to obtain a permit to lease a facility was intended to obtain or retain business. The U.S. did not, in that case, consider the awarding of the permit a routine governmental action, because it took the position that the payment for the permit, which was $50,000, was far beyond any kind of acceptable payment for a routine governmental action. Furthermore, in 1988, the Conference Report on the proposed amendments to the 1977 FCPA noted that "ordinarily and commonly performed" actions with respect to permits or licenses would not include those governmental approvals involving an exercise of discretion by a government official where the actions are the functional equivalent of "obtaining or retaining business for or with, or directing business to, any person."[24]

The U.S. authorities explain that, contrary to Commentary 9 on the Convention, the "routine governmental action" exception was not limited to "small facilitation payments" because due to the problem of aggregation (the practice of attributing one large expenditure to several smaller ones) U.S. prosecutors prefer to not have a lower limit in terms of what constitutes a violation of the FCPA. Additionally, the U.S. authorities confirm that a routine governmental action could be rendered corrupt where the size of the payment thereof is inappropriately large, such as in the Panamanian example above.

Moreover, the U.S. authorities explain that the "routine governmental action" clause only applies where there is entitlement to the action in question. Therefore, for instance, the exception would not cover a payment for a permit to operate a factory that fails to meet statutory requirements.

1.1.10 in the conduct of international business

The FCPA is limited to payments to obtain or retain business. Such payments, when made to foreign public officials by U.S. nationals or business entities, necessarily involve "international" business.

1.2. Complicity

Article 1(2) of the Convention requires Parties to take the steps necessary to criminalise complicity, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official.

As regards "authorisation", the FCPA contains an explicit prohibition on the "authorisation of the payment of any money, or... authorisation of the giving of anything of value."[25] The crime is complete under U.S. law upon the authorisation of the bribe, regardless of whether the bribe is actually offered or paid and regardless of whether it is successful, provided that the jurisdictional element is satisfied.

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21 15 U.S.C. §§ 78dd-1(b), 78dd-2(b), 78dd-3(b).

22 The FCPA states that "routine governmental action" does not include "any decision . . . to award new business to or to continue business with a particular party, or any action taken by a foreign official involved in the decision-making process to encourage a decision to award new business to or continue business with a particular party." *See* 15 U.S.C. §§ 78dd-1(f)(3)(B), 78dd-2(h)(4)(B), 78dd-3(f)(4)(B).

23. U.S. v. Saybolt, Inc. (D. Mass. 1998)

24 H. Conf. Rep. 576, 100th Cong. 2nd Sess. 921 (1988).

25 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a).

Although the FCPA does not itself contain an explicit complicity provision, the federal *Criminal Code* contains a general provision on complicity, incitement and conspiracy that applies to offences prescribed in other criminal statutes, including the FCPA[26].

Where a person encourages or incites a third party to commit an act, but does not himself do any act within the scope of the FCPA, *e.g.*, where he is not in a position to authorise the act, that person can only be prosecuted if the third party actually violates the FCPA. Under U.S. law, a person who "wilfully causes an act to be done which if directly performed by him or another would be an offence against the United States, is punishable as a principal" in the crime[27]. It is not necessary that the bribe be actually paid or that it be successful, it is sufficient that the third party violates the FCPA by offering, promising, or authorising the proscribed act.

1.3. Attempt and Conspiracy

The Convention requires Parties to criminalise attempt and conspiracy. Attempt and conspiracy to bribe a foreign public official shall be criminal offences to the same extent as attempt and conspiracy to bribe a public official of that Party.

U.S. laws prohibit and punish conspiracy to violate the FCPA[28]. The United States has repeatedly brought conspiracy prosecutions for conspiracies to violate the FCPA[29]. As regards attempts, there is no general "attempt offence" under either the FCPA or other U.S. laws. However, neither a completed payment nor a successful result is a requirement under the FCPA[30]. The FCPA prohibits an *offer* or *promise* as well as a payment (i.e. Under the Act a corrupt offer is sufficient.). This is the same approach as is contained in the United States' laws concerning bribery of a domestic official[31].

2. ARTICLE 2. RESPONSIBILITY OF LEGAL PERSONS

Article 2 of the Convention requires each Party to take the steps necessary to establish, in accordance with its legal principles, the liability of legal persons for the bribery of a foreign public official.

2.1.1 Legal Entities

Under general legal principles, the United States holds legal persons criminally responsible for the bribery of a foreign public official, as it does for any other crime. The United States Code provides that the "the words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals."[32] Prior to the 1998 amendments, the FCPA applied only to "issuers" and "domestic concerns". The 1998 amendments expand the FCPA's coverage to any legal

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26 *See* 18 U.S.C. § 2 (aiding and abetting).

27 Ibid.

28 18 U.S.C § 371.

29 *See, most recently*, *United States v. Mead* , Cr. 98-250-01 (D.N.J. 1998); *United States v. Crites*, Cr. 3-98-073 (S.D. Ohio 1998).

30 *See* Senate Report No. 114, 95th Cong., 1st Sess. 10, *reprinted in* 1977 U.S. CODE CONG. & AD. NEWS 4098, 4108 (The FCPA "does not require that the act be fully consummated, or succeed in producing the desired result.").

31 *See* 18 U.S.C. § 201.

32 1 U.S.C. § 1.

person that is organised under the laws of a foreign country, that takes any act in furtherance of an unlawful bribe within the territory of the United States. Under these provisions, state-owned and state-controlled companies are subject to criminal responsibility: if a government-owned enterprise is organised as a corporate identity according to the laws of the state of incorporation and thus falls within the definition of a "domestic concern," "issuer," or "person" under the FCPA, the Department of Justice could bring a criminal prosecution against such an enterprise.

2.1.2 Standard of Liability

With limited exceptions, the criminal responsibility of the legal person is not based on a strict liability concept under US law. A corporation is held accountable for the unlawful acts of its officers, employees, and agents under a *respondeat superior* theory, when the employee acts (i) within the scope of his/her duties, and (ii) for the benefit of the corporation. In both instances, these elements are interpreted broadly. Thus, a corporation is generally liable for the acts of its employees with the limited exception of acts that are truly outside the employee's assigned duties or which are contrary to the corporation's interests (*e.g.*, where the corporation is the *victim* rather than the beneficiary of the employee's unlawful conduct). Whether the corporate management condoned or condemned the employee's conduct is irrelevant to the issue of corporate liability.

The criminal responsibility of the legal person is engaged by the act of *any* corporate employee, not merely high-level executives. Participation, acquiescence, knowledge, or authorisation by higher level employees or officers is relevant to the determination of the appropriate sanction.

Additionally, under the applicable sentencing guidelines, the sanction could be mitigated if an "effective" compliance program had been in place.[33] This principle recognises that a corporation is liable for the acts of its employees although it cannot always control them. Thus if a company has in place a compliance program that is effective and supported by management, and an employee still violates the law, the court can recognise the corporation's efforts as a mitigating factor in determining the level of the sanction.

3. ARTICLE 3. SANCTIONS

The Convention requires Parties to institute "effective, proportionate and dissuasive criminal penalties" comparable to those applicable to bribery of the Party's own domestic officials. Where a Party's domestic law does not subject non-natural persons (e.g. corporations) to criminal responsibility, the Convention requires the Party to ensure that legal persons are "subject to effective, proportionate, and dissuasive non-criminal sanctions, including monetary sanctions." The Convention also mandates that for natural persons, criminal penalties include the "deprivation of liberty" sufficient to enable mutual legal assistance and extradition. In any case, the Convention requires each party to take such measures as 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. Finally, the Convention requires each Party to consider the imposition of additional civil or administrative sanctions.

The FCPA prescribes substantial civil and criminal penalties and imposes additional administrative sanctions. Although the maximum sentence of imprisonment under the FCPA is less than that available (but not mandatory) under the domestic bribery statute (see Table), the fiscal penalties are substantially equivalent. The FCPA does not directly provide for seizure and confiscation of the bribe, or the proceeds of the bribery of a foreign public official, or the property the value of which corresponds to that of such proceeds. The Act only applies monetary sanctions which may have, in some instances, a comparable effect.

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33. This guideline applies to all federal crimes, including domestic and foreign bribery.

3.1 Criminal Penalties for Bribery of a Domestic Official

The criminal violation of the anti-bribery provisions of the U.S. law concerning bribery of a domestic official may result in a fine of "not more than three times the monetary equivalent of the thing of value [offered or given to the public official]" or imprisonment for not more than *fifteen* years, or both[34].

3.2 Criminal Penalties for Bribery of a Foreign Official

The FCPA provides that a natural person may be sentenced to pay a fine of not more than $100,000 and imprisoned not more than five years, or both. A legal person charged for bribery of foreign public officials may be sentenced to pay a fine of not more than $2,000,000[35].

Furthermore, as with bribery of domestic public officials, if the criminal offence causes a pecuniary gain or loss, the penalties provisions of the U.S. Code authorise alternative maximum fines equal to the greater of twice the gross gain or twice the gross loss. Individuals may be fined on this basis, or in the alternative up to $250,000 for an individual, and/or may be imprisoned for up to five years. Legal persons may also be fined on this basis, or in the alternative up to $500,000[36]. According to the Department of Justice, defendants in FCPA cases have often been fined in excess of the amounts specified in the FCPA itself.

	BRIBERY OF DOMESTIC OFFICIALS UNDER U.S. CODE		**BRIBERY OF FOREIGN OFFICIALS UNDER FCPA**		**BRIBERY OF DOMESTIC & FOREIGN OFFICIALS UNDER US CODE ALTERNATIVE PENALTIES PROVISIONS**	
	Fine	Imprisonment	Fine	Imprisonment	Fine	Imprisonment
Legal person	Up to three times the monetary equivalent of the thing of value offered or given to the public official	--	Up to US$ 2,000,000	--	Up to twice the gross gain or twice the gross loss or up to US$ 500,000	--
Natural person	Not available	Up to 15 years	Up to US$ 100,000	Up to five years	Up to twice the gross gain or twice the gross loss or up to US$ 250,000	Up to five years

With respect to the discrepancy between the term of imprisonment for domestic bribery (maximum term of 15 years) and foreign bribery (maximum term of 5 years), the U.S. indicates that under its *Sentencing Guidelines*, which apply to all federal judges, in order to exceed a 5 year sentence of imprisonment for domestic bribery, the bribe or the proceeds of the bribery has to have been in excess of 20 million dollars. In order to reach the maximum sentence of 15 years, the bribe or the proceeds has to have been in excess of 80 million dollars. The U.S. acknowledges that it is conceivable that these amounts might be seen some day in relation to the offences under the FCPA, but so far this has not been the experience. The U.S.

[34] 18 U.S.C. § 201

[35] 15 U.S.C. §§ 78dd-2(g), 78dd-3(e), 78ff- (c).

[36] 18 U.S.C. § 3571

authorities also indicate that, if through the evaluation process it becomes evident that the maximum term is comparatively low, this might form a basis on which Congress could be asked to reconsider it.

3.3 Penalties and Mutual Legal Assistance

The penalties under the FCPA include imprisonment of natural persons for up to five years. FCPA offences are, therefore, serious offences under the U.S. legal system, and the U.S. government will seek legal assistance from other countries to aid in the prosecution of these offences. The United States will honour requests for mutual legal assistance premised on the Convention. The United States generally does not link the providing of mutual legal assistance to other States with the penalty that it imposes for the analogous domestic violation.

3.4 Penalties and Extradition

The penalties under the FCPA include imprisonment of natural persons for up to five years. FCPA offences are, therefore, serious offences under the U.S. legal system, and the United States government will seek extradition from other countries. Generally, U.S. extradition treaties provide for extradition for any offence that is punishable under the laws of both the requesting and requested State by a maximum term of imprisonment exceeding one year. The penalty for a violation of the FCPA is well in excess of one year. Accordingly, even prior to the U.S. becoming a Party to the Convention, if the foreign State requesting extradition under such a treaty had also penalised foreign commercial bribery by a maximum term of imprisonment exceeding one year, extradition would be have been possible, subject to the other terms of the treaty. In any event, now that the United States is a party to the Convention, pursuant to Article 10(1) of the Convention, all of its extradition treaties with parties to the Convention are automatically deemed to incorporate the offences criminalized in Article 1 of the Convention.

3.6 Seizure and Confiscation of the Bribe and of Its Proceeds

The FCPA does not provide for seizure and confiscation of the bribe, the proceeds of the bribery, or the property the value of which corresponds to that of such proceeds. Instead, under the alternative fine provisions of the U.S. Code, "any person" may be fined not more than the greater of twice the pecuniary gain of the offence or twice the loss to a person other than the defendant. The U.S. states that this enables it to impose very substantial fines, and it believes that this satisfies the alternative to seizure and confiscation available under article 3 of the Convention (i.e. to impose fines of comparable effect). The U.S. adds that it does not believe that the absence of a provision on search and seizure would provide a hindrance in relation to requests for mutual legal assistance from other Parties that have provided for search and seizure.

Confiscation/forfeiture may, however, be available under other provisions. As violations of the FCPA are predicate offences for the money laundering offence, forfeiture is available under that provision. In addition, under certain circumstances, there are U.S. statutes, agreements and treaties that permit the sharing of forfeited or seized property or proceeds with a foreign country that participated in the seizure or forfeiture of the property. And where no standing agreement exists, the U.S. typically negotiates case-specific agreements that permit the transfer of such property.

3.8 Civil Penalties and Administrative Sanctions

In addition to criminal penalties, the FCPA provides for civil penalties of up to $10,000 against enterprises and individuals for violations of the anti-bribery provisions. The Securities and Exchange Commission ("SEC") or the Department of Justice (depending on whether the violation is committed by an issuer) may

also seek injunctive relief to enjoin any act of an enterprise or individuals acting on behalf of an enterprise which violates or may violate the FCPA[37].

FCPA violations may also trigger costly collateral sanctions. For example, the mere indictment of a company for violation of the FCPA may trigger debarment from US government contracting, ineligibility for government benefits (such as financing), and/or suspension of export licensing for defence goods and services[38].

With respect to victims, there have been several private civil cases brought by parties under the *Racketeer Influenced and Corrupt Organizations Act* (RICO)[39]. However, the courts have not uniformly recognised a private right of action under RICO.

4. ARTICLE 4. JURISDICTION

The Convention's basic offence of the bribery of a foreign public official applies to any person. Article 4 then requires states to establish jurisdiction over offences committed in whole or in part within their territory, whether or not by nationals, and requires states that have jurisdiction to prosecute their nationals for offences committed abroad to establish jurisdiction in respect of the offence of the bribery of a foreign public official, according to the same principles. The Commentaries clarify that the territorial nexus required for jurisdiction is to be interpreted broadly so as not to require an "extensive physical connection".

Prior to its amendment in 1998, the FCPA asserted only territorial jurisdiction. In light of the requirements of the Convention, the FCPA has added a jurisdiction basis for acts committed abroad by U.S. nationals and businesses (nationality jurisdiction). It has also extended the territorial basis of jurisdiction to cover acts in furtherance of a bribe committed within the territory of the U.S. by foreign nationals and foreign businesses.

4.1 Territorial Jurisdiction

The FCPA, as amended, asserts territorial jurisdiction over offences committed in whole or in part within the territory of the United States, whether or not by nationals.

In asserting territorial jurisdiction, the Act reaches all "issuers" and other businesses ("domestic concerns") "organised under the laws of the U.S., or a State, territory, possession, or commonwealth of the United States or a political subdivision thereof", all businesses organised under the law of a foreign country, as well as US and non-US nationals. There is, however, a different treatment for the acts committed, on the one hand, by non-US nationals and businesses and, on the other hand, by U.S. nationals and businesses organised under the laws of the U.S.

For issuers, domestic concerns and US nationals, the FCPA requires that some acts "in furtherance of" the corrupt activity have a connection to the mails or any means of interstate commerce. Under this provision, it is not necessary that the payment, gift, offer, or authorisation take place in the United States: the Act only requires that an act in furtherance take place (see 4.4, below).

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37 15 U.S.C. §§ 78u(c); 78dd-2(d) & (g); 78dd-3(d) & (e); 78ff(c).

38 *see* 10 U.S.C. §2408 (prohibiting defence-related employment by individuals convicted of procurement-related felony); 48 C.F.R. Subpt. 9.4 (debarment of any company convicted of crime involving fraud or indicating lack of business integrity); and from participation in various government programs, *e.g.*, overseas investment guarantees. *See, e.g.*, Foreign Assistance Act of 1961 § 237(1) (Overseas Private Investment Corporation); 7 C.F.R. § 1493.270 (Commodity Credit Corporation).

39. 18 U.S.C. chapter 96.

For non-US businesses and non-U.S. nationals, the FCPA does not require a connection to mails or any means of interstate commerce. The Act asserts jurisdiction over non-U.S. companies and nationals who take *any acts* in furtherance of a bribe of a foreign public official while *within* the U.S. (See 4.4, below)

4.2 Nationality Jurisdiction

As amended in 1998, the FCPA asserts nationality jurisdiction in cases of bribery of foreign government officials. The Act reaches all "issuers" and other businesses ("domestic concerns") "organised under the laws of the United States, or a State, territory, possession, or commonwealth of the United States or a political subdivision thereof" and all U.S. nationals (as defined in section 101 of the immigration and Nationality Act) who "corruptly do any act outside the United States in furtherance of (an unlawful payment, gift, or offer, or authorisation thereof)."[40]

The United States, under its constitutional principles, has jurisdiction to prosecute its nationals for offences committed abroad. So far, this jurisdiction has been rarely invoked and the U.S. does not expect that the addition of the nationality jurisdiction will have a significant impact on the volume of prosecutions, because since 1977 it has been able to prosecute where only some act in furtherance takes place in the U.S. However, the U.S. states that the addition of the nationality jurisdiction eases the government's burden by enabling a prosecution to proceed on that basis alone without the need to prove an act was committed within U.S. territory.

4.3 Consultation Procedures

There are no legal instruments requiring the U.S. to consult regarding the eventual transfer of a criminal case covered by the FCPA to another Party for investigation or prosecution. However, the U.S. consults regularly on such matters through the Department of Justice's Office of International Affairs, which is the Central Authority for the U.S. on mutual legal assistance matters

4.4 Effectiveness of Jurisdiction

As a result of the 1998 amendment, a significantly larger universe of persons is subject to criminal penalties under the FCPA than was the case previously. However, when nationality jurisdiction applies, the nature of the requisite act in furtherance of an offer, etc. is broader than when territorial jurisdiction applies to U.S. companies and nationals, and is the same as when territorial jurisdiction applies to foreign companies and nationals. The following table illustrates this point:

Persons Covered	Territorial Jurisdiction	Nationality Jurisdiction
"Issuers" and "domestic concerns" organised under U.S. laws and "any U.S. person"	Act in furtherance has to involve "use of mails or any means or instrumentality of interstate commerce".	Act in furtherance does not require a connection to use of mails or U.S. interstate commerce.
"Any person" (i.e. non-national person or business)	Act in furtherance does not require use of an instrumentality of interstate commerce. The requirement is that this act takes place within the U.S.	--

The U.S. explains that the difference in treatment is due to federal constitutional principles and the requirement that a federal crime have a federal nexus, here the use of means or an instrumentality of interstate commerce. The United States does not believe that this will result in an uneven application of the legislation. It would be a rare case in which a business in the United States succeeded in authorising or paying a bribe without making

[40] 15 U.S.C. §§ 78dd-1(g); §§ 78dd-2(i).

use of the mails or other means or instrumentalities of interstate commerce. For example, such means and instrumentalities include phone lines, thus encompassing all phone calls, fax transmissions, telexes, and email messages, air, sea, rail, and auto travel, as well as interstate and international bank wire transfers. Moreover, the communication or travel need not actually cross interstate or international boundaries; it is sufficient if the defendant made use of interstate instrumentalities even for intrastate communication or travel[41].

5. ARTICLE 5. ENFORCEMENT

5.1 Rules and Principles That Govern Investigation and Prosecution

Enforcement Generally

There is no written enforcement policy specifically applicable to the FCPA. However, the general policy that applies to federal prosecutions of all federal criminal statutes, including the FCPA, is set forth in the *Principles of Federal Prosecution.*[42]

A prosecutor is required, as always, to make an initial assessment of the merits of the cases, the likelihood of obtaining sufficient evidence to obtain a conviction, and the availability of sufficient investigative and prosecutive resources. More specifically, the decision whether to initiate or decline charges in a particular cases is governed by the following factors: (i) Federal law enforcement priorities; (ii) the nature and seriousness of the offence;(iii) the deterrent effect of prosecution; (iv) the person's culpability in connection with the offence; (v) the person's history with respect to criminal activity; (vi) the person's willingness to co-operate in the investigation or prosecution of others; and (vii) the probable sentence or other consequences if the person is convicted[43]. The Department's decision not to prosecute generally is not made public. The Department, however, may notify a target individual or company that an investigation has been concluded, and the company may choose to release that information.

According to the U.S. Department of Justice, political or economic interests are not relevant to this decision. To ensure that uniform and consistent prosecutive decisions are made in this particular area, all criminal FCPA investigations are supervised by the Criminal Division of the U.S. Department of Justice. According to U.S. authorities, political or economic interests are not relevant to the Security and Exchange Commission's (SEC) decisions to investigate or bring cases to enforce the civil provisions of the FCPA against issuers.

Guidelines and Opinions of the Attorney General

Pursuant to the FCPA[44], the Attorney General is required, in consultation with other interested agencies of the U.S. government, to decide whether specific guidelines for compliance with the FCPA are necessary and appropriate. This process was undertaken, and involved publishing in the federal register an invitation to interested parties to provide their views on whether guidelines were necessary or appropriate. Only 5 responses were received, and 3 of the responses were to the effect that guidelines were unnecessary. Thus the decision was taken by the Attorney General to not issue guidelines.

However, in compliance with another provision under the FCPA[45], there is an opinion procedure, whereby a person that has a real but prospective transaction may submit to the Department of Justice a request for

41 *See* 15 U.S.C. §§ 78c(a)(17), 78dd-2(h(5), 78dd-2(f)(5).

42. U.S. Attorney's Manual 9-27.230.

43 *Principles of Federal Prosecution,* U.S. Attorney's Manual §9-27.230.

44. 15 U.S.C. §§ 78dd-1(d), 78dd-2(e).

45. 15 U.S.C. §§ 78dd-1(e), 78dd-2(f).

an opinion based on an outline of the relevant facts of the prospective transaction. These opinions are formal opinions of the Department, and the opinion can be relied upon only to the extent that the representations of the requesting party remain unchanged. To date most requests for opinions concerned whether or not a person was a public official and under what circumstances the services of an agent could have been retained.

Plea Bargaining

The U.S. authorities explain that the exercise of prosecutorial discretion in the manner described as "plea bargaining" has not resulted in the imposition of lighter penalties or fewer prosecutions in relation to prosecutions under the FCPA. In fact, the U.S. authorities believe that the fines in relation to corporations have been much greater in those cases that have resulted in convictions because of plea agreements. It is the unofficial policy to seek the maximum criminal fine in situations involving corporate violations, and to advocate the maximum fine for natural persons, to the extent that they are capable of paying them.

5.2 Political or Economic Considerations

FCPA prosecution decisions are based on the merits of the case, not political or economic considerations. Political bodies and non-criminal government bodies have no influence on the investigation and prosecution of cases involving bribery of foreign public officials. Criminal FCPA investigations and prosecutions are handled by career prosecutors and supervised by the Criminal Division of the U.S. Department of Justice. There is no requirement that any other agency within the U.S. government be consulted before bringing charges. The SEC, which enforces the civil provisions of the FCPA against issuers, is an independent, nonpartisan agency.

6. ARTICLE 6. STATUTE OF LIMITATIONS

6.1 Term of Statute

The statute of limitations for criminal violations of the FCPA is five years from the date that the potential offence was committed; this derives from the general federal criminal statute of limitations[46]. The statute of limitations for civil violations is also five years. Both periods can be extended for up to three years, upon a request by a prosecutor and a finding by a court that additional time is needed to gather evidence located abroad[47].

7. ARTICLE 7. MONEY LAUNDERING

The Convention requires that any party that has made domestic bribery a predicate offence for the application of its money laundering legislation shall do so for foreign bribery, without regard to the place where the bribery occurred.

7.1/ 7.2 Bribery of a Domestic and Foreign Public Official

Under the *Money Laundering Control Act*, which applies to active bribery, bribery of a domestic public official is a predicate offence; bribery of a foreign public official has been a predicate offence under the

[46] *See* 18 U.S.C. § 3282.

[47] *See* 18 U.S.C. § 3292.

same Act since 1992[48]. According to the US Department of Justice, both with respect to the FCPA and the *Money Laundering Control Act*, where the bribe takes place is irrelevant. In addition, the *Money Laundering Control Act* explicitly provides for extraterritorial jurisdiction over U.S. nationals and, provided that some conduct occurred within the U.S., over non-U.S. nationals[49].

The U.S. authorities explain that forfeiture is possible under the Act in relation to the bribe itself where it is laundered during the course of delivery to the foreign public official, and to the profit of the person who gives the bribe. However, they indicate that the *Money Laundering Act* is not always the best way to reach profits that have been obtained through bribery. For instance, the money laundering provisions cannot reach savings. In situations such as these, the U.S. authorities find that it is much more effective to fine a corporation to such an extent that the proceeds from bribery have been stripped away. This is accomplished through the alternative fine provisions in the U.S. Code (discussed above under 3.2 and 3.6). The U.S. finds that these 2 tools (i.e. the *Money Laundering Control Act* and the alternative fine provisions) give it the flexibility it needs to meet the various factual situations that it encounters.

8. ARTICLE 8. ACCOUNTING

8.1 Maintenance of Books and Records and Internal Controls Requirements

In addition to the anti-bribery provisions of the FCPA, the statute also contains books and records and internal control provisions. Companies are required to keep accurate books and records and to establish and maintain a system of internal controls adequate to ensure accountability for assets.

Following the enactment of the FCPA in 1977, the SEC adopted two rules under Section 13 of the Exchange Act to implement the books and records and internal controls provisions, Rules 13b2-1 and 13b2-2. Rule 13b2-1 prohibits any person from "directly or indirectly, falsif[ying] or caus[ing] to be falsified, any book, record or account subject to section 13(b)(2)(a)" of the Exchange Act. That is, the rule prohibits any falsification of an issuer's books and records. Rule 13b2-2 makes it unlawful for directors or officers of an issuer to lie to the issuer's independent auditors. The rule specifically provides that no director or officer of an issuer shall, directly or indirectly, make or cause to be made, a materially false or misleading statement, or to omit to state, or cause another person to omit to state, any material fact necessary to make the statements made not misleading to an accountant in connection with the (1) audit or examination of the financial statements of an issuer, or (2) the preparation or filing of any document or report filed with the SEC.

8.2 Companies Subject to these Laws and Regulations

These provisions apply to a much narrower universe of companies than the anti-bribery provisions, (i.e. those companies that qualify as "issuers" as defined in the anti-bribery context).

8.3 Penalties for Omissions and Falsifications

Like the anti-bribery provisions, the books and records and internal control provisions of the FCPA are enforced by the Department of Justice and the SEC. The SEC may impose civil penalties under its general enforcement authority over all reporting companies. The Department of Justice has enforcement authority over criminal violations of these provisions. Under the Act, individuals found to have committed a "wilful" violation of the accounting provisions of the FCPA may be fined up to $1 million and/or imprisoned up to

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[48] 18 U.S.C. § 1956(c)(7)(a) (incorporating 18 U.S.C. § 1961(1), which lists 18 U.S.C. § 201 as a predicate offence), and 18 U.S.C. § 1956(c)(7)(D).

[49] 18 U.S.C. § 1956(f).

ten years; enterprises found to have "wilfully" violated the accounting requirements may be fined up to $2.5 million.

9. ARTICLE 9. MUTUAL LEGAL ASSISTANCE

The OECD Convention obliges parties, "to the fullest extent possible", to provide "prompt and effective legal assistance" to each other in connection with both criminal and non-criminal proceedings, and criminal investigations that relate to any offences within the scope of the Convention. It also establishes dual criminality where its existence is a requirement for a country to provide mutual assistance. Finally, it mandates that countries not decline to provide mutual assistance on the grounds of bank secrecy.

9.1 Laws, Treaties and Arrangements Enabling Mutual Legal Assistance

In the US, the primary legal vehicles for prompt and effective mutual legal assistance are the bilateral mutual legal assistance treaties (MLATs) in force between the United States and the other Parties to the Convention. The US is party to MLATs with the following signatories to this Convention: Argentina, Canada, Hungary, Italy, Korea, Mexico, the Netherlands, Spain, Switzerland, the United Kingdom, and Turkey. The Congress has approved additional MLATs with Brazil, the Czech Republic, Luxembourg, and Poland, but they are not yet in force. The treaties generally provide for assistance in locating persons, serving documents, producing and authenticating government documents, and producing and authenticating some business records and other non-government documents, conducting searches, and obtaining testimony of witnesses. All of these functions are however subject to US constitutional limitations, and most permit the government to refuse to render assistance on a variety of grounds.

Mutual legal assistance is also possible without reliance on treaty procedures in some cases. For example, under Title 28, U.S. Code, Section 1782, U.S. courts may, but are not required to, order the production of documents or testimony of witness in connection with foreign criminal proceedings. Various U.S. law enforcement agencies administer individual statutes that provide for co-operation between the agency and its foreign counterparts. The U.S. asserts that its law and practice permit and encourage informal co-operation.

9.2 Dual Criminality

Mutual legal assistance is generally not conditional on dual criminality under US law, unless such a condition is contained in the mutual legal assistance treaty between the U.S. and the Requesting State. For example, the MLAT between the U.S. and Switzerland requires dual criminality for any assistance that requires compulsory measures. However, seeking legal assistance for an offence established pursuant to the Convention will satisfy any dual criminality requirement imposed under the U.S. laws or treaties.

9.3 Bank Secrecy

U.S. law generally does not require the denial of mutual legal assistance on the ground of bank secrecy. When seeking court orders on behalf of foreign States that seek mutual legal assistance, the United States has taken the position before its courts that assistance may not be declined as a result of privacy provisions of U.S. banking law. Moreover, it is the policy of the United States that where a domestic law provides for executive discretion in denying assistance, the executive branch does not decline assistance on that basis.

Pursuant to the Right to Financial Privacy Act[50], the Government may obtain access to the financial records of any customer from a financial institution by obtaining an administrative subpoena, a search warrant, a judicial

50. 12 U.S.C. chapter 35.

subpoena or by making a formal request.[51] Search warrants must be obtained pursuant to the Federal Rules of Criminal Procedure[52]. In the other cases the customer may challenge a request for financial information before a court, and the court may deny access to the financial records where "there is not a demonstrable reason to believe that the law enforcement inquiry is legitimate and a reasonable belief that the records sought are relevant to that inquiry".[53]

10. ARTICLE 10. EXTRADITION

10.1 Extradition for Bribery of a Foreign Public Official

Whether the bribery of a foreign public official is an extraditable offence depends on the terms of the bilateral extradition treaty in force between the U.S. and the requesting state. In the U.S., extraditable offences are those prescribed by treaty. The offence described in Article 10(1) of the Convention will be an extraditable offence under every extradition treaty in force between the U.S. and another Party to this Convention.

10.2 Convention as a Legal Basis for Extradition

The Convention asks countries that make extradition conditional on the existence of an extradition treaty, to consider this Convention as a legal basis for extradition in respect of the offence of bribery of a foreign public official.

Under U.S. law, extradition can only take place pursuant to extradition treaties. Generally, these treaties provide that extradition can take place where the offence in question is punishable under the laws of both the requesting state and the U.S. by a maximum prison term of more than one year. Thus, even before the advent of the Convention, extradition for these offences would have normally been possible, subject to the other terms of the treaty. Now that the U.S. has become a party to the Convention, extradition treaties with countries that have ratified the Convention are automatically deemed to incorporate the offences criminalised in Article 1 of the Convention. The United States already has bilateral extradition treaties in force with 31 countries that signed the Convention: Argentina, Austria, Belgium, Brazil, Bulgaria, Canada, Chile, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, the Slovak Republic, Spain, Switzerland, Sweden, Turkey, and the U.K. In addition, the U.S. has signed an extradition treaty with Korea, but it is not yet in force.

10.3 Extradition of Nationals

The U.S. can extradite its nationals. It is the policy of the United States not to decline extradition on the ground of nationality. Moreover, under Title 18, United States Code, Section 3196, the extradition of U.S. nationals is authorised (subject to the other requirements of the applicable treaty) even where the applicable extradition treaty does not obligate the United States to do so.

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51. 12 U.S.C. § 3402.

52. 12 U.S.C. § 3406

53. 12 U.S.C. § 3410.

10.5 Dual Criminality

Dual criminality is not constitutionally required before the United States can extradite. Dual criminality as a condition for extradition may however exist under an applicable extradition treaty between the US and another Party to the Convention. In that case, the U.S. would deem that condition to be fulfilled if the offence for which extradition is requested is within the scope of Article 1 of the Convention.

11. ARTICLE 11. RESPONSIBLE AUTHORITIES

The Convention requires Parties to designate an authority or authorities to serve as a channel of communication for requests in connection with the mutual assistance and extradition provisions of the Convention.

In the case of the United States, the Department of Justice is the authority responsible for making and receiving requests for mutual legal assistance under Article 9 of the Convention and requests for consultation under Article 4.3. The Department of State is the authority responsible for making and receiving requests for extradition under Article 10.

B. IMPLEMENTATION OF THE REVISED RECOMMENDATION

3. TAX DEDUCTIBILITY

The Revised Recommendation urges the prompt implementation by Member countries of the 1996 Recommendation on Tax Deductibility of Bribes to Foreign Officials, which states that the Council "recommends that those Member countries which do not disallow the deductibility of bribes to foreign public officials re-examine such treatment with the intention of denying this tax deductibility." Similarly the Commentaries on the Convention state that "in addition to accepting the Revised Recommendation of the Council on Combating Bribery, a full participant also accepts the Recommendation on the Tax deductibility of Bribes of Foreign Public Officials, adopted on 11 April, C(96)27/FINAL".

The United States' prohibition on the tax deductibility of foreign bribes preceded the FCPA. Under section 162(a) of the Internal Revenue Code ("IRC"), U.S. tax payers may deduct all "ordinary and necessary" expenses paid or incurred in carrying on a trade or business. In 1958, Congress amended the IRC to add section 162(c), which denies tax deductibility under section 162(a) for any payment that is an illegal kickback or a bribe. Section 162(c) also precludes deducting any payment that is unlawful under the Foreign Corrupt Practices Act.

EVALUATION OF THE UNITED STATES

General Remarks

The Working Group thanks the United States' authorities for the comprehensive and informative nature of their responses, which significantly assisted in the evaluation process. The relevant U.S. legislation, namely the Foreign Corrupt Practices Act (FCPA), as amended, was initially enacted in 1977. The United States should be commended for its substantial and sustained contribution to this initiative against corruption in international business transactions, and for its prompt implementation of the Convention through amendments to the FCPA, which entered into force on November 10, 1998. Generally, the FCPA implements the standards set by the Convention in a detailed and comprehensive manner. The formulation of the statute is structured and practical in its scope and applicability. The Working Group noted that there are a few areas that may require clarification. Some of the issues identified may be a product of the style of legislative drafting in the United States. The Working Group recommended that those areas and problems identified might benefit from further discussion during Phase 2 of the evaluation process.

Specific Issues

1. The offence of bribery of foreign public officials

1.1 Interstate nexus requirement

As a result of the 1998 amendment, a significantly larger range of persons is subject to criminal penalties under the FCPA than was the case previously. However, the net is cast wider when the offence occurs outside the US territory, and when carried out by a foreign person or business in U.S. territory, in terms of one element of the offence (use of interstate means or instrumentality for US. companies and nationals while in the U.S. *vs.* any act in the U.S. for foreign companies and nationals). The U.S. authorities explained that the difference in treatment is due to the limited legislative power granted to the federal government under the Constitution. As a result, the primary basis for most criminal statutes is the interstate federal commerce clause (i.e. the power to "regulate commerce with foreign Nations and among the several states".) This interstate commerce nexus is satisfied for non-U.S. nationals and businesses when they enter the U.S. to take an action in furtherance of a bribe overseas, because they are necessarily acting in international commerce. Although the United States does not believe that this will result in an uneven application of the legislation due to its expansive interpretation of the interstate commerce nexus, the Working Group noted that the interstate nexus requirement might create a problem of evidence when a bribe is offered in person.

1.2 To a foreign official, for that official, or for a third party

The FCPA prohibits payments of "anything of value" to foreign public officials. The United States has explained that "anything of value" encompasses both tangible and intangible benefits. The ability to designate a third party as the beneficiary of the benefit, however intangible that benefit might be, is also considered a benefit to the foreign public official and is sufficient for the purpose of the FCPA. The Working Group is however concerned that the FCPA does not specifically state that a payment to a third party at the foreign official's direction is prohibited by the statute and would like to re-examine this issue in Phase 2 of the evaluation process.

1.3 Affirmative defence and routine governmental action

Under Article 78dd-1(c), 78dd-2(c) and 78dd-3(c), an affirmative defence may be asserted where a payment was a "reasonable and bona fide expenditure, such as travel and lodging expenses", incurred by or on behalf of a foreign official and "directly related" to the "promotion, demonstration, or explanation of products or services" or "the execution or performance of a contract with a foreign government or agency thereof". Such provision has no equivalent in the Convention. The Working Group expressed some doubts about the effectiveness and necessity of these provisions.

According to the commentaries to the Convention, small "facilitation" payments do not constitute payments made to "obtain or retain business or other improper advantage". The FCPA's provision concerning "routine governmental action" contains a list of such exceptions qualified by the requirement that the payment may not be made to obtain or retain business. The Working Group is concerned, however, that the list of payments is not sufficiently qualified, for example by reference to the size of the payment, and the discretionary nature and the legality of the reciprocal act, and is therefore potentially subject to misuse.

The U.S. believes that these provisions are consistent with the requirements of the Convention because in both cases a payment that seeks a "quid pro quo" is prohibited.

1.4 Obtaining or retaining business or other improper advantage

The Convention prohibits bribes to foreign officials not only to "obtain or retain business" but also to secure any "other improper advantage". In the FCPA formulation, the language relating to an improper advantage is placed before that in respect of obtaining or retaining business. The U.S explained that the rational for its formulation was to avoid doing anything by virtue of the amendment that would take away from the historic broad interpretation of the offence. The U.S. had, prior to the amendment, interpreted the three pre-existing elements of the FCPA to encompass payments "to secure any improper advantage". Whilst the insertion of this language in the statute does clarify and reinforce this interpretation, the Working Group considered that the prospect of the chosen formulation causing problems in the prosecution of offences could not be entirely dismissed.

2. Sanctions

The Convention requires Parties to institute "effective, proportionate, and dissuasive criminal penalties" comparable to those applicable to bribery of the Party's own domestic officials. Although the FCPA prescribes substantial criminal penalties and imposes additional civil and administrative sanctions, the Working Group noted the discrepancy between the maximum imprisonment for bribery of domestic public officials (15 years) and foreign public officials (5 years).

The Working Group noted that although the United States criminal fine provisions provide full compliance with Article 3.3 of the Convention, the FCPA does not expressly provide for seizure and confiscation of the proceeds of the bribery of foreign public officials (the U.S. is, however, able at the present time to seize and confiscate the bribe itself). This may have ramifications in applications for mutual legal assistance. The Working Group agrees this is a general issue for a comparative analysis of the legal situation in Member countries, and that it should therefore be taken up again at a later stage.

3. Statute of limitations

The statute of limitations for criminal violations of the FCPA is five years from the date that the potential offence was limited. This period can be extended for three more years, upon a request by a prosecutor and a finding by a court that additional time is needed to gather evidence located abroad. Article 6 of the Convention requires an adequate period of time for investigation and prosecution. The Working Group agreed that this is a general issue for a comparative analysis of the legal situation in Member countries, and that it should therefore be taken up again at a later stage.

4. Accounting

The Working Group noted that the FCPA's books and records and internal controls provisions apply only to publicly held corporations.