

Anti-Bribery and Corruption Law Multi-Jurisdictional Client Guide

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Anti-Bribery and Corruption Law Multi-Jurisdictional Client Guide

This publication is a quick reference guide to anti-corruption law and enforcement in each of the jurisdictions across Europe, the Far East and North America where the McDermott Will & Emery global network has an office.

The country summaries are preceded by a comparison table that sets out the essential elements of the main anti-corruption rules in each jurisdiction.

For each country, the summary sets out details of the nature and scope of the anti-bribery and corruption rules, explains to whom the rules apply and the consequences of breach, and provides an overview of the current enforcement regime.

What emerges is that, whilst both the long reach of the US rules and pressure from the Organisation for Economic Co-operation and Development has meant that foreign corrupt practices are now to a greater extent unlawful in many jurisdictions worldwide, significant differences remain as to enforcement regimes. For example, facilitation payments are exempt in Germany in certain circumstances, but are not exempt under any circumstances in either the United Kingdom or the People's Republic of China. In many other countries, both public and private bribery (whether domestic or foreign) are expressly outlawed, but the tests vary widely. Notably, in the United States under the US Foreign Corrupt Practices Act (the FCPA), a territorial nexus that is seemingly only tangential—such as a phone call or email from the United States or use of a US bank to clear funds relating to the foreign transaction—may be sufficient for the Department of Justice (DOJ) to exert US jurisdiction.

The clear trend is that the enforcement of anti-corruption laws has become a major focus of law enforcement and regulatory authorities not just in the United States but globally.

With a global team of more than 65 lawyers with experience of international legislation against white-collar crime, including the FCPA and the Bribery Act, McDermott Will & Emery helps companies—and their officers, managers and directors—to understand the unique challenges posed by the overlapping anti-corruption laws that are relevant to multi-national business operations. We represent clients in FCPA, Bribery Act and other internal investigations, government enforcement and regulatory actions and other international, white-collar defence matters. We also assist in developing global anti-bribery and anti-corruption compliance policies, as well as conducting corporate crime, anti-corruption and bribery due diligence in cross-border deals.

This comparative guide is intended to highlight issues by way of overview rather than to provide comprehensive advice. If you have any particular questions about anti-bribery or corruption issues, please contact your regular McDermott Will & Emery lawyer or the authors:

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Anti-Bribery and Corruption Rules Summary

McDermott Will & Emery Jurisdiction Comparison Table

	Is bribery of foreign public officials criminalised?	Is private sector bribery criminalised?	Is bribery through an intermediary criminalised?	Is there any <i>de minimis</i> threshold?	Are facilitation payments exempted?
Belgium	Yes	Yes	Yes	No	No
France	Yes	Yes	Yes	No	No
Germany	Yes	Yes	Yes	There are no statutory thresholds. Assessment is on a case-by-case basis but, generally, receipt or payment of a single benefit of up to €30 is not an offence	Yes, if the benefit is “socially acceptable” (<i>i.e.</i> , an inexpensive promotional item)
Italy	Yes	Yes	Yes	No	No
China	Yes	Yes	Yes	Yes	No
United Kingdom	Yes	Yes	Yes	No	No
United States	Yes	No. However, commercial bribery is illegal in many US states. US prosecutors have also used the Travel Act to prosecute acts of foreign commercial bribery	Yes	No	Yes, but only for limited payments to facilitate or expedite a “routine governmental action” that the official is bound to do anyway

Belgium

PROHIBITED ACTIVITIES

Under the Belgian Criminal Code (Article 246-252 and 505bis-505ter), it is an offence to bribe a person holding a public office, regardless of whether he or she is a Belgian public official or an official of a foreign country or an international organisation). This may arise as a result of directly or indirectly making, offering or promising an advantage of any nature to a person holding public office, for their benefit, or for the benefit of a third party, in order to influence his or her behaviour. This offence also applies to the solicitation or acceptance of a bribe.

Private commercial bribery is also unlawful and may arise as a result of directly or indirectly making, offering or promising an advantage of any nature, to a person who is the administrator or manager of a company, or the agent or employee of a company or person, for their benefit or for the benefit of a third party, in order to influence that person to commit, or not to commit, an act linked to his or her position or facilitated by his or her position, and which is neither known nor authorised by the board of directors or the shareholders' meeting, the principal or the employer. Directly or indirectly soliciting or accepting such a bribe is also unlawful. This prohibition applies to both foreign and domestic private bribery.

SCOPE AND APPLICATION

The Belgian courts have jurisdiction if the offence is committed in Belgium, which requires that at least one of its constitutive elements took place on Belgian territory. Additionally, an offence committed outside Belgium is punishable before the Belgian courts if certain conditions set out in Articles 7, 10, 11 or 12 bis of the Criminal Code are met.

The bribery offences apply to all persons and entities in Belgium. In respect of corrupt acts occurring outside Belgium, the jurisdiction of the Belgian courts extends to both Belgian and foreign nationals.

In addition, with respect to the bribery of a person holding public office, Belgian courts will also have jurisdiction over

Persons committing the offence in a foreign country if the offence relates to a Belgian official

Persons committing the offence in a foreign country if the offence relates to a Belgian official of a foreign country or an international organization that has its seat in Belgium

Belgians or persons having their main residence in Belgium who commit the offence in a foreign country in relation to a foreign official or an official of an international organisation, if the act is also punishable under the laws of the country in which the act is committed.

FINES/PENALTIES

Bribery of a person holding public office by an individual is punishable with a prison sentence of up to 10 years and/or a fine of up to €1.1 million. For companies and other legal entities, the maximum fine is €2.2 million. Private commercial bribery by an individual is punishable with a prison sentence of up to three years and/or a fine of up to €275,000. For companies and other legal entities, the maximum fine is €550,000.

For both public and private bribery, other sanctions include being debarred from certain offices and confiscation of the object and proceeds of the offence.

KEY REGULATORY AND ENFORCEMENT AGENCIES

The Central Office for the Repression of Corruption (Office Central pour la Répression de la Corruption, or OCRC) was established as part of the significant reform of Belgian law enforcement system in 2001. The OCRC is a part of the Directorate for Economic and Financial Crime that belongs to the Belgian Federal Judicial Police. It has the legal power to carry out investigations across the entire Belgian territory and to investigate all serious cases of corruption.

France

PROHIBITED ACTIVITIES

Under the French Criminal Code (Articles 435 and 445), it is an offence to directly or indirectly unlawfully propose or make at any time any offer, promise, gift, present or advantage of any kind to an individual holding a public office or discharging a public service, mission or electoral mandate for himself or for others, so that the relevant individual carries out or abstains from carrying out an act within his functions, duties or mandate, or facilitated by his functions, duties or mandate. The same penalties apply to any person holding public authority or discharging a public service function. These offences apply regardless of whether the public official is domestic or an official of a foreign country or an international organisation. It is also a criminal offence to bribe any person who holds a management position or job other than that of public official.

In France, there is also the offence of “influence peddling” that prohibits activities that are carried out by individuals with the intention of influencing the decision to award contracts by, or to obtain other favourable decisions from, public officials.

Interfering with the proper administration of justice by means of bribery within a foreign state, a foreign court or an international court is also a criminal offence.

There are no safe harbours or exemptions for acts of corruption, and facilitation payments are illegal.

SCOPE

A criminal offence is deemed to have been committed in France whenever part of the offence was carried out on French territory.

French criminal law also applies to crimes committed wholly outside French territory either by French nationals or by entities incorporated in France if the acts are punishable under the law of the country in which they were committed.

In certain circumstances and subject to procedural laws, when the perpetrator of certain foreign corrupt practices is physically present in France, he or she can be tried in France even if the alleged acts occurred outside France.

FINES/PENALTIES

Individuals face fines of up to €150,000 and the court can order a prison sentence of up to 10 years, in addition to other penalties.

Legal entities face fines of up to five times those that can be ordered against individuals, as well as additional penalties such as exclusion for up to five years from government contracts, prohibition from offering their shares to the public, closure of an establishment, *etc.*

Both active and passive bribery of a private person in a commercial context is punishable by five years in prison and a fine of up to €75,000 under Articles 445-1 and 445-2 of the Criminal Code.

KEY REGULATORY AND ENFORCEMENT AGENCIES

The Central Service for the Prevention of Corruption (SCPC) is an interdepartmental body that centralises and uses all information pertaining to corrupt practices and in order to conduct to undertake a complete analysis of any corrupt practices that are being carried on in France.

The main regulatory authority responsible for investigating corporate or business fraud is the Public Prosecutor’s Office (PPO). The Code of Criminal Procedure contains rules governing preliminary enquiries and investigations.

The decision to prosecute will always originate from the PPO. If the PPO decides not to initiate a prosecution, or fails to take any decision in this regard for the first three months following discovery of the acts, the victim can apply to initiate and join criminal proceedings as a civil party.

Criminal proceedings can be triggered by a complaint, a report or a referral by the SCPC or a specialised agency such as the General Directorate for Competition, Consumer Affairs and Fraud Control, the tax authorities, the Financial Intelligence Unit or the Fraud on Means of Payment Team (the *brigade de répression des fraudes aux moyens de paiement*).

Germany

PROHIBITED ACTIVITIES

Bribery and corruption are regulated under the German Criminal Code. Corruption of public officials is unlawful in circumstances where a person offers, promises or grants a public official an advantage for the accomplishment of an act contrary to his or her duty (Section 334 of the Criminal Code) or in accordance with his or her duty (Section 333 of the Criminal Code), regardless of whether the act has, or has yet to, occur. The public official renders him or herself liable to prosecution in these situations if they accept an advantage (Sections 331 and 332 of the Criminal Code).

Corruption in the course of business and trade is also unlawful (Section 299 of the Criminal Code). It occurs if, during the course of a business transaction, an employee or agent intentionally demands, allows himself to be promised, or accepts a benefit for himself or another as consideration for giving an unfair preference in the competitive purchase of goods or commercial services. This prohibition in principle applies to both domestic and foreign corruption.

Companies are guilty of an administrative offence if their management has failed to fulfil the supervisory measures required to prevent bribery by employees of the company (Section 130 of the Administrative Offences Act (Ordnungswidrigkeitengesetz)).

SCOPE AND APPLICATION

A criminal offence is deemed to have been committed in Germany whenever part of the offence was carried out on German territory.

Acts committed by German citizens or acts committed against either German or other EU member state public officials are unlawful, regardless of where the offences have been committed.

FINES/PENALTIES

The Criminal Code imposes liability only on individuals. It provides that persons found guilty of bribery or a related offence may be either fined or imprisoned for up to 10 years. A legal entity may be fined up to €1 million for violations under the Administrative Offences Act. If the profit generated by the offence is higher, the fine can be as high as the profit made or even exceed that figure. In recent cases, fines have exceeded €100 million.

In addition, there are civil sanctions for a corporate body involved in bribery, including being registered in a corruption register, which means it is excluded from public procurement procedures. There are, however, currently only corruption registers maintained by law in the federal states of North-Rhine Westphalia and Berlin. A national register has been proposed but does not yet exist.

KEY REGULATORY AND ENFORCEMENT AGENCIES

Activities that are suspected of involving corrupt practices are investigated and prosecuted by the police and the public prosecutor's office (the Staatsanwaltschaft, or StA). There is no specific civil or administrative enforcement against criminal offences, but the European Anti-Fraud Office (OLAF) can, by law, investigate at administrative level in Germany. These investigations are always undertaken by prosecutors from the StA, accompanied by OLAF staff.

Italy

PROHIBITED ACTIVITIES

The Italian Criminal Code (Articles 317 to 322ter) prohibits the bribery of public officials and persons in charge of a public service, including employees of state-owned or state-controlled companies. The offences apply to both the briber and the bribee (Article 321). The Criminal Code provides for three forms of domestic bribery: i) improper bribery; ii) proper bribery—a more serious offence than improper bribery—that occurs when a public official, in exchange for performing, or having performed, an act conflicting with the duties of his office, or in exchange for omitting or delaying, or having omitted or delayed, an act of his office, receives money or other things of value, or accepts the promise of receipt; and iii) bribery in judicial acts.

Bribery offences relating to foreign public officials are provided for by Article 322bis of the Criminal Code and fall into two main categories of offence. The first relates to the act of bribing a public official of an EU institution or EU Member State, the second relates to the act of bribing a public official of a foreign state or international organisation in specific circumstances.

In 2002, private commercial bribery was outlawed. It became an offence for directors, general managers, or other private corporate officers to carry out, or omit to carry out, acts in violation of their duties that causes damage to the corporation, with a view to obtaining anything of value (or the promise of receipt) (Article 2635, Civil Code).

SCOPE

A criminal offence is deemed to have been committed in Italy whenever part of the offence was carried out on Italian territory.

Extra-territorial jurisdiction generally only applies in limited circumstances, *e.g.*, the presence of the suspect in Italy and in response to a request of proceedings made by the Italian Minister of Justice (Articles 9 and 10, Criminal Code).

FINES/PENALTIES

Domestic and foreign bribery offences committed by individuals are punishable by imprisonment for a period of between six months and eight years, depending on the nature and severity of the offence. Corporations are subject to fines, disqualifications and confiscation.

The criminal offence of corruption of private corporate officers is subject to imprisonment for up to three years for both the briber and the relevant corporate officers. The bribery of ordinary employees does not amount to a criminal offence.

KEY REGULATORY AND ENFORCEMENT AGENCIES

Bribery laws are enforced by public prosecutors, who do not form part of any government agency but are instead magistrates independent of the executive power. Public prosecutors in Italy have extensive powers of investigation. In particular, they are empowered to

- Compel a person (both witnesses and suspects, although suspects have the right not to answer) to attend an interview
- Compel the provision of information and the production of determined items and documents, including documentation and correspondence possessed by banks
- Issue search warrants to enable the search of premises and seizure of relevant items and documents
- Seize funds in bank accounts, and related documentation, where there are reasonable grounds to believe that they are related to a crime.

In 2004, a new body known as the Anti-Corruption High Commission (ACHC) was set up with rather limited powers, such as making enquiries on the causes of corruption and undertaking studies on the adequacy of the Italian system to fight corruption. In 2008, the functions of the ACHC were transferred to the Anti-Corruption and Transparency Service, an internal body within the Ministry for the Public Function.

People's Republic of China

PROHIBITED ACTIVITIES

Bribery is prohibited under Chinese criminal law and monetary thresholds are applied to all bribery and corruption offences. These vary according to whether the bribery involves a private person or a public official, and whether it is committed by an individual or by a corporate body.

There are a number of provisions incorporated specifically in the Criminal Law (effective 1 October 1997, and last amended on 1 May 2011) that relate to bribery offences of domestic public officials (Clauses 385 to 393) and apply to bribery of public officials for an “improper interest” by both individuals and corporate bodies.

The main offence relevant to foreign public officials is bribery of foreign public officials or officials of international public organisations (Clause 164). This consists of offering bribes to foreign public officials or officials of an international public organisation for the purposes of acquiring an improper commercial interest.

There are two main offences in relation to private commercial bribery incorporated under the Criminal Law. One is the act of offering bribes to a person representing a company, enterprise or other entity for the purposes of acquiring an improper interest (Clause 164). The other applies to circumstances where a person representing a company, enterprise or other entity asks for or receives bribes and takes advantage of his or her position in order to help the briber acquire an improper interest (Clause 163). In addition, acting as an intermediary to facilitate the bribery of state officials may also constitute a criminal offence.

In all circumstances, key factors to determine whether an offence has occurred include the value of the benefits received and whether the receiver of the benefits takes advantage of his or her position when offering that advantage.

Certain defences are available in bribery cases, including in circumstances where there is an absence of any improper interest. In addition, if a perpetrator cooperates with the administrative authority in investigating illegal activities and contributes to the investigation, the penalty can be lowered or reduced. Any leniency would, however, depend ultimately on the circumstances of the case. No exemption applies for “facilitation payments”.

SCOPE AND APPLICATION

With respect to corrupt acts occurring in China, the prohibition applies to all persons and entities, regardless of their nationalities or jurisdictions of incorporation. More specifically, in civil actions, the Chinese court generally has jurisdiction, including if the contract in dispute is entered into or performed in China, the property subject to dispute is located in China, or if the defendant has a representative office in China.

In criminal proceedings, Chinese authorities have jurisdiction to investigate crimes

- Committed in China, or on Chinese ships or aircrafts, or where the result of the criminal activity occurs in China
- Committed by Chinese citizens outside China
- Committed by foreigners against China or its citizens outside China (the minimum penalty for which is three years imprisonment), as long as the relevant activity is penalised under the law of the jurisdiction where the crime occurs
- Committed under international treaties, where China is obliged to exercise its jurisdiction.

FINES/PENALTIES

In relation to administrative proceedings, if a company offers bribes for the purpose of selling or purchasing goods or services, but the action has not triggered any criminal offence, under the Anti-Unfair Competition Law the State Administration for Industry and Commerce (SAIC) has the power to confiscate the illegal income from the bribery and impose a fine of between RMB10,000 and RMB200,000.

The sanctions for major criminal offences related to bribery and corruption vary depending on the offence and its severity, but generally involve criminal detention up to life imprisonment, confiscation of property and/or liability for a criminal fine. The Criminal Law does not specify the minimum or maximum amount of the fine for bribery cases; in practice it is left to the discretion of the judges and so varies from case to case.

With respect to a corruption offence not involving any public officials, the offender may be subject to fines and imprisonment for up to 10 years.

KEY REGULATORY AND ENFORCEMENT AGENCIES

The SAIC has the authority to investigate, enforce and prosecute commercial bribery cases in administrative proceedings. Once the bribery constitutes a crime, The SAIC transfers the case to the public security bureau or the prosecutor's office for further criminal investigation. Under the Administrative Supervision Law, the Ministry of Supervision (MOS) has statutory power to investigate public officials' violations of administrative matters, including bribery and corruption. In addition, most public officials are members of the Chinese Communist Party (CCP), which has the power to investigate members' violations of CCP regulations, including bribery and corruption.

The public security bureau performs the investigation in criminal proceedings. The prosecutor's office reviews the result of an investigation and sues on behalf of the State. The People's Court adjudicates the case and decides on the defendant's guilt.

The authorities have extensive investigation powers that include the power to

- Detain or arrest the suspect
- Seal up, seize or freeze the suspect's property
- Restrict the suspect's movements or prohibit the suspect from travelling abroad.

United Kingdom

PROHIBITED ACTIVITIES

Bribery is specifically prohibited under the Bribery Act 2010, which was passed into law on 8 April 2010 and came into force on 1 July 2011.

It is an offence under Section 1 of the Act for a person to offer, promise or give a financial or other advantage to another person where that person intends the advantage to bring about the improper performance by another of a relevant function or activity, or to reward such improper performance; or where the person knows or believes that the acceptance of the advantage offered, promised or given, in itself constitutes the improper performance of a relevant function or activity.

“Improper performance” means performance that amounts to a breach of an expectation that a person will act in good faith, impartially or in accordance with a position of trust. It applies to bribery relating to any function that is of a public nature, connected with a business, performed in the course of a person’s employment, or performed on behalf of a company or another body of persons. The Act therefore covers bribery in both the public and private sectors.

Section 6(1) creates a separate offence of bribing a foreign public official. A person is guilty of this offence if the intention is to influence the official in his or her capacity as a foreign public official. A “foreign public official” is defined in Sections 6(5) and 6(6) and includes, amongst others, government officials and those working for international organisations. The offence does not cover the act of accepting bribes, it relates only to the acts of offering, promising or giving bribes.

There is also a specific offence relating to commercial organisations. Under Section 7(1), a relevant commercial organisation is guilty of an offence if a person associated with that commercial organisation bribes another person, intending to obtain or retain business, or a business advantage, for that commercial organisation. The offence applies whether it is committed in the United Kingdom or overseas. Under Section 7(2), however, that commercial organisation has a defence if it can show that it had in place adequate procedures designed to prevent bribery.

There is no exemption for facilitation payments, which remain illegal even if they are permitted, or even expected, by local custom.

SCOPE AND APPLICATION

The Act applies both to the briber and the bribee. It has a very wide remit and applies to British citizens and individuals ordinarily resident in the United Kingdom and companies incorporated in the United Kingdom. In addition, companies and partnerships incorporated or registered in the United Kingdom, and other companies and partnerships that are registered elsewhere but carry on business in the United Kingdom, may also be liable for bribery offences committed by persons “associated” with them (including employees, agents and subsidiaries), if they have failed to implement “adequate procedures” to prevent bribery occurring.

FINES/PENALTIES

An individual found guilty of an offence under Section 6 can be liable for an unlimited fine and imprisonment for up to 10 years. Companies and other business organisations can face unlimited fines. Businesses also risk being debarred from competing for public contracts under the Public Contracts Regulations 2006.

A commercial organisation guilty of an offence under Section 7 of is liable for a fine on conviction or indictment. As the offence under Section 7 can only be committed by a relevant commercial organisation, senior officers cannot be held personally liable for an organisation’s failure to prevent bribery under Section 7.

KEY REGULATORY AND ENFORCEMENT AGENCIES

The Serious Fraud Office (the SFO) is the main prosecutor with responsibility for enforcing the Bribery Act (Section 10(1)(b)). Owing to the broad manner in which the offences have been drafted in the Act, significant emphasis has been placed on the role of the SFO in exercising its prosecutorial discretion, but the Director of Public Prosecutions (DPP) is also competent to bring prosecutions.

On 30 March 2011, the SFO and the DPP published Bribery Act 2010: Joint Prosecution Guidance of the Director of the SFO and the DPP (the guidance). The guidance is subject to the Code for Crown Prosecutors and, in the case of potential corporate prosecutions, should be read in conjunction with existing guidance on corporate prosecutions. The guidance indicates that bribery is a serious offence and that there is an inherent public interest in prosecuting it. It also states that, provided the evidential burden is satisfied, a prosecution will usually take place unless the prosecutor believes that public interest factors tend against prosecution. This is emphasised in relation to the Section 6 offence of bribing foreign public officials, the prevention of which is described as a “significant policy aspect of the Act”.

The SFO most recently issued revised statements of policy on facilitation payments, business expenditure and corporate self-reporting on 9 October 2012, which supersede previous statements of policy or practice issued by the SFO. This guidance reaffirms that facilitation payments are bribes, irrespective of their size or frequency. The guidance acknowledges that hospitality and promotional expenditure, which is reasonable, proportionate and made in good faith is an established and important part of doing business, and the Act does not seek to penalise it. However, the SFO also recognises, at the same time, that bribes may sometimes be disguised as legitimate business expenditure.

The guidance reinforces the position that the SFO is primarily an investigator and prosecutor of serious and/or complex fraud, including corruption. It is not the role of the SFO to provide corporate bodies with advice on their future conduct.. While the SFO makes clear that it encourages corporate self-reporting, it does stress that self-reporting will not guarantee immunity from prosecution by the SFO.

United States

PROHIBITED ACTIVITIES

Bribery of Foreign Officials

The main US international anti-bribery statute is called the Foreign Corrupt Practices Act (FCPA). The FCPA prohibits the use of any means of inter-state or inter-country commerce (*e.g.*, wires, mail, internet or other method of transacting business across state lines, including communications between any country and the United States) to make an offer or payment, or promise to pay or authorise the payment of, any money, gift or other thing of value, to a foreign official, foreign political party or candidate for foreign political office, where the intention of the bribe is to influence an official act or decision of the recipient, or induce the recipient into violating their duties or using their influence in order to obtain, or retain, business.

The “books and records” provisions in the FCPA apply to issuers of US securities that are registered with the Securities and Exchange Commission (SEC). These provide a separate basis for liability in the event that prohibited payments are not accounted for properly in the company’s books and records and/or internal control procedures are inadequate.

Bribery of Domestic Public Officials

Bribery of domestic public officials is proscribed under federal and state law. Under the US federal general bribery law (Section 201 of the United States Code), bribery involving US public officials is punishable by imprisonment and/or fines. Section 201 applies when a person or entity i) gives, offers or promises anything of value, with corrupt intent, to someone acting for, or on behalf of, the United States in order to influence an official act; ii) influences a public official to commit, collude in, or allow any fraud; or iii) induces a public official to do, or omit to do, any act in violation of their lawful duty.

For bribery to be unlawful, there must be specific intent to give or receive something of value in return for the official act or omitting the official act. Section 201 proscribes both sides of the bribery transaction, both the act of providing or promising a bribe, and the receipt or solicitation of a bribe. Other federal laws (*i.e.*, Section 666 of the United States Code: Theft or Bribery Concerning Programs Receiving Federal Funds) also prohibit acts of bribery, although Section 666 requires that the thing of value be worth US\$5,000 or greater.

Federal US law also outlaws illegal gratuities. The key distinction between bribes and illegal gratuities is that gratuities require a lesser intent. While bribery requires a specific intent to give or receive something in exchange for an official act (or failure to act), an illegal gratuity only requires that the gratuity be given “for or because of” an official act. Various US states have also codified their own bribery laws that vary in the scope of the prohibited acts.

The Hobbs Act, which imposes some of the most severe penalties of all the federal corruption statutes (up to 20 years imprisonment), has also been expanded to include bribery. To prove a violation of the Hobbs Act, prosecutors must establish that there was extortion that interfered with interstate commerce.

Commercial Bribery

While private commercial bribery is generally forbidden at the state, rather than the federal level, the Travel Act has been used to “federalise” the US states’ commercial bribery prohibitions in order to criminalise the act of commercial bribery at the federal level. The Travel Act has been used by prosecutors in FCPA cases where the defendant commits an act in furtherance of the bribery scheme in a US state that outlaws commercial bribery. In order to prove a Travel Act violation, a prosecutor must show that the defendant used a facility of foreign or interstate commerce (such as email, telephone, wire transfer, personal travel, *etc.*) and acted with intent to promote, manage, establish, carry on, or distribute the proceeds of any unlawful activity (*i.e.*, violation of state or federal anti-bribery, money laundering, extortion or other criminal laws).

SCOPE AND APPLICATION

The FCPA’s anti-bribery provisions apply to three categories of persons:

Issuers - Any domestic or foreign entity (including consolidated foreign subsidiaries of US issuers) that issues securities registered with the SEC, or that is required to file reports with the SEC under certain legislative provisions, is subject to the FCPA, as are its officers, directors, employees, or agents and stockholders acting on its behalf.

Domestic Concerns - This category covers a broad group of persons and entities, including individual US citizens (wherever located), US resident aliens, and corporations and other business entities organised under US state laws or having their principal place of business in the United States, as well as their officers, directors, employees or agents.

“Other Persons” - Any person (other than an issuer or domestic concern) that is acting within the territory of the US is covered by the FCPA. Moreover, any person, (including an entity organised in a foreign nation), is subject to the FCPA if she or he performs any act in furtherance of a corrupt payment within the territory of the United States.

In general, territorial nexus is interpreted broadly by the SEC and the DOJ. Both agencies have interpreted the FCPA in recent years to extend not only to acts committed by covered companies and persons, but also to acts committed by third parties or agents acting on their behalf. The United States also utilises various cooperation tools, including deferrals and non-prosecution agreements, that reward defendants for self-reporting and cooperating with the Government’s investigation. The DOJ is expected to release new guidance on the FCPA to provide additional clarity regarding its position on key statutory terms such as “foreign official”, as well as to provide further guidance on FCPA successor liability for acquiring companies and potentially more information about how cooperation credit is calculated or valued by US regulators, including the impact of having an effective compliance program in place before a violation is discovered.

FINES/PENALTIES

FCPA

Corporations and other business entities that violate the FCPA’s anti-bribery provisions are subject to criminal fines of up to US\$2 million per violation. Corporate criminal fines for violating the “books and records” provisions of the FCPA can range up to US\$25 million or, under the Alternative Fines Act, up to twice the amount of the benefit sought or obtained by making, or promising to make, the corrupt payment.

Individuals who violate the anti-bribery provisions of the FCPA are subject to criminal fines of up to US\$100,000 per violation and/or up to five years in prison. Individuals who violate the FCPA’s “books and records” provisions face criminal fines of up to US\$5 million and/or up to 20 years in prison.

Civil penalties for FCPA anti-bribery provision violations can range up to US\$10,000 per violation for both individuals and entities. For “books and records” violations, the civil penalties range from US\$5,000 to US\$100,000 per violation for individuals and US\$50,000 to US\$500,000 per violation for corporate entities.

A corporation found in violation of the FCPA may also be suspended or barred from doing business with the federal Government or within the securities industry more generally, and may lose important Government licenses as a result. Other penalties include the imposition of a compliance monitor, civil or criminal forfeiture of assets, and collateral civil lawsuits and shareholder derivative class actions.

Other US Anti-Bribery Laws

Section 201 bribery offences carry a fine and/or a prison sentence of up to 15 years. In addition, the offender may be disqualified from holding any public office in the United States. Persons that violate Section 666 of the United States Code face a fine and a maximum prison sentence of 10 years; Hobbs Act violations carry a fine and/or up to 20 years in prison. Travel Act violations may also result in a fine and/or a maximum sentence of up to five years in prison.

KEY REGULATORY AND ENFORCEMENT AGENCIES

The SEC and the DOJ are both tasked with responsibility to enforce the FCPA. The SEC has authority to bring civil prosecutions under the FCPA, while the DOJ handles FCPA criminal prosecutions. Both agencies have special units of prosecutors dedicated to prosecuting FCPA violations, and can draw on specialised units at the Federal Bureau of Investigation that assist in the investigation of these cases.

As with corporate fraud more generally, regulators enjoy broad powers to investigate, enforce and prosecute bribery and corruption. With the supervision and authorisation of the court, regulators are empowered to conduct comprehensive searches for relevant evidence. Regulators can use search warrants and subpoenas to gather relevant evidence. Regulators may issue subpoenas directly, although law enforcement officials must seek warrants from the court. The court is, however, able to grant warrants quickly, including, in some cases, the same day the law enforcement agency makes its request. In recent years,

US regulators have begun to use more aggressive investigatory methods in FCPA cases, including sector/industry-wide sweeps and investigations, court-ordered wiretaps and undercover agents.

In 2011, the DOJ brought 23 enforcement actions while the SEC was responsible for 25. The DOJ and SEC together named 23 individuals and 26 corporations in those actions, and the corporations involved paid US\$652 million in criminal penalties, civil fines, disgorgement and interest. There is, moreover, every indication that monitoring compliance with the FCPA will remain a priority. The DOJ is estimated to have over 140 open FCPA cases and the number of FCPA cases filed has more than doubled since 2004, signalling the likelihood of a prolonged period of heightened enforcement activity in the coming years.

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