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Comparative Legal Guide

United States: Bribery & Corruption (2nd edition)

This country-specific Q&A provides an overview to cartels laws and regulations that may occur in the United States.

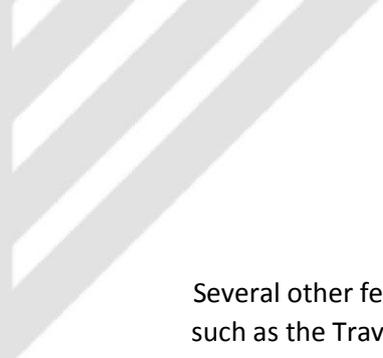
This Q&A is part of the global guide to Bribery & Corruption. For a full list of jurisdictional Q&As visit <http://www.inhouselawyer.co.uk/practice-areas/bribery-and-corruption-second-edition/>



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1. What is the legal framework (legislation/regulations) governing bribery and corruption in your jurisdiction?

The Foreign Corrupt Practices Act [FCPA], enacted in 1977, governs bribery of foreign public officials and representatives of government-controlled companies. 15 USC sections 78dd-1, et seq. In general, the FCPA prohibits US issuers and their agents, US corporate entities, US citizens, nationals or residents, and foreign nationals while in the United States, from ‘corruptly’ paying, promising, authorising or offering ‘anything of value’ to a foreign public official to ‘influenc[e] any act or decision of such foreign official in his official capacity’ or to secure an improper business advantage. 15 USC sections 78dd-1, 78dd-2, and 78dd-3. The FCPA also includes accounting provisions, which require US issuers to make and keep accurate books, records and accounts and to implement internal accounting controls. 15 USC section 78m.



Several other federal criminal statutes can be implicated in anti-bribery investigations, such as the Travel Act, federal money laundering laws, and federal mail and wire fraud statutes. The Travel Act prohibits ‘travels in interstate or foreign commerce’, or use of ‘the mail or any facility in interstate or foreign commerce, with the intent to . . . distribute the proceeds of any unlawful activity’ or ‘promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity’. 18 USC section 1952. Violations of the FCPA, as well as state laws prohibiting private commercial bribery, are included in the Travel Act’s definition of ‘unlawful activity’. Federal money laundering laws prohibit certain financial transactions using proceeds from specified unlawful activities, including FCPA violations. Mail and wire fraud statutes, which prohibit use of the mail or interstate telephonic, electronic or other wire communication to further any fraudulent scheme to deprive another of money or property, may also be implicated—for example, where a company executive with fiduciary duties is alleged to have failed to disclose bribery as part of a scheme to induce investment. 18 USC sections 1341 and 1343.

2. **Which authorities have jurisdiction to investigate and prosecute bribery in your jurisdiction?**

The principal federal prosecuting agencies in the US are the United States Department of Justice [DOJ] and the United States Securities and Exchange Commission [SEC]. The DOJ has authority to bring criminal prosecutions while the SEC has authority to bring civil enforcement actions. In cases involving US issuers or their executives, employees or agents, a company or individual may be subject to parallel investigations by the DOJ and SEC. In criminal investigations, the DOJ works in conjunction with an investigating agency, such as the Federal Bureau of Investigation or the Department of Homeland Security.

3. **How is bribery defined?**

Under the FCPA, bribery is defined as:

- (a) making a payment or offering, authorising or promising a payment or anything of value,

(b) to a foreign public official, foreign political party or party official, or candidate for foreign political office, directly or indirectly,

(c) with a corrupt intent,

(d) 'for purposes of (i) influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official', (iii) 'securing any improper advantage' or (iv) inducing 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',

(e) in order to obtain or retain business or direct business to any person.

4. Does the law distinguish between bribery of a public official and bribery of private persons? If so, how is 'public official' defined? Are there different definitions for bribery of a public official and bribery of a private person?

The FCPA prohibits the bribery of a foreign public official and does not reach bribery of a private person unless that private person is acting on behalf of a foreign official. A 'foreign official' is defined as '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'. 15 USC section 78dd-1. The FCPA does not distinguish between low-ranking and high-level officials of foreign governments—any such foreign government employee or official may fall within the definition of 'foreign official'.

Because 'foreign official' includes those acting on behalf of any foreign governmental 'department, agency, or instrumentality', the term has been interpreted broadly by US enforcement authorities to include employees and agents of state-owned enterprises. DOJ and SEC, *A Resource Guide to the U.S. Foreign Corrupt Practices Act* at 20 [2012, updated 2015]. To

determine whether a foreign entity is an 'instrumentality' of a foreign government under the FCPA, a fact-specific inquiry is made into whether the government controls the entity and whether the entity performs a government function. In *United States v. Esquenazi*, 752 F3d 912 (11th Cir. 2014), the US Court of Appeals for the Eleventh Circuit sought to determine the contours of the term 'instrumentality' in the FCPA and provided a non-exhaustive list of factors to consider.

(a) Whether the government controls the entity

- (i) How is the entity formally designated by the foreign government?
- (ii) Does the foreign government own a majority interest in the entity?
- (iii) Can the foreign government hire and fire the entity's principals?
- (iv) Do the entity's profits, if any, go directly into the foreign government's fisc?
- (v) Does the foreign government fund the entity, if necessary?

(b) Whether the entity performs a government function

- (i) Does the entity have a monopoly over the function it carries out?
- (ii) Does the government subsidize the costs associated with the entity's provision of services?
- (iii) Does the entity provide services to the public at large in the foreign country?
- (iv) Do the foreign government and the public perceive the entity to be performing a governmental function?

United States v. Esquenazi, 752 F3d 912, 926 (11th Cir. 2014), *cert. denied*, 135 S Ct 293 (2014); *accord United States v. Duperval*, 777 F3d 1324 (11th Cir. 2015).

5. **What are the civil consequences of bribery in your jurisdiction?**

Civil consequences of FCPA violations include the imposition of a fine of up to \$20,521 per violation of the anti-bribery provisions, 15 USC section 78ff; 83 Federal Register 1396 [11 Jan 2018], an injunction prohibiting any act that violates or may violate the FCPA, requiring corporate entities to improve compliance programs and retain an independent consultant to advise on such programs, and disgorgement of ill-gotten gains plus pre-judgment interest. For actions involving an individual, the SEC could also impose additional restrictions, including barring that individual from serving as an officer or director of an issuer for a specified period of time.

Corporate violators of the FCPA may also face collateral consequences from civil enforcement actions, including 'suspension or debarment from contracting with the federal government, cross-debarment by multilateral development banks, and the suspension or revocation of certain export privileges'. DOJ and SEC, *A Resource Guide to the U.S. Foreign Corrupt Practices Act* at 69-70 [2012, updated 2015].

6. **What are the criminal consequences of bribery in your jurisdiction?**

Criminal consequences for FCPA violations include the imposition of a fine of up to \$2 million per violation of the anti-bribery provisions for corporations and other business entities and up to \$250,000 for officers, directors, stockholders, employees and agents of such entities. 15 USC section 78ff; 18 USC section 3571(b)(3). In practice, fines are often higher because the Alternative Fines Act, 18 USC section 3571(d), provides for imposition of fines at, among other levels, twice the amount of the gross pecuniary gain or loss associated with the criminal violation.

Individuals may face up to five years' imprisonment per violation. 15 USC section 78ff.

A corporate violator of the FCPA may face collateral consequences of a criminal conviction, such as debarment. In addition, corporate entities are routinely required to improve and enhance their compliance programs, cooperate in on-going government investigations and disclose any

additional credible allegations of bribery. In some cases, corporate entities are also required to retain an independent compliance monitor.

Corporate entities may be able to reduce their penalties or receive a declination by fully cooperating with the DOJ, which involves, among other things, self-disclosing the violation to the DOJ; engaging in timely and appropriate remediation; timely disclosing to the DOJ all relevant facts concerning the violation; timely preserving, collecting and disclosing relevant documents and making relevant individuals available for interviews by the DOJ. The DOJ formalized this approach to FCPA enforcement in the *FCPA Corporate Enforcement Policy* in November 2017, which began as a pilot program in April 2016.

7. Does the law place any restrictions on hospitality, travel and entertainment expenses? Are there specific regulations restricting such expenses for foreign public officials?

The FCPA applies to bribes relayed by means of ‘anything of value’, including hospitality, travel and entertainment expenses if provided corruptly to a foreign public official to influence or induce such official to take an official action (or omit to take an official action) and seek to obtain or retain business. See question 3. The FCPA does not place dollar limits on such expenses; however, the DOJ and SEC issued guidelines on this topic in *A Resource Guide to the U.S. Foreign Corrupt Practices Act* [2012, updated 2015], which states that hospitality, travel and entertainment expenses of nominal value, such as cab fare, reasonable meals and entertainment expenses, ‘are unlikely to improperly influence an official, and, as a result, are not, without more, items that have resulted in enforcement action by DOJ or SEC’. Large and extravagant expenses, however, may, according to the Resource Guide, indicate a corrupt purpose.

8. Are political contributions regulated?

Under the FCPA, bribes to foreign political parties and candidates for foreign political office disguised as political contributions are prohibited so long as all of the required elements are satisfied. Political contributions that are in compliance with the written laws and regulations of

the political party's or candidate's country and not paid for a corrupt purpose may be permitted. 18 USC section 78dd-1(c).

9. **Are facilitation payments regulated? If not, what is the general approach to such payments?**

The FCPA has a narrow exception for 'any facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party official'. 18 USC section 78dd-1(b). This exception applies only to nondiscretionary government acts and includes 'routine governmental action' such as 'processing visas, providing police protection or mail service, and supplying utilities like phone service, power, and water'. DOJ and SEC, *A Resource Guide to the U.S. Foreign Corrupt Practices Act* at 25 [2012, updated 2015].

10. **Are there any defences available?**

The FCPA sets forth two affirmative defences:

1. The Local Law Defence: 'the payment, gift, offer, or promise of anything of value that was made, was lawful under the written laws and regulations of the foreign official's, political party's, party official's, or candidate's country'. 15 USC section 78dd-1(c)(1).
2. Reasonable and Bona Fide Expenditures: 'the payment, gift, offer, or promise of anything of value that was made, was a reasonable and bona fide expenditure, such as travel and lodging expenses, incurred by or on behalf of a foreign official, party, party official, or candidate and was directly related to—(A) the promotion, demonstration, or explanation of products or services; or (B) the execution or performance of a contract with a foreign government or agency thereof'. 15 USC section 78dd-1(c)(2).

In addition, payments to foreign public officials made under circumstances involving extortion or duress do not trigger liability under the FCPA. While this defence is not explicitly stated in the statute, courts and Congress have recognized that payments made in the face of threats to health and safety cannot be made with the requisite corrupt intent. DOJ and SEC, *A Resource Guide to the US Foreign Corrupt Practices Act* at 27 [2012, updated 2015]. However, economic

coercion, such as a threat to restrict a company's entrance to a marketplace, does not qualify under this defence. *Id.*

11. Are compliance programs a mitigating factor to reduce/eliminate liability for bribery offences in your jurisdiction? Please identify any guidance indicating what features a compliance program should have in order to provide an effective defence/mitigation.

A compliance program will not eliminate liability for a bribery offence but may serve as a mitigating factor in determining whether to bring charges against the corporate entity and in how to settle a matter. In corporate settlements, the quality of the compliance program can influence the form of the settlement (i.e., as a non-prosecution agreement, deferred prosecution agreement or guilty plea), the quantum of financial penalty and the type of remedial requirements, including among other things whether to require an independent compliance monitor. Guidance has been issued to address hallmarks of an effective compliance program. DOJ and SEC, *A Resource Guide to the US Foreign Corrupt Practices Act* at 53 [2012, updated 2015]; *FCPA Corporate Enforcement Policy* [March 2019].

12. Who may be held liable for bribery? Only individuals, or also corporate entities?

Both individuals and corporate entities may be held liable for bribery of a foreign official. A corporate entity may be liable 'when its directors, officers, employees, or agents, acting within the scope of their employment, commit FCPA violations intended, at least in part, to benefit the company'. DOJ and SEC, *A Resource Guide to the US Foreign Corrupt Practices Act* at 27 [2012, updated 2015].

In recent years, US government authorities have emphasised enforcement against individuals. In 2015, the DOJ announced that investigations and prosecutions would prioritise identifying and pursuing 'culpable individuals at all levels in corporate cases'. Sally Quillian Yates, DOJ, *Individual Accountability for Corporate Wrongdoing* [9 Sept 2015]. Among other things, the DOJ required

that corporate entities report ‘all relevant facts relating to individuals responsible for the misconduct’ in order to receive cooperation credit. *Id.* The DOJ’s *FCPA Corporate Enforcement Policy* announced in November 2017 similarly focuses on individuals. The Policy reiterates that full cooperation from a corporate entity includes disclosure of ‘all facts related to involvement in the criminal activity by the company’s officers, employees, or agents’. Regarding ‘timely and appropriate remediation’—which is also required for full cooperation credit—the Policy requires corporate entities to appropriately discipline employees who were responsible for the misconduct. The SEC has similarly stated that individual liability is a fundamental aspect of FCPA enforcement.

13. Has the government published any guidance advising how to comply with anti-corruption and bribery laws in your jurisdiction? If so, what are the elements of an effective corporate compliance program?

The DOJ and SEC jointly issued guidance in 2012, and published an update in 2015, entitled *A Resource Guide to the US Foreign Corrupt Practices Act*, which, among other things, addresses the hallmarks of an effective corporate compliance program. In addition, the DOJ’s *FCPA Corporate Enforcement Policy* from November 2017 describes the criteria it will apply in evaluating whether a corporate entity has an effective compliance and ethics program, which criteria overlap with those discussed in the *Resource Guide*. The DOJ and SEC recognize that an effective corporate compliance program must be tailored to each company’s own needs, risk and challenges, but should have the following elements:

- Senior management should show a commitment to a ‘culture of compliance’ and clearly articulate a policy against corruption. Employees should be aware that any criminal conduct will not be tolerated.
- The company should have a written code of conduct and compliance policies and procedures.
- One or more senior executives should be assigned to oversee the compliance program and be provided with sufficient autonomy, authority and resources, including adequate funding and experienced personnel.
- The compliance program should analyse the company’s risk and be tailored to those risks.
- The company should provide training on its compliance policies and offer continuing advice concerning those policies.

- The company should have clear disciplinary procedures for compliance violations and offer positive incentives to drive compliant behaviour.
- The company should engage in due diligence of third parties and monitor those relationships, including payments to third parties.
- The company should have a mechanism for confidential reporting of violations and a procedure for conducting internal investigations.
- The company should seek to continuously improve their compliance program by periodically reviewing and testing its controls through audits.

DOJ, *FCPA Corporate Enforcement Policy* [Nov 2017]; DOJ and SEC, *A Resource Guide to the US Foreign Corrupt Practices Act* at 57-62 [2012, updated 2015].

14. **Does the law provide protection to whistle-blowers?**

The FCPA itself does not provide protections to whistle-blowers, but two separate federal laws do so under certain circumstances. The Sarbanes-Oxley Act of 2002 provides certain protections to employees of US issuers who report corporate misconduct, including FCPA violations, to government regulators, law enforcement, Congress or supervisors at the issuer. 18 USC section 1514A. Under this statute, whistle-blowers who face retaliation may obtain reinstatement, back pay, attorney's fees and costs, and other compensation. *Id.* To obtain recovery, the whistle-blower must file a complaint with the US Secretary of Labour within 180 days of experiencing retaliation. *Id.* The statute permits the whistle-blower to seek recovery in federal court after exhausting administrative remedies through the US Department of Labour. *Id.*

The Dodd-Frank Act of 2010 provides slightly different whistle-blower protections. Under this statute, protections are conferred on individuals who report a violation of the securities laws, including FCPA violations, to the SEC. 15 USC section 78u-6; *see also Digital Realty Trust, Inc. v. Somers*, 138 SCt 767, 777 (21 Feb 2018). This statute also includes anti-retaliation measures, although the recovery mechanism and rights differ from that of the Sarbanes-Oxley Act. Under the Dodd-Frank Act, a whistle-blower may sue his or her employer directly for retaliation in federal court within six years of experiencing retaliation. 15 USC section 78u-6. Allowable recovery includes double back pay, reinstatement and attorney's fees and costs. *Id.* If the whistle-blower's original and timely information results in an SEC enforcement action with a fine

of over \$1 million, the whistle-blower may receive an award between 10% and 30% of the monetary sanctions recovered by the SEC. The highest whistle-blower awards have exceeded \$30 million.

15. **How common are government authority investigations into allegations of bribery?**

Bribery investigations by the DOJ and SEC are common and each agency has a dedicated FCPA unit. Investigations may be initiated as a result of a company's self-disclosure of a violation, a whistle-blower report by a competitor, current or former employee or third party, or the government's own independent discovery of potential violations.

16. **What are the recent trends in investigations and enforcement in your jurisdiction?**

A few recent trends have emerged in enforcement of the FCPA:

- Increased incentives to cooperate: The most significant recent change in FCPA enforcement is the DOJ's *FCPA Corporate Enforcement Policy*, issued in November 2017. The policy sets forth a presumption of declination if no aggravating circumstances are present and corporate entities provide full cooperation, which includes, among other things, voluntary self-disclosure and timely and appropriate remediation. If DOJ decides declination is appropriate, the corporate entity is still required to pay all disgorgement, forfeiture and/or restitution, as appropriate. If the corporate entity does not meet all of those requirements for a declination, the policy provides avenues for the entity to receive up to a 50% reduction in criminal fines and to avoid the appointment of an independent compliance monitor.
- Multi-jurisdictional enforcement and investigations: The DOJ and SEC seek to closely coordinate their investigations and enforcement actions not only between themselves but with foreign authorities as well. As other countries have passed anti-bribery laws, they have increased their enforcement and worked with US authorities in investigating violators and obtaining global resolution. Recent enforcement actions have included coordination with authorities in, for example, Singapore, Brazil, China, the Netherlands and Switzerland involving companies in the oil and gas support services, telecommunications, pharmaceutical and shipping industries.

- Individual accountability and liability: US government authorities continue to emphasise holding individuals—not just corporate entities—accountable and liable for FCPA violations. In several recent enforcement actions against corporate entities, individuals were also criminally charged for their involvement in the bribery violations.

17. Is there a process of judicial review for challenging government authority action and decisions?

Defendants may challenge criminal and civil charges through litigation in federal courts, seeking resolution through trial and appeals, if necessary. At the trial level in both criminal and civil enforcement actions, defendants may move to dismiss the charges during the initial stage of litigation, on a variety of potential grounds, including, for example, that the government failed to properly allege that the defendant committed all elements of the violation. Should that motion fail, the charges against the defendant will be resolved through a trial or by guilty plea. If a defendant is convicted at trial, the defendant may file post-trial motions for a new trial and/or to set aside the verdict. If the judge rules in favour of the government, the defendant may file an appeal to the US Court of Appeals, which hears all appeals that are timely and properly filed. If that appeal fails, the defendant may petition the US Supreme Court to hear the case. The US Supreme Court typically agrees to hear only a limited number of cases that present novel questions of law or involve a conflict that has developed between different US Courts of Appeal on a legal question.

18. Are there any planned developments or reforms of bribery and anti-corruption laws in your jurisdiction?

The DOJ recently released the *FCPA Corporate Enforcement Policy* in November 2017. While the policy does not reform the FCPA, it updates the DOJ's stated approach to enforcement. Among other things, the policy sets forth the circumstances under which the DOJ will decline to bring charges against a corporate entity.

19. **To which international anti-corruption conventions is your country party?**

The United States is a party to the Organisation for Economic Cooperation and Development Anti-Bribery Convention, the United Nations Convention Against Corruption, the Inter-American Convention Against Corruption. The United States is also a member of the OECD Working Group on Bribery and Anti-Bribery Convention.

20. **Do you have a concept of legal privilege in your jurisdiction which applies to lawyer-led investigations? If so, please provide details on the extent of that protection.**

Lawyer-led investigations are in many circumstances protected by the attorney-client privilege and the attorney work product doctrine. To ensure privilege, certain precautions should be taken. The legal investigative team and its support staff should ensure that communications concerning the investigation are kept confidential and shared with company personnel only to the extent necessary. In addition, should it be necessary to retain non-legal professionals, such as forensic accountants or other specialists, they should be directed and overseen by counsel to ensure that privilege extends to those individuals' work.

The attorney-client privilege and attorney work product doctrine protects materials such as communications between attorneys and the company, attorneys' notes or memoranda of confidential interviews with company employees, attorneys' memoranda or other work product concerning the investigation and confidential communications between attorneys and experts who assist the attorneys. Importantly, facts are not privileged; however, communications with attorneys concerning those facts are privileged.

21. How much importance does your government place on tackling bribery and corruption? How do you think your jurisdiction's approach to anti-bribery and corruption compares on an international scale?

The US government places great importance on combatting bribery and corruption and has been a global leader in developing effective methods to investigate and prosecute FCPA violations.

22. Generally how serious are organisations in your country about preventing bribery and corruption?

Because violators of the FCPA have faced large fines, significant reputational risk and, in some cases, collateral consequences such as debarment from government contracting, many organisations are serious about preventing bribery and corruption and investigating any allegations of violations. Large organisations typically devote significant resources to their compliance programs and some have enacted policies that are more stringent than the FCPA and local laws.

23. What are the biggest challenges enforcement agencies/regulators face when investigating and prosecuting cases of bribery and corruption in your jurisdiction?

FCPA investigations are inherently international in scope because they involve wrongdoing outside the United States. Any successful government investigation requires coordination with foreign government counterparts to, for example, obtain evidence abroad. In the absence of coordination and cooperation, US government investigations are more difficult and take more time to pursue. Where US law enforcement has a close relationship with a foreign counterpart, information about a violator can be quickly and easily exchanged without awaiting results from formal, lengthy channels established by mutual legal assistance treaties. As a result of such relationships, US and foreign authorities have been able quickly to share investigative leads and documents, as well as jointly pursue global resolutions.

24. **What do you consider will be the most significant corruption related challenges posed to businesses in your jurisdiction over the next 18 months?**

The most significant challenge for businesses that have uncovered potential violations is weighing whether or not to seek the benefits set out in the DOJ's recently announced *FCPA Corporate Enforcement Policy*. As discussed in Questions 16 and 18, the policy offers many potential advantages to businesses that provide full cooperation in that the DOJ will presume that declination is appropriate unless aggravating circumstances are present.

25. **How would you improve the legal framework and process for preventing, investigating and prosecuting cases of bribery and corruption?**

The number of DOJ and SEC enforcement actions under the FCPA in recent years (ranging between 20 and 74 from 2010 to 2017) and their significant monetary penalties (over \$2 billion in 2016 and over \$1 billion in 2017), show that the framework and processes for investigations and prosecutions of FCPA violations are robust. However, there is substantial room for improvement of coordination across different government investigations, prosecutions and corporate settlements. Major corruption enforcement authorities should consider forming a clearinghouse to coordinate and decide which authority will lead an investigation, what parameters will apply as to a company's own internal investigation (for example, as to whether the company may interview employees), and which authorities will seek monetary penalties from a company as part of a negotiated settlement to resolve all governmental inquiries into a bribery matter.