902 Government Contracting Toolbox

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Faculty Biographies

Douglas J. Cole

Douglas J. Cole is the vice president and general counsel for ECS, located in Chantilly, Virginia, a group of privately-held companies providing geotechnical engineering, construction materials testing, environmental engineering and consulting, specialty engineering and roofing, and waterproofing services around the country. As the head of a two-person law department, his varied responsibilities usually focus on matters of risk management and insurance, commercial and public contracting, litigation and dispute management, intellectual property, corporate compliance, and labor and employment matters.

Prior to joining ECS, Mr. Cole was a partner in a small Northern Virginia firm as well as working for Electronic Data Systems, and the Department of Defense. While in these roles, he provided counsel in a variety of substantive areas, including state and federal contracting, intellectual property and software licensing, export compliance, labor and employment matters, and related disputes and litigation. In addition, Mr. Cole has conducted training on public contracting topics for the Department of the Army, Department of the Air Force, as well as various legal and business organizations.

He is currently active in ACC's Small Law Department Committee and is also a member of the ABA and the National Contracts Management Association.

Mr. Cole received a B.S. from Middle Tennessee State University and is a graduate of the American University, Washington College of Law.

Juliette Hirt

Juliette Hirt is the associate general counsel of ebrary, a software and digital content company based in Palo Alto, California. She oversees all legal matters of the company. Specific responsibilities include managing contract processes and negotiating strategic contracts, developing and implementing company-wide policies, managing intellectual property, keeping corporate records, resolving disputes including pre-litigation and litigation management, retaining and managing outside counsel, and advising senior management and other employees on issues ranging from advertising to zero-tolerance policies.

Ms. Hirt has broad legal experience across a variety of industries. Prior to joining ebrary, she served as the sole in-house counsel of E-Color, a San Francisco software and internet services company that was acquired in 2000. Additionally, she has practiced business litigation in the San Francisco firms of Jackson, Tufts, Cole and Black, LLP, and Landels, Ripley, and Diamond, LLP.

Ms. Hirt currently serves as president of the board of directors of the C5 Children's School, a Reggio-Emilia inspired program in San Francisco serving the children of working families from infancy through pre-K. She also has volunteered with the Lawyers' Committee for Civil Rights, obtaining political asylum for two Mayan refugees from Guatemala.

Ms. Hirt received an A.B. (with highest honors) from the University of California at Berkeley and a J.D. from the Yale Law School, and.

Kevin McGraw

Kevin M. McGraw is associate counsel for Protection One Alarm Monitoring, Inc. (Protection One) in Dallas, Texas. His responsibilities include providing legal counsel to the organization in a broad range of transactional matters, including government contracting and regulatory issues.

Prior to joining Protection One, Mr. McGraw served for seven years as an assistant city attorney for the City of Waco, Texas, where held responsibility for a variety of substantive areas of municipal law, including government contracting involving public works projects, technology procurement, land use, and issues affecting economic development.

Mr. McGraw is an active volunteer on various committees for both his homeowners association and his church. He also helps coach (when time permits) the numerous sports teams of his two older sons.

Mr. McGraw received a B.A. from Texas Tech University and is a graduate of South Texas College of Law.

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GOVERNMENT CONTRACTING TOOLBOX
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CONTRACTING WITH THE FEDERAL GOVERNMENT

I. AN OVERVIEW OF HOW THE GOVERNMENT ACQUIRES SUPPLIES AND SERVICES

The federal government is the largest purchaser of supplies and services in the world. When federal grants made to the states as well as state and local procurements and foreign grants are added to the value of standard government contracts and subcontracts, the total value of goods and services acquired with public funds increases into the hundreds of trillions of dollars annually. Selling goods and services to public organizations is a successful market for thousands of businesses; however, public contracting, and in particular federal public contracting, contains significant differences from the commercial marketplace. A business's failure to fully understand its duties and obligations can result in unnecessary expenses, distractions from the business' main objectives, and even the destruction of the business.

Experience has shown that many businesses, particularly small ones, become a "government contractor or subcontractor" without a significant understanding of what their obligations or responsibilities are and will become. It is not uncommon for such a status to be obtained through an innocent looking requirement in a Purchase Order stating "that Supplier agrees to be bound by the same terms and conditions as the Company is to the End-Use" or when an employee requests that someone in the legal office help complete questions called "Representations and Certifications."[1] As counsel for small and sometimes new entities, you can add significant value to your company's business by offering prudent advice and direction on such issues as the government procurement process, key contract provisions, and how on-going compliance and other issues may affect business operations.

[1] A sample copy of abbreviated Reps and Certs is attached as Appendix A.

The federal government's procurement activity is a heavily regulated process which finds its heart and soul in the requirement that Federal agencies are to obtain "full and open competition through the use of competitive procedures."[2] Each agency must take into account certain factors in determining what particular competitive procedures are appropriate, and, ultimately, justify their decision when full and open competition is not required. It is a process that is designed to optimize the government's ability to determine the "best value" of any offer of goods or services by (1) comparing each offer to the Government's identified needs, and then, (2) by contrasting one offer to another.

Unlike the sometimes easy give-and-take in the commercial sector, government contractors are held to the letter of the contract, irrespective of whether the contract terms appear one-sided or unfair. This comes under the maxim that "men must turn square corners when they deal with the Government."[3] In addition, the government uses its power and purse as a means to compel a contractor's compliance with certain identified socio-economic or long-terms policy goals that may, at times, seem inconsistent with obtaining the "best value" in a specific contract.

Some of the key items that will be discussed as part of this presentation include:

- A brief overview of the vast array of statutes and regulations that apply to federal government contracts;
- The Acquisition Process, including such essential concepts such as "responsibility" and "responsiveness."
- Methods of Acquisition
- Contract Types
- Key Contract Clauses and Concepts
- Resolving Pre- and Post-Award Dispute
- Government Accounting Standards
- Socio-Economic Issues
- Prohibited Practices and Compliance Matters

[2] 41 USC § 253 (2005).
[3] *See Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384, 92 L. Ed. 10, 68 S. Ct. 1 (1947) (denying crop insurance benefits to a farmer who failed to comply with technical requirements of the federal crop insurance program, despite substantial compliance with substantive provisions of program).

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1. A Sampling of Constitutional and Statutory Authority.

Unlike the commercial market, actual authority is an essential concept for both the Government and the contractor. It is important for the contractor to be able to demonstrate that the government's instructions to the contractor originate from an authorized Contracting Officer.[4] As a result, starting with the Constitution and ending with each agency's procurement process are a variety of statutes, regulations and statements of Congressional intent that prohibit some actions, limit other actions, and mandate yet a third set of actions, with respect to the federal government's procurement of goods and services.

Some examples of key legal requirements are found in the following:

CONSTITUTIONAL PROVISIONS

- U.S. Constitution, Art. 1, § 9, cl. 7 – "No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."

SPECIFIC LAWS

- Armed Services Procurement Act, 10 USC §§ 2302a–31 (2005) ("ASPR") – Sets basic procurement rules for the Department of Defense, the Coast Guard, and NASA.
- Federal Property and Administrative Services Act, 41 USC §§ 252-66 (2005) ("FPAS") – Sets basic procurement rules for all other executive agencies.
- 41 USC § 405-405a (2005) – Specifically authorizes the Administrator of the Office of Federal Procurement Policy ("OFPP") to implement and maintain the FAR and gives the FAR the force and effect of law.
- Anti-Assignment Act, 41 USC § 15 (2005) – Prohibits the assignment of contracts or claims without the permission of the Government.
- Anti-Deficiency Act, 31 USC § 1341 (2005); s*ee also* 10 USC § 114(a) (2005) (applicable to DoD) and 42 USC § 7270 (2005) applicable to the Department of Energy (2005) - Set limitations on the ability of the Government to spend monies without proper authorization.
- Buy American Act, 41 USC §§10a–d (2005) – Restricts the ability of the Government to purchase articles, materials or supplies if they are from outside the United States.
- Byrd Amendment, 31 USC § 1352 (2005) – Limits a contractor's ability to use "appropriated funds" to lobby the Government, including Congress, with respect to any federal contract, loan, grant, or cooperative agreement.
- Contract Disputes Act of 1978, 41 USC §§601-13 (2005) ("CDA") – Establishes the standards and process for resolving disputes between a contractor and a procuring activity relating to performance disputes under the contract.
- Contract Work Hours and Safety Standards Act, 40 USC §§ 3701–08 (2005) – Mandates that all laborers under a government contract be paid based on an 8-hour workday and a 40-hour work week.
- Davis-Bacon Act, 40 USC §§ 276a – a-5 (2005) – Establishes a minimum wage for contract laborers and mechanics on government construction projects. Wages paid under a construction contract cannot go below the Department of Labor's wage determination as a matter of law.
- False Statements Act, 18 USC § 1001 (2005) – Prohibits persons, including contractors, from "knowingly and willfully" making false statements to the federal government if such statement might support a false or fraudulent claim or otherwise taint the authorized functions of a Government agency. The Act covers both written and oral statements as well as statements made to third parties.
- False Claims Act, 31 USC §§3729-33 (2005) – Establishes the Government's ability to recover damages and civil penalties against contractors who submit false claims for payment. Included within the Act is a *Qui Tam* provision which allows private citizens the right to bring an action against a contractor on behalf of the Government.
- McNamara-O'Hara Service Contract Act ("SCA"), 41 USC §§ 351-58 (2005) – The SCA requires contractors on all government contracts for services where the amount is in excess of $2,500, to pay employees an amount equal to or greater

[4] FAR §1.602-1 (2005).

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than the local prevailing wage, plus fringe benefits, as determined by the Department of Labor.

- Miller Act, 40 USC §§ 3131-34 (2005) – Requires that contractors for building project in excess of $100,000 post a payment bond for the protection of its subcontractors.
- Procurement Integrity Act, 41 USC § 423 (2005) – Prohibits the release of "source selection" or contractor confidential bid and proposal information. Also limits certain former government employees from accepting employment from certain government contractors for a specified period of time.
- Truth in Negotiations Act, 10 USC § 2306a (2005) – For all negotiated contracts over $500,000, before engaging in negotiations with the Government, the contractor must submit cost and pricing data that is certified to be current, accurate and complete.
- Walsh-Healey Public Contracts Act, 41 USC §§ 351-59 (2005) – Establishes that prevailing local wage requirements for government contracts for goods and materials that exceed $10,000. In addition to wages, the Act also requires that the contractor qualify as a "manufacturer" or "regular dealer."

RECENT REFORM LEGISLATION IMPACTING ON GOVERNMENT CONTRACTORS

- Clinger-Cohen Act of 1996 ("Clinger-Cohen") – Pub. L. 104-106, and amended by Pub. L. 104-208.
- Competition in Contracting Act of 1984 ("CICA") – Pub. L. 98-369 – codification throughout Titles 10, 40, and 41 of the U.S. Code, and 31 USC §§ 3551-3556.
- Debt Collection Improvement Act - Pub L. 107-273.
- Drug Free Workplace Act of 1988 – Pub. L. 100-690.
- Federal Acquisition Reform Act of 1996 ("FARA") – another name for "Clinger-Cohen."
- Federal Acquisition Streamlining Act of 1994 ("FASA") – Pub. L. 103-355.
- Small Business and Federal Procurement Competition Enhancement Act of 1984 – Pub. L. 98-577.
- Small Business Innovation Development Act of 1982 - Pub. L. 97-219.

2. The Regulatory System.

The regulations governing the federal acquisition process are known as the Federal Acquisition Regulations (FAR). In authorizing the FAR, Congress required the OFPP to publish a single, simple regulation to serve as the policy and rule for all federal acquisitions. The federal acquisition regulatory system is assigned title 48 of the CFR. The FAR-proper is found in Chapter 1 and is almost 1900 pages in length. Subordinate, agency-wide regulations are assigned various other Chapters. For example, Chapter 2 is allotted for the Department of Defense Federal Acquisition Regulation Supplement (DFARS). The DFARS are approximately 1000 pages in length. Within DoD there are further supplementary regulations promulgated by various defense activities. The organizational structure within each agency's regulations is similar to that found in the FAR.[5]

3. Responsibility and Responsiveness.

A. Responsibility – The requirements for contractor responsibility are found in Part 9 of the FAR. Determining a prospective contractor's responsibility requires consideration of factors that reach deep into a business entities capability and past practices. To be considered a responsible contractor, an entity must have

(1) "adequate financial resources to perform the contract," or the ability to obtain such resources[6];

(2) the ability "to comply with the required or proposed delivery or performance schedule" taking into consideration all of the contractors other business commitments[7];

(3) a record of satisfactory performance of its contractual obligations[8],;

(4) "a satisfactory record of integrity and business ethics"[9];

(5) "the necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain them.[10]" The controls

[5] A listing of the FAR and DFAR Parts is found in Appendix B.
[6] 48 CFR ("FAR") § 9.104-1(a) (2005).
[7] FAR § 9.104-1(b) (2005).
[8] FAR § 9.104-1(c) (2005).
[9] FAR § 9.104-1(d) (2005).
[10] FAR § 9.104-1(e) (2005).

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include: (a) production control procedures, (b) property control procedures, (c) quality control and assurance procedures, and (d) safety programs;

(6) the necessary equipment and facilities, or the ability to obtain them[11];

(7) the ability to "be otherwise qualified and eligible to receive an award under applicable laws and regulations[12];

The consequences of being determined deficient in any of these areas can affect a prospective contractor in two ways. A Contracting Officer can determine that the contractor is "non-responsible" or evaluate the offer adversely. Offers from non-responsible contractors are excluded from consideration. Offers that are evaluated adversely are not considered as providing the government the best value.[13]

B. Responsiveness – Responsiveness is a concept more applicable to the bid process than to negotiated procurements. In sum, the government may not award a contract to a bidder if the offered product or service deviates from the government's stated needs, even if the offered product or service would fulfill the government's needs.[14]

4. Methods By Which The Government Acquires Good and Services.

FAR Part 5 sets forth the policies and procedures necessary to publicize contracting opportunities and post award information.[15] Which procurement method is used depends largely on what will meet the agency's stated needs.

A. Small Purchases – Section 4201 of the Federal Acquisition Streamlining Act required that the FAR "shall provide for special simplified procedures for contracts for acquisition of property and services that are not greater than the simplified acquisition threshold.[16] That threshold is $100,000. These simplified procedures allow the Government to use purchase cards, checks, cash, purchase orders and purchasing agreements to procure non-commercial supplies and services of up to $100,000, and to procure commercial items up to $5 million without the usual procurement process. That is not to say there is no process. The use of simplified acquisition procedures still requires that certain processes are followed and that only authorized personnel can make such purchases.[17]

B. Commercial Items[18] – Title VII of the Federal Acquisition Streamlining Act ("FASA") requires that agency procurement requirements be defined so that commercially available items are responsive "to the maximum extent possible." FASA also imposes a duty on agencies to "require prime contractors and subcontractors at all levels" to incorporate commercial items into its procurement requirements. In some instances, nondevelopmental items that do not qualify as commercial can be used to satisfy agency requirements.

C. Sealed Bids – Part 14 of the FAR sets for the process for sealed bidding. Invitations for Bid (IFBs) must clearly set forth the Government's requirements. The requirements cannot unduly restrict the number of potential qualified bidders. The IFB must also include the deadline for submitting the bid as well as the time and place for the public opening of the bids. Bids are to be evaluated without discussions with the offerors. The contract is required to be awarded to the party whose bid conforms for the requirements in the IFB with price and price-related factors being the only evaluated criteria[19]

D. Competitive Negotiations -. Competitive proposals are submitted in response to a Request for Proposals (RFP).[20] The RFP sets forth the government's requirements in general terms and allows the offerors to propose unique solutions. It is not uncommon, although not required, for the Contracting Officer to conduct one or more rounds of discussions with the offerors before asking for a Best and Final Offer (BAFO) and making a contract award.

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[11] FAR § 9.104-1(f) (2005).
[12] FAR § 9.104-1(g) (2005).
[13] "Best value" is defined by the FAR to mean "the expected outcome of an acquisition that, in the Government's estimation, provides the greatest overall benefit in response to the requirement." FAR 2.101 (2005).
[14] *See B & D Supply Co. of Arizona*, B-21003, 83-2 Comp. Gen. Proc. Dec. ¶ 50 (1983).
[15] FAR §5-201(d)(1) (2005).
[16] 41 USC § 427 (2005).
[17] *See* FAR, Part 13.
[18] An item is considered "Commercially available off-the-shelf" (aka COTS) if it (1) it is of a type customarily sold, leased, or licensed or offered for sale, lease, or license to the general public or non-governmental entities for other than governmental purposes (2) sold in substantial quantities in the commercial market place, and (3) is offered to the Government without modification, in the same form in which it is sold in the commercial marketplace.
[19] FAR §14.101(a) (2005).
[20] FAR §15.203 (2005).

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E. Limited or Sole Source Acquisitions – Part 6 of the FAR sets forth the exemptions from the general requirement for competition.

- There is only a single source for the product or service.[21]
- There is an unusual or compelling urgency.[22]
- The need to mobilize industry during a time of national emergency, there is a need to establish engineering or development services for federal educational and research facilities, or there is a need for expert witness testimony.[23]
- When a requirement in an international agreement overrides the requirement for full and open competition.[24]
- When otherwise authorized or required by statute.[25]
- When doing so is in the best interests of national security.[26]
- When doing so serves the public interest.[27]

F. Federal Subcontracts – Prime contractors with contracts exceeding $100,000 are permitted to submit notices of subcontracting opportunities to FedBizOpps.[28]

5. Types of Government Contracts.

There are six primary types of contracts, although there are many hybrids and variations.

A. Fixed Price – This type of contract is used when contract requirements and specifications are definite enough so that a bid can be fairly enforced.

B. Cost Reimbursement – This type of contract is usually used when the contract specifications are uncertain, subject to great risks, or the government's need is urgent. While there are many variations of "cost plus" contracts, cost plus a percentage of the cost contracts are forbidden.

[21] FAR §6.302-1 (2005).
[22] FAR §6.302-2 (2005).
[23] FAR §6.3-2-3 (2005).
[24] FAR §6.302-4 (2005)
[25] FAR §6.302-5 (2005).
[26] FAR §6.302-6 (2005).
[27] FAR §6.302-7 (2005).
[28] FAR §5.206 (2005).

C. Incentive Fee – This type of contract usually sets a guaranteed maximum price with a mechanism whereby the government and contractor share in the savings that contractors achieve.

D. IDIQ Contracts – This contract is frequently used with the quantity of the product or service is difficult to project or is unknown. Another form of an IDIQ is a Blanket Purchasing Agreement.

E. Task Orders – Usually used to apply funds to an IDIQ contract and can be either fixed price, cost reimbursement, or a mixture of the two which is sometimes in the form of a time and materials contract.

F. Federal Supply Schedule Contracts – This is actually another form of an IDIQ contract where there are several offerors goods available via a catalogue.

II. KEY CONCEPTS AND CLAUSES IN CONTRACT FORMATION

In the commercial marketplace, parties spend time negotiating the terms of the contract before coming to a meeting of the minds. When you accept a government contract, the government relieves you of much of this task. There are matrices which guide the Contracting Officer's decision as to what clauses will be inserted into your contract.[29] Ordinarily, there is little or no opportunity for these provisions to be negotiated. In most instances, altering these terms or removing them altogether can only be made with the approval of the appropriate authority, usually the head of the agency.[30]

1. The *Christian* Doctrine – Even when you don't agree, you must agree. Under the Christian Doctrine[31], since Congressional law and federal regulations having the force and effect of law express major governmental policy concerns, mandatory contract clauses are incorporated into contracts even when they are omitted.

2. Changes Clause – 48 C.F.R. §§ 52.543.1, 52.243-3 - The FAR embodies a preference for bilateral change orders that are fully negotiated between the parties;

[29] A copy of the Contract Clause Matrix is attached as Appendix C.
[30] FAR § 1.401 (2005).
[31] *G.L Christian & Assoc. v. United States,* 312 F. 2d 418 (Cl. Ct. 1963), *reh. den*., 320 F.2d 345 (Cl. Ct. 1963), *cert. den*., 375 U.S. 954 (1963).

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however, the Contracting Officer has the unilateral right to order changes in the contracts terms, performance, and price. These can be additive or deductive. When a unilateral "Change Order" is issued, the contractor is entitled to an equitable adjustment for the costs arising out of the requested change. This includes a reasonable allowance for profit. The Change Order can be initiated by either the government or the contractor, except that contractor issued requests are called "Proposed Changes Orders" and must wait for government approval.

A key concept is the "constructive change" which, as a general rule, includes any action directing a change in the performance of a government contract taken by a Contracting Officer, or his or her designee, under a valid contract but lacks the formalities required by applicable law and contract. To establish the existence of a "constructive change," the contractor must show, at a minimum, that:

(1) the Government, either expressly or impliedly, gave an instruction that required the contractor to incur additional work;

(2) such work must have been outside the scope of work for the original contract;

(3) there must have been an increase in costs to the contractor; and

(4) the work was not volunteered by the contractor.[32]

In addition, the contractor must inform the Contracting Officer that it interprets the order as a "change" to the contract and provide the factual basis for its conclusion within 20 days of the receipt of the change order.

3. Differing Site Conditions Clause– 48 C.F.R. § 52.236-2 – In many construction contracts, which are ordinarily fixed price, unanticipated site conditions create substantial risks to contractors. The differing site conditions clause is intended to shift the burden from the contractor back to the government when the contractor encounters site conditions that differ substantially from those represented to exist by the government.

There are two types of differing site conditions:

(1) Subsurface or latent physical conditions; and

(2) Unknown physical conditions at the site that are of an unusual nature and differ materially from the type of conditions usually encountered in the type of work contemplated by the contract.

However, the contractor must also comply with the Site Investigations Clause and the Physical Data Clause. These two clauses require the contractor to represent that it has made a reasonable inspection of the site and understands the subsurface tests. The government is excused from the contractor's interpretations of or assumptions made based on the provided data.

As a general rule, the contractor must provide the government with prompt notice of the differing condition, the condition must pre-date the contract, and be at the site in question. The difference must be material, reasonably unforeseeable, the contractor must be able to show that it relied on the government's specifications, that such reliance was reasonable, and that the contractor was damaged by such reliance.

4. Warranty Clauses – Unlike the commercial marketplace, the Government retains the right to decide whether or not to accept a warranty. In some instances, the Contracting Officer may deem the inclusion of a warranty to be adverse to the government's best interests for price or other reasons. In other instances, such as the use of technical data, the government may require the contractor to provide a warranty.[33] The FAR sets forth certain factors that the Contracting Officer is to evaluate prior to accepting or rejecting a warranty.[34]

5. Rights in Patents, Technical Data, and Computer Software Clauses – The complexity of the FAR's requirements in purchasing "Rights in Patents, Technical Data and Computer Software" is not to be underestimated.[35] With respect to patents, the government seeks to obtain a "nonexclusive, nontransferable, irrevocable, paid-up license to practice, or have practiced for" it, any subject invention.[36]

[32] *See CEMS, Inc. v. United States*, 59 Fed. Cl. 168, 203 (2003).

[33] FAR § 46.705 (2005).
[34] FAR § 46.703 (2005).
[35] FAR, Part 27 (2005).
[36] FAR § 27.302(c) (2005). "Subject invention" is defined as an invention the contractor conceives or first reduces to practice during the performance of work under a Government contract. FAR § 27.301 (2005).

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The government usually acquires one of the following classes of rights when purchasing technical data and computer software:

- Unlimited Rights – The government can do anything it wants with the data and any item that incorporates such data, including, reverse engineering and giving the data to a competitor.
- Limited Rights – The government's use is limited to certain specified purposes, but those purposes can be fairly broad.[37]
- Restricted Rights – Limited rights that are limited to computer software.
- Government-purpose Rights – Limited rights that are converted to unlimited rights after a specific period of time or the occurrence of an agreed upon event.[38]

Which rights are granted to the Government is governed by the restrictive legend that is required to be placed on the materials. Since most companies use intellectual property to gain a legitimate advantage over their competitors, competent advice should be sought in order to avoid the risk of unwittingly giving away some or all of its rights.

6. Price Reduction Clauses – The Price Reduction Clause serves as the vehicle for the Truth in Negotiation Act. It provides that if the contract price was "increased by any significant amount" because of a flawed submission of cost or pricing data, the price of the contract is to be reduced accordingly.[39]

7. Certifications and Representations – Commonly called "Reps and Certs," these clauses require a contractor's self certification to a variety of questions ranging from the segregated facilities to Clean Air Act compliance.

8. Termination for Default Clause – The basis for the Government's exercise of rights under a Termination for Default clause rests on the contractor's failure to perform or failure to proceed with the required work. The Contracting Officer is required to review certain factors in order to justify the decision:

- The terms of the contract, plus applicable laws and regulations;
- The facts underlying the contractor's specific failures and possible excuses or justifications for such failures;
- The availability of other sources of supplies for like goods or services;
- The government's need for timely completion of the work;
- The effect the default termination would have on other contracts;
- The impact such termination would have on advance payments or loans; and
- Other relevant factors.

As a part of the evaluation, the Contracting Officer must also confer with appropriate technical personnel and legal counsel. The government is required to issue a show cause letter or cure notice to the contractor specifying in sufficient detail the defects in the contractor's performance and provide a reasonable opportunity in which the contractor can cure the stated defects. In addition, the Government is also required to give notice to applicable sureties supplying the performance bonds in order to allow the sureties to work with the contractor or complete the work themselves.[40] In addition, the breach of any of the statutes listed in the "Contract Termination – Debarment" clause is grounds for termination or debarment.[41]

9. Termination for Convenience Clause - Under the Termination for Convenience clause, the Government has very broad rights to terminate for little or even no reason. The rights of the parties are established by the clause.[42] The contractor is entitled to some compensation.

10. Mandatory and Necessary Flowdown Clauses – Government and private organizations have, from time to time, produced lists of flowdown clauses, but they are rarely good for very long due to Congressional changes in law and agency changes in

[37] One of the rights obtain by the government under restricted rights includes the right to modify, combine, or adapt portions for derivative works. FAR § 27.404(e)(1)(iv) (2005).
[38] FAR § 27.401 (2005).
[39] FAR § 15.804 (2005).
[40] *See* FAR, Part 49 (2005).
[41] FAR 52.222-12 (2005).
[42] FAR §§49.101, 49.201 and 52.249-2 (2005).

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the regulations. Moreover, lists of mandatory flowdowns are hard to produce because there is no single combination of flowdowns that is applicable to every prime-subcontract relationship.

There are two kinds of flowdown clauses: (a) mandatory, and (b) necessary, but not mandatory. Mandatory flowdowns are clauses in the prime contract which, by their own terms, are required to be passed down to lower tier subcontractors in most circumstances. The "Restrictions on Subcontractor Sales to the Government" and the "Prohibition of Segregated Facilities" clauses are two examples.[43] Necessary flowdown clauses are those that a prime or higher level subcontractor must flow down in some fashion to protect itself even though its contract with the government does not require it. The "Changes," "Default" and the "Termination for Convenience" clauses are a few examples.

It takes a careful study of FAR Part 52 in order to understand which clauses must and should be flowed down to subcontractors and which need not be flowed down. It is a complex problem and there is no easy solution.

III. GOVERNMENT ACCOUNTING RULES

1. A General Overview of the Government's Cost Accounting Principles.

The Government's cost accounting rules and principles are located in FAR Part 31. These Cost Accounting Standards ("CAS") represent the Governments uniform method for evaluating the categorization and allowability of a contractor's costs.[44] The two primary goals of the CAS system are (1) to allow an equalized cost comparison when evaluating a contractor's competitive offer, and (2) to attempt to ensure that the Government pays for only those costs that are properly allowable. CAS applies only to certain types of contracts. Even when a contractor is awarded a CAS-covered contract, they may only be obligated to comply with CAS 401 and 402.

Government contractors are required to follow government cost accounting principles when:

(1) The contract price is based on the cost of performance to the contractor;

(2) The contract price is fixed, but the level of competition resulting in the contract was insufficient to assure that the government received a fair price; or

(3) The contract price is modified (up or down) thereby requiring an analysis of the costs associated with the modification.

The FAR lists five non-exclusive factors to be considered in determining the acceptability of contractor's proposed expenses:

(1) Reasonableness;

(2) Allocability;

(3) CAS standards, to the extent applicable, and GAAP'

(4) The specific terms of the contract; and

(5) Specific FAR limitations on the treatment of certain costs.[45]

2. Cost Reasonableness.

Of these five listed factors, the most important is the first - cost reasonableness. The reasonableness of specific costs must be examined with care whenever there is a possibility that the contractor's expenses might not be subjected to competitive restraints. A "prudent person" standard applies:

> A cost is reasonable if, in its nature and amount, it does not exceed that which would be incurred by a prudent person in the conduct of competitive business.[46]

In making a determination as to cost reasonableness, the Contracting Officer is required to consider four factors:

(1) Whether the cost is the type generally recognized as ordinary and necessary for the contractor's business operations;

(2) Whether there are limitations or duties required by such common factors as the use of sound business practices, arm's length bargaining, Federal and state laws, and the contract's terms;

(3) Whether the action resulting in the cost is one that a prudent business person would, considering the responsibilities owed to the business owners,

[43] A sample list of some mandatory flowdown clauses is attached as Appendix D.
[44] A copy of the Fundamental Requirements of the Cost Accounting Standards is attached as Appendix E.

[45] FAR § 31.201-2(a) (2005).
[46] FAR §31.201-3 (2005).

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employee, customers, the Government and the public at large, would undertake under the circumstances; and

(4) Whether there is a significant deviation from the contractor's established practices that may increase the contract costs without valid justification.

"Unreasonable Costs" - The determination that costs are or are not reasonable must be fact specific. In general, the disallowance of costs falls into three categories: (1) excessive, (2) unnecessary, or (3) incurred by poor judgment or mistake. The Government should not attempt to apply an objective standard based on what it believes the costs "should have been.[47] Although, the Government carries the burden of proof to show that a cost is unreasonable, rulings by the Boards of Contract Appeals and the Courts often sustain marginal determinations that a contractor's costs are unreasonable. Moreover, even when successful, the legal, accounting and internal costs associated with challenging the Government's determine can often outweigh the value of the disallowed cost. If there are concerns about the reasonableness of certain costs prior to contract performance, a simple method of avoiding such disputes is to enter into an advance agreement with the Contracting Officer to address the reasonableness of such costs.

3. Cost Allocability.

The contractor has the discretion to select a method of allocation provided it conforms to CAS and GAAP regardless of how that method of allocation impacts the costs claimed under a given contract. The FAR defines "allocability" as follows:

> A cost is allocable if it is assignable or chargeable to one or more cost objectives on the basis of relative benefits received or other equitable relationship. Subject to the foregoing, a cost is allocable to a Government contract if it –
>
> (a) is incurred specifically for the contract;
>
> (b) benefits both the contract and other work, and can be distributed to them in reasonable proportion to the benefits received;
>
> (c) is necessary to the overall operation of the business, although a direct relationship to any particular cost objective cannot be shown.[48]

Direct Costs – To be considered a "direct" cost, the cost must be segregable and incurred for a specific contract. A "but for" test is commonly used to determine if a cost was properly incurred for a specific contract.[49] Costs that a contractor would be likely to incur regardless of the contract will be disallowed as "direct" costs.[50]

Indirect Costs - Costs that are not segregable and benefit more than one contract will usually be treated as an "indirect" cost.[51] The Government will allow some or all of the cost to be recovered if there is a demonstrable benefit to the contract or if the incurrence of such costs are necessary to the contractors overall business operations.[52]

4. CAS and Generally Accepted Accounting Principles ("GAAP").

CAS represents accounting rules that must be followed. If CAS is inapplicable, the contractor is required to the less restrictive "GAAP." In general, GAAP requires that the treatment of costs be (a) accurate, (b) equitable, and (c) consistent. In certain instances, the Government has disallowed a contractor's costs when there has been insufficient accounting support.[53]

5. Contract Provisions.

Just as a contractor and the Contracting Officer can agree to classify certain costs so that they are recoverable, the contract itself can specify that certain costs are or are not recoverable.

6. Limitations Imposed by Law or Regulation.

Subpart 31.2 of the FAR makes certain costs unallowable. For instances, the government will always challenge:

---

[47] *Bruce Constr. Corp. v. U.S.*, 423 F.2d 516 (Ct. Cl. 1963).

[48] FAR §31.201-4 (2005).

[49] *IBM Corp.*, FAACAB No. 67-28, 67-2 BCA ¶ 6470 (1967).

[50] *The Housing Authority of the City of New Haven*, HUDBCA No 74-3, 78-2 BCA ¶13,327 (1978).

[51] FAR §31.203 (2005).

[52] FAR 31.201-4(c) (2005).

[53] *Air Flite Components, Inc.*, FAACAB No. 67-25m 67-1 BCA ¶ 6188 (1967).

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- Advertising and promotional costs;
- Bad debt and related legal costs
- Contributions, donations and other costs primarily directed towards the created or maintenance of goodwill;
- Interest expenses (as distinguished from the cost of money for "facilities capital";
- Costs for fines and penalties;
- Entertainment expenses;
- Lobbying costs; and
- Losses on other contracts.

On the other hand, costs generally considered to be allowable so long as the contractor complies with specific accounting rules are:

- Computer equipment lease costs;
- Personal service compensation;
- The cost of money;
- Depreciation;
- Bid and proposal costs;
- Independent research and development costs;
- Employee relocation costs;
- Rental costs for real or personal property;
- Taxes; and
- Costs associated with the termination of a contract, except for default.

7. CAS Applicability.

(A) Full CAS Coverage - The applicability of CAS is usually triggered by the contractor reaching certain thresholds in a "business unit" or "business segment."[54] A contractor must be in full compliance with CAS when:

(1) Performing a negotiated defense contract or subcontract in excess of $100,000, if the business unit to which it is awarded is performing one or more CAS-covered contracts and has not received notification of final acceptance of all items of work to be delivered under all such contracts.[55]

(2) Performing a single national defense CAS-covered contract, not qualifying under any of the total exemptions, or $10 million or more.[56]

(3) The contractor has received $10 million or more in total national defense CAS-covered contract awards during the contractor's preceding cost accounting period.[57]

(4) The contractor has received national defense CAS-covered contract awards totaling less $10 million during its preceding cost accounting period, when the total of such awards represent 10% or more of the business units total sales.[58]

(B) Limited CAS Coverage – In certain instances, contractors are required to follow only CAS 401 (Consistency in Estimating, Accumulating, and Reporting Costs) and CAS 402 (Consistency in Allocating Costs Incurred for the Same Purpose). These instances exist when:

(1) There is an otherwise CAS-covered contract(s) or subcontract(s) with a foreign concern,[59] or

(2) The contract is CAS-covered and less than $10 million, and (a) the business unit received less than $10 million in awards of CAS-covered contracts in its immediately preceding cost accounting period, and (b) the sum of such awards equaled less than 10% of the business unit's total sales during that period, and (c) the business unit had not previously received a single CAS-covered contract award of $10 million or more in its current cost accounting period.[60]

[54] A "business unit" is defined as any segment of a business organization or the organization itself, which is not itself divided into segments. 4 CFR § 331.20(i) (2005). A "segment" is the subdivision of a business organization, such as a division, department, branch, or office, that reports directly to the home office and that usually has profit responsibility for a particular product or service. 4 CFR § 331.20(j) (2005).

[55] 4 CFR § 331.30(b)(7) (2005).
[56] FAR §30.302(a)(1) (2005).
[57] FAR §30.302(a)(2) (2005).
[58] FAR §30.302(a)(3) (2005).
[59] FAR §30.302(e) (2005).
[60] FAR §30.302(b)(1)-(2) (2005).

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(C) Exemptions from CAS Coverage – There are over a dozen categories of contracts that are wholly exempt from CAS coverage:

(1) Contracts and subcontracts awarded by sealed bid[61];

(2) Negotiated contracts and subcontracts not in excess of $100,000;[62]

(3) Contracts and subcontracts with small businesses;[63]

(4) Contracts and subcontracts awarded to foreign governments, their agents or their instrumentalities;[64]

(5) Contracts or subcontracts where the price is set by law or regulation;[65]

(6) Contracts and subcontract where the price is based on established catalogue or market prices of commercial items sold to the general public in substantial quantities;[66]

(7) Contracts and subcontracts of $500,000 or less if the entities business unit is not currently performing any national defense CAS-covered contracts;[67]

(8) Non-defense related contracts and subcontracts based on adequate price competition;[68]

(9) Nondefense contracts and subcontracts awarded to business units that are not currently performing any CAS-covered national defense contracts;[69]

(10) Contracts and subcontracts with most educational institutions;[70]

(11) Contracts awarded to a labor surplus concern pursuant to labor surplus area set-aside;[71]

(12) Contracts or subcontracts awarded to qualified United Kingdom entities;[72]

(13) Subcontracts under certain NATO ship programs to be performed by a foreign concern outside the U.S;[73]

(14) Contracts and subcontracts executed and wholly performed outside the United States, including its territories and possessions;[74]

(15) Firm fixed-price contracts and subcontracts awarded without the submission of cost data, provided that the failure to submit such data is not attributable to a waiver for the requirement for such cost or pricing data.[75]

IV. SOCIO-ECONOMIC POLICY IN GOVERNMENT CONTRACTS

The FAR imposes requirements on government contractors that are not directly related to the performance of the work. Instead, these requirements fulfill some other public interest. As a general rule, these requirements relate to economic and social agendas. As briefly set forth below, contractors may find it necessary to implement new processes and procedures to collect the information necessary to establish compliance with the government's socio-economic programs. Examples of such programs include:

1. Labor Practices.

The Contract Work Hours Standards Act[76] requires the wages of all laborers and mechanics employed by any contractor or subcontractor on any federal public works project be computed on the basis of a standard workday of eight hours and a workweek of 40 hours. Any work above that standard is compensated at a rate of at least one and one-half times the basic rate of pay for all hours worked in excess of eight hours in any calendar day or in excess of 40 hours in the workweek. A violation renders the contractor liable for unpaid wages, plus liquidated damages, and possible criminal penalties.

Under the Walsh-Healey Service Contract Act[77] and Davis-Bacon Act[78] contractors are required to pay their employees working on government service and government construction contracts, respectively, no less than the prevailing wage in the

[61] FAR §30.301(b)(1) (2005).
[62] FAR §30.301(b)(2) (2005).
[63] FAR §30.301(b)(3) (2005).
[64] FAR §30.301(b)(4) (2005).
[65] FAR §30.301(b)(5) (2005).
[66] FAR §30.301(b)(6) (2005).
[67] FAR §30.301(b)(7) (2005).
[68] FAR §30.301(b)(8) (2005).
[69] FAR§30.301(b)(9) (2005).
[70] FAR §30.301(b)(10) (2005).
[71] FAR §30.301(b)(11) (2005).
[72] FAR S30.301(b)(12) (2005).
[73] FAR §30.301(b)(13) (2005).
[74] FAR §30.301(b)(14) (2005).
[75] FAR §30.301(b)(15) (2005).
[76] 40 USC §§ 3701-3708 (2005).
[77] 41 USC §§ 351-58 (2005)
[78] 40 USC §§ 276a – a-5 (2005)

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locality as determined by the Department of Labor. The net result is that businesses may be required to pay employees working on a government project a premium wage.[79]

2. Environmental Concerns – The FAR contains numerous policies and procedures for implementing various statutes related to conservation of the environment[80] as well as a desire to promote the use of renewable resources.[81]

3. Preferences for the Use of Small, Minority, or Woman-Owned Businesses.

There are a variety of government programs that provide preferences to entities that are (1) owned and controlled by certain classes of people who own "small businesses" or (2) simply qualify as a "small business" based on the applicable standard. As set forth in a variety of Acts, the Small Business Administration works closely with federal agencies and contractors so that small business receives a fair share of the government contracting opportunities.

Small Business - Whether a business is "small" requires referencing the "Standard Industrial Classification" ("SIC") Code.[82] The SIC Code classifies businesses in any given industry on the basis of (1) number of employees, or (2) average annual revenue over the past three years.

Woman-Owned Small Business – A women-owned small business must be 51 percent owned by a woman or group of women. In addition, its daily operations must be actively overseen by a woman. If the company meets this requirement, it can self-certify to its status.[83]

Small Disadvantaged Business – A small disadvantaged business ("SDB") must be owned by an individual who is economically and socially disadvantaged, i.e., African-Americans, Hispanic-Americans, Asian-Pacific Americans, Subcontinent Asian-Americans, and Native Americans.[84] The SDB must be certified as an SDB by the Small Business Administration ("SBA"), and the net worth of each person upon whom the SBA certification is based must be less than $750,000.[85] As with women-owned businesses, the management and daily activities of the SDB must be overseen by the person upon whom the certification is based.

4. Drug-Use In The Workplace – In implementing the Drug-Free Workplace Act, the government requires that all non-exempt contractors have written policies and procedures designed to maintain a drug-free workplace.[86] The failure to have and certify to the existence of such a policy will result in a determination that the offeror is not a responsible source.[87]

5. Preferences for American-Made Products – *See* Section I.1, above.

6. Anti-Discrimination Policies – Beginning with Executive Order 11246, September 24, 1965, the federal government has used its economic power to further nondiscrimination in the workplace. In addition to the requirement that a contractor certify that it does not use segregated facilities[88], Subpart 22.8 also requires certain reporting to the Equal Employment Opportunity Commission as well as an affirmative action plan. Age discrimination is prohibited[89] and government contractors must take affirmative action to employ qualified veterans.[90]

V. RESOLVING DISPUTES RELATED TO A GOVERNMENT PROCUREMENT

1. Bid Protests.

A bid protest is a challenge to:

- the government's decision to accept (or reject) a bid or proposal,
- the award of a government contract, or
- the specifications or process by which the government states an intent to evaluate a proposal.

79 A sample Solicitation, including a DoL Wage Determination, is attached as Appendix F.
80 FAR § 23.201 (2005).
81 FAR § 23.202 (2005).
82 13 CFR, Subpart 121 (2005).
83 *See* FAR §52.219-8 (2005).
84 *See* 13 CFR, Part 124, Subpart B (2005).
85 *See* FAR § 52.219-8 (2005).
86 FAR § 23.504(a)(1) (2005).
87 FAR § 23.504(a) (2005).
88 FAR § 52.222-21 (2005).
89 FAR § 22.9 (2005).
90 FAR § 22.13 (2005)

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The grounds on which protests have been filed are vast and varied and can include everything from improper evaluations the purchasing activity to the proposed contractor not being responsible or responsive.

In order to file a valid protest, the contractor must be an "interested party." In general, this means that the protestor must be:

- an actual or prospective bidder or offeror;
- whose direct,
- economic interests;
- would be affected
- by the award or failure to award the contract.[91]

Although a significant number of protests are filed with the Government Accountability Officer ("GAO") or the procuring activity, an aggrieved bidder or offeror has a choice of four forums in which to complain: (A) the contracting activity[92], (B) the GAO[93], (C) the U.S. Court of Federal Claims, or (D) the district courts.[94]

If filed before the award of a contract, a bid protest to the contracting activity or the GAO can result in the automatic stay of the process while the protest is pending. The failure to file a timely protest is tantamount to a waiver of the right to protest. This period is usually ten days or less.[95] The agency is required to make best efforts to resolve the protest within 35 days.[96] The GAO is required to render a decision within 100 days.[97]

2. Contract Disputes.

Given the Government's broad rights under the contract, it is not unusual for there to be a difference of opinion about a contractor's performance and the amount it should be paid for such performance. In general, an aggrieved contractor has three primary options for seeking a resolution of a disputed matter: (A) Resolve the Dispute by Agreement; (B) ADR, or (C) the Contract Dispute Act ("CDA"). Since 1978, the resolution of these disputes has been governed largely by the CDA[98] and the submission of the claim to the Contracting Officer and a Board of Contract Appeals. The government has stated a preference for resolving disputes at the contracting officer level.[99] If that option is not available, the government would still prefer to avoid the formal process of the CDA and has expressly authorized the use of ADR.[100]

VI. METHODS OF ENFORCEMENT AFFECTING GOVERNMENT CONTRACTORS

The Government has a vast array of weapons through which it can address improper business practices. These weapons include everything from price adjustments, contract terminations, and suspension and debarment, to administrative offsets and fines, civil suits, *qui tam* suits, and criminal prosecution.

1. Improper Business Practices – Several prohibited business practices are listed in Part 3 of the FAR. Engaging in any of the following practices can result in a finding of "non-responsibility" to suspension or debarment.

- Offering Gratuities - Offering or giving things or services of value to Government employee.[101] Some examples would include such common items as tickets to a sports event, theatre tickets, expensive meals, vacations, free repairs, etc.
- Bribes and Bribery – Offering or giving things or services of value to a government employee directed at obtaining a contract or obtaining favorable treatment under a contract.[102]
- Violations related to the Integrity of the Procurement Process – Examples of such prohibited actions include discussions between the contractor's employees and procurement officials regarding or offering future employment, or

[91] 4 CFR § 21.0 (2005) (GAO Bid Protest Regulations). A complete copy of the GAO Bid Protest regulations as attached as Appendix G.
[92] FAR § 33.103 (2005) (the policy for agency procurement protests is set forth in Executive Order 12979.
[93] FAR § 33.104 (2005).
[94] 28 USC § 1491(b) (2005).
[95] *See* 4 CFR § 21.2 (2005).
[96] FAR § 33.103(e) (2005).
[97] 4 CFR § 21.9 (2005).
[98] 41 USC §§ 601-13 (2005).
[99] FAR 33.204 (2005).
[100] *See* 41 USC 605 (2005).
[101] FAR §3.104 (2005).
[102] *Id.*

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the transfer of "source selection" or "proprietary" procurement information.[103] The Procurement Integrity Act imposes on contractors the duty to mark their proprietary information as well as a corresponding duty to make inquiry when it is possible that their action might violation the Act.[104]

2. The Anti-Kickback Act – It is a criminal offense for a subcontractor under a government prime or higher-level contract to knowingly influence the award of the subcontract through the use of payments to the prime or higher-level subcontract.[105]

3. The Byrd Amendment – *See* Section I.1, above.

4. False Statements – It is a crime for a contractor to make an oral or written statement to the government that is false if such a statement is made knowingly or willfully. It is not a high standard. "Knowingly" means only that the action was done with knowledge and "willfully" only means that the act is deliberate.[106] In the context of government contracts, the burden is on the contractor to establish that all data that it has an affirmative duty to disclose to the government complies with applicable legal requirements.[107]

5. False Claims – A contractor and/or its personnel violate the False Claims Act ("FCA") when they:

- Knowingly[108] present or cause to be presented to the federal government a false or fraudulent claim for payment;
- Knowingly use or cause to be used a false record or statement to get a claim paid by the federal government;
- Conspire with others to get a false claim paid by the federal government; or
- Knowingly use a false record to statement to conceal, avoid, or decrease an obligation to pay money to the government.[109]

The FCA also reaches indirect actions; therefore it is also improper for a subcontractor to cause the prime contractor to submit a false claim.[110]

The penalties for violating the FCA are harsh. For each claim, the submitter is required to pay a mandatory civil penalty of between $5,000 and $10,000, plus costs and attorney's fees, plus 3X the amount of damage to the government.[111]

A key component of the FCA is the bounty-hunter provisions that permit individual citizens to file claims on behalf of the federal government.[112] The FCA also makes it illegal to retaliate against an employee for taking lawful actions in furtherance of the goals of the FCA.[113]

6. Truth in Negotiation Act – For larger procurements, a powerful remedial tool held by the government involves a "defective pricing action." Such an action centers on the contractor's submission of inadequate cost or pricing data in support of its proposal and the violation of the certification that the cost or pricing data submitted are accurate, complete and current. Such a certification is required to accompany the submission of such data.[114] TINA provides the government the right to demand price reductions when a contractor submits defective cost or pricing data.

TINA applies to negotiated procurements in excess of $ 550,000 unless the contractor can show that it falls into one of three exceptions:

- the price is based on adequate price competition;
- prices are set by law or regulation; or
- a commercial item is being acquired.[115]

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[103] FAR §3.104-8 (2005).
[104] FAR §3.104(8)(a)-(b) (2005). See FAR 15.509 regarding the legends that should be affixed to every page of a contractor's submission to the government which arguably contains proprietary information.
[105] 41 USC §§ 51-54 (2005).
[106] *United States v Smith,* 523 F2d 771 (5th Cir. 1975), *cert den* 429 US 817 (1976), *reh den* 429 US 987 (1976).
[107] *United States v Poarch,* 878 F2d 1355 (11th Cir. 1989) (contractor had affirmative duty to disclose data that was current, complete and accurate).
[108] "Knowingly" means "that a person, with respect to information--
(1) has actual knowledge of the information;
(2) acts in deliberate ignorance of the truth or falsity of the information; or
(3) acts in reckless disregard of the truth or falsity of the information,
and no proof of specific intent to defraud is required." 31 USC § 3729(b) (2005).
[109] 31 USC § 3729(a) (2005).
[110] *See United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943).
[111] 31 USC § 3729(a) (2005).
[112] *See* 31 USC § 3730(b)(1) (2005).
[113] 31 USC § 3730(h) (2005).
[114] 10 USC § 2306a (2005) (the provisions requiring the submission of certified cost or pricing data are known as the "Truth in Negotiations Act" ("TINA")).
[115] *Id.*

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Government Contracting Toolbox Session 902 $$

Kevin McGraw, Doug Cole, Juliette Hirt

Contracting with State and Local Governments

Kevin McGraw

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"Over the last decade, federal, state, and local government agencies nationwide have contracted with private vendors to provide services from data processing to prison operations to adoption. According to the Government Contracting Institute, the value of federal, state, and local government contracts to private firms is up 65% since 1996 and exceeded $400 billion in 2001."

Pioneer Institute for Public Policy Research White Paper, Competition and Government Services: Can Massachusetts Still Afford the Pacheco Law?
Segal, Moore, and Summers, Reason Public Policy Institute (2002)

There are many important distinctions amongst the various state and local contracting rules and practices that firms must take into account. Unfortunately, there are so many differences from state to state and locality to locality that it is impossible to cover them all.

ACC's 2005 Annual Meeting: Legal Underdog to Corporate Superhero—Using Compliance for a Competitive Advantage
October 17-19, Marriott Wardman Park Hotel

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Many of the rules that govern state and local government contracting are modeled after the Federal Rules.

Successful government contract performance begins *prior* to government contract award. The proposal or bid phase of any procurement is critical not only for competitive reasons, but also for establishing the scope of future government contract obligations.

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A firm wishing to do business with a state or local government must pay particular attention to the rules that govern procurements (e.g., the rules of competition), claims entitlement and pricing, and dispute resolution.

Most states and localities have rules that require some form of competition before the state or local government awards a contract.

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There are a myriad of proposal and contract issues to be alert for when bidding on or negotiating a government contract.

Issues

- **Form of solicitation (RFB or RFP?)**
- **Propriety of imposing or accepting the "flow down" of prime contract provisions**
- **Proper interpretation of solicitation requirements, evaluation criteria, prime contract and subcontract clauses**

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More Issues

- **Cost allowability and cost accounting**
- **Novation, name change and alternative guaranty arrangements**
- **Assignment of contract**

Lots and Lots More Issues

- **Proposal and contract pricing concerns**
- **Creation, interpretation, and operation of joint ventures and teaming agreements**
- **Changes and change orders**

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Even More Issues

- **Defective pricing**
- **Defaults**
- **Defective specifications**

Are There Any More Issues?

- **Delays and interference by government officials with the work**
- **Waivers**

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INDEMNIFICATION AND INSURANCE REQUIREMENTS!!!

Many states and localities limit the availability of true breach contract damages through the inclusion of "changes" and " termination for convenience" clauses.

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One of the most often heard complaints when it comes to state and local government contracts is the uncertainty of payment. Whereas the federal government is required to pay contractors within 30 days of successful completion of the contract, some state and local governments aren't bound to that rule.

Virtually all state and local government contracts permit the customer to terminate them for convenience, but this does not necessarily end the contract relationship. Frequently, contractors are entitled to submit termination settlement proposals that permit them to recover incurred performance costs and reasonable profits on the work performed, plus legal, consulting, and other expert fees incurred in preparing the termination proposal.

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It is our recommendation that you strongly impress upon your clients the need to seek your advice on the special restrictions and complexities involved in government contracting, prior to rushing to bid on any government contract. Otherwise your client may "win" a contract, only to learn a very expensive lesson instead of earning a profit.

Contracting with the United States Government

Doug Cole

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Contracting with Foreign Governments

Juliette Hirt

Contracting with Foreign Governments:

FUNDAMENTAL QUESTIONS:

- What issues commonly arise when working with foreign governments?
- What preparation is advisable to avoid foreseeable problems?
- When is outside counsel advisable?

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Contracting with Foreign Governments:

COMMON ISSUES:

- Foreign laws and regulations
- Sole distributor arrangements to avoid bid processes
- Increased risks associate with regime change in some countries
- Cultural barriers
- U.S. restrictions on how you do business with foreign governments: Foreign Corrupt Practices Act*
- U.S. prohibitions and restrictions on dealings with certain governments

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Contracting with Foreign Governments:

BE AWARE OF:

- Varying levels of compliance
- Varying degrees of openness
- Police powers of government

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Contracting with Foreign Governments: The Foreign Corrupt Practices Act (FCPA)

OVERVIEW OF FCPA COMMENTS:

- Background
- FCPA bribery provisions
- FCPA accounting provisions
- Preventing problems
- Dealing with corrupt competitors
- When outside counsel is advisable

Contracting with Foreign Governments: The Foreign Corrupt Practices Act (FCPA)

BACKGROUND: WHO CARES, AND WHY?

- 1970's: Scandals
- 1977: FCPA enacted: corruption, internal controls
- Efforts to level the international playing field
- 1988: Defenses added, international conventions sought
- Organization of Economic Cooperation and Development ("OECD") Convention on Combating Bribery of Foreign Public Officials in International Business Transactions
- 1998: Jurisdiction broadened, implementing international convention

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Contracting with Foreign Governments: The Foreign Corrupt Practices Act (FCPA)

BRIBERY PROVISIONS: AN OVERVIEW

- Overview of the Elements
  - WHO: Issuer, domestic concern, "other person"
  - CORRUPT PURPOSE: Buying influence
  - PAYMENT OR OFFER: Anything of value
  - RECIPIENT: "Foreign official," broadly defined
  - BUSINESS NEXUS: Broadly defined
- Overview of Exceptions and Defenses
  - FACILITATING PAYMENTS: Routine, "grease"
  - BONA FIDE EXPENDITURES: Marketing, performance

Contracting with Foreign Governments: The Foreign Corrupt Practices Act (FCPA)

ACCOUNTING PROVISIONS: AN OVERVIEW

- Application to foreign and domestic affairs
- Overview of the Elements
  - WHO: Issuers
  - WHAT: Accurately document transactions and disposition of assets, keep accurate books and records, maintain internal controls to ensure managerial oversight and accountability
- Overview of Statutory Exceptions and Limitations
  - Insignificant errors
  - "Good Faith"

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Contracting with Foreign Governments: The Foreign Corrupt Practices Act (FCPA)

BRIBERY PROVISIONS: ELEMENTS

WHO:

- Any "issuer"
- Any "domestic concern" using U.S. mail or other instrumentality of interstate commerce
- Any "person" other than an issuer or domestic concern
- Officer, director, employee, agent, or stockholder of an issuer, domestic concern, or "other person"

Contracting with Foreign Governments: The Foreign Corrupt Practices Act (FCPA)

BRIBERY PROVISIONS: ELEMENTS

CORRUPT PURPOSE:

- Act must be done "corruptly"
- Specific language and interpretation
- Results can be counter-intuitive

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BRIBERY PROVISIONS: ELEMENTS

PAYMENT OR OFFER:

- Anything of value
- Specific language and interpretation
- Value may be indirect

Contracting with Foreign Governments: The Foreign Corrupt Practices Act (FCPA)

BRIBERY PROVISIONS: ELEMENTS

RECIPIENT:

- "Foreign official," broadly defined
- Specific language and interpretation
- Royalty, dual roles, and other challenges

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BRIBERY PROVISIONS: ELEMENTS

BUSINESS NEXUS:

- Broadly defined
- Specific language and interpretation
- Customs example

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BRIBERY PROVISIONS: EXCEPTIONS AND DEFENSES

- FACILITATING PAYMENTS:
  - Routine, "grease"
  - Specific language and interpretation
  - Gray areas, police protection example
- BONA FIDE EXPENDITURES: Demos, performance
  - Specific language and interpretation
  - Gray areas
  - Reference accounting provisions

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Contracting with Foreign Governments: The Foreign Corrupt Practices Act (FCPA)

ACCOUNTING PROVISIONS: ELEMENTS

- WHO: Issuers
- WHAT: Accurately document transactions and disposition of assets, keep accurate books and records, maintain internal controls to ensure managerial oversight and accountability
- Sometimes surprising results

Contracting with Foreign Governments: The Foreign Corrupt Practices Act (FCPA)

ACCOUNTING PROVISIONS: EXCEPTIONS AND LIMITATIONS

- INSIGNIFICANT ERRORS
- MINORITY SHAREHOLDERS
  - Only required to act in "good faith" to seek FCPA accounting compliance by that company

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Contracting with Foreign Governments: The Foreign Corrupt Practices Act (FCPA)

WHAT PREPARATION IS ADVISABLE?

- Suggestions for small non-issuers
  - Educate key staff
  - Include FCPA compliance in all relevant deals
  - See sample forms and language (ebrary)
- Additional suggestions for issuers and larger companies
  - Formal compliance program
  - High-level authority, oversight
  - See sample policy (General Motors)

Contracting with Foreign Governments: The Foreign Corrupt Practices Act (FCPA)

ACTIVELY MANAGING PROBLEMS:

- Identifying possible violations
- Dealing with corrupt competitors

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Contracting with Foreign Governments:

WHEN IS OUTSIDE COUNSEL ADVISABLE?

- FCPA violation prevention
- Suspected FCPA violations
- Negotiating local laws

Contracting with Foreign Governments:

IN CONCLUSION

- Foreign laws and regulations may apply
- FCPA is complex, its application uncertain
- May require resisting strong business pressures
- Education and oversight are critical
- Outside counsel may be necessary

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ACC 2005 Conference – Government Contracting Toolbox

THIS PACKET CONTAINS:

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Panel Description:

902 $$ Government Contracting Toolbox
(presented by ACC's Small Law Department Committee) Want to get into the government contracting business but don't know how? Our contracting experts will give you all the law you need to fill your personal toolbox. You will learn how to distinguish between a do-it-yourself project and when you need to hire a specialist, how the law of contracting with federal agencies, state governments, and government-owned companies differs from the law of contracting with any other customer, how to determine which statutes and regulations apply to your contract, and how signing a public contract can alter how you do business and may affect your property rights.

Presentation Outline:

I. Overview
- A. General Rules About Dealing with Governmental Entities
  1. Sovereign Immunity
  2. Square Corners
  3. Are They Warranted?
  4. If you want to feed at the public trough . . . .
- B. Types of entities affected by laws specific to government entities
  1. Federal, state, local, foreign governments
  2. Governmental agencies, federally-owned companies, organizations receiving funding from or under contract with the foregoing
  3. Prime Contractors
- C. Ways your company can become subject to such laws
  1. Intentionally - direct contract, bid process
  2. Unintentionally – subcontracting, working with an organization you didn't know was subject to the laws and regulations
- D. How Public Contracting WILL Affect You
  1. Hiring and Labor Practices

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2. Increased Costs to Doing Business
3. Information Disclosure and Technological Transfusion
4. Compliance Issues
5. Accounting Practices
6. Subcontracting Practices
7. Officer Compensation and Benefits

E. Business-critical considerations
1. Deal-killing issues (indemnification, liability, insurance)
2. Importance of early involvement (help deal-makers identify deal-killers)

II. Contracting with the Federal Government
A. The Procurement Process
B. Aspects of your business that may be affected
1. Employment practices
2. Compliance issues (affirmative action, no gifts to contracting officer, collusion or "bid rigging")
3. Accounting issues (custom development vs commercial products)
C. Dispute Resolution

III. Contracting with State and Local Governments
A. State purchasing statutes and regulations
B. Requests for Bids or Proposals/Exception Language
C. Issues to be aware of
D. Constitutional/statutory prohibitions/restrictions on indemnification

IV. Contracting with Foreign Governments

A. Foreign Corrupt Practices Act ("FCPA")

i. History

1. Enacted in 1977, following highly publicized incidents of U.S. companies bribing foreign officials. Scandalized U.S., hurt image abroad, and interfered with diplomatic efforts. FCPA prohibited bribery and required publicly-traded companies to maintain transparent accounting and internal controls, including accounting for bribes as such.Exception for routine "grease" or "facilitating" payments.

2. Amended in 1988, due to perception that FCPA put U.S. companies at a competitive disadvantage. Added affirmative defenses for (i) activities expressly permitted under the foreign jurisdiction's laws, (ii) bona fide marketing and product demonstration expenses, and (iii) contractual obligations. Directed executive branch to seek parity through diplomatic efforts and international agreements.

3. Amended in 1998, to implement an international Convention on Combating Bribery. Broadened reach of FCPA to cover foreign nationals, and extended jurisdiction to activities outside the U.S.

ii. Statute and Construction

ANTI-BRIBERY PROVISIONS

a. Statute

15 U.S.C. §78dd-1 (Prohibited trade practices by issuers)
15 U.S.C. §78dd-2 (Prohibited trade practices by domestic concerns)
15 U.S.C. §78dd-3 (Prohibited trade practices by others)

b. Five Elements

(1) WHO LIABLE: Any individual, firm, officer, director, employee, or agent of a firm, any stockholder acting on behalf of a firm who violates OR orders, authorizes or assists someone else to violate.

a. Broad jurisdiction extends to "domestic concerns" (U.S. citizen, national, or resident; or organization with principal place of business in the U.S. or organized under laws of a U.S. state, territory, possession, or commonwealth), "issuers" (corporation with U.S.-registered securities or required to file periodic reports with the SEC); and foreign nationals or businesses (with some act in the U.S.)

b. U.S. parent can be liable for foreign subsidiary if it authorized, directed, or controlled the activity

c. U.S. residents or citizens acting on behalf of foreign organizations can be liable

d. Foreign companies and individuals can be liable by causing, directly or through agents, an act in the territorial U.S. in furtherance of a corrupt payment

(2) CORRUPT PURPOSE: Intent to induce recipient to use his or her position or influence. Includes directly or indirectly influencing any act, omission, or decision; affecting an outcome, securing an advantage. Any situation where the recipient has discretion should receive careful scrutiny. "Intent" includes conscious disregard, or deliberate ignorance. Discerning the difference between an unlawful act and a lawful "facilitating or expediting payment" (discussed below) can be challenging.

(3) PAYMENT: Includes authorizing, offering, or promising to pay money or anything of value. Payment can be made directly, or indirectly through a third party. Payment need not have been consummated.

(4) RECIPIENT: Payment made or offered to a "foreign official," "foreign political party," "party official," or "candidate" Broadly defined, may in some cases include:

a. Member of a royal family

b. Member of a legislative body

c. Official in a state-owned or state-funded organization

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d. Individual with dual capacity, in government agency and also in a separate, private business

e. Charity whose founder also directs a government agency

(5) BUSINESS NEXUS: Payment made to assist in "obtaining" or "retaining" business, or "directing business" to someone.

a. Obtaining or renewing a contract

b. May be broadly construed, e.g., to include obtaining tax breaks or other government benefits that increase profits and provide a competitive advantage.

c. Permitted activities

(1) "Facilitating or expediting payments," commonly referred to as "grease" – Payments to facilitate "routine governmental action," i.e., customary payments to cause officials to do things they are required to do anyway (processing permits, licenses, providing basic government services, unloading cargo, scheduling inspections). If the person has discretion, the action likely is not "routine." Discerning the boundary of lawful "grease" is not simple or intuitive. Anticipate business pressure if "everyone else is doing it." Statue includes specific list of qualifying actions, including obtaining permits, processing documents, police protection, inspections, mail, phone, power, and water services, and "actions of a similar nature."

(2) Affirmative defenses

a. Payment lawful under the local *written* laws. Local custom or practice is not a defense, unless you can find it written in a local law or court precedent.

b. Money was a "reasonable and bona fide expenditure," spent as part of promoting, demonstrating, or explaining a product or performing a contractual obligation. Discerning whether a benefit to a foreign government agent is a permitted promotional expense or an unlawful gift can be challenging. Note that even if it is a legitimate marketing expense, it must be detailed in the company records with adequate detail to permit the

ACCOUNTING PROVISIONS

a. Statute

15 U.S.C. 78m(b)(2)(accurate records, internal controls)
15 U.S.C. 78m(b)(5)(can't knowingly circumvent or fail to implement internal controls, or knowingly falsify records)

b. Elements

a. WHO: "Issuer" required to file with the SEC

b. WHAT'S REQUIRED: [A] Keep accurate books and records, fairly reflecting transactions and disposition of assets, and [B] Maintain a system of internal controls, ensuring that management actually controls assets and transactions, and that assets and transactions are accurately recorded.

c. INTENT: Violation for "knowingly" failing to implement a system of internal controls, or "knowingly" circumventing the system or falsifying books, records or accounts.

c. Limits and Exceptions

(1) No criminal liability for technical or insignificant accounting errors

(2) Parents with a minority interest aren't criminally liable for subsidiary's acts IF parent acted in "good faith" to encourage subsidiary to comply with FCPA accounting provisions

2. Sanctions

1. Criminal penalties:

b. Corporations – up to $2.5M for accounting breach, $2M for bribery. Combined fines have exceeded $20M.

c. Individuals – up to $5M and 20 years for willful accounting violations, up to $100,000 and 5 years imprisonment for bribery violations. Company may not pay on behalf of the individual(s).

2. Civil penalties:

d. Fines up to $10,000 per person or organization

e. Additional court-imposed fines up to $100,000 per person, and up to $500,000 per organization

f. Injunction against improper practices

3. Other government action:

g. Exclusion from doing business with the Federal government

h. Ineligible for export license

i. Suspension or bar from securities activities

j. Other bars or exclusions

2. Preventing FCPA Problems

a. Implement comprehensive formal compliance and ethics program (*see, e.g.,* Metcalf & Eddy)

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d. POLICY: Clearly articulated corporate policy, requiring employees, consultants, and agents to reduce prospective FCPA violations;

e. SR EXEC OVERSIGHT: Assign senior official to establish, update, and oversee compliance with internal policies, standards, and procedures; establish monitoring and auditing systems; investigate and audit as needed to detect criminal conduct;

f. COMMITTEE REVIEW: Establish disinterested committee to ensure appropriate due diligence in selecting and evaluating agents, consultants, joint ventures, and applicable contracts, to ensure FCPA compliance;

g. SPECIFIC PROCEDURES: Restrict discretion of corruptible individuals; Maintain "due diligence" files as to repute and qualification of prospective agents & consultants;

h. PERIODIC TRAINING: Regularly educate employees, agents, affiliates, and consultants about FCPA;

i. DISCIPLINARY MECHANISMS: Discipline not only for malfeasance, but also for failure to detect violations;

j. REPORTING SYSTEM: Establish system to report suspected criminal conduct without fear of retribution;

k. CONTRACT LANGUAGE: Prohibitions clearly spelled out for agents, consultants, etc, including prohibition on retaining sub-agents without the Company's written consent. Contracts terminable for FCPA violations.

2. Be alert for "red flags" with foreign associates
    a. Unusual payment patterns or financial arrangements
    b. History of corruption
    c. Unusually high commissions
    d. Lack of transparency
    e. Lack of qualifications or resources
    f. Intermediary recommended by a government official
3. Due diligence on business partners (see attached sample internal guidelines)
    a. Private firms, also Commerce Department, have commercial services to help identify trustworthy partners (International Partner Search Program, International Company Profile Program, Flexible Market Research Program)
    b. Commerce Department has Commercial Service Officers stationed overseas, with whom you can discuss prospective partners.
    c. See http://ww.export.gov/comm_svc
4. Internal controls
    a. Due diligence before making promotional or charitable donations, to identify government officials affiliated with proposed recipients
        i. Does the type of charity fit the company's goals and internal policies?
        ii. Can payments be broken down into smaller amounts, thus evading higher level review?
        iii. Are large individual or cumulative payments given special review?
    b. Sources of Compliance Guidance and Assistance
5. Department of Commerce
    a. Mandate is to promote commerce, including by assisting businesses with FCPA compliance. Commerce does NOT have an enforcement function.
    b. For informal assistance and guidance regarding particular (hypothetical) situations, call Catherine Nickerson, Senior Counsel, Office of Chief Counsel for International Commerce, (202) 482-5622.
    c. BEWARE: If you present evidence of past, ongoing, or proposed violations of law, Commerce is required to report it to enforcement agencies.
    d. Useful resources and publications regarding transparency and antibribery: http://www.osec.doc.gov/ogc/occic/tabi.html (see esp the March 2005 ethics report)
6. DOJ – Formal Opinions
    a. Written opinion available re FCPA compliance
    b. Procedure described at http://usdoj.gov/criminal/fraud/fcpa.html
    c. Give-and-take discussion with DOJ attorneys often makes final letter unnecessary
    d. Presumption of compliance in subsequent proceedings BUT ONLY as to the particular company that sought that opinion. For reference, see released letters at: http://www.usdoj.gov/criminal/fraud/fcpa/opiindx.htm

3. Competing with Corrupt Competitors – What can be done?
    a. If feasible, focus company priorities on less corrupt markets.
    b. Diplomatic assistance dealing with corruption or bribery by foreign competitors (provided jointly by State and Commerce Department)
    c. Diplomatic meetings and pressure to comply with international anti-bribery treatises.

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d. Company seeking assistance must agree in writing that it and its affiliates enforce anti-bribery policies.

e. Contact Dept of Commerce International Trade Administration, (202) 482-3896 or www.doc.gov

f. Commerce Department Hotline to report bribery by foreign competitors, through the department's Trade Compliance Center at http://www.tcc.mac.doc.gov/cgi-bin/doit.cgi?218:54:1:5

g. DOJ Hotline to report FCPA violations by U.S. companies, or foreign companies and individuals with adequate U.S. nexus

h. U.S. Government may inform foreign government, to obtain clean procurement or re-open tainted bid. If it's too late for either, DOJ may alert foreign counterparts for prosecution under local laws.

B. Other issues

i. Exclusive business arrangements

a. Governments may be unwilling or unable to work with certain partners.

b. Sole distributor letters

(1) Benefit: Avoid government bid process

(2) Risk: Implied exclusivity/market rights

ii. Customs and credibility

a. Do not assume all foreign governments have similar levels of compliance with laws and contracts.

b. Do not assume foreign government negotiators will accurately describe the laws and regulations governing them

Comprehensive Checklist for Government Contracting

When contracting with federal, state, and local governments:

When contracting with foreign governments:

[ ] Implement effective anti-corruption policies and procedures internally
- [ ] Educate staff about FCPA
- [ ] Ensure adequate transparency and accounting controls to identify suspect activities
- [ ] Establish corporate compliance program with high-level responsibility and authority
- [ ] Confirm due diligence regarding foreign partner qualifications and associations
- [ ] Review existing and form contracts, job descriptions, company policies: Look for places to educate staff and business partners, and clarify expectations
- [ ] Consider requiring business partners and affiliates to agree in writing to avoid bribery, corruption

[ ] Consider requiring "exclusive" partners to permit exceptions if government objects to the partner. Governments may have political motivations different from other customers.
[ ] Consider buying "political insurance" for big deals in unstable countries
[ ] Check U.S. embargoes and sanctions: Can we do business with this government?
[ ] Learn what you can about peculiarities of the legal and political environment
[ ] Identify counsel with localized expertise

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Examples of State Purchasing Statues (selections from Texas Government Code)

CHAPTER 2155. PURCHASING: GENERAL RULES AND PROCEDURES

* * *

Sec. 2155.063. COMPETITIVE BIDDING REQUIREMENT. Except as otherwise provided by this subtitle, a purchase of or contract for goods or services shall, whenever possible, be accomplished through competitive bidding.
Added by Acts 1995, 74th Leg., ch. 41, Sec. 1, eff. Sept. 1, 1995.

* * *

Sec. 2155.075. REQUIREMENT TO SPECIFY VALUE FACTORS IN REQUEST FOR BIDS OR PROPOSALS. (a) For a purchase made through competitive bidding, the commission or other state agency making the purchase must specify in the request for bids the factors other than price that the commission or agency will consider in determining which bid offers the best value for the state.

(b) For a purchase made through competitive sealed proposals, the commission or other state agency making the purchase:

(1) must specify in the request for proposals the known factors other than price that the commission or agency will consider in determining which proposal offers the best value for the state; and

(2) may concurrently inform each vendor that made a proposal on the contract of any additional factors the commission or agency will consider in determining which proposal offers the best value for the state if the commission or other agency determines after opening the proposals that additional factors not covered under Subdivision (1) are relevant in determining which proposal offers the best value for the state.

Sec. 2155.076. PROTEST PROCEDURES. (a) The commission and each state agency by rule shall develop and adopt protest procedures for resolving vendor protests relating to purchasing issues. An agency's rules must be consistent with the commission's rules. The rules must include standards for maintaining documentation about the purchasing process to be used in the event of a protest.

(b) A state agency that is not subject to Chapter 2001 shall provide public notice of its proposed and adopted protest rules and provide a procedure for public comment on the proposed rules.
Added by Acts 1997, 75th Leg., ch. 1206, Sec. 6, eff. Sept. 1, 1997.

* * *

SUBCHAPTER C. DELEGATIONS OF AND EXCLUSIONS FROM COMMISSION'S PURCHASING AUTHORITY AND CERTAIN EXEMPTIONS FROM COMPETITIVE BIDDING

Sec. 2155.131. DELEGATION OF AUTHORITY TO STATE AGENCIES. The commission may delegate purchasing functions to a state agency.

Sec. 2155.132. PURCHASES LESS THAN SPECIFIED MONETARY AMOUNT. (a) A state agency is delegated the authority to purchase goods and services if the purchase does not exceed $15,000. If the commission determines that a state agency has not followed the commission's rules or the laws related to the delegated purchases, the commission shall report its determination to the members of the state agency's governing body and to the governor, lieutenant governor, speaker of the house of representatives, and Legislative Budget Board.

(b) The commission by rule may delegate to a state agency the authority to purchase goods and services if the purchase exceeds $15,000 . In delegating purchasing authority under this subsection or Section 2155.131, the commission shall consider factors relevant to a state agency's ability to perform purchasing functions, including:

(1) the capabilities of the agency's purchasing staff and the existence of automated purchasing tools at the agency;

(2) the certification levels held by the agency's purchasing personnel;

(3) the results of the commission's procurement review audits of an agency's purchasing practices; and

(4) whether the agency has adopted and published protest procedures consistent with those of the commission as part of its purchasing rules.

(c) The commission shall monitor the purchasing practices of state agencies that are making delegated purchases under Subsection (b) or Section 2155.131 to ensure that the certification levels of the agency's purchasing personnel and the quality of the agency's purchasing practices continue to warrant the amount of delegated authority provided by the commission to the agency. The commission may revoke for cause all or part of the purchasing authority that the commission delegated to a state agency. The commission shall adopt rules to administer this subsection.

(d) The commission by rule:

(1) shall prescribe procedures for a delegated purchase; and

(2) shall prescribe procedures by which agencies may use the commission's services for delegated purchases, in accordance with Section 2155.082.

(e) Competitive bidding, whether formal or informal, is not required for a purchase by a state agency if the purchase does not exceed $2,000, or a greater amount prescribed by commission rule.

(f) Goods purchased under this section may not include:

(1) an item for which a contract has been awarded under the contract purchase procedure, unless the quantity purchased is less than the minimum quantity specified in the contract;

(2) an item required by statute to be purchased from a particular source; or

(3) a scheduled item that has been designated for purchase by the commission.

(g) A large purchase may not be divided into small lot purchases to meet the dollar limits prescribed by this section. The commission may not require that unrelated purchases be combined into one purchase order to exceed the dollar limits prescribed by this section.

(h) A state agency making a purchase under this section for which competitive bidding is required must:

(1) attempt to obtain at least three competitive bids from sources listed on the master bidders list that normally offer for sale the goods being purchased; and

(2) comply with Subchapter E.

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SELECTED SECTIONS TEXAS LOCAL GOVERNMENT CODE

CHAPTER 252. PURCHASING AND CONTRACTING AUTHORITY OF MUNICIPALITIES

* * *

SUBCHAPTER B. COMPETITIVE BIDDING OR COMPETITIVE PROPOSALS REQUIRED

§ 252.021. COMPETITIVE REQUIREMENTS FOR CERTAIN PURCHASES. (a) Before a municipality may enter into a contract that requires an expenditure of more than $25,000 from one or more municipal funds, the municipality must:

(1) comply with the procedure prescribed by this subchapter and Subchapter C for competitive sealed bidding or competitive sealed proposals;

(2) use the reverse auction procedure, as defined by Section 2155.062(d), Government Code, for purchasing; or

(3) comply with a method described by Subchapter H, Chapter 271.

(b) Before a municipality with a population of less than 25,000 may enter into a contract for insurance that requires an expenditure of more than $5,000 from one or more municipal funds, the municipality must comply with the procedure prescribed by this chapter for competitive sealed bidding.

(c) A municipality may use the competitive sealed proposal procedure for high technology procurements and, in a municipality with a population of 25,000 or more, for the purchase of insurance.

(d) This chapter does not apply to the expenditure of municipal funds that are derived from an appropriation, loan, or grant received by a municipality from the federal or state government for conducting a community development program established under Chapter 373 if under the program items are purchased under the request-for-proposal process described by Section 252.042. A municipality using a request-for-proposal process under this subsection shall also comply with the requirements of Section 252.0215.

§ 252.0215. COMPETITIVE BIDDING IN RELATION TO HISTORICALLY UNDERUTILIZED BUSINESS. A municipality, in making an expenditure of more than $3,000 but less than $25,000, shall contact at least two historically underutilized businesses on a rotating basis, based on information provided by the General Services Commission pursuant to Chapter 2161, Government Code. If the list fails to identify a historically underutilized business in the county in which the municipality is situated, the municipality is exempt from this section.

§ 252.022. GENERAL EXEMPTIONS. (a) This chapter does not apply to an expenditure for:

(1) a procurement made because of a public calamity that requires the immediate appropriation of money to relieve the necessity of the municipality's residents or to preserve the property of the municipality;

(2) a procurement necessary to preserve or protect the public health or safety of the municipality's residents;

(3) a procurement necessary because of unforeseen damage to public machinery, equipment, or other property;

(4) a procurement for personal, professional, or planning services;

(5) a procurement for work that is performed and paid for by the day as the work progresses;

(6) a purchase of land or a right-of-way;

(7) a procurement of items that are available from only one source, including:

(A) items that are available from only one source because of patents, copyrights, secret processes, or natural monopolies;

(B) films, manuscripts, or books;

(C) gas, water, and other utility services;

(D) captive replacement parts or components for equipment;

(E) books, papers, and other library materials for a public library that are available only from the persons holding exclusive distribution rights to the materials; and

(F) management services provided by a nonprofit organization to a municipal museum, park, zoo, or other facility to which the organization has provided significant financial or other benefits;

(8) a purchase of rare books, papers, and other library materials for a public library;

(9) paving drainage, street widening, and other public improvements, or related matters, if at least one-third of the cost is to be paid by or through special assessments levied on property that will benefit from the improvements;

(10) a public improvement project, already in progress, authorized by the voters of the municipality, for which there is a deficiency of funds for completing the project in accordance with the plans and purposes authorized by the voters;

(11) a payment under a contract by which a developer participates in the construction of a public improvement as provided by Subchapter C, Chapter 212;

(12) personal property sold:

(A) at an auction by a state licensed auctioneer;

(B) at a going out of business sale held in compliance with Subchapter F, Chapter 17, Business & Commerce Code;

(C) by a political subdivision of this state, a state agency of this state, or an entity of the federal government; or

(D) under an interlocal contract for cooperative purchasing administered by a regional planning commission established under Chapter 391;

(13) services performed by blind or severely disabled persons;

(14) goods purchased by a municipality for subsequent retail sale by the municipality; or

(15) electricity.

(b) This chapter does not apply to bonds or warrants issued under Subchapter A, Chapter 421.

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(c) This chapter does not apply to expenditures by a municipally owned electric or gas utility or unbundled divisions of a municipally owned electric or gas utility in connection with any purchases by the municipally owned utility or divisions of a municipally owned utility made in accordance with procurement procedures adopted by a resolution of the body vested with authority for management and operation of the municipally owned utility or its divisions that sets out the public purpose to be achieved by those procedures. This subsection may not be deemed to exempt a municipally owned utility from any other applicable statute, charter provision, or ordinance.

(d) This chapter does not apply to an expenditure described by Section 252.021(a) if the governing body of a municipality determines that a method described by Subchapter H, Chapter 271, provides a better value for the municipality with respect to that expenditure than the procedures described in this chapter and the municipality adopts and uses a method described in that subchapter with respect to that expenditure.

* * *

§ 252.043. AWARD OF CONTRACT. (a) If the competitive sealed bidding requirement applies to the contract for goods or services, the contract must be awarded to the lowest responsible bidder or to the bidder who provides goods or services at the best value for the municipality.

(b) In determining the best value for the municipality, the municipality may consider:

(1) the purchase price;

(2) the reputation of the bidder and of the bidder's goods or services;

(3) the quality of the bidder's goods or services;

(4) the extent to which the goods or services meet the municipality's needs;

(5) the bidder's past relationship with the municipality;

(6) the impact on the ability of the municipality to comply with laws and rules relating to contracting with historically underutilized businesses and nonprofit organizations employing persons with disabilities;

(7) the total long-term cost to the municipality to acquire the bidder's goods or services; and

(8) any relevant criteria specifically listed in the request for bids or proposals.

(c) Before awarding a contract under this section, a municipality must indicate in the bid specifications and requirements that the contract may be awarded either to the lowest responsible bidder or to the bidder who provides goods or services at the best value for the municipality.

(d) The contract must be awarded to the lowest responsible bidder if the competitive sealed bidding requirement applies to the contract for construction of:

(1) highways, roads, streets, bridges, utilities, water supply projects, water plants, wastewater plants, water and wastewater distribution or conveyance facilities, wharves, docks, airport runways and taxiways, drainage projects, or related types of projects associated with civil engineering construction; or

(2) buildings or structures that are incidental to projects that are primarily civil engineering construction projects.

(e) If the competitive sealed bidding requirement applies to the contract for construction of a facility, as that term is defined by Section 271.111, the contract must be awarded to the lowest responsible bidder or awarded under the method described by Subchapter H, Chapter 271.

(f) The governing body may reject any and all bids.

(g) A bid that has been opened may not be changed for the purpose of correcting an error in the bid price. This chapter does not change the common law right of a bidder to withdraw a bid due to a material mistake in the bid.

(h) If the competitive sealed proposals requirement applies to the contract, the contract must be awarded to the responsible offeror whose proposal is determined to be the most advantageous to the municipality considering the relative importance of price and the other evaluation factors included in the request for proposals.

(i) This section does not apply to a contract for professional services, as that term is defined by Section 2254.002, Government Code.

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Sample Insurance and Indemnification Language

Indemnification and Insurance. Notwithstanding any term or condition of the Agreement or other agreement between Contractor and Customer to the contrary:

(a) In Connection with Work on the Project Site: Contractor will hold Customer, its officers, directors, agents and employees harmless from any and all losses, damages, injuries, liabilities or other expenses ("Losses") to the extent and only to the extent that such Losses result from the negligent acts or omissions of Contractor, it's agents or employees, during and within the scope of their employment while on the Project Site; provided, however, that in no event shall Contractor be required to indemnify Customer for Losses caused by the sole negligence or willful misconduct of Customer, its officers, directors, agents and employees. Contractor shall purchase and maintain without interruption from date of commencement of the Contractor's Work until the substantial completion and acceptance by Manager of Contractor's Work, full and complete insurance as set forth below:

(1) Worker's Compensation including Occupational Disease insurance meeting all statutory requirements of the state in which the Work is to be performed and containing Employers' Liability insurance with limits of $500,000 for each accident/disease. Contractor will not be required to provide a waiver of subrogation in favor of any party.

(2) Comprehensive Auto Liability insurance on an occurrence basis covering all Contractor owned, non-owned, and hired vehicles with limits of $1,000,000 for each occurrence for bodily injury, including death, to any one person and $1,000,000 for each occurrence of property damage.

(3) Comprehensive General Liability (including Products, Completed Operations and Contractual Liability coverage) insurance providing coverage for a combined single limit of $1,000,000 for each occurrence and $2,000,000 in the aggregate.

(4) Umbrella/Excess Insurance with coverage of $1,000,000. Coverage shall apply to all the same risks as the underlying insurance policies listed above.

(5) Contractor will name Customer, only if required by the contract documents, as additional insured to the extent of Contractor's negligence, subject to the limitations herein, on its general liability and automobile policies.

(6) Contractor shall provide certificates of insurance and any other documentation evidencing the foregoing insurance is in effect at the request of Customer.

(b) Other: Contractor will hold Customer, its officers, directors, agents and employees, harmless from Losses to the extent and only to the extent that such Losses are determined to result solely and directly from the negligent acts or omissions of Contractor, it's agents or employees, during and within the scope of employment of such persons, while on the Project Site.

* * *

The Contractor shall hold harmless and indemnify the _____, its officers and employees from every claim or demand which ~~may be made by reason of~~ is ultimately adjudicated to arise from or be the cause of:

a. Any injury to person or property sustained by the Contractor or by any person, firm, or corporation, employed directly or indirectly by them upon or in connection with his performance under the Contract, however caused, unless such injury is caused by the negligence or willful misconduct of the _____.

b. Any injury to person or property sustained by any person firm or corporation, caused by any act, neglect, default, or omission of the Contractor or of any person, firm, or corporation, indirectly employed by them upon or in connection with his performance under the Contract.

c. Any liability that may arise from the furnishing or use of any copyrighted composition, or patented invention, under this Contract. It is the intent of the _____ to adhere to the provisions of the copyright laws; this hold harmless shall not apply to any claim by Contractor that _____ has infringed a patent or copyright of Contractor.

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Examples of Statutory Restrictions on Ability to Indemnify

The Texas Constitution

Article 3 - LEGISLATIVE DEPARTMENT

Section 52 - COUNTIES, CITIES OR OTHER POLITICAL CORPORATIONS OR SUBDIVISIONS; LENDING CREDIT; GRANTS; BONDS

(a) *Except as otherwise provided by this section, the Legislature shall have no power to authorize any county, city, town or other political corporation or subdivision of the State to lend its credit or to grant public money or thing of value in aid of, or to any individual, association or corporation whatsoever, or to become a stockholder in such corporation, association or company. However, this section does not prohibit the use of public funds or credit for the payment of premiums on nonassessable property and casualty, life, health, or accident insurance policies and annuity contracts issued by a mutual insurance company authorized to do business in this State.*

Article 11 - MUNICIPAL CORPORATIONS

Section 5 - CITIES OF MORE THAN 5,000 POPULATION; ADOPTION OR AMENDMENT OF CHARTERS; TAXES; DEBT RESTRICTIONS

Cities having more than five thousand (5000) inhabitants may, by a majority vote of the qualified voters of said city, at an election held for that purpose, adopt or amend their charters. If the number of inhabitants of cities that have adopted or amended their charters under this section is reduced to five thousand (5000) or fewer, the cities still may amend their charters by a majority vote of the qualified voters of said city at an election held for that purpose. The adoption or amendment of charters is subject to such limitations as may be prescribed by the Legislature, and no charter or any ordinance passed under said charter shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State. Said cities may levy, assess and collect such taxes as may be authorized by law or by their charters; but no tax for any purpose shall ever be lawful for any one year, which shall exceed two and one-half per cent. of the taxable property of such city, and no debt shall ever be created by any city, unless at the same time provision be made to assess and collect annually a sufficient sum to pay the interest thereon and creating a sinking fund of at least two per cent thereon. Furthermore, no city charter shall be altered, amended or repealed oftener than every two years. (Amended Aug. 3, 1909, Nov. 5, 1912, and Nov. 5, 1991.)

Texas Lawyer Joke

A Mexican bandit made a specialty of crossing the Rio Grande from time to time and robbing banks in Texas. Finally, a reward was offered for his capture, and an enterprising Texas Ranger decided to track him down.

After a lengthy search, he traced the bandit to his favorite cantina, snuck up behind him, put his trusty six-shooter to the bandit's head, and said,

"You're under arrest. Tell me where you hid the loot or I'll blow your brains out."

But the bandit didn't speak English, and the Ranger didn't speak Spanish.

Fortunately, a bilingual lawyer was in the saloon and translated the Ranger's message. The terrified bandit blurted out, in Spanish, that the loot was buried under the oak tree in back of the cantina.

"What did he say?" asked the Ranger.

The lawyer answered, "He said 'get lost, you turkey. You wouldn't dare shoot me.'"

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FCPA Antibribery Provisions (DOJ/Commerce)

Also available at: http://www.usdoj.gov/criminal/fraud/fcpa/dojdocb.htm

FOREIGN CORRUPT PRACTICES ACT

ANTIBRIBERY PROVISIONS

United States Department of Justice
Fraud Section, Criminal Division
10th & Constitution Avenue, NW (Bond 4th Fl.)
Washington, D.C. 20530
phone: (202) 514-7023
fax: (202) 514-7021
internet:
www.usdoj.gov/criminal/fraud/fcpa/fcpa.html
email: FCPA.fraud@usdoj.gov

United States Department of Commerce
Office of the Chief Counsel for International Commerce
14th Street and Constitution Avenue, NW
Room 5882
Washington, D.C. 20230
phone: (202) 482-0937
fax: (202) 482-4076
internet: www.ita.doc.gov/legal

INTRODUCTION

The 1988 Trade Act directed the Attorney General to provide guidance concerning the Department of Justice's enforcement policy with respect to the Foreign Corrupt Practices Act of 1977 ("FCPA"), 15 U.S.C. §§ 78dd-1, *et seq.*, to potential exporters and small businesses that are unable to obtain specialized counsel on issues related to the FCPA. The guidance is limited to responses to requests under the Department of Justice's Foreign Corrupt Practices Act Opinion Procedure (described below at p. 10) and to general explanations of compliance responsibilities and potential liabilities under the FCPA. This brochure constitutes the Department of Justice's general explanation of the FCPA.

U.S. firms seeking to do business in foreign markets must be familiar with the FCPA. In general, the FCPA prohibits corrupt payments to foreign officials for the purpose of obtaining or keeping business. In addition, other statutes such as the mail and wire fraud statutes, 18 U.S.C. § 1341, 1343, and the Travel Act, 18 U.S.C. § 1952, which provides for federal prosecution of violations of state commercial bribery statutes, may also apply to such conduct.

The Department of Justice is the chief enforcement agency, with a coordinate role played by the Securities and Exchange Commission (SEC). The Office of General Counsel of the Department of Commerce also answers general questions from U.S. exporters concerning the FCPA's basic requirements and constraints.

This brochure is intended to provide a general description of the FCPA and is not intended to substitute for the advice of private counsel on specific issues related to the FCPA. Moreover, material in this brochure is not intended to set forth the present enforcement intentions of the Department of Justice or the SEC with respect to particular fact situations.

BACKGROUND

As a result of SEC investigations in the mid-1970's, over 400 U.S. companies admitted making questionable or illegal payments in excess of $300 million to foreign government officials, politicians, and political parties. The abuses ran the gamut from bribery of high foreign officials to secure some type of favorable action by a foreign government to so-called facilitating payments that allegedly were made to ensure that government functionaries discharged certain ministerial or clerical duties. Congress enacted the FCPA to bring a halt to the bribery of foreign officials and to restore public confidence in the integrity of the American business system.

The FCPA was intended to have and has had an enormous impact on the way American firms do business. Several firms that paid bribes to foreign officials have been the subject of criminal and civil enforcement actions, resulting in large fines and suspension and debarment from federal procurement contracting, and their employees and officers have gone to jail. To avoid such consequences, many firms have implemented detailed compliance programs intended to prevent and to detect any improper payments by employees and agents.

Following the passage of the FCPA, the Congress became concerned that American companies were operating at a disadvantage compared to foreign companies who routinely paid bribes and, in some countries, were permitted to deduct the cost of such bribes as business expenses on their taxes. A ccordingly, in 1988, the Congress directed the Executive Branch to commence negotiations in the Organization of Economic Cooperation and Development (OECD) to obtain the agreement of the United States' major trading partners to enact legislation similar to the FCPA. In 1997, almost ten years later, the United States and thirty-three other countries signed the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

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The United States ratified this Convention and enacted implementing legislation in 1998. *See* Convention and Commentaries on the DOJ web site.

The antibribery provisions of the FCPA make it unlawful for a U.S. person, and certain foreign issuers of securities, to make a corrupt payment to a foreign official for the purpose of obtaining or retaining business for or with, or directing business to, any person. Since 1998, they also apply to foreign firms and persons who take any act in furtherance of such a corrupt payment while in the United States.

The FCPA also requires companies whose securities are listed in the United States to meet its accounting provisions. *See* 15 U.S.C. § 78m. These accounting provisions, which were designed to operate in tandem with the antibribery provisions of the FCPA, require corporations covered by the provisions to make and keep books and records that accurately and fairly reflect the transactions of the corporation and to devise and maintain an adequate system of internal accounting controls. This brochure discusses only the antibribery provisions.

ENFORCEMENT

The Department of Justice is responsible for all criminal enforcement and for civil enforcement of the antibribery provisions with respect to domestic concerns and foreign companies and nationals. The SEC is responsible for civil enforcement of the antibribery provisions with respect to issuers.

ANTIBRIBERY PROVISIONS

BASIC PROHIBITION

The FCPA makes it unlawful to bribe foreign government officials to obtain or retain business. With respect to the basic prohibition, there are five elements which must be met to constitute a violation of the Act:

A. Who -- The FCPA potentially applies to *any* individual, firm, officer, director, employee, or agent of a firm and any stockholder acting on behalf of a firm. Individuals and firms may also be penalized if they order, authorize, or assist someone else to violate the antibribery provisions or if they conspire to violate those provisions.

Under the FCPA, U.S. jurisdiction over corrupt payments to foreign officials depends upon whether the violator is an "issuer," a "domestic concern," or a foreign national or business.
An "issuer" is a corporation that has issued securities that have been registered in the United States or who is required to file periodic reports with the SEC. A "domestic concern" is any individual who is a citizen, national, or resident of the United States, or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a State of the United States, or a territory, possession, or commonwealth of the United States.
Issuers and domestic concerns may be held liable under the FCPA under *either* territorial or nationality jurisdiction principles. For acts taken within the territory of the United States, issuers and domestic concerns are liable if they take an act in furtherance of a corrupt payment to a foreign official using the U.S. mails or other means or instrumentalities of interstate commerce. Such means or instrumentalities include telephone calls, facsimile transmissions, wire transfers, and interstate or international travel. In addition, issuers and domestic concerns may be held liable for any act in furtherance of a corrupt payment taken *outside* the United States. Thus, a U.S. company or national may be held liable for a corrupt payment authorized by employees or agents operating entirely outside the United States, using money from foreign bank accounts, and without any involvement by personnel located within the United States.
Prior to 1998, foreign companies, with the exception of those who qualified as "issuers," and foreign nationals were not covered by the FCPA. The 1998 amendments expanded the FCPA to assert territorial jurisdiction over foreign companies and nationals. A foreign company or person is now subject to the FCPA if it causes, directly or through agents, an act in furtherance of the corrupt payment to take place within the territory of the United States. There is, however, no requirement that such act make use of the U.S. mails or other means or instrumentalities of interstate commerce.

Finally, U.S. parent corporations may be held liable for the acts of foreign subsidiaries where they authorized, directed, or controlled the activity in question, as can U.S. citizens or residents, themselves "domestic concerns," who were employed by or acting on behalf of such foreign-incorporated subsidiaries.

B. Corrupt intent-- The person making or authorizing the payment must have a corrupt intent, and the payment must be intended to induce the recipient to misuse his official position to direct business wrongfully to the payer or to any other person. You should note that the FCPA does not require that a corrupt act succeed in its purpose. The *offer* or *promise* of a corrupt payment can constitute a violation of the statute. The FCPA prohibits any corrupt payment intended to *influence* any act or decision of a foreign official in his or her official capacity, to induce the official to do or omit to do any act in violation of his or her lawful duty, to obtain any improper advantage, or to *induce* a foreign official to use his or her influence improperly to affect or influence any act or decision.

C. Payment -- The FCPA prohibits paying, offering, promising to pay (or authorizing to pay or offer) money or anything of value.

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D. Recipient -- The prohibition extends only to corrupt payments to a *foreign official*, a *foreign political party* or *party official*, or any *candidate* for foreign political office. A "foreign official" means any officer or employee of a foreign government, a public international organization, or any department or agency thereof, or any person acting in an official capacity. You should consider utilizing the Department of Justice's Foreign Corrupt Practices Act Opinion Procedure for particular questions as to the definition of a "foreign official," such as whether a member of a royal family, a member of a legislative body, or an official of a state-owned business enterprise would be considered a "foreign official."

The FCPA applies to payments to *any* public official, regardless of rank or position. The FCPA focuses on the *purpose* of the payment instead of the particular duties of the official receiving the payment, offer, or promise of payment, and there are exceptions to the antibribery provision for "facilitating payments for routine governmental action" (see below).

E. Business Purpose Test -- The FCPA prohibits payments made in order to assist the firm in *obtaining* or *retaining business* for or with, or *directing business* to, any person. The Department of Justice interprets "obtainingor retaining business" broadly, such that the term encompasses more than the mere award or renewal of a contract. It should be noted that the business to be obtained or retained does *not* need to be with a foreign government or foreign government instrumentality.

THIRD PARTY PAYMENTS

The FCPA prohibits corrupt payments through intermediaries. It is unlawful to make a payment to a third party, while knowing that all or a portion of the payment will go directly or indirectly to a foreign official. *The term "knowing" includes conscious disregard and deliberate ignorance.* The elements of an offense are essentially the same as described above, except that in this case the "recipient" is the intermediary who is making the payment to the requisite "foreign official."

Intermediaries may include joint venture partners or agents. To avoid being held liable for corrupt third party payments, U.S. companies are encouraged to exercise due diligence and to take all necessary precautions to ensure that they have formed a business relationship with reputable and qualified partners and representatives. Such due diligence may include investigating potential foreign representatives and joint venture partners to determine if they are in fact qualified for the position, whether they have personal or professional ties to the government, the number and reputation of their clientele, and their reputation with the U.S. Embassy or Consulate and with local bankers, clients, and other business associates. In addition, in negotiating a business relationship, the U.S. firm should be aware of so-called "red flags," *i.e.*, unusual payment patterns or financial arrangements, a history of corruption in the country, a refusal by the foreign joint venture partner or representative to provide a certification that it will not take any action in furtherance of an unlawful offer, promise, or payment to a foreign public official and not take any act that would cause the U.S. firm to be in violation of the FCPA, unusually high commissions, lack of transparency in expenses and accounting records, apparent lack of qualifications or resources on the part of the joint venture partner or representative to perform the services offered, and whether the joint venture partner or representative has been recommended by an official of the potential governmental customer.

You should seek the advice of counsel and consider utilizing the Department of Justice's Foreign Corrupt Practices Act Opinion Procedure for particular questions relating to third party payments.

PERMISSIBLE PAYMENTS AND AFFIRMATIVE DEFENSES

The FCPA contains an explicit exception to the bribery prohibition for "facilitating payments" for "routine governmental action" and provides affirmative defenses which can be used to defend against alleged violations of the FCPA.

FACILITATING PAYMENTS FOR ROUTINE GOVERNMENTAL ACTIONS

There is an exception to the antibribery prohibition for payments to facilitate or expedite performance of a "routine governmental action." The statute lists the following examples: obtaining permits, licenses, or other official documents; processing governmental papers, such as visas and work orders; providing police protection, mail pick-up and delivery; providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products; and scheduling inspections associated with contract performance or transit of goods across country.

Actions "similar" to these are also covered by this exception. If you have a question about whether a payment falls within the exception, you should consult with counsel. You should also consider whether to utilize the Justice Department's Foreign Corrupt Practices Opinion Procedure, described below on p. 10.

"Routine governmental action" does *not* include any decision by a foreign official to award new business or to continue business with a particular party.

AFFIRMATIVE DEFENSES

A person charged with a violation of the FCPA's antibribery provisions may assert as a defense that the payment was lawful under the written laws of the foreign country or that the money was spent as part of demonstrating a product or performing a contractual obligation.

Whether a payment was lawful under the written laws of the foreign country may be difficult to determine. You should consider seeking the advice of counsel or utilizing the Department of Justice's Foreign Corrupt Practices Act Opinion Procedure when faced with an issue of the legality of such a payment.

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Moreover, because these defenses are "affirmative defenses," the defendant is required to show in the first instance that the payment met these requirements. The prosecution does not bear the burden of demonstrating in the first instance that the payments did not constitute this type of payment.

SANCTIONS AGAINST BRIBERY

CRIMINAL

The following criminal penalties may be imposed for violations of the FCPA's antibribery provisions: corporations and other business entities are subject to a fine of up to $2,000,000; officers, directors, stockholders, employees, and agents are subject to a fine of up to $100,000 and imprisonment for up to five years. Moreover, under the Alternative Fines Act, these fines may be actually quite higher -- the actual fine may be up to twice the benefit that the defendant sought to obtain by making the corrupt payment. You should also be aware that fines imposed on individuals may *not* be paid by their employer or principal.

CIVIL

The Attorney General or the SEC, as appropriate, may bring a civil action for a fine of up to $10,000 against any firm *as well as* any officer, director, employee, or agent of a firm, or stockholder acting on behalf of the firm, who violates the antibribery provisions. In addition, in an SEC enforcement action, the court may impose an additional fine not to exceed the greater of (i) the gross amount of the pecuniary gain to the defendant as a result of the violation, or (ii) a specified dollar limitation. The specified dollar limitations are based on the egregiousness of the violation, ranging from $5,000 to $100,000 for a natural person and $50,000 to $500,000 for any other person.

The Attorney General or the SEC, as appropriate, may also bring a civil action to enjoin any act or practice of a firm whenever it appears that the firm (or an officer, director, employee, agent, or stockholder acting on behalf of the firm) is in violation (or about to be) of the antibribery provisions.

OTHER GOVERNMENTAL ACTION

Under guidelines issued by the Office of Management and Budget, a person or firm found in violation of the FCPA may be barred from doing business with the Federal government. *Indictment alone can lead to suspension of the right to do business with the government.* The President has directed that no executive agency shall allow any party to participate in any procurement or nonprocurement activity if any agency has debarred, suspended, or otherwise excluded that party from participation in a procurement or nonprocurement activity.

In addition, a person or firm found guilty of violating the FCPA may be ruled ineligible to receive export licenses; the SEC may suspend or bar persons from the securities business and impose civil penalties on persons in the securities business for violations of the FCPA; the Commodity Futures Trading Commission and the Overseas Private Investment Corporation both provide for possible suspension or debarment from agency programs for violation of the FCPA; and a payment made to a foreign government official that is unlawful under the FCPA cannot be deducted under the tax laws as a business expense.

PRIVATE CAUSE OF ACTION

Conduct that violates the antibribery provisions of the FCPA may also give rise to a private cause of action for treble damages under the Racketeer Influenced and Corrupt Organizations Act (RICO), or to actions under other federal or state laws. For example, an action might be brought under RICO by a competitor who alleges that the bribery caused the defendant to win a foreign contract.

GUIDANCE FROM THE GOVERNMENT

The Department of Justice has established a Foreign Corrupt Practices Act Opinion Procedure by which any U.S. company or national may request a statement of the Justice Department's present enforcement intentions under the antibribery provisions of the FCPA regarding any proposed business conduct. The details of the opinion procedure may be found at 28 CFR Part 80. Under this procedure, the Attorney General will issue an opinion in response to a specific inquiry from a person or firm within thirty days of the request. (The thirty-day period does not run until the Department of Justice has received all the information it requires to issue the opinion.) Conduct for which the Department of Justice has issued an opinion stating that the conduct conforms with current enforcement policy will be entitled to a presumption, in any subsequent enforcement action, of conformity with the FCPA. Copies of releases issued regarding previous opinions are available on the Department of Justice's FCPA web site.

For further information from the Department of Justice about the FCPA and the Foreign Corrupt Practices Act Opinion Procedure, contact Mark F. Mendelsohn, Acting Deputy Chief, Fraud Section, at (202) 514-7021.

Although the Department of Commerce has no enforcement role with respect to the FCPA, it supplies general guidance to U.S. exporters who have questions about the FCPA and about international developments concerning the FCPA. For further information from the Department of Commerce about the FCPA contact Eleanor Roberts Lewis, Chief Counsel for International Commerce, or Arthur Aronoff, Senior Counsel, Office of the Chief Counsel for International Commerce, U.S. Department of Commerce, Room 5882, 14th Street and Constitution Avenue, N.W., Washington, D.C. 20230, (202) 482-0937.

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usdoj/criminal/fraud/pu:dlj

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Federal Ethics Report: International Enforcement of the OECD Antibribery Convention

International Enforcement of the OECD Antibribery Convention (March 2005)
http://www.osec.doc.gov/ogc/occic/Fed%20Ethics%20Report%20OECD.pdf

FEDERAL ETHICS Report
Volume 12, Issue 3 March 2005

International Enforcement of the OECD Antibribery Convention

Kathryn Nickerson[1]

Introduction

The U.S. Department of Commerce has as part of its mission to promote U.S. and foreign commerce, including through strengthening international trade and investment rules. An important part of this mission is monitoring the trade agreements the United States has entered into with its trading partners to ensure that they are living up to their obligations and that U.S. exporters are gaining all the benefits of such agreements. Although not traditionally recognized as trade agreements, anticorruption instruments play an important role in supporting an open trading system, and creating conditions for sustained economic growth.

The United States has made real progress in building international coalitions to combat bribery and corruption. Bribery and corruption are now being addressed in a number of fora, with positive results. The focus of this article is the Organization for Economic Cooperation and Development ("OECD") Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("OECD Antibribery Convention"). However, there are several other important instruments containing antibribery provisions, including the new United Nations Convention Against Corruption ("U.N. Convention"), the Inter-American Convention Against Corruption (" Inter-American Convention"), the Council of Europe Criminal Law Convention on Corruption ("COE Convention"), and U.S. bilateral Free Trade Agreements ("FTAs"), which will also be briefly discussed.

Corruption as a Barrier to Trade and Competition

Corruption has long been a barrier to international trade and a competitive marketplace. The U.S. Government has for years received reports that bribery of foreign public officials influenced the awarding of billions of dollars in contracts around the world. In the last Department of Commerce annual report to Congress under the International Anti-Bribery and Fair Competition Act of 1998, it is estimated that, between May 1, 2003 and April 30, 2004, the competition for 47 contracts worth U.S. $18 billion may have been affected by bribery by foreign firms of foreign officials. Firms alleged to have offered such bribes won approximately 90 percent of the contracts in the deals for which information is available as to their outcome. The report also states that, although the overall bribery activity by OECD firms dropped substantially from the reporting years prior to 2002, firms from a few OECD countries continue to be involved in a disproportionate share of those allegations.[2] Prior reports indicated that bribery allegations were related to contracts in multiple sectors, including energy, telecommunications, construction, transportation and (primarily) military procurement. The Commerce Department has stressed that, while such bribery is harmful to all enterprises, it is particularly harmful to small and medium sized enterprises ("SMEs"), as they can least afford to compete in extensive bidding processes and are further dissuaded from doing so when the outcome of such transactions is not based on commercial merits.[3]

The OECD Antibribery Convention

One of the primary reasons for negotiating the OECD Antibribery Convention was to level the playing field for U.S. companies by requiring other major exporters to join the United States in criminalizing the bribery of foreign public officials under their own legal systems. The United States unilaterally prohibited such conduct in 1977 with the U.S. Foreign Corrupt Practices Act ("FCPA"). In 1988, Congress, recognizing that U.S. businesses were being negatively affected as a result of foreign bribery by their competitors, directed the

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International Enforcement of OECD

Executive Branch to negotiate at the OECD an international convention prohibiting bribery of foreign public officials. After ten years of effort, the OECD Antibribery Convention was adopted in November 1997. In the absence of the OECD Antibribery Convention, not only did most major exporting countries allow their companies to bribe foreign officials to win international contracts, but many also provided an incentive for companies to do so by allowing such bribes to be tax deductible. Prior U.S. Government attempts at negotiating such an instrument in the United Nations in the mid-seventies and early eighties had not been successful. The entry into force of the OECD Antibribery Convention in February 1999 therefore represented a milestone in the multilateral fight against corruption.

The FCPA was amended in 1998 to conform the statute to the OECD Antibribery Convention. For example, the OECD Antibribery Convention, although primarily based on the FCPA, specifically covered bribes by "any person" to officials of public international organizations, and encouraged countries to adopt nationality jurisdiction if permissible under their legal systems. Although the FCPA already covered bribe payments "in order to obtain or retain business" the statute was amended to make explicit that payments made to secure "any improper advantage," the language used in the OECD Convention, were prohibited by the FCPA. For more information on the 1998 amendments to the FCPA, see http://www.usdoj.gov/criminal/fraud/fcpa/legindx.htm

Role of the Commerce Department

Although the Commerce Department has no enforcement role with respect to the FCPA, it provides general guidance to exporters to assist them in understanding the FCPA in order to help them comply with its prohibitions. With the additional prohibitions by foreign countries pursuant to the OECD Antibribery Convention, it is even more important for U.S. exporters to be aware of such laws when engaging in international trade. As part of the Commerce Department, the U.S. and Foreign Commercial Service plays an important role in counseling U.S. exporters in key markets. This requires that the Commercial Service be aware of and provide information to U.S. companies about the FCPA and other anticorruption initiatives. The U.S. Government provides training to both U.S. State Department Foreign Service Officers and U.S. Commerce Department Commercial Service Officers about the FCPA and other anticorruption efforts. Such overseas personnel are instructed to report to Washington when they learn of bribery allegations implicating the FCPA or another country's laws implementing the OECD Antibribery Convention. Also, the U.S. Department of Commerce's International Trade Administration maintains an internet "hotline" so that the public may report possible violations of the laws implementing the OECD Antibribery Convention by firms of other Parties at www.export.gov/tcc.

Commerce Department officials are core members of the U.S. delegation to the OECD Working Group on Bribery, which monitors the implementation of the OECD Antibribery Convention. For six years the Commerce Department issued a report to Congress on the implementation of the OECD Antibribery Convention (the 2004 report, the last in this series, and all prior reports are available on-line at www.export.gov/tcc). The Department of State has also produced similar reports, available at http://www.state.gov/e/eb/rls/rpts/bib/. Commerce officials also monitor developments under the Inter-American Convention as well as the COE Convention. In addition, Commerce participates in negotiations of other international instruments on corruption, including the recently concluded U.N. Convention, and recent U.S. Free Trade Agreements ("FTAs"), as it is now general U.S. policy to include in its FTAs anticorruption provisions prohibiting domestic and foreign bribery of public officials as it affects trade and investment.

The OECD Working Group on Bribery Monitoring Process

Article 12 of the OECD Antibribery Convention requires Parties to cooperate in carrying out a program of systematic follow-up to monitor and promote full implementation of the Convention. As a result, the OECD Working Group on Bribery, consisting of representatives of all Parties to the Convention, has been steadily developing a growing body of research and analysis on its implementation. The process can be understood as a practical and productive way of measuring the Convention's success. It is in the interest of the Parties to the Convention to ensure that all Parties are upholding their obligations under the agreement, because if some countries continue to tolerate the bribery of foreign public officials while others do not, companies from the country that is not enforcing its obligations under the Convention will maintain an advantage. Besides having the will to ensure that other Parties to the Convention uphold their obligations, the Parties are also developing expertise in monitoring the instrument, as well as developing new investigatory and prosecutorial skills in applying their new laws.

The U.S. Department of Commerce's International Trade Administration maintains an internet "hotline" so that the public may report possible violations of the laws implementing the OECD Antibribery Convention by firms of other Parties at www.export.gov/tcc.

Phase 1 Reviews

Overall, the U.S. Government believes that the OECD monitoring process under the Working Group on Bribery is strong and will continue to grow more rigorous as countries learn from each other's experiences under the OECD Antibribery Convention. The Working Group on Bribery has almost completed the Phase 1 monitoring reviews, which are intended to ensure that all Parties have domestic laws on the books that prohibit the bribery of foreign public officials.[4] Generally, in the Phase 1 review, the OECD Secretariat provides a basic questionnaire to the country being examined to answer concerning the implementation of the Convention's obligations into its law. The answers are then reviewed by two examining countries and the Secretariat, which drafts a summary report. The lead examiners present the report to the Working Group on Bribery, which then proposes recommendations to the reviewed country on how to correct defects in its implementing laws; these recommendations accompany the report at publication.

The U.S. Government has been an active participant in these reviews, and as the country with the most experience in prosecuting the foreign bribery offense, the United States has a lot to bring to the table to share with Working Group on Bribery members concerning the issue. Overall, the results of the review have been positive: 36 countries now have laws on the books prohibiting the bribery of foreign public officials, and many have amended their laws pursuant to the Working Group on Bribery's recommendations.[5] At the same time, some of the reviews have identified important shortcomings. In the Commerce Department's final report to Congress on the implementation of the OECD Antibribery Convention, the U.S. Government listed several areas of concern with other Parties' laws implementing the Convention, including the following :[6]

Basic elements of the offense: laws that do not specifically cover certain basic elements of the offense of bribery of foreign public officials contained in Article 1 of the Convention, e.g., laws that do not specifically cover offering, promising, or giving a bribe; laws that do not cover bribes to third parties or through intermediaries; laws that do not use the Convention's autonomous definition of foreign official or require dual criminality.

Liability of legal persons: a lack of corporate liability, or the addition of inappropriate requirements

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for the conviction of a natural person holding a management or other position within the corporation in order to trigger corporate liability.

Sanctions: fines and prison terms that either do not rise to the level of being effective, dissuasive, and proportionate, or are not at least equal to penalties for domestic bribery.

Enforcement: statutes of limitation that are too short, require dual criminality to bring an action or require a complaint from the "victim" (e.g., the government of the corrupt official) to commence an investigation.

Jurisdiction: limitations on jurisdiction; in particular, a lack of nationality jurisdiction where available under the country's jurisdictional principles, or extremely limited territoriality jurisdiction.

Extradition/mutual legal assistance: laws that do not provide for adequate extradition or mutual legal assistance as required by the Convention or are contingent on dual criminality requirements.

Inappropriate defenses and exceptions: for example, if the bribe was solicited by the foreign public official instead of being initiated by the bribe payor, or if the bribe agreement was cancelled and reported to authorities before its completion (e.g., "effective regret" and "effective repentance").

Potential conflict with other instruments: differences between laws implementing European Union ("EU") or other anticorruption instruments and the OECD Antibribery Convention.

The OECD Working Group on Bribery is following up on these issues with the relevant Parties during the Phase 2 review process. Also, the U.S. Government, where appropriate, may engage its trading partners bilaterally concerning the full implementation of their Convention obligations.[7]

Phase 2 Reviews

The objective of Phase 2 reviews is to assess each Party's enforcement regime, specifically the structures and methods established by the Party to enforce the application of its laws implementing the Convention. The Phase 2 review is a crucial part of the monitoring process and the U.S. Government is firmly committed to ensuring that it is carried out in a rigorous and timely manner.

The Phase 2 process generally begins with the examined country answering a questionnaire tailored to its situation and prepared by the OECD Secretariat and lead examiners. The examined country's responses are forwarded to the lead examiners for their review prior to an on-site visit to the examined country, which is usually about a week long, where meetings are arranged with relevant government agencies, civil society and business. The examiners and the Secretariat then draft a Phase 2 report, which is presented and reviewed by the entire Working Group on Bribery before its adoption and eventual publication on the OECD website. The final version of the report contains recommendations by the Working Group on Bribery which will be followed-up on in future monitoring efforts, including follow-up reports by the examined country. This review process is continuing to evolve, and the Working Group on Bribery is constantly reevaluating it to ensure that it maintains high standards while remaining flexible so as to better address the specific issues raised by the particular situation of the country under examination.

The Phase 2 process began in late 2001 with the review of Finland, followed by the United States. Fifteen countries have now been reviewed. Although the process is still in its relatively early stages, some common themes, or issues of concern for the enforcement of Parties' laws implementing the OECD Antibribery Convention are becoming evident, such as:

Resources, awareness, training & communication in government: although Parties to the Convention now have laws on the books, not all relevant government officials are actually aware of such laws, and many do not have sufficient training and resources to carry them out. In particular, police and prosecutors obviously need adequate training and resources; officials in foreign posts need to be made aware of new antibribery prohibitions. Also, the relevant government agencies involved need to be better coordinated in sharing information.

Public awareness, particularly among SMEs (compliance programs): many companies, particularly SMEs, do not appear to be aware of the antibribery prohibitions, and need to be encouraged to adopt corporate compliance policies to raise employee awareness.

Technical cooperation, mutual legal assistance: although for most Parties the Convention will serve as the basis for international cooperation, and, as mentioned below, some countries are taking advantage of this new channel, others still need to do so.

Accounting provisions: although most Parties have accounting provisions on the books that generally satisfy the Convention's obligations, they are not being routinely enforced. Accounting issues are key for alerting officials to potential bribes, so poor enforcement of accounting rules could have a negative impact on the number of potential bribery investigations. These issues generally need to be given more attention.

Statutes of limitation: many of the Parties' statutes of limitations may be too short to allow for adequate time for the investigation and prosecution of foreign bribery cases, and the Working Group on Bribery needs to examine the effect these short limitations periods have in actual practice.

Sanctions: one of the main problems across the board for many Parties is the lack of corporate criminal liability or civil sanctions that are equally effective, proportionate and dissuasive. Until cases with dissuasive corporate fines emerge in countries other than the United States, laws other than the FCPA risk not having a strong deterrent effect.

Jurisdiction: although the Convention encourages countries to exercise broad jurisdiction over foreign bribery offenses in accordance with national legal principles, not all Parties have provided for effective territorial jurisdiction or nationality jurisdiction, even though possible under domestic legal principles.

For the United States, the Phase 2 enforcement reviews are a long term commitment. The U.S. Government sees great value in the peer review process and believes that public scrutiny and transparency will eventually lead to more investigations, prosecutions, and convictions.

Report Card on International Enforcement

Although the number of cases is still small among other Parties to the OECD Antibribery Convention, Parties are reporting an increased level of investigations. Authorities in Canada, Korea, Norway and Sweden have obtained convictions under their respective implementing laws for bribery of a foreign public official. A number of other Parties have initiated investigations or legal proceedings, including France, Italy, Switzerland and the U.K. As of February 2005, all of the Group of Seven (G-7) countries, with the notable exception of Japan, report active or ongoing investigations into foreign bribery cases. In the recent Phase 2 evaluation of Japan, conducted in December 2004 and January 2005, the lead examiners from the United States and Italy were highly critical of the lack of filed foreign bribery cases. On a more positive note, Japan's law has recently been amended so that it now includes nationality jurisdiction, effective January 1, 2005, so its ability to investigate and prosecute the bribery of foreign public officials should presumably improve.

The Future of the OECD Monitoring Process

The Working Group on Bribery should now have sufficient resources to complete the more rigorous Phase 2 process for all countries by 2007. As the Working Group on Bribery becomes more experienced in conducting its Phase 2 enforcement reviews and Parties to the Antibribery Convention bring more cases, the examiners will have more factual scenarios to work with upon which to judge whether an investigation should have been taken, or whether changes to the Convention or a Party's implementing legislation are needed. (The recent Japanese and U.K. reviews provide good examples of this trend. See http://www.oecd.org/document/24/0,2340,en_2649_34859_1933144_1_1_1_1,00.

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html) Of course, the Working Group on Bribery cannot interfere with prosecutorial discretion. Moreover, there are obvious reasons why sometimes relevant facts may not be given to the Working Group on Bribery, at least initially, including because the divulging of such facts prematurely could jeopardize an ongoing investigation.

The Working Group on Bribery offers a forum where the Working Group's Chairman or any Party can bring publicly available information to the table and ask whether an investigation on the matter has been or will be initiated (the "Tour de Table.") This mechanism complements and supports the Phase 2 review process. The Tour de Table is becoming more effective as more countries participate and bring their own questions to the table, although Parties recognize that publicly available assertions may not always be accurate. The success of the Tour de Table will of course depend on the will of the Parties to the Convention to take it seriously. Given countries continued attention to the Convention, at least within the context of the Working Group on Bribery, there is reason to be optimistic.

Another serious challenge facing the Working Group on Bribery is the importance of ensuring that prosecutors attend Working Group meetings, not just foreign or trade ministry officials. The U.S. Government persists in encouraging other countries to bring their prosecutors to the table, and has led by example, including a Department of Justice prosecutor as a core U.S. delegation member at every Working Group on Bribery meeting, who also serves as the lead examiner for the U.S. Government in the context of the monitoring process.

Enhanced mutual legal assistance is another benefit resulting from the OECD Antibribery Convention that should continue to improve enforcement by all Parties to the Convention. The ability of Parties to the OECD Antibribery Convention to gather foreign evidence, particularly evidence from other Parties, is facilitating efforts to prosecute violations of the FCPA and other countries' laws implementing the Convention. The good relationships which have been developed among prosecutors and investigating magistrates have been extremely useful in enabling prosecutors to obtain information and to share information with their counterparts. Enhanced mutual legal assistance between prosecutors and more frequent contacts among them may also increase their interest and level of representation at meetings of the Working Group on Bribery.

Beyond OECD Convention Enforcement: Other Government Education Efforts

From the Department of Commerce perspective, leveling the playing field in international business by reducing bribery of foreign public officials is crucial. U.S. business has made it clear that this should be a continued goal of the U.S. Government.

Enforcing obligations under the OECD Antibribery Convention is just one way of drawing attention to and lessening the problem. As mentioned above, the U.S. Department of Commerce Foreign Commercial Service Officers and State Department Foreign Service Officers receive training on the FCPA and other international anticorruption instruments, and provide general information to U.S. exporters on international corruption issues. The U.S. Government is also engaged in numerous other initiatives to encourage awareness of and compliance with the FCPA and other relevant anticorruption laws.

Encouraging companies to adopt compliance programs is another key factor in reducing international corruption. Although many of the larger U.S. companies routinely educate and train their employees about the importance of good corporate behavior and stewardship though such compliance programs, the OECD Phase 2 review of the United States noted in 2002 (see http://www.oecd.org/dataoecd/52/19/1962084.pdf) that many SMEs apparently did not. As a result, the U.S. Government is taking steps to ensure that more such businesses are aware of such programs and the importance of adopting similar ones. While recognizing that no one program will suffice for all companies, even small exporters should at least have a policy on the subject of not giving bribes or otherwise violating U.S. and domestic law while engaging in international business.

To assist such SMEs, the Department of Commerce has produced a practical guide for businesses involved in international trade, entitled *Business Ethics: A Manual for Managing a Responsible Business Enterprise in Emerging Market Economies*, available on-line at www.ita.doc.gov/goodgovernance. This manual is intended to aid enterprises in designing and implementing a business ethics program that meets emerging global standards of responsible business conduct. This manual provides a wealth of information on the subject of ethics and corporate compliance for all enterprises, and is particularly helpful to the SMEs and those new to international trade. Included among the subjects in the manual is practical information on the FCPA, other international corruption instruments as well as the value of corporate compliance programs.

The U.S. Government is also taking steps to ensure that its trading partners encourage their companies to adopt compliance programs. In June 2004 at Sea Island Georgia, the U.S. Government joined its Group of Eight (G-8) partners in launching an anticorruption and transparency initiative. The initiative recognizes the importance of governments encouraging their companies to establish corporate compliance programs to combat bribery. As one step to implement both the U.S. Government commitments made at Sea Island and the recommendations of the OECD Working Group on Bribery, in November 2004 Secretary of Commerce Donald L. Evans sent a letter to 160 U.S. exporters concerning the prohibitions of the FCPA, the OECD Antibribery Convention and the importance of corporate awareness and compliance programs in combating bribery and corruption. These important messages were also posted on the Department's website in an effort to reach the broadest audience possible, including SMEs. They were also circulated to our trading partners at the December 2004 Working Group on Bribery meeting, as an example for other countries to follow in educating their companies on the issue.

The Departments of Commerce and Justice and staff from the Securities and Exchange Commission also participate in numerous seminars and conferences on the FCPA and related corporate compliance issues sponsored by professional associations and industry groups, many of which are attended by outside and in-house counsel representing SMEs. In addition, the Department of Justice has required companies to implement rigorous compliance programs as part of plea agreements and consent judgments in FCPA matters. (For example, see the Consent and Undertaking in the *Metcalf & Eddy* case, at, http://www.usdoj.gov/criminal/fraud/fcpa/Appendices/Appendix%20E.htm#Appendix%20E)

The Inter-American and COE Conventions

Although the OECD Antibribery Convention is generally viewed as having the most rigorous monitoring mechanism of any of the several anticorruption conventions, there are important differences between the OECD Convention and other instruments. The OECD Convention focuses primarily on bribery of foreign public officials in international business transactions and its Parties are generally major exporting countries. The Inter-American Convention and the COE Convention cover much broader subject areas but are regional in nature. As a result, their respective monitoring systems and goals differ.

The Inter-American Convention

The Inter-American Convention was negotiated under the auspices of the Organization of American States following a mandate agreed to by the 34 heads of state that participated in the Summit of the Americas in 1994. The Inter-American Convention was adopted and opened for signature on March 29, 1996, in Caracas, Venezuela. The United States signed the Inter-American Convention on June 2, 1996 at the OAS General Assembly in Panama City, and deposited its instrument of ratification with the OAS Secretariat on September 29, 2000. Thirty-three of the 34 OAS member countries have now ratified. For a current list of signatories and ratifications of the Inter-American Convention, see, http://www.oas.org/.

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International Enforcement of OECD

The Inter-American Convention identifies acts of corruption to which the Convention will apply and contains articles that create binding obligations under international law as well as hortatory principles to fight corruption. The Inter-American Convention also provides for institutional development and enforcement of anti-corruption measures, requirements for the criminalization of specified acts of corruption and articles on extradition, seizure of assets, mutual legal assistance and technical assistance where acts of corruption occur or have effect in one of the Parties. In addition, subject to each Party's constitution and the fundamental principles of its legal system, the Inter-American Convention requires Parties to criminalize bribery of domestic and foreign government officials and illicit enrichment. The Inter-American Convention also contains a series of preventive measures that the Parties agree to consider establishing to prevent corruption including systems of government procurement that assure the openness, equity, and efficiency of such systems and prohibiting the tax deductibility of bribes.

A monitoring mechanism for the Inter-American Convention was established in 2001, and consists of two bodies: the Conference of States Parties to the Mechanism, the political arm which provides oversight, and the Committee of Experts, which assesses the progress made by Parties in implementing their obligations of the Inter-American Convention. Evaluations of twelve countries have now been completed and the resulting reports may be viewed on the OAS website, at www.oas.org/juridico/english/mec_ron1_rep.htm. The focus thus far has been on preventive measures (Articles III, XIV, and XVIII) of the Inter-American Convention. Transnational bribery (Article VIII) may be covered in the next round that begins in 2006.

The State Department has produced annual reports to Congress monitoring the Inter-American Convention, which may be viewed at: http://www.state.gov/g/inl/rls/rpt/31190.htm

According to the April 2004 report, Brazil, Nicaragua, and Suriname obtained convictions of officials for corruption. Chile, Mexico, Nicaragua, Paraguay, and Peru punished or removed high-level officials. Supreme Court justices were impeached in Argentina and Paraguay. Brazil, the Dominican Republic, Ecuador, Honduras, Jamaica and Nicaragua brought corruption charges against high-level officials. The Bahamas, Costa Rica, Guatemala and Paraguay brought investigations into high-level official corruption and Mexico fined a political party for campaign financing violations.

The COE Convention

The COE Convention entered into force in September 2002. The United States has signed but not ratified the COE Convention. The COE Convention obligates Parties to criminalize all bribes paid to domestic, foreign, and international public officials and parliamentarians. The COE Convention differs from the OECD Antibribery Convention in that it covers passive bribery (solicitation) as well as active bribery, and commercial (or "private sector") bribery. It is not limited to bribes in order to obtain or retain business. The COE Convention also outlaws trading in influence, and provides for cooperation in assets seizures and investigations. In addition, unlike the OECD Antibribery Convention, the COE Convention contains provisions allowing for reservations to several of the Convention's prohibitions.

In May 1998, the Council of Europe adopted an Agreement Establishing the Group of States Against Corruption ("GRECO"), of which the United States is a member. The GRECO has been evaluating the implementation of the COE Twenty Guiding Principles for the Fight Against Corruption since 2000 and in 2003 began evaluating certain provisions of the COE Convention as well. More about GRECO and the results of this evaluation process may be viewed at: http://www.greco.coe.int/

The U. N. Convention

Signed in December 2003 by over 100 countries, including the United States, the U.N. Convention is the first global instrument against corruption. It requires Parties to criminalize fundamental anti-corruption offenses, such as domestic bribery and bribery of foreign public officials, and mandates measures to prevent corruption. In several respects, the U.N. Convention goes further than existing regional instruments: its accounting provisions are applicable to more offenses, it obligates Parties to disallow the tax deductibility of bribes, and it contains language on transparency in government procurement. It also has new provisions on international cooperation, particularly concerning extradition, mutual legal assistance, asset recovery and the disposition of illicitly obtained assets. For more information on the U.N. Convention, see http://www.unodc.org/unodc/en/crime_convention_corruption.html

Another serious challenge facing the Working Group on Bribery is the importance of ensuring that prosecutors attend Working Group meetings, not just foreign or trade ministry officials.

The Convention requires 30 ratifications before it will enter into force: at the time of this writing there were 118 signatories and 15 Parties. The United States has signed but not yet ratified the U.N. Convention. For the latest list of signatories and ratifications, see http://www.unodc.org/unodc/en/crime_signatures_corruption.html

At present, the U.N. Convention does not have a formal mechanism for monitoring its implementation and enforcement as the above-mentioned instruments do. However, the U.N. Convention does establish a Conference of States Parties to promote and review its implementation, and further provides that the Conference of States Parties shall establish, if it deems necessary, any appropriate mechanism or body to assist in the effective implementation of the Convention. The extent of such a potential monitoring mechanism remains to be determined, but in doing so the Parties will have to take into account the existence of regional monitoring mechanisms and the obvious potential for redundancy, as well as the limited resources of governments to participate in numerous such mechanisms.

U.S. Free Trade Agreements

Pursuant to Congressional mandate via Trade Promotion Authority ("TPA") legislation, it is now U.S. policy to seek and obtain binding commitments in trade agreements that promote transparency and specifically address corruption of foreign and domestic officials. Generally, the United States seeks to have its trading partners apply high standards prohibiting corrupt practices affecting international trade and to enforce such prohibitions. Most of the recently concluded FTAs therefore contain antibribery provisions. This is yet another avenue for the United States to pursue in combating bribery of foreign public officials. For more information on U.S. FTAs, see: http://www.ustr.gov/Trade_Agreements/Bilateral/Section_Index.html

Conclusion

The Department of Commerce is committed to monitoring trade agreements for compliance, including anticorruption instruments, particularly the OECD Antibribery Convention. The United States passed the FCPA criminalizing the bribery of foreign public officials in 1977. As a result of the entry into force of the OECD Antibribery Convention, the Inter-American Convention, and the COE Convention, several dozen countries now have domestic laws prohibiting the bribery of foreign public officials in international business transactions. The U.N. Convention, once it enters into force, should eventually result in many more countries criminalizing the bribery of foreign public officials. Although there have not been numerous foreign bribery convictions yet under other countries' laws implementing the OECD Antibribery Convention (or the Inter-American Convention or the COE Convention), there have been several and more investigations are underway. The monitoring process at the OECD is yielding results: the first round of Phase 1 reviews, an evaluation of countries' laws on the books, has been completed for all Parties

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but one, and the Working Group on Bribery is making steady progress on Phase 2, enforcement reviews. The OECD Working Group on Bribery is also taking other steps to ensure compliance with the Convention and to strengthen its monitoring mechanism, including reviewing press articles for potential cases and bringing them to the attention of OECD Antibribery Convention Parties and encouraging greater attendance by prosecutors at meetings of the Working Group on Bribery. The U.S. Government is also taking other steps to combat bribery and corruption, including in the G-8, the OAS, the COE, the U.N. and in U.S. FTAs.■

Endnotes

1 Senior Counsel, Office of the Chief Counsel for International Commerce, U.S. Department of Commerce. The opinions expressed in this article are those of the author and not necessarily those of any U.S. Government agency.

2 *U.S. Department of Commerce Report to Congress Addressing the Challenges of International Bribery and Fair Competition*, July 2004, at 52.

3 *U.S. Department of Commerce Report to Congress*, July 2001, at 121.

4 Phase 1 reviews have been completed for all Parties except Estonia, which deposited its accession instrument in November 2004.

5 See Information Note: *The OECD Anti-Bribery Convention: Does it Work?* at http://www.oecd.org/dataoecd/43/8/34107314.pdf, last updated January 28, 2005.

6 *U.S. Department of Commerce Report to Congress*, July 2004, at 11-12.

7 Ibid., at 12.

About the Author

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Sample Large Company Policy: Foreign Corrupt Practices Act (International Sales Practices) (General Motors)

FOREIGN CORRUPT PRACTICES ACT (INTERNATIONAL SALES PRACTICES) -

(LEGL-03)

1. Background
2. Policy Statement
3. Bribery and Facilitating Payments
4. Political Contributors outside the U.S.
5. Accounting Standards
6. Special Invoicing or Payment Arrangements with Customers
7. Affected Business Units
8. Superseded Letter

BACKGROUND

As General Motors renews its efforts to penetrate global markets, it is appropriate to reemphasize General Motors' commitment to conduct its business throughout the world in accordance with both applicable law and high ethical standards. Federal laws, including the Foreign Corrupt Practices Act (FCPA) are applicable to the manner in which General Motors, its controlled affiliates, and each of their employees conduct business outside of the United States. State criminal laws and the laws of the countries in which we conduct business may also be applicable. Although the applicable laws vary in their scope and severity, failure to comply with the policies stated below will at a minimum tarnish General Motors' reputation as a responsible corporate citizen. Substantial violations will result in significant fines against the Corporation, and individual employees could face fines and imprisonment. In contrast, adherence to the policies established below will assist the Corporation in its efforts to implement and enforce an effective compliance program as is expected by the President's Council and recommended by an examination of the U.S. Sentencing Guidelines.

POLICY

The policies set forth below apply to all operations in the United States, General Motors controlled subsidiaries abroad, and their respective employees and agents and all U.S. citizens who are employed by General Motors and its affiliated entities worldwide. For purposes of this policy, a controlled affiliate is one in which General Motors owns directly or indirectly more than fifty percent of the shares, appoints a majority of the Board of Directors, or names the key officers.

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BRIBERY AND FACILITATING PAYMENTS

No employee may offer, give, or promise to give any money or anything else of value, or authorize such payment or gift to any officer, employee, or agent of a foreign (i.e., non-U.S.) government or any department, agency, or instrumentality of a foreign government or any political party, candidate or official for the purpose of influencing any act or decision of such person or inducing such persons to do or forebear from taking any action in violation of his or her lawful duty, or inducing such person to use his or her influence with a foreign government to affect or influence any governmental decision relating to the entity's obtaining or retaining business. It is also unlawful to give indirectly, money or anything of value to any third person to accomplish the above purposes. Thus, GM sales and marketing personnel dealing with commission agents, dealers, or other third persons must take appropriate measures to ensure that such third parties do not carry out an illegal payment or promise to pay.

Facilitating payments to minor governmental employees whose duties are essentially ministerial or clerical, or to low level commercial employees in order to expedite the performance of their duties will be permitted on an exceptional basis. Examples include nominal payments for customs clearance of materials and persons, issuance of driver's licenses, placement of international telephone calls, and providing police protection.

It is the responsibility of the General Manager, or corresponding executive, at each location worldwide either to make sure that such payments are avoided altogether or, if he or she deems such payments to be essential to the operation, to establish controls to carry out the following guidelines:

1.) Such payments should be kept as low as possible in the aggregate, both regarding total payments by the General Motors activity and total payments to each individual, and each individual payment should be kept as small as possible;

2.) Such payments must be made only to minor governmental employees or low-level commercial employees whose duties are essentially of a ministerial or clerical nature;

3.) Such payments should be made only in connection with services to which the General Motors activity is clearly entitled;

4.) No such payments should be made for any purpose relating to obtaining or retaining business or directing business to any person;

5.) Such payments should not be made unless in accordance with the general practice in the country or locality where they are made; and

6.) The nature and amount of each facilitating payment must be clearly identifiable in the books, records and accounts of the General Motors activity making the payment.

In the event that the General Manager, or corresponding executive, deems it essential to the operation to make a facilitating payment, or a series of related facilitating payments, which are more than nominal in amount, prior approval of such payment or payments must be obtained from the appropriate Executive Vice President. Prior to submission of the matter to the Executive Vice President, any such proposed facilitating payments must first be reviewed by the Legal Staff to assure that they would comply with all applicable laws.

In view of the complexities of customs requirements, customs regulations should be reviewed with local counsel to determine whether the unit's practices conform to all governing laws and regulations prior to making a facilitating payment to expedite customs clearance. It may be advisable to obtain the services of reputable qualified brokers or agents who are familiar with handling customs matters. While it is recognized that the Corporation cannot control the practices of independent parties such as customs brokers, the payment terms and other aspects of these relationships should be based solely on legitimate commercial considerations and the Corporation should neither encourage nor condone improper practices by such parties. Further, in the event a broker or agent makes a payment, on his or her own and contrary to the requirements of this policy, the General Motors activity may not reimburse the broker or agent for such payment.

POLITICAL CONTRIBUTIONS OUTSIDE THE U.S.

The FCPA does not prohibit political contributions if the purpose of the contribution does not relate to the obtaining or retention of business.

However, political contributions and activities outside the United States warrant special attention because the purpose of such contributions and activities could be misconstrued as payments to obtain or retain business in a given country. Since General Motors and its subsidiaries are potential government suppliers throughout the world, the legality of such contributions might be questioned if they appear to be closely connected to particular business relationships, or are so large in amounts as to suggest that at least an implicit quid

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pro quo understanding exists.

It is also recognized that it may be appropriate for GM and its subsidiaries to support the political process through contributions to major political parties in some countries where such contributions are legal, publicly known and accepted, and could not be misconstrued as having been made for any improper purpose.

Therefore, with respect to non-U.S., political contributions, General Motors and its subsidiaries will neither fund nor in any way give support to any political party or official thereof or to any candidate for political office, even where permitted by law, unless such political contributions receive the prior approval of the President's Council. Prior to submission to the President's Council, any such proposed contributions must first be reviewed by the Legal and Industry-Government Relations Staffs to assure that they would comply with all applicable laws and policies. Any contributions which are made in accordance with this procedure must be accounted for properly and will be reported to the Audit Committee of the Board of Directors for their information.

The policy against any political contributions of any nature in the United States continues in effect and is in no way modified by this letter.

ACCOUNTING STANDARDS

The FCPA also establishes "Accounting Standards" which are separate and apart from the portion of the Act which prohibits certain "Foreign Corrupt Practices." It is essential to recognize that the accounting standards established by the Act are applicable not only to foreign operations of controlled subsidiaries but also to U.S. operations. The Accounting Standards section requires that books, records and accounts be made and kept which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the corporate assets. While this was specifically designed to prevent "off-the-books" accounts which might be used to conceal improper payments, the application of this standard is not limited to such situations. To implement the FCPA, the SEC has issued a rule that no person shall directly or indirectly falsify any book, record or account. Hence, it is essential that all books, records and accounts continue to be prepared accurately on the basis of reliable supporting documentation.

In this regard, it should be noted that the SEC issued another rule, also supplementing the Act, which prohibits directors or officers from directly or indirectly making materially false, misleading or incomplete statements to any accountant, including internal accountants, in connection with an audit or examination of the financial statements or the filing of required reports or documents with the SEC.

In addition to the foregoing requirements, the Accounting Standards section of the Act provides that a system of internal accounting controls must be maintained which is sufficient to provide reasonable assurances that the following specific objectives are met:

1.) Transactions are executed in accordance with management's general or specific authorization.

2.) Transactions are recorded as necessary to permit preparation of financial statements in conformity with generally accepted accounting principles, or any other criteria applicable to such statements, and to maintain accountability for assets.

3.) Access to assets is permitted only in accordance with management's general or specific authorization.

4.) The recorded accountability for assets is compared with existing assets at reasonable intervals and appropriate action is taken with respect to any differences.

These objectives are consistent with those which have long been a part of the Corporation's overall system of internal controls. GM management has complete confidence in this system of internal controls and in the way these controls are monitored and kept up to date.

Failure by individual employees to comply with these standards could result in severe penalties to the employee and the Corporation.

Accordingly, it is particularly important that the control techniques employed by the Corporation to safeguard its assets and to assure factual reporting and accounting in all phases of its operations continue to function properly and that we ensure that any newly created investments adopt these techniques and procedures as well. In this way, the overall system will remain strong and viable and fulfill the specified objectives of this legislation.

SPECIAL INVOICING OR PAYMENT ARRANGEMENT WITH CUSTOMERS

General Motors' long-standing policy to conform to all applicable laws and regulations in those countries in which it does business includes a

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commitment not to knowingly enter into any invoicing or accommodating payment arrangements which would enable others to violate U.S. or other laws or facilitate such violations. The Corporation's policy concerning special invoicing or payment arrangements with customers, dealers, distributors, and agents is set forth in the following guidelines:

1.) Invoices to dealers, distributors, or assembler distributors (collectively referred to herein as ("dealers") should not exceed the normal dealer or distributor invoice price level.

The intent of this guideline is to avoid any special arrangement whereby an amount will be rebated, credited or similarly paid back to the dealer or its designee. Furthermore, the invoice price should not include amounts in excess of reasonable charges for items normally applicable to the distribution of a product to a dealer, such as shipping or insurance charges or, in special cases, finance charges. Therefore, if the invoice includes any additional or unusual items or charges which cause the billing to be in excess of the normal dealer invoice price level, such items or charges should be separately described and valued in sufficient detail to be readily comprehensible to an independent third party. It is not the intent of this policy to prevent customary price adjustments available for dealers generally, such as Holdbacks, the Close-out Allowance, etc.

With respect to the price of the product, this guideline does not preclude an invoice price in excess of the normal dealer level where the selling price of the product is negotiated between the General Motors entity and the dealer. For example, an agreement may be made which establishes a firm price for a product to be delivered at a future date which would exceed the normal price level for that product on its actual delivery date. In these circumstances, it would be entirely appropriate to invoice the dealer at the agreed price, provided no portion of the selling price is paid over to the dealer or its designee.

2.) In instances where dealers request that invoices be made to third parties (e.g., the dealer's customer), such request should be granted only if such invoicing is required to serve a legitimate purpose and does not improperly portray the true nature of the transaction.

This guideline deals primarily with the so-called "indent sale" which is a special arrangement involving a sale of the product by a General Motors entity to a dealer and a resale by such dealer to its customer, where the dealer requests that the General Motors entity ship the product to a customer of the dealer and invoice the customer on behalf of and as a special accommodation to the dealer on terms established by the dealer.

Normally, in a transaction involving a sale to a dealer and a resale by the dealer to its customer, the General Motors entity involved will invoice the transaction for what it is, namely, a sale to the dealer. In turn, the dealer will invoice the customer with its own invoice. Deviations from this practice, such as those defined by an "indent sale," must be clearly necessary and serve a legitimate purpose. Accordingly, a request from a dealer for a General Motors entity to invoice a customer in connection with an "indent sale" should be granted only if such practice is necessary to conclude the sale and resale of the product. Further, the practice must not violate the laws or regulations of the U.S. or the country (or countries) where the customer and the principal place of business of the dealer are located. The request must be in writing and received by the General Motors entity prior to the issuance of the invoice or release for shipment, whichever occurs first. A single request, continuing by its terms but not exceeding one year, will suffice provided the circumstances and parties involved with the sales transaction remain the same.

In addition, there must be a clear understanding between the General Motors entity and the dealer that the applicable invoice will describe the true nature of the transaction, including the fact that the invoice is issued on behalf of the dealer. The selling price designated in an indent invoice must be set by the dealer wholly independent of the General Motors entity and be communicated to such entity in writing. In this connection, where permitted by law, General Motors personnel may suggest in writing, but not establish, the selling price to be charged to the dealer's customer.

To evidence the foregoing conditions, the following language, or its equivalent should appear on the invoice: "Invoice on behalf of and at price quoted by (firm name or dealer or distributor)."

It is recognized that, from time to time, General Motors entities may find it desirable to engage in sales transactions which are similar to the "indent sale" as defined in this policy. For instance, one General Motors entity may sell a product to another General Motors entity for resale to the latter's dealer or to the end user, and the General Motors entity purchasing the product may request that the General Motors entity making the first sale invoice such dealer or such end user on behalf of the General Motors entity reselling the product. In these circumstances also, the preceding guidelines would normally be applicable.

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A "direct sale" is a sale in which a General Motors entity sells a product directly to the end user, without an intervening sale to a dealer. In this case, the General Motors entity should invoice the customer on its own behalf and in accordance with the terms and selling price established by the General Motors entity. This guideline is not applicable to such sales transactions. If, however, any sales commission is to be paid by the General Motors entity, the Legal Staff policy on 'Sales Representatives' is applicable.

Thus, it is important for the General Motors entity to determine at the outset whether a transaction involves an "indent sale" or a "direct sale" with a sales commission to be paid to a third party. As a general rule, if the General Motors entity establishes the terms of sale, including the selling price, the transaction is a "direct sale." On the other hand, if the third party (e.g., a dealer) establishes and controls the terms of sale, including the selling price, the transaction is an "indent sale."

In addition to complying with the requirements of this policy, all statements included on invoices should be consistent with the information contained in other documentation relating to the sales transaction (e.g., letters of credit, bid documents, etc.).

3.) Payments of amounts owing to dealers should be made only at the recipient's principal place of business and only to the person or entity entitled to the amount owed.

The only exception to this guideline is where there is a valid business reason and the unit is given a written statement provided by the dealer, distributor or agent advising General Motors of the following:

(a) the business reason for the special arrangement requested;

(b) the arrangement has been reviewed with competent local legal counsel who has advised in writing that the proposed payment arrangements will not contravene the laws and regulations of the local country;

(c) in the case of continuing arrangements, assurance must be given that General Motors will be notified of any changes in laws or regulations which would affect the arrangements and

(d) a statement of understanding that the Corporation has the right to disclose to outside parties matters concerning the special arrangements if necessitated by duly constituted authorities.

All General Motors employees and operations are expected to conduct the Corporation's business within the spirit of the policies stated in this policy to the end that no sale of products should be made where there is reason to believe that improper transactions are involved. It is recognized that situations may arise which would require individual judgment decisions. In making these decisions, consideration should be given to the appearance which a transaction would have if subjected to review by an independent third party. Any questions regarding any of the practices, procedures and explanatory material covered in this policy should be referred to the GM Legal Staff.

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Sample Small Company Policy: New International Partners – Due Diligance (ebrary)

Company Policy
New International Partners – Due Diligence

It is Company policy to diligently inquire into the suitability of prospective international business partners. The purposes of this policy include (in no particular order):

(1) Identify and pursue the best possible partners
(2) Focus Company resources on the partners that will best help us achieve our organizational goals
(3) Find partners with common goals and objectives, adequate business experience in the right markets, appropriate level of capitalization and infrastructure, and solid reputations
(4) Avoid wasting time and resources on ineffective or unproductive partners
(5) Avoid involvement with partners that may create problems for Company through improper or disadvantageous activities (such as bribery or other legal or ethical violations, or creating an unfavorable impression in the marketplace)
(6) Identify potential risks and problems as early in the relationship as possible

Making critical inquiries about our international partners is especially important, because people and entities operating in other countries are often working under different cultural norms and expectations, and are accustomed to different laws and regulations. **We must be diligent, as working with corrupt partners can subject ebrary and its employees to civil and criminal liability.**

In order to achieve our goals, prospective partners should be diligently investigated, including:

(1) Identify the market, market value, and market barriers
(2) Understand which of our competitors are in the market; if few or none are, find out why
(3) Determine how pursuit of this market fits within Company's business plans, and what additional resources if any are required to pursue this opportunity
(4) Identify the key players in the market, including prospective customers, resellers, consortia, and government organizations
(5) Investigate and understand the prospective partner's business, including:
    a. corporate structure
    b. affiliations
    c. financial health: major investors, capitalization, ability to cover unpaid invoices and pay for any damage they may cause
    d. standard business practices, and whether
    e. length of time in business
    f. breadth and depth of market penetration
    g. degree of sophistication and existing capabilities regarding technical implementation and customer support
    h. degree of sophistication and existing capabilities regarding compliance with local tax, copyright, import, and other applicable laws
    i. relationship(s) with local government (including any sort of public agency, official, party, royalty, public university or other entity with close ties to the government), with special attention to any indications that they may exert an inappropriate influence on prospective deals (even if it is indirect)
    j. reputation among other key players
    k. nature and status any litigation or compliance issues the entity has been involved in
    l. key third parties the entity relies on, such as subcontractors, subresellers, attorneys/accountants, and whether such third parties are reliable
(6) Determine how other prospective partners compares with any alternatives
(7) Consider and evaluate ways in which the partnership could backfire: What problems might be anticipated? How likely are they, and can they be averted?
(8) Identify any peculiarities in the foreign market, including:
    a. local copyright practices and norms
    b. local import, tax, and other relevant regulations
    c. **business norms and conventions**, such as whether contractual obligations are respected, whether businesses are slow to pay
    d. whether "grease" payments to public functionaries are customary (in which case they must be reviewed by counsel to determine whether they are prohibited under US anti-corruption laws.)

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Sample Contract Language for FACP Compliance (ebrary)

RESELLER AGREEMENT (EXCERPT)

X.X Business Ethics. Reseller will at all times conduct itself according to the highest standard of business ethics. Reseller will not offer or provide money or anything else of value to any agent or representative of any government or government agency in order to obtain or retain business, as prohibited under the Foreign Corrupt Practices Act of 1977 as amended. No payments between Reseller and its Customers will be made in cash or via third parties. All such payments will be made directly by check or wire transfer. Reseller represents and warrants that none of its principals or staff are agents or representatives of governments or government agencies in the Territory. Reseller will provide true, accurate, and complete information in all product orders, reimbursement requests, and other communications relating to Ebrary and its Products.

GOVERNMENT AGREEMENT (EXCERPT)

X.X Ethics. Ebrary is committed to fair competition and the rule of law, and it is the company's policy not to participate in bribes or corrupt activities of any nature. Customer represents and warrants that it has exercised independent business judgment in purchasing or renewing ebrary's products, and has not been offered payments or other benefits to enter into this contract, except the contractual benefits set forth herein.

Sample Job Description Language for FACP Compliance (ebrary)

INTERNATIONAL SALES AND MARKETING JOB DESCRIPTION (EXCERPT)

XX. International Market Development: . . . This position is responsible for investigating prospective international business partners, and monitoring existing partners, to ensure that the Company does not sanction, tolerate, or participate in any dealings involving bribery or other corrupt activities.

XX. Professional Integrity: This position contributes toward maintaining a high standard of professional conduct throughout the company, including understanding and abiding by applicable laws and company policies and obligations. This position promptly notifies Legal or other responsible Team members if unlawful or questionable actions are encountered or suspected, whether by employees or by any others with whom the company does business. This position seeks guidance from Legal or other responsible Team members if unsure how to respond to unfamiliar or challenging situations.

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Text of FCPA as Codified (15 USC 78dd-1)

-CITE-

15 USC Sec. *78dd*-1
01/06/03

-EXPCITE-

TITLE 15 - COMMERCE AND TRADE

CHAPTER 2B - SECURITIES EXCHANGES

-HEAD-

Sec. 78dd-1. Prohibited foreign trade practices by issuers

-STATUTE-

(a) Prohibition

It shall be unlawful for any issuer which has a class of securities registered pursuant to section 78l of this title or which is required to file reports under section 78o(d) of this title, or for any officer, director, employee, or agent of such issuer or any stockholder thereof acting on behalf of such issuer, to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to -

(1) any foreign official for purposes of -

(A)(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, or (iii) securing any improper advantage; or

(B) 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,

in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person;

(2) any foreign political party or official thereof or any candidate for foreign political office for purposes of -

(A)(i) influencing any act or decision of such party, official, or candidate in its or his official capacity, (ii) inducing such party, official, or candidate to do or omit to do an act in violation of the lawful duty of such party, official,

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or candidate, or (iii) securing any improper advantage; or

(B) inducing such party, official, or candidate to use its or his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person; or

(3) 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 any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office, for purposes of -

(A)(i) influencing any act or decision of such foreign official, political party, party official, or candidate in his or its official capacity, (ii) inducing such foreign official, political party, party official, or candidate to do or omit to do any act in violation of the lawful duty of such foreign official, political party, party official, or candidate, or (iii) securing any improper advantage; or

(B) inducing such foreign official, political party, party official, or candidate to use his or its influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person.

(b) Exception for routine governmental action

Subsections (a) and (g) of this section shall not apply to 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.

(c) Affirmative defenses

It shall be an affirmative defense to actions under subsection (a) or (g) of this section that -

(1) 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,

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or candidate's country; or

(2) 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.

(d) Guidelines by Attorney General

Not later than one year after August 23, 1988, the Attorney General, after consultation with the Commission, the Secretary of Commerce, the United States Trade Representative, the Secretary of State, and the Secretary of the Treasury, and after obtaining the views of all interested persons through public notice and comment procedures, shall determine to what extent compliance with this section would be enhanced and the business community would be assisted by further clarification of the preceding provisions of this section and may, based on such determination and to the extent necessary and appropriate, issue -

(1) guidelines describing specific types of conduct, associated with common types of export sales arrangements and business contracts, which for purposes of the Department of Justice's present enforcement policy, the Attorney General determines would be in conformance with the preceding provisions of this section; and

(2) general precautionary procedures which issuers may use on a voluntary basis to conform their conduct to the Department of Justice's present enforcement policy regarding the preceding provisions of this section.

The Attorney General shall issue the guidelines and procedures referred to in the preceding sentence in accordance with the provisions of subchapter II of chapter 5 of title 5 and those guidelines and procedures shall be subject to the provisions of chapter 7 of that title.

(e) Opinions of Attorney General

(1) The Attorney General, after consultation with appropriate

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departments and agencies of the United States and after obtaining the views of all interested persons through public notice and comment procedures, shall establish a procedure to provide responses to specific inquiries by issuers concerning conformance of their conduct with the Department of Justice's present enforcement policy regarding the preceding provisions of this section. The Attorney General shall, within 30 days after receiving such a request, issue an opinion in response to that request. The opinion shall state whether or not certain specified prospective conduct would, for purposes of the Department of Justice's present enforcement policy, violate the preceding provisions of this section. Additional requests for opinions may be filed with the Attorney General regarding other specified prospective conduct that is beyond the scope of conduct specified in previous requests. In any action brought under the applicable provisions of this section, there shall be a rebuttable presumption that conduct, which is specified in a request by an issuer and for which the Attorney General has issued an opinion that such conduct is in conformity with the Department of Justice's present enforcement policy, is in compliance with the preceding provisions of this section. Such a presumption may be rebutted by a preponderance of the evidence. In considering the presumption for purposes of this paragraph, a court shall weigh all relevant factors, including but not limited to whether the information submitted to the Attorney General was accurate and complete and whether it was within the scope of the conduct specified in any request received by the Attorney General. The Attorney General shall establish the procedure required by this paragraph in accordance with the provisions of subchapter II of chapter 5 of title 5 and that procedure shall be subject to the provisions of chapter 7 of that title.

(2) Any document or other material which is provided to, received by, or prepared in the Department of Justice or any other department or agency of the United States in connection with a request by an issuer under the procedure established under paragraph (1), shall be exempt from disclosure under section 552 of title 5 and shall not, except with the consent of the issuer, be made publicly available, regardless of whether the Attorney General

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responds to such a request or the issuer withdraws such request before receiving a response.

(3) Any issuer who has made a request to the Attorney General under paragraph (1) may withdraw such request prior to the time the Attorney General issues an opinion in response to such request. Any request so withdrawn shall have no force or effect.

(4) The Attorney General shall, to the maximum extent practicable, provide timely guidance concerning the Department of Justice's present enforcement policy with respect to the preceding provisions of this section to potential exporters and small businesses that are unable to obtain specialized counsel on issues pertaining to such provisions. Such guidance shall be limited to responses to requests under paragraph (1) concerning conformity of specified prospective conduct with the Department of Justice's present enforcement policy regarding the preceding provisions of this section and general explanations of compliance responsibilities and of potential liabilities under the preceding provisions of this section.

(f) Definitions

For purposes of this section:

(1)(A) The term ''foreign official'' means any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.

(B) For purposes of subparagraph (A), the term ''public international organization'' means -

(i) an organization that is designated by Executive order pursuant to section 288 of title 22; or

(ii) any other international organization that is designated by the President by Executive order for the purposes of this section, effective as of the date of publication of such order in the Federal Register.

(2)(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 engaging in such

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conduct, that such circumstance exists, or that such result is substantially certain to occur; or

(ii) such person has a firm belief that such circumstance exists or that such result is substantially certain to occur.

(B) When knowledge of the existence of a particular circumstance is required for an offense, 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.

(3)(A) The term ''routine governmental action'' means only an action which is ordinarily and commonly performed by a foreign official in -

(i) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country;

(ii) processing governmental papers, such as visas and work orders;

(iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country;

(iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or

(v) actions of a similar nature.

(B) The term ''routine governmental action'' does not include any decision by a foreign official whether, or on what terms, to award new business to or to continue business with a particular party, or any action taken by a foreign official involved in the decisionmaking process to encourage a decision to award new business to or continue business with a particular party.

(g) Alternative jurisdiction

(1) It shall also be unlawful for any issuer organized under the laws of the United States, or a State, territory, possession, or commonwealth of the United States or a political subdivision thereof and which has a class of securities registered pursuant to section 78l of this title or which is required to file reports under section 78o(d) of this title, or for any United States person that is an officer, director, employee, or agent of such issuer or a stockholder thereof acting on behalf of such issuer, to corruptly

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do any act outside the United States in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to any of the persons or entities set forth in paragraphs (1), (2), and (3) of subsection (a) of this section for the purposes set forth therein, irrespective of whether such issuer or such officer, director, employee, agent, or stockholder makes use of the mails or any means or instrumentality of interstate commerce in furtherance of such offer, gift, payment, promise, or authorization.

(2) As used in this subsection, the term ''United States person'' means a national of the United States (as defined in section 1101 of title 8) or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship organized under the laws of the United States or any State, territory, possession, or commonwealth of the United States, or any political subdivision thereof.

-SOURCE-

(June 6, 1934, ch. 404, title I, Sec. 30A, as added Pub. L. 95-213, title I, Sec. 103(a), Dec. 19, 1977, 91 Stat. 1495; amended Pub. L. 100-418, title V, Sec. 5003(a), Aug. 23, 1988, 102 Stat. 1415; Pub. L. 105-366, Sec. 2(a)-(c), Nov. 10, 1998, 112 Stat. 3302, 3303.)

-MISC1-

AMENDMENTS

1998 - Subsec. (a)(1)(A). Pub. L. 105-366, Sec. 2(a)(1), amended subpar. (A) generally. Prior to amendment, subpar. (A) read as follows:

''(A)(i) influencing any act or decision of such foreign official in his official capacity, or (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or''.

Subsec. (a)(2)(A). Pub. L. 105-366, Sec. 2(a)(2), amended subpar. (A) generally. Prior to amendment, subpar. (A) read as follows:

''(A)(i) influencing any act or decision of such party, official, or candidate in its or his official capacity, or (ii) inducing such party, official, or candidate to do or omit to do an act in violation of the lawful duty of such party, official, or candidate,''.

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Subsec. (a)(3)(A). Pub. L. 105-366, Sec. 2(a)(3), amended subpar. (A) generally. Prior to amendment, subpar. (A) read as follows:

''(A)(i) influencing any act or decision of such foreign official, political party, party official, or candidate in his or its official capacity, or (ii) inducing such foreign official, political party, party official, or candidate to do or omit to do any act in violation of the lawful duty of such foreign official, political party, party official, or candidate, or''.

Subsec. (b). Pub. L. 105-366, Sec. 2(c)(2), substituted ''Subsections (a) and (g)'' for ''Subsection (a)''.

Subsec. (c). Pub. L. 105-366, Sec. 2(c)(3), substituted ''subsection (a) or (g)'' for ''subsection (a)''.

Subsec. (f)(1). Pub. L. 105-366, Sec. 2(b), amended par. (1) generally. Prior to amendment, par. (1) read as follows: ''The term 'foreign official' means any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality.''

Subsec. (g). Pub. L. 105-366, Sec. 2(c)(1), added subsec. (g).

1988 - Pub. L. 100-418 substituted ''Prohibited foreign trade'' for ''Foreign corrupt'' in section catchline and amended text generally, revising and restating provisions of subsec. (a) relating to prohibitions, adding subsecs. (b) to (e), and redesignating provisions of subsec. (b) relating to definitions as subsec. (f) and amending those provisions generally.

TREATMENT OF INTERNATIONAL ORGANIZATIONS PROVIDING COMMERCIAL COMMUNICATIONS SERVICES

Pub. L. 105-366, Sec. 5, Nov. 10, 1998, 112 Stat. 3309, provided that:

''(a) Definition. - For purposes of this section:

''(1) International organization providing commercial communications services. - The term 'international organization providing commercial communications services' means -

''(A) the International Telecommunications Satellite Organization established pursuant to the Agreement Relating to the International Telecommunications Satellite Organization; and

''(B) the International Mobile Satellite Organization

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established pursuant to the Convention on the International Maritime Satellite Organization.

''(2) Pro-competitive privatization. - The term 'pro-competitive privatization' means a privatization that the President determines to be consistent with the United States policy of obtaining full and open competition to such organizations (or their successors), and nondiscriminatory market access, in the provision of satellite services.

''(b) Treatment as Public International Organizations. -

''(1) Treatment. - An international organization providing commercial communications services shall be treated as a public international organization for purposes of section 30A of the Securities Exchange Act of 1934 (15 U.S.C. 78dd-1) and sections 104 and 104A of the Foreign Corrupt Practices Act of 1977 (15 U.S.C. 78dd-2 (and 78dd-3)) until such time as the President certifies to the Committee on Commerce (now Committee on Energy and Commerce) of the House of Representatives and the Committees on Banking, Housing and Urban Affairs and Commerce, Science, and Transportation that such international organization providing commercial communications services has achieved a pro-competitive privatization.

''(2) Limitation on effect of treatment. - The requirement for a certification under paragraph (1), and any certification made under such paragraph, shall not be construed to affect the administration by the Federal Communications Commission of the Communications Act of 1934 (47 U.S.C. 151 et seq.) in authorizing the provision of services to, from, or within the United States over space segment of the international satellite organizations, or the privatized affiliates or successors thereof.

''(c) Extension of Legal Process. -

''(1) In general. - Except as required by international agreements to which the United States is a party, an international organization providing commercial communications services, its officials and employees, and its records shall not be accorded immunity from suit or legal process for any act or omission taken in connection with such organization's capacity as a provider, directly or indirectly, of commercial telecommunications services to, from, or within the United

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States.

''(2) No effect on personal liability. - Paragraph (1) shall not affect any immunity from personal liability of any individual who is an official or employee of an international organization providing commercial communications services.

''(3) Effective date. - This subsection shall take effect on May 1, 1999.

''(d) Elimination or Limitation of Exceptions. -

''(1) Action required. - The President shall, in a manner that is consistent with requirements in international agreements to which the United States is a party, expeditiously take all appropriate actions necessary to eliminate or to reduce substantially all privileges and immunities that are accorded to an international organization described in subparagraph (A) or (B) of subsection (a)(1), its officials, its employees, or its records, and that are not eliminated pursuant to subsection (c).

''(2) Designation of agreements. - The President shall designate which agreements constitute international agreements to which the United States is a party for purposes of this section.

''(e) Preservation of Law Enforcement and Intelligence Functions. - Nothing in subsection (c) or (d) of this section shall affect any immunity from suit or legal process of an international organization providing commercial communications services, or the privatized affiliates or successors thereof, for acts or omissions -

''(1) under chapter 119, 121, 206, or 601 of title 18, United States Code, the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801 et seq.), section 514 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 884), or Rule 104, 501, or 608 of the Federal Rules of Evidence (28 App. U.S.C.);

''(2) under similar State laws providing protection to service providers cooperating with law enforcement agencies pursuant to State electronic surveillance or evidence laws, rules, regulations, or procedures; or

''(3) pursuant to a court order.

''(f) Rules of Construction. -

''(1) Negotiations. - Nothing in this section shall affect the

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President's existing constitutional authority regarding the time, scope, and objectives of international negotiations.

''(2) Privatization. - Nothing in this section shall be construed as legislative authorization for the privatization of INTELSAT or Inmarsat, nor to increase the President's authority with respect to negotiations concerning such privatization.''

(Memorandum of President of the United States, Nov. 16, 1998, 63 F.R. 65997, delegated to Secretary of State functions and authorities vested in the President by section 5(d)(2) of Pub. L. 105-366, set out above.)

ENFORCEMENT AND MONITORING

Pub. L. 105-366, Sec. 6, Nov. 10, 1998, 112 Stat. 3311, provided that:

''(a) Reports Required. - Not later than July 1 of 1999 and each of the 5 succeeding years, the Secretary of Commerce shall submit to the House of Representatives and the Senate a report that contains the following information with respect to implementation of the Convention:

''(1) Ratification. - A list of the countries that have ratified the Convention, the dates of ratification by such countries, and the entry into force for each such country.

''(2) Domestic legislation. - A description of domestic laws enacted by each party to the Convention that implement commitments under the Convention, and assessment of the compatibility of such laws with the Convention.

''(3) Enforcement. - As assessment of the measures taken by each party to the Convention during the previous year to fulfill its obligations under the Convention and achieve its object and purpose including -

''(A) an assessment of the enforcement of the domestic laws described in paragraph (2);

''(B) an assessment of the efforts by each such party to promote public awareness of such domestic laws and the achievement of such object and purpose; and

''(C) an assessment of the effectiveness, transparency, and viability of the monitoring process for the Convention, including its inclusion of input from the private sector and nongovernmental organizations.

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''(4) Laws prohibiting tax deduction of bribes. - An explanation of the domestic laws enacted by each party to the Convention that would prohibit the deduction of bribes in the computation of domestic taxes.

''(5) New signatories. - A description of efforts to expand international participation in the Convention by adding new signatories to the Convention and by assuring that all countries which are or become members of the Organization for Economic Cooperation and Development are also parties to the Convention.

''(6) Subsequent efforts. - An assessment of the status of efforts to strengthen the Convention by extending the prohibitions contained in the Convention to cover bribes to political parties, party officials, and candidates for political office.

''(7) Advantages. - Advantages, in terms of immunities, market access, or otherwise, in the countries or regions served by the organizations described in section 5(a) (set out as a note above), the reason for such advantages, and an assessment of progress toward fulfilling the policy described in that section.

''(8) Bribery and transparency. - An assessment of anti-bribery programs and transparency with respect to each of the international organizations covered by this Act (enacting section 78dd-3 of this title, amending this section and sections 78dd-2 and 78ff of this title, and enacting provisions set out as notes under this section).

''(9) Private sector review. - A description of the steps taken to ensure full involvement of United States private sector participants and representatives of nongovernmental organizations in the monitoring and implementation of the Convention.

''(10) Additional information. - In consultation with the private sector participants and representatives of nongovernmental organizations described in paragraph (9), a list of additional means for enlarging the scope of the Convention and otherwise increasing its effectiveness. Such additional means shall include, but not be limited to, improved recordkeeping provisions and the desirability of expanding the applicability of the Convention to additional individuals and organizations and the impact on United States business of section 30A of the

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Securities Exchange Act of 1934 (15 U.S.C. 78dd-1) and sections 104 and 104A of the Foreign Corrupt Practices Act of 1977 (15 U.S.C. 78dd-2, 78dd-3).

''(b) Definition. - For purposes of this section, the term 'Convention' means the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions adopted on November 21, 1997, and signed on December 17, 1997, by the United States and 32 other nations.''

INTERNATIONAL AGREEMENTS CONCERNING ACTS PROHIBITED WITH RESPECT TO ISSUERS AND DOMESTIC CONCERNS; REPORT TO CONGRESS

Section 5003(d) of Pub. L. 100-418 provided that:

''(1) Negotiations. - It is the sense of the Congress that the President should pursue the negotiation of an international agreement, among the members of the Organization of Economic Cooperation and Development, to govern persons from those countries concerning acts prohibited with respect to issuers and domestic concerns by the amendments made by this section (amending sections 78dd-1, 78dd-2, and 78ff of this title). Such international agreement should include a process by which problems and conflicts associated with such acts could be resolved.

''(2) Report to congress. - (A) Within 1 year after the date of the enactment of this Act (Aug. 23, 1988), the President shall submit to the Congress a report on -

''(i) the progress of the negotiations referred to in paragraph (1),(;)

''(ii) those steps which the executive branch and the Congress should consider taking in the event that these negotiations do not successfully eliminate any competitive disadvantage of United States businesses that results when persons from other countries commit the acts described in paragraph (1); and

''(iii) possible actions that could be taken to promote cooperation by other countries in international efforts to prevent bribery of foreign officials, candidates, or parties in third countries.

''(B) The President shall include in the report submitted under subparagraph (A) -

''(i) any legislative recommendations necessary to give the President the authority to take appropriate action to carry out

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clauses (ii) and (iii) of subparagraph (A);

''(ii) an analysis of the potential effect on the interests of the United States, including United States national security, when persons from other countries commit the acts described in paragraph (1); and

''(iii) an assessment of the current and future role of private initiatives in curtailing such acts.''

(For delegation of functions of the President under section 5003(d)(1) of Pub. L. 100-418 to the Secretary of State, see section 3-101 of Ex. Ord. No. 12661, Dec. 27, 1988, 54 F.R. 779, set out as a note under section 2901 of Title 19, Customs Duties.)

-EXEC-

EX. ORD. NO. 13259. DESIGNATION OF PUBLIC INTERNATIONAL ORGANIZATIONS FOR PURPOSES OF THE SECURITIES EXCHANGE ACT OF 1934 AND THE FOREIGN CORRUPT PRACTICES ACT OF 1977

Ex. Ord. No. 13259, Mar. 19, 2002, 67 F.R. 13239, provided:

By the authority vested in me as President by the Constitution and the laws of the United States of America, including section 30A(f)(1)(B)(ii) of the Securities Exchange Act of 1934 (15 U.S.C. 78dd-1(f)(1)(B)(ii)) and sections 104(h)(2)(B)(ii) and 104A(f)(2)(B)(ii) of the Foreign Corrupt Practices Act of 1977 (15 U.S.C. 78dd-2(h)(2)(B)(ii), 78dd-3(f)(2)(B)(ii)), I hereby designate as ''public international organizations'' for the purposes of application of section 30A of the Securities Exchange Act of 1934 and sections 104 and 104A of the Foreign Corrupt Practices Act of 1977:

(a) The European Union, including: the European Communities (the European Community, the European Coal & Steel Community, and the European Atomic Energy Community); institutions of the European Union, such as the European Commission, the Council of the European Union, the European Parliament, the European Court of Justice, the European Court of Auditors, the Economic and Social Committee, the Committee of the Regions, the European Central Bank, and the European Investment Bank; and any departments, agencies, and instrumentalities thereof; and

(b) The European Police Office (Europol), including any departments, agencies, and instrumentalities thereof.

Designation in this Executive Order is intended solely to further

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the purposes of the statutes mentioned above and is not

determinative of whether an entity is a public international

organization for the purpose of other statutes or regulations.

George W.
Bush.

-SECREF-

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 78dd-2, 78dd-3, 78ff of

this title; title 7 section 12a; title 18 section 1956; title 22

sections 2197, 2778; title 26 sections 162, 952, 964.

Text of FCPA as Codified (15 USC 78dd-2)

-CITE-

15 USC Sec. *78dd*-2
01/06/03

-EXPCITE-

TITLE 15 - COMMERCE AND TRADE

CHAPTER 2B - SECURITIES EXCHANGES

-HEAD-

Sec. 78dd-2. Prohibited foreign trade practices by domestic

concerns

-STATUTE-

(a) Prohibition

It shall be unlawful for any domestic concern, other than an

issuer which is subject to section 78dd-1 of this title, or for any

officer, director, employee, or agent of such domestic concern or

any stockholder thereof acting on behalf of such domestic concern,

to make use of the mails or any means or instrumentality of

interstate commerce corruptly in furtherance of an offer, payment,

promise to pay, or authorization of the payment of any money, or

offer, gift, promise to give, or authorization of the giving of

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anything of value to -

(1) any foreign official for purposes of -

(A)(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, or (iii) securing any improper advantage; or

(B) 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,

in order to assist such domestic concern in obtaining or retaining business for or with, or directing business to, any person;

(2) any foreign political party or official thereof or any candidate for foreign political office for purposes of -

(A)(i) influencing any act or decision of such party, official, or candidate in its or his official capacity, (ii) inducing such party, official, or candidate to do or omit to do an act in violation of the lawful duty of such party, official, or candidate, or (iii) securing any improper advantage; or

(B) inducing such party, official, or candidate to use its or his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such domestic concern in obtaining or retaining business for or with, or directing business to, any person; or

(3) 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 any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office, for purposes of -

(A)(i) influencing any act or decision of such foreign official, political party, party official, or candidate in his or its official capacity, (ii) inducing such foreign official, political party, party official, or candidate to do or omit to do any act in violation of the lawful duty of such foreign

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official, political party, party official, or candidate, or

(iii) securing any improper advantage; or

(B) inducing such foreign official, political party, party official, or candidate to use his or its influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such domestic concern in obtaining or retaining business for or with, or directing business to, any person.

(b) Exception for routine governmental action

Subsections (a) and (i) of this section shall not apply to 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.

(c) Affirmative defenses

It shall be an affirmative defense to actions under subsection (a) or (i) of this section that -

(1) 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; or

(2) 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.

(d) Injunctive relief

(1) When it appears to the Attorney General that any domestic concern to which this section applies, or officer, director, employee, agent, or stockholder thereof, is engaged, or about to engage, in any act or practice constituting a violation of subsection (a) or (i) of this section, the Attorney General may, in

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his discretion, bring a civil action in an appropriate district court of the United States to enjoin such act or practice, and upon a proper showing, a permanent injunction or a temporary restraining order shall be granted without bond.

(2) For the purpose of any civil investigation which, in the opinion of the Attorney General, is necessary and proper to enforce this section, the Attorney General or his designee are empowered to administer oaths and affirmations, subpoena witnesses, take evidence, and require the production of any books, papers, or other documents which the Attorney General deems relevant or material to such investigation. The attendance of witnesses and the production of documentary evidence may be required from any place in the United States, or any territory, possession, or commonwealth of the United States, at any designated place of hearing.

(3) In case of contumacy by, or refusal to obey a subpoena issued to, any person, the Attorney General may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, or other documents. Any such court may issue an order requiring such person to appear before the Attorney General or his designee, there to produce records, if so ordered, or to give testimony touching the matter under investigation. Any failure to obey such order of the court may be punished by such court as a contempt thereof. All process in any such case may be served in the judicial district in which such person resides or may be found. The Attorney General may make such rules relating to civil investigations as may be necessary or appropriate to implement the provisions of this subsection.

(e) Guidelines by Attorney General

Not later than 6 months after August 23, 1988, the Attorney General, after consultation with the Securities and Exchange Commission, the Secretary of Commerce, the United States Trade Representative, the Secretary of State, and the Secretary of the Treasury, and after obtaining the views of all interested persons through public notice and comment procedures, shall determine to what extent compliance with this section would be enhanced and the

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business community would be assisted by further clarification of the preceding provisions of this section and may, based on such determination and to the extent necessary and appropriate, issue -

(1) guidelines describing specific types of conduct, associated with common types of export sales arrangements and business contracts, which for purposes of the Department of Justice's present enforcement policy, the Attorney General determines would be in conformance with the preceding provisions of this section; and

(2) general precautionary procedures which domestic concerns may use on a voluntary basis to conform their conduct to the Department of Justice's present enforcement policy regarding the preceding provisions of this section.

The Attorney General shall issue the guidelines and procedures referred to in the preceding sentence in accordance with the provisions of subchapter II of chapter 5 of title 5 and those guidelines and procedures shall be subject to the provisions of chapter 7 of that title.

(f) Opinions of Attorney General

(1) The Attorney General, after consultation with appropriate departments and agencies of the United States and after obtaining the views of all interested persons through public notice and comment procedures, shall establish a procedure to provide responses to specific inquiries by domestic concerns concerning conformance of their conduct with the Department of Justice's present enforcement policy regarding the preceding provisions of this section. The Attorney General shall, within 30 days after receiving such a request, issue an opinion in response to that request. The opinion shall state whether or not certain specified prospective conduct would, for purposes of the Department of Justice's present enforcement policy, violate the preceding provisions of this section. Additional requests for opinions may be filed with the Attorney General regarding other specified prospective conduct that is beyond the scope of conduct specified in previous requests. In any action brought under the applicable provisions of this section, there shall be a rebuttable presumption that conduct, which is specified in a request by a domestic concern and for which the Attorney General has issued an opinion that such

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conduct is in conformity with the Department of Justice's present enforcement policy, is in compliance with the preceding provisions of this section. Such a presumption may be rebutted by a preponderance of the evidence. In considering the presumption for purposes of this paragraph, a court shall weigh all relevant factors, including but not limited to whether the information submitted to the Attorney General was accurate and complete and whether it was within the scope of the conduct specified in any request received by the Attorney General. The Attorney General shall establish the procedure required by this paragraph in accordance with the provisions of subchapter II of chapter 5 of title 5 and that procedure shall be subject to the provisions of chapter 7 of that title.

(2) Any document or other material which is provided to, received by, or prepared in the Department of Justice or any other department or agency of the United States in connection with a request by a domestic concern under the procedure established under paragraph (1), shall be exempt from disclosure under section 552 of title 5 and shall not, except with the consent of the domestic concern, be made publicly available, regardless of whether the Attorney General responds to such a request or the domestic concern withdraws such request before receiving a response.

(3) Any domestic concern who has made a request to the Attorney General under paragraph (1) may withdraw such request prior to the time the Attorney General issues an opinion in response to such request. Any request so withdrawn shall have no force or effect.

(4) The Attorney General shall, to the maximum extent practicable, provide timely guidance concerning the Department of Justice's present enforcement policy with respect to the preceding provisions of this section to potential exporters and small businesses that are unable to obtain specialized counsel on issues pertaining to such provisions. Such guidance shall be limited to responses to requests under paragraph (1) concerning conformity of specified prospective conduct with the Department of Justice's present enforcement policy regarding the preceding provisions of this section and general explanations of compliance responsibilities and of potential liabilities under the preceding provisions of this section.

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(g) Penalties

(1)(A) Any domestic concern that is not a natural person and that violates subsection (a) or (i) of this section shall be fined not more than $2,000,000.

(B) Any domestic concern that is not a natural person and that violates subsection (a) or (i) of this section shall be subject to a civil penalty of not more than $10,000 imposed in an action brought by the Attorney General.

(2)(A) Any natural person that is an officer, director, employee, or agent of a domestic concern, or stockholder acting on behalf of such domestic concern, who willfully violates subsection (a) or (i) of this section shall be fined not more than $100,000 or imprisoned not more than 5 years, or both.

(B) Any natural person that is an officer, director, employee, or agent of a domestic concern, or stockholder acting on behalf of such domestic concern, who violates subsection (a) or (i) of this section shall be subject to a civil penalty of not more than $10,000 imposed in an action brought by the Attorney General.

(3) Whenever a fine is imposed under paragraph (2) upon any officer, director, employee, agent, or stockholder of a domestic concern, such fine may not be paid, directly or indirectly, by such domestic concern.

(h) Definitions

For purposes of this section:

(1) The term ''domestic concern'' means -

(A) any individual who is a citizen, national, or resident of the United States; and

(B) any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States.

(2)(A) The term ''foreign official'' means any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or

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instrumentality, or for or on behalf of any such public international organization.

(B) For purposes of subparagraph (A), the term ''public international organization'' means -

(i) an organization that is designated by Executive order pursuant to section 288 of title 22; or

(ii) any other international organization that is designated by the President by Executive order for the purposes of this section, effective as of the date of publication of such order in the Federal Register.

(3)(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 engaging 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 circumstance exists or that such result is substantially certain to occur.

(B) When knowledge of the existence of a particular circumstance is required for an offense, 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.

(4)(A) The term ''routine governmental action'' means only an action which is ordinarily and commonly performed by a foreign official in -

(i) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country;

(ii) processing governmental papers, such as visas and work orders;

(iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country;

(iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or

(v) actions of a similar nature.

(B) The term ''routine governmental action'' does not include any decision by a foreign official whether, or on what terms, to

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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.

(5) The term ''interstate commerce'' means trade, commerce, transportation, or communication among the several States, or between any foreign country and any State or between any State and any place or ship outside thereof, and such term includes the intrastate use of -

(A) a telephone or other interstate means of communication, or

(B) any other interstate instrumentality.

(i) Alternative jurisdiction

(1) It shall also be unlawful for any United States person to corruptly do any act outside the United States in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to any of the persons or entities set forth in paragraphs (1), (2), and (3) of subsection (a) of this section, for the purposes set forth therein, irrespective of whether such United States person makes use of the mails or any means or instrumentality of interstate commerce in furtherance of such offer, gift, payment, promise, or authorization.

(2) As used in this subsection, the term ''United States person'' means a national of the United States (as defined in section 1101 of title 8) or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship organized under the laws of the United States or any State, territory, possession, or commonwealth of the United States, or any political subdivision thereof.

-SOURCE-

(Pub. L. 95-213, title I, Sec. 104, Dec. 19, 1977, 91 Stat. 1496; Pub. L. 100-418, title V, Sec. 5003(c), Aug. 23, 1988, 102 Stat. 1419; Pub. L. 103-322, title XXXIII, Sec. 330005, Sept. 13, 1994, 108 Stat. 2142; Pub. L. 105-366, Sec. 3, Nov. 10, 1998, 112 Stat. 3304.)

-COD-

CODIFICATION

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Section was enacted as part of Pub. L. 95-213, the Foreign Corrupt Practices Act of 1977, and not as part of act June 6, 1934, ch. 404, 48 Stat. 881, the Securities Exchange Act of 1934, which comprises this chapter.

-MISC3-

AMENDMENTS

1998 - Subsec. (a)(1)(A). Pub. L. 105-366, Sec. 3(a)(1), amended subpar. (A) generally. Prior to amendment, subpar. (A) read as follows:

''(A)(i) influencing any act or decision of such foreign official in his official capacity, or (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or''.

Subsec. (a)(2)(A). Pub. L. 105-366, Sec. 3(a)(2), amended subpar. (A) generally. Prior to amendment, subpar. (A) read as follows:

''(A)(i) influencing any act or decision of such party, official, or candidate in its or his official capacity, or (ii) inducing such party, official, or candidate to do or omit to do an act in violation of the lawful duty of such party, official, or candidate,''.

Subsec. (a)(3)(A). Pub. L. 105-366, Sec. 3(a)(3), amended subpar. (A) generally. Prior to amendment, subpar. (A) read as follows:

''(A)(i) influencing any act or decision of such foreign official, political party, party official, or candidate in his or its official capacity, or (ii) inducing such foreign official, political party, party official, or candidate to do or omit to do any act in violation of the lawful duty of such foreign official, political party, party official, or candidate, or''.

Subsec. (b). Pub. L. 105-366, Sec. 3(d)(2), substituted ''Subsections (a) and (i)'' for ''Subsection (a)''.

Subsec. (c). Pub. L. 105-366, Sec. 3(d)(3), substituted ''subsection (a) or (i)'' for ''subsection (a)'' in introductory provisions.

Subsec. (d)(1). Pub. L. 105-366, Sec. 3(d)(4), substituted ''subsection (a) or (i)'' for ''subsection (a)''.

Subsec. (g)(1). Pub. L. 105-366, Sec. 3(b)(1), amended par. (1) generally. Prior to amendment, par. (1) read as follows:

''(1)(A) Any domestic concern that violates subsection (a) of this section shall be fined not more than $2,000,000.

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''(B) Any domestic concern that violates subsection (a) of this section shall be subject to a civil penalty of not more than $10,000 imposed in an action brought by the Attorney General.''

Subsec. (g)(2). Pub. L. 105-366, Sec. 3(b)(2), amended par. (2) generally. Prior to amendment, par. (2) read as follows:

''(2)(A) Any officer or director of a domestic concern, or stockholder acting on behalf of such domestic concern, who willfully violates subsection (a) of this section shall be fined not more than $100,000, or imprisoned not more than 5 years, or both.

''(B) Any employee or agent of a domestic concern who is a United States citizen, national, or resident or is otherwise subject to the jurisdiction of the United States (other than an officer, director, or stockholder acting on behalf of such domestic concern), and who willfully violates subsection (a) of this section, shall be fined not more than $100,000, or imprisoned not more than 5 years, or both.

''(C) Any officer, director, employee, or agent of a domestic concern, or stockholder acting on behalf of such domestic concern, who violates subsection (a) of this section shall be subject to a civil penalty of not more than $10,000 imposed in an action brought by the Attorney General.''

Subsec. (h)(2). Pub. L. 105-366, Sec. 3(c), amended par. (2) generally. Prior to amendment, par. (2) read as follows: ''The term 'foreign official' means any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality.''

Subsec. (h)(4)(A). Pub. L. 105-366, Sec. 3(e), substituted ''The'' for ''For purposes of paragraph (1), the'' in introductory provisions.

Subsec. (i). Pub. L. 105-366, Sec. 3(d)(1), added subsec. (i).

1994 - Subsec. (a)(3). Pub. L. 103-322 substituted ''domestic concern'' for ''issuer'' in closing provisions.

1988 - Pub. L. 100-418 substituted ''Prohibited foreign trade'' for ''Foreign corrupt'' in section catchline and amended text generally, revising and restating as subsecs. (a) to (h) provisions of former subsecs. (a) to (d).

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-SECREF-

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 78dd-3 of this title; title 7 section 12a; title 12 section 635; title 18 section 1956; title 22 sections 2197, 2778, 6301; title 26 sections 162, 952, 964.

Text of FCPA as Codified (15 USC 78dd-3)

-CITE-

15 USC Sec. *78dd*-3
01/06/03

-EXPCITE-

TITLE 15 - COMMERCE AND TRADE

CHAPTER 2B - SECURITIES EXCHANGES

-HEAD-

Sec. 78dd-3. Prohibited foreign trade practices by persons other than issuers or domestic concerns

-STATUTE-

(a) Prohibition

It shall be unlawful for any person other than an issuer that is subject to section 78dd-1 of this title or a domestic concern (as defined in section 78dd-2 of this title), or for any officer, director, employee, or agent of such person or any stockholder thereof acting on behalf of such person, while in the territory of the United States, corruptly to make use of the mails or any means or instrumentality of interstate commerce or to do any other act in furtherance of an offer, payment, promise to pay, or authorization

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of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to -

(1) any foreign official for purposes of -

(A)(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, or (iii) securing any improper advantage; or

(B) 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,

in order to assist such person in obtaining or retaining business for or with, or directing business to, any person;

(2) any foreign political party or official thereof or any candidate for foreign political office for purposes of -

(A)(i) influencing any act or decision of such party, official, or candidate in its or his official capacity, (ii) inducing such party, official, or candidate to do or omit to do an act in violation of the lawful duty of such party, official, or candidate, or (iii) securing any improper advantage; or

(B) inducing such party, official, or candidate to use its or his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such person in obtaining or retaining business for or with, or directing business to, any person; or

(3) 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 any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office, for purposes of -

(A)(i) influencing any act or decision of such foreign official, political party, party official, or candidate in his or its official capacity, (ii) inducing such foreign official, political party, party official, or candidate to do or omit to do any act in violation of the lawful duty of such foreign official, political party, party official, or candidate, or

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(iii) securing any improper advantage; or

(B) inducing such foreign official, political party, party official, or candidate to use his or its influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such person in obtaining or retaining business for or with, or directing business to, any person.

(b) Exception for routine governmental action

Subsection (a) of this section shall not apply to 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.

(c) Affirmative defenses

It shall be an affirmative defense to actions under subsection (a) of this section that -

(1) 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; or

(2) 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.

(d) Injunctive relief

(1) When it appears to the Attorney General that any person to which this section applies, or officer, director, employee, agent, or stockholder thereof, is engaged, or about to engage, in any act or practice constituting a violation of subsection (a) of this section, the Attorney General may, in his discretion, bring a civil action in an appropriate district court of the United States to enjoin such act or practice, and upon a proper showing, a permanent

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injunction or a temporary restraining order shall be granted without bond.

(2) For the purpose of any civil investigation which, in the opinion of the Attorney General, is necessary and proper to enforce this section, the Attorney General or his designee are empowered to administer oaths and affirmations, subpoena witnesses, take evidence, and require the production of any books, papers, or other documents which the Attorney General deems relevant or material to such investigation. The attendance of witnesses and the production of documentary evidence may be required from any place in the United States, or any territory, possession, or commonwealth of the United States, at any designated place of hearing.

(3) In case of contumacy by, or refusal to obey a subpoena issued to, any person, the Attorney General may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, or other documents. Any such court may issue an order requiring such person to appear before the Attorney General or his designee, there to produce records, if so ordered, or to give testimony touching the matter under investigation. Any failure to obey such order of the court may be punished by such court as a contempt thereof.

(4) All process in any such case may be served in the judicial district in which such person resides or may be found. The Attorney General may make such rules relating to civil investigations as may be necessary or appropriate to implement the provisions of this subsection.

(e) Penalties

(1)(A) Any juridical person that violates subsection (a) of this section shall be fined not more than $2,000,000.

(B) Any juridical person that violates subsection (a) of this section shall be subject to a civil penalty of not more than $10,000 imposed in an action brought by the Attorney General.

(2)(A) Any natural person who willfully violates subsection (a) of this section shall be fined not more than $100,000 or imprisoned not more than 5 years, or both.

(B) Any natural person who violates subsection (a) of this

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section shall be subject to a civil penalty of not more than $10,000 imposed in an action brought by the Attorney General.

(3) Whenever a fine is imposed under paragraph (2) upon any officer, director, employee, agent, or stockholder of a person, such fine may not be paid, directly or indirectly, by such person.

(f) Definitions

For purposes of this section:

(1) The term ''person'', when referring to an offender, means any natural person other than a national of the United States (as defined in section 1101 of title 8 (FOOTNOTE 1) or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship organized under the law of a foreign nation or a political subdivision thereof.

(FOOTNOTE 1) So in original. A closing parenthesis probably should appear.

(2)(A) The term ''foreign official'' means any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.

(B) For purposes of subparagraph (A), the term ''public international organization'' means -

(i) an organization that is designated by Executive order pursuant to section 288 of title 22; or

(ii) any other international organization that is designated by the President by Executive order for the purposes of this section, effective as of the date of publication of such order in the Federal Register.

(3)(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 engaging 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 circumstance exists or that such result is substantially certain to occur.

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(B) When knowledge of the existence of a particular circumstance is required for an offense, 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.

(4)(A) The term ''routine governmental action'' means only an action which is ordinarily and commonly performed by a foreign official in -

(i) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country;

(ii) processing governmental papers, such as visas and work orders;

(iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country;

(iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or

(v) actions of a similar nature.

(B) The term ''routine governmental action'' does not include any decision by a foreign official whether, or on what terms, 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.

(5) The term ''interstate commerce'' means trade, commerce, transportation, or communication among the several States, or between any foreign country and any State or between any State and any place or ship outside thereof, and such term includes the intrastate use of -

(A) a telephone or other interstate means of communication, or

(B) any other interstate instrumentality.

-SOURCE-

(Pub. L. 95-213, title I, Sec. 104A, as added Pub. L. 105-366, Sec. 4, Nov. 10, 1998, 112 Stat. 3306.)

-COD-

CODIFICATION

Section was enacted as part of Pub. L. 95-213, the Foreign

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Corrupt Practices Act of 1977, and not as part of act June 6, 1934, ch. 404, 48 Stat. 881, the Securities Exchange Act of 1934, which comprises this chapter.

Text of FCPA as Codified (15 USC 78m(b)(2))

(2) Every issuer which has a class of securities registered pursuant to section 78l of this title and every issuer which is required to file reports pursuant to section 78o(d) of this title shall -

(A) make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer;

(B) devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that -

(i) transactions are executed in accordance with management's general or specific authorization;

(ii) transactions are recorded as necessary (I) to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and (II) to maintain accountability for assets;

(iii) access to assets is permitted only in accordance with

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management's general or specific authorization; and

(iv) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences; and

(C) notwithstanding any other provision of law, pay the allocable share of such issuer of a reasonable annual accounting support fee or fees, determined in accordance with section 7219 of this title.

Text of FCPA as Codified (15 USC 78m(b)(5))

(5) No person shall knowingly circumvent or knowingly fail to implement a system of internal accounting controls or knowingly falsify any book, record, or account described in paragraph (2).

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Useful Web Sites for Foreign Government Contracting:

- Department of Justice: http://www.usdoj.gov/criminal/fraud/fcpa.html
(statute and history, DOJ opinions and procedures, international agreements)

- Department of Treasury, Office of Foreign Assets Control: http://www.ustreas.gov/offices/enforcement/ofac/sanctions/
(embargoes and other sanctions preventing or limiting business with certain foreign governments)

- www.export.gov
(assistance in selecting foreign partners and complying with export requirements)

- Trade Compliance Center: http://www.tcc.mac.doc.gov/cgi-bin/doit.cgi?226:54:44963c1dda8790d3fb19303d2f414ae2a05d297648de925a553ad6dbe542d4a1:17
(report bribery here; comprehensive business risk management brochure; various reports)

- Department of State: http://www.state.gov/e/eb/cba/gc/
(archives and reports regarding international bribery)

- Department of Commerce: Transparency and Antibribery Initiatives: http://www.osec.doc.gov/ogc/occic/tabi.html

- Department of Commerce – Office of the General Counsel: http://www.ogc.doc.gov/intl_comm_home.html
(Contact information and summary of advice and help they offer)

Suggested Additional Reading:

"Twentieth Survey of White Collar Crime: Article: Foreign Corrupt Practices Act," 42 Am Crim. L. Rev. 545 (Spring, 2005)

"Comment: The Lengthening Anti-Bribery Lasso of the United States: The Recent Extraterritorial Application of the U.S. Foreign Corrupt Practices Act," 73 Fordham L. Rev. 2897 (May, 2005)

CCH FEDERAL ETHICS *Report*

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International Enforcement of the OECD Antibribery Convention

Kathryn Nickerson[1]

Introduction

The U.S. Department of Commerce has as part of its mission to promote U.S. and foreign commerce, including through strengthening international trade and investment rules. An important part of this mission is monitoring the trade agreements the United States has entered into with its trading partners to ensure that they are living up to their obligations and that U.S. exporters are gaining all the benefits of such agreements. Although not traditionally recognized as trade agreements, anticorruption instruments play an important role in supporting an open trading system, and creating conditions for sustained economic growth.

The United States has made real progress in building international coalitions to combat bribery and corruption. Bribery and corruption are now being addressed in a number of fora, with positive results. The focus of this article is the Organization for Economic Cooperation and Development ("OECD") Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("OECD Antibribery Convention"). However, there are several other important instruments containing antibribery provisions, including the new United Nations Convention Against Corruption ("U.N. Convention"), the Inter-American Convention Against Corruption (" Inter-American Convention"), the Council of Europe Criminal Law Convention on Corruption ("COE Convention"), and U.S. bilateral Free Trade Agreements ("FTAs"), which will also be briefly discussed.

Corruption as a Barrier to Trade and Competition

Corruption has long been a barrier to international trade and a competitive marketplace. The U.S. Government has for years received reports that bribery of foreign public officials influenced the awarding of billions of dollars in contracts around the world. In the last Department of Commerce annual report to Congress under the International Anti-Bribery and Fair Competition Act of 1998, it is estimated that, between May 1, 2003 and April 30, 2004, the competition for 47 contracts worth U.S. $18 billion may have been affected by bribery by foreign firms of foreign officials. Firms alleged to have offered such bribes won approximately 90 percent of the contracts in the deals for which information is available as to their outcome. The report also states that, although the overall bribery activity by OECD firms dropped substantially from the reporting years prior to 2002, firms from a few OECD countries continue to be involved in a disproportionate share of those allegations.[2] Prior reports indicated that bribery allegations were related to contracts in multiple sectors, including energy, telecommunications, construction, transportation and (primarily) military procurement. The Commerce Department has stressed that, while such bribery is harmful to all enterprises, it is particularly harmful to small and medium sized enterprises ("SMEs"), as they can least afford to compete in extensive bidding processes and are further dissuaded from doing so when the outcome of such transactions is not based on commercial merits.[3]

The OECD Antibribery Convention

One of the primary reasons for negotiating the OECD Antibribery Convention was to level the playing field for U.S. companies by requiring other major exporters to join the United States in criminalizing the bribery of foreign public officials under their own legal systems. The United States unilaterally prohibited such conduct in 1977 with the U.S. Foreign Corrupt Practices Act ("FCPA"). In 1988, Congress, recognizing that U.S. businesses were being negatively affected as a result of foreign bribery by their competitors, directed the

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International Enforcement of OECD

Executive Branch to negotiate at the OECD an international convention prohibiting bribery of foreign public officials. After ten years of effort, the OECD Antibribery Convention was adopted in November 1997. In the absence of the OECD Antibribery Convention, not only did most major exporting countries allow their companies to bribe foreign officials to win international contracts, but many also provided an incentive for companies to do so by allowing such bribes to be tax deductible. Prior U.S. Government attempts at negotiating such an instrument in the United Nations in the mid-seventies and early eighties had not been successful. The entry into force of the OECD Antibribery Convention in February 1999 therefore represented a milestone in the multilateral fight against corruption.

The FCPA was amended in 1998 to conform the statute to the OECD Antibribery Convention. For example, the OECD Antibribery Convention, although primarily based on the FCPA, specifically covered bribes by "any person" to officials of public international organizations, and encouraged countries to adopt nationality jurisdiction if permissible under their legal systems. Although the FCPA already covered bribe payments "in order to obtain or retain business" the statute was amended to make explicit that payments made to secure "any improper advantage," the language used in the OECD Convention, were prohibited by the FCPA. For more information on the 1998 amendments to the FCPA, see http://www.usdoj.gov/criminal/fraud/fcpa/legindx.htm

Role of the Commerce Department

Although the Commerce Department has no enforcement role with respect to the FCPA, it provides general guidance to exporters to assist them in understanding the FCPA in order to help them comply with its prohibitions. With the additional prohibitions by foreign countries pursuant to the OECD Antibribery Convention, it is even more important for U.S. exporters to be aware of such laws when engaging in international trade. As part of the Commerce Department, the U.S. and Foreign Commercial Service plays an important role in counseling U.S. exporters in key markets. This requires that the Commercial Service be aware of and provide information to U.S. companies about the FCPA and other anticorruption initiatives. The U.S. Government provides training to both U.S. State Department Foreign Service Officers and U.S. Commerce Department Commercial Service Officers about the FCPA and other anticorruption efforts. Such overseas personnel are instructed to report to Washington when they learn of bribery allegations implicating the FCPA or another country's laws implementing the OECD Antibribery Convention. Also, the U.S. Department of Commerce's International Trade Administration maintains an internet "hotline" so that the public may report possible violations of the laws implementing the OECD Antibribery Convention by firms of other Parties at www.export.gov/tcc.

Commerce Department officials are core members of the U.S. delegation to the OECD Working Group on Bribery, which monitors the implementation of the OECD Antibribery Convention. For six years the Commerce Department issued a report to Congress on the implementation of the OECD Antibribery Convention (the 2004 report, the last in this series, and all prior reports are available on-line at www.export.gov/tcc). The Department of State has also produced similar reports, available at http://www.state.gov/e/eb/rls/rpts/bib/. Commerce officials also monitor developments under the Inter-American Convention as well as the COE Convention. In addition, Commerce participates in negotiations of other international instruments on corruption, including the recently concluded U.N. Convention, and recent U.S. Free Trade Agreements ("FTAs"), as it is now general U.S. policy to include in its FTAs anticorruption provisions prohibiting domestic and foreign bribery of public officials as it affects trade and investment.

The OECD Working Group on Bribery Monitoring Process

Article 12 of the OECD Antibribery Convention requires Parties to cooperate in carrying out a program of systematic follow-up to monitor and promote full implementation of the Convention. As a result, the OECD Working Group on Bribery, consisting of representatives of all Parties to the Convention, has been steadily developing a growing body of research and analysis on its implementation. The process can be understood as a practical and productive way of measuring the Convention's success. It is in the interest of the Parties to the Convention to ensure that all Parties are upholding their obligations under the agreement, because if some countries continue to tolerate the bribery of foreign public officials while others do not, companies from the country that is not enforcing its obligations under the Convention will maintain an advantage. Besides having the will to ensure that other Parties to the Convention uphold their obligations, the Parties are also developing expertise in monitoring the instrument, as well as developing new investigatory and prosecutorial skills in applying their new laws.

The U.S. Department of Commerce's International Trade Administration maintains an internet "hotline" so that the public may report possible violations of the laws implementing the OECD Antibribery Convention by firms of other Parties at www.export.gov/tcc.

Phase 1 Reviews

Overall, the U.S. Government believes that the OECD monitoring process under the Working Group on Bribery is strong and will continue to grow more rigorous as countries learn from each other's experiences under the OECD Antibribery Convention. The Working Group on Bribery has almost completed the Phase 1 monitoring reviews, which are intended to ensure that all Parties have domestic laws on the books that prohibit the bribery of foreign public officials.[4] Generally, in the Phase 1 review, the OECD Secretariat provides a basic questionnaire to the country being examined to answer concerning the implementation of the Convention's obligations into its law. The answers are then reviewed by two examining countries and the Secretariat, which drafts a summary report. The lead examiners present the report to the Working Group on Bribery, which then proposes recommendations to the reviewed country on how to correct defects in its implementing laws; these recommendations accompany the report at publication.

The U.S. Government has been an active participant in these reviews, and as the country with the most experience in prosecuting the foreign bribery offense, the United States has a lot to bring to the table to share with Working Group on Bribery members concerning the issue. Overall, the results of the review have been positive: 36 countries now have laws on the books prohibiting the bribery of foreign public officials, and many have amended their laws pursuant to the Working Group on Bribery's recommendations.[5] At the same time, some of the reviews have identified important shortcomings. In the Commerce Department's final report to Congress on the implementation of the OECD Antibribery Convention, the U.S. Government listed several areas of concern with other Parties' laws implementing the Convention, including the following :[6]

Basic elements of the offense: laws that do not specifically cover certain basic elements of the offense of bribery of foreign public officials contained in Article 1 of the Convention, e.g., laws that do not specifically cover offering, promising, or giving a bribe; laws that do not cover bribes to third parties or through intermediaries; laws that do not use the Convention's autonomous definition of foreign official or require dual criminality.

Liability of legal persons: a lack of corporate liability, or the addition of inappropriate requirements

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for the conviction of a natural person holding a management or other position within the corporation in order to trigger corporate liability.

Sanctions: fines and prison terms that either do not rise to the level of being effective, dissuasive, and proportionate, or are not at least equal to penalties for domestic bribery.

Enforcement: statutes of limitation that are too short, require dual criminality to bring an action or require a complaint from the "victim" (e.g., the government of the corrupt official) to commence an investigation.

Jurisdiction: limitations on jurisdiction; in particular, a lack of nationality jurisdiction where available under the country's jurisdictional principles, or extremely limited territoriality jurisdiction.

Extradition/mutual legal assistance: laws that do not provide for adequate extradition or mutual legal assistance as required by the Convention or are contingent on dual criminality requirements.

Inappropriate defenses and exceptions: for example, if the bribe was solicited by the foreign public official instead of being initiated by the bribe payor, or if the bribe agreement was cancelled and reported to authorities before its completion (e.g., "effective regret" and "effective repentance").

Potential conflict with other instruments: differences between laws implementing European Union ("EU") or other anticorruption instruments and the OECD Antibribery Convention.

The OECD Working Group on Bribery is following up on these issues with the relevant Parties during the Phase 2 review process. Also, the U.S. Government, where appropriate, may engage its trading partners bilaterally concerning the full implementation of their Convention obligations.[7]

Phase 2 Reviews

The objective of Phase 2 reviews is to assess each Party's enforcement regime, specifically the structures and methods established by the Party to enforce the application of its laws implementing the Convention. The Phase 2 review is a crucial part of the monitoring process and the U.S. Government is firmly committed to ensuring that it is carried out in a rigorous and timely manner.

The Phase 2 process generally begins with the examined country answering a questionnaire tailored to its situation and prepared by the OECD Secretariat and lead examiners. The examined country's responses are forwarded to the lead examiners for their review prior to an on-site visit to the examined country, which is usually about a week long, where meetings are arranged with relevant government agencies, civil society and business. The examiners and the Secretariat then draft a Phase 2 report, which is presented and reviewed by the entire Working Group on Bribery before its adoption and eventual publication on the OECD website. The final version of the report contains recommendations by the Working Group on Bribery which will be followed-up on in future monitoring efforts, including follow-up reports by the examined country. This review process is continuing to evolve, and the Working Group on Bribery is constantly reevaluating it to ensure that it maintains high standards while remaining flexible so as to better address the specific issues raised by the particular situation of the country under examination.

The Phase 2 process began in late 2001 with the review of Finland, followed by the United States. Fifteen countries have now been reviewed. Although the process is still in its relatively early stages, some common themes, or issues of concern for the enforcement of Parties' laws implementing the OECD Antibribery Convention are becoming evident, such as:

Resources, awareness, training & communication in government: although Parties to the Convention now have laws on the books, not all relevant government officials are actually aware of such laws, and many do not have sufficient training and resources to carry them out. In particular, police and prosecutors obviously need adequate training and resources; officials in foreign posts need to be made aware of new antibribery prohibitions. Also, the relevant government agencies involved need to be better coordinated in sharing information.

Public awareness, particularly among SMEs (compliance programs): many companies, particularly SMEs, do not appear to be aware of the antibribery prohibitions, and need to be encouraged to adopt corporate compliance policies to raise employee awareness.

Technical cooperation, mutual legal assistance: although for most Parties the Convention will serve as the basis for international cooperation, and, as mentioned below, some countries are taking advantage of this new channel, others still need to do so.

Accounting provisions: although most Parties have accounting provisions on the books that generally satisfy the Convention's obligations, they are not being routinely enforced. Accounting issues are key for alerting officials to potential bribes, so poor enforcement of accounting rules could have a negative impact on the number of potential bribery investigations. These issues generally need to be given more attention.

Statutes of limitation: many of the Parties' statutes of limitations may be too short to allow for adequate time for the investigation and prosecution of foreign bribery cases, and the Working Group on Bribery needs to examine the effect these short limitations periods have in actual practice.

Sanctions: one of the main problems across the board for many Parties is the lack of corporate criminal liability or civil sanctions that are equally effective, proportionate and dissuasive. Until cases with dissuasive corporate fines emerge in countries other than the United States, laws other than the FCPA risk not having a strong deterrent effect.

Jurisdiction: although the Convention encourages countries to exercise broad jurisdiction over foreign bribery offenses in accordance with national legal principles, not all Parties have provided for effective territorial jurisdiction or nationality jurisdiction, even though possible under domestic legal principles.

For the United States, the Phase 2 enforcement reviews are a long term commitment. The U.S. Government sees great value in the peer review process and believes that public scrutiny and transparency will eventually lead to more investigations, prosecutions, and convictions.

Report Card on International Enforcement

Although the number of cases is still small among other Parties to the OECD Antibribery Convention, Parties are reporting an increased level of investigations. Authorities in Canada, Korea, Norway and Sweden have obtained convictions under their respective implementing laws for bribery of a foreign public official. A number of other Parties have initiated investigations or legal proceedings, including France, Italy, Switzerland and the U.K. As of February 2005, all of the Group of Seven (G-7) countries, with the notable exception of Japan, report active or ongoing investigations into foreign bribery cases. In the recent Phase 2 evaluation of Japan, conducted in December 2004 and January 2005, the lead examiners from the United States and Italy were highly critical of the lack of filed foreign bribery cases. On a more positive note, Japan's law has recently been amended so that it now includes nationality jurisdiction, effective January 1, 2005, so its ability to investigate and prosecute the bribery of foreign public officials should presumably improve.

The Future of the OECD Monitoring Process

The Working Group on Bribery should now have sufficient resources to complete the more rigorous Phase 2 process for all countries by 2007. As the Working Group on Bribery becomes more experienced in conducting its Phase 2 enforcement reviews and Parties to the Antibribery Convention bring more cases, the examiners will have more factual scenarios to work with upon which to judge whether an investigation should have been taken, or whether changes to the Convention or a Party's implementing legislation are needed. (The recent Japanese and U.K. reviews provide good examples of this trend. See http://www.oecd.org/document/24/0,2340,en_2649_34859_1933144_1_1_1_1,00.

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html) Of course, the Working Group on Bribery cannot interfere with prosecutorial discretion. Moreover, there are obvious reasons why sometimes relevant facts may not be given to the Working Group on Bribery, at least initially, including because the divulging of such facts prematurely could jeopardize an ongoing investigation.

The Working Group on Bribery offers a forum where the Working Group's Chairman or any Party can bring publicly available information to the table and ask whether an investigation on the matter has been or will be initiated (the "Tour de Table.") This mechanism complements and supports the Phase 2 review process. The Tour de Table is becoming more effective as more countries participate and bring their own questions to the table, although Parties recognize that publicly available assertions may not always be accurate. The success of the Tour de Table will of course depend on the will of the Parties to the Convention to take it seriously. Given countries continued attention to the Convention, at least within the context of the Working Group on Bribery, there is reason to be optimistic.

Another serious challenge facing the Working Group on Bribery is the importance of ensuring that prosecutors attend Working Group meetings, not just foreign or trade ministry officials. The U.S. Government persists in encouraging other countries to bring their prosecutors to the table, and has led by example, including a Department of Justice prosecutor as a core U.S. delegation member at every Working Group on Bribery meeting, who also serves as the lead examiner for the U.S. Government in the context of the monitoring process.

Enhanced mutual legal assistance is another benefit resulting from the OECD Antibribery Convention that should continue to improve enforcement by all Parties to the Convention. The ability of Parties to the OECD Antibribery Convention to gather foreign evidence, particularly evidence from other Parties, is facilitating efforts to prosecute violations of the FCPA and other countries' laws implementing the Convention. The good relationships which have been developed among prosecutors and investigating magistrates have been extremely useful in enabling prosecutors to obtain information and to share information with their counterparts. Enhanced mutual legal assistance between prosecutors and more frequent contacts among them may also increase their interest and level of representation at meetings of the Working Group on Bribery.

Beyond OECD Convention Enforcement: Other Government Education Efforts

From the Department of Commerce perspective, leveling the playing field in international business by reducing bribery of foreign public officials is crucial. U.S. business has made it clear that this should be a continued goal of the U.S. Government.

Enforcing obligations under the OECD Antibribery Convention is just one way of drawing attention to and lessening the problem. As mentioned above, the U.S. Department of Commerce Foreign Commercial Service Officers and State Department Foreign Service Officers receive training on the FCPA and other international anticorruption instruments, and provide general information to U.S. exporters on international corruption issues. The U.S. Government is also engaged in numerous other initiatives to encourage awareness of and compliance with the FCPA and other relevant anticorruption laws.

Encouraging companies to adopt compliance programs is another key factor in reducing international corruption. Although many of the larger U.S. companies routinely educate and train their employees about the importance of good corporate behavior and stewardship though such compliance programs, the OECD Phase 2 review of the United States noted in 2002 (see http://www.oecd.org/dataoecd/52/19/1962084.pdf) that many SMEs apparently did not. As a result, the U.S. Government is taking steps to ensure that more such businesses are aware of such programs and the importance of adopting similar ones. While recognizing that no one program will suffice for all companies, even small exporters should at least have a policy on the subject of not giving bribes or otherwise violating U.S. and domestic law while engaging in international business.

To assist such SMEs, the Department of Commerce has produced a practical guide for businesses involved in international trade, entitled *Business Ethics: A Manual for Managing a Responsible Business Enterprise in Emerging Market Economies*, available on-line at www.ita.doc.gov/goodgovernance. This manual is intended to aid enterprises in designing and implementing a business ethics program that meets emerging global standards of responsible business conduct. This manual provides a wealth of information on the subject of ethics and corporate compliance for all enterprises, and is particularly helpful to the SMEs and those new to international trade. Included among the subjects in the manual is practical information on the FCPA, other international corruption instruments as well as the value of corporate compliance programs.

The U.S. Government is also taking steps to ensure that its trading partners encourage their companies to adopt compliance programs. In June 2004 at Sea Island Georgia, the U.S. Government joined its Group of Eight (G-8) partners in launching an anticorruption and transparency initiative. The initiative recognizes the importance of governments encouraging their companies to establish corporate compliance programs to combat bribery. As one step to implement both the U.S. Government commitments made at Sea Island and the recommendations of the OECD Working Group on Bribery, in November 2004 Secretary of Commerce Donald L. Evans sent a letter to 160 U.S. exporters concerning the prohibitions of the FCPA, the OECD Antibribery Convention and the importance of corporate awareness and compliance programs in combating bribery and corruption. These important messages were also posted on the Department's website in an effort to reach the broadest audience possible, including SMEs. They were also circulated to our trading partners at the December 2004 Working Group on Bribery meeting, as an example for other countries to follow in educating their companies on the issue.

The Departments of Commerce and Justice and staff from the Securities and Exchange Commission also participate in numerous seminars and conferences on the FCPA and related corporate compliance issues sponsored by professional associations and industry groups, many of which are attended by outside and in-house counsel representing SMEs. In addition, the Department of Justice has required companies to implement rigorous compliance programs as part of plea agreements and consent judgments in FCPA matters. (For example, see the Consent and Undertaking in the *Metcalf & Eddy* case, at, http://www.usdoj.gov/criminal/fraud/fcpa/Appendices/Appendix%20E.htm#Appendix%20E)

The Inter-American and COE Conventions

Although the OECD Antibribery Convention is generally viewed as having the most rigorous monitoring mechanism of any of the several anticorruption conventions, there are important differences between the OECD Convention and other instruments. The OECD Convention focuses primarily on bribery of foreign public officials in international business transactions and its Parties are generally major exporting countries. The Inter-American Convention and the COE Convention cover much broader subject areas but are regional in nature. As a result, their respective monitoring systems and goals differ.

The Inter-American Convention

The Inter-American Convention was negotiated under the auspices of the Organization of American States following a mandate agreed to by the 34 heads of state that participated in the Summit of the Americas in 1994. The Inter-American Convention was adopted and opened for signature on March 29, 1996, in Caracas, Venezuela. The United States signed the Inter-American Convention on June 2, 1996 at the OAS General Assembly in Panama City, and deposited its instrument of ratification with the OAS Secretariat on September 29, 2000. Thirty-three of the 34 OAS member countries have now ratified. For a current list of signatories and ratifications of the Inter-American Convention, see, http://www.oas.org/.

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International Enforcement of OECD

The Inter-American Convention identifies acts of corruption to which the Convention will apply and contains articles that create binding obligations under international law as well as hortatory principles to fight corruption. The Inter-American Convention also provides for institutional development and enforcement of anti-corruption measures, requirements for the criminalization of specified acts of corruption and articles on extradition, seizure of assets, mutual legal assistance and technical assistance where acts of corruption occur or have effect in one of the Parties. In addition, subject to each Party's constitution and the fundamental principles of its legal system, the Inter-American Convention requires Parties to criminalize bribery of domestic and foreign government officials and illicit enrichment. The Inter-American Convention also contains a series of preventive measures that the Parties agree to consider establishing to prevent corruption including systems of government procurement that assure the openness, equity, and efficiency of such systems and prohibiting the tax deductibility of bribes.

A monitoring mechanism for the Inter-American Convention was established in 2001, and consists of two bodies: the Conference of States Parties to the Mechanism, the political arm which provides oversight, and the Committee of Experts, which assesses the progress made by Parties in implementing their obligations of the Inter-American Convention. Evaluations of twelve countries have now been completed and the resulting reports may be viewed on the OAS website, at www.oas.org/juridico/english/mec_ron1_rep.htm. The focus thus far has been on preventive measures (Articles III, XIV, and XVIII) of the Inter-American Convention. Transnational bribery (Article VIII) may be covered in the next round that begins in 2006.

The State Department has produced annual reports to Congress monitoring the Inter-American Convention, which may be viewed at: http://www.state.gov/g/inl/rls/rpt/31190.htm

According to the April 2004 report, Brazil, Nicaragua, and Suriname obtained convictions of officials for corruption. Chile, Mexico, Nicaragua, Paraguay, and Peru punished or removed high-level officials. Supreme Court justices were impeached in Argentina and Paraguay. Brazil, the Dominican Republic, Ecuador, Honduras, Jamaica and Nicaragua brought corruption charges against high-level officials. The Bahamas, Costa Rica, Guatemala and Paraguay brought investigations into high-level official corruption and Mexico fined a political party for campaign financing violations.

The COE Convention

The COE Convention entered into force in September 2002. The United States has signed but not ratified the COE Convention. The COE Convention obligates Parties to criminalize all bribes paid to domestic, foreign, and international public officials and parliamentarians. The COE Convention differs from the OECD Antibribery Convention in that it covers passive bribery (solicitation) as well as active bribery, and commercial (or "private sector") bribery. It is not limited to bribes in order to obtain or retain business. The COE Convention also outlaws trading in influence, and provides for cooperation in assets seizures and investigations. In addition, unlike the OECD Antibribery Convention, the COE Convention contains provisions allowing for reservations to several of the Convention's prohibitions.

In May 1998, the Council of Europe adopted an Agreement Establishing the Group of States Against Corruption ("GRECO"), of which the United States is a member. The GRECO has been evaluating the implementation of the COE Twenty Guiding Principles for the Fight Against Corruption since 2000 and in 2003 began evaluating certain provisions of the COE Convention as well. More about GRECO and the results of this evaluation process may be viewed at: http://www.greco.coe.int/

The U. N. Convention

Signed in December 2003 by over 100 countries, including the United States, the U.N. Convention is the first global instrument against corruption. It requires Parties to criminalize fundamental anti-corruption offenses, such as domestic bribery and bribery of foreign public officials, and mandates measures to prevent corruption. In several respects, the U.N. Convention goes further than existing regional instruments: its accounting provisions are applicable to more offenses, it obligates Parties to disallow the tax deductibility of bribes, and it contains language on transparency in government procurement. It also has new provisions on international cooperation, particularly concerning extradition, mutual legal assistance, asset recovery and the disposition of illicitly obtained assets. For more information on the U.N. Convention, see http://www.unodc.org/unodc/en/crime_convention_corruption.html

Another serious challenge facing the Working Group on Bribery is the importance of ensuring that prosecutors attend Working Group meetings, not just foreign or trade ministry officials.

The Convention requires 30 ratifications before it will enter into force: at the time of this writing there were 118 signatories and 15 Parties. The United States has signed but not yet ratified the U.N. Convention. For the latest list of signatories and ratifications, see http://www.unodc.org/unodc/en/crime_signatures_corruption.html

At present, the U.N. Convention does not have a formal mechanism for monitoring its implementation and enforcement as the above-mentioned instruments do. However, the U.N. Convention does establish a Conference of States Parties to promote and review its implementation, and further provides that the Conference of States Parties shall establish, if it deems necessary, any appropriate mechanism or body to assist in the effective implementation of the Convention. The extent of such a potential monitoring mechanism remains to be determined, but in doing so the Parties will have to take into account the existence of regional monitoring mechanisms and the obvious potential for redundancy, as well as the limited resources of governments to participate in numerous such mechanisms.

U.S. Free Trade Agreements

Pursuant to Congressional mandate via Trade Promotion Authority ("TPA") legislation, it is now U.S. policy to seek and obtain binding commitments in trade agreements that promote transparency and specifically address corruption of foreign and domestic officials. Generally, the United States seeks to have its trading partners apply high standards prohibiting corrupt practices affecting international trade and to enforce such prohibitions. Most of the recently concluded FTAs therefore contain antibribery provisions. This is yet another avenue for the United States to pursue in combating bribery of foreign public officials. For more information on U.S. FTAs, see: http://www.ustr.gov/Trade_Agreements/Bilateral/Section_Index.html

Conclusion

The Department of Commerce is committed to monitoring trade agreements for compliance, including anticorruption instruments, particularly the OECD Antibribery Convention. The United States passed the FCPA criminalizing the bribery of foreign public officials in 1977. As a result of the entry into force of the OECD Antibribery Convention, the Inter-American Convention, and the COE Convention, several dozen countries now have domestic laws prohibiting the bribery of foreign public officials in international business transactions. The U.N. Convention, once it enters into force, should eventually result in many more countries criminalizing the bribery of foreign public officials. Although there have not been numerous foreign bribery convictions yet under other countries' laws implementing the OECD Antibribery Convention (or the Inter-American Convention or the COE Convention), there have been several and more investigations are underway. The monitoring process at the OECD is yielding results: the first round of Phase 1 reviews, an evaluation of countries' laws on the books, has been completed for all Parties

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but one, and the Working Group on Bribery is making steady progress on Phase 2, enforcement reviews. The OECD Working Group on Bribery is also taking other steps to ensure compliance with the Convention and to strengthen its monitoring mechanism, including reviewing press articles for potential cases and bringing them to the attention of OECD Antibribery Convention Parties and encouraging greater attendance by prosecutors at meetings of the Working Group on Bribery. The U.S. Government is also taking other steps to combat bribery and corruption, including in the G-8, the OAS, the COE, the U.N. and in U.S. FTAs.■

Endnotes

1 Senior Counsel, Office of the Chief Counsel for International Commerce, U.S. Department of Commerce. The opinions expressed in this article are those of the author and not necessarily those of any U.S. Government agency.

2 *U.S. Department of Commerce Report to Congress Addressing the Challenges of International Bribery and Fair Competition*, July 2004, at 52.

3 *U.S. Department of Commerce Report to Congress*, July 2001, at 121.

4 Phase 1 reviews have been completed for all Parties except Estonia, which deposited its accession instrument in November 2004.

5 See Information Note: *The OECD Anti-Bribery Convention: Does it Work?* at http://www.oecd.org/dataoecd/43/8/34107314.pdf, last updated January 28, 2005.

6 *U.S. Department of Commerce Report to Congress*, July 2004, at 11-12.

7 Ibid., at 12.

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