Michael F. Zeldin and Carlo V. di Florio, "Global Risk Management under International Laws To Curb Corrupt Business Practices," ACCA Docket 18, no. 1 (2000)

GLOBAL RISK MANAGEMENT UNDER INTERNATIONAL LAWS GOVERNING TO CURB CORRUPT BUSINESS PRACTICES

by Michael F. Zeldin and Carlo V. di Florio

Introduction

Corruption has become one of the most prominent topics on the agenda of international policy debate. In a recent series of high profile international initiatives, no less than sixty nations have committed themselves to combat transnational bribery and other corrupt business practices. More initiatives are on the horizon. These efforts will cause major changes in the ways in which business will be conducted around the world and will require increased attention on the part of corporate counsel to international risk management and corporate governance.

Penalties for non-compliance include substantial fines and imprisonment, loss of financing and insurance from national and international institutions, debarment from public contracting, and lawsuits by competitors alleging a particular firm gained improper business advantages through fraudulent and corrupt means. To provide some examples, allegations of official bribery were at the core of enforcement action settlements in the last few years against Lockheed Corporation ($24.8 million), American Eurocopter ($24.4 million) and Litton Industries ($18.1 million).

As this paper will address in further detail, global risk management strategies to avoid such losses include: 1) implementation of integrated corporate governance and internal control frameworks; 2) routine integrity due diligence of foreign business partners, agents and merger and acquisition targets; 3) corporate ethics and compliance programs to safeguard reputation and cultivate shared values; and 4) timely and effective investigations when bribery allegations and related corruption risks threaten business integrity.

This article provides a roadmap for U.S. companies engaged in doing business abroad and dealing with foreign agents, partners, and governments on a commercial and financial basis. It analyses the recently amended Foreign Corrupt Practices Act[1](FCPA) and the penalties for violations of the law's anti-bribery and accounting provisions. It provides an overview of the 1999 Anti-Bribery Convention entered into force under the auspices of the Organization for Economic Cooperation and Development (OECD) and the Anti-Corruption Conventions of the Organization of American States (OAS) and Council of Europe (CE). The article concludes by providing specific recommendations for building an effective global risk management and integrity program that will protect companies as they navigate global markets.

[1] 1. The Foreign Corrupt Practices Act of 1977, 15 U.S.C. 78m, 78dd-1, 78f (1988) (Public Law 95-213, 91 Stat. 1494, as amended by the Omnibus Trade and Competitiveness Act of 1988, Public Law 100-418, sections 5001-5003 (H.R. 4848), and the International Anti-bribery and Fair Competition Act of 1998 (S. 2375).

The U.S. Foreign Corrupt Practices Act

Overview of the Act

In 1977, Congress passed the FCPA to combat fraud and corruption in international business transactions by criminalising bribery of foreign public officials. The Act was amended in 1988 and again in 1998 to bring it into compliance with the OECD Anti-Bribery Convention. The Nov/Dec 1997 issue of the ACCA Docket includes an in-depth analysis of the FCPA, so this article will provide a summary and focus on the 1998 amendments and new developments.

Who is Covered by the FCPA

The FCPA covers three categories of persons: issuers, domestic concerns, and foreign perrsons who further a corrupt act while in the United States. "Issuers" are public companies, domestic or foreign, who have securities registered or reports filed pursuant to the Securities and Exchange Act of 1934.[2] A "domestic concern" is any U.S. citizen, national or resident and any business organised under the laws of any state and territory or having its principal place of business in U.S.[3] The final category of covered person is any foreign individual or business, or any person acting on behalf of such individual or business who does any act in furtherance of a corrupt practice while in the territory of the United States.[4]

Elements of An FCPA Offense

In general, the FCPA criminalises transnational bribery to obtain any advantage in the conduct of international business. Specifically, the FCPA anti-bribery provisions prohibit the covered persons from: 1) using an instrumentality of interstate commerce; 2) corruptly; 3) in furtherance of an offer, payment, promise to pay, or authorisation of the payment of anything of value; 4) to any foreign public official,[5] or to any person while knowing that all or part will be offered or paid to a foreign public official; 5) for the purpose of (i) influencing any act or decision of such foreign public official in his official capacity; (ii) inducing such foreign public official to do or omit to do any act in violation of the lawful duty of such official; (iii) inducing a foreign public official to influence any government act or decision; or (iv) securing any improper advantage; 6) in order to assist a covered person in obtaining or retaining business for or with, or directing business to, any person.[6]

Pursuant to the alternative jurisdiction provisions,[7] U.S. individuals and companies are bound by the FCPA even if the corrupt act is done outside of the United States and no means or instrumentality of interstate commerce is employed in furtherance of the corrupt practice. Accordingly, enforcement

---

[2] *Id.* §78dd-1(a). This includes foreign companies that list American Depository Receipts (ADRs) on a U.S. stock exchange.
[3] *Id*. §78dd-2(h)(1).
[4] *Id*. §78dd-3(a)
[5] The term *foreign public official* is used in this analysis to mean foreign officials, foreign political parties or officials thereof, or any candidate for foreign political office. The FCPA defines *foreign official* as any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organisation, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organisation. *Id*. §78dd-3(f).
[6] *Id* §78dd-1, 2, and 3.
[7] *Id*. §78dd-2(I).

authorities will exercise nationality jurisdiction over U.S. nationals and companies acting anywhere in the world.

Facilitating Payments Exception

Under an exception to the Act, the anti-bribery provisions do not apply to any facilitating or expediting payment to a foreign public official where the purpose of the payment is to expedite or to secure the performance of a routine governmental action by a foreign public official. The statute defines *routine governmental action* as only that 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 pickup 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.[8]

Affirmative Defences

The FCPA also provides for two affirmative defences. First, it is an affirmative defence if the "thing of value" extended was lawful under the written laws and regulations of the foreign public official's country.[9] Second, it is an affirmative defence if the payment made was a reasonable and bonafide expenditure incurred by a foreign public official which was directly related to either 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.[10]

Accounting Provisions

The FCPA accounting provisions require issuers to keep accurate books, records and accounts, and to implement internal controls sufficient to provide reasonable assurance that transactions and disposition of assets will occur at the instruction and authorisation of management.[11] The broad reach of the accounting provisions is best demonstrated by the SEC's enforcement action against the Italian company, Montedison, S.p.A., headquartered in Milan.[12] Montedison traded American Depository Receipts (" ADRs") on the New York Stock Exchange and for several years falsified its books, records and reports to disguise an estimated $400 million in bribes to government officials for various purposes. Although the company was Italian and the underlying conduct occurred in

[8] *Id*. §78dd-3(f)(4).
[9] *Id.* §78dd-1(c).
[10] Id.
[11] *Id*. §78m(b)(2).
[12] SEC v. Montedison, S.p.A., SEC Lit. Rel., No. 15164 (Nov. 21, 1996), reprinted in 3 Foreign Corrupt Practices Act Rep. 699.450 (D.D.C. Nov. 21, 1996).

Italy, the SEC asserted jurisdiction over Montedison on the ground that the company was an "issuer" covered by the FCPA because it listed ADRs in the United States.

Like the anti-bribery provisions, the accounting provisions do not apply directly to a U.S. company's foreign affiliates. Nevertheless, a U.S. company is required to assure compliance by subsidiaries and affiliates it controls. To illustrate, in 1997, the SEC filed suit against Triton Energy Corporation alleging that it failed to design adequate internal controls thereby allowing its wholly owned foreign subsidiary, Triton Indonesia, to make and disguise improper payments to Indonesian government officials, including payments to lower its tax liability, to receive tax refunds, and to recover costs under its government contract.[13]

With regard to uncontrolled affiliates in which the issuer has a 50% or less interest, such issuer is required to "proceed in good faith to use its influence, to the extent reasonable under the issuer's circumstances, to cause such domestic or foreign firm to devise and maintain a system of internal accounting controls."[14] Such circumstances include the relative degree of the issuer's ownership of the domestic or foreign firm and the laws and practices governing the business operations of the country in which such firm is located.

Overview of the 1998 FCPA Amendments

On October 21, 1998, Congress amended the FCPA by enacting the International Anti-bribery and Fair Competition Act to reflect U.S. obligations under the OECD Anti-Bribery Convention.[15] The amendments attempt to strengthen the law's original provisions and eliminate loopholes. The five major amendments are as follows:

Payments to Secure Any Improper Advantage

First, the amendments expand the prohibited payments provision beyond procurement and retention of business, to explicitly include payments made to secure "any improper advantage."[16]

This amendment clearly expands the prohibition against bribery beyond only those payments made to "obtain or retain" business. This amendment may also, however, have an impact on the facilitating payments exception. The exception has traditionally been one of the greatest areas of interpretative difficulty under the FCPA and may become more narrowly construed as a result of this new language.

For example, it remains to be seen whether obtaining some form of faster routine action (e.g. pushing a license or permit application to the front of the line) could be interpreted by the enforcement authorities as securing an improper business advantage. It certainly provides enforcement authorities with increased leverage for narrowly construing the facilitating payments exception. This would be consistent with other efforts by enforcement authorities to restrict use of the facilitating payments exception.

[13] SEC v. Triton Energy Corp., Civ. Act. No. 1:97CV00401 (D.D.C. Feb 27, 1997).
[14] FCPA, *supra* n.1, §78m(b)(6).
[15] *Id.*, Pub L. No. 105-366, 112 Stat. 3302 (1998)
[16] *Id.* §78dd-5(iv).

To illustrate, many practitioners used to approach the issue of facilitating payments by distinguishing between payments to secure discretionary action (for example, awarding new contracts) versus payments to secure routine action (for example, simply getting an official to do what the official is already legally bound to do). In a recent case, however, a U.S. company pled guilty to having violated the FCPA by making a payment to a government official to secure the government's payment of the outstanding balance due under a contract that had already been performed.[17] Despite the fact that the government had a pre-existing legal obligation to make the payment, the U.S. Department of Justice (DOJ) viewed the decision as to whether and when to pay the overdue balance as discretionary; therefore the payment was not considered to be a "facilitating payment" covered by the exception.

Covering Foreign Companies and Individuals In the U.S.

Second, the amendments expand the Act to cover not only issuers and domestic concerns, but also all foreign persons who commit an act in furtherance of a foreign bribe while in the United States.[18]

This amendment reflects one of the most significant changes to the FCPA. Previously, foreign companies, including foreign subsidiaries of U.S. companies, were not subject to the FCPA if they did not register securities in the U.S. While U.S. parent companies could face prosecution if they authorised or directed payments through a foreign subsidiary, the foreign subsidiary itself fell outside the scope of the FCPA.

As a result of this amendment, any foreign company or individual will be subject to prosecution if they commit any act in furtherance of a foreign bribe while in the United States. Thus, if a Russian subsidiary of a U.S. company and a foreign Russian national employee of that Russian subsidiary, without the knowledge or authorisation of the U.S. parent, engage in bribery in Russia of a foreign official, the Russian subsidiary and employee will now be independently liable under the FCPA if any act, no matter how insignificant, was done in furtherance of that bribe in the territory of the United States. Such acts are not limited only to the use of the “instrumentalities of interstate commerce.”

It should be noted that the U.S. parent of the foreign subsidiary would not be vicariously liable since it did not direct, control or authorise the act of the foreign employee or subsidiary. However, the press reports will not likely distinguish between the two and the reputation costs, in such cases, would likely affect the parent.

Expanding the Definition of Public Official

Third, the amendments expand the act’s definition of *public officials* to include officials of public international organisations.[19]

Under this amendment, for example, a bribe payment to a World Bank country manager to tailor the specifications of a procurement bid to favour one company would now constitute a corrupt payment to a foreign public official and thus be subject to investigation and prosecution. The IMF and the

[17] United States v. Vitusa Corp. (Cr. No. 94-253)(MTB) D.N.J., April 1994
[18] FCPA, §78dd-3(a)
[19] *Id.* at §78dd-3(f)

United Nations are other examples of public international organisations whose officials will now be included in the definition of foreign public official for purposes of the FCPA. This amendment will become increasingly important as these international organisations expand their involvement in the financing, insuring and guaranteeing of international business projects in developing countries.

Nationality Jurisdiction Over U.S. Persons

Fourth, the amendments provide for jurisdiction over the acts of U.S. businesses and nationals in furtherance of unlawful payments that take place wholly outside the United States.[20]

This amendment imposes nationality jurisdiction over U.S. companies and individuals. Accordingly, the law would now reach a U.S. citizen who is working in Indonesia and pays a bribe to a local official to obtain a business advantage, even though no instrumentality of U.S. interstate commerce was used, and even though the individual lives and works in Indonesia with no intent of returning to the United States. No nexus to the instrumentalities of interstate commerce are necessary in such cases.

Subjecting Foreign Nationals to Criminal Penalties

Fifth and finally, the amendments modify the penalties applicable to employees and agents of U.S. businesses to eliminate the current disparity between U.S. nationals and non-U.S. nationals employed by or acting as agents of U.S. companies.[21]

Under the old statute, non-U.S. nationals were subject only to civil penalties. The amended Act subjects all employees or agents of U.S. businesses to both civil and criminal penalties. Accordingly, if the vice-president for marketing of a U.S. business is a foreign citizen and violates the Act, that individual would face potential imprisonment just as a U.S. executive of the company would.

Emerging Anti-corruption Standards under International Law

The investment that U.S. companies make in global risk management programs will not only ensure their compliance and integrity under U.S. law but will conform their business practices to an increasing body of foreign laws as well. When Congress passed the FCPA in 1977, the United States stood alone among nations in actively criminalising bribery of foreign officials. Today, more than 60 nations have committed themselves, under various Conventions, to outlawing transnational bribery, and other corrupt practices such as trading in influence, private sector bribery, and illicit enrichment. The number of countries implementing anti-corruption laws will only grow as additional regional initiatives are being developed and existing treaties open for signature to non-parties.

Of particular importance, new anti-corruption standards under three different Conventions sponsored by the OECD, the OAS, and the CE represent a significant expansion of the network of anti-corruption laws governing public integrity and ethical business practices.

[20] *Id.* at §78dd-2(i)
[21] *Id.* at §78dd-2(g) and 78ff(c)

As a practical matter for U.S. multinationals, foreign subsidiaries not traditionally covered by the FCPA may now be directly covered under similar sanctions by the laws of the foreign jurisdiction in which they are incorporated. Coupled with the new FCPA amendment covering foreign persons acting in the U.S., the expanding theories of vicarious liability under the FCPA anti-bribery provisions, and corporate responsibility for internal controls under the FCPA accounting provisions, it is advisable for U.S. multinationals to implement one global integrity program and cease the traditional practice of some U.S. companies to use foreign subsidiaries as a way of circumventing the FCPA.

In addition, these new Conventions, and the domestic laws that will be enacted in accordance with them, dramatically strengthen international law enforcement efforts by facilitating cross-border mutual legal assistance, evidence gathering, asset seizures, extradition, and other co-operation. As a result, the traditional evidentiary and related legal hurdles that presented practical problems for the DOJ and SEC in the past will be greatly diminished. Accordingly, the business community can expect to see substantially heightened and successful enforcement activity both domestically and abroad.

The OECD Anti-Bribery Convention

On December 19, 1997, the OECD announced that its member countries had successfully negotiated the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.[22] The OECD Convention entered into force on February 15, 1999 and is open for signature by non-OECD member countries. The OECD reports that to date, twenty-five of the thirty-four signatories have ratified the Convention and submitted implementing legislation. Fourteen of those countries have already passed their implementing legislation.

The definitions set forth in the OECD Convention are largely autonomous from local law. On the other hand, the OECD does not attempt to harmonise substantive criminal law, relying instead on the concept of "functional equivalency" to respect the legal traditions of member states. The "functional equivalence" concept is further addressed below in the discussion on sanctions, corporate criminal liability, accounting standards, and jurisdiction.

It should be noted that the OECD Convention establishes an evolving framework, not a limited scope. The Working Group on Bribery is considering further measures to address bribery through foreign political parties and candidates for public office, as well as the use of foreign subsidiaries and offshore financial centres. The Convention acknowledges the essential role that financial resorts play in the preparation and the orchestration of large-scale corruption as well as the laundering of bribe payments and benefits. Accordingly, new developments can be expected on these and related issues. In the meantime, the provisions detailed below will govern.

[22] Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 18, 1997, 37 I.L.M. 1 (1998) [hereinafter OECD Convention]. The complete text of the OECD Convention and plans for future actions is available on the OECD homepage at: www.oecd.org/daf/cmis/bribery.

The Offence of Bribery of Foreign Public Officials

Article 1 of the OECD Convention sets forth the elements of the criminal offence of bribery of foreign public officials. In language substantively similar to the FCPA, it provides that it is a criminal offence for:

> any person intentionally to offer, promise, or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third Party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.[23]

The OECD Convention further requires that parties criminalise complicity in or authorisation of an act of bribery of a foreign public official, as well as attempt to commit such an act.[24] The term *foreign public official* is broadly defined to include "officials in all branches of government, whether appointed or elected; any person exercising a public function, including for a public agency or public enterprise; and any official or agent of a public international organisation."[25]

A *public function* is defined to include any activity in the public interest, delegated by a foreign country, such as functions delegated by the state in relation to public procurement.[26] The OECD Convention applies to state-owned enterprises (parastatals) by defining a *public enterprise* as any enterprise over which a government or governments may, directly or indirectly, exercise a dominant influence, including through majority subscribed capital ownership or majority control through voting or appointment power.[27] An official of a public enterprise is deemed to perform a public function unless the enterprise operates on a normal commercial basis in the relevant market, without preferential subsidies or other privileges.[28]

The Commentaries to the Convention make clear that there is no *de minimis* exception with regard to either the bribe or the benefit, and there is no "local custom" defence. Specifically, it prohibits bribes irrespective of the value of the advantage, its results, perceptions of local custom, the tolerance of such payments by local authorities, or the alleged necessity of the payment to obtain or retain business or other improper advantage.[29]

In sharp contrast to the FCPA, political parties, Party officials and candidates for public office are not explicitly covered in the definition of foreign public officials under the OECD Convention. The OECD Working Group on Bribery is considering expanding the Convention of include such persons in the definition of foreign public official, however, at present they do not fall within the scope of the Convention.

---

[23] *Id.*, art. 1(1).
[24] *Id.*, art. 1(2).
[25] *Id.*, art. 1(4).
[26] Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, para. 12, Nov. 21, 1997, reprinted in 37 I.L.M. 1, 8 (1998) [hereinafter Commentaries].
[27] *Id.*, para. 14.
[28] *Id.*, para. 15.
[29] *Id.*, para. 7.

Exceptions to the Offense

Although the OECD Convention itself does not provide explicit exceptions and affirmative defences like those provided in the FCPA, the Commentaries create *de facto* exceptions. The OECD Commentaries explain that it is not an offence if the "improper advantage" is permitted by the written law or regulation of the foreign official's country – language similar to the FCPA's affirmative defense.[30] Also similar to the FCPA, the Commentaries explain that small "facilitation" payments are not an offence since they do not constitute payments made "to obtain or retain business or other improper advantage" within the meaning of the Convention.[31] Accordingly, the FCPA may be instructive on how these provisions will be implemented in practice.

Sanctions – Fines and Penalties

The OECD Convention provides that the bribery of a foreign public official shall be punishable by "effective, proportionate, and dissuasive" criminal penalties.[32] This demonstrates the negotiators' strategy of assuring functional equivalency while respecting the legal traditions of the parties. The only further requirement is that the range of penalties for bribing foreign public officials is comparable to that applicable to the bribery of the Party's own officials, including deprivation of liberty sufficient to enable effective mutual legal assistance and extradition.[33]

The Convention provides for corporate criminal liability, but allows parties whose legal systems do not recognise such liability to impose noncriminal sanctions as long as they are "effective, proportionate, and dissuasive," including monetary sanctions.[34] Providing similar latitude for countries who would have difficulty introducing a sufficient forfeiture regime, the Convention provides that:

> Each Party shall take such measures as may be necessary to provide that the bribe and proceeds of the bribery of a foreign public official, or property the value of which corresponds to that of such proceeds, are subject to seizure and confiscation or that monetary sanctions of comparable effect are applicable.[35]

The Commentaries explain that the term *proceeds* of bribery are the profits or other benefits or improper advantage derived by the briber from the transaction.[36] There will be debate about what constitutes the "proceeds of bribery." Enforcement authorities can argue that the "benefit or advantage" obtained is not simply limited to the profits from the transaction, but may indeed include the entire value of the contract. Considering the general value range of many of these international contracts, such a possibility serves as a powerful incentive for corporations to proactively foster compliance as a preventive measure, and to settle in cases where violations are reasonably alleged.

---

[30] *Id.*, para. 8.
[31] *Id.*, para. 9.
[32] OECD Convention, *supra* n. 34, art. 3(1).
[33] *Id.*
[34] *Id.*, art. 3(2).
[35] *Id.*, art. 3(3).
[36] Commentaries, *supra* n. 58, para. 21.

Additional civil or administrative sanctions are also to be considered. The Commentaries explain that such civil and administrative sanctions might include: "exclusion from entitlement to public benefits or aid; temporary or permanent disqualification from participation in public procurement or from the practice of other commercial activities; placement under judicial supervision; and judicial winding up orders."[37]

Jurisdiction – Territoriality and Nationality Principles

Jurisdiction presented a delicate issue during the OECD Convention negotiations because of the different approaches various legal traditions have to the issue. Ultimately, the negotiators were able to encourage a broad application of territorial jurisdiction, and the alternative of extradition assistance where nationality jurisdiction was not part of a member country's legal tradition. Furthermore, the Commentaries provide that where a Party's legal system has a requirement of dual criminality, such requirement should be deemed to have been met if the act is unlawful where it occurred even if under a different name or type of criminal statute.[38]

Specifically, Article 4 of the OECD Convention provides that parties are to establish jurisdiction over offences that are committed in whole or in part in their territories. Parties may rely on the general jurisdictional principles—nationality or territoriality—recognised by their legal systems.

The territorial basis for jurisdiction is to be interpreted broadly so that an extensive physical connection to the act of bribery is not required.[39] Participating governments have pledged to consult regarding the most appropriate jurisdiction for prosecution and to take remedial steps where review of their current basis for jurisdiction proves to be ineffective in the fight against corruption.

Accounting Measures – Accurate and Transparent Reporting

The OECD Convention requires that parties take necessary accounting measures, within the framework of their relevant laws, to provide "effective, proportionate, and dissuasive" penalties for omissions and falsifications of records of such companies. Although the OECD Convention falls short of the FCPA by failing to detail effective internal control provisions, the compromise does affect the way companies will have to report their behaviour. One immediate consequence of the Convention is that companies that are required to issue financial statements disclosing their material contingent liabilities will need to include such liabilities potentially arising out of the OECD Convention.[40] Additionally, the Commentaries explain that auditors are now required to assess compliance.

The accounting provisions specifically require:

> The maintenance of books and records, financial statement disclosures, and accounting and auditing standards, to prohibit the establishment of off-the-books accounts, the making of off-the-books or inadequately identified transactions, the recording of nonexistent expenditures, the entry of liabilities with incorrect identification of their object, as well as the

[37] *Id.*, para. 24.
[38] *Id.*, para. 26.
[39] *Id.*, para. 25.
[40] *Id.*, para. 29.

> use of false documents, by companies subject to those laws and regulations, for the purpose of bribing foreign public officials or of hiding such bribery.[41]

It remains to be seen what "specific measures" each member country adopts. The growing trend toward transparency and international accounting standards, however, suggests that best practices in this area will require an effective internal control framework that ensures accurate books and records are kept and facilitates management responsibility for the protection, management and disposition of corporate assets.

Money Laundering – Attacking the Proceeds of Bribery

The link between corruption, money laundering, and forfeiture laws is increasingly being examined. The OECD Convention embraces this new approach and has looked to the experience of the Financial Action Task Force (FATF) in forging multilateral assistance in the war against the drug trade and money laundering. Money laundering laws are proving to be powerful tools in the multilateral efforts against corruption. The Convention provides that parties cannot decline mutual legal assistance on the grounds of bank secrecy. From a practical standpoint, multinational anti-corruption compliance programs include some of the same due diligence and intelligence tools used to combat money laundering schemes and assist the entity to "know" its partners, agents and customers.

The OECD Convention requires that each Party that has made bribery of its own public officials a predicate offence in the application of its money laundering laws shall also do so with regard to bribery of a foreign public official, regardless of the place where the bribery occurred.[42] In the United States, domestic bribery has long been a predicate offence for the application of the money laundering laws, and in 1992 the Money Laundering Control Act was amended to provide that a felony violation of the FCPA constitutes unlawful activity for the purpose of the money laundering laws.[43] The OECD Working Group on Bribery will continue to explore the important role played by financial resorts in the laundering of the proceeds of corruption.

Mutual Legal Assistance, Extradition, and Monitoring

The OECD Convention will greatly facilitate law enforcement's efforts to investigate and prosecute transnational corruption cases. The Convention provides that parties shall provide prompt and effective legal assistance including gathering of evidence, temporary transfer of witnesses, extradition, and asset seizure and forfeiture. The Convention will assist law enforcement in, among other things, locating persons, obtaining business records and other documentary evidence, conducting searches and seizures, and obtaining witness testimony.

In addition to making bribery an extraditable offence, the Convention provides that each Party shall take any measures necessary to assure either that it can extradite its nationals or that it can prosecute

[41] Convention, *supra* n. 54, art. 8(1).
[42] *Id.*, art. 7.
[43] 18 U.S.C. §1956(c)(7)(D).

them for the offence of bribery of a foreign official.[44] Where there is no extradition treaty between the parties, the OECD Convention itself may be considered the legal basis for extradition.[45]

Active enforcement of the Convention's "extradite or prosecute" obligations will be imperative to any substantive progress, and the OECD monitoring process will be critical to ensure that the actions taken by national legislatures during enactment of implementing legislation is in accordance with the substantive spirit of the Convention. Accordingly, each of the parties is required to subject its implementation efforts to both self and peer evaluation.

Organization of American States Anti-Corruption Convention

On March 29, 1996, the member states of the OAS adopted the Inter-American Convention against Corruption.[46] The OAS Convention, which was entered into force on March 20, 1997, was signed by 25 member states; to date, 15 countries have ratified it. The United States has not yet ratified the OAS Convention, the biggest criticism being that it fails to provide for any monitoring mechanism to assess States Parties' efforts at implementation and enforcement. The Parties are, however, considering the monitoring issue and consensus may build through the OAS Political-Juridical Committee and Working Group on Probity to provide adequate monitoring mechanisms.

The OAS Convention is more expansive than the FCPA and the OECD Convention. It targets public officials (the demand side of bribery) as well as multinationals (the supply side of bribery). In addition to emphasising heightened government ethics, improved financial disclosures, and transparent record keeping, the OAS Convention also provides for international co-operation in the gathering of evidence, extradition, and asset seizure. Of the Convention's 28 articles, some are binding, some are conditional, some are subject to progressive development, and some are only matters for future consideration.

Preventive Measures Toward Good Governance

The OAS Convention begins with a broad list of preventive measures that the State Parties agree to consider establishing to deal with good governance and anti-corruption in a comprehensive manner. These include: 1) standards of government conduct intended to prevent conflicts of interest, facilitate reporting of corrupt behaviour, prevent misuse of public funds, and otherwise preserve the public's confidence in the integrity of government; 2) systems for hiring and training public servants, as well as for registering their assets; 3) mechanisms to ensure that companies maintain adequate books, records, and internal controls; and 4) oversight bodies to enforce standards of conduct and protect those who expose corrupt practices.[47]

Definitions, Scope, and Jurisdiction

---

[44] OECD Convention, *supra* n. 54, art. 10(3).
[45] *Id.*, art. 10(2).
[46] Inter-American Convention Against Corruption, OEA/Ser.K/XXXIV.1, CICOR/doc.14/96 rev.2 (March 29, 1996) [hereinafter OAS Convention]. *See also*, Summary of Organization of American States Inter-American Convention Against Corruption, U.S. Department of Commerce, Chief Counsel for International Commerce (April 30, 1996).
[47] *Id.*, art. III.

Unlike the FCPA but similar to the OECD Convention, the OAS Convention fails to cover political parties, party officials, and candidates for public office. Instead, the Convention defines *public official*, *government official*, or *public servant* as:

> any official or employee of the state or its agencies, including those who have been selected, appointed, or elected to perform activities or functions in the name of the state or in the service of the state, at any level of its hierarchy.[48]

Public function is defined as "any temporary or permanent, paid or honorary activity, performed by a natural person in the name of the state or in the service of the state or its institutions, at any level of its hierarchy."[49]

With regard to scope and jurisdiction, the OAS Convention is applicable where the alleged act of corruption has been committed or has effects in a State Party.[50] Each Party is required to adopt measures necessary to establish jurisdiction over offences committed in its territory.[51] In addition, a State Party may adopt nationality jurisdiction covering an offence committed by one of its nationals or residents anywhere in the world.[52] Finally, State Parties are required to prosecute when the alleged criminal is present in its territory and the country does not extradite the person to another country on the basis of nationality.[53]

Domestic Acts of Corruption

The OAS Convention is much broader in scope than the OECD Convention. In addition to targeting both the demand and supply side of corruption, it criminalises aiding and abetting a corrupt act and requires State Parties to establish as criminal offences under their domestic law the following domestic acts of corruption:

- **Solicitation or acceptance of bribes —** The solicitation or acceptance, directly or indirectly, by a government official or a person who performs public functions, of anything of value for himself or for another person or entity, in exchange for any act or omission in the performance of his public functions;

- **Offering or granting of bribes —** The offering or granting, directly or indirectly, to a government official or a person who performs public functions, of anything of value for himself or for another person or entity, in exchange for any act or omission in the performance of his public functions;

- **Acts or omissions in derogation of official duty —** Any act or omission in the discharge of his duties by a government official or a person who performs public functions for the purpose of illicitly obtaining benefits for himself or for a third Party;

---

[48] *Id.*, art. I.
[49] *Id.*
[50] *Id.*, art. IV.
[51] *Id.*, art. V(1).
[52] *Id.*, art. V(2).
[53] *Id.*, art. V(3).

- **Money laundering of bribes —** The fraudulent use or concealment of property derived from any of the acts referred to in this article;

- **Aiding and abetting corrupt acts —** Participation as a principal, coprincipal, instigator, accomplice, or accessory after the fact, or in any other manner, in the commission, attempted commission, or in any collaboration or conspiracy to commit, any of the acts referred to in this article.[54]

Transnational Bribery and Illicit Enrichment

The OAS Convention establishes separate articles for transnational bribery and illicit enrichment. It makes the acceptance of these articles subject to the constitutions and fundamental legal principles of each State Party. Where a State Party cannot establish transnational bribery or illicit enrichment as an offence for constitutional reasons, it is nevertheless required to provide assistance and co-operation with respect to the offence to the degree allowed by its domestic jurisprudence.

Transnational Bribery

In that context, the Article VIII Transnational Bribery provision mirrors to a substantial degree the key elements of that offence as set forth in the FCPA and OECD Convention. It provides that:

> Each State Party shall prohibit the offering or granting, directly or indirectly, by its nationals, persons having their habitual residence in its territory, and businesses domiciled there, to a government official of another state, of any article of monetary value, or other benefit, such as a gift, favor, promise, or advantage, in connection with any economic or commercial transaction in exchange for any act or omission in the performance of that official's public functions.[55]

Illicit Enrichment

The Illicit Enrichment provision requires each Party that has such authority under its constitution to:

> Take the necessary measures to establish under its laws as an offence a significant increase in the assets of a government official that he cannot reasonably explain in relation to his lawful earnings during the performance of his functions.[56]

By basing a presumption of illicit enrichment on the fact of an unexplainable increase in assets during a term of public service, this provision appears on its face to challenge the presumption of innocence contained in the Fifth Amendment to the U.S. Constitution. Accordingly, U.S. negotiators raised concerns about the Illicit Enrichment provisions.

Upon further analysis, however, the Illicit Enrichment provision of the OAS Convention does not appear to require a *mandatory* presumption of guilt, but rather a permissive inference. Accordingly,

[54] *Id.* art VI(1).
[55] *Id.*, art. VIII.
[56] *Id.*, art. IX.

it may be consistent with U.S. law. Indeed, American jurisprudence already incorporates permissive inferences and a concept comparable to illicit enrichment into its tax and money-laundering laws.

A rebuttable presumption (i.e. permissive inference) of guilt is permitted in U.S. tax fraud and money-laundering prosecutions where the courts have recognised that proof by direct means is very difficult to secure since the defendant generally will destroy such records and obscure any trace of their existence. Accordingly, the government is permitted to rely on indirect circumstantial evidence to disclose taxable income or illicit proceeds. In effect, unexplainable increases in net worth during a given period (e.g., period of public service) form the basis for a legitimate presumption and prosecution.

The net worth method of proof is often used in these cases whereby the government meets its burden to prove that net worth increases are attributable to taxable income when it investigates reasonably possible sources of nontaxable income and explores whatever leads the taxpayer or others may proffer. By showing that nontaxable income did not derive from those sources the government negates all reasonable explanations by the taxpayer inconsistent with guilt.[57] In the context of curbing corruption, disclosure requirements for federal government officials, coupled with the net worth method of proof may provide legitimate tools for addressing the problem of illicit enrichment by public officials.

Money Laundering, Asset Forfeiture, and Bank Secrecy

Although it does not specifically use the term "money laundering," Article VI(d) of the Convention criminalises the fraudulent use or concealment of property derived from any of the acts of corruption set forth in Article VI.[58] Furthermore, Article XV addresses asset seizure and forfeiture, and provides that the broadest possible measure of assistance is required in the identification, tracing, freezing, seizure, and forfeiture of illicit proceeds.[59]

In addition, the OAS Convention seeks to ensure that domestic bank secrecy laws are not permitted to obstruct enforcement of the Convention. State Parties whose assistance is requested in a corruption investigation are not permitted to invoke bank secrecy as a basis for refusal to provide the assistance sought.[60] The requesting state, however, is obligated not to use any information received that is protected by bank secrecy for any purpose other than the proceeding for which the information was requested.[61]

Progressive Development of Further Offences

In order to foster the development and harmonisation of their domestic legislation, the State Parties also agree under the OAS Convention to consider prohibiting additional acts, including:

- **Improper use of inside information —** The improper use by a government official or a person who performs public functions, for his own benefit or that of a third Party, of any kind of

[57] United States v. Koskerides, 877 F.2d 1129 (2d Cir. 1989).
[58] OAS Convention, art. VI(d)
[59] *Id.*, art. XV(1).
[60] *Id.*, art. XVI(1).
[61] *Id.*, art. XVI(2).

classified or confidential information which that official or person has obtained because of, or in the performance of, his functions;

- **Improper use of state property —** The improper use by a government official or a person who performs public functions, for his own benefit or that of a third Party, of any kind of property belonging to the state or to any firm or institution in which the state has a proprietary interest, to which that official or person who performs public functions has access because of, or in the performance of, his functions;

- **Illicitly obtaining decisions from public authorities —** Any act or omission by any person who, personally or through a third Party, or acting as an intermediary, seeks to obtain a decision from a public authority whereby he illicitly obtains for himself or for another person any benefit or gain, whether or not such act or omission harms state property;

- **Improper diversion of property by public officials —** The diversion by a government official, for purposes unrelated to those for which they were intended, for his own benefit or that of a third Party, of any movable or immovable property, monies, or securities belonging to the state, to an independent agency, or to an individual, that such official has received by virtue of his position for purposes of administration, custody, or for other reasons.[62]

State Parties are to work toward criminalisation of these offences and establishing them as acts of corruption for the purpose of the OAS Convention. To the extent State Parties do not establish these offences, they are nevertheless required to provide assistance and co-operation regarding these offences to the extent permissible under their local law.[63]

Extradition, Assistance, and Cooperation

The OAS Convention itself may be used as the legal basis for extradition. If State Parties already have bilateral extradition treaties in place, each of the offences listed in the Convention will be included as an extraditable offence in those treaties.[64] The United States, for example, already has limited bilateral extradition treaties with all of the countries that have signed the OAS Convention, and these treaties will be updated automatically upon ratification and implementation of the OAS Convention.

The OAS Convention provides that the allegedly political nature of the offence shall not be a basis for a refusal to extradite or provide mutual legal assistance.[65] Where extradition is refused on the basis of nationality or jurisdiction, the Convention requires that the State Party submit the case to its own competent authorities for prosecution.[66]

The OAS Convention also provides for the most extensive degree of mutual assistance among the various Conventions. State Parties commit to afford one another the "widest measure" of mutual

[62] *Id.*, art. XI(1).
[63] *Id.*, art. XI(3).
[64] *Id.*, art. XIII.
[65] *Id.*, art. XVII.
[66] *Id.*, art. XIII(6).

assistance and technical co-operation regarding the most effective methods for preventing, detecting, investigating, and prosecuting acts of corruption.[67] This co-operation includes exchanges of experience between competent authorities and the participation of citizens and civil society in the fight against corruption.[68]

Reservations to the OAS Convention

The State Parties may make reservations only to the extent that such reservations are not incompatible with the object and purpose of the Convention.[69] Application of the Transnational Bribery and Illicit Enrichment provisions, however, are subject to the constitution and the fundamental principles of each country. Accordingly, it is theoretically possible to make a reservation to the transnational bribery and illicit enrichment provisions, although no ratifying country has done so to date.

Council of Europe Convention

The Council of Europe (CE) is an international organisation whose main role is to strengthen democracy, human rights and the rule of law throughout its member states. It serves as a think tank for legal harmonisation and the integration of western and eastern Europe. On January 27, 1999, the CE opened for signature the Criminal Law Convention on Corruption,[70] the text of which had been approved by the 40 CE member states and 8 observer states, including the United States. Thirty-one states have signed the CE Convention.

The CE Convention is the most ambitious anti-corruption treaty to date. It surpasses the transnational bribery substance of the FCPA and OECD Convention by attacking both the supply and demand sides of corruption, and it goes beyond the OAS Convention by also attacking private commercial bribery. In addition, the CE Convention criminalises trafficking in influence and explicitly sets forth standards for corporate criminal liability.

Similar to the other Conventions, The CE text requires that parties apply territorial jurisdiction and provides that they may apply nationality jurisdiction. Where a Party refuses to extradite a covered person solely on the basis of nationality jurisdiction, it must exercise jurisdiction itself and prosecute the offence.

Bribery of Officials Serving in a Public Capacity

The CE Convention requires parties to criminalise both the supply and demand sides of corruption as well as aiding or abetting in such offences. Because some European countries, such as Germany, do not include legislators in their domestic bribery laws, there are separate provisions explicitly covering both "public officials" and "members of public assemblies." To accommodate different local laws while upholding the spirit of the Convention, the CE Convention prohibitions explicitly

[67] *Id.*, art. XIV.
[68] *Id.*
[69] *Id.*, art. XXIV.
[70] Criminal Law Convention on Corruption, January 27, 1999, Council of Europe, European Treaties, ETS No. 173 <http://www.coe.fr/eng/legaltxt/173e.htm>

cover all of the following persons (hereinafter referred to as "covered public persons"): domestic and foreign public officials, members of domestic and foreign public assemblies, officials of international organisations, members of international parliamentary assemblies, and judges and officials of international courts.

First, the Convention prohibits "active" bribery, which covers the briber or supply side of bribery. Accordingly, each Party is required to adopt legislation making it a criminal offence for any person to "intentionally promise, offer, or give, directly or indirectly, any undue advantage" to a covered public person for such person to act or refrain from acting in the exercise of their fiduciary duties.[71]

Second, the Convention also prohibits "passive" bribery, which covers the bribe recipient or demand side of corruption. Accordingly, each Party is required to adopt legislation making it a criminal offence for any covered public person to directly or indirectly "request or receive any undue advantage" or the offer or promise of such advantage in exchange for acting or refraining to act in the exercise of his or her functions.[72]

Bribery in the Private Sector

As indicated above, the CE Convention is the first Convention to address active and passive bribery in the private sector. The active bribery provision of the Convention provides that:

> Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally in the course of business activity, the promising, offering or giving, directly or indirectly, of any undue advantage to any persons who direct or work for, in any capacity, private sector entities, for themselves or for anyone else, for them to act, or refrain from acting, in breach of their duties.[73]

The provision addressing passive bribery in the private sector is similarly worded, but focuses on the "request or receipt" of a bribe by a private sector participant.[74]

Trading in Influence

Another groundbreaking aspect of the CE Convention is the criminalisation of what the Convention terms "trading in influence." In essence, the prohibition covers those cases in which an individual is bribed to assert influence over a public official or agent. Specifically, the Convention provides that:

> Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally, the promising, giving, or offering, directly or indirectly, of any undue advantage to anyone who asserts or confirms that he or she is able to exert an improper influence over the decision-making of any [covered public person] in consideration thereof, whether the undue advantage is for himself

[71] *Id.*, art. 7.
[72] *Id.*
[73] *Id.*
[74] *Id.*, art. 8.

> or herself or for anyone else, as well as the request, receipt, or the acceptance of the offer or the promise of such an advantage, in consideration of that influence, whether or not the influence is exerted or whether or not the supposed influence leads to the intended result.[75]

Theoretically, such payments would be covered under the "indirect" language in the active bribery provisions if some of the payment was to end up in the hands of a covered public person. This provision expands, however, to cover even those situations where none of the payment is directed to a covered public person and even where ultimately no influence is exerted.

Accounting Offences

The CE Convention takes a criminal law approach to accounting offences. Although it does not discuss internal controls and assurance measures, it requires each Party to criminalise the following acts or omissions, when committed intentionally, in order to commit, conceal, or disguise the offences set forth in the Convention by:

a) creating or using an invoice or any other accounting document or record containing false or incomplete information; and
b) unlawfully omitting to make a record of a payment.[76]

By criminalsing accounting offences, the CE Convention imposes a practical obligation upon companies to address vulnerabilities and reduce potential liability exposure. Although the provision does not prescribe measures which companies should take to ensure compliance, there is a growing body of corporate governance, internal control and international accounting standards emerging in Europe which will effectively serve to provide a compliance benchmark.

Money Laundering and Asset Forfeiture

To address the link between corruption and money laundering, the Convention incorporates by reference a prior CE money-laundering Convention and requires parties to enact legislation designating the corruption-related offences as predicate offences for criminal violations of their money laundering laws.[77] This provision is limited, however, to the extent that the Party has not made a reservation or a declaration with respect to these offences or does not consider such offences serious ones for the purpose of their money laundering laws.[78] As a practical matter, the OECD Financial Action Task Force has progressively addressed money laundering issues in OECD member countries and provides for related issues such as monitoring and enforcement.

The Convention's asset forfeiture provisions require each Party to adopt measures, including "special investigative techniques," to facilitate the gathering of evidence and to identify, trace, freeze, and seize either the instrumentalities and proceeds of corruption or property valued as corresponding to said proceeds.[79] The Convention further provides that bank secrecy shall not be an obstacle, and

[75] *Id.*, art. 12.
[76] *Id.*, art. 14.
[77] *Id.*, art. 13.
[78] *Id.*
[79] *Id.*, art. 23(1).

each Party shall empower its authorities to order that bank, financial, or commercial records be made available or be seized.[80]

Corporate Criminal Liability

The CE Convention aggressively addresses the issue of corporate criminal liability. This is significant since corporate criminal liability is new ground for some European countries. First, the Convention holds corporations criminally liable for the acts of authorised individuals who commit offences that benefit the corporation. Specifically, it requires each Party to adopt laws and measures to ensure that:

> Legal persons can be held liable for the criminal offences of active bribery, trading in influence and money laundering established in accordance with this Convention, committed for their benefit by any natural person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on:
>
> - a power of representation of the legal person; or
> - an authority to take decisions on behalf of the legal person; or
> - an authority to exercise control within the legal person; as well as for involvement of such a natural person as an accessory in the above-mentioned offences.[81]

Second, the corporate liability provisions hold corporations criminally liable where the lack of supervision or control by an individual under its authority has made possible the commission of corrupt practices.[82] Finally, the Convention makes clear that in addition to the corporation's liability, criminal proceedings can be brought against the individuals who are perpetrators of, instigators of, or accessories to, the criminal offences involved.

Penalties, Sanctions, and Measures

Similar to the OECD Convention, the CE Convention requires parties to provide "effective, proportionate, and dissuasive sanctions and measures, including when committed by natural persons, penalties involving deprivation of liberty which can give rise to extradition."[83] Parties are required to ensure that such penalties for businesses and corporations will include criminal or noncriminal sanctions, including monetary sanctions.

In this regard, parties are to consider confiscation of the proceeds of criminal offences or property, the value of which corresponds to such proceeds.[84] As with the other Conventions, this raises the question of what constitutes "proceeds" of corruption. Some argue that such proceeds would be the entire value of the contract procured through corrupt means while others argue that such proceeds would be limited to the amount of the profits from the contract fraudulently procured. If the history of prosecutions under the FCPA is illustrative, this ambiguity has served as a powerful incentive for corporations to settle reasonably alleged violations.

---

[80] *Id.*, art, 23(2and3).
[81] *Id.*, art. 18(1).
[82] *Id.*, art. 18(2).
[83] *Id.*, art. 19(1).
[84] *Id.*, art. 19(3).

Cooperation, Assistance, and Monitoring

The CE Convention provides strong mechanisms for both co-operation and monitoring. It requires State Parties to ensure "the widest measure" of co-operation and assistance regarding the investigation and prosecution of corruption-related offences; the protection of whistleblowers and witnesses; and the gathering of evidence and the confiscation of proceeds.[85] The Group of States against Corruption (GRECO) is entrusted with monitoring implementation of the Convention. The criminal offences established in accordance with the Convention are extraditable offences, with member parties required to prosecute where extradition is refused.[86]

Other International Initiatives

In addition to the binding international Conventions discussed above, numerous other initiatives are underway to combat corruption in international business and development projects. In 1996, the United Nations General Assembly approved by consensus the Declaration on Corruption and Bribery in International Business Transactions.[87] In July 1997, the United Nations Development Program (UNDP) released its "Corruption and Good Governance" report, which supports a global attack on corruption and urges international organisations to cancel or withdraw from projects influenced by corrupt practices and improper payments.[88] More recently, UNDP has established a special unit to investigate allegations of corruption related to UN programs and is funding civil society efforts to promote good governance and curb corruption.

The Council of Europe has drafted a civil law Convention on Corruption which in March 1999 it sent to the Council of Europe Committee of Ministers to the Parliamentary Assembly for debate and opinion. It represents the first attempt to address the establishment of civil remedies for people who have been harmed by corruption. The provisions address: 1) the right to bring civil proceedings to obtain compensation for damage suffered; 2) the liability of individuals who have engaged in or authorised corruption and of the state itself; and 3) whistelblower protection for employees who report corrupt practices in good faith.[89]

The International Chamber of Commerce adopted a report on extortion and bribery that proposes strict rules of conduct for corporate self-regulation.[90] The proposed rules go beyond prohibiting bribery to obtain business, covering extortion and bribery in judicial proceedings, tax matters, environmental matters, and other legislative and regulatory proceedings. The World Trade Organisation is considering a proposed initiative to promote "transparency, openness, and due process" in government procurement contracting.

---

[85] *Id.*, arts 20-27.

[86] *Id.*, art. 27.business (and regulation of it) becomes more prevalent, a company's success and

[87] United Nations Declaration on Corruption and Bribery in International Business Transactions, E/C. 1996/8, 23 July 1996.

[88] *See* United Nations Development Program, July 1997 (visited October 20, 1999)http://www.undp/toppages/publications/index.htm

[89] Council of Europe, *Draft Civil Law Convention on Corruption*, March 2-8, 1999 (visited October 20, 1999)http://www.coe.fr/cm/dec/1999/662/101.htm

[90] International Chamber of Commerce, *Extortion and Bribery in International Business Transactions*, Spring 1999 (visited October 20, 1999)<iccwbo.org/home/statements_rules/1999/briberydoc99.asp>

Multilateral development banks are tightening their procurement procedures and advocating anti-corruption initiatives with developing countries through good governance programs and conditional lending. The World Bank, International Monetary Fund, and regional lenders have strengthened their procurement rules and developed guidelines against graft.[91]

These international financial institutions are implementing formal anti-corruption programs and issuing written guidelines warning that financial assistance will be denied or suspended unless corruption is addressed and good governance reforms implemented. For example, the International Monetary Fund allowed a $205 million, three-year aid package to Kenya to lapse on July 31, 1997, citing corruption and bad governance. The World Bank followed suit and withheld $71.6 million in support for Kenya's budget. More recently, both organisations have taken a similar stance against Indonesia concerning allegations of corruption in its bank restructuring programs.

Finally, civil society is emerging as a powerful force in both global and local efforts to curb corruption. Transparency International serves as the leading anti-corruption watchdog among nongovernmental organisations. Founded by former World Bank executives to combat international corruption, Transparency International has led and co-ordinated international efforts to establish and implement effective laws, policies, and anti-corruption programs around the world.

Safeguarding Business Integrity in the Global Marketplace[92]

In a climate of increased attention to foreign corrupt practices, the importance to corporations of having comprehensive ethics training and legal compliance programs as part of their overall corporate policy and practice is obvious. Corporate governance and internal control strategies designed to achieve these objectives, however, are not always so obvious. Rather than simply dictating prohibitions to management and staff, Best practices in this area require that corporations implement a corporate culture that facilitates adherence to the business integrity principles underlying the FCPA and other international anti-corruption laws and other business ethics standards.

Investing in a strong and effective global risk management program is an integral component of investing in a company's growth and shareholder value. Beyond protecting the corporation and its officers and employees from criminal and civil liability, an efficient global risk management program sends a firm signal of integrity to the capital markets, preserves a company's credit rating, reduces litigation and investigation costs, and protects a company's most valuable asset - its reputation.

An effective anti-corruption risk management program should include: 1) putting in place a strong corporate governance and internal control program; 2)undertaking due diligence on the integrity of business associates and effectively responding to "red flags;" and 3) implementing activities that foster a culture of compliance and ethics. Each of these pillars is outlined below.

---

[91] *See* Transparency International Links to World Bank and IMF Guidelines (visited October 20, 1999)http://www.transparency-usa.org/link/html

[92] Portions of this section appeared in a prior work, M. Zeldin and C. di Florio, *Effecitve Corporate Governance Under Emerging Global Anti-Corruption Laws*, 6 Business Crimes Bulletin 5 (June 1999).

Corporate Governance and Internal Control

Corporate governance principles are premised on the need for corporate accountability and compliance with laws and regulations that reflect society's values generally, and the concerns of key stakeholders in particular. In addition, shareholders require reasonable assurance that their assets will be protected against fraud, self-dealing and other corporate malfeasance. To ensure that these objectives are met, anti-corruption laws, such as the FCPA, require that companies implement systems of internal control.

Internal control is broadly defined as a process, effected by an entity's board of directors, management or other personnel, designed to provide reasonable assurance regarding: 1) the efficiency of operations; 2) the reliability of financial reporting; and 3) compliance with applicable laws and regulations.[93]

To achieve these objectives, effective internal control consists of establishing five interrelated components:

- **Control Environment –** This is what sets the tone of an organisation and provides discipline and structure. It includes the integrity and competence of the entity's people; management's philosophy and operating style; and the way management and the board assign authority and responsibility.

- **Risk Assessment –** This entails the identification and analysis of risks to determine how they should be effectively managed. Once risks have been identified, sourced and measured, steps must be taken to avoid, transfer, or otherwise reduce the risks to acceptable levels. As an example, to evaluate the risk of bribery and corruption in the procurement process, one might analyse how engineering may create specifications that favour specific vendors, how purchasing may unfairly award contracts, and how accounting may record kickbacks.

- **Control Activities –** These are the policies and procedures that help ensure that management's directives are carried out. They include such practices as authorisation, reconciliation and segregation of duties. Such activities would permeate the entire organisation, at all levels and in all functions. Of course they must be customised to reflect the entity's specific control environment, objectives, and tolerance for risks.

- **Information and Communication Systems –** These are systems that produce operational, financial and compliance related reports, and also notify personnel of their role in the internal control system. These systems must provide a means for moving important information to the very top of the organisation and for receiving inputs from external parties. As an example, consider information of corrupt practices coming from a whistelblower. The whistelblower could be a marketing clerk within the organisation who views incriminating documents or

[93] Committee of Sponsoring Organizations of the Treadway Commission, *Internal Control – Integrated Framework* (authored by Coopers & Lybrand 1992).

overhears a telephone conversation. The whistelblower could also be an outside vendor who witnesses corrupt practices are is solicited to participate in a fraudulent scheme. Whatever the source, it is important that internal and external information is identified, captured, and communicated in a form and time frame that enables people to carry out their responsibility and protect the company.

- **Monitoring –** This is the process that assesses the quality of the system's performance over time. When deficiencies are discovered, they must be reported and appropriate remedial actions, including internal investigation, must be undertaken.

All five components should be present and functioning effectively to conclude that internal control over operations is effective.[94]

Know Your Business Partners - Red Flags and Due Diligence

In addition to internal controls, companies should undertake several external safeguards as part of an effective compliance program. First and foremost, the resounding caveat of anti-corruption laws is to know with whom you are doing business and how they conduct themselves in commercial affairs. Due diligence is critical. Understanding relationships is imperative.

Companies must gain an understanding of the integrity of all foreign partners, agents/consultants, and marketing representatives (venture principals), including knowledge of any relationships between the venture principals and foreign government officials, as well as information about the past practices of the venture principals.

Government enforcement authorities have identified "red flag" scenarios (situations where caution should be used) to provide guidance to businesses trying to comply with anti-corruption laws while navigating global markets. These advisories also demonstrate how governments have sharpened their focus on business activities in foreign countries.

Red flags may appear in many forms, including unusual payment patterns, proposed contract terms, or billing requests. It is important to note that the existence of a red flag does not mean the transaction cannot go forward. Rather, it indicates that the agreement should be further analysed and perhaps restructured or made subject to specific representations and warranties. In any event, extra precautions should be taken whenever the following circumstances, for example, arise:

- The agent has stated that a particular amount of money is needed for him to "get the business," "make the necessary arrangements," or some comparable expression is used;

- Off-the-book accounts are used whereby, for example, payment is made to a venture principal who then diverts part of the proceeds to a separate account for unexplainable reasons;

[94] *See e.g.*, SEC, 94th Cong., Report to Senate Comm. on Banking, Housing, and Urban Affairs on Questionable and Illegal Corporate Payments and Practices (Comm. Print 1976); Speech of Philip B. Heyman, The Justice Department's Proposed Program to Provide Advice to Businesses in Connection with Foreign Payments (Nov. 8, 1979).

- The venture principal makes unusual requests, such as to backdate invoices, or asks for payment by indirect unusual means, such as through bank accounts outside the country where the services are being offered, or to third persons;

- The venture principal requests checks be made out to "bearer" or "cash," or seeks payment by some other unusual means, such as through shell companies created to receive revenues and facilitate transactions;

- The payment is being made in a country with a widespread history of corruption or involves an industry that has a history of anti-bribery violations (for example, defence, aircraft, energy, and construction);

- The venture principal wants to work without a contract (or with a vague contract) and is hesitant to make anti-corruption compliance certifications;

- The venture principal asks for commissions that are substantially higher than the "going rate" in that country among comparable service providers (especially where the amount or nature of work does not justify the large payments);

- The venture principal requests an unusually large credit line for a new customer, unusually large bonuses or similar payments, or substantial and unorthodox upfront payments;

- A venture principal has family or business ties with government officials;

- A potential government customer or authorising agency recommends a venture principal. (The reasons for recommendation should be carefully evaluated.)

- A venture principal's business appears to lack sufficient capability or staff qualifications to perform the services offered, is new to the business, cannot provide references or cannot document its claimed experience.

In addition to addressing the foregoing red flags, a company should investigate whether its prospective venture principals have a reputation for ethical behaviour and integrity. A due diligence checklist should include inquiries into the representative's educational background; whether the individual has a personal or professional relationship with any governmental or quasi-governmental body; and the number and reputation of the firm's clientele. It is valuable to explore the opinion of the agent or firm held by the U.S. embassy or consulate, as well as the firm's bankers, lawyers, clients, and partners.

Some of this information can be obtained from the country desk officers and commercial attachés at the relevant country Departments of State and Commerce. The commercial attaché at the local embassy is also an invaluable resource. In addition, references should be requested directly from the venture principal. Once questionnaires are returned, the assertions and other information contained therein should be verified.

It is also helpful to have an objective manager, who is detached from the operating unit seeking to hire the agent, review the merits and rationale of the agency contract. A detailed due diligence file should be prepared and maintained to demonstrate the company's efforts to assure itself of the integrity of its venture principals. In the event of a government enforcement action, press inquiry or contract dispute, a due diligence file serves as Exhibit #1 in forging a response. While a company has a legitimate interest in hiring an experienced and qualified agent who is well connected and respected in the business community, it is critical to ensure that their success is not founded on corrupt practices.

The Anatomy of an Effective Compliance Program

For many multinational corporations, the issue of compliance has evolved into the broader issue of corporate governance and responsibility. The bar is being raised from a minimum legal compliance floor to a business ethics and integrity atmosphere. Financial studies are increasingly concluding that business ethics is no longer a luxury, but rather it is increasingly becoming what stakeholders expect and demand.

A company involved in international business should have an effective anti-corruption compliance program in place. The basic elements of an effective compliance program should include the following:

A Sound Corporate Ethics Policy and Code of Conduct – A code of conduct communicates a company's commitment to a high standard of business integrity to the company's stakeholders, enforcement authorities and the public at large. A code of conduct reflects good corporate governance and serves an educational function as well.

In-house Compliance Team/Officer — Every company engaged in international business should have a business integrity officer (and potentially a compliance team). The officer's (or team's) role would be to implement and monitor the company's business integrity compliance regime, including answering anti-corruption questions for employees and management, serving as liaison with outside counsel and partners, and reviewing all transactions and situations that potentially implicate anti-corruption laws.

Business Integrity Training and Education — In addition to providing company management and employees, especially sales and marketing personnel, with a meaningful understanding of anti-corruption laws, training seminars should reassure employees that there will not be any retaliation for reporting potential violations. On the contrary, many companies are beginning to factor business ethics into their bonus programs. To ensure potential problems will be reported immediately, an effective training program will teach employees to identify fraud and corruption vulnerabilities at the outset.

Program Implementation and Enforcement — Once a compliance program has been designed and implemented, enforcing the program will require regular examination of internal accounting controls and record keeping as well as blind audits of company financial statements and spot checks on individual transaction procedures. A good compliance program will incorporate systematic

reviews of problem situations and continually improve the program's integrity. Where a situation is particularly high-risk, either because of the corruption rating of a country or uncertainty involving the parties to a proposed transaction, executive or high-level management approval should be sought before engaging in certain business activities and contracting.

Business Integrity Contract Clauses — In general, all contracts with foreign agents should include language that requires the agent to be aware of the prohibitions contained in applicable anti-corruption laws, certify that the agent will conform therewith, and provide escape clauses allowing immediate termination of the contract on suspicion of wrongdoing that would or might be a violation of such laws. The proposed business associate should warrant that none of its principals, staff, officers, or key employees are government officials or other persons who might assert illegal influence on the company's behalf. Finally, the business associate should make annual certifications of its compliance with anti-corruption laws, local law, and the company's corporate policies and procedures.

Gifts and Entertainment Policy — Under most anti-corruption laws, payments for travel, entertainment, and related expenses, as well as nominal gifts to foreign officials, are generally permitted as long as a legitimate business purpose exists (one that is directly related to legitimate promotional or contract performance activities), expenses incurred are documented in writing, and the payment is legal in the official's country. A gift and entertainment policy that takes into account such rules ensures that employees do not inadvertently violate the law.

Expense Approval and Documentation Policy — Travel, entertainment, and other miscellaneous expenses should only be paid pursuant to written approval by a company employee who understands business integrity and anti-corruption laws. Detailed records of such expenses should be kept. Expenses incurred under a company's gift and entertainment policy should be audited periodically to ensure that they are legal under local law, in compliance with anti-bribery laws, and commensurate with the legitimate and generally accepted local custom for such expenses by private business persons in the country.

Conclusion

The international business community is witnessing unprecedented interest in the development of international standards for anti-corruption law, corporate governance, accounting procedures, and market transparency. Accordingly, global risk management is becoming increasingly important to effective corporate governance and business integrity. A well-implemented program can strengthen reputation assurance and protect shareholder value, improve corporate governance and ensure compliance with applicable laws and regulations.

In addition to the heightened scrutiny of enforcement authorities, other public institutions, such as project financing, export-import financing, project guarantee programs and public contracting authorities are increasingly making participation in their programs contingent on a company's ability to demonstrate compliance with emerging international anti-corruption standards. Indeed, as international reputation will increasingly hinge upon the manner in which it successfully integrates

transparency and integrity measures into the company's overall corporate governance and global risk management practices.

Michael Zeldin is a principal and Carlo di Florio is a senior manager in the Washington, DC office of PricewaterhouseCoopers. Mr. Zeldin serves as chair, and Mr. di Florio serves as secretary, of ACCA's International Legal Affairs Committee. Mr. Zeldin previously served as Chief of the Office of Money Laundering and Asset Forfeiture with the U.S. Department of Justice.