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DIRECTORS AND OFFICERS OF U.S. MULTINATIONALS: MINIMIZING RISK IN AN ERA OF ENHANCED RESPONSIBILITY

A United States Centered Risk Approach Won't Protect Officers and Directors of U.S. Multinational Companies with Overseas Activities.

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Background.

U.S. Laws and Regulations. U.S. businesses are required to operate within a complex mosaic of governmental regulations. Many prudent businesses adopt and follow corporate compliance programs and use transactional checklists to avoid running afoul of those regulations in day to day operations, such as the tax, securities or other regulatory aspects of an acquisition, a borrowing, a product sale, a services contract or an export transaction, among others.

International Laws and Regulations. When one of these same U.S. businesses decides to form and operate an overseas subsidiary, acquire or "partner with" a non-U.S. company, either public or private, or to engage in other regulated commercial activities overseas, it is faced with a similar and equally complex mosaic of *international* governmental regulations. This combination of domestic and multi-jurisdictional regulations creates an international corporate compliance mosaic *(ICCM)* that, to many U.S. businesses, is either not well known or is poorly understood.

The Effect on U.S. Companies Operating Internationally. The first layer of this *ICCM* is found in the regulations that govern everyday commercial activities of U.S. companies, public or private, either doing business overseas or engaging in conduct that has effects overseas. These regulations include anti-corruption, anti-boycott, anti-bribery, anti-trust, and export control laws, among others.

The second layer of the *ICCM* dates from the increased emphasis the U.S. Government has placed over the last nine years on ways to combat terrorism, including terrorist financing, money laundering and bioterrorism laws. Washington not only introduced new laws, it increased the enforcement of existing laws related to commerce, banking, trade and investment generally. These laws were, and continue to be, hugely influenced by three on-going Executive Branch balancing acts: first**,** the government's stated need to balance desirable international trade *promotion* with national security-driven trade *regulation*; second, the government's attempt to moderate the forces of corporate *enterprise* with the restraints of appropriate corporate *governance;* and third**,** the government's struggle to balance constitutionally embedded concepts of civil *liberty* with perceived needs for civil *security*. These "9/11 issues" are relevant to any U.S. company, public or private, engaged in loans, licenses, acquisitions or other commercial transactions, anywhere in the world.

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A third layer of the *ICCM* has been created by (1) the Sarbanes-Oxley Act of 2002 (SOX), passed in response to the disclosure failings of numerous U.S. companies and (2) the recent proliferation of U.S. and foreign Data Privacy and Security (DP&S) laws designed to protect personal data from unauthorized use. SOX Issues are relevant to any U.S. *public* company engaged in acquisition transactions anywhere in the world, and DP&S Issues are relevant to any company, public *or* private, engaged in acquisition or other inter-entity transactions.

A fourth layer of the *ICCM* reveals itself when a U.S. business targets a foreign company either with an acquisition or some form of partnering in mind, such as a joint venture, joint product development, strategic alliance, partnership, distributorship, or agency relationship. In an *acquisition* context, this layer includes not only successor liability issues, but also compliance with the regulatory regime of the foreign country when the target is expected to remain in existence, and, in a *partnering* context, this layer is relevant when the laws of a foreign country are chosen to govern the relationship.

Selected Regulatory Examples.

Anti-Corruption

The U.S. Foreign Corrupt Practices Act. The Foreign Corrupt Practices Act (FCPA), adopted in 1977 and significantly amended in 1998, prohibits bribery of foreign officials. The *anti-bribery* provisions of the FCPA prohibit any U.S. person or entity from bribing a foreign government official in order to obtain or retain business or secure an improper business advantage. The *record keeping* provisions of the FCPA require any issuer of publicly traded securities to keep accurate books and records and maintain a system of internal controls to assure accountability for assets.

The Department of Justice (DOJ) administers the *anti-bribery* provisions of the FCPA, and the Securities and Exchange Commission (SEC) administers the *record keeping* provisions of the FCPA. The penalties for violations are substantial. Culpability under the act requires "knowledge" on the part of the violator, which includes conscious disregard of known circumstances. The act should be treated with great care and is of particular importance to companies that regularly engage foreign agents. A narrow exception to the FCPA anti-bribery rule permits "facilitating payments" to government employees for routine governmental actions (e.g., obtaining permits, providing telephone or electric service), but the anti-bribery laws of other countries (to which a U.S. violator may also be subject) do not recognize this exception. Additionally, an affirmative defense exists for

payments that are lawful under a foreign country's written laws or for expenditures associated with product demonstration.

The OECD Convention. The Convention for Combating Bribery enacted by the Organization for Economic Cooperation and Development (OECD) became effective in 1999. Bribing a *foreign* public official is a crime in countries that have ratified the OECD Convention (of which the United States is one). Specifically, the Convention prohibits the offering of bribes to *public officials* in other countries in order to obtain or retain international business transactions. A *foreign public official* is (1) any person holding a legislative, administrative or judicial office of a foreign country, (2) any person exercising a public function, and (3) officials of public international organizations. *Public function* includes any activity in the public interest. These terms are defined broadly, so that any person that holds an office (whether elected or appointed) or any person exercising a public function in a foreign country (at any level, national, regional or local) is considered a foreign public official, including an officer of a public enterprise, the head of a government designated monopoly, or a senior officer of a company in which the government exercises dominant control. Note also that any person instigates, assists or authorizes an act of bribery of a foreign public official is guilty of the same criminal offense. The OECD Convention also requires each country to assist other signatory countries in prosecuting bribery and either to prosecute or extradite an individual accused of bribery.

The OAS Convention. The 1996 Inter-American Convention Against Corruption was enacted by the Organization of American States (OAS) in 1996. It was the first *international* convention dedicated to fighting corruption. Its structure consists of two parts: one dedicated to preventing corruption, the other to repressing certain corrupt practices. It requires member countries (of which the United States is one) to prohibit not only the bribery of *foreign* officials, but also the bribery of *domestic* officials. In addition, it not only requires member countries to criminalize (1) the offering of illicit payments (the giving of bribes), but also the solicitation and acceptance of illicit payments (the taking of bribes), (2) acts or omissions by government officials for the purpose of obtaining a bribe, (3) the fraudulent use of property derived from such activities, and (4) participation as a principal, accomplice, or accessory after the fact in a conspiracy to commit any of those acts.

The U.K. Bribery Act. The 2010 U.K. Bribery Act (Bribery Act) was adopted by the U.K. Parliament in April of this year and will shortly come into effect. The Bribery Act has wide territorial scope and applies to bribery (1) committed in the U.K. by any person, regardless of the person's nationality, (2) by any U.K. company irrespective of where the conduct occurs, (3) person residing in the U.K. irrespective of the person's nationality or where the conduct occurs, and (4) any

citizen of the U.K. or any British Overseas Territory, irrespective of that person's residency or where the conduct occurs. The Bribery Act makes it illegal either to offer a bribe or to accept a bribe, and, unlike the FCPA makes no exceptions for facilitation payments. Additionally, acts of bribery committed with the consent or assistance of a senior officer of a company will implicate both the bribing party and his corporate employer. Because many U.S. multinationals have offices or operations in the U.K. or employ U.K. citizens in their overseas operations, the Bribery Act exposes these companies and their senior management to increased risks of prosecution. Criminal penalties run up to ten years in prison (rather than five as in the FCPA). Perhaps most important, a company will be liable if it fails to prevent bribery being committed by persons performing services for it, unless it can establish that it had "adequate procedures" in place to prevent such conduct.

The Whistleblower Overlay. The U.S. Senate is currently working on reconciling with similar House-proposed legislation a bill (Senate Bill 3217, the "Restoring American Financial Stability Act of 2010") that proposes, in Section 922 *et seq.*, to reward employees of U.S.-based companies who provide the SEC or the DOJ with "original information" about FCPA violations with up to 30% of the fines collected by the government as a result of the successful prosecution of the reported violation. The amount of fines collected for FCPA violations exceeded $600 Million in 2009 and has already exceeded $1.2 Billion thus far in 2010. If reconciled and passed, the resulting bill will provide potential "whistleblowers" a significant incentive to disclose FCPA misconduct of their U.S.-based employers and (under *respondeat superior)* their overseas affiliates

See the following Anti-Corruption Appendices at the end of this paper:
Foreign Corrupt Practices Act: Summary and Selected Text
OECD Convention: Summary and Selected Text
OAS Convention: Summary and Selected Text
Article Illustrating Third-Party Issues
U.K. Bribery Act
Transparency International: Corruption Perceptions Index 2009
Trace: Global Enforcement Report 2010

Export Control Laws and Embargoes

The Commerce Department. The U.S. Export Control Laws are primarily administered by the Commerce Department's Bureau of Industry and Security (BIS) and by the Treasury Department through the OFAC Regulations described below, but an array of other agencies

have jurisdiction in limited areas. The Export Administration Act of 1979 (Commerce Department) is implemented by the Export Administration Regulations (EAR). The EAR regulates the export of commodities and technical data from the United States and their re-export to third countries. These regulations are intended to prevent the transfer of technologies that could enhance the military potential of other countries, to halt the proliferation of nuclear and chemical weapons and the depletion of scarce resources, and to advance U.S. foreign policy. The BIS classifies commodities and technical data by level of technology, product type, and destination. Depending on these classifications, an export or re-export, whether to an overseas affiliate or a third party may be permissible only with specific license authorization or prohibited altogether. A U.S. exporter may be liable for violation of the statute if it exports or attempts to export with "knowledge" or "reason to know" that the statute has not been complied with. The EAR are maintained at the BIS website at www.bxa.gov.

The Office of Foreign Assets Control. The United States has also imposed trade controls on countries that present a threat to U.S. national security or foreign policy. The Office of Foreign Assets Control of the Department of Treasury (OFAC) has primary authority for promulgating and administering regulations implementing these embargoes. OFAC Regulations prohibit a wide range of business activities, such as imports from an embargoed country (*e.g.,* Iran and Iraq) and dealings in property in which an embargoed country has an interest (e.g., Iraq), or a U.S. person facilitating such a transaction through a foreign affiliate. OFAC Regulations also prohibit U.S. persons from dealings with individuals and entities determined by the U.S. Government to be involved in terrorism or terrorism-related activities. Such a person is termed a "Specially Designated National" (SDN), and a regularly-updated SDN list is maintained at the OFAC website at www.treas.gov/offices/enforcement/ofac. Many of the sanctions are based on United Nations and other international mandates, are multilateral in scope, and involve close cooperation with allied governments.

Data Privacy and Security Laws

In the United States. Over the past several decades, the United States has adopted multiple data privacy and security (DP&S) laws at federal, state and local levels. These laws sometimes overlap each other and sometimes duplicate one another. Some of them relate only to specific kinds of information---medical, financial, employment and the like. SOX requires U.S. companies to attest to adequate control of data in their possession. Loss of customer data may involve SOX issues and trigger reporting under SOX Section 307.

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Overseas. Many foreign countries have adopted similar data protection laws, often with vigorous but dissimilar privacy protection and data security provisions. If a U.S. company acquires and uses information obtained from its foreign subsidiaries or other business partners, it must do so not only in compliance with U.S. laws, but in a fashion that complies with the foreign DP&S laws applicable to those foreign affiliates. Because DP&S law violations can result in consequences ranging from civil fines to class actions to jail terms, officers and directors of U.S. multinationals should take steps to assure their overseas affiliates (1) know what DP&S laws govern their activities, (2) have or establish appropriate privacy policies and procedures for the collection, processing, storage and transfer of personal data, (3) establish information security controls, and (4) maintain appropriate records with respect to their collection and handling of personal data. U.S. companies acquiring an existing overseas company should also take care to check on possible restrictions on transferring the new affiliate's databases to, or sharing them with, another party, and what, if anything, must be done before completion of the proposed transaction to comply with the DP&S laws applicable to the new overseas affiliate.

Conclusion. I hope the limited examples presented above demonstrate that a solely U.S. centered risk approach will certainly fall far short of complying with a host of international government regulations the violation of which can cost a U.S. company, its officers, directors and senior managers significant civil and criminal penalties as well as immeasurable reputational loss.

An Effective Compliance and Ethics Program For an effective compliance and ethics program (Program), a U.S. multinational with overseas activities must (1) exercise due diligence to prevent and detect criminal conduct and (2) otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law. The U.S. Sentencing Commission Guidelines Manual provides that items (1) and (2) above require the organization *at a minimum* to establish standards and procedures to prevent and detect criminal conduct. This in turn requires:

● that the company's board of directors be knowledgeable about the content and operation of the Program and exercise reasonable oversight with respect to its implementation and effectiveness;

● that the company's board of directors be knowledgeable about the content and operation of the Program and exercise reasonable oversight with respect to its implementation and effectiveness;

● that high-level personnel in the company ensure that the company has an effective Program and that *specific* individual(s) are assigned overall responsibility for the Program;

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●that specific individual(s) are delegated day-to-day operational responsibility for the Program and that they report periodically to high-level personnel, and, as appropriate, to the company's board of directors on the effectiveness of the Program; ***and***

●that the company take reasonable steps:

1. to communicate periodically, and in a *practical* manner, its standards and procedures and other aspects of the Program to its officers, directors, employees, and, as appropriate, its *agents*;

2. to ensure that its Program is followed, including *monitoring* and *auditing* to detect criminal conduct;

3. to evaluate the Program periodically; and

4. to have and *publicize* a system, that may include mechanisms for anonymity or confidentiality, in which the company's employees and agents may report or seek guidance regarding potential or actual criminal conduct without fear of retaliation.

Finally, the Guidelines Manual requires the Program to be promoted and enforced consistently throughout the company through appropriate (1) incentives to perform in accordance with the Program and (2) disciplinary measures for engaging in criminal conduct and for failing to take reasonable steps to detect criminal conduct, and after any criminal conduct has been detected, to respond appropriately to it and to prevent further such conduct, including making any necessary changes in the Program.

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APPENDIX ON FOREIGN CORRUPT PRACTICES ACT

UNITED STATES FOREIGN CORRUPT PRACTICES ACT

SUMMARY AND SELECTED TEXT

FOR PUBLIC COMPANIES

SUMMARY

The Basics. The FCPA consists of two basic prohibitions. The first is that issuers of publicly traded securities may not make *direct* illegal payments to a foreign official *to obtain or retain business for or with, or direct business to, any person,* or *to secure an improper advantage*. The second is that such companies may not make an indirect *payment* to a foreign official, or make any *promise or offer* to a foreign agent or other third party while *knowing* that the third party will *then* make an illegal payment.

Foreign Official. A *foreign official* (a person to whom an improper payment may not be made) means any officer or employee of a foreign government, a public international organization or any of its departments or agencies, or *any person acting in an official capacity*. The definition is broad and may even include family members of a foreign official.

Exceptions. The FCPA contains some exceptions. Among these are payments to a foreign official for *routine governmental actions,* sometimes called "grease payments," as well as payments that are *reasonable and bona fide expenditures relating to the performance of an existing contract* (for example, obtaining permits, providing telephone or electric service). Great caution needs to be exercised however, because while grease payments are allowed under the FCPA, they are *not* allowed under the anti-corruption conventions adopted by many other countries, such as the Organization for Economic Cooperation and Development (OECD) Convention (30 countries) and the OAS Inter-American Convention Against Bribery (15 countries), and the United States is a party to both of those conventions as well.

Broad Coverage. The FCPA covers not only *businesses* incorporated in the United States, but it also covers their officers, directors, employees, U.S. and overseas subsidiaries and branches, *and their agents* (such as sales representatives, distributors, suppliers, and partners of various kinds), as well as foreign companies and foreign nationals who commit bribery while in the United States (see U.S.C. § 78dd-3, prohibited foreign trade practices by persons other than issuers or domestic concerns below).

In short, the FCPA covers (1) *all* entities and individuals that make improper payments *within the United States* and (2) U.S. businesses and their employees and agents that make improper payments of any kind *anywhere else in the world.*

Record Keeping Requirements. The accounting provisions of the FCPA are intended to implement the anti-bribery provisions of the FCPA by requiring any issuer of U.S. publicly-traded

securities to keep accurate books and records and maintain an adequate system of internal controls to assure accountability for its assets.

Enforcement. Violations can result in stiff penalties. A criminal violation for a business may result in a $2,000,000 fine *per violation,* and employees and agents can face fines up to $100,000 and/or five years imprisonment.

Federal Sentencing Guidelines. The U.S. Sentencing Commission Guidelines Manual (18 U.S.C. § 2F1.1), as amended in 2005, sets forth the standards to be used by judges in sentencing companies and their officers, directors and employees for violating the FCPA. These standards include a "culpability score" (§ 8C2.5 of the Guidelines Manual) in which the existence of an "Effective Compliance and Ethics Program" can lower a violator's culpability score, and consequently the resulting financial sanctions, by 50-60%. The Guidelines Manual also provides that if an individual within the "high-level personnel of the organization" participated in, condoned, or was *willfully ignorant* of a violation of a law such as the FCPA, the organization's culpability score, and the resulting financial sanctions, can be increased from 10-100%.

SELECTED TEXT FROM THE FCPA

15 USC § 78dd-1

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

(a) Prohibition.

It shall be unlawful for any issuer which has a class of securities registered pursuant to section 12 of this title [15 USCS § 78 l] or which is required to file reports under section 15(d) of this title [15 USCS § 78o(d)], 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, or (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, 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, 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, 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 (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) 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.

* * * *

(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 1 of the International Organizations Immunities Act (22 U.S.C. 288); 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 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 decision making process to encourage a decision to award new business to or continue business with a particular party.

(g) Alternative jurisdiction.

(1) It shall 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 78*l* 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 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 101 of the Immigration and Nationality Act (8 U.S.C. 1101) 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.

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15 USC § 78ff

§ 78ff. Penalties

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(c) Violations by issuers, officers, directors, stockholders, employees, or agents of issuers.

(1) (A) Any issuer that violates subsection (a) or (g) of section 78dd-1 of this title shall be fined not more than $2,000,000.

(B) Any issuer that violates subsection (a) or (g) of this title shall be subject to a civil penalty of not more than $10,000 imposed in an action brought by the Commission.

(2) (A) Any officer, director, employee, or agent of an issuer, or stockholder acting on behalf of such issuer, who willfully violates subsection (a) or (g) of section 78dd-1 of this title shall be fined not more than $100,000, or imprisoned not more than 5 years, or both.

(B) Any officer, director, employee, or agent of an issuer, or stockholder acting on behalf of such issuer, who violates subsection (a) or (g) of section 78dd-1 of this title shall be subject to a civil penalty of not more than $10,000 imposed in an action brought by the Commission.

(C) Any officer, director, employee, or agent of an issuer, or stockholder acting on behalf of such issuer, who violates section 78dd-1(a) of this title shall be subject to a civil penalty of not more than $10,000 imposed in an action brought by the Commission., or

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

* * * * *

U.S.C. § 78dd-3. Prohibited foreign trade practices by persons other than issuers or domestic concerns

§ 78dd-3 covers any non-U.S. nationals and non-U.S. business entities <u>while such persons or entities are within the territory of the United States</u> and provides for similar penalties.

APPENDIX ON OECD CONVENTION

OECD CONVENTION

SUMMARY AND SELECTED TEXT

List of OECD and Other Countries Ratifying the Convention

Argentina	Czech Republic	Iceland	Netherlands	Spain
Australia	Denmark	Ireland	New Zealand	Sweden
Austria	Estonia	Israel	Norway	Switzerland
Belgium	Finland	Italy	Poland	Turkey
Brazil	France	Japan	Portugal	United Kingdom
Bulgaria	Germany	Korea	Slovak Rep.	United States
Canada	Greece	Luxembourg	Slovenia	
Chile	Hungary	Mexico	South Africa	

The officers, directors, employees, U.S. and overseas subsidiaries and branches of [Name of Company], and its agents (such as sales representatives, distributors, suppliers, and partners of various kinds), are obligated to comply with the provisions of the Organization for Economic Cooperation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention) in addition to their anti-corruption obligations under the Foreign Corrupt Practices Act (FCPA) and the Inter-American Convention Against Bribery (OAS Convention).

SUMMARY

The OECD Convention became effective in 1999. Bribing a *foreign* public official is a crime in countries that have ratified the OECD Convention. Specifically, the Convention prohibits the offering of bribes to *public officials* in other countries in order to obtain or retain international business transactions. A *foreign public official* is (1) any person holding a legislative, administrative or judicial office of a foreign country, (2) any person exercising a public function, and (3) officials of public international organizations. *Public function* includes any activity in the public interest. These terms are defined broadly, so that any person that holds an office (whether elected or appointed) or any person exercising a public function in a foreign country (at any level, national, regional or local) is considered a foreign public official, including an officer of a public enterprise, the head of a government designated monopoly, or a senior officer of a company in which the government exercises dominant control. Note also that any person instigates, assists or authorizes an act of bribery of a foreign public official is guilty of the same criminal offense. The OECD Convention also requires each country to assist other signatory countries in prosecuting bribery and either to prosecute or extradite an individual accused of bribery.

APPENDIX ON OECD CONVENTION

In the United States the sanctions for violations of the OECD Convention include (1) the Civil Asset Forfeiture Reform Act (CAFRA) of 2000 which makes it possible to seek civil and criminal forfeiture of proceeds of foreign bribery, (2) the Department of Justice Sentencing Commission amendments of 2002 making violations of the FCPA and the OECD Convention subject to the same sentencing guidelines, and (3) the Sarbanes-Oxley Act of 2002 making violations of foreign bribery laws offenses under the U.S. Money Laundering Control Act.

SELECTED TEXT
OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions

Article 1
The Offence of Bribery of Foreign Public Officials

1. Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law 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.

2. Each Party shall take any measures necessary to establish that complicity in, including incitement, aiding and abetting, or authorization of an act of bribery of a foreign public official shall be a criminal offence. Attempt and conspiracy to bribe a foreign public official shall be criminal offences to the same extent as attempt and conspiracy to bribe a public official of that Party.

3. The offences set out in paragraphs 1 and 2 above are hereinafter referred to as “bribery of a foreign public official”.

4. For the purpose of this Convention:

a “foreign public official” means any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organization;

b “foreign country” includes all levels and subdivisions of government, from national to local;

c “act or refrain from acting in relation to the performance of official duties” includes any use of the public official’s position, whether or not within the official’s authorized competence.

APPENDIX ON OECD CONVENTION

Article 3
Sanctions

1. The bribery of a foreign public official shall be punishable by effective, proportionate and dissuasive criminal penalties. The range of penalties shall be comparable to that applicable to the bribery of the Party's own public officials and shall, in the case of natural persons, include deprivation of liberty sufficient to enable effective mutual legal assistance and extradition.

2. In the event that, under the legal system of a Party, criminal responsibility is not applicable to legal persons, that Party shall ensure that legal persons shall be subject to effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions, for bribery of foreign public officials.

3. Each Party shall take such measures as may be necessary to provide that the bribe and the 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.

4. Each Party shall consider the imposition of additional civil or administrative sanctions upon a person subject to sanctions for the bribery of a foreign public official.

Article 4
Jurisdiction

1. Each Party shall take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory.

2. Each Party which has jurisdiction to prosecute its nationals for offences committed abroad shall take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official, according to the same principles.

3. When more than one Party has jurisdiction over an alleged offence described in this Convention, the Parties involved shall, at the request of one of them, consult with a view to determining the most appropriate jurisdiction for prosecution.

4. Each Party shall review whether its current basis for jurisdiction is effective in the fight against the bribery of foreign public officials and, if it is not, shall take remedial steps.

Article 5
Enforcement

Investigation and prosecution of the bribery of a foreign public official shall be subject to the applicable rules and principles of each Party. They shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved.

APPENDIX ON OECD CONVENTION

Article 9
Mutual Legal Assistance

1. Each Party shall, to the fullest extent possible under its laws and relevant treaties and arrangements, provide prompt and effective legal assistance to another Party for the purpose of criminal investigations and proceedings brought by a Party concerning offences within the scope of this Convention and for non-criminal proceedings within the scope of this Convention brought by a Party against a legal person. The requested Party shall inform the requesting Party, without delay, of any additional information or documents needed to support the request for assistance and, where requested, of the status and outcome of the request for assistance.

2. Where a Party makes mutual legal assistance conditional upon the existence of dual criminality, dual criminality shall be deemed to exist if the offence for which the assistance is sought is within the scope of this Convention.

3. A Party shall not decline to render mutual legal assistance for criminal matters within the scope of this Convention on the ground of bank secrecy.

Article 10
Extradition

1. Bribery of a foreign public official shall be deemed to be included as an extraditable offence under the laws of the Parties and the extradition treaties between them.

2. If a Party which makes extradition conditional on the existence of an extradition treaty receives a request for extradition from another Party with which it has no extradition treaty, it may consider this Convention to be the legal basis for extradition in respect of the offence of bribery of a foreign public official.

3. Each Party shall take any measures necessary to assure either that it can extradite its nationals or that it can prosecute its nationals for the offence of bribery of a foreign public official. A Party which declines a request to extradite a person for bribery of a foreign public official solely on the ground that the person is its national shall submit the case to its competent authorities for the purpose of prosecution.

4. Extradition for bribery of a foreign public official is subject to the conditions set out in the domestic law and applicable treaties and arrangements of each Party. Where a Party makes extradition conditional upon the existence of dual criminality, that condition shall be deemed to be fulfilled if the offence for which extradition is sought is within the scope of Article 1 of this Convention.

APPENDIX ON OAS CONVENTION

ORGANIZATION OF AMERICAN STATES (OAS)
INTER-AMERICAN CONVENTION AGAINST CORRUPTION

SUMMARY AND SELECTED TEXT

List of OAS Countries That Have Ratified the Convention

Argentina	Canada	El Salvador	Jamaica	St Kitts
Antigua/Barbuda	Chile	Grenada	Mexico	Trinidad/Tobago
Bahamas	Colombia	Guatemala	Nicaragua	United States
Belize	Costa Rica	Guyana	Panama	Uruguay
Bolivia	Dominican Republic	Haiti	Paraguay	Venezuela
Brazil	Ecuador	Honduras	Peru	

The officers, directors, employees, U.S. and overseas subsidiaries and branches of [Name of Company], and its agents (such as sales representatives, distributors, suppliers, and partners of various kinds), are obligated to comply with the provisions of the Inter-American Convention Against Corruption in addition to their anti-corruption obligations under the Foreign Corrupt Practices Act (FCPA) and the Anti-Bribery Convention of the Organization for Economic Cooperation and Development (OECD Convention).

SUMMARY

The Inter-American Convention Against Corruption of the Organization of American States is the first *international* convention dedicated to fighting corruption. It became effective in 1996. Its structure consists of two parts: one dedicated to preventing corruption, the other to repressing certain corrupt practices.

It requires member countries (note that the United States is a member country) to prohibit not only the bribery of *foreign* officials, but also the bribery of *domestic* officials. In addition, it not only requires member countries to criminalize (1) the offering of illicit payments (the giving of bribes), but also the solicitation and acceptance of illicit payments (the taking of bribes), (2) acts or omissions by government officials for the purpose of obtaining a bribe, (3) the fraudulent use of property derived from such activities, and (4) participation as a principal, accomplice, or accessory after the fact in a conspiracy to commit any of those acts.

SELECTED TEXT
B-58: Inter-American Convention Against Corruption

Article I
Definitions

(Continued Next Page)

APPENDIX ON OAS CONVENTION

For the purposes of this Convention:

"Public function" means 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.

"Public official", "government official", or "public servant" means 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.

"Property" means assets of any kind, whether movable or immovable, tangible or intangible, and any document or legal instrument demonstrating, purporting to demonstrate, or relating to ownership or other rights pertaining to such assets.

Article II
Purposes

The purposes of this Convention are:

1. To promote and strengthen the development by each of the States Parties of the mechanisms needed to prevent, detect, punish and eradicate corruption; and

2. To promote, facilitate and regulate cooperation among the States Parties to ensure the effectiveness of measures and actions to prevent, detect, punish and eradicate corruption in the performance of public functions and acts of corruption specifically related to such performance.

Article VI
Acts of Corruption

1. This Convention is applicable to the following acts of corruption:

a The solicitation or acceptance, directly or indirectly, by a government official or a person who performs public functions, of any article of monetary value, or other benefit, such as a gift, favor, promise or advantage for himself or for another person or entity, in exchange for any act or omission in the performance of his public functions;

b The offering or granting, directly or indirectly, to a government official or a person who performs public functions, of any article of monetary value, or other benefit, such as a gift, favor, promise or advantage for himself or for another person or entity, in exchange for any act or omission in the performance of his public functions;

c 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;

d The fraudulent use or concealment of property derived from any of the acts referred to in this article; and

e Participation as a principal, coprincipal, instigator, accomplice or accessory after the fact, or in any other manner, in the commission or attempted commission of, or in any collaboration or conspiracy to commit, any of the acts referred to in this article.

2. This Convention shall also be applicable by mutual agreement between or among two or more States Parties with respect to any other act of corruption not described herein.

Article VIII
Transnational Bribery

Subject to its Constitution and the fundamental principles of its legal system, each State Party shall prohibit and punish 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.

Among those States Parties that have established transnational bribery as an offense, such offense shall be considered an act of corruption for the purposes of this Convention.

Any State Party that has not established transnational bribery as an offense shall, insofar as its laws permit, provide assistance and cooperation with respect to this offense as provided in this Convention.

Article IX
Illicit Enrichment

Subject to its Constitution and the fundamental principles of its legal system, each State Party that has not yet done so shall take the necessary measures to establish under its laws as an offense 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.

Among those States Parties that have established illicit enrichment as an offense, such offense shall be considered an act of corruption for the purposes of this Convention.

Any State Party that has not established illicit enrichment as an offense shall, insofar as its laws permit, provide assistance and cooperation with respect to this offense as provided in this Convention.

APPENDIX ON OAS CONVENTION

Article XIII
Extradition

1. This article shall apply to the offenses established by the States Parties in accordance with this Convention.

2. Each of the offenses to which this article applies shall be deemed to be included as an extraditable offense in any extradition treaty existing between or among the States Parties. The States Parties undertake to include such offenses as extraditable offenses in every extradition treaty to be concluded between or among them.

3. If a State Party that makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it does not have an extradition treaty, it may consider this Convention as the legal basis for extradition with respect to any offense to which this article applies.

4. States Parties that do not make extradition conditional on the existence of a treaty shall recognize offenses to which this article applies as extraditable offenses between themselves.

5. Extradition shall be subject to the conditions provided for by the law of the Requested State or by applicable extradition treaties, including the grounds on which the Requested State may refuse extradition.

6. If extradition for an offense to which this article applies is refused solely on the basis of the nationality of the person sought, or because the Requested State deems that it has jurisdiction over the offense, the Requested State shall submit the case to its competent authorities for the purpose of prosecution unless otherwise agreed with the Requesting State, and shall report the final outcome to the Requesting State in due course.

7. Subject to the provisions of its domestic law and its extradition treaties, the Requested State may, upon being satisfied that the circumstances so warrant and are urgent, and at the request of the Requesting State, take into custody a person whose extradition is sought and who is present in its territory, or take other appropriate measures to ensure his presence at extradition proceedings.

Article XIV
Assistance and Cooperation

1. In accordance with their domestic laws and applicable treaties, the States Parties shall afford one another the widest measure of mutual assistance by processing requests from authorities that, in conformity with their domestic laws, have the power to investigate or prosecute the acts of corruption described in this Convention, to obtain evidence and take other necessary action to facilitate legal proceedings and measures regarding the investigation or prosecution of acts of corruption.

2. The States Parties shall also provide each other with the widest measure of mutual technical cooperation on the most effective ways and means of preventing, detecting, investigating and punishing acts of corruption. To that end, they shall foster exchanges of experiences by way of agreements and meetings between competent bodies and institutions, and shall pay special attention to methods and procedures of citizen participation in the fight against corruption.

ARTICLE ILLUSTRATING THIRD-PARTY ISSUES

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India, USA
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Doing Business in India without Going to Jail

Luce Forward Hamilton & Scripps
S. Elizabeth Foster and John W. Brooks

Some Happy Facts: India is a big and entrepreneurial country of vast potential. In 2008 it imported products and services from the U.S. valued at over US $28.2 billion.* The nationwide governmental and commercial language of India is English, and the country is full of business consultants, sales agents and distributors for American products.

Some Unhappy Facts: India is, according to one well-respected ranking, the 96th most corrupt country in the world.** The funding of Indian political campaigns in 2010 is predicted to involve election and re-election expenditures of over US $53 billion by candidates for government office, some of whom hope (even expect) to become beneficiaries of those expenditures.*** Until recently, the U.S. Foreign Corrupt Practices Act (FCPA) and the Indian Prevention of Corruption Act (PCA) have done little to stop what has been a way of business life in India since at least the end of the Raj.

How Does this Affect You? If you are an officer, director, or manager of a U.S. company (or an overseas affiliate of a U.S. company) that does business in or with India, here's a short quiz you may find interesting.

FCPA QUIZ

Background Facts: You're a senior person at company Alpha, let's say the President. Last year, Alpha came up with an advanced line of medical devices, and you found a distributor in India to try to sell those devices to hospitals throughout India. To encourage your distributor to work hard in creating a market for Alpha's new products, you agreed to a special price discount on all first year shipments. Your Indian distributor proceeded to take a part of those price savings to offer commissions to managers, doctors, and lab personnel at the hospitals, including some state-owned ones, in exchange for recommending Alpha's products over those of your competitors. Unfortunately, a terminated employee of the distributor, mad at being fired, went to the nearest U.S. Consulate and reported the commission payments. Then, to compound your problem, last week your VP International Sales mentioned over lunch that your Indian distributor has asked for reimbursement of 20,000 Indian Rupees in facilitation payments it made to expedite customs clearance of your products into India. Today, your CFO has asked how to convert U.S. dollars into Indian Rupees so she can reimburse the distributor's facilitation payments.

Question: Are you in trouble, and if so, what can you do about it? Do you know?

ARTICLE ILLUSTRATING THIRD-PARTY ISSUES

Answer: Yes, you're in trouble, and your distributor is as well. And if you reimburse the distributor's facilitation payments, you will compound your trouble. Here's why:

1. The FCPA prohibits payments to foreign governmental officials to obtain business or secure an improper advantage in the market. Many hospitals and clinics in India are government funded and their managers are "government officials." Consequently the payments of commissions to those managers of government-owned hospitals were bribes and a violation of the FCPA.

2. The U.S. Department of Justice (DOJ) administers the anti-bribery provisions of the FCPA and takes the position that your company's legal responsibilities extend beyond your own employees to include the conduct of certain third parties, such as your sales reps, subcontractors, joint venture partners - and even distributors. No U.S. company, no matter how small, can ignore signs that its business partners, agents or distributors may be violating the FCPA. In the eyes of the DOJ, your company cannot put its head in the sand when it comes to the activities of people (in this case, your distributor) who may seem far removed from your headquarters, but whom you have put in a position conducive to FCPA violations. An email to the DOJ from the U.S. Consulate in India where the ex-employee spilled the beans can start an investigation of your company that will seem never to end and that may lead to civil and criminal fines and jail terms for those who knew - or should have known - about the commission payments.

3. The reimbursement of your distributor's facilitation payments to Indian customs officials may fit under a narrow exception to the FCPA that allows for such payments to expedite routine governmental actions, but even if it does, it remains a clear violation of the PCA which prohibits "public servants" (the customs officials) from accepting a "gratification" as a motive or reward for performing an official act. The difference is that the FCPA focuses on punishing the payer of a bribe, while the PCA focuses on the punishing the receiver of a bribe, but everybody stands to lose in the scenario above, because your distributor who made the facilitation payment may well be charged with abetting a bribe under the PCA and also prosecuted.

4. With potential exposure under both the FCPA and the PCA, U.S. companies doing business in or with India, together with their affiliates, third-party agents, contractors, partners and distributors should not only know what the FCPA and the PCA demand of them, but also should take appropriate steps to educate their managers and employees about these two laws and what must be done and not done to avoid violating them. You too can stay out of jail if you know what you're doing.

Sources.

* Office of U.S. Trade Representative
** Transparency International 2009 (www.transparency.org)
*** Indian Business Standard, February 11, 2010

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If you are interested in submitting an article to Lexology, please contact Andrew Teague at ateague@lexology.com.