

COMPLIANCE OF THE UNITED STATES OF AMERICA
WITH
THE INTER-AMERICAN CONVENTION AGAINST CORRUPTION

REPORT OF CIVIL SOCIETY
TO THE
COMMITTEE OF EXPERTS

AUGUST 13, 2010

**COMMITTEE OF EXPERTS OF THE FOLLOW-UP MECHANISM
FOR THE IMPLEMENTATION OF THE INTER-AMERICAN
CONVENTION AGAINST CORRUPTION**

**Commentary by Civil Society on the Questionnaire on Provisions Selected by the
Committee of Experts for Analysis Within the Framework of the Third Round**

INTRODUCTION

August 13, 2010

Pursuant to Rule 34(b) of the Rules for the Follow-up Mechanism for the Inter-American Convention against Corruption, Transparency International-USA (TI-USA) submits the following response to the evaluative questionnaire for consideration by the Committee of Experts.

We look forward to presenting these and other findings to the Committee of Experts Meeting with Civil Society on March 21, 2011.

For further information on this report, please contact the undersigned.

Transparency International–USA
1023 15th Street, NW
Suite 300
Washington, DC 20005
(202) 589-1616

Nancy Z. Boswell
President & CEO
nboswell@transparency-usa.org

CHAPTER ONE

DENIAL OR PREVENTION OF FAVORABLE TAX TREATMENT FOR EXPENDITURES MADE IN VIOLATION OF THE ANTICORRUPTION LAWS (ARTICLE III (7) OF THE CONVENTION)

- a) Describe the laws, rules and/or measures that expressly deny or prevent favorable tax treatment for any individual or corporation for expenditures made in violation of the anticorruption laws of your country.*

The United States prohibited the tax deductibility of bribes even before enactment of the Foreign Corrupt Practices Act (“FCPA”) in 1977.¹ The Internal Revenue code prohibits the deduction of payments made to any government or agency or instrumentality thereof “if the payment constitutes an illegal bribe or kickback or, if the payment is to an official or employee of a foreign government, the payment is unlawful under the Foreign Corrupt Practices Act of 1977.”² In addition, bribes paid to foreign officials are not permitted to reduce a foreign corporation’s earnings and profits under United States tax law. Denial of tax deductibility or reduction of earnings and profits does not depend on whether the person making the payment has been convicted of a criminal offense. Treasury has the burden of proving by clear and convincing evidence that a payment is unlawful under the FCPA.³

CHAPTER TWO

PREVENTION OF BRIBERY OF DOMESTIC AND FOREIGN GOVERNMENT OFFICIALS (ARTICLE III (10) OF THE CONVENTION)

- a) Are there laws and/or other measures in your country to deter or impede bribery of domestic and foreign government officials, such as mechanisms to ensure that publicly held companies and other types of associations maintain books and records which, in reasonable detail, accurately reflect the acquisition and disposition of assets, and have sufficient internal accounting controls to enable their officers to detect corrupt acts?*

Foreign Corrupt Practices Act “Accounting Provisions”: In addition to its better known foreign bribery provisions (discussed below) the FCPA requires publicly-listed companies or “issuers” to make and keep accurate books and records and to maintain a system of internal accounting controls.⁴ These “accounting provisions” apply to all types of business

1 U.S. Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-1, et seq., as amended.

2 Internal Revenue Code, 26 U.S.C. §162 (C)(1).

3 *Id.*; see also OECD Publication: 2009 Update of Country Descriptions of Tax Legislation on the Tax Treatment of Bribes to Foreign Public Officials, <http://www.oecd.org/dataoecd/58/10/41353070.pdf>.

4 18 U.S.C. § 78m (b)(2)(B).

transactions and cannot be limited to accounting and financial practices used to hide bribes or other improper payments.⁵ Liability for violation of the “accounting provisions” is independent of the FCPA bribery offense and does not require proof of intent. These provisions, which are vigorously enforced by the United States Securities and Exchange Commission (“SEC”), provide a powerful deterrent to improper payments because they make it less likely that such payments can be disguised or concealed.⁶

In recent years, SEC enforcement efforts have increased significantly, with 14 SEC actions in 2009 alone. One particularly notable example involved Siemens AG. In 2008, Siemens and three of its foreign subsidiaries plead guilty to violating the FCPA and agreed to pay a record-setting \$800 million fine (\$450 million in criminal fines to the DOJ and \$350 million in disgorgement to the SEC) pursuant to agreements reached with the SEC and DOJ. Despite widespread bribery allegations, Siemens was charged with violating the FCPA’s internal controls and books and records provisions. This case represented the first ever criminal charge for internal controls violations by a company. See below for a full discussion of enforcement trends.

Increase of prosecutorial scope and resources. The SEC recently established a specialized FCPA Unit, led by a senior SEC enforcement official and comprised of FCPA investigation and enforcement specialists. The SEC Division of Enforcement has recently announced that it will start using settlement vehicles known as deferred prosecution agreements (“DPAs”) and non-prosecution agreements (“NPAs”) as part of a new initiative to encourage companies and individuals to cooperate with SEC investigations. See discussion of FCPA case settlement below.

Sarbanes-Oxley Act of 2002: Passed in response to corporate accounting scandals in the early 2000s, the Sarbanes-Oxley Act of 2002⁷ has significantly strengthened disclosure and internal-controls requirements for public companies. Section 404 of the Act requires companies to establish and maintain an adequate system of internal controls and procedures for financial reporting and to annually assess the effectiveness of those controls and procedures. A second provision, Section 302, requires quarterly certification by a company’s chief executive and financial officers that filings are accurate and internal controls have been reviewed for effectiveness. As a consequence, corporations are more

5 Proskauer on International Litigation and Arbitration, *Managing, Resolving, and Avoiding Cross-Border Business or Regulatory Disputes*, Matthew S. Queler, Wendy Wu, Bettina Chin, available at http://www.proskauerguide.com/law_topics/27/II.

6 Jones Day, *The Legal Obligation to Maintain Accurate Books and Records in U.S. and Non-U.S. Operations*, March 2006, available at <http://www.jonesday.com/abc2.aspx?url=/newsknowledge/publicationdetail.aspx%3Fpublication%3D3210%26print%3Dtrue>.

7 15 U.S.C. §7241 et seq. (2002).

frequently uncovering accounting-provision violations and are self-reporting them to regulators in an attempt to mitigate penalties for noncompliance.⁸

Privately-Held Companies: Although the FCPA accounting provisions and Sarbanes-Oxley Sections 404 and 302 do not apply to individuals and privately-held entities, other statutes have a similar impact. These include the mail and wire fraud and obstruction of justice statutes⁹ and, in addition, United States law also prohibits individuals and privately-held companies from supplying false statements/records to the government, including in connection with filing tax returns, obtaining government benefits or conducting business with the government.

Recommendation: The United States should consider whether current law and practice is adequate with respect to privately-held companies and individuals.

Incentives for Voluntary Disclosure. Many recent FCPA enforcement actions arise from a company's voluntary disclosure of violations of law. According to the SEC's *Seaboard Memorandum* and the United States Sentencing Guidelines, the government is compelled to consider a company's voluntary disclosure (or lack thereof), in charging, settling, and sentencing decisions. When combined with other forms of cooperation, voluntary disclosure may substantially mitigate or even eliminate penalties that would be imposed if the FCPA violations were uncovered by the government in the first instance, including some settled through deferred prosecution.

Despite this guidance, as well as efforts by SEC officials to communicate publicly the benefits of voluntary disclosure and cooperation in investigations, some question the extent of the benefits conferred as a result. As one close watcher of FCPA enforcement practices has observed, while some corporate defendants that self-reported misconduct "have certainly received relatively lenient treatment, it is not clear that voluntary disclosure was the reason for any particular settlement term."¹⁰

Recommendation: The DoJ and SEC should issue additional guidance indicating what benefits may accrue from voluntary disclosure and the conditions under which they might be accorded.

8 Jones Day, *The Legal Obligation to Maintain Accurate Books and Records in U.S. and Non-U.S. Operations*, March 2006, available at <http://www.jonesday.com/abc2.aspx?url=/newsknowledge/publicationdetail.aspx%3Fpublication%3D3210%26print%3Dtrue>.

9 918 U.S.C. § 641, et seq; 18 U.S.C. §§ 1341, 1343.

10 Gibson Dunn *2009 Year-End FCPA Update*, Jan. 4, 2010.

CHAPTER THREE

TRANSNATIONAL BRIBERY (ARTICLE VIII OF THE CONVENTION)

1. Criminalization of transnational bribery

- a) *Does your State prohibit and punish, subject to its Constitution and the fundamental principles of its legal system, 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?*

Operating in tandem with the accounting provisions discussed above, the FCPA also includes an anti-bribery provision, which make it unlawful for a U.S. person, and certain foreign issuers of securities, to make a corrupt payment to a foreign official to secure any improper advantage in order to assist in obtaining or retaining business for or with, or directing business to, any person. Since 1998, they also apply to foreign firms and persons who take any act in furtherance of such a corrupt payment while in the United States.¹¹

FCPA Enforcement Trends:

The anti-bribery provisions are vigorously enforced by the United States Department of Justice ("DOJ"). As with the SEC, in recent years, DOJ enforcement efforts have increased significantly.

More prosecutions, higher penalties. According to the 2010 Transparency International *Progress Report: Enforcement of the OECD Anti-Bribery Convention*,¹² the DOJ and SEC have brought over 140 cases since enactment of the FCPA. The number of enforcement actions has been particularly notable in recent years, with 26 DOJ prosecutions and 14 SEC actions in 2009, compared to only 2 and 3 actions, respectively, in 2004.

Similarly, sanctions have increased, with companies paying hundreds of millions of dollars in combined DOJ and SEC penalties. Added to the extraordinary amounts paid by Siemens (approx. \$1.6 billion) and Halliburton/KBR (approx. \$600 million), other recent settlements carry with them significant fines: BAE (\$400 million), Daimler (\$185 million), Technip (\$400 million), and Alcatel-Lucent (\$200 million).¹³

11 United States Department of Justice FCPA Lay-Persons Guide, <http://www.justice.gov/criminal/fraud/fcpa/docs/lay-persons-guide.pdf>.

12 Available at http://www.transparency.org/news_room/latest_news/press_releases/2010/2010_07_28_oecd_progress_report.

13 Shearman & Sterling LLP, *FCPA Digest* (March 4, 2010), available at <http://www.shearman.com/files/upload/FCPA-Trends-and-Patterns-Spring-2010.pdf>.

DOJ Prosecution of individuals. In addition to pursuing companies for FCPA violations, the DOJ has significantly increased FCPA prosecutions against individuals, including at high levels of the private sector and government. Indeed, the head of the DOJ's Criminal Division recently stressed that prosecution of individuals is "a cornerstone" of the government's enforcement strategy.¹⁴ Notable cases include:

- KBR's former Chair and CEO, who pled guilty to conspiracy to violate the FCPA and to commit mail and wire fraud and now faces seven years in prison and restitution of more than \$10 million.
- A co-founder of Dooney & Bourke, found guilty of conspiracy to violate the FCPA and making false statements to the Federal Bureau of Investigation (FBI) who was sentenced to prison and fined \$1 million.
- A former Congressman, found guilty of corruption charges, including conspiracy to violate the FCPA, who was sentenced to 13 years in prison.
- The president and vice president of a ports engineering company, who each pled guilty to conspiracy to violate the FCPA and, in the case of the vice president, to making false statements to a law enforcement agent, who were sentenced to 37 and 87 months imprisonment, respectively.

Increase of prosecutorial resources. The DOJ and FBI have resources focused on FCPA enforcement and have recently expanded the number of lawyers and agents dedicated to FCPA investigations.

More aggressive investigative techniques. The government's determination to be more "proactive" in pursuing potential FCPA violations is evident from a "sting" operation it conducted earlier this year. The government arrested 22 individuals who sought to bribe an FBI agent posing as a representative of a defense minister in order to win part of a contract to supply military and law enforcement equipment.

Expansion of enforcement scope. The DOJ has relied on various statutes to reach conduct that falls short of violating the FCPA, conduct that constitutes commercial bribery, or conduct by government officials or their family members. These include the Travel Act and laws pertaining to mail and wire fraud, money laundering, aiding and abetting, tax evasion, false statements, and conspiracy.

Comprehensive Approach to Case Settlement. Authorities outside the United States have expressed interest in the DOJ's use of settlements, including "deferred prosecution agreements" (DPAs) and "non-prosecution agreements" (NPAs), which can be and have been effective mechanisms for resolving FCPA cases while avoiding the cost, time and

14 Assistant Attorney General Lanny Breuer at the ABA's 24th Annual National Institute on White Collar Crime, Miami, Florida, February 25, 2010.

uncertainty of trial. However, it should be underscored that these “settlements” are concluded under a *credible threat* of prosecution and, in addition, parties entering these agreements are subject to stringent requirements subject to court approval. Deferred prosecutions typically require a party to:

- admit wrongful conduct for which it will be criminally prosecuted if it does not comply with its settlement terms;
- cooperate in any ongoing investigation (which may lead to criminal prosecution of individuals), which includes making employees available for testimony;
- waive relevant statutes of limitation and the right to a speedy trial;
- pay significant fines;
- implement a robust corporate compliance program that addresses the underlying criminal conduct; and,
- engage an independent compliance monitor to review and report back to the government.

As noted above, the SEC Division of Enforcement has recently announced that it will start using DPAs and NPAs as part of a new initiative to encourage companies and individuals to cooperate with SEC investigations.

Recommendations: Two concerns have been raised in connection with recent settlements. First, while significant monetary fines were imposed, some have questioned why none of the companies was debarred from bidding on United States contracts. Government contracting officials should clarify how they determine when to impose such a penalty and contracting regulations should require officials to take into account FCPA investigations, settlements and convictions.

Second, home governments of officials who are alleged to have accepted or solicited bribes have not consistently investigated and prosecuted actions against the official. The United States government should encourage, and be seen to encourage governments to investigate and pursue cases. It should provide technical assistance in securing evidence. It should make public its willingness to assist, and where appropriate, consider a *demarche* on the host government to address extortion at its source. It should also make public as much information as possible so citizens are able to bring pressure on their government.

Incentives for Voluntary Disclosure. As noted above, many recent FCPA enforcement actions arise from a company’s voluntary disclosure. According to the Justice Department’s *Principles of Federal Prosecution of Business Organizations* and the U.S. Sentencing Guidelines, the government is compelled to consider a company’s voluntary disclosure (or lack thereof), in charging, settling, and sentencing decisions. When combined with other forms of cooperation, voluntary disclosure may substantially mitigate or even eliminate

penalties that would be imposed if the FCPA violations were uncovered by the government in the first instance.

Despite this guidance and efforts by DOJ officials to communicate publicly the benefits of voluntary disclosure and cooperation in investigations, some question the extent of the benefits conferred as a result.

Recommendation: The United States should clarify the incentives for this important tool to operate effectively. The DOJ and SEC should issue additional guidance indicating what benefits may accrue from voluntary disclosure and the conditions under which they might be accorded.

Addressing Facilitating Payments. Small payments made to foreign government officials for the purpose of expediting or securing routine government functions to which the payor is entitled are exempt from the anti-bribery provision of the FCPA, although they are required to be properly recorded by the FCPA accounting provisions.¹⁵ The exception for these payments – known as facilitating payments -- remains an issue of considerable attention and debate. Pursuant to a new recommendation agreed to by parties to the OECD Anti-Bribery Convention, the United States recently has agreed to review its policies and to encourage companies to prohibit the use of facilitating payments.¹⁶ To this end, high-level United States government officials are increasing their public statements making clear that they do not condone them and that companies should take steps to eliminate them. At a recent conference, Assistant Attorney General Lanny Breuer went further, sharing his view that "I suspect over time, we too will be modifying our law."

Recommendations: Given the potential adverse impact to the company and in the country where such payments are made¹⁷, TI-USA has urged and continues to encourage companies to adopt compliance policies and programs that prohibit such payments. The DOJ and SEC should also do more to clarify what is permissible under the exception's narrow constraints and to encourage private sector action to eliminate these payments.

The US government should also do more to encourage host governments to take action to reduce the solicitation of such payments, which are generally considered bribes in the countries where paid and thus prohibited under the Inter-American Convention against Corruption and the UN Convention against Corruption prohibitions on solicitation.

15 The exemption reads, "Subsections (a) and (i) of this section shall not apply to any facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party official."

16 OECD Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions, November 2009.

17 <http://www.hoganlovells.com/an-international-standard-for-corporate-compliance-05-14-2010/>.

CHAPTER FOUR

ILLICIT ENRICHMENT (ARTICLE IX OF THE CONVENTION)

1. Criminalization of illicit enrichment

- a) Has your State established as an offense, subject to its Constitution and the fundamental principles of its legal system, 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?***

The Ethics in Government Act of 1978 provides an important means of addressing this issue. It requires public financial disclosure for members of all three branches of government – executive, legislative and judicial – to detect and prevent conflicts of interest. The financial disclosure requirements apply to career as well as to political employees.¹⁸ Individuals are required to file a personal financial disclosure report upon taking their position; annually thereafter; and upon leaving office. With certain exceptions for individuals who perform intelligence functions, these reports are available to the public upon request.¹⁹

Both the public and confidential financial disclosure reports are reviewed by the federal executive branch agency in which the individual serves. When information on a financial disclosure report indicates that an actual conflict of interest may have occurred, that matter is referred for further investigation and possible prosecution and/or administrative sanction.

Systems of financial disclosure are also in place at state and local levels.

In addition, the net worth method of proof in prosecuting tax evasion cases is a means of addressing unjust enrichment.²⁰

First Round Recommendations

4. MECHANISMS TO ENCOURAGE PARTICIPATION BY CIVIL SOCIETY AND NONGOVERNMENTAL ORGANIZATIONS IN EFFORTS TO PREVENT CORRUPTION (ARTICLE III, PARAGRAPH 11 OF THE CONVENTION)

4.1.1. Mechanisms for access to information

18 64 U.S.C. app. §101.

19 *Id.* at §105.

20 26 U.S.C. §7201; American Bar Association Section of International Law and Practice Recommendation and Report, Lucinda A. Low, Chair, August 1997.

Since the United States Second Round review, new regulations have gone into effect strengthening citizens' access to public information. In January 2009, President Obama issued a Presidential Memorandum on the Freedom of Information Act (FOIA), ordering all United States government agencies and departments to "adopt a presumption in favor" of acting on FOIA requests. Reversing a Bush Administration policy restricting access, the President noted that "[i]n responding to requests under the FOIA, executive branch agencies should act promptly and in a spirit of cooperation, recognizing that such agencies are servants of the public." TI-USA welcomed the Executive order.

The FOIA gives citizens the right to obtain government information and establishes a general presumption that all records in the possession of the agencies and departments of the U.S. Executive Branch should be accessible to the public. If an agency denies a request, the burden of proof is on the government to demonstrate that the information falls under one of nine statutory exceptions to the rule requiring it to provide the records requested.

In the Clinton Administration, the government's capacity to invoke discretionary exceptions was limited. The government had the burden of demonstrating that foreseeable harm would occur from disclosure. The Bush Administration reversed that presumption, permitting the government to determine whether there is a "sound legal basis" for relying on an exception to withhold information.

President Obama's *Executive Order on Presidential Records* also reversed prior restrictive practices with respect to the use of executive privilege to limit access to historic documents.

Second Round Recommendations

SYSTEMS OF GOVERNMENT HIRING AND PROCUREMENT OF GOODS AND SERVICES (ARTICLE III (5) OF THE CONVENTION)

Government systems for procurement of goods and services

Since the United States Second Round review, new requirements have gone into effect that can greatly enhance prevention of fraud in procurement. Recent amendments to the Federal Acquisition Regulations ("FAR"), which applies throughout the government and addresses all aspects of procurement, will require companies who bid on government contracts to take actions that will have a positive anti-bribery effect.

Successful bidders are subject to a "responsible contractor" eligibility condition and are required to meet certain minimum "code" requirements. Guidelines for determining whether a contractor meets the requirements include "having a satisfactory record of integrity and business ethics" that is broad enough to encompass compliance with the FCPA.

Most companies (*i.e.*, those with contracts or subcontracts greater than \$5 million in value and with a performance period of more than 120 days, including contracts performed wholly outside of the U.S.) that win contracts with the U.S. government also are now required to adopt written codes of business ethics and conduct; institute business ethics training program and an internal control system to promote compliance with the code (small businesses are excepted from these requirements); and display Federal agency Office of the Inspector General (“OIG”) Fraud Hotline Posters unless they have instituted other mechanisms to encourage and facilitate the reporting of suspected instances of improper conduct.

Since 2008, most companies (*see* criteria above) also have been required to disclose possible violations of federal criminal law, including FCPA violations, and to implement specific internal controls to prevent and detect improper conduct. The rule also creates a cause for debarment or suspension for knowing failure to report violations of criminal law related to the award or performance of a contract or subcontract.

SYSTEMS FOR PROTECTING PUBLIC SERVANTS AND PRIVATE CITIZENS WHO, IN GOOD FAITH, REPORT ACTS OF CORRUPTION (ARTICLE III (8) OF THE CONVENTION)

The United States has an extensive system of statutory protections, including the Civil Service Reform Act (“CSRA”) and the Whistleblower Protection Act (“WPA”), for federal government employees who report allegations of fraud and corruption. The Sarbanes-Oxley Act of 2002 expanded significantly protection for private sector whistleblowers. These laws protect those who might otherwise face retaliation.

Since the United States Second Round review, new financial reform legislation has been enacted that also includes a whistleblower incentive provision, referred to as the “whistleblower bounty,” which requires the SEC to pay whistleblowers who volunteer original information in a successful enforcement action a percentage of collected sanctions, when the sanctions exceed \$1 million. The percentage awarded, which will range from 10 to 30%, will be determined at the discretion of the SEC based on considerations such as the significance of the information provided and the assistance provided by the whistleblower(s). The law applies to cases brought under the FCPA as well as other judicial and administrative actions.