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Section 1: LEGAL LANDSCAPE

1.1 What is the scope of bribe payors and bribe recipients covered by your jurisdiction's anti-corruption laws?



The US Foreign Corrupt Practices Act (FCPA) is among the broadest of transnational bribery regimes in defining the scope of bribe payors and recipients.

Bribe payors may be prosecuted if they are issuers of securities under the Securities Exchange Act of 1934 or are required to file periodic reports under section 15(b); or if they are domestic concerns, which include companies or partnerships with their principal places of business in the US or organised under the laws of any state or territory and also US citizens or permanent residents. For those listed, as well as their employees and agents, liability applies no matter where the misconduct occurs. In addition, liability extends to anyone who furthers a covered corrupt payment in US territory.

Covered bribe recipients include foreign officials, which encompass government employees at all levels and is construed as including employees of state-owned or controlled entities, though there is disagreement regarding the degree to which such employees should qualify. Covered recipients also include employees of more than 75 non-governmental organisations, non-US political parties and their candidates and officials. Additionally, other federal and state laws prohibit bribery of US officials.

The Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) prosecute commercial bribery through the FCPA's accounting provisions – the books-and-records and internal controls provisions – and the DOJ has brought commercial bribery actions under the mail and wire fraud statutes.

Individuals and companies may be prosecuted civilly and criminally for conspiracy to commit, aiding or abetting, travelling in interstate commerce or money laundering to facilitate any of the above offences.

1.2 What conduct directly related to bribery is prohibited by anti-corruption laws?



Both direct and indirect payments, and offers of payment, are covered under US law. Prohibited payments include not only cash, but also gifts, hospitality, travel and anything of value provided or offered with corrupt intent.

Each offence requires corrupt intent, though willful blindness or reckless disregard satisfy the knowledge requirement under certain circumstances.

Facilitating payments are excluded from FCPA coverage, which also contains an affirmative defence for reasonable and bona fide payments for education about products or services or in connection with the execution of a government contract.

1.3 What conduct related to internal controls and to books and records is covered by the anti-corruption laws?



The FCPA's accounting provisions, which are applicable to issuers of US securities, mandate the accuracy of books and records and the sufficiency of internal accounting controls, imposing civil and criminal liability for breaching these provisions. An individual who knowingly falsifies the books or records of an issuer or knowingly subverts or fails to implement internal controls reasonably designed to prevent covered bribery may be prosecuted criminally, as may the individual's employer.

Civil liability for violating these provisions is virtually strict liability.

Section 2: POTENTIAL PENALTIES

2.1 What is the range of direct financial consequences for a company engaged in a prohibited anti-bribery offence?



In the past six years, FCPA enforcement has generated more than \$5 billion in corporate recoveries. Remedies include criminal fines of up to \$25 million per violation, up to twice the loss suffered by a counterparty whose employees are bribed or twice the gain by a company whose employees have paid bribes. Civil remedies include penalties in the hundreds of thousands of dollars per violation, disgorgement of ill-gotten gains, restitution and interest.

2.2 What is the range of collateral consequences for a company adjudicated to have engaged in prohibited anti-bribery offences?



Conviction or settlement of an FCPA offence can lead to debarment from procurement and public health programmes, and the loss of broker-dealer licences and export-import bank financing. Collateral civil litigation including private securities litigation, shareholder derivative actions and competitor suits is increasingly common.

2.3 What are the typical punishments of individuals prosecuted for paying or accepting bribes?



Certain books and records and internal controls offences are punishable by criminal sentences of up to 20 years for each violation.

The maximum sentence for each primary FCPA violation is five years in prison and a fine. Sentences vary from probation to more than 15 years, in part given the application of other potentially relevant laws, with the majority falling within the range of one to five years.

Section 3: INVESTIGATION

3.1 What is the role of self-investigation at the remedial stages of an anti-corruption matter?



Companies should work quickly to preserve evidence and investigate anti-bribery issues that arise. If evidence of misconduct is found, timely remediation is expected, including holding culpable individuals responsible and revising internal controls as appropriate. Resolution of an FCPA investigation often will include going-forward monitoring obligations, including either self-monitoring or monitoring by an independent consultant.

3.2 With respect to anti-corruption compliance programmes, what are regulatory expectations if a business wants to receive credit or leniency during an investigation into corrupt behaviour by company personnel?



Enforcement personnel have provided some guidance on what constitutes an effective compliance programme, including on such topics as company leadership, content of anti-bribery policies, training, auditing, monitoring and remediation, and principles for self-reporting.

Nevertheless, relevant laws do not clearly articulate precisely how to maximise credit or leniency. This arises from the discretionary nature of charging decisions, lack of a mandate for such guidance and the variety of companies subject to the FCPA. In some cases, effective and robust compliance programmes can affect significantly the nature of charges or whether they are brought at all.

3.3 What resources are available to regulators to investigate and prosecute anti-corruption offences?



Relative to enforcement agencies globally, the DOJ and the SEC are well funded, and both have dedicated FCPA enforcement units. Nevertheless, officials at both agencies have made clear their desire for additional resources. Companies also typically provide substantial assistance through internal investigations.

3.4 What are the customary forms of resolution of individual and corporate regulatory actions?



Regulatory actions can be resolved through trial in US courts, and, in the case of SEC civil liability, also through administrative actions. Resolutions without trial, which are more frequent, can take the form of guilty pleas, deferred prosecution agreements, non-prosecution agreements and declinations.

Section 4: ADJUDICATION

4.1 What is the perception with respect to the fairness of regulators and the judicial system in addressing anti-corruption?



DOJ and SEC FCPA attorneys are professional and experienced, and, when bringing actions in US courts, are subject to the supervision of an independent and fair judiciary, which serves as an important check against sometimes over-zealous prosecutors.

Although a number of FCPA cases have been brought against non-US companies, no evidence has emerged that political factors motivated those actions. In virtually all cases, those companies employ US citizens and have substantial investment in US operations.


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About the author

Andrew M Levine is a litigation partner in the New York office of Debevoise & Plimpton, who focuses his practice on white-collar criminal defence and internal investigations. He regularly defends companies in criminal, civil, and regulatory enforcement matters, and has conducted numerous investigations throughout the world. Levine frequently advises companies on compliance matters, including on the US Foreign Corrupt Practices Act, and the assessment and management of risks presented by potential mergers, acquisitions, and other transactions. In 2013, Levine was recognised as a Rising Star by the *New York Law Journal* and recently was named in *Global Investigation Review's 40 Under 40* list of the world's leading investigations lawyers. Levine is a co-editor-in-chief of the firm's *FCPA Update* newsletter and has published widely on various anti-corruption topics.

Before joining Debevoise in 2006, Levine served as Deputy Counsel to the Independent Inquiry Committee into the United Nations Oil-for-Food Programme, led by Paul A Volcker.


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Steven Michaels is a counsel in the firm's litigation department, whose practice focuses on matters involving compliance with the US Foreign Corrupt Practices Act and related statutes and regulations, and internal investigations as a member of the firm's white collar and regulatory group. He has worked on matters in these areas, involving more than two dozen major US and non-US corporations, and has handled disputes concerning facilities and public works in the United States, Argentina, the Bahamas, Bolivia, Brazil, the Cayman Islands, Ghana and Venezuela. Michaels is the executive editor of the firm's *FCPA Update* newsletter.

Before joining Debevoise in 1996, Michaels served for more than 11 years in various capacities in the Department of the Attorney General in the State of Hawaii, including as first deputy attorney general and solicitor general.