

THE REGULATION OF BRIBERY IN THE UNITED STATES

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The Taking of a Bribe or Gratuity, should be punished with as severe Penalties as the defrauding of the State.

—William Penn

For the most part, law and practice in the United States reflects Penn's comment. Bribery, the grant or acceptance of a benefit in violation of entrusted power¹, is illegal throughout the United States. Federal and state authorities share enforcement power over bribery. Federal law generally criminalizes bribery of domestic as well as foreign public officials. At the state level, bribery is regulated in a myriad of ways. Like the federal government, states have enacted laws prohibiting bribery of state governmental officials but have also adopted legislation prohibiting bribery between private sector commercial entities. Section I of this chapter contains an overview of federal level bribery enactments and relevant international agreements to which the United States is party and Section II contains an analysis of state level regulation of bribery.

I. Federal Regulation of Bribery

The two main federal statutes concerning bribery include the Foreign Corrupt Practices Act (the "FCPA")² and the federal bribery statute located at 18 U.S.C. § 201 (the "Federal Bribery Statute").³ In addition, regulations promulgated by the

1. Transparency International, *Confronting Corruption: The Elements of a National Integrity System 2* (2000). Bribery has been defined as the "criminal offense of offering, giving, soliciting, accepting, or agreeing to accept something of value with intent to corruptly influence the action of a public official, a labor representative, an employee of a private business, or an individual connected with an athletic contest." 12 Am Jur.2d Bribery § 1.

2. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494, as amended by Title V of the Omnibus Trade & Competitiveness Act of 1988, Pub. L. No. 100-418 Sec. 5001-03, 102 Stat. 1415, 1415-25 (codified as amended at 15 U.S.C. 78m(b)(2), 78m(b)(3), 78dd-1, 78dd-2, 78ff(1994)).

3. 18 U.S.C. § 201.

Office of Government Ethics (the "OGE Regulations")⁴ expand upon the provisions of the Federal Bribery Statute. As noted above, the FCPA prohibits bribery of foreign public officials in connection with business transactions and the Federal Bribery Statute and OGE Regulations relate to bribery of United States federal officials.

A. Foreign Corrupt Practices Act

Since 1977, the federal government has outlawed bribery in connection with international business transactions pursuant to the Foreign Corrupt Practices Act ("FCPA"). The FCPA later became the model for similar international initiatives, most notably the Organization for Economic Cooperation and Development ("OECD") Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.⁵ This Convention was ratified by the United States in 1998 when it made certain conforming changes to the FCPA.⁶

The FCPA was enacted in 1977, as an outgrowth of the Watergate hearings investigating various criminal acts involving the Nixon administration. According to Stanley Sporkin, former Director of Enforcement for the Securities and Exchange Commission and one of the authors of the FCPA, regulators' interest arose based on testimony by corporate officials "about impermissible contributions made by those corporations to President Nixon's re-election campaign."⁷ An investigation by the SEC revealed that these companies had disguised such illegal contributions on their accounting statements.⁸ The companies' "secret funds were used to make many other forms of illicit payments, including payments of bribes to high officials of foreign governments."⁹ In all, the SEC discovered over \$300 million in payments to foreign governmental officials,

4. 5 CFR § 2635.202 (1999).

5. OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Signed December 17, 1997.

6. See International Anti-bribery and Fair Competition Act of 1998, P.L. 105-366, 112 Stat. 3304. The title of this act illustrates the extent to which United States policy makers view the fight against bribery primarily as a competitive threat to United States industry rather than a subject of moral concern.

7. Stanley Sporkin, "The Worldwide Banning of Schmiergeld: A Look at the Foreign Corrupt Practices Act on its Twentieth Birthday", 18 *Northwestern Journal of International Law and Business* 269, 271 (1998).

8. *Id.*

9. *Id.*

politicians, and political parties by United States corporations.¹⁰ As a result of SEC investigations and its agreement with companies to resolve the situation by making them restate their financial statements, Congress took an interest in addressing the subject through legislation. The result was the FCPA.¹¹

The substantive provisions of the FCPA attack bribery through both direct and indirect means. First, it directly prohibits bribery of foreign public officials.¹² Second, it requires companies to prepare accurate accounting statements. This provision, sometimes referred to as the “books and records” requirement, represents an indirect means of addressing the issue.¹³ The bribery sections provide for civil and criminal enforcement by the Justice Department, while the SEC has civil authority over both the books and records and bribery provisions.¹⁴

Anti-bribery Provisions

The anti-bribery provisions of the FCPA apply to:

- (i) any issuer of securities, any company required to register its securities with the SEC, or any officer, director, employee, agent, or stockholder acting on behalf of such issuer,¹⁵
- (ii) any “domestic concern” or any officer, director, employee, or agent thereof or any stockholder acting on behalf of such domestic concern,¹⁶ or
- (iii) any person other than an issuer or domestic concern or any officer, director, employee or agent or shareholder.¹⁷

10. *Id.* at 272.

11. *Id.* at 273.

12. 15 U.S.C. § 78dd-1; 15 U.S.C. 78dd-2; and 15 U.S.C. 78dd-3. The FCPA is broken down into three separate statutes. Except with respect to the class to which each section applies (e.g. domestic concerns, issuers of securities, etc.) the text and proscriptions are identical in each.

13. 15 U.S.C. § 78m(b)(2)(A).

14. This statute vests only the government with enforcement power. See, e.g., *Lamb v. Phillip Morris*, 915 F.2d 1024 (6th Cir. 1990)(no private right of action available under the FCPA). See also, *McLean v. International Harvester*, 817 F.2d 1214, 1219 (5th Cir. 1987); *J.S. Service Center Corporation v. General Electric Technical Services Company, Inc.*, 1996-1997 Fed. Sec. L. Rep. ¶ 99,354 at 96,201 (S.D.N.Y. 1996). In *McLean*, the court held that, the provision of the FCPA that stipulates that an employee cannot be convicted of the FCPA criminally if an employer is not also convicted, creates no private right of action for employees.

15. 15 U.S.C. § 78dd-1(a).

16. 15 U.S.C. § 78dd-2.

17. 15 U.S.C. § 78 dd-3.

The FCPA prohibits the “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” by such enumerated persons to any foreign official for the purpose of “(i) influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage.”¹⁸ Similarly, it prohibits any person from “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.”¹⁹ Both prohibitions are limited to acts designed to “assist such issuer in obtaining or retaining business for or with, or directing business to, any person.”²⁰ Similar provisions apply to payments to “any foreign political party or official thereof or any candidate for foreign political office” for the purpose of influencing or inducing any act by or securing an improper advantage from such party, official or candidate.²¹ The FCPA also prohibits the use of an intermediary to undertake similar actions on behalf of any person.²²

The anti-bribery provisions of the FCPA, unlike the books and records provisions, require scienter for liability to attach. The definitions in the statute indicate that “knowing” conduct exists if (i) a person is aware that they are engaging in certain conduct, that such circumstances exist, or that the result is substantially certain to occur, or (ii) the person has a “firm belief” that such circumstance exists or is substantially certain to occur.²³ It further clarifies that where knowledge of an offense is required, “high probability of the existence of such circumstances” suffices *unless* the person actually believes it does not exist. Given the fact that a bribe giver can never know for certain that his nefarious goals will be accomplished, it is necessary to penalize an attempt provided requisite intent exists.

18. 15 U.S.C. § 78dd-1 (a)(1)(A); 15 U.S.C. § 78dd-2(a)(1)(A); 15 U.S.C. § 78dd-3(a)(1)(a).

19. 15 U.S.C. § 78dd-1(a)(1)(B); 15 U.S.C. § 78dd-2(a)(1)(A); 15 U.S.C. § 78dd-3(a)(1)(B). Note that one of the changes under the International Bribery & Fair Competition Act was to expand the range of actors to which the law applies to bring employees of public international organizations within the scope of the FCPA. See *infra* note 6.

20. *Id.*

21. 15 U.S.C. § 78dd-1(a)(2); 15 U.S.C. § 78dd-2(a)(2); 15 U.S.C. § 78dd-3(a)(2).

22. 15 U.S.C. § 78dd-1(a)(3); 15 U.S.C. § 78dd-2(a)(3); 15 U.S.C. § 78dd-3(a)(3).

23. 15 U.S.C. § 78dd-1(f)(2)(A)(i)-(ii); 15 U.S.C. § 78dd-2(h)(3)(A)(i)-(ii); 15 U.S.C. § 78dd-3(f)(3)(A)(i)-(ii).

An exception to this general anti-bribery prohibition exists for "routine governmental action."²⁴ Such an action is defined as a "facilitating or expediting payment to a foreign official, political party or party official" which is intended to "secure the performance of a routine governmental action."²⁵ This exception applies only to "ministerial" duties involving something to which one is already entitled, as opposed to matters of discretion, such as the decision "to award new business or to continue business with a particular party."²⁶ An example of such a ministerial function might be a payment made for telephone service, in a country where telephone service might take months or years to secure.²⁷

In *U.S. v. Liebo*, the FCPA conviction of a former salesman and Vice President of a United States based aerospace company was upheld as a result of his bribery of a Niger government official in connection with the sale of aircraft parts.²⁸ The court reasoned that claims by the Vice President that he would "make gestures" and set up bank accounts if the contracts were approved, provided sufficient evidence to sustain a conviction under the FCPA.²⁹

The anti-bribery prohibitions include two affirmative defenses. First, for payments, gifts, offers, or promises that are lawful under the laws of the recipient's country.³⁰ Second, if such sums were paid for *bona fide* expenditures, such as travel or lodging expenses, incurred in connection with the "promotion, demonstration, or explanation" of products or services, or the "execution or performance" of a contract with a foreign government.³¹

One challenge to the FCPA has involved the extent to which the act impliedly permits judicial sanctioning of foreign policy. The act of state doctrine recognizes

24. 15 U.S.C. § 78dd-1(b); 15 U.S.C. § 78dd-2(b); 15 U.S.C. § 78dd-3(b).

25. 15 U.S.C. § 78dd-1(b). 15 U.S.C. § 78dd-1(f)(3) defines "routine governmental action" to mean "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." 15 U.S.C. § 78dd-1(f)(3). For domestic concerns the definition is located at § 78dd-2(h)(4) and for all other persons at 15 U.S.C. § 78dd-3(h)(4).

26. 15 U.S.C. § 78dd-1(f)(3)(B).

27. *Article

28. 92 3 F.3d 1308 (8th Cir. 1991).

29. *Id.* at 1311.

30. 15 U.S.C. § 78dd-1(c)(1); 15 U.S.C. § 78dd-2(c)(i); 15 U.S.C. § 78dd-3(c)(i).

31. 15 U.S.C. § 78dd-1(c)(2); 15 U.S.C. § 78dd-2(c)(2); 15 U.S.C. § 78dd-3(c)(2).

the independence of every state and prohibits one state from standing in judgment of the actions of another state taken within its own territory.³² Specifically, the act of state doctrine in constitutional jurisprudence prohibits the judiciary from involving itself in foreign policy matters on the grounds that such matters are normally considered the purview of the executive branch.

In the case of *Clayco Petroleum Corporation v. Occidental Petroleum Corporation*, the Ninth Circuit Court of Appeals held that the act of state doctrine prohibited private law suits based on foreign payments made to sovereign states.³³ The case involved an antitrust action brought by Clayco against Occidental on the grounds that Occidental's secret payments to an official of Umm Al Qaywayn (now a part of the United Arab Emirates) violated various United States antitrust laws. The case grew out of an enforcement action by the SEC against Occidental, which the company settled by agreeing to a permanent injunction. The court found that although the Department of Justice and SEC share enforcement power with respect to the FCPA, they do so in consultation with the Department of State and thus can attend to the "exigencies of foreign affairs."³⁴ Where private parties are concerned, the court would not countenance lawsuits based on payments to foreign governments, as such suits could affect the "proper conduct of national foreign policy."³⁵

Reflecting the act of state concerns, courts have held in other contexts that the FCPA does not permit private lawsuits within the United States against foreign officials based on allegations of bribery. In *U.S. v. Castle*, the Fifth Circuit held that foreign officials could not be prosecuted under 18 U.S.C. § 371 for conspiracy to violate the FCPA. Citing exceptions for facilitating payments and the affirmative defense for acts considered legal in the foreign state in question, the court said that "Congress had absolutely no intention of prosecuting the foreign officials involved, but was concerned solely with regulating the conduct of U.S. entities and citizens."³⁶ While the court's reading of Congress's intent is reasonable, it does raise a question as to the effectiveness of the FCPA as a deterrent. Implicit in the court's rationale, however, is the fact that the United States relies on nationality jurisdiction in enforcing the FCPA. Query whether the

32. See *Underhill v. Hernandez*, 168 U.S. 250, 252, 18 S.Ct. 83, 84 (1897).

33. 712 F.2d 404 (9th Cir. 1983); *cert. den.* 104 S.Ct. 703, 464 U.S. 1040 (1983).

34. *Id.* at 409.

35. *Id.* at 409. But see *Environmental Tectonics*, 847 F.2d 1052 (3rd Cir. 1988), in which the court held that an act of state doctrine did not preclude a private suit based on RICO and Robinson-Patman Act claims related to procurement of a military contract through bribery.

36. *United States v. Castle*, 925 F.2d 831, 834 (5th Cir. 1991).

United States could exercise territorial jurisdiction over bribery of a foreign official within the territory of the United States.

Accounting Books and Records

The accounting books and records provisions of the FCPA can be read essentially as an extension of the securities law requirement that companies with securities registered under Section 12(g) of the Securities Exchange Act of 1934, as amended³⁷ (the "Exchange Act"), file annual and periodic reports of their financial condition with the SEC.³⁸ Such report must first provide accurate information. Specifically, every company filing reports under Section 15 of the Exchange Act must "make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer."³⁹ Beyond the requirements of honest reporting, the accounting provisions add a new requirement, that registrants must implement effective internal controls, thereby effectively adding a duty to monitor or self-police. Under this provision, registrants must "devise and maintain a system of internal accounting controls" which, rather than provide absolute assurance, suffices "to provide *reasonable assurances* that....transactions are executed in accordance with management's general or specific authorization" and that the company's accounting system records transactions accurately.⁴⁰ [emphasis added]

The accounting and internal controls provisions together constitute one of the most effective weapons regulators possess in enforcing the FCPA. While these provisions are only enforceable by the SEC on a civil basis, and apply only to

37. Securities Exchange Act of 1934, as amended, § 12(g) (codified at 15 U.S.C. § 78l(g)).

38. 15 U.S.C. § 78m(a).

39. 15 U.S.C. § 78m(b)(2)(A). The statute defines "reasonable detail" to mean "such level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs." 15 U.S.C. § 78m(b)(7).

40. 15 U.S.C. § 78m(b)(2)(B). Specifically, 15 U.S.C. § 78m(B)(2)(B)(ii),(iii), and (iv) state:

"(ii) transactions are recorded as necessary (I) to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and (II) to maintain accountability for assets;

(iii) access to assets is permitted only in accordance with management's general or specific authorization; and

(iv) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences."

companies with securities registered under the Exchange Act (rather than all “persons” as do the anti-bribery provisions), it is much easier for regulators to prove their case. Even in cases where the SEC cannot prove that a registrant misstated its financial statements, the heightened scrutiny the internal controls provisions involve, permits relief based on a failure to develop adequate systems of control *even if* a registrant has not misstated its accounting statements. Where the SEC is unable to uncover the particular financial misstatement concealing a bribe, it can pursue action on the grounds that an issuer maintained inadequate internal controls.⁴¹ These mechanisms are particularly important in dealing with bribery, as such acts are normally hidden. Most often SEC action in this area involves injunctive relief pursuant to a consent decree, so reported cases in this area are few.⁴²

Penalties

Violation of the anti-bribery provisions of the FCPA can result in both injunctive relief and criminal and civil sanctions. Where it appears that a company or officer, director, employee, or agent of a company is engaged in a violation of the FCPA, the Department of Justice can seek a permanent injunction.⁴³ Where seeking relief at law, companies can be fined more than \$2,000,000 for violating the statute.⁴⁴ Civil penalties against companies can be no more than \$10,000. Criminal penalties against natural persons who willfully violate the anti-bribery provisions can result in fines of up to \$100,000 and/or five years in prison.⁴⁵ In addition, civil penalties can result in as much as a \$10,000 fine.⁴⁶ The SEC can also pursue injunctive relief and civil damages claims based on violations of the books and records provisions.⁴⁷

B. OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions

Although the United States has ratified the OECD Convention and has made the necessary changes under its domestic laws that treaty requires, the OECD Convention was a significant enactment bearing on domestic anti-bribery

41. See, e.g., Stewart Deming, “The Accounting and Record-keeping Provisions of the FCPA in *The FCPA and the OECD Convention: Compliance Issues in the Changing Legal Environment*, American Bar Association (2000) [hereinafter “ABA Book”].

42. See Danforth Newcomb, “Digests of Cases and Review Releases Relating to Bribes of Foreign Officials under the FCPA” in ABA Book.

43. 15 U.S.C. § 78dd-2(d); 15 U.S.C. § 78dd-3(d).

44. 15 U.S.C. § 78dd-2(g); 15 U.S.C. § 78dd-3(e).

45. *Id.*

46. *Id.*

47. *Id.*

enforcement and could require additional changes under UNITED STATES law in the future. As an outgrowth of U.S. efforts to persuade other industrialized countries to put an end to bribery in connection with overseas business transactions, the OECD took up the issue over a number of years. Its first response was the Recommendation on Bribery of Foreign Public Officials enacted by the OECD in 1996. A Revised Recommendation was in turn adopted by the OECD Council on Combating Bribery in International Business in May 1997. This Recommendation conveyed the signatories' sense of bribery's destructiveness, and set the stage for subsequent action. Not satisfied with the non-binding Recommendation, the United States continued to press for a binding treaty and succeeded having it reconsidered later in 1997.

The result was the OECD Convention, which in large part tracked the normative aspects of the FCPA.⁴⁸ Additional provisions, most notably in the areas of jurisdiction, money laundering, mutual legal assistance, extradition, and peer review of domestic implementing legislation, deserve mention.

Jurisdiction

The Convention provides for territorial and, where recognized by domestic law, nationality jurisdiction.⁴⁹ Territorial jurisdiction adheres where an act of bribery, "in whole or in part", occurs within its jurisdiction.⁵⁰ The commentary to the Convention states that parties should construe the territorial requirement broadly "so that extensive physical connection to the bribery act is not required."⁵¹ This clarification is necessary to ensure that the primary purpose of the Convention, combating bribery of foreign officials, is not defeated because most of the activity occurs outside of a signatory's territory. Given this potential limitation, nationality jurisdiction may play a greater role in prosecutions under the Convention. Signatories to the Convention are required to "take such measures as may be necessary to establish its jurisdiction" to prosecute its nationals for conduct occurring overseas.⁵² Nationality jurisdiction is well established under United States law, and thus will likely be used in enforcement actions it initiates.

One potential confusion which may arise under the Convention, concerns situations in which two states share jurisdiction over an act of bribery. Under Article 4(3) of Convention, where more than one state party has jurisdiction over

48. Convention, Article 1(1).

49. Convention, Article 4.

50. Convention, Article 4(1).

51. Commentaries on the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Adopted by the Negotiating Conference on November 21, 1997, Article 1, Paragraph 1.

52. Convention, Article 4(2).

a matter, the states involved should "at the request of one of them, consult with a view to determining the most appropriate jurisdiction for prosecution."⁵³ It is conceivable that a bribery case involving a foreign national working for the United States subsidiary of a foreign company within the United States who engages in bribery in a third country, could find himself the subject of three different prosecuting authorities. While certainly an advance in preventing the loss of jurisdiction due to a suspect falling through the cracks as a result of the lack of clear jurisdictional basis, such overlaps will require significant coordination by all agencies involved.

Money Laundering

The money laundering provisions of the Convention apply a version of the dual criminality concept. Rather than requiring the proceeds of any bribe payment to be subject to money laundering laws, the Convention requires countries to treat the bribery of a foreign public official as a predicate offense under its domestic money laundering law provided it has done so with respect to active or passive bribery of a domestic public official.⁵⁴ Where a state has made only passive bribery of a public official a predicate offense for money laundering purposes, the Convention requires that the laundering of any foreign bribe payment be subject to domestic money laundering law.⁵⁵ In the United States, bribery, whether active or passive, is a predicate offense under relevant money laundering legislation, thus the terms of the Convention are fully applicable.⁵⁶

Mutual Legal Assistance

The Convention requires each state party to provide "prompt and effective" mutual legal assistance (MLA) "to the fullest extent possible under its laws and relevant treaties."⁵⁷ Such assistance shall be rendered for "criminal investigations and proceedings" and, for those countries not recognizing criminal liability of legal persons (corporations), in connection with non-criminal proceedings against such entities.⁵⁸ State parties are required to inform the requesting party "without delay" of its demand for additional information or documents needed for an investigation.⁵⁹ These MLA provisions were intended to overcome some of the difficulties encountered by United States investigators and prosecutors in connection with overseas bribery cases in the past. Article 9(2) further attempts

53. Convention, Article 4(3).

54. Convention, Article 7 and Commentary, Article 7.

55. Commentary, Article 7.

56. 18 U.S.C. § 1956.

57. Convention, Article 9.

58. Convention, Article 9(1).

59. Convention, Article 9(1).

to streamline matters by clarifying that dual criminality is deemed to exist for offenses falling within the scope of the Convention.⁶⁰ As a final matter, the Convention clarifies that bank secrecy shall not constitute a basis for withholding assistance in criminal cases.⁶¹ Though a welcome advance, one must read this provision in light of the lack of criminal liability for legal persons existing in many jurisdictions.⁶² The OECD has convened a working group that is considering tightening this loophole, but as yet has not come up with a proposal. To the extent that the bank secrecy language leaves open the question of *non-criminal* cases, authorities investigating bribery by legal persons may have difficulty getting around bank secrecy laws.

Extradition

As in the MLA context, the Convention seeks to facilitate extradition for crimes falling within its scope. It simply states "bribery of a foreign public official shall be deemed to be included as an extraditable offense under the laws of the parties and the extradition treaties between them."⁶³ Between states parties that have no separate extradition treaty, it "may consider" the Convention itself as the basis for extradition in the event that such treaty is required under its law for extradition to proceed.⁶⁴ The Convention also imposes the obligation of *aut dedere aut iudicare*, that is, it requires states parties to "take any measure necessary to assure that it can" either extradite their nationals for the offense of bribery of a foreign public official, or prosecute such person in its domestic courts.⁶⁵ Finally, while recognizing that extradition will be governed by the "domestic law and applicable treaties and arrangements" of each state party, it confirms that any

60. Convention, Article 9(1). The Convention drafters evidently favored a pragmatic construal of its provisions. In the Commentary to the Convention the drafters clarified that "parties with statutes as diverse as a statute prohibiting the bribery of agents generally and a statute directed specifically at bribery of foreign officials should be able to cooperate fully regarding cases whose facts fall within the scope of the offenses described in this Convention." Commentaries, Article 9(32).

61. Convention, Article 9(3).

62. Although the Convention "giveth" by requiring states parties to impose the "liability of legal persons for the bribery of a foreign public official", the Commentaries "taketh" by withdrawing such obligation for states where "under the legal system...criminal responsibility is not applicable to legal persons." Convention Article 2; Commentaries Article 2(20).

63. Convention Article 10(1).

64. Convention, Article 10(2); Commentaries, Article 10(33).

65. Convention Article 10(3).

dual criminality provisions in domestic law are deemed satisfied by the act of ratifying the Convention itself.⁶⁶

Monitoring and Follow-up

Following similar developments in industry and government where benchmarking and performance evaluations have become standard practice, the Convention has implemented a process of peer review. Through the OECD Working Group on Bribery in International Business Transactions, each state comes under review of its domestic implementing law and enforcement.⁶⁷ Each state party is subject to "a system of mutual evaluation, where each [participating] country will be examined in turn by the Working Group on Bribery, on the basis of a report which will provide an objective assessment of the progress of the participating country" in implementing the Convention.⁶⁸ To date, all of the states to have ratified the Convention have been reviewed, including the United States. If this process shows itself to have teeth, it could represent a significant advance in international law-making.

C. Organization of American States

The Inter-American Convention Against Corruption signed on March 29, 1996 (the "OAS Convention") by the members of the Organization of American States was a substantial regional anti-corruption treaty to which the United States is a party. It is, in a number of ways, much broader than the FCPA and OECD Convention. As with those conventions, it is chiefly concerned with bribery of public officials.⁶⁹ But it also encompasses persons carrying out public functions, a potentially broader category of individuals.⁷⁰

The main normative components of the statute apply to acts of corruption defined as:

"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

66. Convention Article 10(4).

67. Convention Article 12.

68. Commentaries, Article 12(34)(ii).

69. Under Art. I of the OAS Convention, "Public Officials" are defined as "any official or employee of the State or its agencies, including those who have been selected, appointed, or elected to perform activities or functions in the name of the State or in service of the State, at any level of its hierarchy."

70. Article I defines "Public Function" as "any temporary or permanent, paid or honorary activity, performed by a natural person in the name of the State or in the service of the State or its institutions, at any level of its hierarchy."

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, co-principal, 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.⁷¹

States parties to the Convention commit to enacting the necessary criminal law to establish the criminality of these actions within their domestic legal systems. States must also enact legislation making it a crime for their nationals to engage in any gifts, favors, promises, or advantages in connection with economic or commercial transactions in exchange for an act or omission by such actor. States that have not established such offense as criminal still commit to providing mutual legal assistance to other states.

One particularly interesting development in the OAS Convention is to require States Parties to criminalize "illicit enrichment" defined as "a significant increase in the assets of a government official that he cannot reasonably explain in relation to lawful earnings during the performance of his functions."⁷² This provision is potentially of use in combating bribery where the precise source of the illegal funds cannot be pinpointed. It also seems a potential source of prosecutorial abuse.

EXTRADITION, MUTUAL LEGAL ASSISTANCE, AND BANK SECRECY

The OAS Convention streamlines extradition procedures between the States Parties by deeming any offenses to which it applies as extraditable under any

71. Inter-American Convention on Corruption, adopted March 29, 1996, Art. VI.

72. *Id.* at Art. IX.

pertinent extradition treaties of the States Parties.⁷³ Moreover, states lacking an extradition treaty that require such a treaty prior to extraditing a person can treat the Convention as sufficient grounds for extradition. The Convention also stipulates that the States Parties should afford "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" the Convention.⁷⁴

The Convention further stipulates that States Parties should not invoke bank secrecy as a basis for refusing to respond to mutual legal assistance requests.⁷⁵ Such provision should be applied in accordance with the domestic law, procedural provisions, or bilateral agreements with the requesting state.⁷⁶

Forfeiture

The OAS Convention contains significant measures targeted to the illegal profits of corruption. States Parties commit to providing "each other the broadest possible measure of assistance in the identification, tracing, freezing, seizure and forfeiture of property or proceeds obtained, derived from or used in the commission of offenses established in accordance with" the Convention.⁷⁷

D. Federal Bribery Statute

Among federal laws against bribery, 18 U.S.C. § 201 on bribery of public officials and witnesses, is the most significant. It applies to essentially any person employed or acting on behalf of the United States government as well as anyone appointed or nominated to fill any governmental position.⁷⁸ It contains two main normative provisions. First, bribery designed to influence official behavior, and second, illegal gratuities, or the giving of something of value as payback for something done by someone in an official capacity, or as payment for the future expectation of favorable treatment. Each will be treated in turn.

Bribery to influence an official act

73. *Id.* at Art. XIII.

74. *Id.* at Art. XIV.

75. *Id.* at Art. XVI.

76. *Id.*

77. *Id.* at Art. XV.

78. 18 U.S.C. § 201(a)(1). Public official is defined as "any Member of Congress, Delegate, or Resident Commissioner, either before or after such official has been qualified, or an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government, or a juror." This statute has been held to apply to both elected and appointed officials.

Section 201 prohibits bribery designed to influence an official act on both an active and passive basis.⁷⁹ Passive bribery involves anyone who “directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official anything of value with” the intent to accomplish one of three things.⁸⁰ First, to influence an “official act”.⁸¹ Second, to influence such public official to participate in any way in any fraud on the United States.⁸² Third, to induce such public official to act or omit to act in violation of his or her lawful duty.⁸³ The intent required for a violation of the statute must be “to influence” an official act.⁸⁴ If any one of these three prongs is met, a violation of the statute has occurred. Active bribery occurs when a public official “directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person, in return for...being influenced” to participate in acts identical to the three enumerated above.⁸⁵

Bribery designed to influence an official act, simply stated, prohibits “individuals from giving government employees, while they are acting in an official capacity, compensation in return for special favors.”⁸⁶ The United States Supreme Court narrowed the application of the official act element in the case *United States v. Sun Diamond Growers*.⁸⁷ The Court noted that to establish a violation of this provision, the government must prove an actual link between the gratuity in question and a “specific official act” for or because of which such gratuity was given. Moreover, the Court held that for bribery to occur there must be a *quid pro quo* or “a specific intent to give something of value *in exchange* for an official

79. Passive bribery is defined as the corrupt gift or promise of something of value, whereas active bribery is the demand for such thing by a public official.

80. 18 U.S.C § 201(b)(1).

81. 18 U.S.C § 201(a)(3). Section 201 defines “official act” as “any decision or action on any question, matter, cause, suit, proceeding, or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official’s official capacity, or in such official’s place of trust or profit.” § 201(a)(3).

82. 18 U.S.C. § 201(b)(1)(B). The precise language states “to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud on the United States.” *Id.*

83. 18 U.S.C § 201(b)(1)(C).

84. *Sun Diamond Growers*, 119 S.Ct. 1402, 526 U.S. 399 (1999).

85. 18 U.S.C § 201(b)(2).

86. *U.S. v. Pommerening*, 500 F.2d 92, 97 (10th Cir. 1974).

87. 119 S.Ct. 1402, 526 U.S. 399 (1999).

act.⁸⁸ The case concerned certain gifts made to Secretary of Agriculture Michael Espy by the trade association, Sun-Diamond Growers of California, a group of raisin, fig, walnut, prune, and hazelnut growers. An independent prosecutor brought the case against Sun Diamond pursuant to *inter alia* § 201(c)(1)(A) of the illegal gifts provision of the federal bribery statute. The gifts in question totaled \$5,900 in value, consisting of tickets of the U.S. Open Tennis Tournament, luggage, and meals. At the time, Sun Diamond had pending before the Department of Agriculture a grant application for marketing assistance on overseas goods and a request for Department of Agriculture assistance in defeating a proposal by the EPA to phase out certain pesticides. According to the unanimous Court, the indictment setting forth these facts had not alleged “a specific connection between either of them or between any other action of the Secretary and the benefits conferred.”⁸⁹ Moreover, the Court noted that the District Court had stated that “to sustain a charge under the gratuity statute, it is not necessary for the indictment to allege a direct nexus between the value conferred...and an official act performed.”⁹⁰ Similar instructions were issued to the jury. The Court rejected these conclusions holding that the use of the term “official act” carefully defined, seems pregnant with the requirement that some particular official act be identified and proved.⁹¹ In the Court’s estimation, 18 U.S.C. § 201(c)(1)(A) was not “a prohibition of gifts given by reason of the donee’s office” but rather gifts designed to influence “particular official acts.”⁹²

Courts define “public official” under this statute as a person who occupies “a position of public trust with official federal responsibilities.”⁹³ Generally, anyone who is responsible for carrying out duties under the auspices of federal power will likely be considered to hold a position of “public trust” and hence, be deemed a public official for the purposes of Section 201.

88. *Id.* at 1404-5.

89. *Id.* at 1405.

90. *Id.*

91. *Id.* at 1407.

92. *Id.* at 1408.

93. *Dixon v. United States*, 465 U.S. 482, 496 (1984). See also *U.S. v. Hang*, 75 F.3d 1275 (8th Cir. 1996)(eligibility technician for independent public housing corporation administering federal funds deemed a public official); *U.S. v. Velasquez*, 847 F.2d 140, 141-2 (4th Cir. 1988)(county deputy sheriff who supervised federal inmates deemed a public official); *U.S. v. Thomas*, 240 F.3d 445,448 (5th Cir. 2001)(guard employed by private company housing Immigration and Naturalization Service inmates held to be a public official); *U.S. v. Strissel*, 920 F.2d 1162, 1165 (4th Cir. 1990)(executive director of municipal housing authority held to be public official because agency distributed monies obtained from the Department of Housing and Urban Development).

As with the FCPA, the notion of "anything of value" entails virtually any personal benefit, financial or otherwise.

Non official acts

The statute also applies to non-official acts, that is to persons coming before any federal governmental body for the purpose of testifying. It too applies to passive and active bribery. Specifically, it prohibits passive bribery, that is, anyone "corruptly" giving, offering or promising anything of value "with the intent to influence the testimony under oath or affirmation of such first-mentioned person as a witness upon a trial, hearing or other proceeding" before any such governmental body or to influence such person to not testify in such proceeding.⁹⁴ Likewise anyone who "corruptly demands, seeks, receives, accepts or agrees to receive or accept anything of value" in exchange for altering a witness's testimony or in return for not testifying, violates the statute by committing active bribery.⁹⁵ The penalties for violating these provisions of the Section 201 include a fine equal to not more than three times the monetary equivalent of the thing of value or imprisonment of fifteen years, or both.⁹⁶ A violator may also be disqualified from holding any "office of honor, trust, or profit under the United States."⁹⁷

Illegal gratuities

The structure and substance of Section 201's prohibition of illegal gratuities is similar to bribery intended to influence an official act. It restricts a direct or indirect gift, offer, or promise of anything of value to a public official, former public official, or person selected to be a public official on account of an official act performed or to be performed by such public official.⁹⁸ The distinction between bribery and gratuities hinges on the different temporal qualities of each. "Bribery is entirely future oriented, while gratuities can be either forward or backward looking," noted the court in *U.S. v. Schaffer*.⁹⁹ Similarly, any public official, former public official, or person selected to be a public official, who "demands, seeks,

94. 18 U.S.C § 201(b)(3).

95. 18 U.S.C § 201(b)(4).

96. 18 U.S.C § 201(b).

97. 18 U.S.C § 201(b). See also U.S. Constit. Art. I § 3[7]. Article I § 3[7] states "Judgment in cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust, or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment, and Punishment, according to Law." *Id.*

98. 18 U.S.C § 201(c)(1)(A).

99. *U.S. v. Schaffer*, 183 F.3d 833, 841 (D.C. Cir. 1999).

receives, accepts, or agrees to accept or receive anything of value" on account of an official act by such person, violates the statute.¹⁰⁰

The *Shaffer* court noted that three types of illegal gratuities exist. First, gratuities paid as a reward for past action. Second, gratuities intended to entice a public official who has already staked out a position favorable to the giver to maintain that position. Third, gratuities given with the intent to induce a public official to propose, take or shy away from some future official act.¹⁰¹ As with the bribery prohibition, the statute restricts the provision of anything of value to a person in consideration for such person's testimony or agreement not to testify as well as the demand by any person for something of value because of testimony given or to be given, or that person's decision not to testify.¹⁰²

Acts affecting a personal financial interest

Beyond cases of outright bribery, the federal government proscribes any activities that might give rise to a conflict of interest. Under 18 U.S.C. § 208, any officer or employee of the federal executive branch or any independent agency who participates in any "decision, approval, disapproval, recommendation, the rendering of advise or investigation, or otherwise in a judicial or other proceeding" or "other particular matter" in which such person or such person's family member "has a financial interest", is subject to penalty.¹⁰³ The exceptions to this general rule include a determination, after full disclosure by the individual in question, by the "Government official responsible for appointment to his or her position" that such individual's interest is "not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect from such officer or employee."¹⁰⁴ In addition, if, pursuant to regulations adopted by the Office of Government Ethics, such an interest is exempted from the requirements of Section 208(a) as "being too remote or too inconsequential to affect the integrity of the services" of such official, no conflict arises.¹⁰⁵ Other exemptions exist for persons hired as "special Government employees" and for interests held pursuant

100. 18 U.S.C § 201(c)(1)(B).

101. *Shaffer*, 183 F.3d at 841-2.

102. 18 U.S.C § 201(c)(2). The prohibition on payments designed to elicit favorable testimony or an agreement not to testify has repeatedly been held not to apply to payments by the government to witnesses or agreements to treat a defendant with leniency in exchange for testimony. See, e.g., *U.S. v. Lama*, 181 F.3d 183 (1st Cir. 1999); *U.S. v. Harmon*, 194 F.3d 890, 897 (8th Cir. 1999)(noting that "this court and nearly every other circuit to consider the improper compensation issue has held that a plea arrangement offered in exchange for testimony does not violate 18 U.S.C. 201(c)(2)").

103. 18 U.S.C § 208(a).

104. 18 U.S.C § 208(b)(1).

105. 18 U.S.C § 208(b)(2).

to birthright in an Indian tribe.¹⁰⁶ Other conflict of interest provisions prohibit a public official from acting as an agent for a foreign principal, which would require such person to register as a foreign lobbyist under the Foreign Agents Registration Act of 1938 or as a lobbyist under the Lobbying Disclosure Act of 1995.¹⁰⁷

Bribery to obtain appointive public office

In addition to payments made to influence the outcome of government action, it is also a crime for anyone to peddle influence in an attempt to secure public office. Anyone who solicits or receives anything of value as "either a political contribution or for personal emolument" in consideration for "the promise of support or use of influence" in helping someone obtain federal "appointive office or place" can be fined or sentenced to one year imprisonment.¹⁰⁸ Similarly, the solicitation or payment of anything of value in consideration for referring someone's name to an executive department or agency or as a result of securing such employment, can result in a fine, one year imprisonment or both.¹⁰⁹

Bribery distinguished from Extortion

Much of the law dealing with bribery in the United States recognizes a distinction between bribery and extortion. In the words of one federal court to examine the subject "the essence of the crime of bribery is voluntariness, while the essence of extortion is duress."¹¹⁰

E. Office of Government Ethics

The office of Government Ethics has defined certain standards of ethics for employees of the executive branch, which *inter alia* proscribe certain conflict of interest transactions, bribes, and other improper gifts and gratuities.¹¹¹ These rules specify, as a general matter, that "public service is a public trust, requiring employees to place loyalty to the Constitution, the laws, and ethical principles above private gain."¹¹² Similarly, no employee may "solicit or accept any gift or other item of monetary value from any person or entity...whose interests may be substantially affected by the performance or non-performance of the employee's

106. 18 U.S.C § 208(b)(3) and 18 U.S.C § 208(b)(4).

107. 18 U.S.C § 219. Sub-section (c) of this statute defines "public official" broadly to include members of Congress, or "any officer or employee or person acting on behalf of the United States, or any department, agency, or branch of government thereof."

108. 18 U.S.C § 211.

109. 18 U.S.C § 211.

110. *U.S. v. Addonizio*, 451 F.2d 49, 77 (3rd Cir. 1972).

111. 5 CFR § 2635 *et. seq.*

112. 5 CFR § 2635.101(b)(1).

duties.¹¹³ The rules further stipulate that “employees shall not use public office for private gain” and “shall disclose waste, fraud, abuse and corruption to appropriate authorities.”¹¹⁴ The OGE ethics rules can be subject to disciplinary and corrective action at the agency level that can be in addition to any action at law. Employees engaging in bribery could thus be subject to administrative sanction as well as separate prosecution before a court.

The rules institute certain limitations on gifts pursuant to 5 CFR § 2635.201. These rules stipulate that unless a gift is in violation of the Federal Bribery Statute, it will not be deemed an “illegal gratuity” under that statute.¹¹⁵

That said, the rules do impose a byzantine set of restrictions on what gifts federal employees may accept. This restriction stipulates that employees should not accept gifts (1) from a “prohibited source” or (2) given because of the employee’s official position. It defines gift quite broadly, to include “any gratuity, favor, discount, entertainment, hospitality, loan, forbearance, or other item having monetary value.”¹¹⁶ It enumerates many exceptions to this definition. “Prohibited source” includes any person who:

- “(1) is seeking official action by the employee’s agency;
- (2) does business or seeks to do business with the employee’s agency;
- (3) conducts activities regulated by the employee’s agency;
- (4) has interests that may be substantially affected by performance or nonperformance of the employee’s official duties; or
- (5) is an organization a majority of whose members are described” [in (1)-(4) above].¹¹⁷

II. Regulation of Bribery on the State Level

A. Bribery of State Governmental Officials

1. Offense Defined

Bribery of a public official is a crime in all fifty states. Prohibitions on bribery of state officials can be found in both state constitutions and statutes. Each will be considered in turn.

Statutory Prohibitions

113. 5 CFR § 2635.101(b)(4).

114. 5 CFR § 2635.101(b)(7); § 2635.101(b)(11).

115. See *Sun-Diamond Growers*, 119 S.Ct. at 140_.

116. 5 CFR § 2636.203(b).

117. 5 CFR § 2635.203(d).

The vast majority of state statutes have enacted or are substantially consistent with the Model Penal Code bribery statute, and as such the following discussion is based substantially on the MPC formulation.¹¹⁸

The text of the MPC states:

“§ 240.1 Bribery in Official and Political Matters

A person is guilty of bribery, a felony of the third degree, if he offers, confers, or agrees to confer upon another, or solicits, accepts or agrees to accept from another:

(1) any pecuniary benefit as consideration for the recipient's decision, opinion, recommendation, vote or other exercise of discretion as a public servant, party official, or voter;

(2) any benefit as consideration for the recipient's decision, vote, recommendation or other exercise of official discretion in judicial or administrative proceeding; or

(3) any benefit as consideration for a violation of a known legal duty as a public servant or party official.

It is no defense to prosecution under this section that a person whom the actor sought to influence was not qualified to act in the desired way whether because he had not yet assumed office, or lacked jurisdiction, or for any other reason.”¹¹⁹

The MPC formulation represents an advance over earlier statutes for a number of reasons. First, it eliminates the distinction between active and passive bribery by making the offense reciprocal. As such, the offense does not turn on the status of the person making the bribe or the person receiving it. Both the offer, conferral, or agreement to confer and the solicitation, acceptance, or agreement to accept a bribe are crimes.

Second, this formulation also successfully avoids the difficulty of defining the bribe itself by simply stating “any pecuniary benefit”. The apparent breadth of this provision makes it likely that any attempt to influence an action of a public official by providing something of value would fall within the scope of the act.¹²⁰ One

119. Model Penal Code (“MPC”) Article 240, § 240.1.

120. See, e.g., MPC § 240.0(6). Section 240.0(6) defines “pecuniary benefit” as “benefit in the form of money, property, commercial interests or anything else the primary significance of which is economic gain.” It has generally become recognized that bribery can take many forms, and is not limited to cash payments. The MPC Commentary explains that the concept of pecuniary benefits is intended to encompass “cases where a public servant is offered a job in private industry as an inducement to take official action favorable to his prospective employer or where a corporate employee who sits in the state legislature is offered a promotion or a raise in return for his vote on a pending bill.” MPC Commentary 240.1.

state following the MPC formulation specifies in its statute that "benefit as consideration" in subsection 3 means "any benefit not authorized by law."¹²¹

Third, it clarifies the scope of the offense by relating it not only to public servants, party officials, or voters but also to any person who is to violate a "known legal duty".

Finally, reflecting the strong public policy interest in deterring any bribery, whether attempted, actual, or solicited, the MPC formulation prohibits any defense based on the claim that the person whose influence is sought lacked the power to carry out the conduct over which influence was sought. For such purposes, apparent authority suffices.¹²²

In jurisdictions that have not enacted the MPC statute, bribery of a public official is defined in roughly the same manner. Some noteworthy exceptions include the resort to unhelpful terminology such as "whoever corruptly solicits"¹²³ or adding an element of scienter.¹²⁴ Nevertheless, the addition of such terms generally does not complicate things such that the elements of the offense become unclear.

Challenges to state bribery statutes under the United States Constitution have generally failed. Specifically, a number of courts have refused to overturn such statutes on overbreadth grounds. In *Agan v. Vaughn*, for instance, the Eleventh Circuit refused to hold that a Georgia statute criminalizing bribery of public officials was constitutionally overbroad because it could be applied to campaign contributions, which were otherwise constitutionally protected on freedom of speech grounds. The court found that because Georgia courts had found that corrupt intent was needed to sustain a claim of bribery of public officials, campaign contributions were not impermissibly restricted.¹²⁵ Only those contributions made with corrupt intent—that is, the intent to corruptly induce a given action—were forbidden under the statute.¹²⁶

121. N.J.S.A. § 2C:27-2.

122. According to the MPC Commentaries, the rationale for criminalizing attempts where actual authority to carry out the action for which the bribe was offered is similar to the rationale for eliminating the impossibility defense for attempted crimes. Such analysis was more fully developed in connection with MPC treatment of attempt, conspiracy, and solicitation. MPC 240.1 Commentary.

123. DC statute.

124. See, e.g. Alaska Statutes § 11.56.100 ("a person commits the crime of bribery if the person confers, offers to confer, or agrees to confer a benefit upon a public servant with the intent to influence.")

125. See *Agan v. Vaughn*, 119 F.3d 1538, 1542-3 (11th Cir. 1997).

126. *Id.*

CONSTITUTIONAL RESTRICTIONS

In addition to statutory prohibitions on bribery, many state constitutions include similar prohibitions.¹²⁷ Constitutional proscriptions relate most directly to the authority and powers of members of the legislature or executive branch. In this case, bribery of officials is seen as inherently damaging to the political process. Constitutional proscriptions against bribery fall into two main categories. First, those that specify that anyone engaging in bribery, whether a member of the legislature or not, meet with some sort of legal penalties.¹²⁸ Second, those that provide for impeachment, removal from office, and, frequently, permanent bars from elective office in the state.¹²⁹ With the criminalization of bribery in every state, officials who engage in such conduct can be subject to not only impeachment, expulsion and bars from office but also criminal liability.

B. Bribery of Voters

Most states make bribery of a voter a unique crime. The offense is generally specified as prohibiting the gift of anything of value to a person to either induce such person to vote or refrain from voting.¹³⁰ Unlike most statutes concerned with bribery of public officials, the laws covering bribery of voters generally proscribes the conduct of the bribe giver only. Bribery of a voter should be distinguished from bribery of an election official, which is similar in nature to bribery of public officials generally.¹³¹

C. Procurement Bars

In many states, corporations that engage in bribery of public officials may be barred from receiving further government contracts for up to a three year period. Such statutes typically specify that subject to reasonable notice and an

127. See, e.g., Colorado Const. Art. XII, § 6, 7, 40; Kansas Const. Art.2, § 28; Mississippi Const. Art.4, § 50; Missouri; New Hampshire Const. Pt. 2, Art. 38; New Mexico Art. 4, § 39; North Dakota Const. Art. 4, § 9; Tex. Const. Art. 16, § 41; Wyo. Const. Art. 2, § 30,42,43.

128. These states are Colorado, Delaware and Wyoming.

129. These states include Colorado, Kansas, Mississippi, New Mexico, New Hampshire; North Dakota, Texas, Washington, Wyoming.

130. Ariz.Rev.Stat. § 16-1016, 16-1014; Ala.Code § 17-23-3; Ann.Cal.Elec.Code § 18523; Conn.Gen.Stat. Ann. § 9-364a; Colo.Rev.Stat. § 1-13-720; D.C. § 1-1001.14; Fla.Stat. Ann. § 104.061; Del.Code § 3166; Maryland Art. 33, § 16-201; Mich. § 168.932; Neb.Rev.Stat. § 32-1536, § 32-1503; N.J.S.A. § 19:34-25, § 19-34-39; New York § 17-142; Ohio § 3599.02; Okla. Const. Art. 17, § 7, 19 Okl.St. Ann. § 29, 92; Oregon Const. Art. II, § 8; Rhode Island § 17-23-5; So.Dak.Cod.Law. § 12-26-15; So.Car. Const. Art.11, § 1; Code 7-25-190; Tenn.Code. Ann. § 2-19-126; Utah § 20A-1-601; Virginia Stat. § 24.2-1000, 24.2-1005; Vermont Stat. Ann. § 2017.

131. See, e.g., Neb.Rev.St. § 32-1511; Kan.Stat. Ann. § 25-2417.

opportunity for a hearing, bidders, offerors, or contractors including, in some cases, natural persons such as partners, members, officers, directors, or responsible managing officers¹³² of such entities, can be excluded from public contracts based on *inter alia* a criminal conviction in relation to obtaining a public or private contract or a conviction of bribery under state or federal law.¹³³ Constitutional challenges to such statutes have generally failed.¹³⁴

D. Licensing Restrictions

As with bars from procurement, many states make bribery convictions grounds upon which licenses may be withheld. The types of licenses to which such prohibitions apply range from licensed professional counsellors¹³⁵ to dentistry.¹³⁶ Unlike the procurement bars discussed previously, the licensing restrictions can be far more onerous as they usually are irrebutable and presumably last a lifetime.

E. Commercial Bribery

Commercial bribery, sometimes referred to as "private to private" bribery, is recognized in some form in most states. Unlike bribery involving public officials, the logic of criminalizing bribery between commercial entities is sometimes questioned. Because the nature of business dealings is such that all terms are open for negotiation, it is sometimes difficult to distinguish between offers to sweeten the terms of a contract and bribery in violation of employee or managerial duties to an enterprise. Generally speaking, commercial bribery is criminalized in two ways on the state level. First, in connection with general commercial transactions and second, in connection with the use of bribery to obtain trade secrets from a competitor.

1. General Commercial Bribery

General commercial bribery is a crime in at least thirty four states.¹³⁷ A description of the elements of the offense follows.

132. See, e.g., Ann.Cal.Pub.Con.Code § 10285.1.

133. See Cal.Pub.Con.Code § 10285.1; Conn.Gen.Stat. Ann. § 2-71r; Florida Stat. Ann. § 287.133; Kan.Stat. Ann. § 75-37.103; New Mexico Stat. § 13-1-178; New York Pub Off § 75-a; Oregon Stat. § 279.037; Pa.Con.Stat. Ann. § 531; Rhode Island Stat. § 23-19-13.3; South Carolina Code § 11-35-4220; Utah Code § 63-56-48.

134. See *Validity of State Statute Prohibiting Award of Government Contract to Person or Business Entity Previously Convicted of Bribery or Attempting to Bribe State Public Employee*, 7 ALR 4th 1202.

135. See, e.g., Maryland Code § 16-101.

136. See, e.g., Mississippi Code § 99-19-35.

137. See, e.g., Ala. Code 1975 § 13A-11-120; Alaska Stat. § 11.46.670; Arizona Rev. Stat. § 13-2605; Ann. Cal. Penal Code § 641.3; Col. Rev. Stat. Ann. § 18-5-401; Conn.

Breach of a Duty

While stopping short of charging all employees of commercial entities with fiduciary duties to such entities, state commercial bribery statutes generally hold such employees to a lesser duty of fidelity or loyalty to an employer. Frequently this duty of fidelity or loyalty is explicitly premised on a principal-agent theory.¹³⁸ Texas, for instance, defines an employee or agent to be a fiduciary, then defines the offense in terms of such fiduciary's conduct.¹³⁹ Alternatively, Washington state uses the term "trusted person" as a catch all term for agents, employees, or other fiduciaries.¹⁴⁰ Other statutes distinguish between the duties, although including all persons subject to such duties within the bounds of the statute. In the case of the Illinois statute, for instance, commercial bribery involves the breach of an employee's, agent's, or fiduciary's duty to an employer or principal.¹⁴¹

Offense defined

In many states, both the solicitation of a bribe by an employee and the offer of a bribe are criminalized. To clarify this distinction, Illinois, for instance, has defined two separate statutes "Commercial Bribery" and "Commercial Bribe Receiving".¹⁴² Other states have defined the offense together.¹⁴³ To clarify the distinction, the following discussion will treat each separately.

Passive Bribery

Passive bribery, or the solicitation, conferance, or offer to confer any benefit on an employee, agent, or fiduciary, is proscribed in all of the states with commercial bribery statutes. As such, the conduct the law is designed to deter is that of the

Gen. Stat. Ann. § 53a-160; Fla. Stat. Ann. § 838.16; Hawaii Rev. Stat. § 708-880; 720 Ill. Con. Stat. § 5/29A-1 (passive bribery); 720 Ill. Con. Stat. § 5/29A-2 (active bribery); Iowa Code Ann. § 722.10; Kansas Stat. Ann. § 21-4405; Kent. Rev. Stat. § 244.600(brewers); Kent. Rev. Stat. § 518.020 (general); La. Rev. Stat. 14 § 73; Minn.Stat. Ann. § 609.86; Miss. Code Ann. § 97-9-10; Missouri Stat. § 570.150; Neb. § 28-613; Nev. Rev. Stat. § 207.295; New Hamp. Rev. Stat. § 638:7; NJ Stat. Ann. § 2C:21-10; ND Cent. Code § 12.1-12-08; 18 Pa. Con. Stat. Ann. § 4108; SD Cod. Law. § 22-43-1 (passive bribery); SD Cod. Law § 22-43-2 (active bribery); 4 Tex. Stat. § 102.2 (alcoholic beverage law); 7 Tex. Stat. § 32.43 (general); Utah Code § 32A-12-604 (alcoholic beverage distribution); Wash. § 9A.68.060.

138. See, e.g., Hawaii Rev. Stat. § 708-880(1);

139. 7 Tex. Stat. § 32.43.

140. Rev. Code Wash. Ann. § 9A.68.060.

141. 720 Ill. Rev. Stat. § 5/29A-1-5/29A-2; Kansas Stat. Ann. § 21-4405(a)-(e).

142. 720 Ill. Rev. Stat. § 5/29A-1, 5/29A-2.

143. See, e.g., Kan. § 21-4405.

person attempting to corrupt another person, namely an employee or agent, rather than the conduct of the employee or agent in accepting such payment. The core of the offense generally requires two elements. First, the solicitation, offer to confer, or the conferance of a benefit upon an employee, agent, or fiduciary. Second, that such activity is contrary to the interests of a principal, employer or person to whom the duty is owed. This latter element may give rise to some unintended consequences. That is, if the bribe must injure the employer in some way, commercial bribes that inure to the benefit of the employer may in some cases be permitted. Another gap in the law arises in those states that criminalize only the conduct of the offeror, rather than the recipient of the offer.¹⁴⁴ In such cases, the employee or agent who receives the bribe may escape punishment while the offeror is subject to criminal prosecution.

Active Bribery

The employee, agent or fiduciary's conduct is generally defined as involving the offer, solicitation, request, or acceptance of a benefit in connection with an agreement to be influenced with respect to the business of an employer or principal.

Constitutional Challenges

Challenges to commercial bribery statutes on constitutional grounds have generally failed. In *U.S. v. Gautreau*, the Tenth Circuit held that Colorado's commercial bribery statute prohibiting the solicitation or acceptance of a benefit in violation of a duty of fidelity as an agent or employee, was not unconstitutionally vague.¹⁴⁵ The use of the term fidelity gave sufficient notice of what was prohibited based on its everyday usage.¹⁴⁶

Penalties

While a criminal offense in all of the jurisdictions described here, the severity with which commercial bribery is penalized varies widely. Sentences range from a fine of \$550¹⁴⁷ to imprisonment of up to five years¹⁴⁸. Some states vary the penalty depending upon the amount of bribe in question.¹⁴⁹

144. See, e.g., Fla. Stat. Ann. § 838.16, which criminalizes the conferring, offer to confer, or agreement to confer a benefit on someone subject to a duty.

145. *U.S. v. Gautreau*, 860 F.2d 357 (10th Cir. 1998).

146. *Id.*

147. Miss. § 97-9-10.

148. Minn. Stat. Ann. § 609.86 (Subd.3).

149. Arizona Rev. Stat. § 13-2605.

III. Conclusion

The United States regulates bribery in many ways. Despite this extensive regulatory approach, the news is regularly filled with stories of official and commercial corruption. Given that bribery is most always hidden from public view, it is difficult to determine how effective enforcement actually is. In the case of the FCPA, where governmental enforcement action is quite minimal, it is difficult not to doubt the effectiveness of law enforcement in this area. Certainly, the difficulty of bringing an enforcement action with respect to criminality occurring outside of the territory of the United States, particularly where evidence of the underlying offense is potentially embarrassing to foreign officials, complicates legal assistance matters. Yet the dearth of enforcement cases reflects not only logistical and practical complexities but also the lack of political will. Although the United States was successful in pushing the OECD Convention forward, and thus "leveling the playing field" in international commerce, domestic prosecutions will continue to be limited in the near future given the lack of *any* prosecutions to date in Europe under the OECD Convention. Drafting appropriate laws is only one part of the equation. The extent to which the fight against corruption will be successful will, in the end, turn on the extent to which citizens and governments exercise the necessary political will.