

INTERNATIONAL TRADE ALERT

THE UNITED NATIONS CONVENTION AGAINST CORRUPTION



Bribery and other corrupt practices, such as money laundering, once tolerated by many national governments and estimated by the World Bank to cost the global economy a trillion dollars annually, have come under increasing attack in recent years as governments and the international community have recognized the significant economic, political and social damage such practices cause. In December 2003 an important step forward in the struggle against corruption occurred when 95 countries, including the United States, signed the new United Nations Convention Against Corruption during a conference held in Merida, Mexico. Countries at all levels of economic development and in all regions of the world, such as China, Iran, Haiti and those of the European Union, signed the Convention during the conference, demonstrating broad-based international determination to end corruption. Negotiations for the Convention began in early 2002 and involved approximately 125 countries, culminating on October 31, 2003, when the UN General Assembly unanimously adopted the final convention text. The Convention, which was opened for signature at the three-day Merida conference, will enter into force after 30 countries have ratified it, a process expected to take several years.

Although the full effect of the UN Convention will not be felt for several years, business organizations operating internationally should be aware of its scope in order to anticipate and prepare for potential changes in the legal landscape in countries where they do business. This Alert first provides a brief background on the Convention and highlights its most significant provisions. The Alert next compares the UN Convention to the U.S. Foreign Corrupt Practices Act and the Organization of Economic Cooperation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, two legal instruments with which businesses engaged in international trade are likely to be familiar. Finally, this Alert discusses the potential significance of the UN Convention and makes several recommendations for businesses to prepare for its eventual entering into force.

BACKGROUND

The UN Convention Against Corruption is a comprehensive international response to the problems of bribery and other corrupt practices that draws on a series of earlier efforts to curb such

activities. United States nationals and corporations conducting business outside the United States are likely most familiar with the U.S. Foreign Corrupt Practices Act of 1977 (FCPA). The FCPA was enacted after U.S. government investigations initiated in the wake of the Watergate scandal revealed that hundreds of U.S. companies made questionable or illegal payments to foreign public officials to gain advantages in business operations. In order to eliminate these abuses, the FCPA prohibited U.S. nationals and companies from bribing foreign public officials, political parties and officials, and candidates for public office in order to obtain or retain business.

In 1988, reflecting concerns that U.S. businesses were at a disadvantage compared to foreign competitors with no restrictions on bribery in their foreign business operations, Congress called upon the executive branch to begin negotiating with the United States' major trading partners in the Organization of Economic Cooperation and Development (OECD) to develop similar legislation. The result of these efforts was the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention), which was signed by 34 countries, including the United States, in 1997. The OECD Convention, which was modeled on the FCPA, required parties to make bribery of foreign public officials a criminal offense. However, the Convention went beyond the scope of the prohibitions and jurisdiction established in the FCPA, and Congress responded with amendments to the FCPA in 1998 conforming it to the Convention. The amendments included jurisdictional coverage for any person — not just U.S. “issuers” or “domestic concerns” — within the territory of the United States, and the effective elimination of the U.S. commerce nexus requirement for U.S. issuers and domestic concerns acting outside of the United States.

Additional international efforts to combat corruption include the Inter-American Convention Against Corruption, signed in 1996, and the Council of Europe Criminal Law Convention on Corruption, adopted in 1999. The International Monetary Fund and the World Bank adopted anti-corruption guidelines for grants and loans in 1997, and the problem of corruption was first raised in the United Nations during two Crime Prevention Conferences held in 1990 and 1995.

PROVISIONS OF THE UN CONVENTION

The UN Convention may be seen as the comprehensive result of international efforts to come to grips with corruption. The Convention addresses corruption involving national and foreign public officials as well as the private sector; identifies a broad list of practices that states must establish as criminal offenses, such as bribery and money laundering; and encourages states to criminalize additional practices. The UN Convention also requires states to provide mutual legal and technical assistance to combat corruption, including mutual assistance to confiscate and return the proceeds of corrupt acts, and establishes a mechanism to monitor the implementation of the Convention by states that have become parties to it.

The Convention is organized into eight chapters, including substantive chapters covering Criminalization and Law Enforcement, Preventive Measures, Asset Recovery and International Cooperation. Recognizing the different legal and constitutional systems, levels of development and likely political sensitivities of the negotiating countries, the Convention requires states to take measures necessary and consistent with domestic law to prevent and criminalize certain corrupt practices, such as bribery of public officials. The Convention simply encourages states to consider adopting other measures, such as criminalizing bribery in the private sector. Nevertheless, in spite of the fact that

implementation of the Convention will not be uniform among all signatory states, the Convention should significantly strengthen both domestic and cross-border efforts to combat corruption.

Significant provisions of the Convention include —

Criminalization and Law Enforcement. This chapter, which catalogs the acts that constitute criminal offenses under the Convention, is the most relevant to businesses operating internationally because it clearly maps out the reach of the Convention and, thus, the potential changes in the domestic laws of states as they implement it. Acts involving public officials that states are required to criminalize include —

- *intentional bribery* of domestic, foreign and public international organization officials
- the solicitation or acceptance of an *undue advantage* by a public official
- *embezzlement or misappropriation of funds* by a public official.

Acts involving public officials that states must consider criminalizing include —

- *trading in influence*; that is, promising or giving a public official an undue advantage so that the official will use his influence to obtain from the government an undue advantage for the instigator of the act, or the solicitation or acceptance of an undue advantage by an official for such a purpose
- a public official's *abuse of his position*, defined as an official's performance of or failure to perform an act that violates a law in order to obtain an undue advantage for himself or another
- *illicit enrichment*, defined as a significant increase in a public official's assets that cannot be reasonably explained.

In addition, states must consider enacting measures to criminalize acts of bribery and embezzlement in the private sector when committed intentionally in the course of economic, financial or commercial activities.

Many provisions in this chapter address acts committed by any person, regardless of position. The provision requiring states to enact measures to make *money laundering* a criminal offense is particularly notable, as it addresses the crime in significantly more detail than any other crime in the Convention. The Convention defines money laundering in broad terms and includes acts such as converting and concealing the proceeds of a crime; concealing the true nature, source or location of such proceeds; and the knowing acquisition or possession of the proceeds of a crime.

Participation or conspiracy in any money laundering offense, as well as attempting to commit or aiding or abetting a money laundering offense, are included as well. States are required to apply these provisions to the widest possible range of predicate offenses (e.g., embezzlement), both within the state's jurisdiction when the offense is committed there and outside its jurisdiction when the act is a crime in both jurisdictions. Other provisions target concealing after the fact the proceeds of an offense, obstruction of justice, and participation and attempt in any offense. Further, the Convention requires parties to establish the legal liability of legal persons and to subject them to criminal or civil penalties for violations. The detailed treatment of money laundering offenses in the Convention signals the importance attached to this particular crime during the Convention negotiations and provides a good sense of the potential legal landscape in states as they implement this provision.

Preventive Measures. These provisions address measures to prevent corruption in the public and private sectors. To combat corruption in the *public sector*, states are required to —

- establish or maintain an independent body to implement anti-corruption policies
- establish a transparent and competitive system of public procurement
- enhance the transparency of government functions, and
- take measures to prevent corruption by members of the judiciary.

In addition, parties are encouraged to —

- establish and maintain a civil service employment system based on merit that incorporates adequate pay and appropriate training
- establish criteria for elected public office and the financing of election campaigns and political parties, and
- establish codes or standards of conduct for public officials, including the reporting of outside activities and financial interests.

To combat corruption in the *private sector*, parties are required to —

- take measures to prevent corruption and enhance accounting and auditing standards, such as promoting cooperation between law enforcement and private entities, promoting the development of standards and codes of conduct, promoting transparency, preventing conflicts of interest, and ensuring that businesses follow proper accounting practices and internal auditing controls
- enact measures to prohibit off-the-books accounts, incorrect or inadequate identification of transactions, recording of false expenditures and use of false documents, and intentional destruction of documents
- establish a comprehensive regulatory and supervisory system for banks and financial institutions, including persons and entities that provide financial transmission services, in order to detect and deter money laundering
- establish civil or criminal penalties for violations, and
- disallow entities from taking tax deductions for bribes.

States are encouraged to take further measures to combat corruption in the private sector, including —

- establish systems to monitor cross-border movement of cash and negotiable instruments
- require financial institutions and money transfer services to gather and maintain information on originators of electronic funds transfers.

Finally, this chapter addresses issues such as prosecution of offenses; the freezing and seizure of the proceeds of crimes; the protection of witnesses, victims and persons who report offenses; cooperation between public and private authorities within the country; and establishing jurisdiction over Convention offenses.

Asset Recovery. The provisions in this chapter reflect a strong interest in recovering state assets that have been stolen by corrupt public officials, which is declared as a fundamental principle of the Convention. In order to prevent and detect the transfer of proceeds from a Convention offense, states must require financial institutions to verify the identities of customers and owners of high-value accounts. Financial institutions must also closely scrutinize accounts of persons who hold or have held prominent public positions, as well as accounts held by members of their family and close associates. States are encouraged to establish financial disclosure systems for public officials, including disclosure of an interest in overseas financial accounts. Further, states must enact measures that permit court actions by other states to recover proceeds from a Convention offense and establish the ability of domestic authorities to confiscate or freeze property when requested by another state. The Convention also prescribes additional areas of international cooperation, such as tracing and freezing proceeds of a Convention offense and forwarding information on proceeds to another state without a prior request if it will assist an investigation. States must also adopt measures to enable the return of confiscated property to a state requesting the return of the property or to a prior legitimate owner.

International Cooperation. This chapter outlines a broad program of global cooperation to combat and prosecute corruption that, if fully realized, will significantly restrict the possibility that a corrupt act will go undetected and unpunished. Convention offenses are established as extraditable crimes; notably, in the absence of an extradition treaty between two states, the Convention may serve as the legal basis for extradition. The Convention also envisions that states will provide mutual legal assistance to investigate and prosecute offenses and share information on criminal matters related to Convention offenses. States may not refuse to provide legal assistance on the basis of bank secrecy considerations, and must take steps to enhance law enforcement cooperation to combat Convention offenses, including the possibility of establishing joint investigative bodies and to permit “special investigative techniques” such as controlled delivery, electronic surveillance and undercover operations.

Finally, the chapter on **Technical Assistance and Information Exchange** is also noteworthy in that it envisions that parties will establish domestic training programs for anti-corruption personnel and consider sharing technical assistance, particularly to benefit developing countries. The Convention also encourages parties to conduct and share analyses on trends in corruption, in part with an eye toward developing common definitions, methodologies and best practices for combating corruption. This program of assistance and information, if successful, will lead to much more sophisticated global anti-corruption efforts.

COMPARISON OF THE FCPA, OECD CONVENTION AND UN CONVENTION

Given that the UN Convention builds on existing anti-corruption instruments, it shares many of the basic premises and definitions of the FCPA and OECD Convention. These include the requirement that an act be intentional to constitute an offense under the Convention; the definitions of public officials and “bribery”; the liability of legal persons, i.e., businesses and other corporate entities; and the imposition of both civil and criminal penalties for offenses. The most salient difference between the UN Convention and the FCPA and OECD Convention is its sheer scope; whereas the FCPA and OECD Convention address the narrower issue of bribery of foreign public officials, the UN Convention is an all-encompassing effort to address various manifestations of corruption, including bribery. Of course, many provi-

sions of the UN Convention that are not addressed in the FCPA or OECD Convention are already covered in other areas of domestic law of the United States and other countries. Nonetheless, corporations doing business abroad should be aware of how the UN Convention compares to the FCPA and OECD Convention in important respects in order to be prepared for the impact of the UN Convention once it is implemented by states and enters into force in the next several years. These areas include —

- **Accounting Practices.** The UN Convention requires parties to adopt measures to prohibit companies from engaging in such practices as keeping off-the-books accounts, inadequately or improperly identifying transactions, or using false documents, which are also prohibited under the FCPA and OECD Convention. The UN Convention is more comprehensive, however, in that it also envisions that states will promote the development of codes of conduct for businesses and professions, impose restrictions on lobbying activities by former government officials, and encourage businesses to develop appropriate internal auditing controls. In addition, the UN Convention requires parties to disallow tax deductions for bribes, which is not a prohibited act under the FCPA or OECD Convention (although prohibited under U.S. tax law).
- **Prohibited Acts.** All three instruments prohibit persons or entities from bribing, or attempting to bribe, foreign public officials. As noted above, however, the UN Convention is much broader and covers bribery of domestic public officials and embezzlement, misappropriation, trading in influence, abuse of function and illicit enrichment by public officials. The UN Convention also encourages states to criminalize bribery and embezzlement in the private sector.

As previously discussed, the UN Convention comprehensively addresses the criminalization of money laundering acts, such as conversion, transfer, concealing, conspiracy, knowing acquisition of property, and aiding and abetting. The UN Convention requires states to apply money laundering laws to as wide a range of predicate offenses as possible, but at a minimum to a comprehensive range of Convention offenses. In contrast, the FCPA does not include a provision on money laundering (which is dealt with elsewhere in U.S. law), although the OECD Convention directs states to establish bribery of a foreign public official as a predicate offense under its money laundering laws if bribery of a domestic public official is a predicate offense.

- **Penalties and Defenses.** All three instruments establish civil and criminal penalties for offenses, but only the FCPA provides an exception for payments to expedite a routine government action, and affirmative defenses based on a claim that a payment was lawful in the foreign country or was a legitimate expenditure by a foreign official.
- **Jurisdiction.** All three instruments contain provisions asserting jurisdiction over acts committed in a state's territory. The FCPA establishes jurisdiction over U.S. nationals and U.S. businesses for offenses committed outside the United States, which accords with the OECD Convention. In comparison, the UN Convention also specifies that states must adopt measures to establish jurisdiction over Convention offenses committed on board a vessel flying the flag of the state or aircraft registered in a state. However, the UN Convention provides that a state may establish jurisdiction for an offense against the state or its nationals or for an offense committed by its national outside its territory only if it does not violate the sovereignty of another state. Finally, the UN Convention permits a state to establish jurisdiction over participation in or conspiracy outside the territory of the state to commit a money laundering offense within the state's territory.

- **International Cooperation.** The OECD Convention addresses international cooperation to a limited extent, calling upon states to provide mutual legal assistance in investigations and criminal proceedings and establishing bribery of a foreign public official as an extraditable offense. As a piece of domestic legislation, however, the FCPA does not include any provisions on international cooperation. In contrast, the UN Convention devotes an entire chapter to issues of international cooperation, including detailed provisions covering extradition for Convention offenses, mutual legal and technical assistance, and law enforcement cooperation. Further, the UN Convention requires states to cooperate as fully as possible in order to prevent the transfer of criminal proceeds and recover and return assets acquired through the commission of a Convention offense. Finally, the UN Convention envisions that states will collect and exchange information on corruption and provide mutual assistance in training and specialized knowledge. In particular, the UN Convention encourages states to assist developing and transition countries to combat corruption through technical, training and financial assistance.

SIGNIFICANCE FOR INTERNATIONAL BUSINESSES

Although states that sign and ratify the UN Convention are obliged to implement its provisions, and the Convention establishes a Conference of States Parties to promote and monitor its implementation, the United Nations does not have any direct power to enforce compliance with the Convention. In addition, states may ratify the Convention with reservations, in which they expressly declare which provisions they will not be bound by, and states may withdraw from the Convention one year after giving written notification of their intent to do so. Thus, the ultimate strength of the Convention depends in large part on the commitment of states to fully implement and enforce its anti-corruption provisions.

Nevertheless, while most of the proscribed acts in the UN Convention are already prohibited under U.S. law, companies and individuals engaged in international trade should be aware of potential changes in the domestic laws of other countries as these countries implement the UN Convention. In particular, foreign subsidiaries, affiliates and joint ventures of U.S. businesses that are not currently subject to the FCPA or OECD Convention may be operating in states that are parties to the UN Convention. Thus, international businesses need to be fully aware of the ramifications of the UN Convention's implementation in states where a subsidiary, affiliate or joint venture operates in order to avoid potential liability for illegal acts. In addition, businesses should begin now to consider how their corporate compliance policies may need to be revised so that they can fully prepare for the UN Convention's implementation in states where they operate. Finally, as noted above, the Convention recognizes that the legal and constitutional systems of individual states will lead to variations in how the Convention is implemented into domestic law, and many provisions do not require states to adopt particular measures but merely encourage them to consider doing so. This implies that laws in different countries may evolve over time as additional provisions are enacted, so businesses operating internationally should be prepared to periodically monitor changes in the laws of states where they operate and adjust their policies and practices accordingly.

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