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United States of America: Civil Society Report

by Transparency International USA

An input to the UNCAC Implementation Review Mechanism: First year of review of UNCAC chapters III and IV

-Executive Summary-

This is the executive summary of a Transparency International USA report¹ that reviews the USA's implementation and enforcement of selected articles in UN Convention against Corruption (UNCAC) Chapters III (Criminalization and Law Enforcement) and IV (International Cooperation). The report is intended as a contribution to the UNCAC peer review process of the USA covering those two Chapters.

The UNCAC articles that receive particular attention in the report are those covering bribery (Article 15), foreign bribery (Article 16), embezzlement (Article 17), money laundering (Article 23), liability of legal persons (Article 26), witness protection (Article 32), whistleblower protection (Article 33), and mutual legal assistance (Article 46).

The overall findings of this report indicate that the USA's legal regime can be said to be largely compatible with standards and principles of the UNCAC.

Assessment of the review process

Conduct of process

The following table provides an overall assessment of transparency, country visits and civil society participation in the UNCAC review of the USA.

Table 1: Transparency and CSO participation in the review process

Did the government make public the contact details of the country focal point?	Yes
Was civil society consulted in the preparation of the self-assessment?	No
Was the self-assessment published online or provided to CSOs?	Yes
Did the government agree to a country visit?	Yes
Was a country visit undertaken?	Yes
Was civil society invited to provide input to the official reviewers?	Yes
Has the government committed to publishing the full country report?	Yes

Availability of information

There is a significant amount of information available to the public about corruption cases through the media, government and the private sector. With respect to foreign bribery cases, there is also significant information available, particularly for cases litigated in the courts. However, comprehensive information about settlements and deferred prosecutions is generally not easily accessible. TI-USA recommends that the government establish a

¹ The full report is available at <http://www.uncaccoalition.org/en/uncac-review/cso-review-reports.html>. Its authors are Nancy Boswell and Shruti Shah, Transparency International USA. The final report will be used for continuing the dialogue and engagement with the stakeholders including the government beyond the first round country review process.

procedure for making more information about settlements and deferred prosecution agreements publicly accessible online.

Implementation and enforcement

The United States has satisfactorily implemented almost all of the UNCAC articles into federal law. US law does not criminalize illicit enrichment as article 20 of UNCAC defines illicit enrichment in a manner that places the burden of proof on the defendant, which is contrary to the presumption of innocence for the accused as required under the US Constitution.

The United States has a generally good record of enforcement of its domestic anti-corruption laws. However, in *Skilling v. United States*, 130 S.Ct. 2896 (2010), the Supreme Court may have “significantly eroded” one of the key tools relied on to “combat fraud and corruption” according to a Justice Department official. In *Skilling*, the Supreme Court limited the application of the “honest services” law to “fraudulent schemes to deprive another of honest services through *bribes and kickbacks*” and expressly prohibited the criminalization of the “*mere failure to disclose a conflict of interest*” as void for vagueness in violation of the right to due process of law afforded by the Fifth Amendment to the US Constitution.

In addition, the definition of bribery under US law is narrower than under the UNCAC. Under US federal law, bribery only occurs when there is a quid pro quo—a one for one exchange: “a specific intent to give or receive something of value *in exchange for* an official act. It may also be difficult to draw the line between bribery and legitimate lobbying efforts, which according to the Supreme Court implicate important First Amendment rights under the US Constitution.² In addition, defining bribery to prevent a corrupt result as envisioned by UNCAC may, ironically, raise vagueness concerns similar to those addressed by the *Skilling* decision.

One comparative weakness in US anti-money laundering (AML) law is the gatekeeper rules as set forth in the Financial Action Task Force (FATF) rules covering accountants, attorneys, and real estate agents, among others. Further, in February 2010 the US Senate Permanent Subcommittee on Investigations issued a report that shows how some politically exposed persons (PEPs) have used US lawyers, real estate and escrow agents, lobbyists, bankers, and even university officials to circumvent US AML and anti-corruption safeguards.³ The FATF, which monitors national AML efforts, in 2006 criticized weaknesses in US prevention and the insufficient transparency requirements pertaining to the beneficial ownership of corporations in certain states, notably Delaware, Nevada and Wyoming.

Recommendations for priority actions

Bribery of national public officials; and Embezzlement, misappropriation or other diversion by a public official (Articles 15(a), 15(b), 17)

In light of *Skilling* a revision of the criminal code to cover an undisclosed conflict of interest while at the same time respecting an individual’s rights under the US Constitution demands careful study and legislation by the US Congress. The hallmark of a successful statute covering this conduct will include a knowing and specific-intent state-of-mind requirement. Also, to avoid due process and vagueness concerns, a new or amended law should specifically define terms within the law such as “financial interest”, “harm,” and “acts.” Experts disagree on how best to craft any such law.⁴

On a second issue, the definition of bribery if the US conforms its definition of bribery with UNCAC’s approach by clarifying the scope of bribery in the various bribery-related statutes,

² See *Citizens United v. Federal Election Commission*, 130 S.Ct. 876 (2010).

³ US Senate Permanent Subcommittee on Investigations, *Majority and Minority Staff Report*, “Keeping Foreign Corruption Out of the United States: Four Case Histories,” 4 February 2010.

⁴ *Senate Hearing on Skilling*, at 15 (Statement of Sam Buell) (limit the offense to “important fiduciary and trust relationship”); *id.* at 11 (Statement of Lanny Breuer) (rely on the mail and wire fraud statutes and draw content from 18 USC § 208 which currently applies only to the executive branch); *id.* at 18 (statement of George Terwillinger) (amend chapter 11 of the criminal code).

there are, nonetheless, two potential complications. First, it may be difficult to draw the line between bribery and legitimate lobbying efforts, which, according to the Supreme Court, implicate important First Amendment rights under the US Constitution.⁵ Second, defining bribery to prevent a corrupt result as envisioned by UNCAC may, ironically, raise vagueness concerns similar to those addressed by the *Skilling* decision.

A third area that needs to be addressed is to ensure balanced prosecutorial charging decisions. It is true that many considerations factor into prosecutorial charging decisions. However, it is also true that claims of ignorance should not inoculate senior public officials suspected of corruption-related offences who must be investigated and prosecuted with equal, if not more, vigor than their subordinates. The US government must take steps to ensure that prosecution of senior public officials is a top priority.

Bribery of foreign public officials (Article 16)

The United States has been commended “for its visible and high level of support for the fight against the bribery of foreign public officials, including engagement with the private sector, substantial enforcement, and stated commitment by the highest echelon of the government.”⁶ However, there still remain a number of steps the United States should consider.

Consideration of voluntary disclosure in FCPA prosecution

Many recent FCPA enforcement actions followed voluntary disclosure by the company to authorities. Under voluntary disclosure, companies voluntarily report to authorities their internal findings, the steps they have taken to respond to misconduct and remediate possible FCPA violations, and to demonstrate their overall commitment to compliance.

The government must consider voluntary disclosure (or lack thereof) in charging, settling, and sentencing decisions. When combined with other forms of cooperation, this may substantially mitigate or even eliminate penalties that would be imposed if the FCPA violations were uncovered by the government in the first instance. Nevertheless, even in cases of extensive cooperation, significant penalties have been imposed raising questions about the extent of the benefits of cooperation.

Although US authorities have taken some steps to begin to address the issue, this has been an area of long-standing concern in FCPA enforcement. While the enforcement agencies encourage such disclosures, current tools do not make the benefits of such disclosures as transparent as they could be (often because voluntary disclosure is not a mitigating factor in and of itself) and, because of the extent of prosecutorial discretion, as predictable as it could be. Recent developments, and especially the mandatory rewards for whistleblowers under the Dodd-Frank financial reform legislation of 2010, make this issue one that is ripe for action now.

Simplify procedures for obtaining guidance on FCPA prosecutions

Moreover, the DOJ should revise the procedures necessary for obtaining an opinion from the Attorney General in an effort to provide increased guidance. Few FCPA cases go to trial, resulting in a lack of clarity as to the requirements of the law. The DOJ has instituted a procedure that allows a company to request the Department’s opinion regarding specified, prospective conduct. However, seeking an opinion requires an extensive factual submission, and there is no assurance that the opinion will be provided within the time needed by the company to determine whether to undertake the prospective conduct. Accordingly, few opinions are requested. In 2010, only three opinions were released and 2009 saw only one opinion released. The DOJ should make it a practice to issue opinions within 30 days of receipt of a request. Furthermore, the DOJ should supplement the opinion procedure with the issuance of more generic guidance on compliance issues known to be of great interest to the business community. The combination of more prompt formal opinions on specific questions and more frequent generic guidance would engender more informed compliance practices.

⁵ See *Citizens United v. Federal Election Commission*, 130 S.Ct. 876 (2010).

⁶ Organisation for Economic Co-operation and Development, OECD Working Group on Bribery, *2010 Annual Report* 58, available at www.oecd.org/dataoecd/7/15/47628703.pdf.

Clearer interpretation of key statutory language

Although court cases might bring greater clarity to the increasingly important question of when employees of state-owned enterprises will be considered “foreign officials,” further guidance by the DOJ and SEC would be helpful. In a recent case of *United States v. Lindsey Manufacturing*, for example, the judge determined that an officer of Mexico’s state-owned utility, whom Lindsay purportedly bribed, should be considered a “foreign official” under the FCPA because the Mexican government derived sufficient benefits and exerted enough control.⁷ However, the case leaves open whether a different outcome might occur if the government owns a significant but non-controlling portion of a company.

Encourage foreign governments to investigate and pursue corruption cases

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

Striking the right balance in implementing the whistleblower incentive provisions of Dodd-Frank: Significant among the many concerns that have been raised in response to both the provisions of the Dodd-Frank Act and the SEC’s rules is the potential for whistleblowers to bypass a company’s existing compliance procedures.

Clarification of when debarment is imposed

Additionally, while significant monetary fines have been imposed on companies in recent FCPA settlements, none of the companies was debarred from bidding on US government contracts. Government contracting officials should clarify how they determine when to impose such a penalty and contracting regulations should require officials to take into account FCPA settlements and convictions.

Laundering of proceeds of crime (Article 23)

In light of the comparative weakness in US AML law regarding gatekeeper rules, more cooperation between the government and private sector is needed to address gatekeeper issues. In addition, the United States should adopt stronger regulatory reporting requirements addressed to dealers of precious metals, stones, or jewels to ensure compliance with AML laws.⁸ On 20 September 2011, the United States announced its Action Plan under the Open Government Partnership (OGP), where it committed to increasing transparency of legal entities formed in the United States.⁹ The administration will advocate for legislation that will require the disclosure of meaningful beneficial ownership information for corporations at the time of company formation.¹⁰ TI-USA welcomed the US Action Plan.

The full TI USA review report can be found at

<http://www.uncaccoalition.org/en/uncac-review/cso-review-reports.html>

⁷ The FCPA Blog, 10 May 2011, “Just In: All Lindsey Defendants Convicted On All Counts,” www.fcpablog.com/blog/2011/5/10/just-in-all-lindsey-defendants-convicted-on-all-counts.html.

⁸ International Monetary Fund, *Financial Sector Assessment Program Documentation: United States of America 20 (2010)*, available at www.imf.org/external/pubs/ft/scr/2010/cr10253.pdf.

⁹ The Open Government Partnership, “National Action Plan for the United States of America,” 20 September 2011.

¹⁰ Id.