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CIVIL  
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SOCIETY

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of 31 October  
United Nations Convention  
against Corruption

UN CONVENTION  
AGAINST CORRUPTION  
CIVIL SOCIETY REVIEW:  
USA 2011

# Context and purpose

The UN Convention against Corruption (UNCAC) was adopted in 2003 and entered into force in December 2005. It is the first legally-binding anti-corruption agreement applicable on a global basis. To date, 154 states have become parties to the convention. States have committed to implement a wide and detailed range of anti-corruption measures that affect their laws, institutions and practices. These measures promote prevention, criminalisation and law enforcement, international cooperation, asset recovery, technical assistance and information exchange.

Concurrent with UNCAC's entry into force in 2005, a "Conference of the States Parties to the Convention" (CoSP) was established to review and facilitate required activities. In November 2009 the CoSP agreed on a review mechanism that was to be "transparent, efficient, non-intrusive, inclusive and impartial". It also agreed to two five-year review cycles, with the first on Chapters III (Criminalisation and Law Enforcement) and IV (International Cooperation), and the second cycle on Chapters II (Preventive Measures) and V (Asset Recovery). The mechanism included an Implementation Review Group (IRG), which met for the first time in June-July 2010 in Vienna and selected the order of countries to be reviewed in the first five-year cycle, including the 26 countries (originally 30) in the first year of review.

UNCAC Article 13 requires States Parties to take appropriate measures including "*to promote the active participation of individuals and groups outside the public sector in the prevention of and the fight against corruption*" and to strengthen that participation by measures such as "*enhancing the transparency of and promote the contribution of the public in decision-making processes and ensuring that the public has effective access to information; [and] respecting, promoting and protecting the freedom to seek, receive, publish and disseminate information concerning corruption.*" Further articles call on each State Party to develop anti-corruption policies that promote the participation of society (Article 5); and to enhance transparency in their public administration (Article 10).; Article 63 (4) (c) requires the Conference of the States Parties to agree on procedures and methods of work, including cooperation with relevant non-governmental organizations.

In accordance with Resolution 3/1 on the review mechanism and the annex on terms of reference for the mechanism, all States Parties provide information to the Conference secretariat on their compliance with the Convention, based upon a "comprehensive self-assessment checklist". In addition, States Parties participate in a review conducted by two other States Parties on their compliance with the Convention. The reviewing States Parties then prepare a country review report, in close cooperation and coordination with the State Party under review and finalize it upon agreement. The result is a full review report and an Executive Summary, the latter of which is required to be published. The Secretariat, based upon the country review report, is then required to "compile the most common and relevant information on successes, good practices, challenges, observations and technical assistance needs contained in the technical review reports and include them, organized by theme, in a thematic implementation report and regional supplementary agenda for submission to the Implementation Review Group". The Terms of Reference call for governments to conduct broad consultation with stakeholders during preparation of the self-assessment and to facilitate engagement with stakeholders if a country visit is undertaken by the review team.

The inclusion of civil society in the UNCAC review process is of crucial importance for accountability and transparency, as well as for the credibility and effectiveness of the review process. Thus, civil society organisations around the world are actively seeking to contribute to this process in different ways. As part of a project on enhancing civil society's role in monitoring corruption funded by the UN Democracy Fund (UNDEF), Transparency International has offered small grants for civil society organisations (CSOs) engaged in monitoring and advocating around the UNCAC review process, aimed at supporting the preparation of UNCAC implementation review reports by CSOs, for input into the review process.

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# Introduction

The United States signed the UNCAC on 9 December 2003 and ratified the treaty on 30 October 2006.

**Scope.** This report reviews the United States's implementation and enforcement of selected articles in chapters III (Criminalization and Law Enforcement) and IV (International Cooperation) of the UNCAC. The report is intended as a contribution to the UNCAC peer review process currently underway covering those two chapters. The United States was selected by the UNCAC Implementation Review Group in July 2010 by a drawing of lots for review in the first year of the process.

The UNCAC articles that receive particular attention in this report are those covering bribery (Article 15), foreign bribery (Article 16), embezzlement (Article 17), illicit enrichment (Article 20), money laundering (Article 23), liability of legal persons (Article 26), freezing, seizure and confiscation (Article 31), witness protection (Article 32), protection of reporting persons (Article 33), and mutual legal assistance (Article 46).

**Structure.** Section I of the report is an executive summary, with the condensed findings, conclusions and recommendations about the review process and the availability of information, as well as about implementation and enforcement of selected UNCAC articles. Section II covers in more detail the findings about the review process in the United States as well as access to information issues. Section III reviews implementation and enforcement of the convention, including key issues related to the legal framework and to the enforcement system, with examples of good and bad practice. Section IV covers recent developments and section V elaborates on recommended priority actions.

**Methodology.** The report produced with UNDEF funding was prepared by Transparency International USA. The group made efforts to obtain information for the reports from government offices and to engage in dialogue with government officials. The views contained in the reports were conveyed to government officials as part of this dialogue, through supplying a draft of the report.

The report was prepared using a questionnaire and report template designed by Transparency International for the use of CSOs. These tools reflected but simplified the UNODC checklist and called for relatively short assessments as compared with the detailed official checklist self-assessments. The questionnaire and report template asked a set of questions about the review process and in the section on implementation and enforcement, asked for examples of good practices and areas in need of improvement in selected areas, namely with respect to UNCAC Articles 15, 16, 17, 20, 23, 26, 32, 33 and 46(9)(b)&(c).

The report preparation process went through a number of steps, with respondents first filling out the simplified questionnaire and then preparing the draft report. The report was peer reviewed by a national expert identified by Transparency International.

The draft report was shared with the government for comments prior to finalizing. Finally, a final draft of the report has been sent to the government prior to publication with the aim of continuing the dialogue beyond the first round country review process.

In preparing this report, the authors also took into account the review of the US implementation of the OECD Anti-Bribery Convention and of the Inter-American Convention against Corruption. The last report of the OECD Working Group was published in October 2010<sup>1</sup> and the one of the Inter-American Convention against Corruption Committee of Experts in March 2011<sup>2</sup>. The United States was also reviewed as part of the Council of Europe Group of States against Corruption review process, with its second round review dating to 2005.<sup>3</sup>

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<sup>1</sup> OECD Working Group on Bribery in International Business Transactions: United States: Phase 3 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2009 Revised Recommendation on Combating Bribery in International Business Transactions. October 2010, <http://www.oecd.org/dataoecd/10/49/46213841.pdf>.

<sup>2</sup> Inter-American Convention against Corruption Committee of Experts, Report on Implementation in the United States of the Convention Provisions Selected for Review in the Third Round, and on Follow-up to the Recommendations Formulated to That Country in Previous Rounds, adopted 25 March 2011, [www.oas.org/juridico/english/mesicic3\\_usa\\_rep.pdf](http://www.oas.org/juridico/english/mesicic3_usa_rep.pdf).

<sup>3</sup> Compliance Report on the United States of America adopted by GRECO at its 40th Plenary Meeting, second Evaluation Round, Greco RC-II (2008) 5E, Strasbourg, December 2008, [http://www.coe.int/t/dghl/monitoring/greco/evaluations/round2/GrecoRC2\(2008\)5\\_USA\\_EN.pdf](http://www.coe.int/t/dghl/monitoring/greco/evaluations/round2/GrecoRC2(2008)5_USA_EN.pdf)

# I. Executive Summary

## 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 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.<sup>4</sup> Further, defining bribery to prevent a corrupt result as envisioned by UNCAC may, ironically, raise vagueness concerns similar to those addressed by the *Skilling* decision.

<sup>4</sup> See *Citizens United v. Federal Election Commission*, 130 S.Ct. 876 (2010).

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.<sup>5</sup> 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

- With respect to domestic bribery, steps should be taken to address any void regarding corruption created by *Skilling v. United States*.
- The Department of Justice (DOJ) and Securities and Exchange Commission (SEC) should increase guidance on Foreign Corrupt Practices Act (FCPA) enforcement including the benefits of voluntary disclosure and the clarification of terms, such as foreign official.
- Continue to encourage foreign governments to investigate and pursue corruption cases.
- Enhance cooperation between government and the private sector to address gatekeeper issues in the US AML law.
- Adopt regulatory reporting requirements for dealers of precious metals, stones, or jewels to ensure compliance with AML laws.

## II. Assessment of review process

### A. Conduct of process

The following provides details of the transparency, country visits, and civil society participation in UNCAC review process for the United States.

The country focal point person is John Brandolino, senior advisor in the State Department Bureau of International Narcotics and Law Enforcement (INL), and is readily accessible for discussion on UNCAC and other conventions.

The US self-assessment was published online at [www.state.gov/documents/organization/158105.pdf](http://www.state.gov/documents/organization/158105.pdf) and also on the United Nations Office on Drugs and Crime (UNODC) website.

A country visit was undertaken 5–7 April 2011 by Sweden and Macedonia, and civil society organizations and private sector entities met the review team. On 7 April 2011, TI-USA, at the invitation of the US State Department, assembled a panel of experts to present civil society views. Panelists included the chief compliance officer of Pfizer; a former FCPA prosecutor and partner of Paul, Weiss, Rifkind, Wharton & Garrison LLP; the legal director of the Government Accountability Project; an AML expert and chief compliance officer of Regulatory DataCorp, Inc.; and a legislative representative of the NGO Public Citizen.

The government has committed to publishing the full review report online.

### B. 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 procedure for making more information about settlements and deferred prosecution agreements publically accessible online.

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<sup>5</sup> 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.

# III Implementation and enforcement of the convention

## A. Key issues related to the legal framework

### 1. Areas showing good practice

**UNCAC Article 15: Bribery of national public officials.** Title 18 of the United States Code (USC) criminalizes active bribery of national public officials consistent with UNCAC Article 15(a). US federal law enforcement authorities may prosecute such conduct, depending on the facts and circumstances of a given case, under Title 18 including sections 201(b)(1) (bribery of public Officials and witnesses), 599 (promise of appointment by candidate), 210 (offer to procure appointive public office), 1961–63 (racketeer influenced and corrupt organizations, or RICO), 1341 (mail fraud), 1343 (wire fraud), and 1346 (scheme or artifice to defraud another of the intangible right to honest services). In addition, the law prohibits conspiracies to commit the above listed crimes under section 371 (conspiracy to commit an offense against the United States), and aiding and abetting of the same under section 2. Finally, various states have enacted laws comparable to the federal regime prohibiting the conduct described in Article 15(a).

Title 18 of the USC also criminalizes passive bribery of national public officials consistent with UNCAC Article 15(b). US federal law enforcement authorities may prosecute such conduct, depending on the facts and circumstances of a given case, under Title 18 including sections 201(b)(2) and 201(c) (bribery of public officials and witnesses), 599 (promise of appointment by candidate), 210 (offer to procure appointive public office), 1961–63 (racketeer influenced and corrupt organizations, or RICO), 1341 (mail fraud), 1343 (wire fraud), 1346 (scheme or artifice to defraud another of the intangible right to honest services), and section 666 (theft or bribery concerning programs receiving federal funds). In addition, the law prohibits conspiracies to commit the above listed crimes under section 371 (conspiracy to commit an offense against the United States), and aiding and abetting of the same under section 2. Finally, various states have enacted laws comparable to the federal regime prohibiting the conduct described in Article 15(b).

**UNCAC Article 16: Bribery of foreign public officials.** The US FCPA, 15 USC §§ 78dd-1, et seq., makes it illegal to offer or provide money or anything of value to a foreign official with the intent to obtain or retain business. The FCPA applies to any US citizen, national, or resident; any person who violates the act when in US territory; any business entity organized under the laws of a US state; any business entity with a principal place of business in the United States; and any business entity traded on a US stock exchange. In addition, the conduct described in Article 16 may, depending on the facts and circumstances of a given case, be prosecuted under additional laws covering conspiracy to commit a crime, 18 USC § 371, mail fraud, 18 USC § 1341, or wire fraud, 18 USC § 1343.

**UNCAC Article 17: Embezzlement, misappropriation or other diversion by a public official.** The United States has strong anti-embezzlement laws, which are vigorously enforced.

The primary anti-embezzlement statute applicable to officials of the US federal government is 18 USC § 654 (officer or employee of United States converting property of another). Other anti-embezzlement laws include 18 USC § 641 (embezzlement of public money, property or records by any person); 18 USC § 645 (embezzlement by federal court officers); and 18 USC § 666 (theft or bribery concerning programs receiving federal funds). The United States also has several other criminal laws that could potentially be used to punish the conduct described in Article 17, including, but not limited to, 18 USC § 371 (conspiracy to commit an offence against the United States), 18 USC § 1341 (mail fraud), 18 USC § 1343 (wire fraud), and 18 USC § 1346 (scheme or artifice to defraud another of the intangible right to honest services). Individual states also have laws prohibiting the conduct described in Article 17.<sup>6</sup>

**UNCAC Article 23: Laundering of proceeds of crime.** The Money Laundering Control Act of 1986, 18 USC §§ 1956, 1957, criminalizes four forms of money laundering: (1) basic money laundering; (2) international money laundering where criminal proceeds are moved in or out of the United States; (3)

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<sup>6</sup> UNODC, *Mechanism for the Review of Implementation of the United Nations Convention Against Corruption, Response of the United States of America to the Comprehensive Self-Assessment Checklist 29* (2010) available at [www.state.gov/documents/organization/158105.pdf](http://www.state.gov/documents/organization/158105.pdf).

money laundering in the context of an undercover "sting" case where the money being laundered has been represented by a law enforcement officer as being criminal proceeds; and (4) knowingly spending greater than US\$10,000 in criminal proceeds.

The Money Laundering Control Act applies to the proceeds of an offense constituting a "specified unlawful activity." Among included offenses are the production, importation, sale or distribution of illegal drugs; racketeering; fraud; counterfeiting; alien smuggling; human trafficking; arms trafficking; trafficking in stolen property; gambling; terrorism and terrorist financing; sex trafficking and sexual exploitation of children; corruption and bribery; environmental crimes; security fraud; and crimes of violence.

**UNCAC Article 26: Liability of legal persons.** Legal persons face criminal, civil, and administrative sanctions if convicted of bribery and other corruption offenses.

**UNCAC Articles 32. Protection of witnesses, experts, and victims and Article 33: Protection of reporting persons.** The United States passed significant legislation in July 2010 that may have an impact on the incentives surrounding whistleblower complaints and the manner in which companies often allocate their internal compliance resources. The Dodd-Frank Act contains new provisions requiring the SEC to pay monetary awards of 10 percent to 30 percent of ultimate recoveries to persons who voluntarily provide the SEC, the DOJ, and the Commodity Futures Trading Commission (CFTC) with original information that leads to successful enforcement action resulting in the recovery of more than US\$1 million. These provisions apply to enforcement actions under the FCPA. The legislation significantly expands the universe of persons who may qualify as whistleblowers, and the protections against retaliation that may be available to them. The SEC issued rules to clarify how the whistleblower provisions will be implemented. Significant among the many concerns that have been raised in response to both the provisions of Dodd-Frank and the SEC's rules is the potential for whistleblowers to bypass a company's existing compliance procedures. In implementing these rules, the SEC needs to strike the right balance between incentivizing and protecting whistleblowers, and encouraging robust corporate compliance programs.

**UNCAC Article 46(9)(b)&(c): Mutual legal assistance.** The United States has an active mutual legal assistance relationship with foreign governments. The United States is authorized to provide mutual legal assistance by statute, 18 USC § 3512 and 28 USC § 1782 (assistance to foreign and international tribunals and to litigants before such tribunals). US law does not impede assistance in the absence of dual criminality, where the assistance does not require certain types of coercive action, such as search warrants. The United States also retains the ability to decline to provide assistance in situations where the matter involved is of a de minimis nature, is in opposition to its essential interests, or where the assistance sought is available through other means, such as informal police cooperation. The United States is authorized by its treaty power under Article II, section 2, of the United States Constitution to negotiate bilateral and multilateral treaties to seek and provide mutual legal assistance. Those treaties constitute legal authority to engage in international cooperation.

## 2. Areas with deficiencies

**UNCAC Articles 15(a), 15(b), 17: Bribery of national public officials; Embezzlement, misappropriation or other diversion by a public official.** Recent case law may create a void in the criminalization of corruption and bribery-like offenses.

The list of statutes above indicates that the United States has incorporated into domestic criminal law the UNCAC prohibition against the bribery of national public officials. The United States generally has a good record of enforcement of its domestic anti-corruption laws. However, recent developments in US federal case law concerning bribery may limit one of the tools relied on to combat corruption.

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 Justice Department official Lanny Breuer.<sup>7</sup> 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

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<sup>7</sup> DOJ press release, "Assistant Attorney General Lanny A. Breuer Testifies before the Senate Judiciary Committee at a Hearing Regarding Honest Services Fraud," (28 September 2010) available at [www.justice.gov/criminal/pr/testimony/2010/crm-testimony-100928.html](http://www.justice.gov/criminal/pr/testimony/2010/crm-testimony-100928.html).



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.

The Supreme Court in *Skilling* specifically cautioned Congress from legislating to criminalize a failure to disclose a conflict of interest; “[i]f Congress were to take up the enterprise of criminalizing ‘undisclosed self-dealing by a public official or private employee,’ ... it would have to employ standards of sufficient definiteness and specificity to overcome due process concerns.”<sup>8</sup> Thus, any new law created to fill the *Skilling* gap will face close judicial scrutiny.

A second case-law driven inadequacy is the definition of “bribery,” which is narrower than that which the convention seeks to proscribe. Under US federal law, bribery only occurs when there is a quid pro quo: “a specific intent to give or receive something of value *in exchange for* an official act.”<sup>9</sup> During the US Senate Hearing concerning *Skilling v. United States*, Senator Feingold of Wisconsin observed that where a “mayor accepted lavish gifts, tickets to sporting events, and expensive meals from someone bidding on a development contract with the city,” prosecuting that public official would be difficult considering the requirement to show a direct quid pro quo relationship between these meals and gifts and a decision to award a contract to the bribing individual.<sup>10</sup> Also consider the difficulty of establishing a quid pro quo where there is a longstanding pattern of small gifts over time. In this instance, there is not a clear link between any particular gift in exchange for influence over the official’s action but the end result of such conduct is, nonetheless, potentially corrupt influence over the official’s decision-making.

Article 15 of the UNCAC does not conceptualize bribery as narrowly. Although the convention does not specifically define the word “bribe” or “bribery,” the text of Article 15(b) strongly suggests that a specific quid pro quo is not required. To paraphrase, Article 15(b) prohibits the direct or indirect solicitation or acceptance of an undue advantage by and for the public official in order that the official act or refrain from acting in his official capacity. The phrase “undue advantage” is purposely broad to encompass a wide array of benefits conferred. The link between the undue advantage conferred and the official action or inaction does not require a quid pro quo or a specific exchange. Instead, the text requires that solicitation or acceptance of an undue advantage occur *in order that* the official act or refrain from acting. The forward-looking language of Article 15(b), and indeed UNCAC’s purpose, is to avoid a corrupt result in public decision-making, be it a direct exchange of favors or a corrupt relationship.<sup>11</sup> US federal case law, by contrast, seeks to require a specific link between an item given and an official act.<sup>12</sup>

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.<sup>13</sup> 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.

**UNCAC Article 16: Bribery of foreign public officials.** US law does not criminalize facilitation payments, the receipt of foreign bribes, or prevent companies convicted of foreign bribery offenses from competing for government contracts.

The United States has not criminalized the solicitation or acceptance of a bribe by a foreign official under the FCPA, the US anti-foreign bribery law. Depending on the facts and circumstances of a given case, US federal law enforcement authorities could potentially punish the conduct described in Article 16(2) under various US federal criminal laws, including but not limited to, money laundering, 18 USC §§ 1956, 1957, conspiracy to commit a crime, 18 USC § 371, mail fraud, 18 USC § 1341, or wire fraud, 18 USC § 1343.

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<sup>8</sup> *Skilling*, 130 S.Ct. at 2934 n. 45.

<sup>9</sup> *United States v. Dean*, 629 F.3d 257, 259 (D.C. Cir. 2011) (citing *Sun-Diamond Growers*, 526 US 398, 404-05 (1999)).

<sup>10</sup> *Senate Hearing on Skilling*, at 6 (statement of Sen. Feingold, member, S. Comm. on the Judiciary).

<sup>11</sup> See *United Nations Convention Against Corruption, Preamble* (“*Bearing also in mind* the principles of proper management of public affairs and public property, fairness, responsibility and equality before the law and the need to safeguard integrity and to foster a culture of rejection of corruption”) (emphasis in original) and Art. 1(c) (“The purposes of this Convention are: To promote integrity, accountability and proper management of public affairs and public property”); see also, Transparency International, *Anti-Corruption Plain Language Guide 5* (July 2009) (“The offering, promising, giving, accepting or soliciting of an advantage *as an inducement for* an action which is illegal, unethical or a breach of trust. Inducements can take the form of gifts, loans, fees, rewards or other advantages (taxes, services, donations, etc.)” (emphasis added)).

<sup>12</sup> “[A] *quid pro quo* necessitates *an agreement* between the public official and the other party that the official will perform an official act in return for a personal benefit to the official.” *Dean*, 629 F.3d at 259.

<sup>13</sup> See *Citizens United v. Federal Election Commission*, 130 S.Ct. 876 (2010).

Additionally, the FCPA, does not currently criminalize facilitation payments or automatically prevent a company or individual convicted of a foreign bribery offense from competing for government contracts.

**UNCAC Article 20: Illicit enrichment.** 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 required under the US Constitution. The United States has, however, adopted other statutes to criminalize improper financial gain by public officials. The Ethics in Government Act, for example, requires employees of the executive, legislative, and judicial branches to file financial disclosure reports.

**UNCAC Article 23: Laundering of proceeds of crime.** Anti-money laundering laws have been in effect for over two decades in the United States. The focus in AML has been on preventing financial institutions from processing the proceeds of any crime. In spite of the enviable record of the United States in prosecuting AML cases, there remain shortcomings in the US AML system.

One comparative weakness in US 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. Even though FATF gave the United States a non-compliant evaluation in 2006 with respect to its application of AML to the gatekeepers,<sup>14</sup> neither the executive nor the legislative branches have adopted rules that require gatekeepers to know their clients, make suspicious transaction reports, and not tip off the clients.

Further, in February 2010 the US Senate Permanent Subcommittee on Investigations issued a report that shows how some PEPs have used US lawyers, real estate and escrow agents, lobbyists, bankers, and even university officials, to circumvent U.S. anti-money laundering and anticorruption safeguards.<sup>15</sup> The Financial Action Task Force (FATF), which monitors national anti-money laundering 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.<sup>16</sup> 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.<sup>17</sup> The administration will advocate for legislation that will require the disclosure of meaningful beneficial ownership information for corporations at the time of company formation.<sup>18</sup> TI-USA welcomed the US government's Action Plan.

## B. Key issues related to enforcement

### 1. Statistics

Table 3: **Bribery of national public officials; and embezzlement, misappropriation or other diversion by a public official** (Articles 15(a), 15(b), 17)<sup>19</sup>

	Charged			Convicted			Awaiting Trial		
	2007	2008	2009	2007	2008	2009	2007	2008	2009
Federal Officials	426	518	425	405	458	426	116	117	107
State Officials	128	144	93	85	123	102	65	61	57
Local Officials	284	287	270	275	246	257	127	127	148

<sup>14</sup> Financial Action Task Force, *Mutual Evaluation Report of the United States of America* 205 (2006), available at [www.fatf-gafi.org/dataoecd/44/9/37101772.pdf](http://www.fatf-gafi.org/dataoecd/44/9/37101772.pdf).

<sup>15</sup> 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.

<sup>16</sup> FATF Third Mutual Evaluation Report on Anti-Money Laundering and Combating Financing of Terrorism, 23 June 2006, [www.fatf-gafi.org/dataoecd/44/9/37101772.pdf](http://www.fatf-gafi.org/dataoecd/44/9/37101772.pdf).

<sup>17</sup> The Open Government Partnership, "National Action Plan for the United States of America," 20 September 2011.

<sup>18</sup> *Id.*

<sup>19</sup> United States Department of Justice, *Report to Congress on the Activities and Operations of the Public Integrity Section for 2009*.

Table 4: **Bribery of foreign officials** (Article 16)

	Total number of cases <sup>20</sup>	Enforcement actions pending <sup>21</sup>	Enforcement actions concluded <sup>22</sup>
<b>Bribery of foreign public officials</b> (Article 16)	227	46	181

Table 5: **Anti-money laundering** (Article 23)

	File defendant count	Terminated defendant count	Guilty
<b>Money laundering, corruption-related</b> <sup>23</sup>	2674	2094	1088

## 2. Areas showing good practice

Law enforcement pursues major corruption cases. Investigators, prosecution, and judiciary act independently of those being investigated. Specialized anti-corruption units exist throughout the enforcement agencies. The Public Integrity Section of the DOJ prepares reports for Congress and the public about major prosecutions undertaken.

The relatively vigorous US enforcement and ease of access to information about cases is illustrated by the cases cited below, which are just a representative sample.

### **Domestic bribery: embezzlement, misappropriation or other diversion by a public official**

#### **Article 15(a): Bribery of national public officials**

*United States v. Abramoff*, no. 06-CR-00001 (D. D.C. Jan. 3, 2006); *United States v. Abramoff*, no. 05-60204 (S.D. Fla. March 29, 2006):

Former lobbyist Jack Abramoff pled guilty on 3 January 2006, to conspiracy to commit bribery and honest services wire and mail fraud; mail fraud; and tax evasion arising from a scheme to defraud four Native American tribes by charging lobbying fees that incorporated huge profit margins and then splitting the net profits in a secret kickback arrangement. Abramoff admitted that, over a 10-year period ending in 2004, he and others engaged in a pattern of corruptly providing items of value to public officials with the intent to influence acts by the public officials that would benefit Abramoff and his clients. Examples of things of value given to public officials and members of their staff by Abramoff include a lavish trip to Scotland to play golf on world-famous courses, tickets to sporting events, meals at upscale restaurants, and campaign contributions. On 4 September 2008, Abramoff was sentenced to 48 months' imprisonment and three years of supervised release, and was ordered to pay US\$23,134,695 in restitution to victims.

<sup>20</sup> Total number of cases opened since 1 Jan. 2001; Transparency International, *2011 Progress Report on Enforcement against Foreign Bribery*.

<sup>21</sup> All enforcement actions not concluded as of 1 Jan. 2011; Transparency International, *2011 Progress Report on Enforcement against Foreign Bribery*.

<sup>22</sup> Total number of cases concluded since 2001; Transparency International, *2011 Progress Report on Enforcement against Foreign Bribery*.

<sup>23</sup> These numbers represent the total counts for cases brought under 18 USC § 1956 and 18 USC § 1957 between 1 Oct. 2003 and 30 Sept. 2004. US UNCAC country submission, with statistics for money laundering cases for FY2004, including but not limited to cases predicated on bribery or corruption.

**Article 15(b): Bribery of national public officials.**

*Skilling v. United States*, 130 S. Ct. 2896 (2010):

Jeffery Skilling, former Enron chief executive officer, appealed his conviction under the honest services fraud statute, 18 USC § 1346, to the Supreme Court. Section 1346 provides that, for purposes of the mail and wire fraud statutes, the term “scheme or artifice to defraud” includes a scheme or artifice to deprive another of the intangible right of honest services.<sup>24</sup> The Supreme Court limited the application of the 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 unconstitutionally vague. Although Skilling was charged with violating the law as a private individual, following the Supreme Court case, federal courts have overturned honest services fraud convictions in numerous cases, many of which involve public officials.<sup>25</sup> Although under the Supreme Court decision the statute remains constitutionally applicable to bribery or kickback schemes, the distinction between bribes/kickbacks and an undisclosed conflict of interest is only a matter of structure.<sup>26</sup>

*United States v. Jefferson*, 634 F. Supp. 2d 595 (E.D. Va. 2009):

William J. Jefferson is a former member of the US House of Representatives from Louisiana’s second congressional district. On 4 June 2007, a federal grand jury returned an indictment charging Jefferson with 16 counts, including conspiracy, wire fraud, violating the FCPA, money laundering, obstructing justice, racketeering, and soliciting bribes. Jefferson allegedly used his office and status as a member of the US House of Representatives to advance the business interest of various individuals and corporations in return for money and other things of value. Specifically, he was indicted for undertaking, or agreeing to undertake, various actions in exchange for bribes from individuals seeking to advance various business ventures in Africa and elsewhere. Jefferson’s alleged actions generally involved Jefferson obtaining financial and other business development assistance for the business ventures by exerting his influence as a member of Congress on various US and African government officials and agencies, including the Nigerian government, the Export-Import Bank of the United States, and the United States Trade Development Agency. The money-laundering charges alleged that Jefferson knowingly participated in the transfer of proceeds of criminal activity, namely the bribery proceeds, from the Eastern District of Virginia to the Eastern District of Louisiana. On 5 August 2009, a federal court jury found Jefferson guilty of 11 of the 16 corruption counts of bribery, racketeering, and money laundering, but acquitted him of the charges of obstruction of justice and violating the FCPA. Jefferson was sentenced to 13 years in prison.

*United States v. Ney*, no. 06-CR-00272 (D. D.C. 19 Jan. 2007):

Robert Ney, a former member of the US House of Representatives, pled guilty to conspiracy to commit multiple offenses, including committing bribery-related honest services fraud and making false statements to federal agents. His guilty plea is linked to the receipt of valuable gifts from Jack Abramoff and his associates. Ney was sentenced to 30 months of imprisonment and fined US\$6,000. This marks the lone successful prosecution of a high-ranking congressional official in Abramoff’s bribery scandal, though many were potentially implicated.

**UNCAC Article 16: Bribery of foreign public officials.**

*United States v. Johnson & Johnson*, no. 11-CV-00686 (D.D.C. 2011):

Johnson & Johnson and its subsidiaries agreed to a deferred prosecution agreement (DPA) with the DOJ under the FCPA.<sup>27</sup> The agreement arises from alleged bribes paid to government officials in Greece, Poland, Romania, and Iraq in order to induce the foreign governments to purchase Johnson & Johnson’s products. The company will pay more than US\$21 million in fines and agreed to implement a compliance program. While the DOJ’s standard DPAs typically contain a listing of best practices for a company’s compliance program, the Johnson & Johnson DPA goes further by including a more detailed description of

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<sup>24</sup> Section 1346.

<sup>25</sup> See, e.g., *United States v. Jaramillo*, no. 09-50480, 2011 WL 560399 (9th Cir. Feb. 2011) (vacating a state official’s guilty plea based on failure to disclose gifts and loans on a financial disclosure form); *United States v. Weyhrauch*, 623 F.3d 707 (9th Cir. 2010) (rejecting government’s attempt to introduce evidence showing a failure by an Alaskan Congresswoman to disclose a conflict of interest), indictment dismissed on government motion, *United States v. Kott*, no. 07-CR-00056 (D. Alaska Mar. 2011) (Dkt. No. 498).

<sup>26</sup> See *Restoring Key Tools to Combat Fraud and Corruption after the Supreme Court’s Skilling Decision: Hearing before the S. Comm. on the Judiciary*, 111th Cong., 2nd Session 6 (28 Sept. 2010) [hereinafter *Senate Hearing on Skilling*] (statement of Lanny Breuer, assistant attorney general) (comparing a hypothetical mayor’s scheme to solicit kickbacks in exchange for awarding contracts with the creation of a company, wholly owned by the mayor, to which contracts are awarded).

<sup>27</sup> DOJ press release, “Johnson & Johnson Agrees to Pay \$21.4 Million Criminal Penalty to Resolve Foreign Corrupt Practices Act and Oil for Food Investigations,” (8 April 2011) available at [www.justice.gov/opa/pr/2011/April/11-crm-446.html](http://www.justice.gov/opa/pr/2011/April/11-crm-446.html).

enhanced compliance obligations. This case is one of the few times the DOJ has required enhanced compliance obligations in a DPA setting forth additional details on required compliance practices. Examples of the required enhanced compliance obligations include: (1) a requirement that senior managers in each of the company's corporate-level functions, divisions, and business units in each foreign country be required to submit annual certifications confirming that local standard operating procedures adequately implement the company's anti-corruption policies and procedures and that they are not aware of any corruption issues not already reported to corporate compliance; and (2) Johnson & Johnson must institute gifts, hospitality, and travel policies and procedures in every jurisdiction in which it operates which limit gifts to those of modest value appropriate under the circumstances and limit hospitality to reasonably priced meals and accommodations and to only limited incidental expenses. To settle the case coordinated by SEC and criminal authorities, Johnson & Johnson will pay disgorgement and interest of more than US\$48 million and comply with specific requirements regarding its compliance program.

*United States v. Noriega et al*, no. 10-CR-01031 (C.D. Cal. 2011):

A California district court defined "foreign official" under the FCPA to include employees of state-owned corporations, reinforcing the position of the DOJ. Lindsey Manufacturing executives and the company were charged with conspiring to bribe officials of Mexico's state-owned electric utility company, Comision Federal de Electricidad (CFE). The court held that CFE was an instrumentality of a foreign government. As a result, the senior officials of CFE are included in the definition of "foreign official" under the FCPA. In making this determination, the court relied heavily on the facts that the CFE's governing board is composed of Mexican government officials, that its director general is appointed by the president of Mexico, that the CFE's English language website described it as an agency of the Mexican federal government, that the Mexican Constitution provides that the supply of electricity in Mexico is solely a government function, and that Mexican statutory law defines CFE as a public entity. Court opinions remain pending in two separate FCPA prosecutions in which defendants challenged the government's application of the phrase "foreign official" to state-owned entities.<sup>28</sup>

*United States v. Panalpina*, no. 10-CR-765 (S.D. Tex., 2010)

In October 2010, the DOJ and SEC prosecuted Panalpina World Transport Holdings, Inc., a Swiss freight forwarding company, and its US subsidiary alleging that Panalpina had made payments of more than US\$49 million to customs officials in numerous countries. The case was settled with US\$11 million in disgorgement and a criminal fine of US\$70.56 million. The SEC settlement marks the first for FCPA charges against a corporation that is neither an "issuer" of securities in the United States, nor a subsidiary of an issuer. Panalpina is an independent third party that acted as an agent for US issuers. The US issuers involved, Royal Dutch Shell Ltd., Tidewater Inc., Transocean Inc., Pride International and Noble Corp.,<sup>29</sup> also settled in what was the first large-scale industry sweep resulting in multiple concurrent DOJ and SEC settlements. The settlements also mark the first time the SEC and the DOJ have charged companies with FCPA violations for their authorization of reimbursements to contractors that subsequently reimbursed another subcontractor for improper payments. The Panalpina cases illustrate the expansive jurisdictional reach of the FCPA to those that are (a) non-US companies, (b) doing business outside the United States, and (c) not affiliates of a US issuer.<sup>30</sup>

*United States v. Technip*, no. 10-CR-439 (S.D. Tex., 2010):

The US-charged Technip, a Paris-based engineering and service provider for the oil and gas industry, with a 10-year bribery scheme to win contracts for a consortium seeking to expand the Bonny Island liquefied natural gas facility in Nigeria.<sup>31</sup> US authorities exerted jurisdiction based on the company's trading of American depository receipts on the New York Stock Exchange between 2001 and 2007, as well as its use of New York banks to route payments. The SEC brought books and records charges against Technip based on consortium group records that Technip maintained and which documented how the company paid the bribes (characterized as "consulting" and "service" fees) to Nigerian officials through UK and Japanese intermediaries. Under the settlement with the DOJ and SEC, Technip agreed to pay US\$338

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<sup>28</sup> *United States v. Carson*, no. 09-CR-00077 (C.D. Cal. 2009); *United States v. O'Shea*, no. 09-CR-00629 (S.D. Tex. 2010).

<sup>29</sup> David Voreacos and Laurel Brubaker Calkins, Bloomberg, 5 November 2010, "Shell Bribes among 'Culture of Corruption,' Panalpina Admits" [www.businessweek.com/news/2010-11-05/shell-bribes-among-culture-of-corruption-panalpina-admits.html](http://www.businessweek.com/news/2010-11-05/shell-bribes-among-culture-of-corruption-panalpina-admits.html).

<sup>30</sup> Steptoe & Johnson, 29 November 2010, "Resolution of Panalpina and Related Cases Yields Significant Penalties, New Enforcement Theories," [www.steptoe.com/publications-newsletter-27.html](http://www.steptoe.com/publications-newsletter-27.html).

<sup>31</sup> Samuel Rubinfeld, *Wall Street Journal*, 6 December 2010, "Former KBR Consultant Pleads Guilty to Conspiring to Violate the FCPA". <http://blogs.wsj.com/corruption-currents/2010/12/06/former-kbr-consultant-pleads-guilty-to-conspiring-to-violate-fcpa/>.

million in criminal penalties and disgorgement of profits.<sup>32</sup> Other consortium partners, including an Italian, Japanese, and UK company as well as a former Halliburton subsidiary, collectively paid fines and disgorgement of over US\$1 billion. Technip also signals the continuing trend in cooperation. US authorities recognized the assistance they received from France, the UK, Switzerland, Italy, and a number of African and Asian countries.<sup>33</sup>

*United States v. Innospec*, no. 10-CR-061-ESH (D.D.C. 2010):

On 18 March 2010, Innospec settled over a dozen criminal charges brought by the US and UK governments. Innospec was charged for paying kickbacks to former Iraqi government officials under the UN Oil-for-Food program. To settle the charges brought by the DOJ and the SEC, the company agreed to pay more than US\$14 million in criminal fines, disgorge more than US\$11 million in profits to the SEC, and hire an independent compliance monitor for three years. Innospec also agreed to pay almost US\$13 million to the UK Serious Fraud Office.<sup>34</sup> The British action arose as a result of a referral from the DOJ, illustrating the increasing multi-lateral coordination among enforcement agencies.<sup>35</sup>

**Article 17: Embezzlement, misappropriation or other diversion of property by a public official**

*United States v. Ryan*, no. 09-MJ-00006 (D.D.C. 2009):

Bobbie Cyana Ryan, a former employee of the United States Military Academy, pled guilty on 28 October 2009 for her scheme to defraud and embezzle funds from the United States government by authorizing approximately US\$2.9 million in payments from the United States Military Academy to a bogus corporation she controlled. On 23 March 2010, Ryan was sentenced to 46 months in prison followed by 36 months of supervised release and ordered to pay restitution. The charges included devising a scheme to defraud and transmitting funds in interstate commerce for the purpose of executing the fraud scheme; embezzling and converting government funds; and executing a financial transaction with criminally derived funds.

**Article 23: Laundering of proceeds of crime.**

*Texas v. Colyandro, et al.*, no. D1DC-5900725 (Travis County, Texas 2010):

Tom DeLay, a former US House of Representatives majority leader, was convicted of money laundering and conspiracy to commit money laundering on 24 November 2010. The charges stemmed from a scheme to channel corporate contributions to Republican candidates in 2002 Texas legislative races. DeLay was sentenced to three years in prison and ten years of probation following his prison term.

*United States v. Cockerham et al.*, no. 07-CR-00511 (W.D. Tex. 2007):

John Cockerham, a former major in the United States Army, pled guilty to conspiracy, bribery, and money laundering related to contracts awarded during the Iraq war. Cockerham received more than US\$9 million in bribery proceeds. More than US\$1.4 million of the bribery proceeds were funneled through his wife and more than US\$3 million were funneled through his sister in order to avoid detection. John Cockerham was sentenced to 210 months in prison and 36 months of supervised release, and ordered to pay US\$9.6 million in restitution. His wife, Melissa Cockerham, was sentenced to 41 months in prison and 36 months of supervised release, and ordered to pay US\$1.4 million in restitution. His sister, Carolyn Blake, was sentenced to 70 months in prison and 36 months of supervised release, and ordered to pay US\$3.1 million in restitution. His niece, Nyree Pattaway, was sentenced to 12 months and 1 day in prison, for her help in concealing the money-laundering scheme.

## 2. Areas with deficiencies

There are no significant deficiencies worth mentioning. However, comments by a federal judge during the sentencing of a congressional staffer ensnared in the Abramoff scandal poignantly summarize a third area for concern: “There are three or four congressmen lurking out there who will never see the light of day for these activities, and we’re blaming the staffers.... The people that really benefitted from this scheme, with one exception, don’t appear in front of me.” The judge observed that efforts to hold senior public officials

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<sup>32</sup> SEC press release, “SEC Charges Technip with FCPA Violations. Technip to Pay \$338 Million to Settle SEC and DOJ Charges; Brings Total Sanctions Against Joint Venture Partners to \$917 Million,” (28 June 2010) available at [www.sec.gov/news/press/2010/2010-110.html](http://www.sec.gov/news/press/2010/2010-110.html).

<sup>33</sup> Lucinda Low and Brittany Prelogar, Steptoe & Johnson, 15 July 2010, “International Law Advisory—French Companies Prepare to Pay Hundreds of Millions to US Authorities in Foreign Corruption Matters,” [www.steptoec.com/publications-7001.html](http://www.steptoec.com/publications-7001.html).

<sup>34</sup> DOJ press release, “Innospec Inc. Pleads Guilty to FCPA Charges and Defrauding the United Nations; Admits to Violating the US Embargo Against Cuba,” (18 March 2010) available at [www.justice.gov/opa/pr/2010/March/10-crm-278.html](http://www.justice.gov/opa/pr/2010/March/10-crm-278.html).

<sup>35</sup> *Id.*

accountable for their alleged involvement in publically reported<sup>36</sup> bribery do not meet public expectations. Indeed, the stipulated facts supporting Abramoff's guilty plea identify, though not by name, at least four congressmen but only one, Robert Ney, was successfully prosecuted. 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 who must be investigated and prosecuted with equal, if not more, vigor than their subordinates. The US government must ensure that prosecution of senior public officials suspected of corruption-related offences is a top priority.

More cooperation between the government and private sector is needed to address gatekeeper issues. In addition, the United States has not sufficiently adopted regulatory reporting requirements addressed to dealers of precious metals, stones, or jewels to ensure compliance with AML laws. Currently, dealers of precious metals, stones, or jewels are not subject to customer identification, record-keeping, or account monitoring requirements.<sup>37</sup>

## IV. Recent developments

First, *Skilling v. United States* may have stripped the US government of a key tool to combat corruption by domestic public officials. It may be possible for corrupt officials to develop schemes that offend public integrity but, at the same time, do not violate US criminal laws due to a narrowing definition of "bribery."

Second, the Dodd-Frank Act, passed by Congress in 2010, contains new provisions requiring the SEC to pay monetary awards of 10 percent to 30 percent to persons who voluntarily provide the SEC with original information about securities laws violations that leads to successful enforcement action resulting in recovery of more than US\$1 million.

Dodd-Frank will also require companies in the oil, gas, and natural resources sector to disclose more information on payments made to governments. It will also require disclosure of corporate involvement in the manufacture, mining, or final-end use of certain minerals defined as "conflict minerals" or other minerals that the US Secretary of State has determined to be financing conflict in the Democratic Republic of the Congo.

## V. 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.<sup>38</sup>

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, 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

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<sup>36</sup> See, for example, Carrie Johnson and Del Quentin Wilber, "Former Abramoff Associate Is Arrested: Indictment Charges Fraud, Conspiracy," *Washington Post* (9 Sept 2008), [www.washingtonpost.com/wp-dyn/content/article/2008/09/08/AR2008090801302.html](http://www.washingtonpost.com/wp-dyn/content/article/2008/09/08/AR2008090801302.html); Jeffery Smith, "The DeLay-Abramoff Money Trail: Nonprofit Group Linked to Lawmaker Was Funded Mostly by Clients of Lobbyist," *Washington Post* (31 Dec. 2005), [www.washingtonpost.com/wp-dyn/content/article/2005/12/30/AR2005123001480.html](http://www.washingtonpost.com/wp-dyn/content/article/2005/12/30/AR2005123001480.html); Susan Schmidt, "Tribal Grant Is Being Questioned: Senator Who Had Dealings With Lobbyist Abramoff Pushed for Award," *Washington Post* (1 Mar. 2005), at A03, available at [www.washingtonpost.com/wp-dyn/articles/A61436-2005Feb28.html](http://www.washingtonpost.com/wp-dyn/articles/A61436-2005Feb28.html).

<sup>37</sup> 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](http://www.imf.org/external/pubs/ft/scr/2010/cr10253.pdf).

<sup>38</sup> *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).

the US Constitution.<sup>39</sup> 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.”<sup>40</sup> 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.

#### *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

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<sup>39</sup> See *Citizens United v. Federal Election Commission*, 130 S.Ct. 876 (2010).

<sup>40</sup> 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](http://www.oecd.org/dataoecd/7/15/47628703.pdf).



and exerted enough control.<sup>41</sup> 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.<sup>42</sup> 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.<sup>43</sup> The administration will advocate for legislation that will require the disclosure of meaningful beneficial ownership information for corporations at the time of company formation.<sup>44</sup> TI-USA welcomed the US Action Plan.

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<sup>41</sup> The FCPA Blog, 10 May 2011, "Just In: All Lindsey Defendants Convicted On All Counts," [www.fcpcblogger.com/blog/2011/5/10/just-in-all-lindsey-defendants-convicted-on-all-counts.html](http://www.fcpcblogger.com/blog/2011/5/10/just-in-all-lindsey-defendants-convicted-on-all-counts.html).

<sup>42</sup> 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](http://www.imf.org/external/pubs/ft/scr/2010/cr10253.pdf).

<sup>43</sup> The Open Government Partnership, "National Action Plan for the United States of America," 20 September 2011.

<sup>44</sup> *Id.*

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