

United States Efforts to Implement Article 12

The three main objectives of Article 12--to address private sector corruption, to improve preventive and monitoring functions in the private sector through accounting and auditing standards, and, where appropriate, to introduce sanctions for non-compliance--are important elements of the UN Convention against Corruption (UNCAC), and part of what makes the Convention innovative. The United States recognizes that the successful implementation of various portions of Article 12 requires a proactive approach to corruption within the private sector, including through close cooperation and partnership with various private sector actors, ranging from corporate leaders to corporate whistleblowers. The following provides some examples of the necessary proactive measures taken by the U.S. government, which includes opening the lines of communication between government and businesses, as well as promoting the development of guidance, standards, and procedures designed to safeguard the integrity of private sector entities.

- For the benefit of the private sector, the U.S. Securities and Exchange Commission (SEC) describes and publishes information on its website to increase awareness of its diligent pursuit of books and records violations (<http://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml>). In addition to information about cases, the SEC's website features a "spotlight" page with information and resources on the Foreign Corrupt Practices Act (FCPA), which is the U.S. legislation on bribery of foreign public officials (<http://www.sec.gov/spotlight/fcpa.shtml>).
- In June of 2011, the U.S. Department of Commerce's Bureau of Industry and Security published "Compliance Guidelines: How to Develop an Effective Export Management and Compliance Program and Manual." These guidelines assist companies in establishing, or enhancing, an export management and compliance program (EMCP). The guidelines promote good export compliance practices, including recommendations related to codes of conduct and identifying and preventing conflicts of interest (http://www.bis.doc.gov/complianceand enforcement/emcp_guidelines.pdf).
- For the benefit of the private sector, the Department of Justice (DOJ) has a comprehensive website on the FCPA that includes a useful one-page description of the statute, a "Lay-Person's Guide to the FCPA", which summarizes the anti-bribery provisions of the FCPA in more detail, the legislative history behind the law, and links to specific enforcement actions (<http://www.justice.gov/criminal/fraud/fcpa>). In addition, certain entities can request from the DOJ an opinion of the Attorney General as to whether certain specified, prospective--not hypothetical--conduct conforms with the DOJ's present enforcement policy regarding the anti-bribery provisions of the FCPA (<http://www.justice.gov/criminal/fraud/fcpa/docs/frgncrpt.pdf>).
- The U.S. government encourages business entities engaged in international business to develop comprehensive corporate compliance programs that detect and prevent bribery.

These compliance programs include establishing procedures to prevent the payment of bribes, conducting internal investigations when allegations of bribery are brought to management's attention, and, when appropriate, voluntarily disclosing to the government any bribery uncovered as a result of their investigation. Through their enforcement actions, the DOJ and the SEC have identified the elements of a rigorous anti-corruption compliance code, standards, and procedures designed to detect and deter violations of the FCPA and other applicable anti-corruption laws.

- The U.S. government seeks to increase awareness in the private sector about FCPA books and records violations through conferences and other public events on accounting and internal controls. These events include business roundtables hosted by the U.S. Department of Commerce (DOC), the DOJ, and the SEC where companies discuss their views and experiences with the FCPA and conferences where DOJ and SEC staff identify problematic conduct and red flags of possible violations. Senior DOJ leadership and the SEC's Enforcement Division have also met with members of corporate compliance organizations, nongovernmental organizations, and members of civil society to discuss the enforcement of the FCPA and how to effectively provide guidance regarding the FCPA. DOC officials also participate in numerous seminars and conferences on corruption, the FCPA, and related corporate compliance issues sponsored by professional associations and industry groups, many of which are attended by outside and in-house counsel representing small and medium enterprises (SMEs). The DOC also provides information to companies through a number of U.S. and international publications designed to assist firms in complying with anti-corruption laws. For example, particularly helpful for SMEs is the Good Practice Guidance on Internal Controls, Ethics, and Compliance, which was recently issued by the Organization for Economic Cooperation and Development (OECD) and was developed and agreed upon by the United States and other countries that are parties to the OECD Antibribery Convention. The DOC has also included a new anticorruption section in U.S. Foreign Commerce Service Country Commercial Guides, (http://export.gov/about/eg_main_016806.asp), including FCPA information from the Lay-Person's Guide and the OECD Good Practice Guidance.
- Several U.S. government agencies outline criteria for industry-specific compliance programs that are tailored to industry-specific regulations and good practices and include recommendations regarding codes of conduct and systems to identify and prevent conflicts of interest.
 - For example, the U.S. Department of Health and Human Services' (HHS) Office of Inspector General has developed a series of voluntary compliance program guidance documents directed at various segments of the health care industry, such as hospitals, nursing homes, third-party billers, and durable medical equipment

suppliers, to encourage the development and use of internal controls to monitor adherence to applicable statutes, regulations, and program requirements. HHS also provides free training for health care providers, compliance professionals, and attorneys on the realities of Medicare and Medicaid fraud and the importance of implementing an effective compliance program (<http://oig.hhs.gov/compliance/101/index.asp>).

- Since its enactment in 1962, 18 U.S.C. § 207 has remained the primary source of restrictions that may limit the activities of individuals after they leave government service (or after they leave certain high-level positions). The purpose of this statute is to prevent unfair use (or the appearance of unfair use) of prior government employment to influence government action on behalf of another person or organization.
 - The U.S. Office of Government Ethics (OGE) has published guidance concerning post-employment restrictions for employees of the executive branch – and, by extension, those private sector employers who may hire them – as well as all of the exceptions to the restrictions (<http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&sid=f5a750dc9c1e675ff404e5e2757915ac&rgn=div5&view=text&no-de=5:3.0.10.10.13&idno=5>). The OGE also publishes a variety of resources to educate executive branch employees about the post-government restrictions. These resources include pamphlets, brochures, and web-based training (<http://www.oge.gov/Education/Education-Resources-for-Ethics-Officials/Resources/Resources/>). The OGE’s guidance also addresses the ethical requirements that apply to employees even before they leave government, i.e., while they are still seeking future employment (<http://www.oge.gov/DisplayTemplates/ModelSub.aspx?id=1456> and <http://www.oge.gov/Education/Education-Resources-for-Ethics-Officials/Resources/Understanding-the-Revolving-Door--How-Ethics-Rules-Apply-to-Your-Job-Seeking-and-Post-Government-Employment-Activities/>).
 - In addition, section 847 of the National Defense Authorization Act for FY 2008, Public Law 110181, requires a selected category of senior Department of Defense (DoD) acquisition officials to seek a post-employment DoD ethics opinion letter before accepting compensation from a DoD contractor. The ethics officials are required to issue the written opinion letter within 30 days after receiving the request. DoD is required to maintain copies of these opinion letters in a centralized database/repository. The Inspector General is required to perform periodic reviews to ensure that written opinions are being provided and retained in accordance with the requirements of this section. Also, defense contractors are required, prior to compensating a former DoD official, to determine that the former DoD official has sought and received (or has not received after 30 days of seeking) a written opinion from the appropriate ethics counselor.

- The United States is making important efforts to promote domestic transparency in the natural resources sector through cooperation with private sector partners.
 - For example, in 2011, as part of its Open Government National Action Plan for the Open Government Partnership, the United States committed to join the Extractive Industries Transparency Initiative (EITI). Under this voluntary framework, participating governments disclose their revenues from oil, gas, and mining to an independent reconciler, while extractive sector companies operating in that country make parallel disclosures regarding payments they make to the government. These disclosures are then independently reconciled and publicly reported. The U.S. Department of Interior is currently working with members of industry, as well as civil society, on implementation, and recently announced the establishment of a national committee to guide and oversee implementation of EITI.
 - In addition, Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act requires companies listed on U.S. stock exchanges that engage in the commercial development of oil, natural gas, or minerals to disclose on a project-by-project basis payments they make to the U.S. and foreign governments for natural resource extraction (<http://www.sec.gov/rules/final/2012/34-67717.pdf>). These two complementary initiatives set a new global standard for transparency in the extractive industries.
- The United States has taken several important steps over the last decade -- including through the passage of landmark legislation -- to improve the maintenance of books and records, financial statement disclosures, and accounting and auditing standards. For example, enacted in July 2002, the Sarbanes–Oxley Act is a U.S. federal law that established enhanced standards for all U.S. publicly traded company boards, management and public accounting firms. A reaction to a number of major corporate and accounting scandals, the law led to the creation of a new, quasi-public agency, the Public Company Accounting Oversight Board, charged with overseeing, regulating, inspecting, and disciplining accounting firms in their roles as auditors of public companies. The act also covers issues such as auditor independence, corporate governance, internal control assessment, and enhanced financial disclosure. It also defines the codes of conduct for securities analysts and requires disclosure of knowable conflicts of interest. In addition, it describes specific criminal penalties for manipulation, destruction or alteration of financial records or other interference with investigations, while providing certain protections for whistleblowers.
- The Dodd–Frank Wall Street Reform and Consumer Protection Act, a U.S. federal statute that was signed into law in July 2010, contains several corporate governance-related provisions. In particular, the act significantly provides financial incentives for corporate

whistleblowers, expressly prohibits retaliation by employers against whistleblowers, and provides them with a private cause of action in the event that they are discharged or discriminated against by their employers in violation of the act. It also imposes greater transparency requirements, particularly in the energy and mining industries. The legislation is expected to affect every financial institution that operates in the United States, many that operate from outside the United States, as well as a large number of multinationals and commercial companies. As such, effective enforcement of the Dodd-Frank Act could have an impact on preventing corruption in the private sector by facilitating a more strictly regulated, transparent, and accountable global financial environment.

- The Financial Fraud Enforcement Task Force was created by President Obama in November 2009. Employing both enforcement and preventive actions, it is the largest coalition ever created to confront fraud in the private sector. The Task Force is directed to use the full criminal and civil enforcement resources of the member departments and agencies: (1) to investigate and prosecute financial crimes and other violations relating to the current financial crisis and economic recovery efforts; (2) to recover the proceeds for such crimes and violations; (3) to address discrimination in the lending and financial markets; (4) to enhance coordination and cooperation among federal, state, and local authorities responsible for the investigation and prosecution of financial crimes and violations; and (5) to conduct outreach to the public, victims, financial institutions, nonprofit organizations, state and local governments and agencies, and other interested partners to enhance detection and prevention of financial fraud schemes. The Task Force's website (www.StopFraud.gov) serves as a one-stop site for American consumers to learn how to protect themselves from fraud and to report fraud wherever — and however — it occurs. The Task Force's First Year Report (<http://www.stopfraud.gov/docs/FFETF-Report-LR.pdf>) outlines the accomplishments of the Task Force, including internal governmental coordination and training, and outreach to the public, victims, financial institutions, nonprofit organizations, state and local governments and agencies, and other interested parties to enhance detection and prevention of financial fraud schemes.
- Since November 2009, the U.S. Department of the Treasury has engaged with private and public sector stakeholders, as well as members of the U.S. Congress, to find a legislative solution to make meaningful beneficial ownership information available to law enforcement in the company formation process. In the U.S. Senate, this culminated in the August 2011 introduction of S. 1483, the "Incorporation Transparency and Law Enforcement Assistant Act", which — if the bill were to become law — would require the disclosure of meaningful beneficial ownership information during the company formation process. In addition, on November 14, 2011, members of the U.S. House of Representatives introduced H.R. 3416, the "Incorporation Transparency and Law

Enforcement Assistance Act,” which is largely similar to S.1483 in what it would require (if the bill were to become law).

- U.S. law explicitly disallows tax deductibility of illegal bribes for all tax purposes. Internal Revenue Service (IRS) publications include informational booklets written by the IRS to provide private sector taxpayers detailed guidance on these issues. IRS Publication 535, “Business Expenses,” and several other IRS Publications identify illegal bribes as nondeductible expenses.