Facilitation payment under the Foreign Corrupt Practices Act (FCPA) of the United States and its effect on corruption in Nigeria

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ABSTRACT

Corruption in international business has become rampant but is frequently ignored. Now, the U.S. Foreign Corrupt Practices Act of 1977 ("FCPA") generally prohibits U.S. companies and citizens, foreign companies listed on a U.S. stock exchange, or any person acting while in the United States, from corruptly paying or offering to pay, directly or indirectly, money or anything of value to a foreign official to obtain or retain business (the "Anti bribery Provisions"). However, the FCPA exempts “facilitation payments”, which are usually small payments that are designed to get a foreign official to perform a non-discretionary function. Facilitation payments are generally prohibited in the domestic laws of countries where they are paid. Although, some countries allow the payment of small bribes to foreign officials to access services. There is however a thin line between bribery and the so-called facilitation payment and this has become a conundrum in the international anti-corruption arena. This paper shall discuss the impact of the FCPA in Nigeria and how facilitation payments breeds corruption and argues that even though the United States allows for facilitation payments thereby protecting US companies, this practice has however proved burdensome on developing countries like Nigeria who is already grappling with corruption because companies tend to go outside the intended meaning of this exception and this practice should not be encouraged.

Keywords: Nigeria, corruption, bribe, FCPA, facilitation payment.

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INTRODUCTION

Facilitation payments debate is progressively taking over issues in the anti-corruption world as countries execute and implement laws designed to combat corruption. This has seen to the creation of two schools of thought; some experts take a tough stance on facilitation payments, clearly linking such payments to corruption and prohibiting them in any form while others view it as a gray area of corruption, making exceptions in individual cases and under certain circumstances.

Corruption is so widespread that each country has developed its own terminology to describe these practices; egunje in Nigeria, arrego in Philippines, baksheesh in Egypt, dash in Kenya, and now facilitation payment which is yet another form of corruption. All these phrases or slangs as it were, are used to refer to bribe such as money or a favor, offered or given to a person in a position of trust to influence that person's views or conduct. Corruption is not a novel concern in the world today, it is an everyday occurrence in countries throughout the world, whether developed or under developed. Corruption has become a global phenomenon and no country is completely corrupt free. However, corruption is apparent in some countries than others because those countries with less corruption have learnt to manage it better than others by putting the necessary checks and balances in place and curbing the opportunities of corruption while others have either not figured corruption out or lack the political will to do same.
The use of public power and resources in a manner that advances individual, factional, ethnic, religious or other limited interests at the expense of more broad based social, national or global needs is corruption because power and public resources are appropriated towards private purposes and gains. Theft, bribery, extortion, patronage, nepotism, and other practices grouped together as corruption (Waziri, 2011).

The United States have found ways of curbing corruption not only within the United States but also abroad and it did that by enacting the Foreign Corrupt Practices Act of 1977, as amended hereinafter referred to as FCPA. FCPA addresses conduct that largely occurs outside the sovereignty of the United States. It was enacted for the purpose of making it unlawful for certain classes of persons and entities to make payments to foreign government officials to assist in obtaining or retaining business but allows for exceptions called facilitation payments that has in turn contributed to grand corruption in Nigeria because most of these companies step outside the purview of what is regarded as facilitation payment under the FCPA.

Since 1977, the anti-bribery provisions of the FCPA have applied to all U.S. persons and certain foreign issuers of securities. What this means is that the FCPA also requires companies whose securities are listed in the United States, to meet its accounting provisions. Facilitation payment is the act of giving and receiving a thing of small value, to persuade a public office to do or omit to do something that they are otherwise obligated to perform, to the benefit of the person giving the thing of value or to a third party.

FCPA have long stirred up lot of discussions with its facilitation payment exception, an exception to the general prohibition of bribing government officials of other countries. This exception is unusual among international anti corruption laws because it makes it difficult to determine the exact parameters in order to distinguish between a bribe and a facilitation payment. An example is where a government official is offered money or goods to expedite the performance of an already existing action. Even though facilitation payment is an acceptable legal practice in the United States, it should however be seen as a form of bribery and should neither be demanded nor paid. Bribery is unanimously criminalized and as such facilitating payments would seem to be illegal under any domestic law. Recognizing the ills of facilitation payments, Brazil, Mexico and Russia have laws that expressly prohibit it.

In other to address that problem, in its 2009 Recommendation for Further Combating Foreign Bribery, the Organization for Economic Co-operation and Development (“OECD”) recommended that its member countries take steps to discourage companies from making facilitating payments and periodically review their policies and approaches in order to combat these payments. The OECD noted that these payments have a corrosive effect on economies and are frequently illegal in the countries where they are made. The OECD also included in its best practice guidance for companies, the maintenance of an ethics and compliance program designed to prevent foreign bribery in the form of facilitating payments.

A recent 2015 survey conducted by the FCPA blog highlights common attitudes towards facilitation payments. The one-question anonymous survey, conducted over a four-day period revealed that almost 65% of respondents represent organizations that do not allow facilitation payments, but 23.8% work for organizations that do sometimes allow such payments. What this survey reveals is that there is definitely a growing community kicking against facilitation payment.

This paper shall commence with a brief introduction to the subject matter followed by the legal framework for corruption in Nigeria. The third part analyzes the Foreign Corrupt Practices Act (FCPA) and the fourth part looks at, in its entirety facilitation payments under the Foreign Corrupt Practices Act (FCPA). The fifth part distinguishes the term gift from bribe and facilitation payment and the sixth part discusses the intersection of Nigerian Law and Foreign Corrupt Practices Act (FCPA) and finally my conclusion.

METHODOLOGY

The research methodology for this paper involved library research and cases. In order to develop the analysis, the author looked at the present corruption legal framework in Nigeria, which included domestic, regional and international framework and the intersection between them and the Foreign Corrupt Practices Act of the United States as it relates to facilitation payment. With the use of benchmarking surveys and cases on facilitation payment as compiled by Trace International Inc, a non-profit membership association, it was understood that facilitation payment is indeed bribery and the fact that, the majority of FCPA prosecutions have been related to corrupt payments to Nigerian government officials.

LEGAL FRAMEWORK FOR CORRUPTION IN NIGERIA

Nigeria has a broad framework for corruption on the domestic, regional and international level that if properly

3 Id.
4 http://www.traceinternational.org/facilitation-payments-no-longer-business-as-usual/
implemented will go a long way in curbing corruption. However none of these domestic laws out rightly criminalized facilitation payments rather, they focus on domestic bribery and corruption. Domestic provisions against corruption is contained in the Nigerian Constitution, Code of Conduct Act, Criminal Code Act, Independent Corrupt Practices and Other Related Offences Commission Act, Economic and Financial Crimes Act, Money Laundering (Prohibition Act) and Advanced Fee Fraud and Fraud Related Offences Act. At the regional level, Nigeria is signatory to Economic Community of West African States (ECOWAS) Treaty on Exchange of Information on Criminal Matters and the African Convention on Prevention and Combating Corruption. At the international level, Nigeria is also a signatory to the United Nations Convention against Corruption (UNCAC).

**Domestic legislations against corruption**

**The Nigerian 1999 Constitution**

Here sections of the Constitution that relate to corruption survey will be pointed out. The Nigerian 1999 Constitution contains provisions aimed at preventing corruption in Nigeria, Section 15(5) of the 1999 Constitution under the fundamental objectives and directive principles of state policy require the state to abolish corrupt practices and abuse of power. Similarly, section 13 of the same Constitution states that all organs of the government are required to conform to and observe the provisions of the chapter on fundamental objectives and directive principles of state policy.

On declaration of assets and liabilities, Section 140 (1) and Section 185 (1) states that a person elected to the office of President shall not begin to perform the functions of that office until he has declared his assets and liabilities as prescribed in the Constitution and he has taken and subscribed the Oath of Allegiance and the oath of office prescribed in the Seventh Schedule to this Constitution. Similarly, a person elected to the office of the Governor of a State shall not begin to perform the functions of that until he has declared his assets and liabilities as prescribed in the Constitution and has subsequently taken and subscribed the Oath of Allegiance and oath of office prescribed in the Seventh Schedule to the Constitution. Similarly, section 149 and Section 194 provides for asset declaration for a Ministers and Commissioners respectively.

On gifts and benefits, the fifth schedule, part 1, Section 6 of the Constitution states that a public officer shall not ask for or accept property or benefits of any kind for himself or any other person on account of anything done or omitted to be done by him in the discharge of his duties. The section goes further the state that “for the purposes of sub-paragraph (1) of this paragraph, the receipt by a public officer of any gifts or benefits from commercial firms, business enterprises or persons who have contracts with the government shall be presumed to have been received in contravention of the said sub-paragraph unless the contrary is proved”. A public officer shall only accept personal gifts or benefits from relatives or personal friends to such extent and on such occasions as are recognized by custom, provided that any gift or donation to a public officer on any public or ceremonial occasion shall be treated as a gift to the appropriate institution represented by the public officer and accordingly, the mere acceptance or receipt of any such gift shall not be treated as a contravention of this provision.

On bribing public officers and the abuse of office, Sections 8, 9 and 10 of the fifth schedule, part 1 state that no persons shall offer a public officer any property, gift or benefit of any kind as an inducement or bribe for the granting of any favor or the discharge in his favor of the public officer's duties. A public officer shall not do or direct to be done, in abuse of his office, any arbitrary act prejudicial to the rights of any other person knowing that such act is unlawful or contrary to any government policy. A public officer shall not be a member of, belong to, or take part in any society the membership of which is incompatible with the functions or dignity of his office.

On the issue of punishment for corrupt practices, Section 18(1), part 1, schedule 5 state that where the Code of Conduct Tribunal finds a public officer guilty of contravention of any of the provisions of this Code it shall impose upon that officer any of the punishments specified under sub-paragraph (2) of this paragraph and such other punishment as may be prescribed by the National Assembly. Sub-paragraph (2) of this paragraph states that the punishment which the Code of Conduct Tribunal may impose shall include any of the following: vacation of office or seat in any legislative house, as the case may be; disqualification from membership of a legislative house and from the holding of any public office for a period not exceeding ten years; and seizure and forfeiture to the State of any property acquired in abuse or corruption of office.

Even though the Constitution has done a fantastic job in promulgating provisions that will help in preventing corruption, the Constitution still contains some structural weaknesses. The first issue with the Constitutional provision on corruption is in section 15(5) where the Constitution failed to enumerate what it means by corrupt practices, because of the complexities associated with corruption, it has been interpreted and perceived differently by individuals. Hence, what one party may perceive as corruption may not be corruption to another party. Therefore, the failure of the Constitution to state what its

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7 Constitution, fifth schedule, part 1, Art. 6(3) (1999) (Nigeria).
interpretation of corrupt practices is a gap that needs to be addressed.

The author has decided to develop this analysis as to whether the National Assembly has legislative powers over anti corruption statutes according to the 1999 Nigerian Constitution because there have been arguments in the past as to whether the National Assembly had legislative powers over anti corruption statutes or not. The general legislative powers of the National Assembly are contained in section 4 of the 1999 Constitution, the section states that the legislative powers of the Federal Republic of Nigeria shall be vested in the National Assembly which consists of the Senate and the House of Representatives. The National Assembly shall have powers to make laws for the peace, order and good government of the Federation or any part thereof with respect to any matter included in the Exclusive Legislative List set out in Part 1 of the Second Schedule to the Constitution.

Now, the power of the National Assembly to make laws for the peace, order and good government of the Federation with respect to any matter included in the Exclusive Legislative List shall, save as otherwise provided in the Constitution, be to the exclusion of the Houses of Assembly of States. The Constitution does not provide for the sharing of legislative powers between the National Assembly and the Houses of Assembly of States in respect of matters in the Exclusive Legislative List. The Constitution further stated that in addition and without prejudice to the powers conferred by section 4(2), the National Assembly shall have powers to make laws with respect to; any matter in the Concurrent Legislative List set out in the first column of Part II of the Second Schedule to the Constitution to the extent prescribed in the second column opposite thereto and any other matter with respect to which it is empowered to make laws in accordance with the provisions of the Constitution.

Also, Section 4(6) of the Constitution provides that the legislative powers of a state of the federation shall be vested in the House of Assembly of the State which shall have power to make laws for the peace, order and good government of a State or any part thereof with respect to the any matter not included in the Exclusive Legislative List set out in Part I of the Second Schedule to the Constitution and any matter included in the Concurrent Legislative List set out in the first column of Part II to the Second Schedule to the extent prescribed with respect to which it is empowered to make laws in accordance with the provisions of the Constitution.

Due to this confusion, the Supreme Court decided to deliberate as to whether the National Assembly has the constitutional power to legislate on corruption in the light of the federal arrangement in the 1999 Constitution. The

fact in issue before the Court was the constitutionality of the Corrupt Practices and Other Related Offences Act 2000 in the case of Attorney-General of Ondo State v. Attorney-General of the Federation. By an originating summons filed, the plaintiff asked for the following six reliefs:

i. A determination of the question whether or not the Corrupt Practices and Other Related Offences Act, 2000, is valid and in force as a law enacted by the National Assembly and in force in every State of the Federal Republic of Nigeria (including Ondo State).

ii. A determination of the question whether or not the Attorney-General of the Federation (1st defendant) or any person authorized by him can lawfully initiate legal proceedings in any Court of law in Ondo State in respect of any of the criminal offences created by any of the provisions of the said Corrupt Practices and Other Related Offences Act, 2000.

iii. A declaration that the Corrupt Practices and Other Related Offences Act, 2000, is not in force as law in Ondo State.

iv. A declaration that it is not lawful for the Attorney-General of the Federation (1st defendant) or any person authorized by him to initiate legal proceedings in any Court of law in Ondo State in respect of the criminal offences purported to be created by the provisions of the Corrupt Practices and Other Related Offences Act, 2000.

v. An order of perpetual injunction restraining the Federal Government, its functionaries or agencies (including the Independent Corrupt Practices Commission) from executing, applying or enforcing the provisions of the Corrupt Practices and Other Related Offences Act, 2000 in Ondo State whether by interfering with the activities of any person in Ondo State (including any public officer or functionary or officer or servant of the Government of Ondo State) in exercise of powers purported to be conferred by or under the provisions of the said Act or otherwise howsoever.

vi. An order of perpetual injunction restraining the Attorney-General of the Federation including his officers, servants and agents whosoever or howsoever from exercising any of the powers vested in him by the 1999 Constitution of the Federal Republic of Nigeria, or by any other law in respect of any of the criminal offences created by any of the provisions contained in the Corrupt Practices and Other Related Offences Act, 2000.

In resolving the conflict, the Supreme Court referred to and construed relevant provisions of the 1999 Constitution, the Corrupt Practices and Other Related Offences Act, 2000 and the Interpretation Act of 1964. The Court held that where an enactment is in relation to a matter within the enumerated classes of subjects expressly assigned to the National Assembly by section

9 Id. at Art 4(2).
10 Id. at 4(3).
11 Id. at Art 4(7).
12 9 NWLR Pt. 772, 222 (2002).
15(5) and Item 60(a) on the Exclusive Legislative List of the 1999 Constitution. The National Assembly may by that enactment provide for matters which, although are within the legislative, or even executive, competence of the states, are necessarily incidental or ancillary to effective legislation by the National Assembly in relation to that enumerated matter.\textsuperscript{14}

The Court also stated that it is the construction of the constitutional provisions under which powers are allocated to the different governments that determines whether an Act of the Federal or National Government has gone beyond limits to interfere with the affairs of a State in matters reserved to it under the Constitution. The Court further stated that going by the definitions of “State” and “Government” in section 318(1) of the 1999 Constitution, the directive under section 15(5) of the Constitution states that “the State shall abolish all corrupt practices and abuse of government applies to all the three tiers of government”. In that case, the power to legislate in order to prohibit corrupt practices and abuse of power is concurrent and can be exercised by the Federal and State Governments by virtue of section 49(2), 4(4)(b) and 4(7)(c) of the Constitution.\textsuperscript{15}

The Court added that although the power to legislate on the subject of corruption and abuse of office is given to the National Assembly and State House of Assembly, when both exercise the power, the legislation by the National Assembly will prevail by virtue of section 4(5) of the Constitution. Since by virtue of section 4(2) of the 1999 Constitution the National Assembly has the power to make laws for the peace, order and good government of the Federation with respect to any matter included in the Exclusive Legislative List it follows that the National Assembly is empowered to legislate under Item 60(a) of the Exclusive Legislative List for the power to make laws in respect to —any other matter which it is empowered to make laws in accordance with the provisions of this Constitution.

In conclusion, the Court stated that the issue of corruption and abuse of power has become international, it is a declared state policy in Nigeria to combat it and so it has assumed a national issue of high priority which is considered best suited for the National Assembly to be addressed through a federal agency like the ICPC.\textsuperscript{16}

Reading these provisions of the 1999 Constitution together and construed liberally and broadly the Court noted that it can easily be seen that the National Assembly possesses the power both “incidental” and “implied” to promulgate the Corrupt Practices and Other Related Offences Act, 2000, to enable the State, which for this purpose means the Federal Republic of Nigeria, to implement provisions of Item 68 read together with section 15(5) of the Constitution which confers power on the National Assembly to enact the Act.\textsuperscript{17}

\textbf{Code of Conduct Act}

The Code of Conduct Bureau was set up by the Federal Government under the Code of Conduct Bureau and Tribunal Act.\textsuperscript{18} Under Sections 172 and 209 of the Constitution, persons in both Federal and State public services are required to conform to and observe the Code of Conduct. The Code also makes it mandatory for public officers to declare their assets immediately after taking office and at the end of his or her tenure,\textsuperscript{19} it requires a public officer to abstain from putting himself in a position where his personal interests will conflict with his official duties.\textsuperscript{20} It prohibits a public officer, except where he is employed on a part-time basis, from engaging or participating in the management or running of any private business, profession, or trade, except farming.\textsuperscript{21} Even though the Code of Conduct Bureau Act has a broad mandate its enforcement measures have routinely been mostly at the level of asset declaration.

\textbf{Criminal Code Act}

Section 98, Criminal Code Act, Chapter C38, Laws of the Federation of Nigeria 2004 provides for corruption and abuse of office by Nigerian public officials. The Act prohibits demanding and receiving of bribes by public officers, they also penalize persons who either give or offers bribe to public officers and prohibits the activities of agents, relatives and other close associates of public officers who exploit their relationship with such officers to demand or receive gratification either for themselves or any other person. Section 98 generally states that, any public official\textsuperscript{22} who corruptly asks for, receives or obtains any property or benefit of any kind for himself or any other person or bribes, corruptly agrees or attempts to receive or obtain any property or benefit of any kind for himself or any other person is guilty of the felony of official corruption and is liable to imprisonment for seven years.\textsuperscript{23}

\begin{itemize}
  \item[15] Id.
  \item[16] Id.
  \item[17] The Supreme Court also considered the same issue in Chief Olafisoye v Federal Republic of Nigeria, 4NWLR Pt. 864, 580 (2004).
  \item[20] Id at Art. 5.
  \item[21] Id at Art. 6(b).
  \item[22] According to Art 98D of the Criminal Code Act, public official means any person employed in the public service within the meaning of that expression as defined in Art 1(i) or any judicial officer within the meaning of section 98C of this Code.
  \item[23] Id at Art 98(ii).
\end{itemize}
The Criminal Code Act has a very broad mandate that covers explicitly incidences of corruption and bribery and I particularly like the fact that the Act is not asymmetric in nature in that they penalize, exclusively or to a greater extent, the bribe-giver/payer, rather than the bribe-taker, it is important not to underestimate the impact of a clear and vigorous law by making it impartial between giver and taker.

**Independent Corrupt Practices and other Related Offences Commission Act**

For the first time in the history of the Nigeria, the Corrupt Practices Act of 2000 establishes a statutory body answerable to the National Assembly and whose main purpose is fighting corruption. Recognizing that corruption has become pervasive, the Act grants the Independent Corrupt Practices Commission (ICPC) considerable power for investigation, arrest and prosecution of suspected persons. The Act renders both receiving and offering a bribe a criminal offence. It prohibits and prescribes punishment for corrupt practices and other related offences. The Act also established the Independent Corrupt Practices and other Related Offences Commission (ICPC).

Section 6 (a-f) of the Act sets out the duties of the Commission as: To receive and investigate complaints from members of the public on allegations of corrupt practices and in appropriate cases, prosecute the offenders; to examine the practices, systems and procedures of public bodies and where such systems aid corruption, to direct and supervise their review; to instruct, advice and assist any officer, agency, or parastatals on ways by which fraud or corruption may be eliminated or minimized by them; to advise heads of public bodies of any changes in practice, systems or procedures compatible with the effective discharge of the duties of public bodies to reduce the likelihood or incidence of bribery, corruption and related offences; to educate the public on and against bribery, corruption and related offences and to enlist and foster public support in combating corruption.

The ICPC chairman is vested with additional powers, including the power to seize movable property in the custody or control of a bank or financial institution, where the property is the subject matter of any investigation under the Act, the power to obtain information from any person including relatives, associates and their banks suspected of having committed an offence under the Act and the power to make an application to Court to prohibit any person from dealing with any property which is the subject matter of an offence under the Act, where the property is held or deposited outside Nigeria. The Act collectively established and redefined nine offences relating to corrupt practices and abuse of office, among which are: Accepting gratification (section 8); fraudulent acquisition of property (section 12); fraudulent receipt of property (section 13); making a false statement or return (section 16); bribing a public officer (section 8); use of office or position for gratification (section 19); bribery in relation to contracts (section 21); bribery in relation to contracts (section 22) and failure to report bribery transactions (section 23).

**Economic and Financial Crimes Commission Act**

Three years after the establishment of Independent Corrupt Practices Commission (ICPC), the Economic and Financial Crime Commission (EFCC) was established as a law enforcement agency that investigates financial crimes such as advance fee fraud and money laundering under the EFCC (Establishment) Act of 2004. The Commission is empowered to “investigate, prevent and prosecute offenders who engage in money laundering, embezzlement, bribery, looting and any form of corrupt practices, illegal arms deal, smuggling, human trafficking, child labor, illegal oil bunkering, illegal mining, tax evasion, foreign exchange malpractices including counterfeiting of currency, theft of intellectual property and piracy, open market abuse, dumping of toxic wastes, and prohibited goods”. The Commission is also responsible for identifying, tracing, freezing, confiscating, or seizing proceeds derived from terrorist activities. EFCC is host to the Nigerian Financial Intelligence Unit (NFIU), vested with the responsibility of collecting suspicious transactions reports (STRs) from financial and designated non-financial institutions, analyzing and disseminating them to all relevant government agencies and other Financial Intelligent Units all over the world. There is, therefore, no gainsaying that the Nigerian anti-corruption regime is very comprehensive. It covers a wide range of subjects such as institutional issues, definition of applicable offences and rules governing the prosecution and trial of offenders.

**Money Laundering (Prohibition Act)**

The Money Laundering (Prohibition) Act of Nigeria was adopted on 24 March 2004. This Act provides for the repeal of the Money Laundering (Prohibition) Act 2003 and makes comprehensive provisions to prohibit the laundering of the proceeds of a crime or an illegal act; and provides appropriate penalties and expands the

25 Id at Art. 45.
26 Id at Art. 44.
27 Id at Art. 46.
29 Id.
interpretation of financial institutions and scope of supervision of regulatory authorities on money laundering activities, among other things.

**Advance Fee Fraud and Fraud Related Offences Act 2006**

The Advance Fee Fraud and other Fraud Related Offences Act of Nigeria was enacted by the National Assembly on the 5th June 2006. This Act prohibits and punishes certain offences pertaining to Advance Fee Fraud and other fraud related offences and to repeal other Acts related therewith.

**Regional treaties against corruption**

**Economic Community of West African States (ECOWAS) treaty on exchange of information on criminal matters**

The treaty of which Nigeria is a signatory to states that with a view to strengthening national legal instruments on mutual legal assistance, extradition and making them more functional and efficient, all member states shall harmonize their domestic law in accordance with the relevant ECOWAS Conventions on Mutual Assistance in Criminal Matters and Extradition. It further states that member states should undertake to adopt a convention to incriminate and make punishable the most commonly committed crimes in the sub-regional. In essence, this treaty will enable countries gain access to public officials who may seek for refuge in other ECOWAS countries in other to evade prosecution for corruption and other related matter.

**Economic Community of West African States (ECOWAS) protocol on the fight against corruption**

This Protocol on the Fight against Corruption was adopted with the objective of strengthening effective mechanisms to prevent, suppress and eradicate corruption in each of the State Parties through cooperation between the States Parties. The Protocol calls upon States Parties to harmonize their national anti-corruption laws, to adopt effective preventive measures against corruption and to introduce proportionate and dissuasive sanctions. Nigeria is a signatory to this protocol.

**African convention on prevention and combating corruption**

The aim of the convention is to promote and strengthen the development in Africa by each state party. They are required to prevent, detect, punish and eradicate corruption and related offences in the public and private sectors. They should promote, facilitate and regulate cooperation among the state parties to ensure the effectiveness of measures and actions to prevent, detect, punish and eradicate corruption and other related offences in Africa. State parties are expected to coordinate and harmonize the policies and legislation between state parties for the purposes of prevention, detection, punishment and eradication of corruption on the continent. Nigeria became a signatory to this Convention in 2003 and ratified it in 2006.

**International convention against corruption**

**United Nations Convention against Corruption (UNCAC)**

The United Nations Convention against Corruption (UNCAC) is the first legally binding international anti-corruption instrument. In its eight chapters and seventy-one articles, UNCAC obliges its states parties to implement a wide and detailed range of anti-corruption measures affecting their laws, institutions and practices. These measures aim to promote the prevention, criminalization, law enforcement, international cooperation, asset recovery, technical assistance, information exchange, and mechanisms for implementation. The UNCAC requires parties to criminalize a wide range of corrupt acts, including domestic and foreign bribery and related offenses such as money laundering and obstruction of justice. The UNCAC also establishes guidelines for the creation of anti-corruption bodies, codes of conduct for public officials, transparent and objective systems of procurement, and enhanced accounting and auditing standards for the private sector. Nigeria became a signatory to UNCAC in 2003 and went ahead to ratify in 2004.

It is important to note that even though Nigeria has ratified all these treaties and Convention, they are not yet operative because of the legal provision contained in section 12 of the Nigerian 1999 Constitution, which requires the National Assembly to domesticate a treaty, or convention, that is, to formally incorporate the treaty or convention into the domestic legal framework. Basically, the 1999 Constitution stipulates that no treaty shall have the force of law except to the extent such treaties have

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30 Economic Community of West African States (ECOWAS) Treaty on Exchange of Information on Criminal Matters.
been enacted into law by the National Assembly.

This means that the National Assembly may not only refuse to enact a law “domesticating” treaties but can also just give partial consent by excising part of the provisions of the treaties and conventions. In that event, only the part approved by the National Assembly becomes part of the domestic law.34

**ANALYSIS OF THE FOREIGN CORRUPT PRACTICES ACT (FCPA)**

The FCPA prohibits payments (including promises to pay) of anything of value (including favors, perks, etc.) to influence corruptly the discretion of a foreign official to do something in violation of his or her official duty, to obtain, retain, direct business, or to gain any improper advantage.35 The FCPA defines “foreign official” to include: any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.36

As this language makes clear, the FCPA broadly applies to corrupt payments to “any” officer or employee of a foreign government and to those acting on the foreign government’s behalf.37 The FCPA thus covers corrupt payments to low-ranking employees and high-level officials alike.38 The FCPA prohibits payments to foreign officials, not to foreign governments.39

That said, companies contemplating contributions or donations to foreign governments should take steps to ensure that no monies are used for corrupt purposes, such as the personal benefit of individual foreign officials. The FCPA also prohibits indirect payments, as well.40 These provisions can transform acts of a non-U.S. representative, agent or business partner into a potential crime under U.S. law that is attributable to the U.S. party.41 The FCPA exempts —facilitation payments, which are usually small payments that are designed to get a foreign official to perform a non-discretionary function.42 For example, if a company’s goods are being processed slowly through customs, a payment may be allowed to have the goods move more quickly. A payment to have the customs office open on a holiday, however, would not be permitted. Accepted examples of facilitation payments under the FCPA are:43

- i. Obtaining permits, licenses, or other official documents;
- ii. Processing visas and work orders;
- iii. Providing police protection, mail pick-up and delivery;
- iv. Providing phone service, power and water supply;
- v. Loading and unloading cargo, or protecting perishable

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34 The domestication process commences with the signing of the instrument by the designated official. The instrument then goes through some administrative review aimed at identifying any areas of incompatibility with the Constitution or other laws. This task is usually undertaken by the Department of International Law and Treaties at the Federal Ministry of Justice Nigeria. Thereafter, the document may pass through several ministries and government departments whose mandate and activities are relevant to the subject of the Treaty or Convention. At the end of the review process, a legal instrument to enact the provisions of the treaty into law is then presented to the National Assembly for deliberation.

35 FCPA generally prohibits U.S. companies and citizens, foreign companies listed on the U.S. stock exchange, or any person acting while in the United States, from corruptly paying or offering to pay, directly or indirectly, money or anything of value to a foreign official to obtain or retain business (the Anti bribery provisions). The FCPA also requires issuers (any company including foreign companies) with securities traded on a U.S. exchange or otherwise required to file periodic reports with the Securities and Exchange Commission (SEC) to keep books and records that accurately reflect business transactions and to maintain effective internal controls (the books and records and internal control provisions).


38 See Sections 30A(b) and (f )(3)(A) of the Exchange Act, 15 U.S.C. § 78dd-1(b) & (f )(3); 15 U.S.C. §§ 78dd-2(b) & (h)(4), 78dd-3(b) & (f )(4) (facilitating payments exception).

39 Even though payments to a foreign government may not violate the anti-bribery provisions of the FCPA, such payments may violate other U.S. laws, including wire fraud, money laundering, and the FCPA’s accounting provisions.

40 Penalties for violation of the anti-bribery provisions can be significant. The Justice Department can pursue criminal sanctions of up to two million dollars per count for legal entities, with individuals facing fines of up to two hundred and fifty thousand dollars per violation and imprisonment up to five years. (Each payment or act in furtherance of the violation can be considered a separate count or violation). Corporate indemnification is not permitted for fines imposed on individuals. An alternative sanctions schedule is possible. If the violation produced a gain for the offender or a loss for a third party, the maximum fine can be the greater of twice the gross gain or loss. See the Foreign Corrupt Practices Act, United States Code Title 15. Commerce And Trade, Chapter 2b--Securities Exchanges S. F(1) § 78dd-2(g).

41 See 15 U.S.C. § 78dd-1, 78d-2 &78m. The FCPA is jointly enforced by the Department of Justice (DOJ) and the Security and Exchange Commission (SEC). The Justice Department enforces the anti-bribery provisions, while the Securities and Exchange Commission has jurisdiction over the accounting requirements.

42 See the Foreign Corrupt Practices Act, United States Code Title 15. Commerce And Trade, Chapter 2b--Securities Exchanges S. F(1) § 78dd-2(h).

43 Art Aronoff, Senior Counsel, Office of the Chief Counsel for International Commerce, Domestic and International Anticorruption Initiatives.
products; vi. Scheduling inspections associated with contract performance or transit of goods across country.

Violations of the FCPA can lead to civil and criminal penalties, sanctions, and remedies, including fines, disgorgement, and/or imprisonment. For each violation of the anti-bribery provisions, the FCPA provides that corporations and other business entities are subject to a fine of up to $2 million.\(^{44}\) Individuals, including officers, directors, stockholders, and agents of companies, are subject to a fine of up to $250,000 and imprisonment for up to five years.\(^{45}\)

For each violation of the accounting provisions, the FCPA provides that corporations and other business entities are subject to a fine of up to $25 million. Individuals are subject to a fine of up to $5 million and imprisonment for up to 20 years.\(^{46}\) Under the Alternative Fines Act, 18 U.S.C. § 3571(d), courts may impose significantly higher fines than those provided by the FCPA, up to twice the benefit that the defendant obtained by making the corrupt payment, as long as the facts supporting the increased fines are included in the indictment and either proved to the jury beyond a reasonable doubt or admitted in a guilty plea proceeding.\(^{47}\) Fines imposed on individuals may not be paid by their employer or principal.\(^{48}\)

Although only DOJ has the authority to pursue criminal actions, both DOJ and SEC have civil enforcement authority under the FCPA. DOJ may pursue civil actions for anti-bribery violations by domestic concerns (and their officers, directors, employees, agents, or stockholders) and foreign nationals and companies for violations while in the United States, while SEC may pursue civil actions against issuers and their officers, directors, employees, agents, or stockholders for violations of the anti-bribery and the accounting provisions.\(^{49}\) For violations of the anti-bribery provisions, corporations and other business entities are subject to a civil penalty of up to $16,000 per violation.\(^{50}\)

Individuals, including officers, directors, stockholders, and agents of companies, are similarly subject to a civil penalty of up to $16,000 per violation,\(^{51}\) which may not be paid by their employer or principal.\(^{52}\) For violations of the accounting provisions, SEC may obtain a civil penalty not to exceed the greater of (a) the gross amount of the pecuniary gain to the defendant as a result of the violations or (b) a specified dollar limitation. The specified dollar limitations are based on the egregiousness of the violation, ranging from $7,500 to $150,000 for an individual and $75,000 to $725,000 for a company.\(^{53}\) SEC may obtain civil penalties both in actions filed in federal court and in administrative proceedings.\(^{54}\)

### Historical perspective of FCPA

Congress enacted the FCPA in 1977 after revelations of widespread global corruption in the wake of the Watergate political scandal. Securities and Exchange Commission (SEC) discovered that more than four hundred U.S. companies had paid hundreds of millions of dollars in bribes to foreign government officials to secure business overseas.\(^{55}\) SEC reported that companies were using secret “slush funds” to make illegal campaign contributions in the United States and corrupt payments to foreign officials abroad and were falsifying their corporate financial records to conceal the payments.\(^{56}\) Due to this, Congress viewed passage of the FCPA as critical to stopping corporate bribery, which had tarnished the image of U.S. businesses, impaired public confidence in the financial integrity of U.S. companies, and hampered the efficient functioning of the markets.\(^{57}\)

As Congress recognized when it passed the FCPA, corruption imposes enormous costs both at home and abroad, leading to market inefficiencies and instability, sub-standard products, and an unfair playing field for honest businesses.\(^{58}\) By enacting a strong foreign bribery statute, Congress sought to minimize these destructive

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49 DOJ has exercised this civil authority in limited circumstances in the last thirty years.
50 15 U.S.C. §§ 78dd-2(g)(1)(B), 78dd-3(e)(1)(B), 78ff(c)(1)(B); see also 17 C.F.R. § 201.1004 (providing adjustments for inflation).
51 15 U.S.C. §§ 78dd-2(g)(2)(B), 78dd-3(e)(2)(B), 78ff(c)(2)(B); see also 17 C.F.R. § 201.1004 (providing adjustments for inflation).
effects and help companies resist corrupt demands, while addressing the destructive foreign policy ramifications of transnational bribery.59

The FCPA's anti-bribery provisions apply broadly to three categories of persons and entities: (1) “issuers” and their officers, directors, employees, agents, and shareholders; (2) “domestic concerns” and their officers, directors, employees, agents, and shareholders; and (3) certain persons and entities, other than issuers and domestic concerns, acting while in the territory of the United States.60

Issuers

Section 30A of the Securities Exchange Act of 1934 (the Exchange Act), contains the anti-bribery provision governing issuers.61 A company is an “issuer” under the FCPA if it has a class of securities registered under Section 12 of the Exchange Act62 or is required to file periodic and other reports with SEC under Section 15(d) of the Exchange Act.63 In practice, this means that any company with a class of securities listed on a national securities exchange in the United States, or any company with a class of securities quoted in the over-the-counter market in the United States and required to file periodic reports with SEC, is an issuer. A company thus need not be a U.S. company to be an issuer. Foreign companies with American Depository Receipts that are listed on a U.S. exchange are also issuers.64 Officers, directors, employees, agents, or stockholders acting on behalf of an issuer (whether U.S. or foreign nationals), and any co-conspirators, also can be prosecuted under the FCPA.65


Domestic concerns

The FCPA also applies to “domestic concerns.”66 A domestic concern is any individual who is a citizen, national, or resident of the United States, or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship that is organized under the laws of the United States or its states, territories, possessions, or commonwealths or that has its principal place of business in the United States.67 Officers, directors, employees, agents, or stockholders acting on behalf of a domestic concern, including foreign nationals or companies, are also covered.68

Territorial jurisdictions

The FCPA also applies to certain foreign nationals or entities that are not issuers or domestic concerns.69 Since 1998, the FCPA’s anti-bribery provisions have applied to foreign persons and foreign non-issuer entities that, either directly or through an agent, engage in any act in furtherance of a corrupt payment (or an offer, promise, or authorization to pay) while in the territory of the United States.70 Also, officers, directors, employees, agents, or stockholders acting on behalf of such persons or entities

violating the FCPA for bribery of Nigerian officials), Superseding Indictment, United States v. Sapsizian, et al., supra note 8, ECF 32 (charging a French employee of French company traded on a U.S. exchange with violating the FCPA).
69 15 U.S.C. § 78dd-3(a). Foreign companies that have securities registered in the United States or that are required to file periodic reports with the SEC, including certain foreign companies with American Depository Receipts, are covered by the FCPA’s anti-bribery provisions governing “issuers” under 15 U.S.C. § 78dd-1. 70 See International Anti-Bribery and Fair Competition Act of 1998, Pub. L. 105-366, 112 Stat. 3302 (1998); 15 U.S.C. § 78dd-3(a); see also U.S. Dept. of Justice, Criminal Resource Manual § 9-1018 (Nov. 2000) (the Department “interprets [Section 78dd-3(a)] as conferring jurisdiction whenever a foreign company or national causes an act to be done within the territory of the United States by any person acting as that company’s or national’s agent.”). This interpretation is consistent with U.S. treaty obligations. See S. Rep. No. 105-2177 (1998) (expressing Congress’ intention that the 1998 amendments to the FCPA “conform it to the requirements of and to implement the OECD Convention.”); Anti-Bribery Convention at art. 4.1, supra note 19 (“Each Party shall take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory.”).
may be subject to the FCPA’s anti-bribery prohibitions.\textsuperscript{71} The Act also prohibited off the books accounting through provisions designed to “strengthen the accuracy of the corporate books and records and the reliability of the audit process, which constitute the foundations of our system of corporate disclosure”.\textsuperscript{72} In 1988, Congress amended the FCPA to add two affirmative defenses: (1) the local law defense; and (2) the reasonable and bona fide promotional expense defense.\textsuperscript{73} Congress also requested that the President negotiate an international treaty with members of the Organization for Economic Co-operation and Development (OECD) to prohibit bribery in international business transactions by many of the United States’ major trading partners.\textsuperscript{74} Subsequent negotiations at the OECD culminated in the Convention on Combating Bribery of Foreign Officials in International Business Transactions (Anti-Bribery Convention), which, among other things, required parties to make it a crime to bribe foreign officials.\textsuperscript{75}

In 1998, the FCPA was amended to conform to the requirements of the Anti-Bribery Convention. These amendments expanded the FCPA’s scope to: (1) include payments made to secure “any improper advantage”; (2) reach certain foreign persons who commit an act in furtherance of a foreign bribe while in the United States; (3) cover public international organizations in the definition of “foreign official”; (4) add an alternative basis for jurisdiction based on nationality; and (5) apply criminal penalties to foreign nationals employed by or acting as agents of U.S. companies.\textsuperscript{76} The Anti-Bribery Convention came into force on February 15, 1999, with the United States as a founding party.

The FCPA’s anti-bribery provisions contain two affirmative defenses: (1) that the payment was lawful under the written laws of the foreign country (the “local law” defense),\textsuperscript{80} and (2) that the money was spent as part of demonstrating a product or performing a contractual obligation (the “reasonable and bona fide business expenditure” defense).\textsuperscript{81} Because these are affirmative defenses, the defendant bears the burden of proving them.

**FACILITATION PAYMENT AND THE FOREIGN CORRUPT PRACTICES ACT (FCPA)**

Facilitation payments are permitted in United States, Canada, Australia, New Zealand and South Korea but illegal in every country in which they are paid.\textsuperscript{82} As already noted, facilitation payment is an interesting issue in the anti-corruption world and there are debates as to whether facilitation payment can be tagged as corruption or not and this is where its effects on Nigeria becomes very worrisome. I believe facilitation payment within the context of FCPA is a subtle phrase for bribe which promotes petty corruption that gradually builds up to grand corruption because it consist of small payments or gifts made to a person with authority to obtain a favor such as expediting an administrative process, obtaining a permit, license or service.

\textsuperscript{71} 15 U.S.C. § 78dd-3(a).
\textsuperscript{72} S. Rep. No. 95-114, at 7.
\textsuperscript{75} Convention on Combating Bribery of Foreign Public Officials in International Business Transactions art. 1.1, Dec. 18, 1997, 37 I.L.M. 1 [hereinafter Anti-Bribery Convention]. The Anti-Bribery Convention requires member countries to make it a criminal offense “for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.”
\textsuperscript{77} DOJ has criminal FCPA enforcement authority over “issuers” (i.e., public companies) and their officers, directors, employees, agents, or stockholders acting on the issuer’s behalf. DOJ also has both criminal and civil enforcement responsibility for the FCPA’s anti-bribery provisions over “domestic concerns”—which include (a) U.S. citizens, nationals, and residents and (b) U.S. businesses and their officers, directors, employees, agents, or stockholders acting on the domestic concern’s behalf—and certain foreign persons and businesses that act in furtherance of an FCPA violation while in the territory of the United States.
\textsuperscript{78} SEC is responsible for civil enforcement of the FCPA over issuers and their officers, directors, employees, agents, or stockholders acting on the issuer’s behalf.
\textsuperscript{79} There is no private right of action under the FCPA. See, e.g., Lamb v. Phillip Morris, Inc., 915 F.2d 1024, 1028-29 (6th Cir. 1990); McLean v. Int’l Harvester Co., 817 F.2d 1214, 1219 (5th Cir. 1987).
\textsuperscript{80} 80 Section 30A(c)(1) of the Exchange Act, 15 U.S.C. § 78dd-1(c)(1); 15 U.S.C. §§ 78dd-2(c)(1), 78dd-3(c)(1).
\textsuperscript{81} 81 Section 30A(c)(2)(A), (B) of the Exchange Act, 15 U.S.C. § 78dd-1(c)(2); 15 U.S.C. §§ 78dd-2(c)(2), 78dd-3(c)(2).
\textsuperscript{82} \textsuperscript{82}http://www.traceinternational.org/documents/FacilitationPaymentsSurveyResults.pdf.
These foreign companies come in and take advantage of the already porous system in Nigeria and impede the fight against corruption by creating more opportunities for corruption. Most of these foreign companies hide behind the veil of facilitation payment under the FCPA and engage in grand corruption, hence the high fines incurred on them by the Security and Exchange Commission and the argument here is that the FCPA has done little to regulate U.S. companies from going outside the intended meaning of facilitation payment as evident in the case of Nigeria.

The FCPA’s bribery prohibition contains a narrow exception for “facilitating or expediting payments” made in furtherance of routine governmental action.\(^83\) The facilitation payments exception applies only when a payment is made to further “routine governmental action” that involves non-discretionary acts.\(^84\) Examples of “routine governmental action” include processing visas, providing police protection or mail service, and supplying utilities like phone service, power, and water. Routine government action does not include a decision to award new business or to continue business with a particular party.\(^85\) Nor does it include acts that are within an officer’s discretion or that would constitute misuse of an official’s office.\(^86\) Thus, paying an official a small amount to have

\[\text{the power turned on at a factory might be a facilitating payment; paying an inspector to ignore the fact that the company does not have a valid permit to operate the factory would not be a facilitating payment.}\]

Routine governmental actions are actions which are ordinarily and commonly performed by a foreign official in: Obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country; processing governmental papers, such as visas and work orders; providing police protection, mail pickup and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country; providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or actions of a similar nature.\(^87\)

Whether a payment falls within the exception is not dependent on the size of the payment, though size can be telling, as a large payment is more suggestive of corrupt intent to influence a non-routine governmental action. But, like the FCPA’s anti-bribery provisions more generally, the facilitating payments exception focuses on the purpose of the payment rather than its value.\(^88\) For instance, an Oklahoma-based corporation violated the FCPA when its subsidiary paid Argentine customs officials approximately $166,000 to secure customs clearance for equipment and materials that lacked required certifications or could not be imported under local law and to pay a lower-than-applicable duty rate. The company’s Venezuelan subsidiary had also paid Venezuelan customs officials approximately $7,000 to avoid a full inspection of the imported goods.\(^89\)

In another case, three subsidiaries of a global supplier of oil drilling products and services were criminally charged with authorizing an agent to make at least three hundred and seventy eight corrupt payments (totaling approximately $2.1 million) to Nigerian Customs Service officials for preferential treatment during the customs process, including the reduction or elimination of customs duties.\(^90\)

As noted at the beginning of this sub chapter, although

\[\text{performed by mid- or low-level foreign functionaries. United States v. Kay; 359 F.3d 738, 750-51 (5th Cir. 2004).}\]

83 Unlike the local law and bona fide expenditures defenses, the facilitating payments exception is not an affirmative defense to the FCPA. Rather, payments of this kind fall outside the scope of the FCPA’s bribery prohibition. Prior to 1988, the “facilitating payments” exception was incorporated into the definition of “foreign official,” which excluded from the statute’s purview officials whose duties were primarily ministerial or clerical. See Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, § 104(d)(2), 91 Stat. 1494, 1498 (1977) (providing that the term foreign official “does not include any employee of a foreign government or any department, agency, or instrumentality thereof whose duties are essentially ministerial or clerical”).

84 In exempting facilitating payments, Congress sought to distinguish them as “payments which merely move a particular matter toward an eventual act or decision or which do not involve any discretionary action,” giving the examples of “a gratuity paid to a customs official to speed the processing of a customs document” or “payments made to secure permits, licenses, or the expeditious performance of similar duties of an essentially ministerial or clerical nature which must of necessity be performed in any event.” H.R. Rep. No. 95-640, at 8.


86 In a 2004 decision, the Fifth Circuit emphasized this precise point, commenting on the limited nature of the facilitating payments exception: A brief review of the types of routine governmental actions enumerated by Congress shows how limited Congress wanted to make the grease exceptions. Routine governmental action, for instance, includes “obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country,” and “scheduling inspections associated with contract performance or inspections related to transit of goods across country.” Therefore, routine governmental action does not include the issuance of every official document or every inspection, but only (1) documentation that qualifies a party to do business and (2) scheduling an inspection—very narrow categories of largely non-discretionary, ministerial activities performed by mid- or low-level foreign functionaries. United States v. Kay; 359 F.3d 738, 750-51 (5th Cir. 2004).

87 Supra Note 62 at pg 25.

88 Id.


true facilitating payments are not illegal under the FCPA, they may still violate local law in the countries where the company is operating, and the OECD’s Working Group on Bribery recommends that all countries should encourage companies to prohibit or discourage facilitating payments. In line with this recommendation, other countries’ foreign bribery laws, such as the United Kingdom’s, do not contain an exception for facilitating payments.

UNDERSTANDING THE DISTINCTION BETWEEN GIFTS FROM BRIBE AND FACILITATION PAYMENT

The OECD has said that they do not consider facilitating payments to be bribery; however, they have flagged them as a concern for years. The author disagrees with this position. The terms bribe, and facilitating payments are forms of corruption the difference between both phrases is that facilitating payments within the context of its original meaning refers to small payments of money or goods. People ask questions like—what if I give a gift or tip after an act has been performed for me is that the same thing as bribe and being corrupt? What if one makes a facilitation payment just to accelerate the process, is that the same as bribe? To answer these questions, an understanding of how to identify these terms and deciding where to draw the line between permissible and prohibited actions is imperative.

As already defined by the Criminal Code in Section 98, a bribe occurs when a person corruptly gives, confers or procures any property or benefit of any kind to, on or for a public official and is guilty of corruption. On what a gift is, the fifth schedule, part 1, Section 6 of the Nigerian Constitution states that a public officer shall not ask for or accept property or benefits of any kind for himself or any other person on account of anything done or omitted to be done by him in the discharge of his duties. In other words, a gift is something of value given without the expectation of return.

Facilitation payment or grease payment on the other hand is a payment to a foreign official, in order to expedite performance of duties of non-discretionary nature, which they are already bound to perform. Although the most classic cases of bribery concern political officials and civil servants, however one need not be a political official or a civil servant to be bribed. Payments, whether in money or in kind, can be characterized along two dimensions; first does an explicit quid pro quo exist? If so, the transaction can be labeled a sale even if there is a long time lag between payment and receipt of the benefit. Both market sales and bribes involve reciprocal obligations, gifts to charities or loved ones often do not explicitly involve reciprocity, although many do generate implicit obligations. The second dimension is the institutional positions of payers and payees; are they agents or principals? Gift connotes voluntariness, Nigerians and indeed most Africans are habitual gift-givers which they do voluntarily, no strings attached.

By the same token, the equation of bribe or gratification of gifts, which citizens were, obliged to present to chiefs and kings under the traditional social and political system is mistaken. Citizens presented tributes to their political overlords as a form of tax which went to the upkeep of the royal home, presentation of tribute was compulsory in the traditional dispensation, not so with gift-giving, which remains a sign of charity and hospitality on the part of the giver. Till this day, the practice of paying tribute and giving gifts to traditional leaders in Nigeria is still practiced but not compulsory. Against this background, it is clear that a gift differs from a bribe or a facilitation payment because it is not intended to obtain a direct benefit for the giver while the latter is intended to obtain a direct benefit from the receiver.

The main distinction between facilitation payments, ordinary bribery and extortion is that facilitation payments tend to be made to obtain something to which the payer is already entitled to. In other words, what the payer wants the corrupt official or employee to do is not something improper or something that exceeds their authority such that the normal course of business would be perverted through dishonest or unlawful behavior but rather to do what it is their duty to do in the procedure for resolving a particular matter. There are many different kinds of gifts, and therefore the similarities and differences between gifts and facilitating payments can

91 Working Group on Bribery, 2009 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions, at § VI (recommending countries should periodically review their policies and approach to facilitation payments and should encourage companies to prohibit or discourage facilitation payments “in view of the corrosive effect of small facilitation payments, particularly on sustainable economic development and the rule of law”).

92 Facilitating payments are illegal under the U.K. Bribery Act 2010, which came into force on July 1, 2011, and were also illegal under prior U.K. legislation. See Bribery Act 2010, c.23 (Eng.), available at http://www.legislation.gov.uk/ukpga/2010/23/contents.


95 Susan Rose – Ackerman, Corruption and Government: Causes, Consequences and Reform, Cambridge University Press, 92 (1999).

be varied.

i. As with facilitation payments, gifts may consist of money, goods, services, discounts etc.

ii. They may be large or, like facilitation payments, small.

iii. In principle, the initiative in gift-making comes from the giver; although there may be a prior spoken or unspoken demand - for example, in the form of a long-standing custom.

iv. As with facilitation payments, gifts may be given once, occasionally, or on a regular basis.

v. Gifts may be made to the office or company or, as with facilitation payments, to an individual official, manager or employee - either at their place of work or home depending on how secretive they have to be.

vi. Unlike bribes or facilitation payments, gifts tend to be public, or at least they could be without drawing attention, whereas bribes and facilitating payments tend to be made in secret.

It is believed that it can rightly be concluded that a gift is something of value given without the expectation of return while bribe and facilitation payment, on the other hand is something of value given with strings attached. Ultimately, the terms bribe and facilitation payment can be categorically and unequivocally grouped as corrupt acts, which lead to corruption.

INTERSECTION OF NIGERIAN LAW AND FOREIGN CORRUPT PRACTICES ACT (FCPA)

In Nigeria, the hub of our anti corruption laws and compliance programs is focused on preventing corruption within the country, there is nothing in our laws prohibiting foreign nations from bribing Nigerian public officials. To this end, there are numerous cases of foreign US companies doing business and bribing public officers with millions of dollars to secure contracts. Payments while legal under the FCPA remain unethical and unacceptable. Facilitation payment encourage laxity amongst public officials, they will not carry out their duty or resolve the issues entrusted to them as swiftly or efficiently as expected when they know they can be nudged by facilitation payment. This represents a step towards a culture of corruption in society hampering the fight against corruption because superior public officers are themselves corrupt.

Nigeria would have to take such measures as may be necessary to establish under its criminal law and other anti corruption compliance programs that it is an offence for any non Nigerian or foreign organization to intentionally offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a Nigerian public official, otherwise known as “foreign official" by the FCPA and for that official or for a third party to act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.

Similarly, Section 98 of the Nigerian Criminal Code in criminalizing bribery should include “public official receiving bribe from foreign official, person or organization”. In addition, such foreign organizations should be sanctioned and fined. Nigerian legislation should not only focus on criminalizing bribery and corruption amongst Nigerians but should extend its jurisdiction to non Nigerians and their corporations because in the past few years, a large percentage of FCPA enforcement actions have involved transactions in Nigeria and this has exacerbated the incidence of grand corruption in the country. In the interests of effectiveness, viable economy and good governance, it is only right that large-scale corruption should head the agenda of governments.

In October of 2009, TRACE International, Inc. (TRACE) a non-profit membership association that pools resources to provide practical and cost-effective anti-bribery compliance solutions for multinational companies, their commercial intermediaries (sales agents, representatives, consultants, distributors, suppliers and etc.), conducted a benchmarking survey on facilitation payment. The survey revealed a clear trend by corporations to ban facilitation payments, coupled with awareness by survey respondents of the added risk and complexity presented by facilitation payments.

In 2010 the National Bureau of Statistics (NBS) presented the newly published “NBS/EFCC Business Crime and Corruption Survey.” The survey covered over 2,200 businesses across all Nigerian States and sectors of the economy and aimed at gathering the perception and experiences of businesses with regard to corruption and crime, as well as their opinions regarding the efforts of the Nigerian Government to prevent and fight these phenomena.

Among the findings of the report, 71% of respondents answered that corruption presents a serious risk for doing business in Nigeria and the payment of bribes affects most companies operating in the country. According to the report, one in three companies reported paying a bribe to public officials in undertaking administrative tasks. According to the report, in dealing with police or clearing goods through customs, the bribe to public officials in undertaking administrative tasks. According to the report, in dealing with police or clearing goods through customs, the payment of bribes is


99 https://secure.traceinternational.org/Default.asp

100 This survey was conducted in partnership with the Economic and Financial Crimes Commission (EFCC) and the United Nations Office on Drugs and Crime (UNODC). The survey was carried out in 2007 as part of the project "Support to EFCC and the Nigerian Judiciary" funded by the European Union with 25 million Euro.

Landmark cases of facilitation payments under the Foreign Corrupt Practices Act (FCPA) by United States corporations to Nigerian officials

Since 2002, the United States Department of Justice has prosecuted more companies under the Foreign Corrupt Practices Act (FCPA) for bribery occurring in Nigeria than in any other country. In fact, the majority of FCPA prosecutions have been related to corrupt payments to Nigerian government officials (Elesinmogun et al., 2011). Although many other developing nations are rife with corruption, a recent string of FCPA cases clearly demonstrates that U.S. companies doing business in Nigeria are prime targets for FCPA enforcement actions. This is because in the author's opinion Nigeria is already riddled with corruption and these companies are seen to be taking advantage of the situation.

Here, the author shall discuss some landmark cases where US corporations have used the veil of facilitation payments under the FCPA to bribe Nigerian officials into getting contracts and preferential treatment from public officials to reiterate my point that the practice of facilitation payment is burdensome on Nigeria and creates a culture of corruption and therefore should not be encouraged in any way. One of the cases that made news headline all over the world is the Halliburton case.

The Halliburton bribery tale has been a worrisome issue since it broke in 2003, following an investigation of Kellog, Brown and Root (KBR), a Halliburton subsidiary over payments to a range of high profile Nigerian government officials, politicians, including those of the Nigerian National Petroleum Corporation (NNPC) and the Nigerian Liquefied and Natural Gas (NLNG). The sum of one hundred and eighty million dollars bribe was involved over a contract estimated at nearly seven billion dollars for the construction of the LNG plant in Bonny, River State.

The bribe allegedly spanned the period from 1995 till when the contract was awarded in 2004 to KBR. On February 11, 2009, KBR LLC pleaded guilty to conspiracy to violate the FCPA and to four counts of violating the FCPA's anti bribery provisions. Under the plea agreement, KBR LLC agreed to pay a four hundred and two million dollars criminal fine and to retain an independent compliance monitor for a three year period.

Another interesting case is the corruption scandal that involved William Jefferson, who at the time of scandal was a serving Congressman in the United States House of Representatives for Louisiana’s 2nd Congressional District from 1991 until 2009. Beginning in 2001 and continuing until 2005, Jefferson solicited bribes from several businessmen in exchange for his assistance with securing business in several West African countries including Nigeria. According to the prosecution, Jefferson allegedly agreed to pay Nigeria’s former Vice President Atiku Abubakar and other Nigerian officials half a million dollars in cash to secure a contract in Nigeria and officials would later receive a percentage of the share of the profits after the business had been completed.

Jefferson was given one hundred thousand dollars in marked bills to pass on to the Nigerian officials as first installment on the half a million dollars payment. The FBI recovered ninety thousand dollars from Jefferson's freezer when they searched his home and on June 4, 2007, Jefferson was indicted on sixteen counts including conspiracy to solicit bribes by a public official, conspiracy to commit wire fraud and conspiracy to violate the FCPA, solicitation of bribes by a public official, wire fraud, violations of the FCPA, money laundering, obstruction of justice and racketeering. On August 5, 2009, Jefferson was convicted on eleven counts.

The last case is the wide publicized Siemens scandal of 2007. Between March 12, 2001 and December 30, 2007, Siemens used a variety of methods to make approximately four thousand two hundred and eighty three payments to government officials, totaling approximately one billion one hundred million dollars and these payments caused the company to realize over one billion one hundred million dollars in profits during the relevant time period. The payments made in various divisions of the company between 2001 and 2007 included amongst others cash payments to Nigerian officials in connection with four telecommunications projects. Siemens used a variety of methods to conceal these payments and improperly recorded all four thousand two hundred and eighty three payments on its books and records.

Approximately one hundred million dollars in profits were funneled through third parties, Siemens routed more than two hundred and eleven million dollars in bribes through slush funds that were often maintained by former Siemens executives, third parties or affiliated companies. Siemens also used cash to pay approximately one hundred and sixty million four hundred thousand dollars in bribes. In addition to the other methods, Siemens used a number of internal accounts to make more than sixteen million two hundred thousand dollars in payments, these accounts were intended to make payments on transactions between two Siemens entities; however, Siemens often used these accounts to make payments to third parties. On December 15, 2008, Siemens settled charges with the DOJ, the SEC and the Munich Prosecutor's Office for a record-breaking one billion six hundred million dollars in fines and penalties.

102 Id.
103 Id.
104 For a comprehensive list of corruptions case see http://www.traceinternational.org/compendium/
CONCLUSION

There is no doubt the FCPA is a good piece of legislation considering how comprehensive it is. However, the act was designed to prevent corrupt practices, protect investors, and provide a fair playing field for those US companies trying to win businesses abroad based on quality and price rather than bribes without recourse to justice and should develop compliance policies that do not permit any kind of payments.

What this means is that conduct of FCPA should be subject to local law and determining the legality of facilitation payments must include the laws of Nigeria. In other to tackle this, Nigerian legislature should enact laws criminalizing facilitation payments of any kind and the judiciary would need to take proactive steps in enforcing this law.

Also, as an immediate solution, the necessary policy should be put in place that will address those countries where facilitation payments are permitted and would want to do business in Nigeria. Appropriate actions should be taken to eliminate all forms of facilitation payments and this can be done through progressively reducing the size and frequency of these payments. There should be some kind of oversight mechanism whose primary function is to monitor, oversee and fully account for any facilitation payments made by or on behalf of any foreign company.

Facilitation payments carry legal risks even if they are permitted under the anti-bribery laws of a particular country. US companies should recognize the waning of the argument supporting a facilitation payment exception and should develop compliance policies that do not permit any kind of payments. Facilitation payments foster a culture of corruption among governmental officials and Nigeria should enact and enforce domestic bribery laws that explicitly prohibit such payments. Facilitation payment is not a necessary evil like proponents of this exception suggests, rather, it is that evil that can be avoided.

REFERENCES


Economic Community of West African States (ECOWAS) Treaty on Exchange of Information on Criminal Matters.


McLean v. Int’l Harvester Co., 817 F.2d 1214, 1219 (5th Cir. 1987).


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