



Israel's New FCPA

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■ Date of Enactment

- Enacted July 14, 2008 - Effective July 21, 2008

■ Summary of New Law

■ Israeli law:

- Enacted Section 291A of the Penal Code, which applies the penalty for bribery under existing Israeli law to any person who bribes a foreign public employee to obtain, to promise, or to gain any advantage with regard to a business activity.
- Extends various provisions of existing Israeli law regarding bribery of Israeli public employees to foreign public employees. Thus domestic precedents may be relevant to interpreting the new law.

■ Who is prohibited from making such payments?

The new law is silent regarding to whom it applies. In general, Israeli law applies to:

- "Domestic Concerns", i.e. offenses where all or part of the offense was committed in Israel.
- "Foreign Offenses", i.e. offenses committed entirely outside of Israel, if committed by Israeli citizens or residents subject to it being an offense under local law.
- Israeli corporations under the "organs Doctrine". Under Section 23 of the Penal Code, Israeli corporations may be prosecuted criminally for offenses in the penal code like bribery where justified by the circumstances of the offense and the role of the parties involved (such as officers and directors, or other individuals and entities that act on behalf of a Corporation.) Under the "Organs Doctrine", the actions and intentions of the organ are viewed as the actions and intentions of the corporation.

■ Who is prohibited from making such payments?

Thus, the new law would seem to apply to:

- All offenses and individuals involved (whether Israeli or not) where all or part of the offense was committed in Israel.
- For offenses committed entirely overseas, the law would seem to apply to:
 - Israeli citizens, including those working for a foreign subsidiary of an Israeli company.
 - Israeli corporations which pay a bribe overseas.
- In addition, it is possible that Israeli corporations could be liable for the acts of foreign subsidiaries if a court decides that a foreign subsidiary is an organ of the corporation under Section 23.

■ What payments are prohibited?

The law prohibits:

- Paying, offering, promising to pay, or authorizing the payment of money, service, or anything else of value.
- Bribery cases have been prosecuted in Israeli courts for, among others, the following things of value:
 - a loan
 - an advantage in a queue
 - a sexual benefit
 - presents for holidays and personal events
 - payment of expenses
 - postponement of a payment
 - use of vehicles without payment
 - a discount on goods

■ What payments are prohibited?

- Success is not required – a request or suggestion of bribery, or an offer (even if rejected) is enough to convict.
- Nothing specific has to be given or done in return for a payment to be considered a bribe. All that is needed is a link between a payment (or an attempted payment) and an act desired of a public employee performing a public function.
- Israeli courts have convicted in cases where a gift or reward was given to a public employee in connection with an act where the gift or reward was provided after the act, with no prior agreement or understanding between the payor and the public employee. (Karp v. State of Israel)

■ What is the required intent behind the payment?

- Must have corrupt or criminal intent for making a payment for it to be considered a bribe.
- The corrupt intent required is "awareness of the circumstances and of the elements of the bribe felony" (State of Israel v. Ben-Atar).
- Deliberately turning a blind eye to the existence of a fact or circumstance is tantamount as "knowing" that same fact or circumstance.
- The fact that the payment of bribes is a widespread custom is not considered a proper defense, but the payment must be illegal in the country where the payment is made.
- If a payment has a "mingled" intent – part corrupt/part pure – it will be considered a bribe.

■ Payments are prohibited to whom?

A payment is considered a bribe if it is made to a:

- Foreign public employee, or a candidate for a job as a public employee.
- Holder of a public office, or to one who fulfills a “public function” (elected or appointed, with or without pay).
- Official of a “public institute” established by a statute or controlled by a foreign country, such as universities or hospitals.
- Employee of a “public international organization”, defined as one established by two or more countries.
- The prohibition against bribery within Israel includes payments made to “private companies providing services to the public”. It is unclear if this provision applies to bribes paid overseas or not: the explanation to the new law says that it does apply, but the provision is not in the new law itself.

■ Payments are prohibited to whom?

- “Private companies providing services to the public” include:
 - Companies with government contracts, including computer, security, or legal contracts.
 - Companies providing a public service, even with no government contract, such as a stock exchange.

- To determine whether a private company provides a public services, courts applying the domestic law against bribery have considered:
 - The corporation's obligation to provide the service to the public.
 - The corporation's public nature – such as government involvement in management, public financing, or public oversight.
 - The importance of the service being provided.
 - The ability of the public to acquire the service from another corporation.

■ Payments are prohibited to whom?

- The following corporations within Israel were found to be “private companies providing services to the public”:
 - Israeli Aerospace Industries (“IAI”)
 - The General Workers Federation (Histadrut)
 - The Pi Glilot Gas Terminal Ltd.
 - The Eged bus cooperative
 - Israeli banks
 - The Electric Company

- The courts will have to resolve whether this applies in the context of bribes paid outside of Israel.

■ With what purpose must the payments be made?

- To achieve, secure, or to promote a business activity or business advantage.
- It does not matter whether the bribe was for:
 - An act or omission
 - A specific act or for a general preference or bias
 - An act within or outside the public employee's role

■ Use of Agents

It makes no difference whether:

- The person accepting the bribe does the desired act or influences someone else to do the act.
- The bribe is given by the beneficiary of the bribe or by a third party.
- The bribe is received by the intended recipient of the bribe or by an agent.
- The agent is paid or not.
- The agent actually pays the intended bribe.

■ Permissible Payments

- Payments that may be considered "common custom", such as payment of expenses, travel, accommodations, or presents for holidays and personal events, can be considered bribes if they are accompanied by corrupt intent. Example: a manager of Kashrut supervision for the Rabbinate was convicted for accepting money as holiday gifts from hotels. (State of Israel v. Shadmi)
- Because the punishment is so severe and the potential payments covered is so wide, Israeli courts have indicated that they will not consider minor favors (or minor payments) as bribes.

■ Whistleblower Protections

- Israeli law provides that an employee's status shall not be harmed as a result of a complaint to authorities.

■ Certifications

- The ISA proposed new regulations in February 2008 that would require the CEO and the officeholder responsible for preparing the financial statements (or director authorized to sign the financial statements) to certify that they have discussed any fraud, whether or not material, with the Board of Directors, Audit Committee, and auditors, if that fraud involves the CEO, anyone directly answerable to the CEO, and any employee with a material role in preparing or auditing the company's financial statements.
- “Any fraud” might be limited only to any fraud having to do with the financial statements. However, if “any fraud” is viewed the same way as it is in the similar U.S. certification requirement adopted under SOX, it would include bribery payments to foreign public officials.

■ What does Certification and Best Practice Require?

- Due diligence for operations in foreign countries.
 - To be cautious, should include activities of foreign subsidiaries.
 - Should document steps you have taken.
- Special care regarding selection of distributors, agents, and other third parties.
 - Background checks.
 - Size of payments to such parties or payment of strange fees.
 - Provisions in written contracts with such parties.
 - Activities in countries or in industries with reputation for bribery.
- Train management and personnel to spot red flags and investigate them.