RESPONSE OF THE UNITED STATES QUESTIONS CONCERNING PHASE 2

A. GENERAL ISSUES

1. General approach

1.1

Please describe our country's policy with regard to the means put in place (besides implementing the Convention into doestic legislation) to fight bribery of foreign public officials. In addressing this question, please include specific information on measures your government may have taken (or plans to take) with respect to items listed in section II of the 1997 Recommendation (see Part C of questionnaire).

The United States first enacted the Foreign Corrupt Practices Act (FCPA) in 1977. Since 1977, the United States government has developed a range of mechanisms to fight bribery of foreign public officials. These include experienced prosecutors based in the Fraud Section of the United States Department of Justice, attorneys charged with enforcement in the United States Securities & Exchange Commission, and attorneys and trade experts in the United States Departments of Commerce, State, and Treasury. Additional anti-bribery efforts have been undertaken by procurement officials at the Department of Defense, the U.S. Trade Representative, and the U.S. Agency for International Development (USAID). The activities of each of these components are described in detail below.

In addition, the private sector has developed sophisticated internal compliance programs designed to detect and deter foreign bribery by companies doing business overseas. These compliance programs generally require "due diligence" investigation of foreign consultants and agents; advance and periodic review of the retention of foreign consultants and agents, foreign joint ventures, and foreign sales efforts by an independent committee; training of management, sales staff, and foreign consultants and agents; and compliance officers charged with conducting or supervising investigations of alleged wrongdoing. The United States government, through both publicly and privately funded programs, participates in training compliance officers and members of the bar. In addition, the Department of Justice has required companies to implement rigorous compliance programs as part of plea agreements and consent judgments in FCPA matters.

With respect to the Revised Recommendation, the United States has taken the following steps:

(i) *criminal laws and their application*: The United States passed the Foreign Corrupt Practices Act in 1977.[(1)] It has since been substantively amended twice: first in 1988 to clarify the *scienter* standard and certain defenses[(2)] and again in 1998 to implement the OECD Convention.[(3)]

(ii) *tax legislation, regulations, and practice*: The Internal Revenue Code and related regulations prohibit any deduction related to the payment of bribes.[(4)]

(iii) *company and business accounting practices*: Since 1977, the FCPA and regulations issued by the U.S. Securities and Exchange Commission (SEC) have required all public companies to, among other things, maintain books and records that, in reasonable detail, accurately reflect the companies' transactions. Further, public companies must maintain a system of internal accounting controls sufficient to provide reasonable assurance that all transactions take place in accordance with management's authorization and are recorded in a manner that permits the preparation of financial statements in conformity with generally accepted accounting principles (GAAP).[(5)] Although private companies are not covered by the books and records and internal

control provisions of the FCPA and do not fall within the SEC's jurisdiction, such companies generally are required by federal and state tax laws and state corporation laws to maintain accurate books and records sufficient to properly calculate taxes owed.[6] Further, most larger private companies maintain their books and records to facilitate the preparation of financial statements in conformity with GAAP to comply with financial institutions' lending requirements.

(iv) *banking, financial, and other relevant provisions*:

Various federal and state laws provide for the maintenance of financial and other business records. Companies that are "issuers" are required to provide financial information, on a periodic basis, to the SEC. The Internal Revenue Code requires that materials used to create tax returns and other information provided to the Internal Revenue Service (IRS) must be kept for a minimum of seven years and made available to the IRS upon request.

As discussed above, the FCPA also requires certain issuers to maintain records that accurately reflect transactions and dispositions of corporate assets and to maintain systems of internal accounting controls. For violations of these provisions, the SEC is authorized to seek civil penalties or to seek civil injunctive relief.[7]

(v) *public subsidies, licenses, government procurement contracts, or other public advantages*:

Individuals or entities that bribe foreign officials may be prohibited from receiving contracts or subcontracts from the United States Government.[8] Similar prohibitions apply to certain non-procurement activities such as providing consulting services and receiving federal grants.[9] Each federal department and agency determines the eligibility of individuals and entities to receive contract awards from it. However, an entity that has been suspended or debarred from contracting with any department or agency of the United States Government is equally ineligible to contract with most Federal departments and agencies.[10] In addition, the Commodities Futures Trading Commission and the Overseas Private Investment Corporation have regulations which provide for possible suspension or debarment from agency programs for violations of, *inter alia*, the FCPA.[11]

A contractor may be debarred for a period of up to eighteen months based upon a reasonable suspicion that it has engaged in illicit conduct; if convicted or held liable in a civil action, the contractor may be debarred for three years or, if in the interests of the Government, even longer.[12] In addition, a contractor may be debarred by the Department of Defense from obtaining overseas contracts if the foreign country in which the contract is to be executed determines that the contractor has engaged in anti-competitive behavior or formally debars or suspends the contractor.[13]

The Department of Justice, at the request of other federal authorities, provides information regarding the criminal activity of prospective contractors to federal contracting agencies. In addition, the General Services Administration maintains a current, consolidated list of all contractors debarred, suspended, proposed for debarment, or declared ineligible by any federal agency or the General Accounting Office.[14] *See* answers to section 18 *infra*.

(vi) *civil, commercial, and administrative laws and regulations*:

The FCPA contains parallel civil and criminal prohibitions against the bribery of foreign government officials.[15] The SEC and the DOJ share civil injunctive authority for violations of

these prohibitions and may obtain monetary penalties through civil enforcement actions. In addition, the SEC may take administrative action in the form of cease and desist orders.

(vii) *international cooperation in investigations and other legal proceedings*:

As discussed below, the United States has a wide panoply of mechanisms to provide assistance in both civil and criminal enforcement of anti-bribery laws.

1.2

If you have dependent or overseas territories, is the Convention and your implementing legislation applicable to them? If not, have you taken any steps (or do you plan to take steps) to make the Convention applicable to those territories?

Yes. The FCPA applies to all citizens, nationals, and residents of the United States and to any company organized under the laws of a State or a territory, possession, or commonwealth of the United States.[(16)]

1.3

If more than one level of government has legislative-making powers, and another level of government has enacted legislation that applies to the situation of foreign bribery, please explain the relationship of these laws and whether one would supersede in certain circumstances.

The United States is a federal state, and both the national and state governments, subject to some limitations, are empowered to enact and to enforce criminal laws. The FCPA is a national statute and is enforced by the national government. Individual states, however, are not prohibited from enacting similar laws. Although no state has passed a law that explicitly prohibits foreign bribery, thirty-seven states have enacted commercial bribery statutes whose terms encompass the bribery of any agent of a principal or an employee of an employer.[(17)] These state statutes, therefore, may also be used to prosecute foreign bribery, where the foreign official is viewed as an agent or employee of his government.

Under the United States' federal system, the national government and the individual state governments are viewed as separate sovereigns. Accordingly, the prosecution of an individual or a company by both the national and a state government does not constitute double jeopardy and is not prohibited by the federal constitution,[(18)] although Congress has barred certain successive prosecutions and the Department of Justice's policy prohibits successive prosecutions except in special circumstances.[(19)] Accordingly, it is possible, although we are not aware of any instances, for an individual or company to be prosecuted by both the national and a state government for the same act of foreign bribery.

2. Institutional Mechanisms

2.1

If there are specific bodies that include in their competence the fight against bribery of foreign public officials in your country, please specify their legal basis, composition, functions, and powers.

All federal criminal laws are enforced by the Department of Justice. Within the Department of Justice, responsibility for prosecuting foreign bribery cases has been delegated to the Fraud

Section of the Criminal Division, based in Washington, D.C.[(20)] Such prosecutions are generally staffed by an attorney from the Fraud Section and an Assistant United States Attorney based in the judicial district with venue over the offense.

The lead investigative agency for most FCPA matters is the Federal Bureau of Investigation, an agency of the Department of Justice. Other investigative agencies, however, have participated and have even taken the lead in some FCPA cases, usually when the FCPA allegation arose during a pending investigation. For example, the Criminal Investigative Division of the Environmental Protection Agency was the lead agency in the investigation of Saybolt, Inc.'s bribes of Panamanian officials and the USAID Inspector General participated in the investigation of Metcalf & Eddy's bribe of an Egyptian official.[(21)]

2.2

What measures are in place to ensure that persons or bodies in charge of combating bribery of foreign public officials have the necessary independence and autonomy to perform their functions?

In the United States, unlike in many parliamentary systems, the Attorney General, the equivalent of the Justice Minister, is not a member of Congress and cannot be an elected official. The Attorney General is the fourth-most senior member of the president's cabinet (and is seventh in the line of succession to the Presidency). The Attorney General is nominated by the president and confirmed by the Senate. Once confirmed, the Attorney General may only be fired by the president or impeached by the Congress.

All federal prosecutors are ultimately answerable to the Attorney General. Prosecutors based in the Criminal Division, which is located at the Department of Justice's headquarters, report, through a chain of command, to the Assistant Attorney General for the Criminal Division, a presidential appointee. Local federal prosecutors, known as Assistant United States Attorneys (AUSAs), are based in ninety-four judicial districts and report to the United States Attorney for that district, a presidential appointee who reports to the Attorney General.

The Department of Justice is independent of any other agency and no other agency has the right or authority to question the Department's decision to bring a prosecution. Although the Department is part of the executive branch and therefore answerable to the President, any attempt by political members of the Administration or by other agencies to interfere with specific criminal law enforcement decisions would be resisted by the Department and would be viewed unfavorably by both the Congress and the polity.

FCPA prosecutions obviously raise sensitive issues of foreign sovereignty and local self-interest. For that reason, the Attorney General has delegated the sole authority for supervising FCPA prosecutions to the Fraud Section of the Criminal Division.[(22)] This delegation ensures a uniform prosecutive policy and prevents a large company from exerting undue influence upon a local prosecutor. Further, as FCPA prosecutions often require foreign evidence collection and other sophisticated investigative techniques, it ensures that prosecutors familiar with the FCPA staff and supervise investigations of alleged foreign bribery.

2.3

What resources (human and financial) are available for the implementation of the Convention?

(Please include information about training programs, if any). If private resources have also been available for implementation activities, please specify the nature and level of such resources.

The Fraud Section consists of approximately sixty experienced attorneys, any one of which may be assigned to a FCPA matter. Its budget is large enough to permit travel to judicial districts around the country as well as international travel to gather evidence. Fraud Section attorneys receive regular training in complex prosecution techniques, white collar crime prosecutions, and other matters.

In addition, Fraud Section attorneys and officials of the Department of Commerce's General Counsel's Office and International Trade Administration regularly participate in industry and bar seminars concerning the FCPA and compliance programs. For example, in FY2000, Fraud Section attorneys taught at approximately fifteen seminars that focused on the FCPA and Department of Commerce officials similarly taught at approximately twenty-five seminars involving cross-border corruption issues. These seminars are directed to compliance officers and attorneys and focus on the requirements of the FCPA and the proper implementation of a FCPA compliance program.

Further, the Fraud Section, the SEC, and the Department of Commerce provide extensive guidance on FCPA compliance. Pursuant to the Department of Justice FCPA Opinion Procedure, [(23)] the Department provides guidance as to whether a specific, non-hypothetical, prospective transaction would violate the FCPA. If the Department affirms it will not take enforcement action based upon the requestor's description of the transaction, and the transaction thereafter takes place exactly as described, the requestor qualifies for a "safe harbor" and may not be prosecuted.[(24)] Similarly, although the Department of Commerce cannot provide a "safe harbor," it often provides general advice and counsel to American business operating in the international arena.

The SEC devotes substantial resources to its FCPA program. It oversees the accounting profession, investigates violations of the federal securities laws, including violations of books and records and internal controls provisions, as well as some civil anti-bribery provisions. FCPA civil investigations are conducted by attorneys assigned to the Division of Enforcement in Washington, D.C., and by enforcement attorneys in the SEC's regional offices. In addition, SEC staff participates in workshops and training sessions for practitioners and other regulators regarding the provisions of the anti-bribery and books and records and internal controls provisions of the federal securities laws.

All publicly listed companies must have external audits performed by accounting firms. All major accounting firms are aware of the provisions of the FCPA, and have procedures in place to advise clients of means of complying with its requirements. Many listed companies have internal audit departments, which expend substantial resources assuring that internal controls operate appropriately.

Other components of the United States government are also involved in implementation of the OECD Convention. For example, the U.S. government has recently begun seeking to include in trade agreements clauses prohibiting bribery of government officials, and the Office of Government Ethics has participated in international conferences on international corruption.

Supplemental Question: In responding to question 2.3, please explain the application in practice of the budget for investigating and prosecuting cases under the FCPA. The Secretariat notes that in the House Report No. 105 - 802 of October 8, 1998, it is stated that the costs incurred as a result of the 1998amendments to the FCPA would be subject to the availability of appropriated funds. It is also stated that any increase in direct spending would equal the fines collected within a 1 year lag.

The funding of FCPA investigations and prosecutions is not a separate line item in the Department of Justice's budget. All FCPA investigations and prosecutions are supervised by attorneys of the Criminal Division's Fraud Section. In every budget cycle, the Fraud Section submits a budget request to the Division's budget officers, and this request is incorporated

into the Department's overall budget request to Congress. The Department endeavors to insure that the Fraud Section, like all other components of the Department, receives sufficient funds to enforce the laws within its purview.

The language cited from the House Report is standard legislative language intended to ensure that the legislation does not obligate future Congresses to any specific appropriation. In every budget cycle, the Congress is responsible for allocating funds to ensure that government programs are adequately funded, given the constraints of revenues and funding priorities, such as national defense. Further, the language quoted from the Congressional Budget Office (CBO) is not intended to require or guarantee that fines would equal spending, but to indicate that the CBO believed that any additional costs arising from prosecutions brought as a result of the expansion of jurisdiction in the 1998 amendments to the FCPA would be likely to be offset by the concomitant increased receipt of criminal fines.

2.4

Have there been any cases in your country of domestic officials reporting cases to superiors, prosecutors, or other public authority, that they have been promised, offered or given a bribe by foreign nationals or companies? Is there any mechanism for such reporting? Are there safeguards such as whistle blowing or witness protection programs for such officials?

The Department of Justice does not have any statistics relevant to this question. Public employees are, however, generally required to report any improper offers or promises, regardless of their source, and each federal agency's Inspector General maintains confidential "hotlines" to report suspected fraud, waste, and abuse. For federal employees, the Whistleblower Protection Act[(25)] and the Inspector General Act of 1978[(26)] provide for civil service protections against any reprisals for reporting conduct that they "reasonably believe evidences a violation of any law . . ."[(27)]

2.5

Have there been instances where competitors have filed complaints or provided information, or where company employees have brought a violation to the attention of the authorities? Do procedures exist for the public to provide information (*e.g.*, hot lines)? Are there safeguards to protect "whistle-blowers"? Are there mechanisms to make such information available to other countries concerned?

The Department of Justice receives allegations concerning foreign bribery from a number of sources, including competitors. These reports may be made in person, by telephone, facsimile transmission, or mail, or through an electronic mail mailbox (FCPA.fraud@usdoj.gov) accessible through the Department's FCPA webpage, www.justice.gov/criminal/fraud/fcpa/. In addition, the Department of Commerce has a "bribery hotline" accessible from the Department of Commerce Trade Compliance Center's website at http://tcc.export.gov/Report_a_Barrier/index.asp, through which U.S. companies can report bribery activity in international business transactions, which reports are then forwarded to the Department of Justice.

The Department cannot and does not promise that the identity of a complainant will be kept confidential in all cases. The Department will, however, generally agree to keep the complainant's identity confidential unless disclosure is unavoidable during the course of an investigation or prosecution. For instance, should an allegation proceed through an investigation to an indictment, it may be necessary, in some cases, for the complainant to testify or be deposed and his or her (or a company's) identity would obviously be disclosed at that time.

Neither the FCPA nor other generally applicable federal criminal laws provide for "whistleblower" protection. As noted above, federal employees are protected by a federal whistleblower law, and some states have passed similar laws to protect state employees. In the private sector, the degree of protection afforded an employee is generally a contractual matter and will depend upon whether the employee is covered by a collective bargaining contract that provides for grievance procedures or whether his or her individual contract provides for termination with or without cause.

When the Department of Justice becomes aware of credible information indicating that a foreign company has violated another country's foreign bribery law, it may provide that information to foreign law enforcement through a variety of avenues, including spontaneous transmissions under bilateral or multilateral mutual assistance treaties or through law enforcement to law enforcement contacts. The United States government has established a working group consisting of representatives from the Departments of State, Commerce, and Justice, and other agencies to ensure that all complaints of such conduct by foreign companies, regardless of which agency initially receives the report, are passed to the Department of Justice for possible referral to foreign law enforcement.

2.6

Have your authorities provided any assistance to companies in case of direct or indirect solicitation of bribery of foreign public officials? In particular, have any initiatives been taken or mechanisms developed concerning greater public recognition of solicitation, the setting-up of bodies providing assistance to enterprises, and organised concerted actions in exceptional cases, including joint actions by governments?

The Departments of Commerce, State, and Justice have assisted U.S. companies in such cases in the past, and will continue to be available to assist U.S. companies in the event that they are solicited for bribe payments from foreign public officials in the future. Often companies approach U.S. officials in U.S. Embassies, such as the U.S. Commercial or Foreign Service Officers, or they may contact Washington agencies directly when they have been solicited or have learned that one of their competitors has been solicited for bribe payments from a foreign public official.

The U.S. Department of Commerce now has a "bribery hotline" accessible from the Department of Commerce Trade Compliance Center's website at http://tcc.export.gov/Report_a_Barrier/index.asp, through which U.S. companies can report bribery activity in international business transactions. The Department of Justice also has a hotline specifically for FCPA complaints. When information is received relating to acts of bribery that may fall within the jurisdiction of other Parties to the Convention, the information is forwarded, as appropriate, to national authorities for action.

In addition, the U.S. Departments of Commerce and State also provide worldwide support and advocacy for qualified U.S. companies bidding for foreign government contracts. Problems, including corruption by foreign governments or competitors, encountered by U.S. companies in seeking such foreign business opportunities can be brought to the attention of appropriate U.S. government officials. In October of 1996,the Commerce and State Departments revised their advocacy guidelines to require an anti-corruption agreement from companies seeking U.S. advocacy. A firm seeking advocacy support must agree in writing:(1) that it and its affiliates have not and will not engage in the bribery of foreign officials in connection with the matter for which advocacy assistance is being sought; and (2) that it and its affiliates maintain and enforce a policy that prohibits the bribery of foreign officials. The firm must further acknowledge that failure to comply with the terms of this agreement may result in the denial of advocacy assistance. In some respects this policy reaches conduct that is not prohibited by the FCPA. For example, the advocacy guidelines require a firm seeking advocacy to certify not only as to its conduct, but also as to the conduct of its affiliates, including foreign parent firms.

2.7

Does your government provide a procedure whereby persons and companies may submit a request for an opinion, based on the facts of a prospective transaction, on whether the transaction would constitute the offence of bribing a foreign public official? If so, please describe the process and explain to what extent, if any, the opinion would be binding on the courts.

The Department of Justice has created a formal opinion procedure. (28) Pursuant to this procedure, any American company or individual may request an opinion concerning specific, non-hypothetical, prospective transaction. (29) The request must set forth all of the relevant details and may, at the Department's request, be supplemented by additional facts or certifications. (30) The Attorney General or his designee (generally the Assistant Attorney General for the Criminal Division) will then issue an opinion stating whether, on the facts presented, the Department would take enforcement action. (31) A requesting company that receives a favorable opinion is entitled to a rebuttable presumption that its conduct was in compliance with the FCPA. (32) In determining what weight to give this presumption, a court may consider many factors, including whether the information provided to the Department was complete and accurate and whether the transaction as consummated was within the scope of the conduct described in the request. (33)

The Department issues a public release when it issues a formal opinion. (34) These releases, which generally do not disclose the identity of the requestor, are intended to provide general guidance as to the Department's current enforcement policy. Neither they nor the formal opinion are binding upon the Department in any other action and do not create a safe harbor for any party that did not join in the request. (35)

Although the Department's Opinions are non-binding on other federal agencies, the SEC has stated that, as a matter of its prosecutorial discretion, it will not take enforcement action against an issuer with respect to a transaction concerning which the Department has rendered a favorable opinion. (36)

3. Public Awareness

3.1

What activities have been undertaken or what activities are planned to make the Convention better known in your country (*e.g.*, workshops, seminars, public campaigns, encouraging compliance in the private sector, training programs for lawyers, etc.)?

Departments of Justice and Commerce and the SEC regularly participate in workshops and seminars concerning the FCPA and compliance programs. U.S. officials have provided information on the Convention to the private sector by participating in numerous meetings on the Convention held by corporations, law firms, and business associations, such as the National Association of Manufacturers, the American Bar Association, the American Corporate Counsels Association, and the Business Roundtable. In twenty-four years, since the enactment of the FCPA, there have been well over one hundred seminars on FCPA compliance. In addition, U.S. officials attend meetings with groups that have a strong interest in combating international corruption, including Transparency International, the American Bar Association Task Force on International Standards for Corrupt Practices, the U.S. Council for International Business, and the International Organization of Employers.

Furthermore, the Departments of Commerce and State produce annual reports to Congress on implementation of the Convention. [(37)] The Commerce, Justice, and State Departments have posted the Convention and related commentaries, as well as relevant legislation and other background materials, on their websites. [(38)] In May 2001, the State Department, in cooperation with the Commerce and Justice Departments, also re-published the brochure titled Fighting Global Corruption: Business Risk Management that contains information about the benefits of good governance and strong corporate anti-bribery policies, the requirements of U.S. law and the Convention, and various international initiatives underway to combat business bribery and official public corruption. The brochure is being made available to U.S. and foreign companies and business associations. [(39)] The Justice Department has also posted on its website the responses of the United States to the OECD Phase I Questionnaire on our implementing legislation and the full text of the FCPA. The United States intends to publish its responses to the Phase II Questionnaire accordingly.

The Commerce Department has provided detailed information on the status of the implementation of the Convention by our trading partners. Commerce's Trade Compliance Center has included on its website an Exporters' Guide to help businesses understand key provisions of the Convention. The Commerce Department's Trade Compliance Center has also used its compliance liaison program and other private sector initiatives to enlist the cooperation of the private sector in monitoring bribery of foreign public officials and implementation of the Convention. In addition, the U.S. Office of Government Ethics has a website with information on anti-corruption issues. [(40)]

3.2

Are you aware of guidelines or of any public or private initiative to develop codes of conduct, including corporate compliance schemes concerning adequate internal company controls? What efforts do you undertake to promote the OECD Guidelines for Multinational Enterprises and the OECD Principles on Corporate Governance as they relate to issues of bribery?

The United States government generally encourages business organizations to implement codes of conduct and compliance programs to address the application of the FCPA to a company's activities and those of its officers, directors, employees, agents, and shareholders. Most large U.S. companies have implemented codes of conduct and corporate compliance programs with internal company controls, and there have been numerous private sector initiatives to develop sample codes of conduct. [(41)]

Although the U.S. government does not approve or disapprove of the contents of these or any such programs, the Sentencing Guidelines that guide a federal court's imposition of fines on corporate defendants recognize the value of such programs by permitting the court to reduce the sentence where a violation occurs despite an adequate compliance program. [(42)] Otherwise, a company's failure to ensure the compliance of its employees, agents, and contractors may give rise to severe penalties. In addition, the Department of Justice has required companies to implement rigorous compliance programs as part of plea agreements and other settlements of FCPA matters. [(43)]

3.3

Does your government maintain contact and organize consultations with business, labour, and NGOs in anti-corruption activities with a view to promoting public awareness of the Convention?

The U.S. government has initiated an active dialogue with the private sector on how to address the problem of bribery of foreign public officials and support effective implementation

of the Convention. Senior officials of the Departments of Commerce, State, and Justice have raised the Convention and bribery issues in different contacts with counterparts and private sector groups. Officials of the Commerce, State, and Justice Departments are in regular contact with business representatives to brief them on new developments on anti-bribery issues and discuss problems they encounter in their operations. U.S. officials have provided information on the Convention to the private sector by participating in numerous meetings on the Convention held by corporations, law firms, educational institutions and business associations, such as the National Association of Manufacturers and the Business Roundtable. In addition, U.S. officials attend meetings with groups that have a strong interest in combating international corruption, including Transparency International, the American Bar Association Task Force on International Standards for Corrupt Practices, the U.S. Council for International Business, and the International Organization of Employers. U.S. officials respond to public inquiries on the Convention and the status of its implementation on a daily basis and, as noted in 3.1 *supra*, provide substantial information on the Convention and the FCPA through various websites, brochures, and hotlines.

U.S. agencies are also making use of an existing advisory committee structure as a forum for dialogue with the private sector when discussions go beyond the exchange of information and into the solicitation of recommendations of advice on specific matters of policy. For example, the Department of Commerce maintains an ongoing dialogue with the private sector through its regularly scheduled meetings of industry sector advisory committees, industry functional advisory committees, and the President's Export Council. The Commerce Department has raised the issue of international bribery before the Transatlantic Business Dialogue (TABD), a public/private partnership in which U.S. and European Union businesses meet to discuss transatlantic trade barriers and relay their findings to governments. The State Department receives input on bribery issues through its advisory committee on international economic policy.

The U.S. government strives to build a strong working relationship with the U.S. private sector in order to combat international bribery and corruption. U.S. officials are committed to maintaining this valuable relationship as they seek to ensure effective implementation and enforcement of the Convention.

B. APPLICATION OF THE CONVENTION

Preliminary remark: The following questions have been designed to provide participants with some guidance in addressing the relevant issues concerning the application of their implementing legislation. Ideally, participants would answer these questions by referring to concrete cases that have arisen under their implementing legislation or any other legislation (such as trafficking in influence or misuse of company assets, etc.) with regard to the bribery of foreign public officials (whether or not these cases have been successfully prosecuted). However, if a country cannot provide examples that relate directly to the bribery of foreign public officials, it is invited to provide other relevant examples. Cases of bribery of domestic public officials would be the best alternative.

1. Have there been any concrete cases in your country that fall under the scope of the Convention? If yes, please describe the facts and explain how your authorities have dealt with such cases.

   Between 1978 and 1981, the Department of Justice brought approximately 15 criminal enforcement actions against American companies based on questionable payments that took place before the effective date of the FCPA. Since 1977, the Department of Justice has brought approximately 32 criminal prosecutions and 7 civil enforcement actions under the anti-bribery provisions of the FCPA. In addition, the SEC has brought seven civil enforcement actions under the anti-bribery provisions and hundreds of cases under the books and records provisions. We have attached detailed descriptions of bribery matters at

Appendix A [44] and Appendix B. This list is as complete as possible. However, sole jurisdiction over FCPA matters was only vested in the Fraud Section in approximately 1994, and it is possible that there were additional prosecutions by local federal prosecutors that were not reported to the Fraud Section.

We are not able to provide any statistics on the number of prosecutions brought under the books and records provisions that did not specifically allege foreign bribery. However, the Department of Justice has brought two criminal prosecutions under the books and records provisions that involved suspect payments and the SEC has brought two civil enforcement actions for such conduct. We have attached detailed descriptions of these matters as Appendix A and Appendix B.

2. Please describe what has been done in your country in order to provide for an effective application of your country's implementing legislation? Have guidelines been developed concerning the interpretation of the Convention?

Neither the Department of Justice nor any other agency of the United States government has provided guidelines concerning the interpretation of the Convention. The FCPA is modeled on domestic corruption legislation, and its terms are clear. However, the Department of Justice has established an Opinion Procedure that permits companies to request an opinion on whether specific, non-hypothetical, prospective conduct would violate the FCPA,[45] and summaries of these opinions are available on the Department's website.[46] In addition, the Departments of Justice and Commerce have published a brochure, available on the internet[47] to serve as a general guide to the FCPA. Similarly, as stated above, the Department of State, in cooperation with the Departments of Justice and Commerce, has published a brochure, also available on the internet,[48] that sets forth the United States' anti-corruption efforts throughout the world.

3. Has a coherent interpretation of the Convention and/or its implementing legislation been developed by legal science? What is the legal weight given to secondary sources of law, such as the Commentaries to the Convention and articles in legal journals?

There have been few judicial opinions interpreting the FCPA. In *United States v. Liebo*,[49] the court approved an instruction defining the word "corruptly," which embodies the *scienter* requirement of the FCPA, as "voluntarily and intentionally, and with a bad purpose of accomplishing either an unlawful end or result, or a lawful end or result by some unlawful method or means." In *United States v. Castle*,[50] the court held that foreign officials, who are not covered by the FCPA itself, may not be prosecuted for conspiracy to violate the FCPA. In the *Young & Rubicam, Inc.* matter, the court held that the crime was completed upon the bribe money being provided to an intermediary, even though the intermediary allegedly did not convey the money to the foreign official. [51]

The FCPA itself creates no private right of action. [52] The courts have split, however, as to whether private parties may use the FCPA as a predicate for other private actions such as those authorized under the RICO act. In *W.S. Kirkpatrick & Co. v. Environmental Corp.*,[53] the Supreme Court upheld evidentiary findings in such an action without addressing the validity of the FCPA predicate itself. Some lower courts have permitted such actions, while others courts have not. [54]

The most recent judicial authority on the FCPA is the jury charge given by the District Court in *United States v. Mead*, which went to trial in October 1998. We have attached a copy of the FCPA portions of this charge as Appendix C and a copy of the indictment as Appendix Q.

The legislative history for the FCPA is fairly detailed and provides useful guidance concerning the proper interpretation of many terms of the FCPA.[(55)] For example, the legislative history for the 1988 amendments clearly explains that the new knowledge standard, *i.e.*, the standard for whether a person is responsible for knowing that a third party was acting as an intermediary, included not only actual knowledge but also willful blindness. [(56)] While courts regularly examine legislative history in interpreting the FCPA's provisions,[(57)] there are limits to the uses of legislative history in interpreting statutes. In addition to the fact that many courts look primarily to the text itself in interpreting statutes and often use legislative history only as a secondary interpretive tool, [(58)] some courts refuse to consider isolated comments in legislative history when the meaning of the text appears clear.[(59)] Furthermore, a number of judges, including some Supreme Court justices have been highly critical of the use of legislative history in interpreting statutes and instead advocate a "plain meaning" interpretation of statutes, in which the language of a statute is said to be given the meaning that is clear or common without use, or with only limited use, of legislative history.[(60)]

In addition, the FCPA has been the subject of extensive commentary in the academic and professional legal literature. Although some courts will cite to such literature in supporting a particular decision, we are not aware of any instance in which this was done in an FCPA matter. Thus, such literature is most important in educating the business community and its legal advisors concerning the FCPA and its requirements. We have attached a bibliography of FCPA-related literature as Appendix D.

4. If relevant, have there been practical examples to show how your country has/has not been able to use the concept of "direct applicability" of the Convention in order to compensate for discrepancies or gaps in the national implementing legislation?

The rule of "direct applicability" does not apply in the United States. The United States has implemented the OECD Convention through its 1998 amendments to the FCPA.

4 Article 1. The Offence

4.1

a. Please describe how your authorities have applied the offence in cases involving bribery of foreign public officials (by natural or legal persons). If no cases have arisen concerning the bribery of foreign public officials, please refer to cases involving bribery of domestic public officials where appropriate. In answering this question, please pay particular attention to the following elements:

Since Phase 1, have there been any significant interpretations (by courts or other authorities) of Article 1? How have the following elements of the offence of bribery of foreign public officials or equivalent domestic bribery laws been interpreted: intent, the offer, promise or giving of a bribe, undue pecuniary or other advantage (provide examples of advantages that have been covered), intermediaries (provide examples, where available), third party beneficiaries (especially cases where the benefit went directly to the third party), in relation to performance of official duties (what acts/omissions have been covered), obtaining or retaining business or other improper advantage (where relevant, how have the courts applied facilitation payments or bona fide expenses), and international business (compared to domestic business)?

b. As noted above, some of the elements of Article I, as implemented through the FCPA, have been the subject of court decisions or enforcement actions or formal opinions by the Department of Justice and the SEC. Many of these were discussed in the Phase 1 review of the United States and we have included a list of FCPA enforcement actions at Appendix A and Appendix B. Since the Phase 1 review of the United States, the following has occurred:

In *United States v. Control System Specialist, Inc., et al* (S.D. Ohio 1998) and *United States v. IMS, et al.* (S.D. Ohio 1998), the defendants pleaded guilty to conspiracy to violate the FCPA, substantive violations of the FCPA, and paying an illegal gratuity to a federal employee. The underlying conduct involved payments to a Brazilian military officer to obtain contracts to sell surplus military equipment to the Brazilian Air Force. A copy of the criminal information in *Control System Specialist* is attached at Appendix R.

In *United States v. Metcalf & Eddy* (D. Mass. 1999), the court approved a consent judgment and issued an injunction prohibiting the company from engaging in any future conduct in violation of the FCPA. The particular conduct at issue involved the provision of airfare, travel expenses, and pocket money to an Egyptian official and his family during business trips to the United States. The Department of Justice interpreted this conduct as exceeding the affirmative defense for *bona fide* promotion expenses. As the company eventually agreed to the entry of the injunction and a consent order which imposed a stringent compliance program upon it, the court did not explicitly rule upon the scope of the affirmative defense. Copies of the pleadings in this matter are attached at Appendix E.

In *United States v. Robert Richard King and Pablo Barquero Herndandez* (W.D. Mo. 2001), the grand jury indicted two individuals for conspiring to violate the FCPA and the Travel Act (incorporating the Missouri commercial bribery statute), as well as substantive violations of the FCPA and the Travel Act, in connection with an alleged scheme to bribe officials and political parties in Costa Rica to obtain a concession to build a new commercial port and resort on the Costa Rican coast. Trial is currently scheduled for April 2002 in this matter. In addition, in *United States v. Richard Halford* (W.D. Mo. 2001) and *United States v. Albert Reitz* (W.D. Mo. 2001), two co-conspirators pleaded guilty to conspiring to violate the FCPA. Sentencing for these defendants is pending. A copy of the indictment in the *King* matter and the plea agreements and criminal informations in *Reitz* and *Halford* are attached at Appendix G.

In *United States v. Joshua Cantor* (S.D.N.Y. 2001), an officer of American Bank Note Holographics (ABNH), a public company, pleaded guilty to conspiring to violate the FCPA in connection with bribes paid to a Saudi Arabian official to obtain a contract to manufacture holographics for Saudi currency. As described below, in related matters, the SEC filed a complaint seeking civil fines and injunctive relief against Cantor and his superior, Morris Weissman, and issued an administrative order against ABNH. Sentencing for Mr. Cantor and trial on the SEC complaint is pending. Copies of the criminal information in the *Cantor* matter, the SEC complaint, and the SEC administrative order are attached at Appendix H.

In *United States and SEC v. KPMG Siddharta Siddharta & Harsano and Sonny Harsano* (S.D. Tex. 2001), the Department of Justice and the SEC brought a joint civil complaint against accountants for Baker Hughes, an American corporation, for facilitating the payment of a bribe to an Indonesian tax official to obtain favorable tax treatment. The court entered a consent order in this matter. As described below, in related matters, the SEC brought a settled administrative proceeding against Baker Hughes, which resulted in a cease and desist order against the company, and a civil complaint seeking monetary penalties and injunctive relief against two of Baker

Hughes' officers. Trial is pending on the SEC complaint. Copies of the complaint, consents and undertakings, and judgments in the *KPMG Siddharta Siddharta & Harsano* matter and the SEC's cease and desist order against Baker Hughes are attached at Appendix I.

In *United States v. David Kay* (S.D. Tex. 2001), the defendant, an officer of American Rice Inc., was charged with twelve counts of violating the FCPA. The charged conduct involved alleged bribes to Haitian customs officials to accept false bills of lading and other importation documents, thereby resulting in lower customs duties. Trial in this matter is pending. A copy of the indictment in this matter is attached at Appendix P.

In Opinion Release 00-01, the Attorney General opined that a law firm could permit a partner to take a leave of absence to assume a post in a foreign government, make certain up-front payments to account for future fees from that partner's clients, and allow that partner, at his own expense, to maintain coverage under the firm's health insurance package. The Attorney General required, however, that both the partner/official and the law firm certify to the Department of Justice that the partner/official would recuse himself from all decisions involving the law firm's clients or involving the retention of the law firm to represent or advise the foreign government. A copy of Opinion Release 00-01 is attached at Appendix J(i).

In Opinion Release 01-01, the Attorney General opined that a U.S. company could form a joint venture with a French company to which each company contributed existing contracts, where certain precautions, including termination of existing agency contracts and the institution of a rigorous compliance program, had been taken to ensure that neither company nor the joint venture made any payments to foreign agents that could have been in furtherance of any pre-existing agreement to pay a bribe. The Opinion was expressly conditioned on the Department of Justice's understanding that the French company had represented that none of the contracts it was contributing to the joint venture had been obtained by payments that would have been in violation of either the new French anti-foreign bribery law or *any* applicable foreign or domestic anti-bribery law. A copy of Opinion Release 01-01 is attached at Appendix J(ii).

In Opinion Release 01-02, the Attorney General opined that a U.S. company could retain as a consultant a company owned by a foreign official, provided that the official was not responsible for awarding any business to the company and undertook to recuse himself from any discussion or decision in which such award of business was contemplated. A copy of Opinion Release 01-02 is attached at Appendix J(iii).

In Opinion Release 01-03, the Attorney General opined that a U.S. company could proceed with a transaction after investigating an employee's report that a dealer had made statements that the employee had understood to mean that payments to a public official had been or would be made. The company's investigation had uncovered no evidence to corroborate this statement, the dealer had affirmatively represented that no payments had been or would be made and had repeated that representation in a statement directed to the Department of Justice, and the proposed agreement with the dealer gave the U.S. company the right to audit the dealer and to terminate the agreement if it determined that an illegal payment had been made. A copy of Opinion Release 01-03 is attached at Appendix J(iv).

a. Regarding SEC cases, in the past few years the SEC has brought cases and administrative actions against at least six corporations. Many of the actions have also named individuals involved, including in some cases officers of the companies, and, in one case, a foreign accounting firm.

SEC civil actions include the following cases (which are summarized in more detail in Appendix A and Appendix B):

CASE	OUTCOME-Parties	OUTCOME-Action taken
SEC v. Montedison, SpA.	Company	Settlement, $300,000 penalty
SEC v. Triton Energy.	Company	Cease and desist order, $300,000 penalty
	Two former officers	$50,000 and $35,000 penalties, respectively
	Four additional employees	Administrative order prohibiting future conduct
In re IBM, Inc.	Company	Settlement, $300,000 penalty
In re American Bank Note Holographics, Inc (ABNH).	Company	Administrative order, company paid $75,000 penalty
In re Baker Hughes, Inc.	Company	Cease and desist order
	Foreign accounting firm and local partner (jointly w/Department of Justice)	In litigation
	Two former officials	In litigation
In re Chiquita Brands International, Inc.	Company	Cease and desist order, $100,000 penalty

Supplemental Questions: In responding to question 4, please also explain whether the offences have been applied in practice to the various categories of offenders including the following:

A "U.S. person" bribing abroad on behalf of a "U.S. person".

The United States has not yet brought any prosecution invoking the nationality jurisdiction established by the 1998 amendments to the FCPA. However, in the *Mead* and *Saybolt Inc.* cases (Appendix Q), which were brought under the pre-1998 FCPA, the facts established that a U.S. person traveled from New Jersey to Panama at the direction of the U.S. company's officers. Once in Panama, he caused a check to be drafted and drawn on the company's Panamanian affiliate's bank account and directed that the cash be paid to specific Panamanian officials.

A "U.S. person" bribing abroad on behalf of a foreign company or person.

The United States has not yet brought any prosecution invoking the nationality jurisdiction established by the 1998 amendments to the FCPA. However, in *SEC v. Triton Corp.* (D.D.C. 1997), two U.S. persons who were former officials of the company's Indonesian subsidiary were charged with making payments to Indonesian officials.

Whether in practice the provisions in the FCPA respecting those who bribe on behalf of others (i.e. any officer, director, employee, or agent . . . or any stockholder") apply to legal persons.

We understand this question to ask whether a legal person may be held liable for acting as an agent of another legal person. The answer to this, both legally and in practice, is "yes." The most recent example is *SEC v. KPMG Siddharta Siddharta & Harsano* (S.D. Tex. 2001) (Appendix I), in which a foreign firm was charged with making a payment to an Indonesian official on behalf of an American firm.

c. Many countries did not adopt in their national laws, per se, the autonomous definition of foreign public official provided in the Convention. Can you please describe how the definition adopted in your legislation has been applied to foreign bribery cases and whether you have encountered any difficulties? Please provide examples of cases involving interpretation of the terms "public function", "public enterprises", and "public agencies."

The FCPA definition[(61)] predates the OECD Convention but it incorporates an autonomous definition similar to that contained in Article I(4)(a). The definition was amended in 1998 to add officials of public international organizations.

FCPA enforcement actions have encompassed bribes paid to officials of foreign tourist boards (*Young & Rubicam*), state-owned oil companies (*Crawford Enterprises*, *C.E. Miller Corp., Ruston Gas Turbines, International Harvester Corp.,* and *Applied Process Products Overseas*), political parties (*Kenny Int'l Corp.*, *W.S. Kirkpatrick, Inc.*), sewage authorities (*Metcalf & Eddy*), state-owned bus companies (*Castle*), racing authorities (*Sam P. Wallace Co.*, *American Totaliser Co.*), utilities commissions (*Silicon Contractors*), state-owned trading companies (*Goodyear Int'l Corp.*), state-owned banks (*IBM*), and tax authorities (*Triton, Baker Hughes, KPMG Siddharta Siddharta & Harsano*).

For summaries of this cases, *see* Appendix A and Appendix B.

d. Please provide examples of cases involving incitement, aiding, abetting, or authorization, attempt (if relevant), conspiracy (if relevant).

It is common in the United States to charge conspiracy together with the substantive act. Similarly, aiding and abetting is commonly charged as part of the substantive act.

There is no crime of attempt to commit the FCPA. However, the FCPA does not require consummation of the bribe and the crime is complete once any act in furtherance of an offer or promise of a bribe has been taken.[(62)] Thus, in *Young & Rubicam*, the offense was completed when the bribe money was given to an intermediary, even though that intermediary allegedly did not in fact pay the bribe.[(63)] Similarly, in *United States v. Mead*, the court instructed a jury that it did not need to find that a payment had been made for it to convict the defendant - his authorization of such a payment was sufficient. *See Mead* jury instructions at Appendix C.

The FCPA explicitly includes authorization of a bribe as a grounds for liability. In *United States v. Mead* (Appendix Q), the chief executive of the company was charged and convicted of authorizing the bribe. Similarly, in *United States v. Kay* (Appendix P), the defendant is charged (trial is pending) with authorizing his subordinates to pay bribes in Haiti. Finally, in *United States v. King* (Appendix G), the grand jury charged King not with paying a bribe but with conspiring to pay and authorizing the payment of a bribe *in the future*.

e. Have cases been dismissed due to successful pleading of defenses (either general or defenses specific to the bribery offence)?

We are not aware of any cases dismissed due to the pleading of one of the FCPA specific defenses.

Of the thirty-three FCPA criminal prosecutions brought to date, thirty resulted in convictions under the FCPA or related charges, one was dismissed at trial, and two are pending trial. Of the seventy-six companies and individuals charged, twenty-two companies and twenty-six individuals have been convicted, five defendants are fugitives, and two are pending trial. In addition, some defendants' cases were resolved by civil enforcement actions.

In one case, the court dismissed the charges after hearing the government's evidence, finding that there was not sufficient evidence to present the case to the jury. The court found that the government had failed to establish an agreement to bribe the foreign officials and had consequently failed to establish the specific intent necessary to support a finding of falsifying accounting records.[(64)] In two other cases, the jury acquitted certain defendants while convicting others.[(65)] As the jury clearly found that the bribe was paid or offered, the jury's verdict of acquittal of a specific defendant presumably reflected a determination that that defendant lacked intent or knowledge.

Finally, prior to 1988, the FCPA required that an individual's employer be convicted prior to or at the same time as the individual.[(66)] In *United States v. McLean*,[(67)] the court held that the employer's plea to *conspiracy* to violate the FCPA did not satisfy this requirement and ordered the defendant employee acquitted.

As noted above, in *United States v. Castle*,[(68)] the court dismissed charges against two employees of a foreign state-owned bus company, finding that they could not be charged with conspiracy to violate the FCPA, where the FCPA itself does not create liability for passive bribery.

Supplemental question: Please also explain how the affirmative defense in respect of a payment, etc. that was "lawful under the written laws and regulations of the foreign official's . . . country" has been applied in practice by referring to case law and Opinion releases.

There have been no cases or Opinion Releases that explicitly addressed this defense, nor has it been raised in any FCPA prosecution of which we are aware. However, the defense was inserted in the FCPA in 1988 to codify Review Letters issued by the Department of Justice under its then-existing Review Procedure.[(69)] These included:

> Release 80-02: Employee of an American company's subsidiary to run for public office. Company provided opinion of local counsel that proposed safeguards would ensure that conduct would not violate local conflict of interest or other laws.
>
> Release 80-04: American company and foreign company whose chairman was also a director of a state-owned company intended to engage in certain prospective business transactions with the state-owned company. Company agreed to institute safeguards and warranted that arrangement did not violate local laws.
>
> Release 81-1: Proposed business arrangement with a local company would not violate local law.

Release 85-1: American company to pay reasonable and necessary expenses of French officials while they toured its facilities and met with its employees. Company furnished an opinion that the proposed payments did not violate French law.

Release 86-1: American companies intended to employ members of the British and Malaysian parliaments. Companies warranted that the employment relationships would comply with the local laws of each country.

Release 88-1: American company to participate in Mexican debt-equity swap program, which required payment of a fee to the Government's financial agent. Company warranted that the arrangement did not violate any local law.

5. Responsibility of Legal Persons

5.1

Can you provide examples of the application of the law ascribing the liability of legal persons(including state enterprises) to the bribery of foreign public officials? If not, please refer to cases involving bribery of domestic public officials. In describing the cases, please pay careful attention to describing the types of entities that have been prosecuted and how the standard of liability (*e.g.*, breach of supervisory duty, leading person theory, etc.) has been applied to bribery offences.

As shown in Appendix A, twenty-two companies have been charged and twenty-one convicted to date with criminal violations of the FCPA. Five additional companies have been the subject of civil enforcement actions by the Department of Justice and additional companies have been the subject of SEC actions. As discussed during the Phase I review, corporate liability under United States law is not predicated upon any breach of supervisory duty or leading person responsibility, but is satisfied by proof that an agent or employee of the legal person committed a crime or violation of the securities laws while acting within the scope of his employment and, at least in part, for the benefit of the legal person. A copy of the Principles of Federal Prosecution of Corporations, which sets out the Department of Justice's policy in this area, is attached as Appendix K.

We are not aware of any U.S. "state enterprises" being charged in an FCPA matter. As noted in the U.S. Response to Phase 2: Questions Related to Phase 1 Evaluation, several state trade associations and agencies obtained a favorable statement of enforcement intent with respect to their intention to provide samples or pay expenses of foreign officials while attending meetings or demonstrations of industrial or agricultural products. *See* Review Releases 81-02, 82-01, and 83-3.

5.2

Concerning the relationship of liability between the legal person and the natural person:

1. What has been the outcome when the individual(s) responsible for the bribery transaction (*e.g.*, directors, managers, shareholders) has (have) not been convicted or identified before assigning liability to the legal person?

   Between 1977 and 1988, the FCPA required conviction, either in prior proceedings or in the same trial, of the legal person before any natural person employed by that legal

person could be convicted. As a result of this provision, charges against one person were dismissed.[(70)] This provision was repealed in 1988.

U.S. law does not require the conviction of any individual prior to convicting a corporation of a crime. A corporation may be convicted upon proof that any employee or agent committed a crime while acting within the scope of his duties and, at least in part, on behalf of the corporation.[(71)] The *mens rea* requirement may be satisfied by a showing of collective knowledge of a corporation's officers, employees, and agents.[(72)]

2. Is the responsibility of the legal person determined in the same proceedings as the individual(s) responsible for the bribe or as a consequence of the proceedings in relation to the individual(s)?

   For a legal person to held liable, it must be convicted in a criminal or civil proceeding in which it is a defendant and is able to contest the charges. There is no automatic imposition of liability based upon the conviction of an employee.

   In the United States, it is common to charge the legal person and the responsible natural persons in the same indictment and to try them together.

3. If the standard of liability for legal persons involves the identification of someone in the legal person who is responsible for the bribe, would information about the identity of the directors, shareholders and beneficial owners be available on a timely basis to the investigating authorities? Please explain what information would be available and how it would have to be obtained.

   Although liability for legal persons is predicated upon the acts of *any* director, officers, employee, or agent, information concerning the identity of directors, shareholders, and beneficial owners of most companies is generally available to the government.

   For example, public corporations whose securities are traded on national exchanges are required to register and file periodic statements with the SEC. These statements include information about the identity of directors, officers and large shareholders, and are available to the public.

   In addition, federal investigating authorities, including financial, regulatory and law enforcement officials, have broad subpoena powers. These powers allow government authorities to compel documents and testimony from persons and entities in the United States. Generally, the SEC conducts civil investigations using its independent subpoena power, while the Department of Justice utilizes federal grand juries to subpoena the production of documents and to obtain testimony. Using these broad subpoena powers, law enforcement authorities are able to obtain information located in the United States about the beneficial ownership and control of corporate vehicles (e.g., corporations, trusts, and partnerships) established in each of the fifty States.

   In the United States, each of the States establishes its own laws and regulations regarding corporate vehicles. Generally, the States require corporations, as a condition of incorporation, to maintain a register of shareholders (lists of shareholders of record). Thus, each corporation is required to obtain and maintain information about its shareholders. This information is available both from the company and from various intermediaries (e.g., broker-dealers, banks) to federal authorities via their broad subpoena powers.

Does the state have the same powers for investigating an offence in relation to a legal person as in relation to a natural person (*e.g.*, search and seizure, including the search and seizure of bank records, subpoenaing witnesses, etc.)? Who are the competent authorities for investigating such cases?

Yes. The same authorities are responsible for investigating and prosecuting legal persons as do so for natural persons. In addition, additional authorities may have regulatory jurisdiction over legal persons and may take corrupt behavior into account in granting licenses or other official actions.

6. Sanctions

Natural and Legal Persons

6.1

On the basis of available information, please describe all criminal, administrative, and civil sanctions that have been applied in practice to natural persons for the offence of bribing a foreign public official and compare them with those that have been applied for domestic bribery as well as other similar offences (*e.g.*, fraud, theft and embezzlement).

To date, twenty-six individuals have been convicted of criminal violations of the FCPA. Sixteen of those individuals were sentenced to probation or incarceration and required to pay total fines and forfeiture of $2,446,953.[(73)] The sentences imposed in those cases are listed in Appendix A. Three defendants are pending sentencing. In addition, several individuals were the subject of civil enforcement actions for the payment of bribes, paid fines, and were enjoined from future violations. Penalties imposed in the Department of Justice's and the SEC's civil enforcement actions are set forth in Appendix A and Appendix B.

The FCPA provides for both criminal and civil sanctions. In criminal prosecutions, a defendant may be sentenced to a term of imprisonment of up to five years and a fine of $250,000 or twice the gross pecuniary gain from the offense.[(74)] In civil actions, a defendant may be subject to an injunction and required to pay a fine.[(75)] Since August 23, 2000, forfeiture has been available in both civil and criminal actions.[(76)] Further, individuals indicted for violations of the FCPA may be suspended from bidding on public procurement contracts pending the outcome of the case, and individuals convicted of violating the FCPA may be debarred from public procurement contracts.[(77)]

For conduct that occurred prior to November 1, 1987, the courts had wide discretion to impose sentences, provided they did not exceed the statutory maximum. For crimes committed after November 1, 1987, individuals are sentenced in accordance with the United States Sentencing Guidelines, which were enacted in large part to reduce unjustifiably wide sentencing disparity between similarly situated offenders. In sentencing an individual pursuant to the Guidelines, a court first determines his "base offense level" by reference to the type of offense committed. This base offense level is then adjusted to account for any specific offense characteristics, with an upward adjustment made for aggravating circumstances and a downward adjustment made for mitigating circumstances. For example, the base offense level would be adjusted upward if the offender played a substantial role or abused a position of trust in his commission of the offense. After determining the individual's "total offense level," the court determines his "criminal history category;" the more serious the offender's past criminal record, the higher his category will be. The final calculation of the offender's term of imprisonment is determined by the intersection of his offense level and criminal history on a sentencing table. At the intersection is a sentencing range within which the court must impose a term of imprisonment. In certain circumstances, a court may then enhance or reduce the sentence actually imposed

(known as "departing" upward or downward from a particular sentencing range) when the offender's conduct differs significantly from that described by the Guidelines. For example, a court may depart downward from a particular sentencing range and impose a less severe sentence based on an offender's substantial assistance in bringing other criminals to justice.

Other features of the Guidelines include the abolishment of parole, for offenders must now serve the full length of their prison term, and the rigorous imposition of fines. Concerning fines, the sentencing court must impose a fine not less than the minimum of the fine range corresponding to the offender's aforementioned offense level, unless the individual can establish that he is unable to pay the fine. The maximum fine that may be imposed is, depending on the circumstances of the crime, either the maximum of the fine range corresponding to the offense level, twice the gross loss caused by the offense, or twice the gross gain to the offender.

As noted in the United States' Phase 1 Evaluation, the Sentencing Guideline applicable to domestic bribery cases is § 2C1.1: Offering, Giving, or Receiving a Bribe," which establishes a base offense level of 10. FCPA violations currently fall under the offense type of "Commercial Bribery and Kickbacks"§ 2B4.1, which establishes an offense level of 8. However, on November 27, 2001, the U.S. Sentencing Commission published a notice of proposed amendments that transferred the FCPA to the guideline for "Offering, Giving, or Receiving a Bribe," U.S.S.G. § 2C1.1, thereby making its offense level equal to domestic bribery. Comments are due by February 2, 2002, and the amendments should become final sometime thereafter.

Although the Department of Justice does not maintain statistics on sentences imposed in domestic bribery cases, data collected by the U.S. Sentencing Commission for fiscal year 2000 showed that the mean sentence in domestic bribery cases was 16.3 months and the median sentence was 12.0 months. Of those sentenced, 17% received a downward departure for reasons other than substantial assistance to the government and were sentenced out of their sentencing range, while 0.9% received an upward departure.

Supplemental question: Can the U.S. provide examples of the application of sanctions under the FCPA to "domestic concerns" who are natural persons and have not bribed on behalf of a domestic concern? [§78 dd-2(g)(2)]

The United States has not yet brought any prosecution invoking the nationality jurisdiction established by the 1998 amendments to the FCPA.

6.2

On the basis of available information, please describe all criminal, administrative, and civil sanctions that have been applied in practice to legal persons found liable for bribing foreign public officials and compare them with the sanctions that have been applied for domestic bribery as well as other similar offences (*e.g.*, fraud, theft and embezzlement).

To date, twenty-one legal persons have been convicted of criminal violations of the FCPA and required to pay total fines of $29,471,000.[(78)] In addition, several legal persons were the subject of civil enforcement actions, paid fines, and were enjoined from future violations. The specific sanctions imposed in each are listed in Appendix A and Appendix B.

The FCPA provides for both criminal and civil sanctions. In criminal prosecutions, a defendant legal person may be sentenced to a fine of $2,000,000 or twice the gross pecuniary gain from the offense.[(79)]In civil actions, a defendant may be subject to an injunction and required to pay a fine.[(80)] Since August 23, 2000, forfeiture has been available in both civil and criminal actions.[(81)] Further, companies indicted for violations of the FCPA may be suspended from

bidding on public procurement contracts pending the outcome of the case, and companies convicted of violating the FCPA may be debarred from public procurement contracts.[(82)]

The Sentencing Guidelines applicable to legal persons became effective on November 1, 1991. For sentencing organizations, the Guidelines are broken into three principal areas. First, for cases involving an identifiable victim, a sentencing court must order the offending organization to pay restitution in the full amount of the victim's loss. Second, the court must determine the amount the organization is to be fined. For organizations operated primarily for a criminal purpose and with no legitimate means of conducting business, the court must impose a fine sufficient to divest the organization of its assets. All other organizations are subject to a different set of fine provisions, which mandate two basic calculations in determining the applicable fine. The first calculation assesses the seriousness of the organization's offense by choosing the highest of (1) an amount from a table corresponding to the offense level calculation for individual offenders; (2) the gain from the offense; or (3) the loss intentionally, knowingly, or recklessly caused by the offense. Once the court makes this initial "base fine" calculation, the actual fine level may vary substantially, according to the court's determination of the organization's "culpability score," which credits such organizational actions as voluntarily reporting the crime and penalizes such actions as prior commissions of the offence. This culpability score establishes the minimum and maximum multiple by which the base fine is multiplied to produce the fine range within which the court must fine the organization. The third principal area of sentencing covers organizational probation, which may be imposed on an organization for a variety of reasons, such as to secure payment of restitution or ensure establishment of a program to prevent future violations of the law. Beyond these three principal sentencing areas, organizations may also have certain assets forfeited depending on the nature of the crime.

The Department of Justice does not maintain statistics on sentences imposed in domestic bribery cases. The Sentencing Commission data referred to question 6.1 did not distinguish among legal persons and natural persons and provided data only on terms of imprisonment.

6.3

Where possible, in cases where persons have been found liable for foreign bribery cases, what were the grounds for determining the severity of the sentence (including the amount of the fine and/or term of the imprisonment, or for the non-imposition of a sanction)?

As discussed in the Phase I review, sentences under the FCPA are governed by the Sentencing Guidelines.

As explained above, the range of an individual's term of imprisonment and fine is determined by the intersection of his total offense level and criminal history category on the Guidelines sentencing table. For organizations, which include legal persons, the fine is calculated, as explained in 6.3, with reference to the type of crime committed and the level of the organization's culpability.

6.4

If your country provides a procedure for out-of court settlements (*e.g.*, plea-bargaining or other procedure), please describe how this process has been applied to cases of bribery of foreign public officials, and include information about the resulting sanctions. If information is available, please compare these sanctions with those obtained under other judicial procedures.

Plea-bargaining is not an "out-of-court" settlement under our system. Instead, the parties present the agreement to the court which may reject it entirely. In presenting the agreement, the United States is obligated to inform the court about all of the circumstances surrounding

the crime, including whether the defendant is being granted immunity from prosecution for any other crimes. Moreover, both the Sentencing Guidelines and Department of Justice regulations prohibit plea bargains that conceal relevant sentencing factors, such as the amount of the bribe or the benefit to be received as a result of the bribe, from the court or which mislead the court as to the relevant sentencing factors.(83)

Individuals and companies may choose to plead guilty to a crime without first going to trial. In some instances, they may be invited to the prosecutor's office in advance of charges to discuss the matter; in others they may choose to meet with the prosecutor after charges have been formally presented. In either case, pursuant to the Federal Principles of Prosecutions, they must plead to the "highest, most provable offense." By doing so, they achieve the certainty of a quick resolution to the charges and may obtain the government's agreement concerning particular facts that may bear on sentencing, such as the amount of the financial gain or loss involved or the offender's role in the commission of the crime. In recognition of an offender's acceptance of responsibility by pleading guilty, the Sentencing Guidelines authorize the court to grant a set reduction in sentence.(84) In addition, should the defendant also agree to cooperate with the government against other offenders, the government may agree that any self-incriminating information so provided will not be used against the defendant in determining his sentencing range under the Guidelines.(85) Furthermore, there is a possibility that the government may, at its discretion, make a formal motion to the court requesting a reduction in the defendant's sentence to recognize his "substantial assistance" in bringing other offenders to justice. The extent of any such reduction will depend upon the court's evaluation of the significance, usefulness, and timeliness of the defendant's assistance after taking into consideration the government's evaluation of the assistance rendered.(86)

7. Seizure and Confiscation

-- Pre-trial Search, Seizure and Confiscation

7.1

Please provide cases where your authorities have granted or denied pre-trial search, seizure and confiscation in relation to the bribe and the proceeds of bribing a foreign public official.

Until 2000, there was no authority to forfeit the proceeds of bribery under the FCPA, although in theory the bribe itself might be seized and confiscated from the foreign official if the foreign official was charged with money laundering. Thus, we are not aware of any request for pre-trial seizure or confiscation of the bribe or proceeds of bribery in a FCPA case. However, as noted below in 7.3, the fines available under the FCPA are sufficient to meet the OECD Convention's requirement of discussed in Phase I, the United States met the OECD Convention's requirement of "monetary sanctions of comparable effect"(87)

Search warrants are available in FCPA investigations, as in other federal criminal investigations, whenever there is probable cause to believe that the evidence of a crime is present at a particular location. Search warrants have been used in FCPA investigations. For instance, in the *King* case, search warrants were executed on the same day on five locations, including King's office and residence, those of two of his alleged co-conspirators, and the office of the investment company formed to develop the Costa Rican project.

7.2

Please provide cases where your authorities requested access to bank records or other financial records held by a financial institution for the purpose of obtaining information, searching and seizing, or freezing property in relation to the bribery of foreign public officials and note any difficulties encountered in carrying out these powers.

Bank records and other financial information are routinely requested in FCPA investigations. As discussed in Phase I, there is no bank secrecy provision limiting the access of the government to such records in a criminal investigation, and the United States has not encountered any problems obtaining such evidence from domestic financial institutions.[(88)] As noted below, the United States has, in the past, encountered problems due to dual criminality in obtaining evidence from foreign financial institutions.

-- Confiscation or comparable monetary sanctions

7.3

Please describe how confiscation of the bribe and the proceeds has been exercised in relation to the foreign bribery offence. In responding, please answer the following questions:

a. In practice, have the authorities confiscated the bribe and the proceeds of bribing a foreign public official or just one or the other? In practice, how far have the authorities been able to trace the assets generated by the foreign bribery offence (*i.e.*, where they have been converted from their original form)? Have the authorities encountered difficulties in tracing the proceeds?

Generally, the United States "confiscates" the proceeds of foreign bribery through the imposition of a fine. *See* 7.3(b) below. Until 2000,[(89)] the United States did not have the authority to directly confiscate the proceeds of foreign bribery and could only confiscate the bribe itself if it had jurisdiction over the subsequent laundering of the bribe by the bribe recipient.[(90)] Thus, tracing of the actual proceeds was not necessary for the purpose of confiscation.

The United States has, however, often sought to trace funds used to pay bribes for the purpose of obtaining evidence of the underlying offense. As noted above, the United States has not encountered any problems in obtaining domestic bank and corporate records. However, it has encountered problems in obtaining foreign bank and corporate records. For instance, in the *General Electric* case, the Swiss government, which at the time had no foreign bribery law, refused to provide a critical piece of evidence, citing the lack of dual criminality. The United States, however, revised its request and its theory of prosecution to focus on a related fraud upon the U.S. government involving the non-disclosure of "commissions" paid by the company, and the Swiss government provided the evidence for use in a prosecution of that offense. In separate cases, certain individuals were charged and convicted under the FCPA for having authorized the payment of the "commissions."

b. If confiscation is not possible because the assets cannot be traced or are no longer available (because, for instance, they are in the possession of a bona fide third party, or they have been gambled away), or confiscation is not available under your laws, what monetary sanctions of a comparable effect have been applied? As noted in Phase I, United States' law imposes "comparable monetary sanctions" in lieu (and, since 2000, in addition to) forfeiture. Prior to the establishment of the Sentencing Guidelines in 1987, courts had wide discretion to impose a sentence and were not required to explain the factors that caused them to impose particular sentences. The Alternative Fines Act[(91)] however, provided that the fine for financial crimes should be twice the gross gain to the offender or the gross loss to a victim. Thus, for example, in the *Lockheed* case, the company was fined $21.8 million, which fine was determined by referring to the anticipated profits from the sale of two airplanes to the Egyptian government.

Under the Sentencing Guidelines, which went into effect for individuals in 1987 and for corporations in 1991, the fines have been determined by reference to the offense

levels set by the Guidelines, which, in turn, are dependent upon the offender's actual or anticipated gain or the victim's loss resulting the offense. Gain is calculated by determining the before-tax profit to the defendant resulting from the relevant conduct of the offense and may result from either additional revenue or cost savings.(92) Loss is calculated by determining the fair market value of the money, property, or services unlawfully taken, but it excludes the amount of any interest the victim could have earned on any such funds had the offense not occurred. In addition, in a prosecution for conspiracy or attempt, loss will be calculated by using the greater of the actual loss and the intended loss the offender was attempting to inflict. Finally, loss need not be determined with precision, and the court need only make a reasonable estimate of the loss given the available information. Such an estimate, for example, may be based upon the approximate number of victims and the average loss to each victim, or on more general factors such as the scope and duration of the offense.(93) For example, in the *Saybolt* case, the company had not actually received the land concession for which it had paid the bribe. Nevertheless, the company's internal documents contained estimates of the probable gain from receiving the concession, and, accordingly, the company stipulated that its expected gain was $ 700,000. This resulted in a Guidelines fine range of $980,000 - $1,960,000, and the court imposed a fine of $ 1,300,000. When the same issue was presented to the trial court that had presided over the trial of the CEO of the company's U.S. subsidiary, however, a different trial court found that these internal estimates were too speculative and that the benefit would not have inured directly to the defendant, and thus used an estimated benefit of $ 50,000 (the amount of the bribe itself). This resulted in a Guidelines fine range of $2,000 to $20,000, and the court imposed a fine of $20,000.

c. If confiscation of the bribe when it is still in the possession of the briber is available, can you provide examples of having applied this power in practice? United States law provides for the direct forfeiture of bribe proceeds or the forfeiture of property involved in a money laundering transaction related to a bribery offense.(94) As a general matter, this would require the payment of the bribe to generate proceeds or some other action that would constitute the commission of the bribery offense before the funds could be forfeited. It is conceivable that, since the FCPA offense is complete once an offer, promise, or payment of a bribe is authorized, that internal transfers of funds in preparation for the payment might be sufficient to establish a violation of the money laundering statute and thus render the designated funds as money laundering "proceeds." More likely, however, funds intended to be used to pay a bribe would not be deemed the "proceeds" of a violation of the FCPA until they were actually paid to a foreign official or an intermediary.

Nevertheless, in certain circumstances, particularly involving transactions designed to promote a bribery offense that are conducted with other criminally derived proceeds or that send funds into or out of the United States, it may be possible for the United States to forfeit bribe money before it has been paid to the bribe recipient. In addition, as a result of legislative changes in 2000 and 2001, the United States can directly forfeit bribe proceeds without the need to demonstrate a separate money laundering transaction and can forfeit property located in the United States that constitutes the proceeds and instrumentalities of bribery committed outside of the United States.(95)

We are not aware of FCPA cases in which forfeiture has been sought, and, as discussed above, the government has generally sought to "confiscate" the proceeds of FCPA bribery through fines that are determined by the amount the offender gained or sought to gain as a result of the bribery.

d. Can you report cases concerning legal persons subject to confiscation? If so, is it available on the same terms as it is for natural persons?

Forfeiture is available against legal persons on the same terms as it is against natural persons. See answers concerning the imposition of fines upon legal persons *supra*.

8. Jurisdiction

-- Territorial Jurisdiction

8.1

In practice, have there been any difficulties in establishing territorial jurisdiction over cases of bribery of a foreign public official? For natural persons? For legal persons? In particular, if your country has identified certain requirements such as government authorization, the requirement that a particular person report the offence (*e.g.*, an employer or a victim), or that some test is met (*e.g.*, that prosecution is in the public interest), how has this requirement(s) been applied in practice to the foreign bribery offence?

There have not been any difficulties in establishing territorial jurisdiction in FCPA matters over natural or legal persons. Prior to 1998, the FCPA explicitly required a territorial act in furtherance of an offer, promise to pay, or payment, or an authorization thereof, without any further requirement of governmental authorization or public interest. This territorial requirement has been easily satisfied. For instance, in the *Mead/Saybolt* cases, the relevant territorial acts included transmitting electronic mail and airline travel. For a further discussion of the territorial nexus, please see the United States' Response to Phase 2: Questions Related to Phase 1.

Supplemental question: In responding to question 8, please explain what steps have been taken to ratify the Convention with respect to U.S. dependencies, and whether an offence committed in any of those dependencies is considered to have occurred within U.S. territory.

It has not been necessary for the United States to take any steps to ratify the Convention with respect to U.S. dependencies. Such territories are bound by treaties ratified by the federal government.(96)

As defined in the Securities Exchange Act of 1934, whose provisions govern 15 U.S.C. § 78dd-1, "State" includes " any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, or any other possession of the United States."(97) Further, the definition of interstate commerce applicable to the FCPA defines such commerce as "trade, commerce, transportation, or communication among the several States, or between any foreign country and any State, or between any State and any place or ship outside thereof."(98) Accordingly, an offense committed within any dependency of the United States falls within U.S. territory.

-- Nationality Jurisdiction

8.2

In practice, have there been any difficulties in establishing nationality jurisdiction over cases of bribery of a foreign public official? For natural persons? For legal persons? In particular, if a requirement(s) must be satisfied for the establishment of nationality jurisdiction, such as reciprocity, dual criminality, government authorization, the requirement that a particular person report the offence (*e.g.*, an employer), or that some test is met (*e.g.*, that the prosecution is in the public interest),how has this requirement(s) been applied in practice to the foreign bribery offence?

The United States has only had nationality jurisdiction in FCPA matters since November 1998. It has not yet had the opportunity to exercise it. The FCPA, as amended, asserts nationality

jurisdiction over U.S. nationals and businesses that is not dependent upon the proof of any additional requirement.[(99)]

8.3

Can you report whether your country has established jurisdiction over cases where a foreigner(non-national) working for a domestic company bribes a foreign public official abroad?

The FCPA imposes jurisdiction on U.S. legal persons and other U.S. businesses whose directors, officers, employees, agents, or shareholders, regardless of their nationality, take any act in violation of the statute.

The FCPA's nationality jurisdiction obviously does not apply to non-nationals. However, such nationals may be charged with conspiracy to violate the FCPA provided that at least one co-conspirator committed some act in furtherance within the United States.[(100)]

8.4

Please explain what criteria you apply in determining the "nationality" of a legal person in your country (*e.g.*, place of registry or main seat). Has a legal person established in your country been held responsible for bribery of foreign public officials by one of its subsidiaries abroad?

The nationality of a legal person is determined by its place of registry. The FCPA defines a legal person as having U.S. nationality if it is organized under the laws of the United States or one of its states, territories, or commonwealths.[(101)]

With respect to foreign-incorporated corporations, including foreign subsidiaries of a domestic company, the United States, like other OECD signatories, requires a territorial act by the foreign corporation before it will assert jurisdiction over that corporation's conduct. Thus, for liability to exist under the FCPA for an offer, promise to pay, or payment (or authorization thereof) by a foreign-incorporated corporation, that corporation, or one of its agents, must have taken some act in furtherance of the bribe within its territory.[(102)] However, domestic parent companies or affiliates have been held liable for the extraterritorial acts of their foreign subsidiaries when they had authorized, directed, or otherwise directed those acts. For example, in the *Saybolt* matter, the U.S. companies were held responsible for authorizing and directing a payment that was made by a Panamanian affiliate, Saybolt de Panama, using funds from a Panamanian bank account that were later reimbursed by the companies' Dutch parent corporation. In the *International Systems & Controls Corp.* matter, the SEC brought a civil enforcement action against the U.S. parent company for payments made to several foreign officials through the company's subsidiaries.

Parent companies may also be held criminally and civilly liable for violating the FCPA's books and records and internal controls provisions.[(103)] These books and records and internal controls provisions include those of the corporation's majority-owned subsidiaries and can include the consolidated books and records and internal controls of other subsidiaries.[(104)] Thus, in the *International Business Machines* matter, the SEC held the parent responsible for consolidating false statements contained in its Argentinian subsidiary's books, even in the absence of any involvement by the parent in any wrongdoing by its foreign subsidiary and absent any knowledge by the parent that the accounting entries were false. Similarly, in the *Montedison, S.P.A.*, matter, the SEC brought a civil enforcement action against an Italian company that was also a U.S. issuer that was based upon payments made through the company's offshore subsidiaries.

See descriptions of cases in Appendix A and Appendix B.

9. Enforcement (Investigation and Prosecution)

9.1

How do you apply existing rules concerning the opening and closing of investigation and prosecution (principle of legality, principle of discretion)? Are there any special investigative techniques that can be used in your country in cases of bribery, especially in regard to bribery of foreign public officials?

As described in Phase 1, prosecutors in the United States have discretion in opening and closing criminal and civil investigations, and the same rules apply to foreign bribery cases. However, this discretion is not open-ended and is exercised in much the same manner as prosecutors in countries that apply the principle of legality. Thus, a prosecution may be declined for lack of evidence, lack of resources, lack of likelihood of conviction at trial, and similar factors.(105)

9.2

What difficulties have you experienced concerning investigation and prosecution of offences of bribery of foreign public officials?

The chief difficulty in investigating and prosecuting foreign bribery cases has been the lack of cooperation in obtaining evidence located outside the United States. In some instances, to overcome a perceived lack of mutuality or the absence of a Mutual Legal Assistance Treaty, the Department of Justice developed the so-called "Lockheed Agreements," or Mutual Legal Assistance Agreements (MLAAs), which were case-specific. Nevertheless, although in some cases, *e.g.*, Niger and Syria, countries have provided access to witnesses and extradited defendants, other countries have not provided evidence for use in FCPA prosecutions, citing lack of mutuality. Since the signing and subsequent ratification of the OECD Convention by some of these countries, mutuality has become less of an issue, although it is clearly still relevant when seeking evidence from non-OECD countries.

9.3

If available, please provide statistical information concerning the number of investigations, prosecutions, court cases, and convictions. If information is available, how long has it taken your authorities to conclude the prosecution of any foreign bribery cases that have occurred to date? Are there any time limits for any of the stages of the criminal process from investigation to appeal?

See Appendix A and Appendix B for details concerning DOJ and SEC enforcement actions. The general practice of both DOJ and SEC is not to comment on investigations.

FCPA criminal investigations are governed by the five-year statute of limitations that applies to the vast majority of U.S. criminal offenses, including domestic bribery.(106) This limitations period may be "tolled" for up to an additional three years while awaiting the receipt of foreign evidence.(107) No criminal prosecution may be brought after five (or eight) years has elapsed since the last act in furtherance of the bribe. All federal civil enforcement actions seeking "penalties, fines or forfeitures" are subject to a general five year statute of limitations.(108)

Once indicted, a case must be brought to trial promptly. Under the Speedy Trial Act of 1974,(109) an information must be filed within thirty days of arrest or the service of a summons on a

defendant, and the trial must begin within seventy days of the filing of the information or indictment or within seventy days of the date the defendant first appears before the court, whichever is later. At the same time, certain pretrial delays are excludable from the aforementioned time limits, such as delays resulting from the court's consideration of pretrial motions and delays resulting from proceedings to determine the mental competency of the defendant. Delays resulting from the absence or unavailability of the defendant or an essential witness are also excludable. For example, any delay resulting from a defendant's absence when he is attempting to avoid apprehension or prosecution will be excludable.

The SEC has authority to bring civil enforcement actions against issuers. There is no statute of limitations for SEC actions seeking injunctions, disgorgement of unlawful profits, or other equitable relief. However, SEC requests for monetary penalties are subject to a five year statute of limitations.

Supplemental questions: In responding to questions 9.3, could the U.S. provide statistical information about the number of cases that have been investigated in relation to the number of cases that have been dropped, been settled, advanced to the plea agreement stage, advance to trial, and obtained convictions at trial?

The United States does not maintain these statistics.

If cases can be settled before reaching the plea agreement stage, are the facts therein a matter of public record?

There are no "settlements" prior to either a plea agreement, indictment, or the commencement of a civil action. Indictments, civil complaints, and administrative orders, whether or not pursuant to a negotiated plea agreement or consent order, are matters of public record. As a general rule, however, neither the Department of Justice nor the SEC will publicly disclose the existence of an investigation, nor will they disclose when an investigation has been closed. Further, the government's investigative files are protected from disclosure under the Freedom of Information Act and the Privacy Act.[(110)]

In applying prosecutorial discretion to cases under the FCPA, does the prosecutor consider whether the transaction has affected competition (foreign or domestic)?

No.

9.4

In practice, does the prosecution of a case of foreign bribery depend on the consent of a person or body other than the normal prosecutorial authorities (*e.g.*, Minister of Justice)? On what grounds did this authority grant or deny consent?

The decision to initiate a criminal prosecution of FCPA offenses is made only by the Department of Justice. Authority to bring these cases has been delegated by the Attorney General to the Assistant Attorney General for the Criminal Division. In practice, prosecution decisions are made at the level of the Fraud Section of the Criminal Division, after an indictment review by experienced Fraud Section prosecutors.

Civil prosecution of FCPA offenses is handled by the SEC (for issuers) and the Department of Justice (for non-issuers). No consent of any other public body is required. Decisions to initiate SEC civil proceedings, including proceedings under the FCPA, are made by vote of the SEC Commissioners.

9.5

If there are examples of where the determination of whether to prosecute a case of bribing a foreign public official involved consideration of the public interest, on what grounds was it decided that the public interest was or was not satisfied and by whom?

No FCPA matter has ever been declined on the grounds of "public interest."

9.6

If you give victims the opportunity to intervene at any stage of the proceedings, please provide examples of how you identify the victim in the case of bribery of foreign public officials. In particular, can victims compel prosecution or have an impact on the sentence?

The United States system does not provide victims the opportunity to "intervene" in criminal or civil enforcement actions except as discussed below. We are not aware of any FCPA matter in which these provisions have been applied. However, in several FCPA prosecutions, the courts have ordered restitution to be paid to the foreign government. *See Kenny Int'l Corp.*, *F.G. Mason Engineering, Inc.*, *Crites*.

In the United States, victims may make what are known as "victim impact statements" to the court at the time of sentencing. While a victim's reactions are not controlling, they are something that many courts consider before imposing sentence. Indeed, victim impact statements are seen to be important not only because they provide details about the seriousness of the crime but also because they provide some indication of what punishment society deems appropriate. Furthermore, victim impact statements allow victims to realize that they are important participants in the criminal justice process, thus preventing them from losing faith in the system and possibly turning to the dangerous course of self-help.[(111)]

In addition, the Victims of Crime Act of 1984[(112)] provides a mechanism for compensating and assisting the victims of federal and state crimes. Under this scheme, all persons convicted of a federal offense are assessed a special assessment, and the collected money is used to fund state and federal programs that compensate crime victims for lost wages and medical expenses, assist victims in participating as witnesses in court proceedings, and promote victims' cooperation with law enforcement authorities during investigations of criminal activity.

10. Statute of Limitations

If information is available, can you indicate approximately how many cases of bribery of foreign public officials could not be prosecuted because the statute of limitations had expired, even taking into account periods of suspension, interruption, reinstatement, or extension?

We are not able to provide specific statistics on this issue. However, based on our experience, it is very rare that an investigation cannot be concluded within the applicable five year statute of limitations, particularly if extended three additional years to permit the gathering of foreign evidence.[(113)] When a limitations period has expired prior to indictment, it usually has been due to the failure of a foreign country to provide assistance due to a perceived lack of dual criminality, to the failure of a foreign country to respond promptly to a mutual legal assistance request, or when, due to the complexity of a transactions, it has been necessary to file mutual legal assistance requests *seriatim*, *e.g.*, when one country's response provides evidence that requires a second request either to that country or another.

Under 18 U.S.C. § 3292, it is necessary for the United States to file an application with the court to invoke the three-year suspension of the statute of limitations to permit the government to obtain foreign evidence. This application may be made at any time, although it is usually made at the time the request for foreign evidence is filed with the foreign

government. Under the terms of § 3292, the court "shall" suspend the statute of limitations provided it finds that the official request has been made and "it reasonably appears, or reasonably appeared at the time the request was made, that such evidence is, or was, in such foreign country." We are not aware of any court denying the government's application on its merits.[(114)]

As noted, the criminal statute of limitations does not apply to SEC civil enforcement actions.

11. Money Laundering

11.1

Please explain how your money laundering legislation has been applied where the predicate offence was the bribery of a foreign public official, and include answers to the following questions:

a. What sanctions (including confiscation or monetary sanctions of comparable effect and sanctions under the laws that regulate the financial system) have been applied to cases involving bribery by natural and legal persons?

The United States has comprehensive sanctions for money laundering violations involving a wide variety of different offenses, including foreign official bribery. Money laundering sanctions in the United States include a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both. Additional sanctions ordinarily can include confiscation of property involved in the money laundering transaction, as well as the proceeds or instrumentalities of the predicate offense. The United States also has new authority to enforce foreign confiscation judgments involving foreign official bribery provided that the conduct would be punishable in both countries by a term of imprisonment of at least a year. United States law also provides for sanctions for failure to comply with federal financial regulations and financial reporting requirements.

Prior to October 26, 2001, the Money Laundering Control Act prohibited the laundering of proceeds of bribery of both domestic public officials, 18 U.S.C. § 201, and bribery of foreign public officials under the Foreign Corrupt Practices Act.[(115)] However, these provisions generally applied to cases involving either a U.S. national or resident or conduct that occurred in part in the U.S. In cases involving transactions over $10,000, the Money Laundering Control Act also explicitly provided for extraterritorial jurisdiction over U.S. nationals and over non-U.S. nationals as well in cases in which some conduct occurred within the United States.[(116)] However, foreign official bribery did not become a "specified unlawful activity", or predicate offense, for a money laundering violation in the United States until the enactment of the U.S.A. Patriot Act on October 26, 2001.

Nevertheless, even prior to enactment of the Patriot Act, the United States still had legal mechanisms to prosecute the laundering of foreign official corruption. In cases of public corruption that occurred wholly outside the United States and did not involve United States citizens, residents or legal entities, the United States could still prosecute money laundering conduct occurring in the United States because foreign extortion was specifically enumerated as a predicate for money laundering and United States jurisprudence defines common law extortion to include passive public bribery.[(117)] In addition, the transportation of foreign public or private bribery proceeds into or through the United States could constitute the predicate offense of cross-border transportation of property stolen or taken by fraud.[(118)] Similarly, under certain circumstances, foreign corruption offenses may also give rise to violations of United

States domestic mail and wire fraud (including the deprivation of the right to honest services) statutes or offenses under the Interstate Travel in Aid of Racketeering Act (ITAR), which constitute predicate offenses for money laundering.[(119)] Thus, even before October 27, 2001, official corrupt conduct occurring outside the United States could still provide a basis for a domestic violation of a money laundering predicate such as the transportation into the United States of the bribe proceeds or in cases in which part of the conduct occurred in the United States.

The addition of bribery of a public official and misappropriation of public funds as a foreign predicate for money laundering in the United States has clarified the ability of United States law to reach money laundering in such cases. As a result, the United States now has express authority to prosecute a person who knowingly conducts a financial transaction in the U.S. involving the proceeds of foreign corruption. Moreover, because it is also a money laundering offense to send money, whether criminally or legally derived, into or out of the U.S. with the intent to promote a predicate offense, such transactions designed to promote bribery of a foreign public official are now also subject to prosecution.[(120)]

Under United States forfeiture law, crimes which are considered serious enough to constitute predicate offenses for money laundering are also considered serious enough to carry the penalty of forfeiture. The United States can directly forfeit the proceeds of money laundering predicates, including foreign official bribery, without the necessity of demonstrating a separate money laundering transaction.[(121)] If the underlying conduct would constitute a crime in both countries, both the proceeds and the instrumentalities of the crime may be subject to confiscation.[(122)] Moreover, all property involved in a money laundering transaction is subject to forfeiture.[(123)]

The United States holds legal persons criminally responsible for the bribery of a foreign public official or for money laundering, as it does for any other crime. In addition to criminal liability, legal persons may be subject to substantial civil sanctions including fines, revocation of a financial institution's authority to operate, or even confiscation of the business.[(124)]

Because foreign official corruption was added as a money laundering predicate only short months ago through the enactment of the Patriot Act, we do not have examples demonstrating how this statute has worked in practice. Similarly, while we are aware of a couple of pending cases, we have had limited opportunities to apply other money laundering predicates, such as interstate transportation of stolen property or wire fraud, in pursuing the prosecution and confiscation of laundering offenses related to foreign official corruption.

b. If applicable, can you provide examples of the application of the money laundering offence where the defendant should have known or was negligent as to whether the proceeds were derived from the commission of the offence of bribing a foreign public official?

Although the elements of the two money laundering offenses established under the Money Laundering Act are different, in either case the Government must establish that the defendant had knowledge that he or she was dealing in criminally derived property or property used to promote criminal activity.[(125)] However, in satisfying the knowledge element, the Government does not have to prove actual knowledge of the predicate offense. Instead, in interpreting the statute courts have found that it is sufficient for the Government to establish that the defendant knew that the property was the proceeds of some unlawful activity, and have not required proof that the defendant knew the property to be the proceeds of a particular predicate offense.[(126)]

In addition, courts have held that the Government can meet its burden through the use of circumstantial evidence.[(127)]

The United States does not apply a "should of known" standard *per se*, however, courts have held that a money laundering violation can be found if the Government establishes that the criminal was willfully blind, consciously avoided knowledge, or deliberately sought to remain ignorant of the source of funds.[(128)] The United States also does not apply a negligence standard in money laundering cases.

c. Where the predicate offence takes place abroad have the courts required that certain additional conditions be met (*e.g.*, dual criminality or a conviction of the predicate offence)?

The United States generally does not impose a dual criminality prerequisite or require conviction of a foreign predicate offense in order to convict for money laundering or seek confiscation of property involved in money laundering offense. However, under the United States' list-based system of predicate offenses, the number of foreign predicate offenses for money laundering is much more limited than for the broad range of domestic predicate offenses. Prior to October 26, 2001, the foreign predicate offenses that gave rise to money laundering offenses and money laundering forfeiture in the United States were: narcotics violations; murder; kidnapping; robbery; extortion; destruction of property by explosive or fire; and fraud by or against a foreign bank. The Patriot Act expanded this list of foreign predicates to also include crimes of violence more generally; bribery of a public official or the misappropriation, theft, or embezzlement of public funds by or for the benefit of a public official; smuggling or export control violations involving munitions or export controlled items; and offenses with respect to which the United States would be bound under a multilateral treaty either to extradite an individual or submit a case for prosecution.[(129)]

While not a requirement for seeking confiscation as property involved in a money laundering offense or property that is the proceeds of a foreign predicate offense, United States law does impose a dual criminality requirement for utilizing the Patriot Act's expanded authority to directly confiscate proceeds and instrumentalities of foreign predicate offenses.[(130)] In addition, the United States can enforce a foreign confiscation order, based upon a foreign offense enumerated in the money laundering statute or any other violation of foreign law for which confiscation could be ordered under federal law if the offense had occurred in the United States.[(131)]

Since foreign official bribery and misappropriation of public funds are now predicate offenses for money laundering, no dual criminality or conviction prerequisite should apply to related United States money laundering prosecutions or confiscation proceedings, including those to enforce a foreign confiscation judgment. Because the extension of the foreign money laundering predicates to reach foreign bribery is so recent, we are unaware of cases interpreting this statue. There are also relatively few reported decisions concerning the application of the other foreign money laundering predicates.

d. Please explain any differences in the application of the money laundering offence where the predicate offence has been the bribery of a domestic public official.

Apart from the differences regarding the specific enumerated offenses for which money laundering and money laundering confiscation are available, money laundering

of foreign and domestic bribery predicate offenses are treated the same under United States law. *See* Answer to 11.1(a).

11.2

Has your country applied sanctions for money laundering to employees and officers of financial institutions who have assisted or co-operated in laundering the illegal gains from the bribery of foreign public officials?

Since foreign official corruption only became a predicate offense for money laundering in October of 2001, we do not have examples regarding the application of this new provision regarding financial institution officers or employees. We also generally do not maintain statistics that would identify the predicate offense and employment relationship of persons convicted of money laundering offenses that could identify other cases in which we have applied other money laundering predicates, such as interstate transportation of stolen property or wire fraud, to prosecute and sanction the laundering of foreign corruption proceeds. Nevertheless, the United States has had success in prosecuting the employees and officers of financial institutions for money laundering offenses.

11.3

Have financial institutions provided information to the competent authorities about suspicious transactions involving the proceeds of bribing foreign public officials?

The United States generally does not maintain records based upon the category of suspicious activity that a financial institution reports. However, new obligations on financial institutions to more closely scrutinize the accounts of foreign political figures as a result of regulatory changes last year and enactment of the Patriot Act may increase the frequency with which they make such reports. In January of 2001, the Department of the Treasury and the federal bank regulating agencies issued "Guidance on Enhanced Scrutiny for Transactions that May Involve the Proceeds of Foreign Official Corruption"[(132)] to help U.S. financial institutions avoid transactions that may involve the proceeds of foreign official corruption. The guidance, issued in furtherance of the National Money Laundering Strategy, encourages U.S. financial institutions to apply enhanced scrutiny to their private banking and similar high dollar-value accounts and transactions where such accounts or transactions may involve the proceeds of corruption by senior foreign political figures, their immediate family or close associates. The guidance provides a set of suggested account establishment and maintenance procedures designed to help institutions obtain appropriate information on accounts held by such persons, as well as a list of potentially suspicious transactions that will often warrant enhanced scrutiny.

With the enactment of the Patriot Act, the United States made it mandatory for financial institutions to apply enhanced scrutiny to private banking accounts to try to better detect transactions with proceeds of foreign corruption. Specifically, the Patriot Act required financial institutions to apply enhanced due diligence measures to ascertain the identity of the nominal and beneficial owners of, and the source of funds deposited into, private banking accounts (defined, in part, as having a balance of $1,000,000 or more) as needed to guard against money laundering and report any suspicious transactions.[(133)] In addition, financial institutions are required to "conduct enhanced scrutiny of any such account that is requested or maintained by, or on behalf of, a senior foreign political figure, or any immediate family member or close associate of a senior foreign political figure that is reasonably designed to detect and report transactions that may involve the proceeds of foreign corruption."

12. Accounting and Auditing Standards

12.1

Please provide examples of the civil, administrative and criminal penalties that have been applied for omissions and falsifications of books, records, accounts and financial statements of companies for the purpose of bribing foreign public officials or of hiding such bribery.

The SEC has ordered the payment of civil penalties, *e.g.*, *IBM*; obtained court-ordered injunctions enjoining a party to cease and desist activity in furtherance of a bribe, *e.g.*, *Baker Hughes*; and issued administrative orders prohibiting future misconduct to employees in connection with improper payments and mis-bookings, *e.g., Triton Energy*. Frequently, the SEC has reached settlements with defendants in actions alleging violations of the books and records provisions of the FCPA regarding bribery of foreign public officials, *e.g.*, *Montedison, IBM, American Bank Note*. (*See also* table above in Response to Question 4.1. For more detailed descriptions of the cases, see Appendix B).

12.2

Please provide examples of prosecutions of the bribery of foreign public officials in your country that were initiated by a report by an auditor of a suspicious transaction to the company management, a corporate monitoring body or the competent authorities.

Section 10A of the Exchange Act addresses the responsibilities of independent auditors who discover an illegal act, such as the payment of bribes to domestic and foreign government officials, in connection with their audits of public companies. Generally, Section 10A requires that auditors who become aware of illegal acts report such acts to appropriate levels within the company. If the company fails to take appropriate action when the illegal acts are material to the financial statements and the failure of the company to take remedial action is expected to warrant a modification of the auditor's report on the financial statements, Section 10A requires the auditor to notify the SEC. The text of Section 10A appears in full in Appendix F.

In addition to the legal requirements of Section 10A, the auditor has parallel responsibilities under Generally Applicable Accounting Standards (GAAS), set forth in AU Section 317 Illegal Acts By Clients. Excerpts of this standard can be found in Appendix F.

12.3

Does your country have accounting standards, auditing standards and financial statement disclosure requirements in place that are effectively used as a tool to deter and detect the bribery offences discussed in Article 8.1 of the Convention? If so, please describe such accounting standards, auditing standards and financial statement disclosure requirements, as well as how they are used.

The FCPA's books and records provisions[(134)] require all issuers to:

A. make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer; and

B. devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that--

i. transactions are executed in accordance with management's general or specific authorization;

ii. transactions are recorded as necessary (I) to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and (II) to maintain accountability for assets;

iii. access to assets is permitted only in accordance with management's general or specific authorization; and

iv. the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.

Generally Accepted Accounting Principles (GAAP) in the United States, issued primarily by the Financial Accounting Standards Board (FASB) with the oversight of the Securities and Exchange Commission (SEC), are among the most comprehensive in the world. U.S. GAAP require an accounting of all assets, liabilities, revenue and expenses, which would require that bribes paid should be properly accounted for in a company's books, records, and financial statements. Two of the many requirements of financial statements issued under U.S. GAAP are those of completeness and representational faithfulness, as set forth in Statement of Financial Accounting Concepts No. 2, paragraphs 63-80. U.S. GAAP also require extensive disclosures concerning the operations and financial condition of companies.

U.S. Generally Accepted Auditing Standards (GAAS) are established by the Auditing Standards Board of the American Institute of Certified Public Accountants (AICPA) with SEC oversight. U.S. GAAS that address the auditor's responsibility concerning the consideration of fraud in a financial statement can be found in AU Section 316 (Consideration of Fraud in a Financial Statement Audit).[(135)] Additionally, the auditor has a responsibility to obtain an understanding of an entity's internal control structure,[(136)] and when an auditor becomes aware of certain reportable conditions relating to internal controls during an audit, including evidence of illegal acts, the auditor has a responsibility under GAAS to report such conditions to the board of directors of the company.[(137)]

Disclosure standards for U.S. companies are primarily embodied in the individual U.S. GAAP pronouncements issued by the FASB. In addition, the SEC requires additional accounting disclosures for public companies[(138)] and other important disclosures[(139)] related to the operations of public companies.

12.4

How are such accounting/auditing standards and financial statement disclosure requirements enforced in practice to deter and detect the bribery offences discussed in Article 8.1 of the Convention?

The SEC requires public companies and their auditors to comply with those standards and disclosure requirements. The SEC enforces them through injunctive actions (civil actions filed in US federal courts) and administrative proceedings, and occasionally by recommending that criminal proceedings be pursued by the Department of Justice.

12.5

What mechanisms, resources and structures does your country devote to deterring and detecting the bribery offences discussed in Article 8.1 of the Convention?

The SEC's Division of Enforcement investigates possible violations of securities laws, including books and records and internal controls violations. The Division recommends Commission action when appropriate, either in a federal court or before an administrative law judge, and negotiates settlements on behalf of the Commission. While the SEC has civil enforcement authority only, it works closely with various criminal law enforcement agencies throughout the country to develop and bring criminal cases when the misconduct warrants more severe action. As noted above, in addition to the threat of administrative and civil enforcement action by the SEC, willful violations of the books and records provisions subject the company and its officers to criminal prosecution.[(140)]

13. Mutual Legal Assistance

13.1

Please describe the requests for MLA your authorities have received (including requests for financial information such as bank records) regarding the bribery of a foreign public official, and include answers to the following questions:

In general, the Criminal Division, through its Office of International Affairs (OIA), is responsible for handling all requests between the U.S. and foreign countries for mutual legal assistance in criminal matters. The record-keeping system in OIA has a place for highlighting cases involving public officials, both U.S. and foreign. It also identifies cases by type of crime, including bribery. The system, however, does not distinguish between assistance requests made by the payers' country if different from the official's country.

The numbers below include cases from both OECD countries and non-OECD countries.

a. How many requests have your authorities received since the Convention entered into force in your country? How many requests have been granted/rejected and on what grounds?

   The U.S. has received seven requests concerning bribery and corruption matters since the Convention entered into force. Four have been granted and three are still open.

   In matters involving bribery of a foreign official that falls within the terms of the OECD Convention, the Fraud Section routinely obtains authority to act as commissioners to respond to the requests, thus ensuring that prosecutors experienced in the investigation and prosecution of foreign bribery matters can offer particular assistance.

b. How many requests have you made to other countries? How long has it taken for your country to receive a reply to a request for MLA? How many of them were granted/rejected and on what grounds?

   Many FCPA cases require multiple requests to different, or even to the same country. We are aware of at least three open FCPA investigations with pending MLAT requests that were made since the Convention came into effect in the United States. The time it has taken countries to respond varies. One request was satisfied in three months, while others, including several that are pending, have taken one or more years.

c. How long has it taken your country to reply to requests for MLA? Have you been able to reply to requests promptly (see Article 9)? Are there time limits for responding to requests for the various forms of MLA?

   Three of the "incoming" requests were satisfied in three months, and the fourth request was satisfied in seven months. We are replying promptly in these cases. There are no specific time limits for responding to requests, whether by letter rogatory/ request or by treaty/ agreement.

d. How have any existing requirements (such as dual criminality or reciprocity) been applied?

   Not applicable to cases handled thus far.

e. Have you granted or denied requests for MLA concerning a legal person; if so, under what circumstances?

Not applicable; all incoming requests to date have concerned individuals.

13.2

If your authorities have received requests for MLA regarding the offence of money laundering where the predicate offence is the bribery of a foreign public official, please explain how you responded, and comment on whether you provided the same range of MLA as has been provided for other offences?

The U.S. has received one such request and it is open. The response will provide the same range of assistance for the money laundering offense as for the bribery offense, in this case a request for bank records.

13.3

Have your authorities been able to promptly grant MLA in cases where a request is for (a) information from a financial institution, such as a customer's name or about a customer's transaction, or (b) information about a company, including the identity of the owner, proof of incorporation, legal form, address, the name of directors, etc.?

Yes, the U.S. has provided these types of assistance promptly, for example, in three months (three requests) and seven months (one request).

13.4 Can MLA be provided by dependent or overseas territories?

Yes, assistance can be provided wherever there are U.S. Attorneys offices, including such territories as Puerto Rico and the U.S. Virgin Islands.

13.5

have you entered into new arrangements or agreements for the purpose of facilitating mutual legal assistance since the Convention became effective for your country?

The U.S. is continuously entering into new and better arrangements for mutual legal assistance, but has not done so specifically for the purpose of helping to implement the Convention. In addition, as noted above, the United States will enter into case-specific Mutual Legal Assistance Agreements in appropriate cases.

14. Extradition

14.1

Please describe the requests for extradition that you have received in relation to the offence of bribing a foreign public official, and include answers to the following:

In general, the Criminal Division, through its Office of International Affairs (OIA), is responsible for handling all requests between the U.S. and foreign countries for extradition. The record-keeping system in OIA has a place for highlighting cases involving public officials, both U.S. and foreign. It also identifies cases by type of crime, including bribery. The system, however, does not distinguish between extradition requests made by the payers' country if different from the official's country. The numbers below include cases from both OECD countries and non-OECD countries.

a. How many requests have your authorities received since the Convention entered into force for your country? How many requests have been granted/rejected and on what grounds?

The U.S. has received three requests: one person voluntarily returned to the requested country; another person was arrested in another country; in the third case, the person has not been located in the U.S.

b. How many requests have you made to other countries? How many of them were granted/rejected and on what grounds?

The U.S. has made two requests. In the first, extradition was denied on the ground that there was no dual criminality and that the punishment (for the other charge) was not in excess of one year. The U.S. continues to seek that person's extradition. In the second request (involving bribery of a U.S. local government official), the defendant was arrested in the foreign jurisdiction and extradition is pending.

c. How have any existing requirements (such as dual criminality or reciprocity) that must be met in order to grant extradition been applied? How have other grounds (such as offences of a political nature, "ordre public" or other essential interests) been interpreted and applied?

See (b)*supra*.

d. If you have denied any requests for extradition on the basis that the requests concerned your nationals, were these cases submitted to your own prosecutorial authorities?

Not applicable.

e. How long has it taken for your authorities to respond to these requests? Are there time limits for granting/denying extradition.

Not applicable. Although there are various deadlines under extradition treaties that the U.S. has with other countries, there are no specific time limits for granting or denying extradition.

14.2

Have you entered into new arrangements or agreements for the purpose of facilitating extradition since the Convention became effective for your country?

The U.S. is continuously entering into new and better arrangements for extradition, but has not done so specifically for the purpose of helping to implement the Convention.

C. APPLICATION OF THE REVISED RECOMMENDATION

15. Public subsidies, licenses, or other public advantages

Have you taken steps to ensure that public subsidies, licenses, or other public advantages be denied as a sanction for bribery of foreign public officials, pursuant to Section II (v) of the Revised Recommendation? How do you ensure that public subsidies, licenses, or other public advantages are not inadvertently granted in cases of bribery of foreign public officials?

See response to Question 1.1(v) above.

16. Accounting and Auditing Standards

16.1

Have civil, administrative, or criminal penalties pursuant to Section V.A of the Revised Recommendation been imposed since the Convention went into effect? If so, please provide a list of cases or examples.

Civil and administrative penalties have been imposed in SEC enforcement actions. *See* answer 4.1.

In addition, the Department of Justice has brought several criminal actions to enforce the FCPA's books and records provisions. For example in the *Cantor* case, *see* Appendix H, the defendant was charged with conspiracy to falsify books and records and a substantive offense related to a securities fraud. Sentencing is pending in that matter. In *United States v. UNC/Lear Services* (W.D. Ky. 2000), the defendant company was charged with mail fraud, false statements, and false books and records in connection with falsely declaring to the Defense Department that it had not paid any foreign agents in a foreign military sales contract. The company was sentenced to pay a $75,000 fine, $768,000 in restitution, and $132,000 in civil penalties. In *United States v. Daniel Ray Rothrock* (W.D. Texas 2001), the defendant was charged with making false entries to cover payments to Russian agents. Sentencing is pending in this matter as well.

16.2

How do you effectively ensure the independence of external auditors (Section B. (ii)).

Federal securities laws and regulations, including Regulation S-X, require all public companies to have their financial statements audited by an independent auditor. State laws and US GAAS also require auditors to be independent. The SEC may commence an enforcement action against a public company, as well as its auditor, when an auditor lacks independence. In addition, the SEC may require that the company's financial statements be reaudited by another auditor who is independent.

If your country requires independent external audits as described in the Revised Recommendation Section V.B, what mechanisms are in place to ensure that they are being carried out?

See above comment. Additionally, the American Institute of Certified Public Accountants (AICPA), SEC Practice Section, whose members audit over 95% of US public companies, has membership requirements such as concurring partner review and peer review that help assure the quality of audits conducted of public companies.

Please provide examples or a list of cases.

The SEC actively investigates auditors for lack of independence and brings actions where warranted. SEC staff issue "Accounting and Auditing Enforcement Releases ("AAER"), many of which discuss the accounting and recordkeeping aspects of the FCPA.[(141)] Auditor independence issues addressed in AAERs include:

- an auditor's financial interest in a client;[(142)]

- an auditor's auditing of its own work;[(143)]

- an auditor acting as management or as an employee of the audit client;[(144)] and

- an auditor being an advocate for the client.[(145)]

16.3

If your country requires independent auditors to report irregularities indicating possible illegal acts, pursuant to Revised Recommendation Section V.B, what mechanisms exist in your country to ensure that auditors are carrying out this obligation?

See response to question 12.2.

Please provide examples or a list of cases.

In Re Rossetti and Yonkers (AAER 1338, 1388 and 1428).

In an administrative proceeding (AAER 1338) the SEC alleged that Rossetti and Yonkers, while serving as independent auditors for Detour Magazine, Inc., learned that their client was using simple fractions of numbers from existing financial statements, rather than actual results of the company's operations, in preparing its quarterly financial statements. The SEC claimed that despite their discovery of these illegal acts, respondents failed to notify the company's management, the board of directors, or the Commission, and that the client continued to use the "fractional" approach in its quarterly financial statements throughout 1997 and 1998. On May 2, 2001, Rossetti settled the case against him by consenting to a cease and desist order against further violations of Section 10A, and to a Rule 102(e) suspension with a right to apply for reinstatement after three years (AAER 1388). On July 27, 2001, Yonkers settled the case by consenting to a cease and desist order against further violations of Section 10A, and to a Rule 102(e) suspension with a right to apply for reinstatement after one year (AAER 1428).

In re Ohlhauser (AAER 1337).

The SEC's complaint in this case alleges that Ohlhauser failed to take appropriate action after he learned of possible illegal conduct by company management. Ohlhauser allegedly discovered, in the course of his audit of Solucorp's financial statements for the year ended December 31, 1997, that Solucorp officials had backdated a license agreement in order to justify Solucorp's recognition of $500,000 in license fees during the quarter ended September 30, 1997. This amount represented 40% of Solucorp's revenues for that quarter. The SEC claims that Ohlhauser "reasonably concluded that the agreement appeared to have been backdated for improper accounting purposes," but nevertheless failed to comply with Section 10A. The case is pending before a district court judge.

In re Charles K. Springer, Robert Haugen And Haugen, Springer & Co., Pc (AAER 1457).

Charles Springer, Robert Haugen and their firm settled Rule 102(e) administrative proceedings that found they had engaged in improper professional conduct by recklessly violating professional auditing standards. The Commission also entered a cease and desist order against Springer for failing to report fraud and for willfully aiding and abetting violations of the anti-fraud and reporting provisions of the federal securities laws. The Commission also found that Springer knew in 1998 that Vari-L had or may have improperly recognized $1.3 million of revenue in 1997 but failed to inform Vari-L's audit committee of the false revenue, thus

violating Section 10A. The order provides that Haugen and Haugen, Springer & Co. may apply for reinstatement after three years, and Springer may apply for reinstatement after ten years. In addition, Springer was ordered to cease and desist from committing or causing any violations and any future violations of Sections 10A, 10(b), and 13(a) of the Securities Exchange Act of 1934, and Rules 10b-5, 12b-20 and 13a-1 there under.

16.4 What steps has your country taken to encourage the development and adoption of adequate internal company controls, as described in Revised Recommendation Section V.C?

Section 13(b)(2) of the Exchange Act applies to those companies whose securities are registered with the SEC and requires that such companies keep accurate books and records and maintain adequate internal accounting controls. Section 13(b)(5) makes it illegal for any person to knowingly assist a company in its failure to follow Section 13(b)(2).

Overview of rules: Under the U.S. system, rules promulgated by the responsible government agency elaborate on the requirements imposed by the law and have the full force of the law. Two rules promulgated by the SEC under Exchange Act Section 13(b)(2), Rules 13b2-1 and 13b2-2, provide that the SEC can take legal action against persons who directly or indirectly falsify books and records of a public company or who lie to or otherwise mislead accountants in connection with the preparation or audit of financial statements that are included in a filing made with the SEC. (For excerpts of these two rules, see Appendix F).

Additionally, as mentioned above, U.S. GAAS (AU Section 319 Consideration of the Internal Control Structure in a Financial Statement Audit) requires auditors to evaluate internal controls during the course of an audit and to advise their clients of serious deficiencies in the internal control system. An additional section of GAAS, namely AU Section 325 Communication of Internal Control Structure Related Matters Noted in an Audit, provides further instruction to auditors about internal controls. Excerpts of AU Section 325 are provided in Appendix F.

17 Tax Deductibility of Bribes

17.1

How do you ensure that bribes paid to foreign public officials are not inadvertently permitted a deduction? In providing your response, please address the following questions:

i. Please describe the categories of expenses and methods of payment that your tax examiners would examine to identify suspicious payments that could be bribe payments to a foreign public official.
ii. Please describe the measures that have been taken to sensitise your tax examiners to the need to focus on suspicious payments that might constitute bribes and to provide guidance to your tax authorities on how to identify suspicious payments (*e.g.*, guidelines, tax manuals, training programs).
iii. Who has the burden of proving that a particular deduction is permissible or impermissible and what is the standard of proof?

In general, "No deduction shall be allowed...for any payment made, directly or indirectly, to an official or employee of any government, or of any agency or instrumentality of any government, if the payment constitutes an illegal bribe or kickback or, if the payment is to an official or employee of a foreign government, the payment is unlawful under the Foreign Corrupt Practices Act of 1977."[(146)]

iv. In addition to deductions for operating expenses, examiners would examine components of cost of goods sold and other areas susceptible to concealment, such as returns and allowances. Special attention would be given to the use of foreign bank

accounts, or other indicators of "slush funds" or the use of cash payments. Expense categories requiring special attention might include outside services (*e.g.*, consulting) or items relating to foreign property of questionable use to the taxpayer or its affiliates. Examiners are encouraged to research sources such as other Federal agencies, as well as internal and external audit reports, for indications of illegal payment activity.

v. Consideration of illegal payments is a topic in early phases of training for both domestic and international examiners. The Internal Revenue Manual contains procedures for the identification of improper payments, in the section relating to examination of U.S. shareholders of controlled foreign corporations, and of large corporations with significant foreign operations.(147)

vi. The burden of proof as to whether or not a payment constitutes an illegal bribe or kickback for purposes of allowance/disallowance of a deduction under 26 U.S.C. § 162(c) is upon the Commissioner of Internal Revenue. The standard of proof is the same as in a civil fraud case under 26 U.S.C. § 7454 (*i.e.*, he must prove the illegality of the payment by clear and convincing evidence).

17.2

Under what conditions and in what circumstances can your tax authorities share information about suspicious bribery transactions with the following authorities:

a. the criminal law enforcement authorities in your own country;

As a general rule, IRS employees and other federal employees may not disclose tax information (*i.e.*, tax returns and return information) except as authorized by the Internal Revenue Code.(148) Tax information may be disclosed under certain circumstances in connection with the administration of federal laws not relating to tax administration.(149)

Federal agencies generally may obtain tax information for use in non-tax criminal investigations pursuant to an *ex parte* order of a federal district court judge or magistrate(150). The *ex parte* court order may only be obtained upon application authorized by the Attorney General, Deputy Attorney General, Assistant Attorney Generals, United States Attorney, Independent Counsel, or an attorney in charge of a criminal division organized crime strike force. Return information other than taxpayer return information (that is, information obtained from a source other than the taxpayer or the taxpayer's representative) is available under a less restrictive process. This type of tax information may be disclosed for federal non-tax criminal purposes pursuant to a written request from the head of a federal agency, Inspector General, Attorney General, Deputy Attorney General, Associate Attorney General, Assistant Attorney General, Director of the FBI, the Administrator of DEA, United States Attorney, Independent Counsel, or any attorney in charge of a criminal division organized crime strike force.

Tax return information (other than taxpayer return information) that may constitute evidence of a non-tax federal crime may be disclosed in writing to the extent necessary to apprize the head of the federal agency charged with enforcing the laws to which the crime relates.(151) Return information (including taxpayer return information) may also be disclosed to the extent necessary to apprize appropriate officers or employees of federal and state law enforcement agencies of circumstances involving an imminent danger of death or physical injury to any individual.(152) Return information (including taxpayer return information) may also be disclosed to apprize

officers or employees of a federal law enforcement agency of the imminent flight of any individual from federal prosecution.[(153)] Finally, returns and return information may be disclosed to officers and employees of a federal agency exclusively for locating fugitives who have committed a federal felony offense only upon the grant of an *ex parte* order by a federal district court judge or magistrate.[(154)]

Generally, the above disclosures may not be made if it is determined that the disclosure would identify a confidential informant or seriously impair a civil or criminal tax investigation.[(155)]

The Internal Revenue Service also has a Criminal Investigation (CI) Function to which referrals can be made by the civil division, if it is believed a criminal tax violation has occurred. The deductibility of bribes could be considered a criminal tax violation, thus permitting such a referral. Once CI has opened a criminal investigation, it is authorized to request permission to expand the investigation to other non-tax criminal violations arising out of the same facts and circumstances and request assistance from other Federal law enforcement agencies that have jurisdiction to pursue those crimes. However, if the tax part of the investigation terminates, a 26 U.S.C. § 6103(i)(1) *ex parte* court order is required to continue to use tax returns and other tax information provided by the taxpayer.

b. the tax authorities in another country; and

Returns and return information may be disclosed to tax authorities of a foreign government which has an income tax or gift and estate tax convention, or other convention or bilateral agreement relating to the exchange of tax information, with the United States.[(156)] However, disclosure of tax information may be made only to the extent provided in, and subject to, the terms and conditions of, the convention or bilateral agreement. For example, in the case of a tax treaty, it is generally required that the exchange of information relate to tax administration. The exchange of information may be pursuant to a request, or it could be spontaneous. Other types of agreements include MLATs which allow for the exchange of information in criminal matters generally. Another type of agreement is the tax information exchange agreement (TIEA). TIEAs are agreements that specifically provide for mutual assistance in criminal and civil tax investigations and proceedings, including tax-related money laundering offenses. TIEAs are authorized under 26 U.S.C. § 274(h)(6)(C), and are concluded by the Secretary of the Treasury. TIEAs, like tax treaties, generally provide for exchange of information only when there is a tax investigation or proceeding involved, and they are administered by the competent authority, who is currently the Director, International (Large and Mid-Size Business (LMSB) Division).

c. the criminal law enforcement authorities in another country?

Information may be shared with the criminal law enforcement authorities in another country through an MLAT. As with all bilateral agreements, however, the terms of the treaty define what type of assistance may be rendered. Generally, MLATS require compliance with the domestic law of the country providing the information. For example, in order to obtain tax returns and other tax information for use in the equivalent of a federal criminal matter, the Department of Justice will apply for a 26 U.S.C. § 6103(i) *ex parte* court order on behalf of the foreign treaty partner requesting the information.

17.3

Are financial institutions in your country obliged to provide financial information (*e.g.*, identification of bank customers and beneficial owners of accounts as well as suspicious bribery transactions) where requested by the tax authorities for tax purposes? If so:

a. under what circumstances; and
b. what procedures must be followed?

The answer to this question is "yes." (For purposes of our response to this question, the term "tax authorities" is presumed to be domestic tax authorities, since the issues involving the sharing of information with foreign tax authorities have been addressed in question 17.2 above).

Financial institutions are required to maintain records of beneficial ownership under the rules of several regulatory agencies, depending on the type of institution. In addition, certain types of transactions require the institution to verify the identity of both the transactor and the beneficial owner of funds. For example, under 31 C.F.R. § 103.22, financial institutions are required to obtain and to report this information when a person engages in a currency transaction which exceeds $10,000. The same information must be obtained when a customer purchases with currency at least $3,000 in money orders, bank or travelers checks, or other monetary instruments. Also, records of the originator and beneficiary of funds transfers of $3,000 or more must be maintained by an institution.

Information may be obtained by the tax authorities in a civil tax investigation pursuant to an administrative summons, in accordance with the procedures set forth in 26 U.S.C. §§ 7603 and 7609. For criminal tax investigations, as well as state or Federal investigations of other criminal activity, the investigating agency may use subpoena power (*e.g.*, grand jury subpoena) to obtain the desired information.

In addition, 31 C.F.R. § 103.11, and the sections following (Financial Record-Keeping and Reporting of Currency and Foreign Transactions), include provisions relating to the requirement of financial institutions to file reports of suspicious transactions with the Department of the Treasury, Financial Crimes Enforcement Network (FinCEN).

17.4

Have your tax authorities permitted tax deductions for payments to foreign public officials that fall within an exception to the offence (*e.g.*, small facilitation payments or a payment permitted by the written law of the foreign public official's country--Commentaries 8 and 9 of the Convention), or a defence to the offence? If so when?

26 U.S.C. § 162(c)(1) provides that a deduction for a payment to an official or employee of a foreign government will be disallowed if the payment is unlawful under the Foreign Corrupt Practices Act of 1977 (FCPA). The lawfulness of a bribe under the laws of the foreign official's country is an affirmative defense under the FCPA. Thus, payments that are legal under the local law of a foreign jurisdiction or that violate a federal law other than the FCPA may be deducted if they otherwise satisfy the requirements of Section 162. Payments that violate foreign law but are legal under the FCPA are also deductible if they meet the requirements of Section 162. Hence, a payment would be deductible in the circumstances described in the question, as the payment was not unlawful under the FCPA.

18 Public Procurement

18.1

Can you report cases concerning bribery of foreign public officials with regard to public procurement? In particular, are there cases where your authorities suspended from competition for public contracts enterprises that have bribed foreign public officials in contravention of your national laws? Did your authorities apply any other (additional) procurement sanctions in such cases?

As described in the answer to question 1, Federal law provides that the debarment, suspension, or other exclusion of a participant in a procurement activity under the Federal Acquisition Regulations will be given reciprocal government-wide effect. A contractor may be debarred or suspended by all Federal agencies upon indictment or conviction for violation of the FCPA.(157) According to Federal Procurement rules, no executive party or agency shall allow any party to participate in any procurement activity if another agency has debarred, suspended, or otherwise excluded that party from participation in a procurement activity, unless the agency's head has a "compelling reason" for such action.(158)

The General Services Administration (GSA), a Federal agency, maintains the List of Parties Excluded from Federal Procurement and Nonprocurement Programs. The list is issued monthly, and identifies parties that are excluded throughout the U.S. Government (unless otherwise noted) from receiving Federal contracts or certain subcontracts and from certain types of Federal financial and nonfinancial assistance and benefits. The List is found on GSA's website at http://epls.arnet.gov.

The List contains three sections, each with a different function:

List of Parties Excluded from Procurement and Nonprocurement Programs lists individuals, entities, and contractors that are excluded Government-wide, unless otherwise noted, from Federal procurement and sales programs, nonprocurement programs, and financial and nonfinancial benefits. An exclusion may be based on the Federal Acquisition Regulation (FAR) 9.4; Federal Property Management Regulation (FPMR) 101-45.6; Government Printing Office (GPO) Instruction 110.11 A; U.S. Postal Service (PS) Publication 41; the Nonprocurement Common Rule, 32 C.F.R. part 25; or the authority of a statute, executive order or regulation applying to procurement or nonprocurement programs.

List of Parties Excluded from Procurement Programs lists contractors that are excluded government-wide, unless otherwise noted, from Federal procurement and/or sales programs. Such an exclusion may be based on the administrative debarment, suspension, or proposed debarment of a contractor by an agency in accordance with Federal Acquisition Regulation (FAR) 9.4, Federal Property Management Regulation (FPMR) 101-45.6, Government Printing Office (GPO) Instruction 110.11A, or U.S. Postal Service (PS) Publication 41. An exclusion may also be the result of actions by a Federal agency under the authority of a statute, executive order, or regulation applying to procurement programs.

List of Parties Excluded from Nonprocurement Programs lists persons (individuals and entities) excluded government-wide, unless otherwise noted, from certain types of Federal financial and nonfinancial assistance and benefits. An exclusion may be based on an administrative debarment or suspension by any Federal agency or the voluntary exclusion of a person under agency regulations implementing Executive Order 12549 (February 18, 1986 (51 Fed. Reg. 6370)). Parties Excluded from Nonprocurement Programs also includes actions under the authority of a statute, another executive order, or a regulation applying to nonprocurement programs.

The treatment to be accorded to a party listed depends on the type of exclusionary action and the authority under which the action was taken. The cause for the exclusion and the treatment of the party excluded are noted by a code in the listing. These codes are explained under the heading "Cause and Treatment Codes" on the GSA website. There are twenty-six codes in all,

a number of which could include indictment or conviction under the Foreign Corrupt Practices Act. GSA does not provide information about a person or entity on the list more detailed than the general codes described. Access to the lists maintained by GSA is limited, and the list system is subject to the Privacy Act and other relevant legislation.

Information about a person or entity on the list, including the code indicating the general nature of the violation, is supplied by the Federal agency that took the debarment or suspension action. As a result, it is not possible to derive from the list the names of persons or entities who may have been indicted or convicted under the Foreign Corrupt Practices Act.

The United States Government does not maintain statistical information on whether persons or entities indicted or convicted under the Foreign Corrupt Practices Act have been debarred or suspended from procurement activities. News reports suggest that one defendant, the Harris Corporation, which was tried on FCPA charges in 1991, was suspended from Federal government procurement activities during the period during which it was under indictment. Other reports suggest that a number of U.S. companies have had their export licenses suspended while under indictment for violation of the FCPA.

18.2

Have you taken steps to require anti-bribery provisions in bilateral aid-funded procurement, to promote the proper implementation of anti-bribery provisions in international development institutions, and to work closely with development partners to combat bribery in all development co-operation efforts?

The United States has strongly supported ant bribery programs and contractual provisions by international development institutions, including the International Monetary Fund, the World Bank, the African Development Bank, the Asian Development Bank, the European Bank for Reconstruction and Development, and the Inter-American Development Bank.[(159)]

19 International Co-operation

Please provide an overview of cases of international co-operation involving your country in relation to combating bribery in international business relations (other than Mutual Legal Assistance and Extradition). In particular, please respond to the following:

a. What have been the specific means of co-operation?
b. Did you enter into new arrangements or agreements for this purpose since the Recommendation became effective for your country?
c. Did you find it necessary to take steps to ensure that your domestic laws afford adequate basis for international co-operation? If yes, please describe the measures taken.

The United States has used a variety of formal and informal methods to obtain and share information regarding combating bribery in international business relations. For the most part, international co-operation involving law enforcement investigations and prosecutions is handled through mechanisms established by MLATs, memoranda of understanding between regulatory agencies, and extradition treaties or through judicially-authorized letters rogatory. In some instances, however, the United States has signed case-specific bi-lateral MLAAs to govern the sharing of information in specific cases. This was, for instance, the situation in the prosecution of Lockheed for FCPA violations. U.S. authorities have also used other informal methods, *e.g.*, informal letters to foreign authorities, to obtain information relevant to their investigations. The success of obtaining information using these various mechanisms is dependent on the breadth and scope of assistance statutes in other jurisdictions.

In addition, various U.S. law enforcement agencies have forged close ties with their counterparts in other countries. In particular, the Department of Justice and the FBI have stationed attorneys and agents as Resident Legal Advisors and Legal Attaches in U.S. Embassies throughout the world specifically to coordinate international investigations and prosecutions. Through these and other avenues, the United States government shares information and reports of unlawful conduct that it believes falls within the jurisdiction of other countries and offers its assistance in gathering evidence. Other countries have extended similar co-operation and sharing of information to the United States. For example, in Spring 2001, two prosecutors and a FBI agent were invited by a foreign magistrate to attend witness interviews in a foreign country in a matter involving potential FCPA violations. On another occasion, the Ministry of Justice of a foreign country (a party to the OECD Convention) agreed to allow a FBI agent to pose as a corrupt official of that nation in an undercover operation in the United States. This was done informally, due to the exigency of the situation, and led directly to a successful FCPA prosecution. Had the same request been made to the U.S. Department of Justice, we would have agreed to the same cooperation.

The United States has not found it necessary to amend any domestic laws to afford an adequate basis for international co-operation. To a large extent, such co-operation may be extended on a law enforcement to law enforcement basis. When, however, coercive measures, such as subpoenas and search warrants are necessary, the existing mechanisms of MLATs and letters rogatory have proved to be sufficient.

Footnotes:

1. 15 U.S.C. §§ 78m, 78dd-1, *et seq.*, 78ff.

2. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 5003, 102 Stat. 1107 (1988) (amending 15 U.S.C. §§ 78dd-1 & 78dd-2)

3. International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302 (1998) (amending 15 U.S.C. §§ 78dd-1, 78dd-2, 78ff, and adding § 78dd-3).

4. I.R.C. 162(c)(1) (26 U.S.C. § 162(c)(1)). *See also* 26 C.F.R. §§ 1.212-1(p), 1.162-18, 1.952-1(a)(4), 1.964-1(5).

5. 15 U.S.C. § 78m(b)(2); Rules 13b2-1 and 13b2-2, 17 C.F.R. §§ 240.13b2-1, 240.13b2-2.

6. *See, e.g.*, Ala. Code § 40-2A-7 (requiring corporations and individuals to keep "accurate" and "complete" records for tax purposes); Cal. Corp. Code § 1500 (requiring corporations to keep "adequate and correct books and records of account"); Fla. Stat. § 607.1601(2) (requiring corporations to maintain "accurate accounting records"); Ind. Code § 23-1-52-1(b) (requiring corporations to maintain "appropriate accounting records"); Minn. Stat. § 300.32 (requiring all stock corporations to maintain "accurate and complete records" of all corporate proceedings and "proper" records of all business transactions).

7. *See* Section 21 of the Exchange Act of 1934, 15 U.S.C. § 78u,

8. *See* Federal Acquisition Regulations System (FARS), 48 C.F.R. § 9.407-2.

9. *See* Final Rule Regarding Government Wide Nonprocurement Debarment and Suspension, 58 Fed. Reg. 28,759; Exec. Order No. 12, 549, 51 Fed. Reg. 6370 (1986); Exec. Order 12,689, 51 Fed. Reg. 34,131 (1989).

10. FARS, 48 C.F.R. at 9.406-1(c); Exec. Order No. 12,689, 50 Fed. Reg. 34,131 (1989).

11. *See* 7 U.S.C. §§ 12a(2)(E) and 12a(3)(B); 17 C.F.R. §§ 3.55 and 3.60; and 22 C.F.R. § 709.1. *See also* Arms Export Control Act, 22 U.S.C. § 2778.

12. *Id*. at 9.407-2, 209.403(2).

13. *Id*. at 209.403(2)(iii).

14. *See* 48 C.F.R. § 9.404.

15. 15 U.S.C. §§ 78u(d), 78dd-1, 78dd-2(d), and 78dd-3(d).

16. 15 U.S.C. § 78dd-2(h)(1) (defining "domestic concern"); *see also* 15 U.S.C. § 78e(a)(16) (defining "State" for the purpose of the Securities Exchange Act of 1934); 18 U.S.C. § 5 (defining the "United States" as "all places and waters, continental or insular, subject to the jurisdiction of the United States, except the Canal Zone.").

17. *See* Ala. Code §§ 13A-11-120, -121; Alaska Stat. §§ 11.46.660 - .670; Ariz. Rev. Stat. Ann. § 13-2605; Cal. Penal Code §641.3; Colo. Rev. Stat. § 18-5-401; Conn. Gen. Stat. Ann. §§53a-160, -161; Del. Code Ann. tit. 11, §§ 881-882; Fla. Stat. Ann. §§ 838.15-.16; Haw. Rev. Stat. Ann. § 709-880; Ill. Com. Stat. Ann., ch. 720, §§ 5/29A-1, A-2; Iowa Code Ann. § 722.10; Kan. Stat. Ann. §21-4405; Ky. Rev. Stat. Ann. §§ 518.020 -.030; La. Rev. Stat. Ann. §14:73; Me. Rev. Stat. Ann. tit. 17-A, § 904; Mass. Ann. Laws ch. 271, § 39; Mich. Comp. Laws Ann. § 750.125; Minn. Stat. Ann. § 609.86; Miss. Code Ann. § 97-9-10; Mo. Ann. Stat. §570.150; Neb. Rev. Stat. § 28-613; Nev. Rev. Stat. Ann. § 207.295; N.H. Rev. Stat. Ann. § 638:7; N.J. Stat. Ann. § 2C:21-10; N.Y. Penal Law §§ 180.00 - .08; N.C. Gen. Stat. § 14-353; N.D. Cent. Code § 12.1-12-08; 18 Pa. Cons. Stat. Ann. § 4108; R.I. Gen. Laws §§ 11-7-3, -4; S.C. Code Ann. § 16-17-540; S.D. Codified Laws Ann. §§ 22-43-1, -2; Tex. Penal Code Ann. § 32.43; Utah Code Ann. § 76-6-508; Va. Code Ann. § 18.2-444; Wash. Rev. Code Ann. §9A.68.060; and Wis. Stat. Ann. § 134.05. Copies of these statutes were previously provided to the OECD Working Group in the United States's Response to the first OECD Working Group questionnaire in 1994.

18. *See Abbate v. United States*, 359 U.S. 187, 193-96 (1959)

19. *See* Executive Office for U.S. Attorneys, U.S. Dept. of Justice, United States Attorneys' Manual § 9-2.031 (Dual and Successive Prosecution Policy (*Petite* Policy)). Moreover, most states have prohibited a successive prosecution following a federal (national) prosecution for the same conduct. For example, New Hampshire has interpreted its state constitution to prohibit such a prosecution, *State v. Hogg*, 385 A.2d 844, 847 (N.H. 1978), while other states have prohibited such a prosecution by statute, *see, e.g.,* Idaho Code § 19-315; Ind. Code § 35-41-4-5 ; Wash. Rev. Code § 10.43.040.

20. *See* Executive Office for U.S. Attorneys, U.S. Dept. of Justice, United States Attorneys' Manual § 9-47.110.

21. *See United States v. Saybolt, Inc.*, No. 98 Cr 10266 WGY (D. Mass. 1998); *United States v. David H. Mead and Frerik Pluimers*, Cr. 98-240-01 (D.N.J., Trenton Div. 1998) (Appendix Q).

22. *See* Executive Office for U.S. Attorneys, U.S. Dept. of Justice, United States Attorneys' Manual § 9-47.110.

23. 28 C.F.R. part 80.

24. Although the Department's Opinions are non-binding on other federal agencies, the SEC has stated that, as a matter of its prosecutorial discretion, it will not take enforcement action against an

issuer with respect to a transaction concerning which the Department has rendered a favorable opinion. *See* SEC Interpretative Release No. 34-17099 (Aug. 28, 1980).

25. 5 U.S.C. § 2302(b)(8).

26. Pub. L. 95-452, 92 Stat. 1105.

27. *See* U.S. Merit Systems Protection Board: Questions and Answers about Whistleblower Appeals (Appendix N).

28. 28 C.F.R. part 80, Foreign Corrupt Practices Act Opinion Procedure.

29. 28 C.F.R. §§ 80.3, 80.4.

30. 28 C.F.R. §§ 80.6, 80.7.

31. 28 C.F.R. § 80.8.

32. 28 C.F.R. § 80.10.

33. *Id*.

34. 28 C.F.R. § 80.14.

35. 28 C.F.R. § 80.4.

36. SEC Interpretative Release No. 34-17099 (Aug. 28, 1980).

37. These reports can be found at http://tcc.export.gov and www.state.gov.

38. *See* www.justice.gov/criminal/fraud/fcpa/, http://tcc.export.gov, www.ita.doc.gov/legal, and www.state.gov.

39. The brochure can be found at www.state.gov and www.usoge.gov. It includes the brochure prepared by the Departments of Commerce and Justice.

40. *See* www.usoge.gov.

41. For examples of codes and more information on such codes generally, see: http://www.ethics.ubc.ca; http://csep.iit.edu/codes/business.html; and http://www.iccwbo.org/home/statements_rules/rules/1999/briberydoc99.asp.

42. *See* U.S.S.G. § 8C2.5(f). *See also* Department of Justice, Principles of Federal Prosecution of Corporations (attached at Appendix K).

43. *See*, *e.g.*, *United States v. Metcalf & Eddy*, No. No. 99CV12566-NG (D. Mass. 1999) (Appendix E).

44. Appendix A is a digest of FCPA enforcement actions drafted by a member of the private bar. Although we believe to be useful, comprehensive, and accurate, the U.S. government does not vouch for its contents.

45. 28 C.F.R. part 80, Foreign Corrupt Practices Act Opinion Procedure.

46. www.justice.gov/criminal/fraud/fcpa/.

47. www.justice.gov/criminal/fraud/fcpa/. This brochure is also included in the Department of State's brochure, see footnote 44, *infra.*

48. *See* www.state.gov, www.usoge.gov.

49. 923 F.2d 1308, 1312 (8th Cir. 1991).

50. 925 F.2d 831 (5th Cir. 1991).

51. *See Abrahams v. Young & Rubicam, Inc.*, 79 F.3d 234, 236 (2d Cir. 1996).

52. *See McLean v. International Harvester Co.*, 817 F.2d 1214 (5th Cir. 1987); *Citicorp International Trading Co. v. Western Oil & Refining* Co., 771 F. Supp. 600 (S.D.N.Y. 1991); *Shields v. Erickson*, 710 F. Supp. 686 (N.D. Ill. 1989) (books & records provisions).

53. 493 U.S. 400 (1990).

54. *Compare Dooley v. United Technologies Corp.*, 803 F. Supp. 428, 440 (D.D.C. 1992) (allowing a plaintiff's FCPA violation claim to serve as a predicate for his civil RICO action) *with Eisenberger v. Spectex Indus., Inc.*, 644 F. Supp. 48, 51 (E.D.N.Y. 1986) (refusing to recognize an FCPA accounting provision violation as a predicate offense in a civil RICO action).

55. The most significant legislative reports can be found on the Department of Justice's website at www.justice.gov/criminal/fraud/fcpa/.

56. H.R. Conf. Rep. No. 100-576, at 919-21 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1952-54.

57. *See, e.g., United States v. Castle*, 925 F.2d 831, 834-36 (5th Cir. 1991); *Lamb v. Phillip Morris, Inc.*, 915 F.2d 1024, 1028-29 (6th Cir. 1990).

58. *See, e.g., United States v. McLean*, 738 F.2d 655, 657 (5th Cir. 1984).

59. *See, e.g.*, *Trans World Airlines, Inc. v. Civil Aeronautics Bd.*, 637 F.2d 62, 68 (2nd Cir. 1980).

60. *See, e.g., United States v. Stuart*, 489 U.S. 353, 371-77 (1989) (Scalia, J., concurring) (arguing that words of the treaty text are controlling)*; Public Citizen v. Department of Justice*, 491 U.S. 440, 470-71 (1989) (Kennedy, J., concurring) (arguing that the plain language of the statute should control unless the result is "absurd," even if it would lead to a constitutional issue).

61. 15 U.S.C. §§ 78dd-1(f)(1), 78dd-1(h)(2), 78dd-3(f)(2).

62. 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a). *See also* jury instructions in *United States v. Mead*, attached as Appendix C.

63. *United States v. Young & Rubicam, Inc., Crim No. N-89-68 (PCD) (D. Conn. 1990); see also Abrahams v. Young & Rubicam, Inc.*, 79 F.3d 234, 236 (2d Cir. 1996) (discussing the facts of the criminal case against Young & Rubicam, Inc.).

64. *United States v. Harris Corp.* (N.D. Cal. 1990); *see also United States v. O'Hara*, 960 F.2d 11, 12 (9th Cir. 1992) (summarizing the basis of the court's unreported decision in *Harris Corporation*). In another case, *United States v. Pou* (S.D. Fla. 1989), two defendants pled and one fled the country. The remaining defendant went to trial, but the court, after first suppressing certain evidence involving the fugitive defendant, dismissed the charges at the end of the government's case.

65. *United States v. Blondek* (N.D. Tex. 1990) (company agreed to an injunction and foreign agent pled guilty to conspiracy; two foreign officials dismissed (*see United States v. Castle*); two company officials acquitted at trial); *United States v. Crawford Enterprises, et al.* (S.D. Texas 1982).

66. 15 U.S.C. §§ 78dd-2(b)(1)(B)(3), 78ff(c)(3), *repealed* by the Omnibus Trade & Competitiveness Act of 1988, P.L. 100-418. *See* H. Conf. Rep. 576, 100th Cong. 2nd Sess. 923 (1988), *reprinted in* 1988 U.S.C.C.A.N.1547, 1956. (This report is also included on the DOJ website at www.justice.gov/criminal/fraud/fcpa/.)

67. 738 F.2d 655 (5th Cir. 1984), *cert. denied*, 470 U.S. 1050 (1985).

68. 741 F. Supp. 116 (N.D. Tex. 1990), *aff'd*, 925 F.2d 831 (5th Cir. 1991).

69. Prior to 1992, the Department of Justice issued Review Letters and Releases. In 1992, this system was superseded by the current Opinion Procedure. Both the Review Releases and the Opinion Releases may be found at www.justice.gov/criminal/fraud/fcpa/.

70. *United States v. McLean*, 738 F.2d 655 (5th Cir. 1984).

71. *See* Principles of Federal Prosecution of Corporations at Appendix K.

72. *See United States v. Bank of New England*, 821 F.2d 844 (1st Cir.), *cert. denied*, 484 U.S. 943 (1987).

73. In addition, one defendant was also required to pay a civil penalty of $534,000.

74. 15 U.S.C. §§ 78dd-2(g), 78dd-3(d), 78ff(c); 18 U.S.C. § 3571 (Alternative Fines Act) (Appendix M).

75. 15 U.S.C. §§ 78u(c), 78dd-2(d) & (g), 78dd-3(d) & (e), 78ff(c).

76. 18 U.S.C. §§ 981, 983, 1956(c)(7); 28 U.S.C. § 2461(c).

77. *See, e.g.*, Federal Acquisition Regulations System (FARS), 48 C.F.R. § 9.407-2.

78. In some cases, the corporations were also required to pay civil fines, restitution, costs of prosecution, or fines related to other criminal charges. These additional sanctions totaled $4,252,000.

79. 15 U.S.C. §§ 78dd-2(g), 78dd-3(d), 78ff(c); 18 U.S.C. § 3571 (Alternative Fines Act) (Appendix M).

80. 15 U.S.C. §§ 78u(c), 78dd-2(d) & (g), 78dd-3(d) & (e), 78ff(c).

81. 18 U.S.C. §§ 981, 983, 1956(c)(7); 28 U.S.C. § 2461(c).

82. *See, e.g.*, Federal Acquisition Regulations System (FARS), 48 C.F.R. § 9.407-2.

83. *See, e.g.,* U.S. Sentencing Guidelines Manual § 6B1.4(a) (2001) (a copy of which is provided separately); *Principles of Federal Prosecution*, Executive Office for U.S. Attorneys, U.S. Dept. of Justice, United States Attorneys' Manual §§ 9-16.300, 9-27.400, 9-27.710 (attached as Appendix L).

84. U.S. Sentencing Guidelines Manual § 3E1.1 (2000).

85. *Id*. at § 1B1.8.

86. *Id*. at § 5K1.1.

87. OECD Convention, art. 3 at ¶ 3.

88. In a criminal case, such records must generally be obtained pursuant to a grand jury subpoena, the issuance of which is covered by Rule 6(e) of the Federal Rules of Criminal Procedure. This rule prohibits the government from disclosing specific matters occurring before the grand jury without a court's authorization. The SEC also has independent statutory authority to subpoena bank records.

89. The Civil Asset Forfeiture Reform Act of 2000 (CAFRA), Pub. L. No. 106-185, 114 Stat. 202 (2000), made both civil and criminal forfeiture available for violations of the FCPA. However, there have not yet been any forfeiture orders issued in a FCPA matter.

90. Generally, although there have been exceptions, the United States has not charged the foreign officials themselves, believing that such prosecutions are more properly handled by the government to whom the foreign official owes his fiduciary duty. Further, the FCPA applies only to active bribery of foreign officials, and the U.S. courts have held that foreign officials may not be charged either with substantive violations of the FCPA or conspiracy to violate the FCPA. *See United States v. Castle*, 925 F.2d 831 (5th Cir. 1991). A foreign official may, however, be charged with mail or wire fraud under 18 U.S.C. §§ 1341, 1343, 1346, for defrauding his employer (the foreign government) of his honest services or under the Travel Act, 18 U.S.C. § 1952, for using an interstate facility to violate a state commercial bribery law. In addition, the foreign official may be charged with laundering the proceeds of a violation of the FCPA if he engages in a transaction designed to promote the violation or to conceal the source or ownership of the funds. *See* 18 U.S.C. § 1956(a)(1). Forfeiture is available under any of these statutes. *See* 18 U.S.C. § 982 and CAFRA.

91. 18 U.S.C. § 3571 (effective Nov. 1, 1987) (*see* Appendix M).

92. U.S. Sentencing Guidelines Manual § 8A1.2 cmt. n. 3(h).

93. *Id.* at § 2B1.1, cmt. n. 2, 3; § 2F1.1, cmt. n. 8; § 8A1.2, cmt. n. 3(i).

94. 18 U.S.C. §§ 981, 982(a).

95. 18 U.S.C. § 1956(c)(7)(B) (as amended); 28 U.S.C. § 2461(c).

96. *See, e.g.*, 48 U.S.C. § 1574(a) (Revised Organic Law granting territory of Virgin Islands authority to enact laws of local concern "but no law shall be enacted which would impair rights existing or arising by virtue of any treaty or international agreement entered into by the United States").

97. 15 U.S.C. § 78c(a)(16).

98. 15 U.S.C. §§ 78c(a)(17), 78dd-2(h)(5), 78dd-3(f)(5).

99. 15 U.S.C. §§ 78dd-1(g), 78dd-2(i).

100. *See Ford v. United States*, 273 U.S. 593 (1927); *Strassheim v. Daily*, 221 U.S. 280 (1910); *In re Marc Rich & Co.*, 707 F.2d 663 (2nd Cir.), *cert. denied*, 463 U.S. 1215 (1983); *United States v. Lawson*, 507 F.2d 433 (7th Cir.), *cert. denied*, 420 U.S. 1004 (1975), *overruled on other grounds*, *United States v. Hollinger*, 553 F.2d 535 (7th Cir. 1977).

101. 15 U.S.C. §§ 78dd-1(g), 78dd-2(i)

102. 15 U.S.C. § 78dd-3(a).

103. 15 U.S.C. § 78m(b)(2), (5). Civil liability may be established based upon proof that a company's books were not accurate or that a company had failed to institute an adequate system of internal controls; criminal liability requires a further showing of willfulness.

104. 15 U.S.C. § 78m(b)(6).

105. *See* Principles of Federal Prosecution (Appendix L) *and* Principles of Federal Prosecution of Corporations (Appendix K).

106. 18 U.S.C. § 3282 (attached at Appendix O).

107. 18 U.S.C. § 3292 (attached at Appendix O).

108. 28 U.S.C. § 2462.

109. 18 U.S.C. §§ 3161-3174.

110. 5 U.S.C. §§ 552(b)(7), 552a.

111. *See United States v. Blake*, 89 F. Supp.2d 328, 347-51 (E.D.N.Y. 2000) (detailing the history and use of victim impact statements in the federal system).

112. 42 U.S.C. § 3013

113. *See* 18 U.S.C. §§ 3282, 3292 (Appendix O).

114. The only denials of an application of which we are aware involved procedural matters. For example, the government's application is generally filed *ex parte* to protect the confidentiality of the investigation. However, in *In re Grand Jury Investigation*, 3 F. Supp. 2d 82 (D. Mass 1998), the court denied an *ex parte* application without prejudice to its being filed after providing notice to the targets of the investigation. We are not aware of any reported decision in which another court has adopted

this position, and one court of appeals has explicitly declined to follow it. *See DeGeorge v. District Court*, 219 F.3d 930, 937 (9th Cir. 2000).

115. *See* 18 U.S.C. § 1956 (c)(7)(A) (18 U.S.C. §§ 1956, 1957 are attached as Appendix T).

116. *See* U.S.C. § 1956(f).

117. *See* 18 U.S.C. § 1956 (c)(7)(B)(ii); *Evans v. United States*, 504 U.S. 255 (1992) (extortion under color of official right).

118. 18 U.S.C. §§ 2314, 2315.

119. *See* 18 U.S.C. §§ 2, 1341, 1343, 1346, 1952.

120. *See* 18 U.S.C. § 1956 (a)(2)(A).

121. *See* 18 U.S.C. § 981 (a)(1)(C) (18 U.S.C. §§ 981, 982 are attached as Appendix U).

122. *See* 18 U.S.C. § 981 (a)(1)(B).

123. *See* 18 U.S.C. § 981 (a)(1)(A).

124. *See, e.g.*, 12 U.S.C. § 93.

125. *See* 18 U.S.C. §§ 1956, 1957 (Appendix T).

126. *See, e.g., United States v. Maher*, 108 F.3d 1513, 1526 (2nd Cir. 1997).

127. *See*, *e.g.*, *United States v. Carr*, 25 F.3d 1194, 1215 (3rd Cir. 1994).

128. *See, e.g.*, *United States v. Lalley*, 257 F.3d 751 (8th Cir. 2001).

129. *See* 18 U.S.C. § 1956(c)(7)(B).

130. *Compare* 18 U.S.C. § 981(a)(1)(B) *with* 18 U.S.C. §§ 981(a)(1)(A) *and* 981(a)(1)(C).

131. *See* 28 U.S.C. § 2467 (Appendix V).

132. Appendix W

133. *See* 31 U.S.C. § 5318(i) (Appendix X).

134. 15 U.S.C. § 78m(b)(2).

135. AU Section refers to Codification of Statements on Auditing Standards, AICPA, 2001.

136. AU Section 319 Consideration of the Internal Control Structure in a Financial Statement Audit.

137. AU Section 325 Communication of Internal Control Structure Related Matters Noted in an Audit.

138. Regulation S-X.

139. Regulation S-K.

140. 15 U.S.C. § 78m(b)(6).

141. Accounting and Auditing Enforcement Releases are available on the SEC's website, www.sec.gov, under "Litigation/Opinions".

142. *See In the Matter of KPMG LLP*, AAER No. 1360, 1/23/01; *In the Matter of PricewaterhouseCoopers LLP*, AAER No. 1098, 1/14/99, and *In the Matter of Michael Goodbread*, AAER No. 861, 12/10/96.

143. *See In the Matter of Stephen F.Broadbent*, AAER No. 921, 6/3/97, and *In the Matter of Alan Kappel*, AAER No. 552, 4/22/94.

144. *See In the Matter of Bernard Tarnowsky*, AAER No. 467, 7/15/93, and *In the Matter of Monte S. Colbert*, AAER No. 835, 9/30/96.

145. *See In the Matter of Samuel GeorgeGreenspan*, AAER No. 312, 8/26/91, and *In the Matter of Charles E. Falk*, AAER No. 1134, 5/19/99.

146. 26 U.S.C. § 162(c).

147. *See* IRM 4.3.1.2 (Chapter 13) and IRM 4.3.12 (Chapter 5) (Appendix S).

148. 26 U.S.C. § 6103(a).

149. *Id*. at § 6103(i).

150. *Id*. at § 6103(i)(A)(1).

151. *Id*. at § 6103(i)(3)(A).

152. *Id*. at § 6103(i)(3)(B)(i).

153. *Id*. at § 6103(i)(3)(B)(ii).

154. *Id*. at § 6103(i)(5).

155. *Id.* at § 6103(i)(6).

156. *Id*. at § 6103(k)(4).

157. 48 C.F.R. § 9.406-2.

158. *Id*. at § 9.405(a),

159. A detailed description of these efforts is found in Chapter 7 (Antibribery Programs and Transparency in International Organizations) of the Third Annual Report Under Section 6 of the

International Anti-Bribery and Fair Competition Act of 1998, issued by the Department of Commerce in July 2001, and found on the website of the International Trade Administration at http://www.tcc.mac.doc.gov.