RESPONSE OF THE UNITED STATES

QUESTIONS CONCERNING PHASE 3

OECD WORKING GROUP ON BRIBERY

MAY 3, 2010

TABLE OF CONTENTS

E. Statutes

15 U.S.C. § 78dd-1 *et seq.* (the Foreign Corrupt Practices Act)
18 U.S.C. §§ 3282, 3288, 3289, 3290, 3293, and 3296 (statute of limitations)
18 U.S.C. § 1514A (whistleblower protections)

F. Department of Justice Policies

Principles of Federal Prosecution (U.S. Attorney's Manual)
Principles of Federal Prosecution of Business Organizations (U.S. Attorney's Manual)
Model Corporate Compliance Program Obligations

G. The United States Sentencing Guidelines

Chapter 2 (excerpts): Bribery Guidelines
Chapter 3: Adjustments
Chapter 4: Criminal History and Criminal Livelihood
Chapter 5: Determining the Sentence
Chapter 8: Sentencing of Organizations

H. U.S. Response to the Working Group's Study Group on Small Facilitation Payments Survey Question #2 on Treatment of Small Facilitation Payments by Members

I. Third Mutual Evaluation Report on Anti-Money Laundering and Combating the Financing of Terrorism in the United States of America by the Financial Action Task Force

PART I. VERTICAL (COUNTRY-SPECIFIC) ISSUES

I. Progress on Phase 2 Recommendations

1.1 Since your written follow-up report to Phase 2, did you take steps to implement the recommendations identified by the Working Group on Bribery (Working Group) as not having been implemented, or having been only partially implemented? By way of supplementary questions, the Secretariat will elaborate on this question having regard to the written follow-up report to Phase 2, the findings of the Working Group in that regard, any subsequent oral report(s), and other official updates such as those to the Steps Taken by State Parties to implement and enforce the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

This question will be answered in the response to the Supplementary Questionnaire.

1.2 What practice has developed concerning the issues identified for follow-up in Phase 2?

This question will be answered in the response to the Supplementary Questionnaire.

II. Issues Raised by Changes in Domestic Legislation, Jurisprudence, or Institutional Frameworks since Phase 2

2.1 Have there been any changes to your <u>legal</u> framework (legislative, regulatory, or jurisprudential) or <u>institutional</u> framework (including policy statements, guidelines, directives, and protocols) since Phase 2 which might directly or indirectly impact upon any of the obligations under the Convention, the 2009 Recommendation on Further Combating Bribery of Foreign Public Officials in International Business Transactions (the 2009 Recommendation on Tax Measures)? If there have been such changes:

(a) Please include or provide exact references to all relevant documentation concerning the bribery of foreign public officials (foreign bribery), including documentation that may have an impact on the detection, investigation or prosecution of foreign bribery (e.g. legislation, regulations, court decisions, interpretative notes or commentaries, guidelines, or policy directives). Please describe the impact that these changes have had on the implementation of the Convention or other OECD anti-bribery instruments.

The U.S. foreign bribery offense, the Foreign Corrupt Practices Act (FCPA), 15 U.S.C. § 78dd-1 *et seq.*, has not been amended since Phase 2. The law is attached at Appendix E. The Principles of Federal Prosecution of Business Organizations have been amended and are discussed in more detail in 5.1 below.

(b) In particular, please include reference to any change(s) affecting:

(i) the offense of bribing a foreign public official (the foreign bribery offense), criminal responsibility for the foreign bribery offense, and related defenses and exceptions, including small facilitation payments;

Since the Follow-Up Report on Phase 2, there have been two matters resulting in judicial opinions regarding the interpretation of the FCPA.[1]

In *United States v. Kay*, 513 F.3d 432 (5th Cir. 2007),[2] *cert. denied*, ___ U.S. ___, 129 S. Ct. 42 (2008), the 5th Circuit ruled that *any* payments to foreign officials that might assist in obtaining or retaining business by lowering the costs of operations can fall within the FCPA, even where such a payment is not directly related to securing a contract. The judges rejected the defendants' argument that to interpret the business nexus requirement that broadly rendered the

[1] There was also a challenge to the definition of "foreign official" in the Nexus Technologies matter (Case 27 in Appendix C). The defendants argued that the definition of "foreign official" did not include employees of state-owned enterprises, because in order for an organization to be considered an "agency or instrumentality" of a foreign government, it had to serve a purely public purpose. The United States argued that public purpose was only one of many factors in determining that an organization is an agency or instrumentality of a foreign government, and that Congress expressly intended to include employees of state-owned enterprises in the definition of foreign official. The judge ruled in favor of the United States, but issued no written opinion.

[2] The opinions of circuit courts, which are the first court of appeal in the federal system, are binding only in courts in that circuit. For other courts, they are only persuasive authority.

statute unconstitutionally vague. The court also ruled that in proving the "knowing" element of an FCPA offense, the United States need only prove the defendants understood that their actions were illegal. No specific knowledge about the FCPA or its prohibitions is required. (See Case 73A in Appendix C.) The *Kay* opinion is attached at Appendix D.

In *United States v. Kozeny, et al.*, No. 05-cr-518 (S.D.N.Y. 2005) (Case 50 in Appendix C), the District Court[3] judge issued a series of rulings on three key issues under the FCPA in the course of the trial and conviction of defendant Frederic Bourke. First, the judge ruled that the "knowing" standard under the FCPA can be met by evidence that the defendant "consciously avoided" or was "willfully blind" to the substantial likelihood that there was bribery. Second, the Court held that for purposes of the affirmative defense of legality under local law, it is not enough that the local law merely relieve the payor of criminal liability; rather, it must affirmatively render the payment legal. Lastly, the trial court rejected the view that economic extortion can be a defense to an FCPA bribery charge, stating that the jury would receive an instruction on extortion only if the defendant laid a sufficient evidentiary foundation of "true extortion," which would involve threats of injury or death, rather than a threat to business interests or business demands. The *Kozeny* opinions are attached at Appendix D. Bourke is currently appealing his conviction and the aforementioned legal rulings.

The Department of Justice (the Department) has issued the following additional guidance on defenses and exceptions to the FCPA pursuant to its opinion procedure since the Follow-Up Report on Phase 2 (no opinions were issued in 2005):[4]

Opinion Procedure Release No. 10-10: In April 2010, the Department responded to an opinion request regarding whether certain payments to a foreign government official would be appropriate under the FCPA. The requestor, who was contracting with a U.S. government agency to perform work overseas, was obligated to hire and compensate individuals at the direction of a U.S. government agency. One individual so identified, who was hired on the basis of the individual's qualifications, also served as a paid officer for an agency of the foreign country in a position unrelated to the work the individual would perform for the requestor. Based upon all of the facts and circumstances, as represented by the requestor, the Department determined that while the individual was a foreign official within the meaning of the FCPA, and would receive compensation from the requestor through a subcontractor, the individual would not be in a position to influence any official act or decision affecting the requestor. In addition, the requestor is contractually bound to hire and compensate the individual as directed by the U.S. government agency, and the requestor did not play any role in selecting the individual. As such, the payment was not being corruptly made, was not made to obtain or retain business, and was

[3] The opinions of District Court judges, while persuasive authority, are not binding on any court.

[4] Pursuant to the Department of Justice FCPA Opinion Procedure, 28 C.F.R. part 80, 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. 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).

not made to secure an improper advantage. Accordingly, the Department indicated that, based on the facts as presented, it would not take any enforcement action.

Opinion Procedure Release No. 09-01: In August 2009, the Department issued an opinion that donations of medical devices to a government agency, as opposed to individual government officials, through a program open to all medical device manufacturers, fell outside the scope of the FCPA, as the FCPA covers only the offering of things of value to individual government officials, not to a government itself.

Opinion Procedure Release No. 08-01: In January 2008, the Department issued an opinion in response to an inquiry from a U.S. public company regarding its intent to acquire a foreign company that managed public services for a foreign municipality. The foreign company was majority-owned by an individual determined to be a "foreign official" within the meaning of the FCPA. The U.S. company was concerned that payments to the owner of the foreign company in connection with the purchase might run afoul of the FCPA. The Department determined that, in light of the U.S. company's extensive due diligence, the transparency of the transaction, the undertakings of both the foreign owner and the U.S. company, and the terms of the transaction, it would not take enforcement action.

Opinion Procedure Release No. 08-02: In June 2008, the Department issued an opinion in response to an inquiry from a Halliburton Company (Halliburton). Halliburton intended to acquire a business in a foreign jurisdiction where they would not be able to conduct full due diligence in advance of acquisition. The company provided a detailed procedure for conducting staged due diligence quickly after acquisition. The Department determined that, assuming Halliburton completed each of the steps detailed in the submission, including full disclosure to the Department, the Department would not take any enforcement action against Halliburton for the acquisition, any pre-acquisition unlawful conduct by the business being acquired, if timely disclosed to the Department, or any post-acquisition conduct by the business being acquired, if it is halted and disclosed to the Department in a timely fashion.

Opinion Procedure Release No. 08-03: In July 2008, the Department issued an opinion in response to an inquiry from TRACE International (TRACE), a U.S. non-profit business membership organization, declining to take enforcement action if TRACE paid a limited stipend to cover certain travel expenses for Chinese journalists (who are employees of the state, and therefore foreign officials under the FCPA) to attend a press conference to be held by TRACE. TRACE represented that the journalists are not typically reimbursed by their employers for such costs; that stipends will be equally available to all journalists regardless of whether they later provide coverage of the conference and regardless of the nature of such coverage; that TRACE has no business pending with any government agency in China; and that it had obtained written assurances from an established international law firm that the payment of the stipends is not contrary to Chinese law.

Opinion Procedure Release No. 07-01: In July 2007, the Department issued an opinion in response to a private company in the United States, declining to take enforcement action if the company proceeded with sponsoring domestic expenses for a trip by a six-person delegation from an Asian government. The company represented that the purpose of the visit would be to

familiarize the delegates with the nature and extent of the company's business operations; that it would not select the delegates; it would pay all costs directly to providers; and it did not currently conduct operations in the foreign country at issue.

Opinion Procedure Release No. 07-02: In September 2007, the Department issued an opinion in response to a private insurance company in the United States, declining to take enforcement action if the company proceeded with sponsoring domestic expenses for a trip by six officials from an Asian government for an educational program at the company's U.S. headquarters. The company represented that the purpose of the visit would be to familiarize the officials with the operation of a U.S. insurance company; that it would not select the officials who would participate; that it would pay costs directly to providers; and that it has no non-routine business pending before the agency that employs the officials.

Opinion Procedure Release No. 07-03: In December 2007, the Department issued an opinion in response to a lawful permanent resident of the United States declining to take enforcement action if the requestor paid up-front expenses to a foreign court-appointed estate administrator. The Department noted that there were two primary reasons for declining enforcement: first, the requestor had represented that the payment would be made to a government entity (the court clerk's office) rather than directly to the foreign official; and second, that the payment in any event is lawful under the written laws and regulations of the country, according to an experienced attorney retained by the requestor in the country in question, which would be consistent with the affirmative defense of legality under local law enumerated in the FCPA.

Opinion Procedure Release No. 06-01: In October 2006, the Department issued an Opinion Procedure Release in response to a request from a Delaware corporation with headquarters in Switzerland, declining to take enforcement action if the corporation proceeded with a proposed contribution to the government of an African country. The company proposed to contribute $25,000 to the African country's regional customs department and/or Ministry of Finance as part of a pilot project to improve local enforcement of anti-counterfeiting laws. The company represented that it would execute a formal memorandum of understanding with the country and would establish several procedural safeguards to ensure that the funds would be used as intended.

Opinion Procedure Release No. 06-02: In December 2006, the Department issued an opinion in response to a request from a subsidiary of a U.S. issuer declining to take enforcement action if the corporation retained a law firm in the foreign country and paid it substantial fees to aid the company in obtaining foreign exchange from a government agency of that country. The law firm would prepare its foreign exchange applications to that agency and represent the company during the review process. The Department's release was based on the company's representations regarding steps taken in conducting due diligence regarding the law firm and the inclusion in the agreement between the company and the law firm several provisions designed to prevent corruption from occurring.

(ii) the responsibility of legal persons for the foreign bribery offense, or the responsibility of legal persons more generally;

Please see the answer to 2.1(a) above.

(iii) sanctions applicable to the foreign bribery offense, including confiscation and administrative or civil sanctions;

There have been no changes to the maximum sanctions applicable to violations of the FCPA. The U.S. Sentencing Commission has recommended changes to the U.S. Sentencing Guidelines regarding corporate compliance programs. These changes are discussed in more detail in 5.1 below.

On January 13, 2010, the Enforcement Division (the Division) of the Securities and Exchange Commission (SEC or the Commission) announced additional enhancements to its program to recognize cooperation with SEC investigations. Since 2001, the Commission has had a formal policy of recognizing self-reporting, remediation, and cooperation by corporations. Many of the cases in the Enforcement Division's FCPA program come to the Division's attention when corporations self-report potential conduct. It is the Division's practice to recognize this self-reporting, along with remedial efforts and cooperation, when it determines the appropriate resolution of these matters. The new program will provide similar incentives to individuals and it will give the Division more options in terms of resolutions with defendants. The Commission expects that the FCPA program will benefit from these enhancements because individuals will have greater incentives to come forward and alert the SEC to potential violations. The enhancements include cooperation agreements, which are formal written agreements in which the Division will agree to recommend to the Commission that an individual receive credit for cooperating in an investigation or related enforcement action. Such credit will only be extended if the cooperator provides substantial assistance in those investigations and enforcement actions.

Deferred prosecution agreements are an additional new tool now being used by the SEC. These are formal written agreements in which the Commission agrees to forego an enforcement action against a cooperator, if the individual or company agrees to cooperate fully and truthfully and to comply with certain reforms, controls and other undertakings. The final new enhancement is the non-prosecution agreement. These are formal written agreements, entered into under very limited and appropriate circumstances, in which the Commission agrees not to pursue an enforcement action against a cooperator. Here, too, the agreement would only be entered if the individual or company agrees to cooperate fully and truthfully in connection with an investigation or enforcement action and to comply with express undertakings.

(iv) the exercise of territorial, nationality or other forms of extraterritorial jurisdiction over the foreign bribery offense;

There have been no changes to the jurisdictional reach of the FCPA.

(v) the availability of investigative techniques in cases of bribery, including access to information from financial institutions and tax authorities;

While there has been no change in the investigative techniques available to detect violations of the FCPA or in the laws and regulations that allow access to information from financial institutions and tax authorities, greater use is being made of traditional law enforcement techniques than was the case at the time of the Follow-Up Report on Phase 2 review. This is discussed in more detail in Chapter 3 below.

(vi) the potential impact of factors prohibited under Article 5 of the Convention (i.e. national economic interest, relations with another State, or the identity of the natural or legal persons involved), or of other forms of improper influence which are the result of concerns of a political nature, on investigations and prosecutions;

There has been no impact on enforcement by factors prohibited under Article 5. Investigations and prosecutions are conducted in a manner independent from political influence and in accordance with the Principles of Federal Prosecution, discussed in more detail in 4.1 and 5.1 below.

(vii) prosecutorial discretion, and any requirement to obtain consent from the executive branch of government (e.g. Minister of Justice) to open, close or continue an investigation or prosecution; or to inform the executive branch prior to the opening, closure or continuance of an investigation or prosecution; or any authority of the executive branch to direct the opening, closure or continuance of an investigation or prosecution;

There has been no change to the procedures relevant to prosecutorial discretion since the Follow-Up Report on Phase 2.

(viii) the statute of limitations applicable to the foreign bribery offense;

The statute of limitations for criminal prosecutions of the FCPA remains five years. The statute of limitations defense is only applicable to the SEC obtaining a civil penalty. It does not impact the SEC's ability to bring charges or to seek disgorgement, pre-judgment interest, or other equitable relief.

(ix) false accounting offences, and money laundering offences in so far as the latter relate to foreign bribery;

There have been no changes to these offenses since the Follow-Up Report on Phase 2.

(x) the tax treatment of bribes to foreign public officials, including the tax treatment of small facilitation payments and implementation of the 2009 Recommendation on Tax Measures;

There have been no major changes to the tax treatment of bribes since the Follow-Up Report on Phase 2, discussed in more detail in Chapter 9.

(xi) the ability of your tax authorities to require financial institutions in your country to provide information; and

There have been no changes to the ability of tax authorities to work with financial institutions to secure information, discussed in more detail in Chapter 9. The Department and the SEC have continued to obtain investigative information from financial institutions and other authorities. For example, the SEC has a dedicated team that reviews Suspicious Activity Reports (SARS) from banking and brokerage institutions. The Department and the SEC also obtain data from the Financial Crimes Enforcement Network (FinCEN), which is the U.S. financial investigation unit (FIU).

(xii) new arrangements and agreements on mutual legal assistance (MLA) and extradition; and the rules governing MLA and extradition, including the potential impact of issues addressed under Articles 9 and 10 of the Convention (i.e. bank secrecy, absence of an extradition treaty, declining extradition requests solely on the grounds that a person is a country's national, requirement for dual criminality).

The United States has bilateral extradition treaties with 133 states or multilateral organizations (such as the European Union) and Mutual Legal Assistance Treaties (MLATs), Instruments, or Protocols with 80 states or multilateral organizations. Recently, the United States and the European Union completed 27 new MLATs, Instruments, or Protocols disallowing bank secrecy as the basis for the denial of a mutual legal assistance (MLA) request. Few of our bilateral MLATs require dual criminality; most allow for broad cooperation on offenses that are criminalized in the requesting country. Criminal activity not covered by a MLAT may be supplemented by various multilateral conventions, such as the OECD Anti-Bribery Convention, the Transnational Organized Crime Convention, and the United Nations Convention Against Corruption. Such conventions add offenses covered by MLATs. In addition, such multilateral treaties provide an independent basis for the provision of MLA where there is no bilateral treaty.

In 2002, the SEC became a signatory to the International Organization of Securities Commissions (IOSCO) Multilateral Memorandum of Understanding (MMoU), the first global multilateral information-sharing arrangement among securities regulators. As of April 2010, sixty-five securities and derivatives regulators had become signatories to the MMoU; accordingly, the SEC is able to seek mutual legal assistance from each existing signatory as well as new signatories who join in the future.

Pursuant to the MMoU, signatories agree, among other things, to provide certain critical information in response to a request by the SEC, to permit use of that information in civil or

administrative proceedings, to onward-share information with self-regulatory organizations and criminal authorities, and to keep such information confidential. In particular, the MMoU provides for the following:

- sharing information and documents held in the regulators' files;
- obtaining information and documents regarding transactions in bank and brokerage accounts, and the beneficial owners of such accounts; and
- taking or compelling a person's statement or, where permissible, a person's testimony.

The MMoU has significantly enhanced the SEC's enforcement program by increasing and expediting the SEC's ability to obtain information from a growing number of jurisdictions worldwide.

In addition to the IOSCO MMoU, the SEC has entered into bilateral information sharing MOUs with the securities authorities of 20 different countries. Bilateral MOUs have likewise proven crucial to investigations undertaken by SEC enforcement staff and, as such, the SEC considers these bilateral arrangements to be an excellent supplement to the information sharing mechanism of the IOSCO MMoU.[5]

The United States extradites its nationals and does not deny extradition requests based on nationality. Our bilateral extradition treaties require either dual criminality – in the more recent treaties – or list the offenses for which extradition is possible. The older list treaties are often supplemented by various multilateral conventions, such as the OECD Anti-Bribery Convention, the Transnational Organized Crime Convention, and the United Nations Convention Against Corruption, to which the United States and other states are parties. Such conventions add offenses to the lists of extraditable offenses.

(c) Please include reference to any significant changes in the resources (human and financial) available for the implementation of the Convention and the 2009 Recommendations, including resources for law enforcement authorities and bodies responsible for awareness and prevention of foreign bribery. If more than one level of government has relevant legislative-making powers, please identify relevant changes to all levels of legislation which might directly or indirectly impact upon the implementation of the Convention.

Pursuant to the U.S. Attorney's Manual (USAM) 9-47.110, criminal violations of the Foreign Corrupt Practices Act are prosecuted only by the Fraud Section of the Criminal Division of the Department of Justice. In 2006, the Fraud Section formed a dedicated FCPA Unit within the Fraud Section to handle prosecutions, issue opinion releases, participate in interagency anticorruption policy development, and to engage in public education about the FCPA and OECD Anti-Bribery Convention. The Unit consists of a Deputy Chief, two Assistant Chiefs, and a number of trial attorneys. Since the establishment of the Unit, prosecutions have increased significantly, rising from an average of 4.6 prosecutions per year from 2001-2005 to 18.75 from

[5] A list of existing MoUs may be found at http://www.sec.gov/about/offices/oia/oia_cooparrangements.shtml.

2006-2009. Since 2005, the FCPA Unit has prosecuted more cases than were prosecuted in the first 28 years of the FCPA's existence combined.

In May 2008, the Department of Justice Criminal Division announced its International Anticorruption Strategic Implementation Plan, focused on supporting anticorruption efforts around the world as an important component of the Criminal Division's overall mission. The Plan sets forth specific strategic objectives and implementation goals to coordinate the cross-cutting anticorruption efforts of the Office of International Affairs (OIA), the Fraud Section, Public Integrity Section (which handles domestic corruption), and Asset Forfeiture and Money Laundering Section (AFMLS), as well as the Office of Overseas Prosecutorial Development and the International Criminal Investigative Training Program.

The International Corruption Unit (ICU) of the Federal Bureau of Investigation (FBI) was created in 2008 to oversee the increasing number of corruption and fraud investigations emanating overseas, which required extensive international coordination and increased collaboration between FBI Headquarters (FBI-HQ) and other FBI divisions, Legal Attachés, other federal agencies, and host countries. Specifically, the ICU has program oversight for all fraud and corruption matters related to Overseas Contingency Operations (OCO), FCPA, and antitrust matters. Given the investigative and prosecutorial complexities associated with FCPA investigations, and to ensure and promote close coordination between FBI field offices, FBI-HQ, and Fraud Section, in 2008, the FBI created a national FCPA squad located in the FBI's Washington Field Office (WFO). This squad is responsible for investigating and/or providing investigative support for all FBI FCPA related investigations. The squad is staffed with a Supervisory Special Agent, 12 Special Agents, an Investigative Analyst, and an administrative support officer. The ICU also provides annual training in FCPA investigations to law enforcement agents from all over the United States, including agents from other agencies.

On January 13, 2010, the Enforcement Division of the Securities and Exchange Commission announced the creation of a specialized unit that will focus on violations of the FCPA. The FCPA Unit is comprised of approximately 30 attorneys from around the country. A primary mission of this Unit is to enhance the staff's expertise, to coordinate enforcement efforts, and to conduct efficient investigations. The Unit will also conduct more targeted sweeps and sector-wide investigations, alone and with other regulatory counterparts both in the U.S. and abroad. The FCPA Unit also has in-house experts, accountants, and other resources to ensure the SEC remains a very proactive organization in rooting out foreign bribery schemes. The SEC's budget ensures the FCPA unit members obtain adequate training, have state-of-the-art technological capability, and have an adequate travel budget to meet with foreign regulators and to speak with foreign witnesses.

2.2 Has your national policy or strategy on combating the bribery of foreign public officials been updated since Phase 2, or changed in any way?

The global fight against corruption, including the bribery of foreign public officials, remains a central concern for the United States. President Barack Obama, as well as the heads of relevant U.S. government agencies, have underscored publicly and repeatedly the importance of fighting corruption internationally. Fighting corruption is a primary tenet of U.S. foreign policy

and one of the highest priorities of the Department, and anti-bribery efforts are an important area of enforcement and policy engagement at the bilateral and multilateral level. The U.S. recognizes that corrupt practices threaten the security and stability of democratic nations, sabotage development efforts, undermine economic development, discourage investment and create an uneven playing field for business, and lead to misuse of public resources.

As is described in much greater detail in Chapter Three, United States policy and practice is to actively prosecute individuals and companies that bribe foreign government officials. The United States also undertakes a range of measures to raise public awareness of the commitment to fight foreign bribery and to encourage companies to adopt anti-bribery compliance programs and report solicitations of bribery.

Bolstering the enforcement authorities of the Department and the Commission, policy development, domestic outreach, and international engagement efforts are driven by ongoing interagency coordination, involving these agencies as well as the Departments of State and Commerce. These in turn reach out through U.S. embassy staff, commercial officers, and Department of Justice advisors, among others, to engage a wide range of interlocutors abroad, both in the private sector, in foreign governments, and in civil society.

U.S. policy complements the robust enforcement at the domestic level with broad, ongoing engagement multilaterally to advance this agenda. While the United States' active involvement in and strong support for the Working Group on Bribery is a critical component, the U.S. strategy extends beyond the implementation of this convention alone, to seek to establish rejection of transnational bribery as the global norm. The United States has worked within the G-8 to highlight the issue of transnational bribery and corruption generally, and to call for accession to the OECD Anti-Bribery Convention and enforcement of its provisions; likewise, it has collaborated with G-20 partners, through the November 2009 Pittsburgh Leaders' Statement, to call for enactment and enforcement of such laws. The United States is also a strong proponent and supporter of the international commitments that complement the provisions of the Anti-Bribery Convention. The United States is a party to the Inter-American Convention against Corruption, whose anti-transnational bribery provisions reach 33 countries in the Americas, and provides support to the Convention's follow-up mechanism, and is a party to the Group of States against Corruption of the Council of Europe, which has similar provisions. The United States also includes anticorruption provisions in its Free Trade Agreements and Trade and Investment Framework Agreements. The United States is active in related anticorruption initiatives of the OECD, such as the OECD Principles on Corporate Governance, and is supportive of industry initiatives to promote adoption of effective anti-bribery compliance programs.

An important part of U.S. efforts to address transnational bribery is working collaboratively with our partners to promote effective implementation of the United Nations Convention against Corruption (UNCAC). Currently, 144 countries are bound by UNCAC provisions, which include requirements functionally equivalent to and in some cases beyond the four corners of the Anti-Bribery Convention. Even prior to the adoption of an UNCAC review mechanism, conclusion and ratification of UNCAC has influenced legislative and enforcement activity; to further spur implementation, the United States actively has supported development of the terms of reference for an effective review mechanism and strongly supported their adoption

at the third Conference of States Parties (COSP) in Doha, Qatar. The issues for consideration in the first round include criminalization and law enforcement, adding greater impetus to adoption and enforcement of anti-transnational bribery laws and related legislation, such as liability for legal persons, in a wide range of countries.

The United States has also pressed for greater recognition and action on this issue in various global and regional fora, and in interaction with international organizations. The United States has worked actively within the APEC and Summit of the Americas contexts to elevate the issue of anticorruption and transnational bribery. The U.S. supports regional anticorruption initiatives, in some cases in partnership with the OECD, in Eastern Europe and Central Asia, the Middle-East/North Africa Region, the Americas, and Asia, and has given input to the work programs of these initiatives, or provided expertise, to increase awareness of the OECD Anti-Bribery Convention and to stimulate action against bribery of foreign public officials. The United States has also been actively supportive of the development of measures to promote oversight, transparency, and integrity in the operations of international organizations including international financial organizations. The United States participates in the Extractive Industries Transparency Initiative (EITI), including through significant contributions to the EITI multi-donor trust fund and bilateral assistance to support implementation in participating countries.

U.S. policy also reflects the idea that bribery of foreign public officials is less likely to flourish where there is good governance and accountability in the recipient country. U.S. promotion of implementation of UNCAC and other multilateral anticorruption instruments, and U.S. support for the regional and special initiatives described above, further this aim. The United States couples encouragement to implement anticorruption commitments and good practices with assistance to countries to pursue reform. The United States provides hundreds of millions of dollars in technical assistance to aid countries to address corruption and enhance related areas of good governance. Much of the assistance bears on the ability to prevent corruption and provide oversight, or to investigate and prosecute acts of corruption, in the public sector.

All of these elements were captured and reinforced by the adoption, in July 2006, of a Presidential Strategy on Internationalizing the Fight against Kleptocracy, including the formation of the interagency Kleptocracy Working Group. The strategy builds upon prior U.S. initiatives and announced the intention to further engage and mobilize the international community to confront large-scale corruption by high-level foreign public officials and target the fruits of their ill-gotten gains. The Kleptocracy Working Group also implements the No Safe Haven policy, a commitment by 53 jurisdictions worldwide to deny safe haven to the corrupt, those who corrupt them, and their assets, through seizure and forfeiture of the proceeds of corruption, and the denial of entry to or extradition and prosecution of those who participate in corruption.[6] The strategy

[6] In total, fifty-three jurisdictions have subscribed to the No Safe Haven commitment, including many members of the OECD Working Group on Bribery, through the G8, the Summit of the Americas, and APEC, as follows:

- *Group of Eight - Declaration of Evian (June 2003)*: "We will each seek in accordance with national laws to deny safe haven to public officials guilty of corruption, by denying them entry, when appropriate, and using extradition and mutual legal assistance laws and mechanisms more effectively."
- *Summit of the Americas - Declaration of Nuevo Leon (January 2004)*: "In the framework of applicable national and international law, we commit to deny safe haven to corrupt officials, to those who corrupt

covers a range of mutually reinforcing actions and incorporated a strong emphasis on the issue of bribery of foreign public officials.

Specifically, the strategy committed the United States to: enhance its work with international financial partners, in the public and private sectors; to pinpoint best practices for identifying, tracing, freezing, and recovering assets illicitly acquired through kleptocracy and to immobilize kleptocratic foreign public officials by using financial and economic sanctions against them and their networks; to vigorously prosecute foreign corruption offenses and seize illicitly acquired assets; to develop and promote mechanisms that capture and dispose of recovered assets for the benefit of the citizens of countries victimized by high-level public corruption; in its continuing efforts against bribery of foreign officials, expand U.S. government capacity to investigate and prosecute criminal violations associated with high-level foreign official corruption and related money laundering, as well as to seize the proceeds of such crimes; to work closely with international partners to identify kleptocrats and those who corrupt them, and deny such persons entry and safe haven; and work with international partners to more vigorously investigate and prosecute those who pay or promise to pay bribes to public officials, to strengthen multilateral and national disciplines to stop bribery of foreign public officials, and to halt bribery of foreign political parties, party officials, and candidates for office. The United States also committed to targeting technical assistance and focusing international attention on building capacity to detect, prosecute, and recover the proceeds of high-level public corruption, while helping build strong systems to promote responsible, accountable, and honest governance.

2.3 If you have any dependencies or overseas territories, what progress has been made since Phase 2 to bring them in compliance with the Convention? In addition, if you have the authority to extend ratification of the Convention to them, what steps have been taken in this regard?

The United States has four "Insular Areas," territories which are administered directly by the U.S. federal government but are not part of any state: American Samoa, Guam, the Commonwealth of the Northern Mariana Islands, and the U.S. Virgin Islands. Puerto Rico is a self-governing unincorporated territory of the United States.[7] The U.S. law governing the status of each of these territories also provides that the U.S. Constitution and U.S. federal law apply, including treaties executed by the United States.[8] Therefore, no steps need to be taken to extend the Convention to them, as the FCPA is in full force and effect, as is the Convention, in all U.S.

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them, and their assets; and to cooperate in their extradition as well as in the recovery and return of the proceeds of corruption to their legitimate owners."

- *Asia-Pacific Economic Forum - APEC Course of Action on Fighting Corruption and Ensuring Transparency (November 2004)*: "We agree to… encourage each economy to promulgate rules to deny entry and safe haven, when appropriate, to officials and individuals guilty of public corruption, those who corrupt them, and their assets."

[7] There are additional territories of the United States, but they are uninhabited.

[8] *See e.g.* 48 U.S.C. § 734 (Puerto Rico).

dependencies and overseas territories. In addition, the U.S. criminal code and the FCPA both contain express provisions extending their reach to such dependencies and territories.[9]

[9] *See* 15 U.S.C. § 78dd-2(h)(2) (defining "domestic concern") and 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…").

PART II. HORIZONTAL (CROSS-CUTTING) ISSUES, INCLUDING ENFORCEMENT EFFORTS AND RESULTS

III. Investigation and Prosecution of the Foreign Bribery Offense

3.1 Please provide information on enforcement actions since Phase 2 with regard to alleged foreign bribery, related accounting misconduct, and related money laundering, including if available updated information not already provided as part of other data gathering exercises by the Working Group:

(a) Concerning the investigation of such cases, please identify:
- ***(i) the total number of investigations commenced each year;***
- ***(ii) the number of on-going investigations;***
- ***(iii) the number of investigations in which there has been a pre-trial seizure or freezing of assets;***
- ***(iv) the number of discontinued investigations without sanctions; and***
- ***(v) the number of discontinued or deferred investigations where persons were sanctioned as a result of settlement, mediation, or the like.***

There are presently approximately 150 ongoing criminal FCPA investigations. The Department opened nine new FCPA matters in fiscal year 2005,[10] 14 in 2006, 53 in 2007, 34 in 2008, 29 in 2009, and had opened 28 as of April 30, 2010. At any given time, there may be a number of matters that have not been officially assigned DOJ case numbers, as those matters are being evaluated preliminarily, including some voluntary disclosures. At least two cases involved pre-trial seizure or freezing of assets (see Cases 5 and 22 in Appendix C). The Department does not publicly disclose the number of investigations discontinued without sanctions. For the number of criminal investigations resolved through settlement (deferred prosecution agreements and non-prosecution agreements), please see Charts 1 and 5 attached at Appendix B.[11]

There are approximately 80 ongoing civil FCPA investigations. No cases involved pre-trial seizure or freezing of assets. The SEC does not publicly disclose the number of investigations discontinued without action. For the number of civil actions resolved through settlement, please see Chart 2 attached at Appendix B.

(b) Concerning criminal prosecutions and convictions with formal charges, please identify:
- ***(i) the total number of prosecutions commenced each year;***
- ***(ii) the number of on-going prosecutions;***
- ***(iii) the number of prosecutions discontinued or deferred without sanctions or conditions;***

[10] These U.S. government statistics are kept by fiscal year, rather than calendar year. The U.S. fiscal year runs from October 1 to September 30.

[11] Chart 1 only includes statistics regarding cases against legal persons resolved by deferred prosecution agreements and non-prosecution agreements. For reasons of internal policy, the Department does not disclose investigations against natural persons resolved by non-prosecution agreements. No matters against natural persons have been resolved by deferred prosecution agreements.

(iv) the number of prosecutions discontinued or deferred with sanctions or other measures;
(v) the number of convictions with sanctions; and
(vi) the number of acquittals.

Please see Chart 1 attached at Appendix B.

(c) Concerning additional administrative or civil proceedings foreseen under Article 3(4) of the Convention which seek imposition of sanctions (e.g. debarment, suspension from public procurement contracts, suspension or termination of official export credit support, penalties for accounting violations), please identify on an annual basis:
(i) the number of on-going proceedings;
(ii) the number of proceedings discontinued or deferred without sanctions or other measures;
(iii) the number of proceedings discontinued or deferred with sanctions or other measures;
(iv) the number of proceedings discontinued as a result of civil settlements or agreements, or reference of the matter to arbitration;
(v) the number of decisions finding liability with sanctions; and
(vi) the number of decisions finding no liability.

Please see Chart 2 attached at Appendix B regarding civil proceedings by the SEC. Where there has been a criminal or civil settlement regarding foreign bribery or accounting misconduct, such misconduct would be taken into account in debarment or suspension decisions, as discussed more fully in 8.6 and Chapter 12 below.

(d) Concerning all statistics provided, please distinguish between natural persons and legal persons. Please also distinguish between enforcement action concerning alleged foreign bribery, related accounting misconduct, and related money laundering misconduct.

Please see the charts attached at Appendix B.

(e) Please provide a summary of selected relevant cases since Phase 2, including those that address weaknesses identified in previous evaluations and information on any changes in the domestic legal or institutional framework since Phase 2. In accordance with national rules on confidentiality, please include:
(i) the sources of information regarding foreign bribery, and how they came to the attention of your law enforcement authorities (e.g. media, competitors, employees, tax authorities, the auditing profession, money laundering authorities, the investigation of other offences, embassies, information from foreign authorities, foreign court decisions, or MLA requests from other countries);

(ii) the important facts of the case revealed by the evidence (which may be anonymized), including the briber, the amount of the bribe, the nature of the advantage obtained, the time period and location of the events, the involvement of intermediaries, etc.;

(iii) the procedural steps taken, including investigative and prosecutorial steps;

(iv) the practices and procedures used by law enforcement authorities to assess the information received; and

(v) any interpretation of the foreign bribery offense by the court, or opinion of (please provide a copy of any relevant documentation, with a translation of the relevant parts of such documentation into the agreed official language for the evaluation).

Please see the summaries attached at Appendix C. Court opinions are attached at Appendix D.

Investigations come to the attention of law enforcement from a wide variety of sources, including, but not limited to: corporate securities filings; suspicious activity reports from financial institutions; the media, including key word searches of the Internet; whistleblower complaints, including those pursuant to the Sarbanes-Oxley Act; *qui tam* and civil complaints; direct reporting to law enforcement by employees, customers, competitors, agents, and others; referral from other U.S. government agencies and their employees, including the various Inspectorates General; referral from state, local, and foreign law enforcement; referrals from international financial institutions such as the World Bank; reports through the "hotline" email address that allows reporting directly to the FCPA Unit of the Fraud Section; voluntary disclosures from companies; and investigations derived from traditional law enforcement methods, including sting operations (see Case 6 in the summaries). The majority of investigations initiated by Department and the SEC were not the result of voluntary disclosures, but rather one of the other sources listed above.

MLA requests are generally reviewed for possible U.S. violations, and the U.S. Central Authority (the Office of International Affairs in the Criminal Division) shares information as appropriate from MLA requests with appropriate sections of the Criminal Division to review in light of U.S. criminal laws, and there are many instances in which MLA requests reflect joint or parallel investigations in the United States and other countries.

For example, in 2008 a then-non-Party to the OECD Convention sent an MLAT request to the U.S. regarding an investigation into its former high-ranking official on charges of bribery and breach of trust, by accepting illegal payments from a U.S. businessman. That request and simultaneous media reports prompted a U.S. investigation into the U.S. businessman. The requestor's authorities sought and received bank, business, hotel, and telephone records, and participated in numerous interviews around the United States. The U.S. also opened an FCPA investigation into the U.S. businessman and submitted reciprocal requests for assistance.

A second example involves a non-Party with which the United States does not have an MLAT, though both countries are parties to multilateral conventions that include MLA

provisions. The requestor sent four requests to the Department in accordance with UNCAC, seeking evidence and forfeiture-related assistance in connection with several corruption investigations allegedly involving two former high-ranking officials, former cabinet members, and others. The investigations involve the acceptance of kickbacks by the requestor's officials in connection with the awarding of government contracts. The requests were forwarded to the AFMLS for execution, and AFMLS attorneys served approximately 125 subpoenas for bank records, which have been provided to the requestor. The United States has also sought evidence from the requestor. As a result of this continuing cooperation, in January 2009, attorneys with AFMLS filed a forfeiture action in U.S. District Court in the District of Columbia against accounts worth nearly $3 million that are alleged to be the proceeds of a wide-ranging conspiracy to bribe public officials and their family members in connection with various public works projects. A final default order of forfeiture was entered in April 2010.

(f) Where applicable, please indicate the nature of any challenges encountered which: prevented information referred to your law enforcement authorities accusing natural and/or legal persons of involvement in foreign bribery from progressing to the investigative stage; or prevented investigations from leading to indictments (or the initiation of civil or administrative proceedings); or prevented any indictments (or other proceedings) from going to trial; or resulted in any trials leading to acquittals (or the finding of no liability). Where such challenges have arisen, please explain what measures you have taken in attempting to overcome them, including practices that have worked particularly well.

(i) Practical challenges might include, for example, that: the benefit was transferred through an intermediary, including a related legal person; the benefit was provided directly to a third party with the agreement, or instruction, of the foreign public official; the person bribed was not clearly a foreign public official, or might have received the bribe in a personal capacity; a defense or exception that does not apply in your jurisdiction was successfully invoked in another country; the offense occurred only <u>in part</u> in your country, <u>or</u> entirely abroad in a foreign territory (i.e. either in a public official's country, or in a third party); the circumstances surrounding the offense are the subject of an on-going investigation in another country, or have been investigated and concluded in another country; and/or the statute of limitations expired before or during the investigation or prosecution.

Three individuals have been acquitted of at least some foreign bribery charges since the Phase 2 review (see Cases 51, Congressman William Jefferson,[12] and Case 67, HealthSouth, in Appendix C). There have been no acquittals of companies or findings of no liability.

The statute of limitations for FCPA violations is five years.[13] The statute of limitations does limit the ability of enforcement authorities to investigate and prosecute historical conduct,

[12] Although Congressman Jefferson was acquitted on the substantive FCPA violation, he was convicted of conspiracy to violate the FCPA.

given the length of time that it takes for such allegations to come to light and subsequently to investigate them. But the statute of limitations may be tolled for up to three years where a mutual legal assistance request has been made but not been completed.[14] 18 U.S.C. § 3292. Nevertheless, statutes of limitations can pose challenges when the schemes are complicated, well concealed, and involve multiple foreign jurisdictions. In many instances, as part of their cooperation, companies under investigation will voluntarily toll the statute of limitations. In much rarer instances, individuals will also agree to do so.

Gathering and obtaining evidence outside the United States and authenticating it so that it can be use in litigation can pose challenges, particularly when transactions have been routed through countries with which mutual legal assistance relationships are poor.

There has recently been a challenge to the inclusion of employees of state-owned enterprises in the definition of "foreign official" under the FCPA, discussed in footnote 1 above, but the challenge failed.[15]

Overlapping investigations with other countries have posed some new challenges, but also have greatly aided in investigations. In some cases, we have developed good working relationships with foreign investigators and prosecutors that have ensured that both the bribe payors and the bribe recipients were prosecuted in their respective jurisdictions. In other cases, differences in disclosure rules in the two jurisdictions, where information that must be disclosed in one jurisdiction but must be protected in the other, and the lack of flexibility to seek negotiated resolutions, have created on occasion obstacles in cooperation and delayed investigations, which can give rise to statute of limitations issues.

(g) If challenges have been encountered as a result of waiting for the conclusion of a request for MLA from, or extradition by, another State, please describe the nature of such difficulties and what measures you have taken in attempting to overcome them. Please identify whether any difficulties relate to another State which is a Party to the Convention (without necessarily naming the Party). Please include reference to any difficulties encountered in obtaining judicial or administrative decisions from another State which is Party to the Convention.

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[13] 18 U.S.C. § 3282(a) ("Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.").

[14] Incidentally, because a conspiracy is considered a continuing crime, which is not complete until the purposes of the conspiracy have been accomplished or abandoned, it has long been held that the statute of limitations for conspiracy does not begin to run until the conspiracy has ended. *See, e.g.*, *United States v. Kissel*, 218 U.S. 601, 607 (1910); *United States v. Pizzonia*, 577 F.3d 455, 465 (2d Cir. 2009). As such, the government need only plead and prove a single overt act in furtherance of a conspiracy within the five-year statute of limitation period. *See Grunewald v. United States*, 353 U.S. 391, 396 (1957). This means that an international bribery conspiracy scheme can be charged back to the original conception of the conspiracy, even if the statute of limitations has run on the substantive offenses.

[15] The challenge in the case, *United States v. Nam Nguyen et al.* (the Nexus Technologies matter, Case 26 in Appendix C), came at an early stage procedurally as a challenge to the sufficiency of the charging document. The defendants pled guilty immediately prior to trial, so the facts had not been fully enumerated. The judge issued no opinion in denying the defendants' motion to dismiss.

While the majority of requests have been executed successfully,[16] the United States has encountered some difficulties in obtaining evidence or extradition from other countries. Two examples illustrate these difficulties.

MLA: With regard to a complicated and large-scale case in which an MLAT request was submitted in mid-2006 to another Party to the Anti-Bribery Convention, it has taken a prolonged period to obtain a complete response. Moreover, in the same case, that Party decided to open a domestic criminal investigation into a corporate audit of surrounding suspicious transactions paid by a prominent foreign company being investigated by the U.S. authorities under the FCPA. The mandated reporters who informed the United States about possible bribes found during an audit are now being investigated by the Party as possible violations of that Party's laws. These include potential violations of that Party's data privacy laws for sharing information on corporate officials involved in the suspicious transactions. As a result, these mandated reporters have been unwilling to provide further cooperation with the U.S. investigation, even though its disclosures were initially triggered because the foreign corporate entity was traded on the New York Stock Exchange.

Extradition: A 2000 extradition request from the U.S. was submitted to a then-non-Party for the offenses of official corruption and international travel in aid of racketeering under the FCPA. For over eight years, the United States fought to obtain extradition. First, it was denied for lack of dual criminality on both counts, and the United States resubmitted it in 2001, after this country became a Party to the Convention. In 2003, the Party's Supreme Court eventually found the offenses extraditable. From 2003 until 2008, the United States continued to try to effect extradition, including negotiations for self-surrender and expedited plea and sentencing. However, the Minister of Justice determined that the fugitive would not be extradited for "humanitarian" reasons (a guarantee that he would be returned to the Party within six months of his extradition to the United States). The United States protested this determination vigorously, citing to the Convention, to no avail. The United States continues to pursue this fugitive.

3.2 What are the most common sources of information referred to your law enforcement authorities accusing natural and/or legal persons of involvement in foreign bribery? If such information is not being referred to your authorities, what do you believe the reasons for this to be (e.g. reluctance by the public to blow the whistle)?

Please see the answer to 3.1(e) above. Reporting of potential violations to law enforcement authorities in the United States is robust, and authorities receive reports from all over the world.

3.3 Please describe the criteria for the commencement, suspension, interruption and termination of the statute of limitations applicable to the foreign bribery offense.

The tolling of the statute of limitations in non-capital offense cases is governed by 18 U.S.C. § 3282. A copy of the relevant portions is attached at Appendix E. In some cases,

[16] Successes include Ousama Naaman, Case 2B in Appendix C, who was extradited from the Federal Republic of Germany on April 30, 2010.

defendants will also agree voluntarily to toll the statute of limitations as part of cooperation with law enforcement.

3.4 Have your law enforcement authorities investigated and/or prosecuted credible factual allegations of bribing a foreign public official through an intermediary where the intermediary made an offer, promise or gift to a foreign public official for the benefit of the company without having been directed or authorized to do so? If your authorities have prosecuted such cases, please describe (by reference to selected relevant cases) how they established the necessary mens rea for criminality?

The FCPA provides that it is illegal to provide something of value to "any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official…," expressly prohibiting the payment of a bribe through an intermediary, even when they did not direct or authorize the intermediary to do so. Congress was clear when it passed the FCPA that it intended "knowing" to include the concept of "willful blindness," which means *mens rea* is established where the defendant knows there is a "high probability" that all or a portion of something of value given to the intermediary would be given to a foreign official. Knowledge may be established if a person is aware of a high probability of its existence and consciously and intentionally avoided confirming that fact. *See United States v. Bourke, Opinion and Order, October 28, 2008* in Appendix D. Other examples include *United States v. Self,* Case 31A in Appendix C and *United States v. BAE Systems plc,* Case 4 in Appendix C.

3.5 Have your law enforcement authorities investigated and/or prosecuted credible factual allegations of bribing a foreign public official where all of the advantage was transferred directly to a third party with the knowledge or agreement of the foreign public official? If so, please describe (by reference to selected relevant cases) what practical or legal obstacles your authorities faced in this situation.

There are several cases where the bribe was paid, at the direction of the foreign official, to a third party, such as Case 4 (BAE Systems plc) (family members of foreign officials), Case 10 (Sugar Land) (family members of foreign officials), Case 16 (Control Components International), Case 21 (Bribery of Thai Tourism Officials) (payments to the official's daughter), and Case 68 (Schering Plough) (payments to a charity affiliated with the official). Such routes for paying bribes are not uncommon and generally have not posed practical or legal obstacles to prosecution.

3.6 Have your law enforcement authorities investigated and/or prosecuted credible factual allegations of bribing a foreign public official where the benefit given, offered, or promised was small or was a facilitation payment?

(a) If so, and if your country allows an exception or defense for facilitation payments, or applies one in practice through prosecutorial discretion, have there been situations where authorities in your country have decided not to proceed with an investigation or prosecution because it was not clear whether the payment was a facilitation payment? Please explain (by reference to

selected relevant cases where applicable) how your authorities determined whether or not the benefit amounted to a facilitation payment.

(b) If your country does not allow such an exception or defense, and your foreign bribery law would cover such payments, please provide any relevant cases and explain what criteria or other standards govern the investigation and prosecution of such cases.

(c) Whether your country allows such an exception or defense, or disallows facilitation payments, have your authorities periodically reviewed your country's policies and approaches on small facilitation payments?

Small payments, where they have been made to influence a discretionary action, have been prosecuted in the United States, as there is no minimum amount a bribe must reach in order to be within the purview of the FCPA. See, for example, Case 14 (Helmerich & Payne), where the bribes at issue were small payments to customs officials in order to reduce import charges and the like. A determination of whether or not a payment is for "facilitation" or is made with corrupt intent hinges upon whether the payment is made to obtain or retain business and whether it is routine in nature (such as connecting a phone) or discretionary (such as assessing a customs duty). If the payment is to secure something to which the payor is entitled, as opposed to an act that is discretionary, it is more likely to lack the necessary *means rea* to be a violation of the statute.

An illustrative list of what qualifies as "routine governmental action" includes actions ordinarily and commonly performed by a foreign official in: (i) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country; (ii) processing governmental papers, such as visas and work orders; (iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country; (iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; and (v) actions of a similar nature. The FCPA, however, states that "routine governmental action" does not include "any decision . . . to award new business to or to continue business with a particular party, or any action taken by a foreign official involved in the decision-making process to encourage a decision to award new business to or continue business with a particular party." 15 U.S.C. §§ 78dd-1(f)(3)(B), 78dd-2(h)(4)(B), 78dd-3(f)(4)(B).

Facilitation payments are exempted from the substantive bribery offense, but such payments can still be violations of the FCPA if they are not properly recorded in the books and records of the company. Such payments may also violate the wire fraud, mail fraud, money laundering, or other U.S. statutes.

The U.S. response to the Working Group's Study Group on Small Facilitation Payments Survey Question #2 on Treatment of Small Facilitation Payments by Members of May 4, 2009 is attached at Appendix H for reference. The United States has reviewed its policies and approaches on facilitation payments and has determined to maintain its exception for such payments, which, as noted above, are generally small payments for nondiscretionary, routine governmental actions.

The U.S. Government believes that the facilitating payments exception is a transparent and effective way to address such payments. Companies take a risk by making such payments, as they are illegal in the country where paid, and given the broad definition of "obtain or retain business" under the FCPA, only small categories of payments will fall outside its purview. Such companies could consider using the Department of Justice's Foreign Corrupt Practices Act Opinion Procedure for particular questions as to whether certain payments would fall within the exception.

3.7 Have your law enforcement authorities investigated and/or prosecuted credible factual allegations of bribing a foreign public official where the foreign public official solicited the bribe?

In many cases, as described in Appendix C, the foreign public official solicited the bribe. However, it is often difficult to determine whether the bribe was solicited or not. Whether the bribe was solicited or voluntarily offered, has no bearing on the legality of the conduct, and thus the U.S. is not obligated to determine who first proposed the illegal transaction.

3.8 Please provide information on measures taken by your authorities to ensure that:

(a) Investigations and prosecutions of the bribery of foreign public officials are not influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved, in compliance with Article 5 of the Convention;

(b) Credible factual allegations of bribery of foreign public officials are seriously investigated and assessed by the competent authorities; and

(c) Adequate resources have been provided to law enforcement authorities to permit effective investigation and prosecution of bribery of foreign public officials.

As described in the U.S. response in Phase 2, the Attorney General of the United States is appointed by the President and confirmed by the Senate, and cannot hold elected office while Attorney General. He can only be removed from office by the President or through the impeachment process. The Department of Justice is independent and no other agency has the right or authority to question the Department's decision to bring a prosecution. Although the Department is answerable to the President as part of the Executive Branch, any attempt by members of the Administration to interfere with prosecutorial discretion would be resisted by the Department and viewed unfavorably by Congress, the courts, and the public. Both Congress and the courts have the ability to appoint a special prosecutor to investigate a matter should they feel the Executive Branch is unable to do so free from improper influence.

The determination of whether to commence, decline, or otherwise resolve an FCPA matter is governed by the Principles of Federal Prosecution, attached at Appendix F. Those principles do not allow for termination of a prosecution for any of the reasons prohibited by Article 5. No criminal prosecution under the FCPA has ever been terminated for reasons other than those enumerated in the Principles.

The Securities and Exchange Commission is likewise an independent law enforcement agency. It consists of five presidentially-appointed Commissioners, with staggered five-year

terms. One of the Commissioners is designated by the President as Chairman of the Commission — the agency's chief executive. By law, no more than three of the Commissioners may belong to the same political party, ensuring non-partisanship.

The United States believes it has the most robust, independent foreign bribery enforcement regime in the world. As discussed in 2.1 above, resources dedicated to the investigation and prosecution of violations of the FCPA have increased dramatically in the United States since the Phase 2 review.

IV. Responsibility of Legal Persons

4.1 Can you provide examples, since Phase 2, of the application of the law ascribing the responsibility of legal persons (including State-owned or State-controlled enterprises) for the bribery of a foreign public official?

(a) If not, please refer if possible to cases since Phase 2 involving bribery of domestic officials or other similar offences (e.g. fraud, money laundering, or an offense(s) against anti-monopoly or anti-cartel laws).

(b) Please provide, if available, detailed information on the types of entities that have been prosecuted and how the standard of liability (e.g. vicarious liability, or liability triggered by acts of high-level managerial authority) has been applied.

(c) Where a case has been brought against a natural person employed by or acting on behalf of a legal person, please explain whether an investigation or prosecution has also been initiated against the legal person. If not, please explain the reasons for this.

(d) Please explain how jurisdiction has been established (or not) over legal entities operating abroad, including foreign subsidiaries of national companies or legal entities which are registered or operate in more than one jurisdiction.

Numerous examples of prosecutions of legal persons are attached at Appendix C. The vast majority of FCPA prosecutions, both criminal and civil, include prosecution of legal persons. In those few cases where individuals are prosecuted but the legal person on behalf of which they acted was not, it is generally because the legal person has ceased to exist as a going concern (see, for example, Cases 8, 31, and 49).

Prior to 1998, foreign companies, with the exception of those who qualified as "issuers," and most foreign nationals were not covered by the FCPA. The 1998 amendments expanded the FCPA to assert territorial jurisdiction over foreign companies and nationals. A foreign company is now subject to the FCPA if it takes any act in furtherance of the corrupt payment while within the territory of the United States. *See* 15 U.S.C. § 78dd-3(a) There is, however, no requirement that such act make use of the U.S. mails or other means or instrumentalities of interstate commerce. *See* 15 U.S.C. § 78dd-3(a), (f)(1). Although this section has not yet been interpreted by any court, the Department interprets it as conferring jurisdiction whenever a foreign company or national causes an act to be done within the territory of the United States by any person acting as that company's or national's agent. U.S. Dept. Justice, *Criminal Resource Manual* § 1018.

Moreover, foreign non-issuer companies, for example, may be held liable under 18 U.S.C. § 371 for conspiring to violate the FCPA through a domestic concern's violations of the prohibitions on corruption payments under Section 78dd-2.[17] Indeed, if a foreign non-issuer

[17] To establish a conspiracy under Section 371, the government must prove an agreement among two or more persons to pursue an unlawful objective; the defendant's knowledge of the unlawful objective and his voluntary agreement to join the conspiracy; and an over act in furtherance of the objective of the conspiracy. *United States v. Freeman*, 434 F.3d 369, 376 (5th Cir. 2005). The general rule in conspiracy cases is that there is U.S. jurisdiction over the conspiracy and all of the conspirators so long as at least one conspirator commits an overt act within the United States. *United States v. MacAllister*, 160 F.3d 1304, 1307 (11th Cir. 1998), *cert. denied*, 528 U.S. 853 (1999); *United States v. Winter*, 509 F.2d 975, 982 (5th Cir.), *cert. denied*, 423 U.S. 825 (1975).

company is charged with conspiring with a domestic concern, for example, to violate the FCPA, that company could likewise be held liable for the domestic concern's violations of Section 78dd-2 under *Pinkerton v. United States*, 328 U.S. 640, 647-648 (1946), which holds that a conspirator can be found guilty of a substantive offense committed by a co-conspirator in furtherance of the conspiracy when the co-conspirator's acts are reasonably foreseeable.[18] Similarly, a non-issuer foreign company may be prosecuted for aiding and abetting a domestic concern's violation of the FCPA.[19]

[18] *See United States v. Jimenez*, 509 F.3d 682, 692 n.9 (5th Cir. 2007), *cert. denied*, ___ U.S. ___, 128 S. Ct. 2924 (2008); *United States v. Mata*, 491 F.3d 237, 242 n.l (5th Cir. 2007), *cert. denied*, ___ U.S. ___, 128 S. Ct. 1219 (2008).

[19] 18 U.S.C. § 2(a). Since its enactment in 1909, the aiding-and-abetting statute has applied to the entire criminal code except where Congress carves out an exception for a particular offense. *United States v. Pino-Perez*, 870 F.2d 1230, 1233 (7th Cir. 1989) (en banc), *cert. denied*, 493 U.S. 901 (1989); *United States v. Angwin*, 271 F.3d 786, 802 (9th Cir. 2001), *cert. denied*, 535U.S. 966 (2002).

V. Sanctions

5.1 Please describe the nature (type and level) of all criminal, administrative, and civil sanctions that have been applied in practice to natural and legal persons for the foreign bribery offense since Phase 2. The summary should include, if possible, information on:

(a) 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).

(b) The application of a procedure for plea-bargaining, or other procedure such as deferred prosecution, if your country provides such a procedure. If information is available, please compare the sanctions imposed as a result of these two procedures with those obtained otherwise.

For sanctions imposed on natural persons, please see Charts 3 and 4 in Appendix B and Appendix C. For sanctions imposed on natural persons, please see Chart 5 in Appendix B and Appendix C.

Maximum penalties for violations of the FCPA are set out in 15 U.S.C. §§ 78dd-2(g), 78dd-3(e), and 78ff, and provide as follows:

> **(a) Willful violations; false and misleading statements**
> Any person who willfully violates any provision of this chapter (other than section 78dd-1 of this title), or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this chapter, or any person who willfully and knowingly makes, or causes to be made, any statement in any application, report, or document required to be filed under this chapter or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 78*o* of this title, or by any self-regulatory organization in connection with an application for membership or participation therein or to become associated with a member thereof, which statement was false or misleading with respect to any material fact, shall upon conviction be fined not more than $5,000,000, or imprisoned not more than 20 years, or both, except that when such person is a person other than a natural person, a fine not exceeding $25,000,000 may be imposed; but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation.
>
> **(b) Failure to file information, documents, or reports**
> Any issuer which fails to file information, documents, or reports required to be filed under subsection (d) of section 78*o* of this title or any rule or regulation thereunder shall forfeit to the United States the sum of $100 for each and every day such failure to file shall continue. Such forfeiture, which shall be in lieu of any criminal penalty for such failure to file which might be deemed to arise under

subsection (a) of this section, shall be payable into the Treasury of the United States and shall be recoverable in a civil suit in the name of the United States.

(c) Violations by issuers, officers, directors, stockholders, employees, or agents of issuers[20]

(1) (A) Any issuer that violates subsection (a) or (g) of section 30A of this title [15 U.S.C. § 78dd-1] shall be fined not more than $2,000,000.
(B) Any issuer that violates subsection (a) or (g) of section 30A of this title [15 U.S.C. § 78dd-1] shall be subject to a civil penalty of not more than $10,000 imposed in an action brought by the Commission.

(2) (A) Any officer, director, employee, or agent of an issuer, or stockholder acting on behalf of such issuer, who willfully violates subsection (a) or (g) of section 30A of this title [15 U.S.C. § 78dd-1] shall be fined not more than $100,000, or imprisoned not more than 5 years, or both.
(B) Any officer, director, employee, or agent of an issuer, or stockholder acting on behalf of such issuer, who violates subsection (a) or (g) of section 30A of this title [15 U.S.C. § 78dd-1] shall be subject to a civil penalty of not more than $10,000 imposed in an action brought by the Commission.

(3) Whenever a fine is imposed under paragraph (2) upon any officer, director, employee, agent, or stockholder of an issuer, such fine may not be paid, directly or indirectly, by such issuer.

In practice, criminal penalties are determined by the U.S. Sentencing Guidelines,[21] excerpts of which are attached at Appendix G. The substantive bribery offense is assessed under U.S.S.G. § 2C1.1; books and records offenses are assessed under U.S.S.G. § 2B1.1. Those assessments are then modified by factors particular to natural persons under U.S.S.G. Chapters 3 and 4 to determine the length of any prison term and the appropriate amount of the fine, as described in Chapter 5; and factors particular to legal persons under U.S.S.G. Chapter 8, including cooperation, to determine a corporate fine. Fines are determined in accordance with the U.S. Sentencing Guidelines whether the resolution is a guilty plea, a deferred prosecution agreement (DPA), or non-prosecution agreement (NPA), although fines pursuant to DPAs and NPAs can be reduced below the bottom of the guidelines range to reflect voluntary reporting, extensive internal investigation, cooperation, remediation, and similar mitigating factors.

On April 7, 2010, the U.S. Sentencing Commission voted to promulgate amendments to Chapter 8, regarding sentencing of legal persons. In particular, the proposed amendments add new guidance describing the reasonable steps a legal person should take to respond appropriately after criminal conduct is detected, including remedying the harm caused to victims and payment

[20] These are the same penalties that apply to substantive violations of the FCPA by domestic concerns and others pursuant to 15 U.S.C. §§ 78dd-2 and 78dd-3. *See* 15 U.S.C. §§ 78dd-2(g) and 78dd-3(e).

[21] During the Phase 2 Review, the sentencing ranges identified in the U.S.S.G. were mandatory, and a District Court judge had limited discretion over the sentence to be imposed on a defendant. Based on a 2005 decision by the U.S. Supreme Court, *United States v. Booker*, 543 U.S. 220 (2005), the sentencing ranges identified in the U.S.S.G. are now advisory, and thus a District Court judge now has significant discretion over the sentence to be imposed on natural and legal persons.

of restitution.[22] The proposed amendment also alters the guidelines to encourage organizations to adopt structures under which individuals with responsibility for compliance and ethics programs have direct reporting obligations to the governing authority of the organization by providing for a reduction in the fine imposed where such structures exist. Provided Congress does not object to the amendments, they will enter into force on November 1, 2010.

The SEC can seek civil monetary penalties and the return of illegal profits (called disgorgement). The SEC considers several factors when it determines the appropriateness of assessing civil penalties. These factors include, among others, the presence or absence of a direct benefit; the need to deter the offense; the level of intent; the presence or lack of remedial steps; and the extent of cooperation with law enforcement.

Plea bargaining, including the availability of alternatives such as DPAs or NPAs are governed by the Principles of Federal Prosecution, U.S. Attorneys' Manual, Chapter 9-27.000 (natural persons) and the Principles of Federal Prosecution of Business Organizations, U.S. Attorney's Manual, Chapter 9-28.000 (legal persons), attached at Appendix F. Principal factors include voluntary disclosure; cooperation with the investigation; collateral consequences to prosecution; adequacy of alternatives, such as civil penalties; and prosecution by another jurisdiction.

In August 2008, the Department of Justice issued new Principles of Federal Prosecution of Business Organizations to reflect policy changes regarding the waiver of the attorney-client privilege by legal persons. The new guidance prohibits giving an organization credit for cooperation based on waivers of the attorney-client privilege, in order to remove pressure from organizations to waive the privilege. With two exceptions, prosecutors are prohibited from requesting privileged materials.[23] Cooperation may be assessed only on the basis of whether the organization disclosed the *relevant facts* underlying the investigation, not whether it waived its rights. Organizations cannot be sanctioned more harshly for failure to waive the privilege under any circumstances.

Factors in civil prosecution include egregiousness of conduct, isolated or systemic nature of violations; widespread or systemic nature of conduct; degree of self-policing; remedial efforts; and the extent of cooperation with investigation. Additional factors include the degree of benefit to the company and the harm to others; the level of intent; the need for deterrence; and whether conduct was difficult to detect. New initiatives at SEC regarding cooperation are described in more detail in 2.1 above.

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[22] The payment of restitution by a legal person is also a consideration in applying the Principles of Federal Prosecution of Business Organizations. *See* U.S. Attorneys' Manual, Chapter 9-28.300(A)(6) and Chapter 9-28.900(A) and (B), attached at Appendix E.

[23] The two exceptions are: (1) where the organization or an individual has asserted a defense that he/she/it acted on the advice of counsel, negating criminal intent; and (2) where the attorney-client communications were in furtherance of the crime at issue or to otherwise perpetrate a fraud. Under long established case law, in both of these cases the prosecution may request a waiver of the attorney-client privilege if it can establish that either circumstance is likely to exist.

VI. Confiscation of the Bribe and the Proceeds of Bribery

6.1 Please describe, using the example of selected relevant cases, how confiscation of the bribe and proceeds of the offense has been exercised in relation to the foreign bribery offense. If confiscation is not available under your country's laws, please explain how monetary sanctions of a comparable effect have been applied.

(a) In particular, please indicate to what extent your authorities have been able to trace the assets generated by commission of the foreign bribery offense? Have authorities encountered difficulties in tracing the proceeds resulting from commission of the foreign bribery offense?

(b) Have your authorities experienced difficulties in quantifying the proceeds of bribery for the purpose of pre-trial seizure, or confiscation? If applicable, please describe the nature of such difficulties and what measures you have taken in attempting to overcome them, including practices that have worked particularly well.

(c) What is the policy and practice of your authorities concerning the recovery of the proceeds of bribery of foreign public officials? If your authorities have experienced difficulties in this respect, please describe the nature of such difficulties and what measures you have taken in attempting to overcome them, including practices that have worked particularly well.

The U.S. generally recovers benefits of bribery to the payor through either criminal forfeiture by the DOJ or civil disgorgement of profits to the SEC. In terms of tracing assets, the Department, for example, uses a variety of resources, including the use of agents and financial analysts from the FBI, agents from the Internal Revenue Service--Criminal Investigation, and agents from FinCEN. The SEC employs personnel with accounting and auditing backgrounds, among others. The SEC and the Department also trace assets by gathering evidence via subpoenas, such as bank records, international wire transfers, credit reports, brokerage accounts, loan records, and other financial information. In the context of companies that are cooperating with the Department and the SEC, in many instances the tracing and quantifying of the assets is done by the company itself. But tracing assets can be difficult and time consuming, even where the companies are cooperating, such as with BAE (Case 4 in Appendix C) and Siemens (Case 24 in Appendix C). In some cases, the benefits to the payor have been traced through bank records, books and records of the company, and the like. However, benefits to the payor have not been frozen or seized in advance of prosecution in an FCPA case to date.

Benefits of bribery to the payee – namely, the foreign official – are rarely located in the United States in FCPA cases, and therefore often cannot be recovered directly by U.S. authorities. In addition, foreign officials cannot be charged under the FCPA, making it more difficult to freeze, seize, and forfeit benefits in their possession, as they are not subject to criminal forfeiture. For those reasons, generally the U.S. has not sought recovery of bribes paid to foreign officials. Notable exceptions are the bribery involving Telecommunications D'Haiti, Case 5 in Appendix C, and the bribery of Thai tourism officials, Case 22 in Appendix C, where money was laundered through the United States. In both cases, the foreign officials participated in money laundering within the jurisdiction of the United States. They were indicted and criminal forfeiture was sought in the indictment in both cases. The U.S. anticipates that such

recovery efforts will continue in the future where foreign officials fall within the jurisdictional reach of U.S. money laundering statutes.

Since 2001, wholly foreign corruption, including bribery, has been a predicate to the money laundering offense under 18 U.S.C. § 1956(c)(7)(B)(iv). Moreover, the United States can and does assist foreign governments in recovering the proceeds of corruption regardless of whether the corruption in question falls within the jurisdiction of the FCPA. First, the U.S. can provide formal and informal assistance in tracing assets and obtaining evidence in support of a foreign confiscation. Second, the U.S. can open its own investigation and seek confiscation of assets based upon foreign or transnational corruption. On several occasions, the United States has instituted forfeiture actions to recover the proceeds of corruption. In 2004 the United States returned approximately $2.8 million to Nicaragua, which had been misappropriated by a Nicaraguan official that had been forfeited to the United States. Also in 2004, the United States returned over $20 million in corruption proceeds to Peru that had been forfeited to the United States. Another $755,000 was returned to Peru in 2009. The United States is in the process of returning $84 million in corruption proceeds, plus interest, to benefit the citizens of Kazakhstan (see Case 71C in Appendix C).

In 2008, the United States forfeited and returned nearly $120 million in corruption proceeds to victims in Italy. From 2007 through 2009, AFMLS restrained, civilly forfeited, and returned to the victim (an Italian bank) about $116 million in laundered bribery proceeds that were held in U.S. brokerage accounts. The case arose out of the bribery of Italian judges by one party to an Italian civil suit, which resulted in a tainted civil judgment of about $390 million in favor of the party giving the bribes.

In addition to the aforementioned cases, the United States is actively investigating or litigating multiple cases seeking the recovery of proceeds of corruption. Through the Kleptocracy Working Group, described in 2.3 above, the FCPA Unit, AFMLS, FinCEN, and other relevant agencies share information to ensure that any proceeds of bribery located in the United States are recovered.

VII. Money Laundering

7.1 Please provide the most recent report of the Financial Action Task Force, or regional equivalent, on the operation of your anti-money laundering mechanisms. If applicable, please also explain any steps taken, since the adoption of the latter report, to change your anti-money laundering mechanisms.

The United States was last evaluated by the Financial Action Task Force on June 23, 2006. The report is attached at Appendix I. While there have been minor changes to the U.S. anti-money laundering regime since the evaluation, none would impact the use of money laundering statutes in foreign bribery cases.

7.2 Please explain how your money laundering legislation has been applied since Phase 2 where the predicate offense was the foreign bribery offense. Please include, if available:

(a) Information on whether cases of bribing foreign public officials have been detected by your money laundering authorities, or by foreign money laundering authorities where information was shared with your authorities. Please also explain whether this was done by identifying the laundering of the proceeds of bribing a foreign public official and/or the bribe payment and/or a connected offense.

(b) Information concerning the capacity to detect bribe payments through money laundering transactions involving politically exposed persons (PEPs) who are foreign public officials.

(c) Any available information on how your authorities have quantified the proceeds of bribery in money laundering cases concerning the bribery of foreign public officials as a predicate offense, and whether your authorities has encountered difficulties in this respect.

Please see Chart 1 attached at Appendix B for FCPA cases involving money laundering charges. Potential violations of the FCPA have been identified through the use of suspicious activity reports, as well as reports of potential money laundering to U.S. authorities by foreign authorities.

The United States has a well-developed system of laws and regulations designed to prevent and detect the transfer of proceeds of crime, including the proceeds of corruption in the hands of politically exposed persons (PEPs). These laws are codified at 31 U.S.C. § 5318(i)(3), which contains requirements for the identification of the beneficial owner of funds deposited into private banking accounts and for conducting enhanced scrutiny of such accounts of "senior foreign political figures" (the term used for PEPs in U.S. law).[24] In particular, the United States Department of the Treasury, the principal regulatory body within the United States with responsibility for implementing preventative anti-money laundering laws, through its bureau, the Financial Crimes Enforcement Network (FinCEN), has promulgated numerous rules and

[24] An overview of the anti-money laundering strategy of the United States, including the various programs, agencies and authorities that the United States brings to bear to combat money laundering, is available in the self assessment report at http://www.ustreas.gov/press/releases/docs/nmls.pdf.

regulations, pursuant to United States federal laws, setting forth substantial anti-money laundering, due diligence, and record-keeping procedures applicable to a wide range of United States financial institutions. Those regulations can be found at Title 31, Part 103, of the United States Code of Federal Regulations (CFR). In particular, 31 CFR 103.178 requires determination of beneficial owners of private banking (i.e., "high value") accounts and enhanced scrutiny of such accounts maintained for current or former senior foreign political figures, their family members and associates, and monitoring the accounts in order to detect suspicious transactions.

Beyond this regulatory regime, section 326 of the USA PATRIOT Act imposes statutory customer verification requirements on financial institutions. Sections 311 and 312 of the Act further impose beneficial owner verification requirements, especially for residents of countries "of concern," as designated by the U.S. Treasury Department, due to recognized money-laundering issues. The 4 January 2006 "Final Rule" regulating these provisions of law also requires banks to determine whether foreign accounts have a "senior political figure" as the beneficial owner. In addition, in 2001, the Federal Banking Agencies and the State Department issued "Guidance on Enhanced Security for Transactions that May Involve the Proceeds of Foreign Corruption," with detailed advisories on general procedures for tracking the accounts of "senior foreign political figures" (i.e., PEPs), as well as their families and business interests. In 2004 and 2005, Riggs Bank was prosecuted and fined more than $40 million for failing to implement PEP regimes in connection with accounts of foreign officials in Equatorial Guinea and Chile, *U.S. v. Riggs Bank*., CR 05-35 (RMU), 2005; *In Re Riggs Bank*, Case 2005-1, May 13, 2004. Riggs Bank ceased to exist, in part as a result of this prosecution.

Bribes are generally quantified in the same manner as any other financial crime; through wire transfer and other bank records, correspondence, the books and records of the payor, testimony of witnesses, and the like. There are times when quantification of the bribes is difficult due to unavailability of bank records, poor bookkeeping, or deliberate concealment, or, as was the case in Siemens (Case 24 in Appendix C), the sheer volume of the bribes.

VIII. Accounting Requirements, External Audit, and Internal Controls and Ethics Compliance

8.1 Has your country been successful since Phase 2 in detecting foreign bribery through the enforcement of books and records requirements, accounting standards, auditing standards, and financial statement disclosure requirements? If so, please explain how these requirements are enforced, and provide a summary of selected relevant cases. Please also indicate whether the investigation of foreign bribery has led to the detection and investigation of fraudulent accounting.

Summaries of cases involving enforcement of books and records and internal controls requirements are in Appendix C. As noted above, in all foreign bribery-related cases brought by the SEC, the SEC has charged violations of accounting and internal controls provisions. In addition, the SEC has filed several bribery-related cases in which the SEC charged stand-alone books and records and internal controls cases with no formal bribery charge. In those cases, the SEC sought civil penalties and disgorgement of profits. Recent examples include the *Oil for Food* cases and *SEC v. ITT Corporation* (Case 21 in Appendix C). In all instances, the SEC files its cases in civil court and must show, with a preponderance of the evidence, that the defendant more likely than not engaged in the alleged misconduct. If the matter is settled, the defendant neither admits nor denies in civil court the misconduct.

Like the SEC, the Department generally includes books and records violations when it charges substantive FCPA violations, and may also charge books and records violations where there is no jurisdiction over the substantive foreign bribery misconduct. Criminal internal controls charges are less common (see, for example, the Siemens case, Case 24 in Appendix C).

8.2 What are the measures in place in your country concerning guidance for external auditors who discover indications of a suspected act of bribery to report such matters (i) within the audited company; and (ii) to authorities outside the company (e.g. law enforcement and regulatory authorities)? Please specify in particular:

- ***(a) Whether these measures are included in law or in other regulatory texts, including professional regulations;***
- ***(b) Whether these measures include an authorization or an obligation to report;***
- ***(c) Whether the external auditor, in the case of insufficient management action upon receipt by management of such a report, is under obligation (by law, professional regulations, or otherwise) to elevate such reporting to a company monitoring body, independent of management, such as audit committees or boards of directors or of supervisory boards;***
- ***(d) Whether there are specific criteria allowing or requiring such reporting by external auditors (e.g. materiality, the suspicion of an offense, etc.);***
- ***(e) Whether your national legislation provides for protection from legal action for external auditors reporting to authorities outside the company; and***
- ***(f) Whether the audited company's management, if it receives such a report, is under obligation (by law, professional regulations, or otherwise) to act on such information and, where applicable, please describe such measures. If such an obligation does not exist in your country, please describe any steps taken by***

your authorities to encourage audited companies to act on information received.

Section 10A of the Securities Exchange Act of 1934 ("Section 10A") requires audits of issuers[25] to include procedures designed to provide reasonable assurance of detecting illegal acts, including acts of bribery that meet the definition of an illegal act in Section 10A, that would have a direct and material effect on the financial statements of the company.[26] U.S. auditing standards, both those prescribed by the Public Company Accounting Oversight Board (PCAOB) for audits of issuers and those prescribed by the American Institute of Certified Public Accountants' Auditing Standards Board for audits of non-issuers, establish requirements and responsibilities for auditors regarding illegal acts, including acts of bribery, in AU section 317, *Illegal Acts by Clients* ("AU section 317").[27] These standards establish requirements for auditors that are consistent with the requirements in Section 10A. In addition, AU section 316, *Consideration of Fraud in a Financial Statement Audit*, of U.S. auditing standards for audits of both issuers and non-issuers establish requirements for auditors to detect fraud, including acts of bribery, which would result in a material misstatement of the financial statements.

Section 10A requires that if, during the course of conducting an audit, a registered public accounting firm detects or otherwise becomes aware of information indicating that an illegal act has or may have occurred (whether or not perceived to have a material effect on the financial statements of the issuer), the accounting firm shall first determine whether it is likely that an illegal act has occurred and, if so, determine and consider the possible effect of the illegal act on the financial statements of the issuer. The firm must also, as soon as practicable, inform the appropriate level of the management of the issuer and assure that the audit committee of the issuer, or the board of directors of the issuer in the absence of such a committee, is adequately informed unless the illegal act is clearly inconsequential.

Section 10A further requires that if, after determining that the audit committee of the board of directors of the issuer, or the board of directors of the issuer in the absence of an audit committee, is adequately informed, the firm concludes that (1) the illegal act has a material effect on the financial statements of the issuer; (2) the senior management has not taken, and the board of directors has not caused senior management to take, timely and appropriate remedial actions; and (3) the failure to take remedial action is reasonably expected to warrant departure from a standard report of the auditor or warrant resignation from the audit engagement, then the firm shall, as soon as practicable, directly report its conclusions to the board of directors.

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[25] Section 2(a)(7) of the Sarbanes-Oxley Act of 2002 defines the term "issuer" as an issuer (as defined in section 3 of the Securities Exchange Act of 1934 (15 U.S.C. § 78c)), the securities of which are registered under section 12 of that Act (15 U.S.C. § 781), or that is required to file reports under section 15(d) (15 U.S.C. § 78o(d)), or that files or has filed a registration statement that has not yet become effective under the Securities Act of 1933 (15 U.S.C. § 77a et seq.), and that it has not withdrawn.

[26] 15 U.S.C. § 78j-1.

[27] PCAOB standards are available at http://pcaobus.org/Standards/Auditing/Pages/default.aspx and AICPA standards are available at http://www.aicpa.org/Professional+Resources/Accounting+and+Auditing/Audit+and+Attest+Standards/Authoritative+Standards+and+Related+Guidance+for+Non-Issuers/auditing_standards.htm.

If a board of directors receives a report of such conclusions, then the issuer shall inform the Commission by notice not later than one business day after the receipt of such report and shall furnish the firm making such report with a copy of the notice furnished to the Commission. If the firm fails to receive a copy of the notice before the expiration of the required one-business-day period, the firm shall either resign from the engagement or furnish to the Commission a copy of its report (or the documentation of any oral report given) not later than one business day following such failure to receive notice.

If a firm resigns from an engagement due to failure to receive a copy of the notice required to be furnished to the Commission, the firm shall, not later than one business day following the failure by the issuer to notify the Commission, furnish to the Commission a copy of its report (or the documentation of any oral report given).

Section 10A provides that no firm shall be liable in a private action for any finding, conclusion, or statement expressed in a report described above. However, if a firm does not receive a copy of the notice required to be furnished to the Commission by the issuer and does not either resign from the engagement and furnish to the Commission a copy of the report or furnish a copy of the report to the Commission while remaining on the engagement, the Commission may impose a civil penalty against the firm and any other person that the Commission finds was a cause of such violation.

AU Section 317 of U.S. auditing standards applicable to audits of both issuers and non-issuers provides direction beyond the requirements in Section 10A with respect to the obligation of auditors to determine the effect an illegal act may have on the auditor's report. Depending upon the circumstances encountered and the effect of the illegal act on the financial statements and the auditor's ability to obtain sufficient evidential matter, this guidance directs the auditor to express a qualified or an adverse opinion and even to disclaim an opinion or withdraw from the engagement.[28]

In addition to the various reporting responsibilities of companies and auditors, companies are required to maintain compliance with U.S. laws and regulations in the conduct of their affairs. Therefore, companies receiving information indicating an illegal act, including acts of bribery, may have occurred, whether received via communications from their auditor or otherwise, have a responsibility to investigate the matter and determine the appropriate actions necessary in the circumstances. The requirements for auditors to report to the Commission instances where management or the board of directors fails to take appropriate action provides a strong incentive for companies to act on information concerning illegal acts. Further, the Commission established in December 2009 five separate national specialized investigative groups dedicated to high-priority areas of enforcement, one of which is a group focused on cases related to violations of the FCPA, as discussed in 2.1 above.

[28] See paragraphs 18-21 of AU section 317.

8.3 Are there in your country any foreign bribery investigations that may have been triggered by reports from external auditors, either through the company itself, or directly to law enforcement or regulatory authorities?

A number of voluntary disclosures have been triggered by reports from external auditors, which lead to internal investigations. There have also been circumstances where external auditors reported potential FCPA violations that triggered internal investigations, but the company did not disclose those investigations or their results to law enforcement, and law enforcement later independently discovered the violations. We were not able to identify a circumstance where an external auditor reported directly to law enforcement.

8.4 Since Phase 2, what steps has your country taken to encourage companies to adopt and develop adequate internal controls, ethics and compliance programs or measures for the prevention and detection of bribery of foreign public officials? In particular, please describe:

(a) Steps taken to encourage companies to take into account elements identified in Annex 2 to the 2009 Recommendation on Further Combating Bribery;

(b) Steps taken to encourage companies to prohibit or discourage the use of small facilitation payments, and ensure that, where they are made, they are accurately accounted for in companies' books and financial records;

(c) Steps to encourage companies to publicly disclose (e.g. in annual reports, on their web sites, or otherwise) their internal controls, ethics and compliance programs or measures; and

(d) Specific action undertaken in coordination with business associations and/or professional organizations, in particular as concerns small and medium size enterprises exporting or investing abroad.

U.S. companies have been required to maintain accurate books and records and sufficient systems of internal accounting control since the passage of the FCPA in 1977, including properly recording facilitation payments.[29] Actions taken since Phase 2 encouraging companies to maintain adequate internal controls have focused on systems of internal control over financial reporting, which would include controls over acts of bribery that would result in a material[30] misstatement of the financial statements. As required by Section 404 of the Sarbanes-Oxley Act,[31] the Commission adopted rules in 2003 to require issuers and their independent auditors to report to the public on the effectiveness of the company's internal control over financial reporting.[32] Internal control over financial reporting includes controls related to illegal acts and fraud, including acts of bribery that result in a material misstatement of the financial statements. Issuers which did not meet the definition of a large accelerated filer or accelerated filer

[29] *See* 15 U.S.C. § 78m.

[30] Acts of foreign bribery are often considered qualitatively material, even where they are not quantitatively material, to a company's financial statements.

[31] 15 U.S.C. § 7201 *et seq*.

[32] Exchange Act Rules 13a-15 and 15d-15; Item 308 of Regulation S-K; and Item 15 of Form 20-F and General Instruction (B) to Form 40-F (for foreign private issuers).

(generally those with a public float below $75 million) were given additional time before they were required to evaluate the effectiveness of their internal control over financial reporting and before their auditors were required to attest to the effectiveness of those controls. However, beginning in 2007, all issuers were required to provide their assessment of the effectiveness of their internal control over financial reporting and beginning with the annual reports for fiscal years ending on or after June 15, 2010, all issuers, regardless of size, will be required to have their auditors attest to the effectiveness of those controls.

The Commission also issued interpretive guidance for management in 2007 regarding its evaluation and assessment of internal control over financial reporting. The guidance sets forth an approach by which management can conduct a top-down risk-based evaluation of internal controls. This guidance includes direction for management in identifying financial reporting risks and controls and evaluating evidence of the operating effectiveness of internal control over financial reporting. Further, the guidance contains information to assist management in developing disclosures about their internal control over financial reporting, including disclosures about material weaknesses that may be identified.

In 2005, the Committee of Sponsoring Organizations of the Treadway Commission ("COSO") issued *Guidance for Smaller Public Companies Reporting on Internal Control over Financial Reporting* to supplement COSO's *Internal Control - Integrated Framework*, originally published in 1992. The guidance focuses on the needs of smaller organizations in regard to compliance with Section 404 of the Sarbanes-Oxley Act, and outlines fundamental principles associated with the five key components of internal control: control environment; risk assessment; control activities; information and communication; and monitoring. Also, in 2009, COSO issued *Guidance on Monitoring Internal Control Systems* to help companies better monitor the effectiveness of their internal control systems and to take timely corrective actions if needed.

In 2007, the PCAOB issued Auditing Standard No. 5, *An Audit of Internal Control Over Financial Reporting That Is Integrated With An Audit of Financial Statements* ("AS 5"), to provide guidance for auditors in performing an integrated audit of internal control over financial reporting.[33] For audits of smaller and less complex companies, AS 5 includes specific guidance on assessment of control risk, achievement of control objectives, testing on the effectiveness of a control and identification of controls over management override.

Additionally, the Commission adopted rules required by Section 406 of the Sarbanes-Oxley Act to require each issuer, together with periodic reports required pursuant to section 13(a) or 15(d) of the Securities Exchange Act of 1934, to disclose whether such issuer has adopted a code of ethics for senior financial officers and if not, the reasons why it has not done so.[34] "Code of ethics" includes such standards as are reasonably necessary to promote compliance with applicable governmental rules and regulations, and the prompt internal

[33] Auditing Standard No. 5 is available at pcaobus.org/Standards/Auditing/Pages/Auditing_Standard_5.aspx.

[34] Item 406(c)(2) and Item 601(b)(14) of Regulation S-K.

reporting of violations of the code.[35] Issuers are also required to immediately disclose any change in or waiver of the code of ethics.[36] Each company listed on the New York Stock Exchange (NYSE) must make its code of business conduct and ethics available on or through its website.[37]

Each company listed on the NYSE must also comply with other corporate governance standards, including maintaining an internal audit function.[38] The purpose of the internal audit function is to provide management and the audit committee with assessments of the company's risk management processes and system of internal control.

The Commission's Division of Enforcement has been instrumental in encouraging companies to prohibit or discourage the use of small facilitations payments, and ensure that, where they are made, they are accurately accounted for in companies' books and financial records by instituting actions against public companies that fail in this regard. For example, in the Siemens matter (Case 24E in Appendix C) the Commission filed a settled enforcement action charging Siemens Aktiengesellschaft ("Siemens"), a Munich, Germany-based manufacturer of industrial and consumer products, with violations of the anti-bribery, books and records, and internal controls provisions of the FCPA. As part of the settlement, Siemens paid a total of $1.6 billion in disgorgement and fines, including $350 million in disgorgement to the Commission, which is the largest amount a company has ever paid to resolve corruption-related charges.[39] Moreover, as part of a reorganization of the entire Division, the Division of Enforcement has created a specialized unit dedicated exclusively to investigating potential violations of the FCPA, as discussed in 2.1 above.[40] The specialized unit intends to devise ways to be more proactive in the Commission's enforcement of the FCPA including the use of more targeted sweeps and sector-wide investigations, alone and with other regulatory counterparts both in the U.S. and abroad.

The Department of Commerce (DOC) promptly placed the new Recommendation and Annex on its anticorruption websites (www.ogc.doc.gov/trans_anti_bribery.html; www.tcc.export.gov/bribery/index.asp). Commerce's Trade Compliance Center has included on its website an Exporters' Guide to help businesses understand key provisions of the OECD Anti-Bribery Convention, and this publication has also been updated to highlight the new Recommendation and Good Guidance Annex. DOC also highlights the new Recommendation and Annex in its training of U.S. and Foreign Commercial Service Officers and Foreign Service Officers.

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[35] Item 406(b) of Regulation S-K.

[36] Item 406(d) of Regulation S-K.

[37] Section 303A.10 of the NYSE Listed Company Manual.

[38] Section 303A.07(c) of the NYSE Listed Company Manual.

[39] Litigation Release No. 20829 (December 15, 2008).

[40] *See SEC Names New Specialized Unit Chiefs and Head of New Office of Market Intelligence*, Release No. 2010-5 (January 13, 2010).

In addition, DOC, DOJ, and SEC officials have also spoken at numerous domestic and international anti-corruption conferences and highlighted the existence of the new instrument and guidance. At these conferences, the aforementioned officials have provided guidance on enhanced compliance programs contained in the guidance, specifically encouraged companies to prohibit or discourage the use of small facilitation payments, described recent enforcement trends, underscored high-risk industries, countries, and practices, and identified enforcement priorities. Attendees at these conferences have included members of law enforcement, in-house counsel, corporate compliance officers, and attorneys focused on FCPA enforcement and transnational business. Besides these conferences, DOC's Commercial Service has on its own conferences and in partnership with the private sector puts on webinars and conferences targeted at SMEs, specifically on foreign bribery, which webinars and conferences have recently highlighted the new instrument and guidance.

In addition to active participation in conferences regarding corporate compliance, the Department of Justice issued Opinion 08-02, regarding due diligence in mergers and acquisitions, discussed in more detail in 2.1(b)(i) above. The Department is also working with several industry-wide organizations, particularly life sciences companies and international adoption agencies, to help develop best practices in corporate compliance in those industries. Moreover, in all corporate settlements, the Department has for many years required companies to commit to the implementation of enhanced compliance programs containing particular elements. In April 2010, the Department revised the required elements of the corporate compliance programs to incorporate the elements identified in Annex 2 to the 2009 Recommendation on Further Combating Bribery, as well as the new amendments to the U.S. Sentencing Guidelines. A model version of the new corporate compliance program requirements are attached at Appendix F.

8.5 Please indicate what steps have been taken to encourage companies to provide mechanisms for communication by and protection of persons not willing to violate professional standards or ethics, as well as for persons willing to report in good faith and on reasonable grounds suspected breaches of the law or professional standards or ethics. Please also indicate what steps have been taken to encourage companies to take appropriate action based on such reporting.

Certain provisions of U.S. Federal laws protect persons willing to report suspected breaches of the law or professional standards. Two examples are the "whistleblower protections" provided by the Sarbanes-Oxley Act of 2002 (the Act)[41] and the reporting responsibilities and protections for auditors in Section 10A.[42]

The Act contained various provisions to protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to U.S. securities laws and also included specific provisions related to corporate and criminal fraud accountability. Specifically, Section 806 of the Act prohibits public companies or their officers, employees, contractors,

[41] 15 U.S.C. § 7201 *et seq*.

[42] 15 U.S.C. § 78j-1.

subcontractors, or agents from discharging, demoting, suspending, threatening, harassing, or otherwise discriminating against an employee because of any lawful act done by the employee to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee believes constitutes a violation of any rule or regulation of the Commission or any provision of U.S. Federal law relating to fraud against shareholders. Moreover, Section 301 of the Act amended Section 10A to require the audit committee of any listed issuer to be independent, and it must establish procedures for the receipt, retention and treatment of complaints received by the company regarding accounting, internal accounting controls, or auditing matters and must also establish procedures for the confidential, anonymous submission by employees of the company of concerns regarding questionable accounting or auditing matters.

Under Section 302 of the Act, an issuer's principal executive officer and principal financial officer is each required to certify, among other things, that he or she has disclosed to the issuer's auditors and audit committee any fraud, whether or not material, involving employees of the issuer who have a significant role in the issuer's internal controls. The Commission adopted rules requiring that the certifications be included in the issuer's periodic reports filed with the Commission.[43]

The PCAOB recently published for public comment a proposed auditing standard on communications with audit committees, to establish requirements for the auditor regarding certain matters related to the conduct of an audit that are communicated to a company's audit committee in connection with an audit.[44] The proposed standard specifies that the auditor is to communicate to the audit committee matters arising from the audit that are significant to the oversight of the financial reporting process, including when the auditor is aware of complaints or concerns regarding accounting or auditing matters.

In addition, as described in the response to Question 8.2, Section 10A requires issuers to report to the Commission if its auditor provides the board of directors with a report that the company failed to take remedial action with respect to an illegal act having a material effect on the financial statements from warranting a departure from the standard report of the auditor. In these circumstances, Section 10A requires auditors to report directly to the Commission if the issuer fails to provide the report or if the auditor resigns from the engagement and provides that no audit firm shall be liable in a private action for any finding, conclusion, or statement expressed in its report to the Commission.

[43] *See* Release No. 33-8124 (August 28, 2002) [67 FR 57276].

[44] *See* PCAOB Release No. 2010-001, *Proposed Auditing Standard on Communications with Audit Committees*, available at http://pcaobus.org/Rules/Rulemaking/Docket030/Release_No_2010-001.pdf.

8.6 Please indicate whether and in what circumstances your government agencies may consider the existence of internal controls, ethics, and compliances systems or measures in their decisions to grant public advantages (e.g. public subsidies, export credits, public licenses, public procurement and ODA-funded contracts, etc.).

To qualify for public advantages, companies must have appropriate internal controls to ensure compliance with federal law and regulation. As part of that process, federal agencies are required to audit applicants for such advantages, including their compliance programs. The Office of Management and Budget (OMB) has issued extensive guidance to federal agencies on how to conduct such audits, including OMB Circular A-133.

Federal Acquisition Circular Subpart 3.10, a part of the Federal Acquisition Regulations that govern all federal procurement activities, prescribes policies and procedures for the establishment of contractor codes of business ethics and conduct. The establishment of such a code is always recommended, but for many types of contracts it is required. A contractor may be suspended and/or debarred for knowing failure by a timely disclose to the government, in connection with the award, performance, or closeout of a Government contract performed by the contractor or a subcontract awarded thereunder, credible evidence of a violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations.

As described in more detail in 12.3 below, the U.S. export credit agency, the Export-Import Bank of the United States, considers internal controls and ethics and compliance in its assessments and has promulgated guidelines for effective due diligence and compliance programs.

IX. Tax Measures for Further Combating Bribery

9.1 Does your country explicitly disallow the tax deductibility of bribes to foreign public officials, for all tax purposes? Are there any specific conditions under which tax authorities accept or deny the deductibility of bribes to foreign public officials?

> U.S. law explicitly disallows tax deductibility of bribes for all tax purposes:
>
> 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.

26 U.S.C. § 162(c). This is a general prohibition; there are no specific conditions under which tax authorities would review such deductibility and accept or deny it.

9.2 Has your country taken steps to review, on an ongoing basis, the effectiveness of your legal, administrative and policy frameworks as well as practices for disallowing tax deductibility of bribes to foreign public officials? Is guidance provided to taxpayers and tax authorities as to the types of expenses that are deemed to constitute bribes to foreign public officials? Please include information on whether such bribes are effectively detected by tax authorities.

Both domestic and international tax examiners are trained to consider illegal payments in the course of an audit. For example, the Internal Revenue Manual alerts examiners as to how illegal payments are to be treated in terms of subpart F income.[45] In conducting a tax audit, in addition to deductions for operating expenses, examiners review 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.

[45] *See* IRM 4.61.7.5.2.

9.3 Please describe the circumstances in which your tax authorities can (or must) report suspicions of foreign bribery transactions to law enforcement authorities in your own country, and how tax information is shared with tax authorities and/or law enforcement authorities in another country, including whether:

(a) Such information must be requested or can be shared spontaneously; and

(b) The optional language of paragraph 12.3 of the Commentary to Article 26 of the OECD Model Tax Convention is included in your bilateral tax treaties.

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. Tax information may be disclosed under certain circumstances in connection with the administration of federal laws not relating to tax administration.[46] 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.[47] The *ex parte* court order may only be obtained upon application authorized by the Attorney General, Deputy Attorney General, Associate Attorney General, Assistant Attorney Generals, United States Attorney, any special prosecutor appointed under 28 U.S.C. § 593, or an attorney in charge of a criminal division organized crime strike force established pursuant to 28 U.S.C. § 510.

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 or the Inspector General thereof, or in the case of the Department of Justice, the Attorney General, Deputy Attorney General, Associate Attorney General, Assistant Attorney General, Director of the FBI, the Administrator of the Drug Enforcement Administration (DEA), United States Attorney, any special prosecutor appointed under 28 U.S.C. § 593, or any attorney in charge of a criminal division organized crime strike force established pursuant to 28 U.SC. § 510.

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 apprise the head of the federal agency charged with enforcing the laws to which the crime relates.[48] 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.[49] 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.[50] Finally, returns and return information may be

[46] 26 U.S.C. § 6103(i).

[47] 26 U.S.C. § 6103(i)(1)(A).

[48] 26 U.S.C. § 6103(i)(3)(A).

[49] 26 U.S.C. § 6103(i)(3)(B)(i).

[50] 26 U.S.C. § 6103(i)(3)(B)(ii).

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.[51]

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.[52]

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. Agents of the IRS often participate in investigations of foreign bribery in cooperation with DOJ and FBI, and may both refer such cases and receive referrals. Tax charges have been brought in conjunction with FCPA charges, such as in *United States v. Green* (Case 22B in Appendix C), and Titan (Case 60 in Appendix C).

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.[53] However, disclosure of tax returns and return 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 is typically pursuant to a specific request. Most tax treaties and other types of exchange of information agreements, however, also provide for sharing information spontaneously. 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 offenses relating to money laundering activities. 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 Internal Revenue Service Deputy Commissioner (International), Large and Mid-Size Business.

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

[51] 26 U.S.C. § 6103(i)(5).

[52] 26 U.S.C. § 6103(i)(6).

[53] 26 U.S.C. § 6103(k)(4).

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.

The United States has included the optional language of paragraph 12.3 of the Commentary to Article 26 of the OECD Model Tax Convention in some of its bilateral tax treaties and TIEAs.

X. International Cooperation

The Central Authority for the United States in criminal matters is the Office of International Affairs (OIA) in the Criminal Division. OIA maintains records of more than 65,000 matters – both extradition and MLA – most of which are completed and closed. Many codes in the system could encompass bribery of a foreign public official, and it is not clear from the database which cases specifically address those offenses covered under the OECD Anti-Bribery Convention. Under the narrowest crime definition, those cases actually coded under the FCPA, the United States opened and closed 96 outgoing and incoming FCPA matters between July 2002 and March 2010. The universe of foreign public official bribery cases is probably much broader than those listed under the FCPA, because incoming cases are not listed under that statute. Unfortunately, such cases are not easily identifiable.

The SEC obtains evidence and other information located outside the United States in FCPA investigations through various mechanisms, including pursuant to multilateral and bilateral agreements as well as on an ad hoc basis. Multilateral and bilateral information sharing arrangements operate on the basis of memoranda of understanding (MOU) between securities authorities. Such MOUs delineate the terms of information-sharing between and among MOU signatories and create a framework for regular and predictable cooperation in securities law enforcement. Multilateral and bilateral MOUs detail the scope and terms of information-sharing among securities regulators. Please see 2.1(b)(xii) above for a detailed description of the multilateral MMoU available to the SEC.

10.1 Please describe the requests for MLA received by your authorities from other Parties to the Convention regarding the bribery of a foreign public official since Phase 2. Please include answers to the following questions, if this information is available and capable of being shared:

- ***(a) How many requests of this kind have your authorities received each year from other Parties to the Convention? How many requests have been granted/rejected each year and on what grounds? What types of measures were requested (e.g. search and seizure of financial and company records, witness statements, court records, etc.)?***
- ***(b) On average, how long has it taken your country to reply to requests for MLA from other Parties concerning foreign bribery? If possible, please provide examples of the shortest and longest times it has taken your country to reply to such requests. Is the delay for answering similar to the delay for other offences? Are there time limits for responding to requests for the various forms of MLA? Was the range of legal assistance provided the same as that provided for other offences?***
- ***(c) How have any existing requirements (such as dual criminality or reciprocity) been applied?***
- ***(d) Have you granted or denied requests for MLA concerning a legal person and, if so, under what circumstances?***

(e) Have your authorities been able to grant MLA as promptly in cases where a request is for:

(i) Information from a financial institution (such as the customer's name or details about a customer's transaction); or

(ii) Information about a company (including the identity of the owner, proof of incorporation, legal form, address, the names of directors, etc.)?

(f) Have you consulted and otherwise co-operated with competent authorities in other countries on the identification, freezing, seizure, confiscation and recovery of the proceeds of bribery of foreign public officials?

(g) Have you consulted and otherwise co-operated as appropriate with international and regional law enforcement networks involving Parties and non-Parties, in investigations and other legal proceedings concerning specific cases of foreign bribery, through such means as the sharing of information spontaneously or upon request, provision of evidence, extradition, and the identification, freezing, seizure, confiscation and recovery of the proceeds of bribery of foreign public officials?

(h) Have reports of foreign bribery been referred to your authorities by international government organizations, such as the international and regional development banks? If so, have steps been taken by your authorities to investigate such matters?

(i) Have you considered ways for facilitating mutual legal assistance between Parties and with non-Parties in cases of foreign bribery, including regarding treaty requirements with evidentiary thresholds where applicable?

The United States has a robust MLA relationship with many countries in FCPA, foreign corrupt public official, bribery, and official corruption cases. With regard to incoming requests, since July 2002, the United States has received requests from 72 countries in bribery-related matters. More specifically, the United States has opened and closed 31 incoming requests coded as crimes under "FCPA" or "foreign corrupt public official;" 330 cases were opened and closed if the more expansive categories of "bribery" and "official corruption" are included. Of the 31 cases, 24 were granted and several were withdrawn. A typical request asked for banking, corporate or Internet-related records. Several incoming requests involved cases that the U.S. was already investigating, and bilateral cooperation was possible in many matters. For instance, in two examples listed below, the United States received several requests from the non-Party in the same matter and worked closely with the non-Party to determine what the U.S. was able to provide from its own investigative materials. In such cases, the United States may require defendants who enter into plea agreements to cooperate with foreign authorities, or may obtain permission from U.S. courts to share with foreign authorities information gathered by the grand jury. As a point of information, the United States does not need to receive requests under a treaty in order to execute them, and is able to execute letters rogatory and letters of request from Ministries of Justice as well. Several examples below illustrate the type of experiences OIA has had.

Example A: In July 2002, a then-non-Party sought bank records in connection with its investigation into violations of fraud, theft, forgery and its corrupt practices act. One set of bank records would have cost more than $400,000 to produce, and execution therefore was deemed

impractical and the records were not sought from the bank. However, other records were produced and forwarded to the non-Party.

Example B: In April 2007, a then-non-Party was prosecuting a former cabinet minister who was indicted for taking bribes. The non-Party asked for assistance in locating a foreign national in the U.S. whom they wanted to invite to the non-Party to testify during the trial. The witness, who was found to have entered the U.S. illegally, was never located and the interview could therefore not be conducted.

Example C: In March 2005, a then-non-Party was investigating senior employees of a company that was involved in defense-related activities. The target was the director of the Acquisitions Department and was alleged to have taken bribes in exchange for hiring delivery companies that did not comply with company's regulations regarding outside contractors. He was also being investigated for fraud and theft by a public servant. The evidence requested included interviews of witnesses and coconspirators, as well as records of money transfers and bank transactions. This request was executed.

10.2 Concerning MLA requests regarding the bribery of foreign public official made by you to other countries since Phase 2, please provide the following information if available and capable of being shared:

(a) How many requests have you made to other countries? How long has it taken for your country to receive a reply to such requests? How many of them were granted /rejected and on what grounds? In responding to this question, please differentiate between requests to Parties and non-Parties (without necessarily naming the countries).

(b) If you did not receive a response to your request(s), what further steps did you take, if any? Did the absence of a response result in termination of proceedings?

With regard to outgoing MLA requests, since July 2002, the United States has sent requests to 57 countries in bribery-related matters. The vast majority have been granted, while some are still pending. The United States has experienced the gamut of cooperation – from full-scale sharing of domestic investigative files on short notice to outright non-compliance. Some examples:

Example A: A November 2006 example of excellent cooperation was with a non-Party to the Convention. In one particularly urgent matter, when contacted late on a Thursday evening asking for the non-Party's entire investigative and prosecutorial files involving possible bribes leading to a telecommunications contract, the non-Party was completely cooperative. U.S. authorities reviewed the materials over the weekend, presented them to the grand jury on Monday morning, obtained an arrest warrant, and sent agents to the airport on Monday afternoon to effect arrest of the target, who was transferring through a U.S. airport. That target ultimately pleaded guilty to an FCPA-related offense.

Example B: Another example of good cooperation, this time in July 2007, was with a non-Party to the Convention. In this matter, the United States sought bank and business records

as evidence of bribes paid to third-country nationals who had money wired through the non-Party's banks. The third-party nationals were suspected of bribing officials in order to obtain contracts for passenger and commercial vehicles, such as pickup trucks and Sports Utility Vehicles. The United States received the results in less than three months, and a guilty plea was entered in the United States in 2010. The non-Party is currently conducting its own investigation, and the U.S. is assisting by providing evidence gathered in the U.S. case.

Example C: In another case, the United States sought and obtained the freeze of $29 million dollars in proceeds from corruption, wire fraud, and money laundering. Unfortunately, the non-Party does not have a mechanism to forfeit these proceeds because the U.S. order is a *civil* forfeiture order in a criminal case, and is not recognized in the non-Party. Moreover, even if the non-Party could forfeit the monies, that non-Party is not able under its own laws to share the proceeds with the United States or the victims in the third country in which the corruption took place.

Example D: An example of non-cooperation is a June 2007 request sent to a non-Party, where the United States sought banking and business records regarding possible unlawful payments to secure contracts to build government-owned power plants. The United States sent a supplement in July 2007, and asked for updates in 2008 and 2009. We have yet to receive a response.

Example E: An example of stymied cooperation is a 2006 case in which a Party was unable to execute an MLAT request because of lack of dual criminality. The offenses included promising not to pay surcharges to a government against whom there were sanctions, possessing the proceeds of the sales of oil (the sanctioned item), bribery of a UN official in order to bypass sanctions against this country, and money laundering of millions of dollars obtained through the sale of the oil. While the Party passed domestic laws – coming into effect on July 1, 2006 – making the corruption offenses criminal, ultimately the United States no longer sought MLA because the defendants had already pleaded guilty.

Example F: In June 2008, the U.S. sent a request to a then-non-Party seeking witness interviews, bank records, and witness testimony obtained by the non-Party's authorities, in connection with an investigation by both countries into a company's suspicious business practices. The U.S. was investigating the company and its subsidiaries for, among other things, making improper payments to foreign government officials. A parallel U.S. investigation into civil violations was also being conducted. The non-Party's authorities also were conducting their own investigation into the company. The non-Party did not provide any assistance, and the U.S. prosecutors eventually went forward in the U.S. case without the foreign evidence. The U.S. request was withdrawn in February 2009.

XI. Public Awareness and the Reporting of Foreign Bribery

11.1 Please provide information on actions undertaken or planned since Phase 2 to make the Convention and your country's foreign bribery laws better known in your country.

(a) Please include information on steps taken to engage companies (especially small and medium enterprises), business associations, professional organizations, trade unions, non-governmental organizations, universities and business schools, and the media, as well as the general public.

(b) Please describe awareness-raising and training provided to government officials, including those posted abroad, on the laws implementing the Convention, such that government officials can provide basic information to their companies at home and abroad and appropriate assistance when such companies are solicited for bribes.

(c) Please advise whether you are aware of any positive consequences from increased awareness of the Convention, the foreign bribery offense, or its detection and prosecution (e.g. an increase in corporate codes of conduct directed towards the detection and reporting of foreign bribery, an increased level of reporting from embassies abroad, etc.).

As noted above, Department of Commerce (DOC) provides training to U.S. and Foreign Commercial Service officers and Foreign Service officers on the Convention and the FCPA. In turn, officers provide information and general guidance to the business community on these issues. DOC officials also speak at numerous private sector events with organizations and schools, and DOC has participated in webinars on the FCPA and the Convention for the general public. DOC also maintains websites with information on the FCPA and the Convention for the general public. DOC has translated the FCPA into four languages (Arabic, Chinese, Spanish and Russian) in order to increase the general awareness and understanding of the FCPA by U.S. exporters and their trading partners (see www.ogc.doc.gov/trans_anti_bribery.html). The general public may and often does contact DOC's Office of the General Counsel with general questions about the Convention and the FCPA.

The Department of Commerce's International Trade Administration's (ITA) United States and Foreign Commercial Service (CS) has a network of export and industry specialists located in more than 100 U.S. cities and over 80 countries worldwide. These trade professionals provide counseling and a variety of products and services to assist small and medium-sized U.S. businesses in exporting their products and services. DOC provides extensive FCPA training to U.S. and Foreign Commercial Service officers and State Department Foreign Service officers. Between FY03 and FY07, 94% of Commercial Service Officers completed training on the FCPA. New officers also received training in FY08. In the Fall of 2009 alone, DOC conducted global training via a series of FCPA webinars, reaching an additional 80 Commercial Service staff. Once its projected FCPA training in 2010 is complete, DOC will have trained 524 Commercial Service staff in over 40 countries. In addition, since 2000, DOC has also conducted training of State Department Foreign Service officers, on average 50 officers, four times a year. In FY09, 75 Foreign Service officers received the FCPA training. Training and resources for all officers is also available online. The USG also provides guidance to its posts through an

interagency cleared FCPA guidance cable, which is currently under review to be reissued this year.

The Departments of Justice and State receive reporting on potential FCPA violations directly from Embassies overseas. Such reporting has increased over time.

11.2 In your awareness-raising efforts since Phase 2, have you used international standards on corporate social responsibility, including Annex 2 to the 2009 Recommendation on Further Combating Bribery, the OECD Guidelines for Multinational Enterprises and other relevant OECD and non-OECD principles as they relate to issues of bribery? If so, how did you use them?

The United States has drawn specific attention to the Annex and the new Recommendation during our internal training as well as outreach to the private sector. The USG also references other principles as they relate to bribery, for example, the DOC website references links to websites with such principles from Transparency International, the World Economic Forum PACI principles, the U.N. Global Compact, the International Chamber of Commerce etc. (see www.ogc.doc.gov/trans_anti_bribery.html). In addition, the International Trade Administration (ITA) of the U.S. Department of Commerce promotes integrity practices within the private sector in emerging markets and developing countries. ITA offers training workshops and business ethics resources like the "Business Ethics: A Manual for Managing a Responsible Business Enterprise in Emerging Market Economies" which is publicly available. This manual is intended to aid enterprises in designing and implementing a business ethics program that meets emerging global standards of responsible business conduct. The manual includes information on the FCPA and other international anticorruption instruments as well as the value of corporate compliance programs.

11.3 Please indicate the procedures or mechanisms in place for reporting suspected acts of foreign bribery, and how existing procedures and mechanisms were publicized.

As noted above, the USG issues FCPA guidance that instructs diplomatic and consular posts overseas how to report foreign bribery allegations to the appropriate Washington agencies. DOC also maintains a hotline for foreign bribery allegations that may be covered under other countries' laws implementing the OECD Anti-Bribery Convention, tcc.export.gov/Report_a_Barrier/index.asp. The Department of Justice also has a hotline specifically for FCPA complaints. Both of these hotlines are publicly available on the internet. 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.

As stated in our Phase 2 Questionnaire, 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. 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.) Any firm seeking to be included on a Department of Commerce trade mission must sign and submit a similar agreement.

11.4 Please indicate the measures in place to encourage and/or require reporting by your own public officials of suspected acts of foreign bribery. In particular, please describe:

(a) Which categories of public officials are concerned by these reporting mechanisms;

(b) The mechanisms for reporting internally as well as externally to law enforcement authorities; and

(c) Whether specific awareness raising activities have been undertaken to publicize the existence of these reporting channels, and facilitate their use, and whether certain bodies of public officials have been more specifically targeted.

In general, every federal executive branch officer and employee is required by the executive branch standards of ethical conduct to "disclose waste, fraud, abuse, and corruption to appropriate authorities." 5 C.F.R. 2635.101(11). This requirement is also one of the Principles found in Executive Order 12674. Who that appropriate authority is will depend upon the nature of the activity in question. If the matter is a suspected violation of a criminal statute, appropriate authorities include an Office of an Inspector General and/or the Department of Justice. There are no specific procedural requirements involved in making that report; the duty is to report. However, having said that, if the matter involves a specific statute with its own reporting mechanism, then officers and employees are to use that reporting mechanism.

Part of the ethics program requirements is that each department and agency shall provide an initial ethics orientation for all officers and employees, and thereafter an annual oral ethics briefing for all senior officials. The annual briefing should include, in part, a review of the Principles and the Standards of Ethical Conduct. Agencies are encouraged, however, to vary the content and subject matter emphasis from year to year. In addition, many departments and agencies, including those with employees who serve in posts around the world, are developing computer based training modules that are available to all officers and employees on an on-demand basis.

Specifically with regard to the duty to report, because this requirement extends to suspected violations of administrative procedures as well as statutory restrictions, the Office of Government Ethics developed a podcast providing information for employees on the duty to report and the options employees may use when determining where to report. The podcast is available through OGE's website. Participants in the pod cast included a representative of an Office of Inspector General discussing the use of IG hotlines, the Office of Special Counsel (OSC) discussing its Disclosure Unit (DU) and the Office of Government Ethics discussing the

use of reporting to a supervisor or an ethics officer. OIG offices and OSC also publicize these avenues separately.

As noted in 11.1 and 11.3 above, Department of State Foreign Service Officers and Department of Commerce Foreign Commercial Service Officers are trained on the prohibitions against foreign bribery and the mechanisms by which incidents can be reported. Complementary reporting guidance is typically biennially updated and disseminated to foreign missions. The guidance provides that U.S. government employees at foreign posts should report to Washington agencies possible FCPA violations, or allegations of such violations, for further review and action as necessary. Although the guidance refers to all overseas posts, it has generally been interpreted to apply to Washington agencies as well.

11.5 Please describe the measures in place to protect from discriminatory or disciplinary action public and private sector employees who report in good faith and on reasonable grounds suspected acts of foreign bribery to competent authorities. Please also indicate whether any specific awareness raising activities have been undertaken to publicize the existence of such measures.

The Whistleblower Protection Act (WPA), 5 U.S.C. § 2302(b), prohibits taking or failing to take a personnel action as a result of disclosure of information by any employee or applicant which the employee or applicant reasonably believes evidences a violation of the law. 5 U.S.C. § 1212 provides that the OSC is responsible for protecting government employees, former employees, and applicants for employment from violations of the WPA and investigates allegations of retaliation through the Investigation and Prosecution Division. If retaliation occurs, OSC can take corrective action to remediate any discriminatory or disciplinary action. OSC reports on such investigations and remedial actions to Congress on an annual basis. OSC also maintains a Disclosure Unit (DU) that serves as a safe conduit for the receipt and evaluation of whistleblower disclosures from federal employees, former employees, and applicants for federal employment. 5 U.S.C. § 1213. Federal employees are advised of their ability to resort to their OIGs and OSC, as described in 11.4 above.

Private sector whistleblowers are protected under 18 U.S.C. § 1514A,[54] and can seek redress through the Department of Labor for retaliation. The law is attached at Appendix E. The Department of Labor Office of the Whistleblower Protection Program promulgates guidance on seeking redress in both English and Spanish, maintains an easy-to-use website, www.osha.gov/dep/oia/whistleblower, and engages in awareness-raising activities.

[54] This provision is more commonly known as the Sarbanes-Oxley Whistleblower Protection provisions.

XII. Public Advantages

12.1 Please indicate whether measures were taken since Phase 2 to permit your authorities to suspend from competition for public contracts or other public advantages (e.g. public procurement and ODA-funded contracts, export credits, etc.) companies determined to have bribed a foreign public official in the context of an international business transaction. If so, please describe the measures taken. Please also describe what steps you have taken to evaluate the effectiveness of your approach in this area.

Individuals or entities that bribe foreign officials may be prohibited from receiving contracts or subcontracts from the United States Government. Similar prohibitions apply to certain non-procurement activities such as providing consulting services and receiving federal grants. 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. 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 the FCPA, as well as other laws. 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. 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. The United States also cooperates with the international financial institutions, including the World Bank, in their investigations.

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 Government Accountability Office (GAO).

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. 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.

12.2 Please indicate whether measures were taken since Phase 2 to enhance transparency in public procurement. If so, please describe the measures taken. In this regard, please indicate the international instruments your country has adhered to (e.g. WTO Agreement on Government Procurement).

The United States has, at the Federal level, a set of provisions related to the government systems for the procurement of goods and services, among which the following, related to the principal systems, should be noted, including:[55] the Competition in Contracting Act (CICA), codified in Titles 10, 31 and 41 of the United States Code, and which requires procurements to be carried out through full and open competition (41 U.S.C. § 253(a)); sealed bidding, provided for by Section 6.102(a) of the FAR; negotiated procurement, provided for by Section 6.102(b) of the FAR, which provides that contracting officers may request competitive proposals when the use of sealed bidding is not appropriate for the particular procurement; detailed requirements for the acquisition of commercial items, including Section 12.207(a), which specifies the type of contracts to be used for these types of acquisitions; Section 12.209, which requires the contracting officer to establish price reasonableness for commercial acquisitions and document the basis of the award; Section 12.301, which establishes detailed provisions and required contract clauses for these types of acquisitions; and Section 12.503, which provides that certain laws are not applicable to contracts for the acquisition of commercial items; and other provisions to ensure transparency in public procurement.

In addition, there are legal provisions regarding oversight bodies for the procurement system, such as the following: Title 31 of the United States Code, which provides for the Comptroller General of the GAO to investigate, all matters related to the disbursement and use of public money (Section 712(1)); Title 41 USC Section 414b, which establishes the Chief Acquisition Officers Council, and charges it with monitoring the performance of acquisition activities and programs, evaluating their performance, and making recommendations on ways to improve the federal acquisition system; the Offices of the Inspectors General, which pursuant to Title 5 USC App Section 1 *et seq,* are charged with conducting and supervising audits and investigations of executive branch agencies and departments; and the Acquisitions Advisory Panel, created pursuant to Section 1423 of the Services Acquisition Reform Act of 2003, which charges the Panel with (1) reviewing all federal acquisition laws as well as government-wide acquisition policies; and (2) based on that review, making any modifications of laws, regulations or policies necessary to: (a) protect the best interests of the government, (b) ensure the continuing financial and ethical integrity of acquisitions, (c) amend or eliminate any provision that is unnecessary for effective, fair award of administration of contracts, and (d) issuing a report with a detailed statement of its findings, conclusions and recommendations.

Furthermore, the False Claims Act also allows any person to file a legal action, known as a *qui tam* action, in the appropriate District Court against government contractors on the basis that the contractor has committed a fraud against the government. Section 3730(d) provides that in such cases, the person bringing the action is entitled to recover a portion of the proceeds of the action.

[55] For a full review of U.S. public procurement in the anticorruption context, please see the Report on the United States of America by the Mechanism for Follow-Up on the Inter-American Convention Against Corruption, published June 27, 2008, available at www.oas.org/juridico/english/mesicic_II_inf_usa_en.pdf.

The United States has a number of bilateral treaties regarding public procurement. The United States is a party to the WTO Agreement on Government Procurement, which entered into force in the United States on January 1, 1996.

12.3 Please indicate whether measures were taken since Phase 2 by your export credit agency to address foreign bribery issues in relation to the attribution and suspension of export credit guarantees. If so, please describe the measures taken. If relevant, please indicate in particular whether your country has taken steps to adhere to the 2006 OECD Council Recommendation on Bribery and Officially Supported Export Credits and explain those steps. If not, please explain why not.

The U.S. export credit agency, Export-Import Bank of the United States (Ex-Im), has fully incorporated foreign bribery issues and the 2006 OECD Council Recommendation on Bribery and Officially Supported Export Credits into its operations and reserves the right to require that exporters and, where appropriate, applicants, disclose upon demand the identity of persons acting on their behalf in connection with any transaction and the amount and purpose of commissions and fees paid to such persons. Ex-Im may decline to process or discontinue processing any application related to a transaction if Ex-Im determines there is evidence of fraud or corruption or any of the participants has engaged in, or been associated with, fraud or corruption in the past. Ex-Im cooperates with law enforcement authorities, foreign and domestic, and will refer allegations of corruption to law enforcement if they are deemed credible.[56] Ex-Im has adopted guidelines for Transaction Due Diligence Best Practices, which are available on their website. Parties doing business with Ex-Im are encouraged to develop, apply, and document appropriate controls to combat bribery.

[56] Ex-Im has referred potential FCPA violations to the Department for prosecution in the past.