USA: PHASE 2

Questions Related to Phase 1 Evaluation

1. The offense of bribing a foreign public official

1.1 Interstate Nexus Requirement

- **Please provide reference to other legislation employing the type of terminology (e.g that offender must make use of the mails or any means or instrumentality of interstate commerce).**

The interstate nexus requirement derives from the limited jurisdiction granted to the federal government under Constitution. Specifically, the Ninth Amendment provides: "The powers not delegated to the United States [*i.e.*, the national government] by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Article I, section 8 of the Constitution provides a list of specific "powers" and further authorizes Congress "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers." *Id*. at cl. 18. This list provides explicit authority to enact criminal laws only for counterfeiting, piracies, and offenses against the Law of Nations. *Id*. at cl. 6 & 10. Thus, all other criminal prohibitions must be necessary and proper to execute one of the other Powers. The most common justification for federal laws, including criminal laws, is to execute the Congressional power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." *Id*. at cl. 3.
The number of statutes that include an interstate nexus are too numerous to list. The following, however, provide a representative sample:

18 U.S.C. § 1341: Mail Fraud (requires that an item be placed in mail or entrusted to a private or commercial interstate carrier in furtherance of the scheme or artifice to defraud)

18 U.S.C. § 1343: Wire Fraud (requires that information be transmitted by means of wire, radio, or television communication in interstate or foreign commerce in furtherance of the scheme or artifice to defraud)

18 U.S.C. § 1952: Interstate and Foreign Travel or Transportation in Aid of Racketeering Enterprises (requires travel in interstate or foreign commerce or use of the mail or any facility in interstate or foreign commerce with intent to commit enumerated crimes)

18 U.S.C. § 1956: Money Laundering (requires a financial transaction which affects interstate or foreign commerce)

18 U.S.C. § 1962: Racketeer Influenced and Corrupt Organizations (RICO) (requires investment of income from pattern of racketeering in an enterprise engaged in or whose activities affect interstate or foreign commerce)

15 U.S.C. § 77e: Securities Act of 1933 (unlawful to use any means or instruments of transportation or communication in interstate commerce or of the mails to sell an unregistered or improperly registered security)

15 U.S.C. §77q: Securities Act of 1933 (unlawful to engage in fraudulent or misleading conduct in connection with the offer or sale of any securities by use of any means or instruments of transportation or communication in interstate commerce or by use of the mails)

15 U.S.C. §§ 78i, 78j: Securities Exchange Act of 1934 (unlawful to use the mails or any means or instrumentality of interstate commerce fraudulently to manipulate securities prices)

- **The Secretariat notes that the Travel Act, Wire Fraud Act and RICO employ slightly different terminology (e.g." travels in interstate or foreign commerce or uses the mail or any facility of interstate of foreign commerce"). Please explain (with supporting examples from case law, if possible) the effect of the additional of a foreign nexus.**

The varying formulations in different criminal statutes are most likely the artifacts of legislative drafting. The critical issue is the inclusion of a "foreign nexus" in statutes such as the FCPA. Under general principles of U.S. law, "legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949). The FCPA incorporates the Securities Exchange Act's definition of interstate commerce, which provides that interstate commerce includes "communications . . . between any foreign country and any State . . ." *See* 15 U.S.C. §§ 78c(a)(17), 78dd-2(h)(5), 78dd-3(f)(5). The inclusion of the "foreign nexus" in all three sections of the FCPA, coupled with its explicit extraterritorial application to U.S. nationals and companies, makes it clear that the Congress, in enacting and amending the FCPA, intended for it to have the broadest possible scope, including applying to transactions that take place outside the United States. *See Kauthar SDN BHD v. Sternberg*, 149 F.3d 659, 664 (7th Cir. 1998), *cert. denied*, 525 U.S. 114 (1999) (noting that § 78c(a)(17) and §78dd(b) demonstrated that Congress intended to apply securities laws to certain transnational transactions); *Securities and Exchange Commission v. Kasser*, 548 F.2d 109 (3rd Cir. 1977) ("The federal securities laws, in our view, do grant jurisdiction in transnational securities cases where at least some activity designed to further a fraudulent scheme occurs within this country."). *Cf. Commodity Futures Trading Commn. v. Muller*, 570 F.2d 1296, 1299 (5th Cir. 1978) (Commodity Futures Trading Commn. Act of 1974's definition of interstate commerce, 7 U.S.C. § 2, encompassed "London options" that were traded in "foreign commerce" on behalf of U.S. customers).

Congress' intent to create the broadest possible application of the FCPA is further demonstrated by the inclusion in the FCPA's definition of interstate commerce of a statement that such commerce includes the *intrastate* use of an interstate facility such as telephones. *See* 15 U.S.C. §§ 78c(a)(17), 78dd-2(h)(5), 78dd-3(f)(5). The Travel Act, 18 U.S.C. § 1952, on the other hand, uses a more limited definition that requires that the commerce in question actually transit an interstate border, even if the item eventually comes to rest in the originating State. *See* 18 U.S.C. § 1951 (b)(3).)

- **Please provide case law illustrating when an interstate connection is proven and when it is not (examples concerning application of the FCPA as well as legislation using similar terminology would be useful).**

There has been no case interpreting interstate commerce in the context of the FCPA. However, in the *Mead* case, this element was satisfied by proof that the defendant had caused a subordinate to travel by airplane from the United States to Panama and subsequently sent an email from New Jersey to Panama. In the *Cantor* case, the criminal information alleged that the company's agent had sent several faxes from England to New York and that the defendant thereafter authorized a wire transfer from New York to Switzerland. In the *King* case, the indictment alleges a series of faxes between Kansas City, Missouri, and various other places outside Missouri, including Costa Rica. In *Crites*, the criminal information alleged that the defendant had used the mails and telephones in furtherance of the unlawful payment.

The case law interpreting the anti-fraud provisions of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), which is governed by the same definition of interstate commerce as the FCPA, 15 U.S.C. § 78c(a)(17), is instructive. The courts have found this element satisfied by proof of

mail solicitations from the United States to a foreign investor and the receipt in the United States of fraudulently solicited payments, *Kauthar*, 149 F.3d at 667; the mailing from the United States of an instruction to revalue certain investments, *Robinson v. TCI/US West Communications*, 117 F.3d 900, 907 (5th Cir. 1997); using interstate and international transportation facilities to travel to a meeting in the United States, *Grunenthal GmbH v. Holz*, 712 F.2d 421, 425 n.6 (9th Cir. 1983); transnational use of telephones and mails in furtherance of a fraudulent securities scheme, *Kasser*, 548 F.2d at 111; and the mailing of a purchase agreement from New York to Canada, *Schoenbaum v. Firstbrook*, 405 F.2d 200, 210 (2nd Cir. 1968), *cert. denied*, 395 U.S. 906 (1969).

In recent years, the United States Supreme Court has emphasized the necessity of establishing an interstate nexus in federal prosecutions. In *United States v. Lopez*, 514 U.S. 549 (1995), the Court struck down a statute that prohibited the carrying of a firearm onto public school grounds, finding that the statute, on its face, neither applied to conduct that generically affected interstate commerce nor required a specific showing of such an effect as an element of the crime. A *Lopez*-based challenge has not been made in a FCPA prosecution, and we do not believe that one would succeed if made. Nor are we aware of any successful challenge to other statutes, such as the securities laws, that similarly require a specific showing of a use of the mails or an instrumentality of interstate or foreign commerce. *Compare United States v. Kunzman*, 125 F.3d 1363 (10th Cir. 1997) (securities fraud laws within Congress's power to regulate commerce), *cert. denied*, 523 U.S. 1053 (1998), *with United States v. Morrison*, 529 U.S. 598 (2000) (in absence of interstate commerce jurisdictional requirement, Congress did not have the authority to create a federal right of action premised on an wholly intrastate act of violence).

- **Please address the following issues in this regard:**

  - **Is the case covered where the intermediary, not the briber, uses the interstate connection and the briber is/is not aware thereof?**

    As an initial point, an intermediary is either an agent of the briber or the foreign official. If the former, the briber, as the principal, is responsible for the acts of its agent that are within the scope of the agency. If the latter, the bribe would be complete upon the payment to the intermediary itself. *See*, *e.g.*, 15 U.S.C. § 78dd-1(a)(3).

    We understand the Secretariat's question to concern when an intermediary uses an instrumentality of interstate commerce without the briber's knowledge. The FCPA provides, "It shall be unlawful for any [issuer, domestic concern, other person] to make use of the mails or any other means or instrumentality of interstate commerce . . ." 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a). This, however, does not require that each individual defendant personally use an interstate facility or even authorize one to be used. Under generally applicable principles of U.S. criminal law, a person may be held liable as a principal if he "aids, abets, counsels, commands, induces or procures [an offense's] commission." 18 U.S.C. § 2(a).

    Although we are not aware of any case in which a court addressed this issue with respect to the FCPA, the courts have held that the government was not required to prove knowledge of the use of an interstate instrumentality in cases brought under other statutes that include the use of an interstate instrumentality as a jurisdictional element. *See, e.g., United States v. Godwin*, 272 F.3d 659 (4th Cir. 2001) (in mail fraud prosecution, requirement that defendant "causes" mails to be used is satisfied if defendant does an act with knowledge that use of mails will follow in ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended); *United States v. Winters*, 33 F.3d 720, 721 (6th Cir. 1994) (citing cases; where intent requirement in Murder for Hire statute did not encompass use of interstate instrumentality, it was not necessary for the government to prove

defendants knew of or directed such use), *cert. denied*, 513 U.S. 1172 (1995); *United States v. Auerbach*, 913 F.3d 407 (7th Cir. 1990) (personal knowledge of interstate activities or use of interstate facilities is not element of Travel Act, it is sufficient that defendant's unlawful activity caused interstate travel); *United States v. Herrera*, 584 F.2d 1187,1150 (2nd Cir. 1978) (citing cases; not necessary to prove defendant knew of or authorized use of interstate instrumentality in Travel Act prosecutions).

- **Whether the letter, e-mail, etc. must have been sent to the foreign public official, or whether a letter, e-mail, etc. received by the briber/intermediary would be sufficient.**

  There is no requirement that the use of an interstate facility be directed to the foreign public official at all. The FCPA requires only that the use of an interstate facility be "in furtherance" of the unlawful payment. To establish that an act was "in furtherance" it is not necessary to show that the illegal conduct would not have occurred "but for" the use of the interstate facility; it is only necessary to show that the act was related to the unlawful conduct and intended to further it in some way. *See United States v. Reyes*, 239 F.3d 722, 736 (5th Cir. 2001) (in mail fraud prosecution, "[t]o be part of the execution of the fraud, the use of the mails need not be an essential element of the scheme. It is sufficient for the mailing to be incident to an essential part of the scheme or a step in the plot."); *United States v. Basile*, 109 F.3d 1304 (8th Cir. 1997) (in murder-for-hire scheme, filing of insurance claim by mail was intended to conceal one conspirator's involvement although there was otherwise no connection between the insurance claim and the murder agreement). Thus, for instance, in the *Mead* case, the two instances of a use of an interstate facility involved an email sent from one conspirator to another and travel by one conspirator (not the defendant). In neither instance was there any evidence that the foreign public official was aware of the use of the interstate instrumentality.

- **How could it be proved that such a letter, e-mail, etc. was sent in the absence of testimony from the briber or foreign public official that the letter, etc. was sent/received?**

  As noted, it is not necessary to prove either that the defendant himself mailed a particular document nor that the official received any document. Mailings and other uses of interstate facilities may be proven in a number of ways. For instance, in the *Mead* case, the government introduced copies of emails that had been found in the company's computers, telephone records, and airline ticket receipts, all of which were authenticated by law enforcement agents or custodians of records. In addition, an employee of the company who was cooperating with the government testified concerning these items.

  The proof of the use of an interstate facility will depend upon the specific instrumentality. Telephone calls may be proven through toll records obtained from service providers, through hotel records, or through expense reports. Emails may be proven by obtaining copies from the sender's or receiver's computer hard disk, from electronic back-up records, or from copies printed out and maintained in a company's files. Fax transmissions may be proved by obtaining copies from the company's records, together with either the confirmation printout or the fax line on the sent copy. Travel records (itineraries, tickets, etc.) may be obtained from the company's records or from third parties such as airlines and travel agents. Mailings may be proven through obtaining a copy of the envelope, if maintained in the recipient's records, through mailing receipts (including private delivery services' copies of invoices and waybills), or through testimony from a company employee that all documents sent to a particular location were sent in a particular way, *e.g.*, by mail or overnight delivery service. *See, e.g.*, *United States v. Sprick*, 233 F.3d 845, 853 (5th Cir. 2000) (mailings may be proved by circumstantial evidence).

- **Must it be proven that the letter, e-mail, etc., predates the offer, etc. of the bribe, since according to the FCPA the use of the mails, etc. must be "in furtherance of an offer . . ."?**

  Whether a use of an interstate instrumentality is in furtherance of an offer, promise, or payment of a bribe, or the authorization of such an offer, promise, or payment, is "in furtherance" of the bribe is dependent upon the facts. Thus, an email that is not sent until long after a bribe has been paid might not be in furtherance of it, even if the correspondents discuss the now-completed bribe. On the other hand, an email to an official reminding him of his obligations under the corrupt agreement, even if subsequent to the payment of the bribe, would be in furtherance of the bribe. So too, in most instances, would an email from a subordinate to a superior confirming that a payment authorized by the superior had been made. We are not aware of any case in which a bribe was authorized, offered, promised, or paid and the Department declined to bring a prosecution due to a lack of evidence of an interstate nexus.

- **Does the FCPA cover intrastate and foreign commerce? In particular, the Secretariat notes the case of *U.S. V. Kunzman* 54F. 3d 1522(10th Cir. 1995), in which it was decided that interstate commerce involves money transactions involving institutions insured by FDIC.**

  The FCPA's definition of interstate commerce explicitly includes the *intra*state use of an *inter*state facility, such as "a telephone or other interstate means of communication, or (B) any other interstate instrumentality." *See* 15 U.S.C. 78dd-2(h)(5), 78dd-3(f)(5); *see also* 15 U.S.C. § 78c(a)(17). *United States v. Kunzman*, 54 F.3d 1522, 1527 (10th Cir. 1995), in which the court found that a transaction involving a federally insured bank was sufficient to confer jurisdiction under the money laundering statutes, 18 U.S.C. §§ 1956, 1957, is inapposite to FCPA cases as those statutes contain definitions of "financial transaction" and "financial institution" that specifically reference federally-insured banks. *See* 18 U.S.C. § 1956(c)(4), (5) (incorporating 31 U.S. § 5312(a)(2)); 18 U.S.C. § 1957(f)(1) (incorporating 18 U.S.C. § 1956(c)(5)). Nevertheless, it is hard to conceive of any use (deposit, withdrawal, transfer, etc.) of a financial institution, federally-insured or otherwise, in furtherance of a bribe to a foreign official that would not, in some way, also involve the use of the mails or a means or instrumentality of interstate commerce.

- **Would interstate commerce cover the use of a private mail carrier?**

  The use of a private mail carrier would ordinarily qualify as interstate commerce, provided that the use in this instance crossed state lines or that the carrier qualified as an "interstate facility" even if, in this instance, the transaction was wholly intrastate. *See* 15 U.S.C. 78c(a)(17), 78dd-2(h)(5), 78dd-3(f)(5).

1.2 Third Party Beneficiaries

- **Please provide examples from the case law that illustrate the application in practice of the foreign bribery offences in the FCPA to cases where the briber and the foreign public official agree that the bribe payment be directed to a third party.**

  There have been no reported cases on this issue. We are not able to identify specific cases in which the official *directed* that payments be made to a third party. However, a significant number of prosecutions have been premised on facts that involved payments to foreign officials through or to intermediaries or to entities controlled by the foreign official. For example:

SEC v. Page Airways (D.D.C. 1978): payments to various Asian and African government officials through foreign entities controlled by the officials (complaint under books and records provision of the FCPA as payments predated effective date of the anti-bribery provisions).

SEC v. Katy Industries (N.D. Ill. 1978): payments to Indonesian official through a Cayman Island corporation owned by the company's consultant and a representative of the foreign official.

SEC v. International Systems & Controls Corp. (D.D.C. 1979): payments to officials of several countries through the company's subsidiaries and to foreign entities controlled by the foreign officials.

SEC v. Tesoro Petroleum Corp. (D.D.C. 1980): payments to various government officials and political leaders through a foreign finder/consultant.

United States v. Crawford Enterprises (S.D. Tex. 1982); *United States v. C.E. Miller, et al.* (C.D. Cal. 1982); *United States v. Miller* (D.D.C. 1983); *United States v. Ruston Gas Turbines* (S.D. Tex. 1982); *United States v. International Harvester Co.* (S.D. Tex. 1982): a series of cases involving payments to officials of Pemex, a Mexican state-owned oil company, through Grupo Delta, a Mexican corporation that purported to act as the U.S. companies' sales representative.

United States v. Harry G. Carpenter and W.S. Kirkpatrick, Inc. (D.N.J. 1985); *United States v. Carpenter* (D.N.J. 1985): payments to Nigerian political and military officials through a local agent who established two Panamanian share corporations to receive the payments.

United States v. Napco Int'l, Inc. and Venturian Corp. (D. Minn. 1989); *United States v. Liebo* (D. Minn.), *aff'd*, 923 F.2d 1308 (8th Cir. 1991); *United States v. Dornier GmbH* (D. Minn. 1990): payments to officials of the Republic of Niger through relatives who posed as Napco's agents.

United States v. Goodyear Int'l Corp. (D.D.C. 1989): payments to Iraqi officials through a Greek company which prepared false advertising and marketing studies.

United States v. Young & Rubicam, Inc., 741 F. Supp. 334 (D. Conn. 1990): payments to a Jamaican official through a Grand Cayman company established by the official and an associate.

United States v. Morton (N.D. Tex. 1990): payments to officials of a Canadian Crown corporation through a company controlled by the American company's Canadian agent.

United States v. American Totalisator Co. (D. Md. 1993): payments to officials of an instrumentality of the Greek government through the company's Greek agent.

United States v. Steindler, et al. (S.D. Ohio 1994): payments to an Israeli general through an attorney.

United States v. Vitusa Corp. (D.N.J. 1994); *United States v. Herzberg* (D.N.J. 1993): payments to an official of the Dominican Republic through an agent.

United States v. Lockheed Corp. (N.D. Ga. 1994); *United States v. Love* (N.D. Ga. 1994); *United States v. Nassar* (N.D. Ga. 1994): payments to a member of the Egyptian Parliament that were facilitated by her husband.

SEC v. Montedison, S.P.A. (D.D.C. filed in 1996) (cross motions for summary judgment pending): alleged payments to Italian politicians through off-shore subsidiaries and facilitated by a real estate developer in Rome.

SEC v. Triton Energy Corp. (D.D.C. 1997): payments to Indonesian officials through the company's business agent in Indonesia.

United States v. Tannenbaum (S.D.N.Y 1998): in an undercover operation, defendant offered to establish a fictitious corporation to receive payment to the purported foreign official.

SEC v. International Business Machines Corp. (D.D.C. 2000): payments by a foreign subsidiary to directors of an Argentinian state-owned bank through a sub-contractor (U.S. company charged with books & records violations based on false entries in subsidiary's books)

United States v. Cantor (S.D.N.Y. 2000); *In re American Bank Note Holographics, Inc.* (S.E.C.. 2000): payments to an offshore corporation's Swiss bank account for the benefit of a Saudi Arabian official at the direction of a foreign agent.

SEC v. KPMG Siddharto Siddharto & Harsano (S.D. Tex. 2001); *SEC v. Eric L. Mattson, et al.* (S.D. Tex. 2001); *In re Baker Hughes Inc.* (S.E.C. 2001) (corporations and Indonesian national settled civil and administrative claims; two officials of Baker Hughes have filed motions to dismiss civil complaint): payments to Indonesian official through KPMG-SSH.

1.3 Affirmative Defense and Routine Governmental Action

- **Please provide examples from the case law and Opinion Release procedure of cases where it has been deemed that a payment, etc. did / did not constitute:**
  - **a reasonable and *bona fide* expenditure [*e.g.*, pursuant to FCPA § 78dd-1(c)(2)]**

There have been no cases or Opinion Releases that explicitly addressed this defense, nor has it been raised in any FCPA prosecution. In the *Metcalf & Eddy* case, the payments in question included travel and expenses that were associated with a foreign official's trip to trade shows. In that case, however, the Department concluded that the payments exceeded *bona fide* expenditures and, moreover, included the expenses of the foreign official's family on trips to the United States.

The statutory defense was inserted in the FCPA in 1988 to codify Review Letters issued by the Department under its Review Procedure in which it either stated it would not take enforcement action upon the facts presented or opined that the proposed conduct did not implicate the FCPA. These included:

Release 81-02: trade association to provide samples of packaged beef products to officials of the Soviet Ministry of Foreign Trade for inspection, testing, and sampling.

Release 82-01: state agency to pay Mexican officials' reasonable and necessary expenses to attend a series of meetings for the purpose of promoting state's agricultural products.

Release 83-2: joint venture participant to pay reasonable and necessary actual expenses of general manager of a foreign government entity and his wife to extend their vacation to take a promotional tour of the American company's facilities.

Release 83-3: state agency and American company to pay reasonable and necessary expenses of a Singapore government official to attend a series of site inspections, demonstrations, and meetings to promote state's agricultural products and facilities.

Release 85-1: American company to pay reasonable and necessary expenses of French government delegation to inspect a facility and to discuss environmental and management concerns raised by French authorities concerning prospective business.

Release 92-1: American company to pay necessary and reasonable expenses while Pakistani government personnel undergo training provided by American company.

Release 96-1: American company to sponsor and provide funding for various government's officials to attend environmental training in the U.S.

- **a facilitating or expediting payment (exception for routine governmental action) [*e.g.*, pursuant to FCPA § 78 dd-1(b)]**

  There have been no cases or Opinion Releases that explicitly addressed this defense, nor has it been raised in any FCPA prosecution.

2. **Sanctions**

   - **Please provide information about the sanctions that have been applied in practice to cases under the FCPA and the domestic bribery offence (18 U.S.C. § 201), including the confiscation of the bribe.**

     See answers to section 6 and Appendices A & B in Phase II questionnaire response.

   - **Please comment on whether the U.S. has had difficulty implementing fines in practice due to the unavailability of pre-trial seizure of the proceeds of bribery for the purpose of insuring the availability of a fine?**

     This has not been an issue in any FCPA prosecution. See answers to section 7 in Phase II questionnaire response.

   - **Has the U.S. received requests for MLA in the form of the seizure or confiscation of the proceeds of bribery, and not been able to respond effectively to the request due to the lack of authority in the law to provide them domestically?**

     The United States has not received any request for seizure or confiscation of the proceeds of bribery of a foreign official.

3. **Statute of Limitations**

- **Please provide information about the time that it normally takes to investigate and prosecute cases of bribing a foreign public official, including cases where it was necessary to obtain information abroad. Is 5 years generally enough time? Have there been cases where it was necessary to apply to the court for granting/not granting such an application?**

  See answer to question 10 in Phase II questionnaire response.

4. **Accounting**

- **Please provide all the legislation, regulations and rules regarding the implementation of Article 8 of the Convention on accounting to non-issuers.**

  The accounting of non-issuers is chiefly governed by state corporation law and accounting standards established by the accounting profession. Under separate cover we have provided copies of accounting standards and representative state statutes.

Questions Supplementing Phase 2 Questionnaire

1. **Question 2.3 concerning Availability of Resources**

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

  See answer to question 2.3 in Phase II questionnaire response.

2. **Question 4 concerning the application in practice of the Offence**

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

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

  See answer to question 4.1(a) in Phase II questionnaire response.

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

  See answer to question 4.1(a) in Phase II questionnaire response.

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

  See answer to question 4.1(a) in Phase II questionnaire response.

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

  See answer to question 4.1(d) in Phase II questionnaire response.

3. **Question 6.1 concerning Sanctions available for Natural Persons**

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

  See answer to question 6.1 in Phase II questionnaire response.

4. **Question 8 concerning Jurisdiction**

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

  See answers to question 1.2 and 8.1 in Phase II questionnaire response.

5. **Question 9 concerning Enforcement (Investigation and Prosecution)**

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

  See answer to question 9.3 in Phase II questionnaire response.

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

  See answer to question 9.3 In Phase II questionnaire response.

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

  See answer to question 9.3 in Phase II questionnaire response.