RESPONSE OF THE UNITED STATES

SUPPLEMENTARY QUESTIONS CONCERNING PHASE 3

OECD WORKING GROUP ON BRIBERY

MAY 21, 2010

TABLE OF CONTENTS

PART A. QUESTIONS FROM PHASE 2 WRITTEN FOLLOW-UP REPORT

1. (Recommendation 4) Please indicate whether the United States has developed specific guidance on small facilitation payments.

We presently believe that the language of the FCPA, including its definition of "facilitating or expediting payments" listed in the statute is sufficient guidance. We have also provided specific guidance in our Layperson's Guide, as well as in the publicly available Department of Justice Criminal Resource Manual.

Even more specific advice can be obtained through using the Department of Justice Opinion Procedure. We elaborate on each of these sources of information below.

In addition, the Departments of Justice and Commerce regularly speak at conferences and provide guidance in those settings, including participating in an American Bar Association panel specifically on the issue of facilitating payments. Due to the detail provided in statements of facts accompanying resolved cases, guidance can also be derived from those matters where a claim that a payment falls within the exception has been rejected. *See, e.g.*, Helmerich & Payne (Case 14 in Appendix C to the main questionnaire).

To provide additional guidance, the Department of Justice will shortly be making its Response to the Working Group's Study Group on Small Facilitation Payments Survey Question #2 on Treatment of Small Facilitation Payments by Members (attached to the main questionnaire as Appendix H) publicly available on its website, www.justice.gov/criminal/fraud/fcpa/intlagree.

The Statute

The FCPA clearly states that it does not prohibit "facilitating or expediting payment[s]... to expedite or to secure the performance of a routine governmental action." 15 U.S.C. §§ 78dd-1(b), 78dd-2(b), 78dd-3(b). The FCPA provides an illustrative list of what qualifies as "routine governmental action." This list 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 further provides 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).

The statute is unique in comparison to other criminal statutes in the amount of detail it provides in defining these provisions. *See, e.g.*, 18 U.S.C. §§ 1341 and 1343.

The Layperson's Guide

The Department of Justice website addressing the Foreign Corrupt Practices Act includes a "Layperson's Guide to the Foreign Corrupt Practices Act," available at www.justice.gov/criminal/fraud/fcpa/docs/lay-persons-guide.pdf, which includes the following guidance regarding the facilitation payments exception:

> PERMISSIBLE PAYMENTS AND AFFIRMATIVE DEFENSES
>
> The FCPA contains an explicit exception to the bribery prohibition for "facilitating payments" for "routine governmental action" and provides affirmative defenses which can be used to defend against alleged violations of the FCPA.
>
> FACILITATING PAYMENTS FOR ROUTINE GOVERNMENTAL ACTIONS
>
> There is an exception to the antibribery prohibition for payments to facilitate or expedite performance of a "routine governmental action." The statute lists the following examples: obtaining permits, licenses, or other official documents; processing governmental papers, such as visas and work orders; providing police protection, mail pick-up and delivery; providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products; and scheduling inspections associated with contract performance or transit of goods across country.
>
> Actions "similar" to these are also covered by this exception. If you have a question about whether a payment falls within the exception, you should consult with counsel. You should also consider whether to utilize the Justice Department's Foreign Corrupt Practices Opinion Procedure, described below on p. 10.
>
> "Routine governmental action" does not include any decision by a foreign official to award new business or to continue business with a particular party.

DOJ Criminal Resource Manual

Guidance to federal prosecutors on facilitation payments exists in the DOJ Criminal Resource Manual, which is publicly available on the Department of Justice website.[1] The Criminal Resource Manual states, with regard to facilitation payments:

> The FCPA contains an explicit exception to the bribery prohibition for facilitating payments made in furtherance of routine governmental action. *See* §§ 78dd-1(b), 78dd-2(b), 78dd-3(b). The statute lists several examples of payments that may be made to facilitate or to expedite performance of a routine governmental action, including payments made to: obtain permits, licenses, or other official documents;

[1] www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm01018.htm.

> process governmental papers, such as visas and work orders; provide police protection, mail pick-up and delivery; provide phone service, power and water supply, cargo handling, or protection of perishable products; and schedule inspections associated with contract performance or transit of goods across country. *See* §§ 78dd-1(f)(3), 78dd-2(h)(4), 78dd-3(f)(4). Other similar actions may also be covered by this exception. "Routine governmental action" does not include any decision by a foreign official to award new business or to continue business with a particular party. *Id.*

Department of Justice, Criminal Resource Manual at 1018.

DOJ Opinion Procedure

As noted in the Layperson's Guide, the Department of Justice Opinion Procedure establishes a process by which companies can request an opinion on whether specific, non-hypothetical, prospective conduct would violate the FCPA. While to date no such opinion request has been submitted related to "facilitating or expediting payments," this process is available and the Department stands prepared to provide such guidance.

2. (Recommendation 5) Please indicate whether guidance has been provided on the defense of reasonable and bona fide expenses.

The Department of Justice has continued to issue significant guidance on the defense of reasonable and bona fide expenses through its opinion procedure. In addition, case law and enforcement actions have provided guidance on the exception.

DOJ Opinion Procedure

Opinion Procedure Releases 09-01, 08-03, 07-01, 07-02, and 07-03, summarized in the answer to question 2.1(b)(i) in the main questionnaire, all provide guidance on reasonable and bona fide expenses .

Case Law

Metcalf & Eddy (Case 80 in Appendix C) involved funding travel for an Egyptian official, including first class tickets to Disney World for the official, his wife, and his children. Metcalf & Eddy attempted to defend the expenditure as a reasonable and bona fide expense, but the court denied the claim, issued an injunction, and fined the company $400,000. *United States v. Metcalf & Eddy, Inc.*, No. 1:99CV12566 (D. Mass., filed Dec. 14, 1999).

Recent Enforcement Actions

Examples of enforcement actions where a determination was made that travel and/or entertainment expenses were bribes rather than reasonable and bona fide expenses include: UTStarcom (Case 7 in Appendix C) and Lucent Technologies Inc. (Case 35 in Appendix C) involved travel to the U.S. for Chinese officials; involved travel to the U.S.; Ingersoll-Rand

(Case 40 in Appendix C), an Oil for Food case, included travel for Iraqi officials to Europe; Paradigm B.V. (Case 46 in Appendix C) involved a trip to Napa Valley for a Mexican government official; and Dow Chemical (Case 54 in Appendix C) included $37,000 in gifts, travel, entertainment, and other items to an Indian government official.

3. (Recommendation 7) Please explain any steps taken to make the books and records provisions of the FCPA applicable to certain non-issuers based on the level of foreign business they transact, so as to possibly improve the level of deterrence and detection of FCPA violations.

As discussed in the follow-up to the Phase 2 review, the United States has carefully considered this recommendation and believes that the level of deterrence provided by the FCPA is generally reasonable. We do not presently intend to expand the coverage of the books and records provisions of the FCPA to non-issuers. As was discussed in Phase 1 and Phase 2, we believe that other laws and regulations, including those governing bank fraud, tax fraud, and wire and mail fraud cover non-issuers and may provide a basis for prosecutions based on false books and records.

4. (Recommendation 8) Please describe any steps taken to clarify auditing standards, especially regarding "materiality", and strengthen controls over auditors in order to enhance the detection of foreign bribery.

Auditing Standards

The Public Company Accounting Oversight Board (PCAOB) sets auditing standards for audits of issuers,[2] and has taken several actions to clarify and strengthen its standards. 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*, to provide guidance and direction for auditors in performing an integrated audit of internal control over financial reporting and the financial statements.[3] Among other things, this standard provides direction to auditors in applying the concepts of materiality and the consideration of fraud risks, including acts of bribery that could have a material effect on the financial statements. In 2009, the PCAOB issued Auditing Standard No. 7, *Engagement Quality Review*, which requires engagement quality reviewers to evaluate the audit team's judgments about materiality and the effect of those judgments on the engagement strategy, and to evaluate the audit engagement team's assessment of and audit responses to fraud risks.[4] Additionally, the PCAOB proposed a suite of standards, collectively referred to as the "risk assessment standards," that integrate the existing requirements for auditors' considerations of fraud that could result in a material misstatement of

[2] 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.

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

[4] PCAOB Auditing Standard No. 7 is available at pcaobus.org/Standards/Auditing/Pages/Auditing_Standard_7.aspx.

the financial statements with the requirements to identify and respond to risks of material misstatement in the financial statements.[5] Further, the proposed "risk assessment standards" include a standard related to the auditor's consideration of materiality in planning and performing the audit that would supersede the existing requirements and guidance related to materiality in the auditing standards. This proposed standard contains new and revised requirements for determining materiality for particular accounts or disclosures, determining materiality for individual locations or business units in multi-location engagements, and reassessing materiality and the scope of audit procedures. The PCAOB expects to finalize the "risk assessment standards" in 2010. Recently, the PCAOB 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.[6] 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.

Additionally, the American Institute of Certified Public Accountants (AICPA) Auditing Standards Board (ASB) is currently in the process of redrafting the auditing standards applicable to non-issuers using drafting conventions that are designed to make them easier to read, understand, and apply.[7] As part of this "clarity project," the ASB has developed a convergence plan to align its standards with those of the International Auditing and Assurance Standards Board and to avoid unnecessary conflict with the PCAOB's standards. Once this project is complete, audits of non-public companies will contain objectives and requirements to guide auditor performance with respect to materiality, fraud, and illegal acts, including acts of bribery.

Strengthened Controls over Auditors

U.S. auditing standards require auditors to consider the risks of fraud and illegal acts, including acts of bribery, which could have a material effect on the financial statements.[8] Controls over audit firms' compliance with these standards include inspections of firms, and the manner in which inspections are performed differ for firms conducting audits of issuers from those auditing non-issuers. Despite these differences, inspections of audit firms provide significant incentive for firms to comply with the auditing standards, including those related to fraud and illegal acts.

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[5] *See* PCAOB Release No. 2009-007, Proposed Auditing Standards Related to the Auditor's Assessment of and Response to Risk and Related Amendments to PCAOB standards, available at pcaobus.org/Rules/Rulemaking/Docket%20026/2009-12-16_Release_No_2009-007.pdf.

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

[7] Further information about the ASB's "clarity project" is available at www.aicpa.org/Professional+Resources/Accounting+and+Auditing/Audit+and+Attest+Standards/Improving+the+Clarity+of+ASB+Standards/default htm.

[8] *See* AU section 316, *Consideration of Fraud in a Financial Statement Audit*, and AU section 317, *Illegal Acts by Clients* in either the PCAOB interim standards or the AICPA's Auditing Standard Boards standards.

The Sarbanes-Oxley Act of 2002 (the Act) established the PCAOB to oversee audits of public companies. The Act gave the PCAOB authority to, among other things, establish auditing, quality control, ethics, independence, and other standards relating to the preparation of audit reports for issuers, and conduct inspections of accounting firms. PCAOB inspections focus on evaluating the quality controls and methodologies used by firms in conducting audits of issuers as well as reviews of specific audit engagements for compliance with PCAOB auditing standards. The specific engagement reviews generally include consideration of the engagement team's evaluation of and response to the risk of fraud that could result in a material misstatement of the financial statements. The PCAOB then publishes certain results of their inspections in a public report. In addition, the PCAOB published a report in January 2007 that identified certain observations made in the course of their inspections related to auditors' considerations of the risk of fraud that are sufficiently important or arose with sufficient frequency to warrant discussion for the purpose of focusing auditors on being diligent about these matters.[9]

Firms conducting audits of non-issuers are also required to receive an inspection by another audit firm of their system of quality control and compliance with auditing and other professional standards. Similar to PCAOB inspections, this "peer review" focuses on evaluating audit firm quality control practices and procedures as well as a review of specific engagements for compliance with the relevant auditing standards.

5. (Recommendation 9) This recommendation concerning enforcement statistics is covered already by Part II, Question 3.1 of the standard Phase 3 Questionnaire.

Please see the response to Question 3.1 in the main questionnaire.

6. (Recommendation 10) Please indicate if the United States has made a clear public statement, in light of the OECD Convention, identifying the criteria applied in determining the priorities of the Department of Justice and the Securities and Exchange Commission in prosecuting FCPA cases.

As explained at the Phase 2 on-site examination, the Department of Justice and the SEC do not have priorities amongst FCPA cases. Any FCPA allegation that comes to the attention of either agency and that, upon investigation, satisfies generally applicable criteria for prosecution (sufficiency of the evidence, likelihood of success at trial, etc.) will be prosecuted in accordance with the Principles of Federal Prosecution (attached to the main questionnaire at Appendix F), as discussed in the answer to question 5.1 of the main questionnaire and question 2 below.

7. (Recommendation 11) Please explain any steps taken by the United States to enhance the existing organizational enforcement infrastructure by setting up a mechanism,

[9] *See* PCAOB Release No. 2007-001, *Observations on Auditors' Implementation of PCAOB Standards Relating to Auditors' Responsibilities with Respect to Fraud*, January 22, 2007, available at pcaobus.org/Inspections/Documents/2007_01-22_Release_2007-001.pdf.

including the compilation of relevant statistics, for the periodic review and evaluation of the overall FCPA enforcement effort.

The Enforcement Division of the Securities and Exchange Commission maintains a computerized database of all investigations and filed enforcement actions. In addition, the FCPA Unit maintains a database of its active inventory and it keeps detailed information regarding its filed actions, including names of defendants, relevant facts, substantive charges and monetary relief. These databases are a useful way to track trends in enforcement and to assess the effectiveness of the FCPA enforcement program.

All FCPA investigations within the FBI are identified by a specific Case Classification, which can be searched to compile statistical data required to periodically review and assess the FBI's overall enforcement efforts. Likewise, the Fraud Section of the Department of Justice maintains a non-public, computerized case tracking system that monitors the status of all cases that have been opened as formal investigations. Case reviews are periodically conducted with prosecutors to evaluate investigation and prosecution progress. The case reviews include planning future actions, investigative strategy, charging decisions, and resolution options, as well as addressing staffing and resource issues.

In terms of resolved cases, the U.S. Government keeps a wide variety of statistics on FCPA enforcement, as represented by the charts in Appendix B to the main questionnaire, as well as the statistics periodically submitted to the Working Group.

B. FURTHER SUPPLEMENTARY QUESTIONS

I. Foreign Bribery Offense

a. General

1. Please comment on the development of guidance on what constitutes improper conduct, given that there is not a substantial body of jurisprudence for companies to draw on due to the use of plea agreements and out-of-court agreements (non-prosecution agreements and deferred prosecution agreements) in FCPA cases.

As an initial matter, deferred prosecution agreements (DPAs) are not "out-of-court" agreements. (See the answer to question 26 below.) When a DPA is signed, both the agreement and the proposed charging document are filed with a court and a judge has to approve the settlement (*see, e.g.*, Daimler AG, Case 2 in Appendix C to the original questionnaire). In addition, in the cases of plea agreements and DPAs, the judge must determine that all elements of the FCPA have been proven, albeit in a setting that is not adversarial. If an element of the statute were missing or if the judge found the Department's interpretation overly broad, the plea agreement or DPA would be rejected.

Guidance is also provided through the Opinion Procedure, discussed in the answer to question 2.1(b)(i) of the main questionnaire, and a company or individual always has the option of seeking such an opinion in advance if they are uncertain as to whether an undertaking would possibly violate the FCPA. In addition, guilty pleas, DPAs, and non-prosecution agreements (NPAs) are all made public and include detailed statements of facts that provide significant guidance on what constitutes improper conduct, which may also be highlighted in case-specific press releases. Both the Department of Justice and the Securities and Exchange Commission also participate actively and regularly in conferences on FCPA issues, where they provide guidance as to what constitutes improper conduct, based on resolved cases.

Since the Phase 2 review, there have been substantial additions to the body of FCPA jurisprudence. For a detailed discussion, please see the answer to question 2.1(b)(i) in the main questionnaire.

2. Please explain how decisions are taken on whether to proceed under non-FCPA charges (e.g. violations of the Arms Export Control Act, wire fraud, money laundering, false tax returns, Travel Act, Sherman Anti-Trust Act, etc.).

Like other prosecutorial decisions, a determination of which statute to charge is based on the facts, the evidence, and the principles laid out in the U.S. Attorney's Manual (USAM). As an initial matter, the USAM requires that a prosecutor charge the most serious readily provable conduct, USAM 9-27.400(B), but in a manner that is consistent with the other principles of federal prosecution, which require consideration of collateral consequences and other factors. When the same factual predicate is sufficient to prove multiple violations, what constitutes the most serious charge in any given circumstance will depend on the facts specific to that case. Where a particular element of a statute is missing, a different statute may be used. For example,

in the Oil for Food cases, companies could not be charged under the FCPA because the payments were to a government rather than a foreign official. Because a critical element of the FCPA was missing, the charges were pursuant to the wire fraud statute rather than the FCPA.

3. Please explain whether it is easier to prove a conspiracy to violate the FCPA than a substantive violation of the FCPA, referring to relevant cases if possible (e.g. Bourke).

Whether conspiracy or substantive violations are more readily provable varies from case to case and is a fact-specific analysis. The elements of each violation are different and require different elements of proof. Conspiracy requires proof beyond a reasonable doubt of, among other elements, agreement between two or more persons to engage in the illicit activity and that they have taken an overt act in furtherance within the territory of the United States. In contrast, a substantive violation of the FCPA does not require proof of an agreement or an overt act, but does require proof of other elements not needed to prove a conspiracy, including, among other elements, that the defendant be a particular type of entity, such as an issuer or a domestic concern, or that the defendant use the means or instrumentalities of interstate commerce in furtherance of the scheme. Depending on the factual circumstances of the matter, the particular elements of a conspiracy or a substantive violation may be easier to prove. As discussed in question 2 above, these are decisions that are made based on the facts and evidence of each particular case.

b. Business Nexus Test

4. Please explain what must be proven in order to satisfy the "business nexus" test under the FCPA, including by summarizing the test as it was articulated by the court in U.S. v. Kay, 359 F.3d 738 (5th Cir. 2004). For instance, please provide examples of cases in which a payment to a tax official to reduce taxes or a customs official to reduce duties would not satisfy the "business nexus" test.

In *United States v. Kay*, 359 F.3d 738 (5th Cir. 2004), the 5th Circuit ruled that the payments at issue in that case – to customs officials to reduce import duties on rice – fell within the parameters of the business nexus test. However, the 5th Circuit did not attempt to prescribe the outer limits of the business nexus required in order for there to be a violation of the FCPA. The court stated:

> [W]e cannot hold as a matter of law that Congress meant to limit the FCPA's applicability to cover only bribes that lead directly to the award or renewal of contracts. Instead, we hold that Congress intended for the FCPA to apply broadly to payments intended to assist the payor, either directly or indirectly, in obtaining or retaining business for some person, and that bribes paid to foreign tax officials to secure illegally reduced customs and tax liability constitute a type of payment that can fall within this broad coverage. In 1977, Congress was motivated to prohibit rampant foreign bribery by domestic business entities, but nevertheless understood the pragmatic need to exclude innocuous grease payments from the scope of its proposals. The FCPA's legislative history instructs that Congress was concerned about both the kind of bribery that leads to discrete contractual

> arrangements and the kind that more generally helps a domestic payor obtain or retain business for some person in a foreign country; and that Congress was aware that this type includes illicit payments made to officials to obtain favorable but unlawful tax treatment.
>
> Furthermore, by narrowly defining exceptions and affirmative defenses against a backdrop of broad applicability, Congress reaffirmed its intention for the statute to apply to payments that even indirectly assist in obtaining business or maintaining existing business operations in a foreign country. Finally, Congress's intention to implement the [OECD Ant-Bribery] Convention, a treaty that indisputably prohibits any bribes that give an advantage to which a business entity is not fully entitled, further supports our determination of the extent of the FCPA's scope.
>
> Thus, in diametric opposition to the district court, we conclude that bribes paid to foreign officials in consideration for unlawful evasion of customs duties and sales taxes *could* fall within the purview of the FCPA's proscription. We hasten to add, however, that this conduct does not automatically constitute a violation of the FCPA: It still must be shown that the bribery was intended to produce an effect — here, through tax savings — that would "assist in obtaining or retaining business."

United States v. Kay, 359 F.3d at 755-756. Consequently, payments that secured no unfair advantage to the company would not fall within the parameters of the business nexus test.

c. Extortion

5. Please explain whether evidence of extortion is taken into account in prosecution decisions. If it is, is the definition of extortion under the foreign law taken into consideration in determining whether a payment by a U.S. company to a foreign public official was obtained by the foreign public official through extortion rather than a violation of the FCPA by the company?

True extortion is a common law defense available in an FCPA prosecution. Under U.S. common law, an individual who is forced to make a payment under threat of injury or death would not be liable under any criminal statute, including the FCPA, because actions taken under duress are not criminalized. Three elements must be met to establish duress: (1) a threat of force directed at the time of the defendant's conduct; (2) a threat sufficient to induce a well-founded fear of *impending death or serious bodily injury*; and (3) a lack of a reasonable opportunity to escape harm other than by engaging in the illegal activity. *United States v. Gonzalez*, 407 F.3d 118, 122 (2d Cir. 2005) (emphasis added). Thus, the common law defense of extortion requires the threat of bodily harm, not economic harm.

In addition, true extortion could be argued to vitiate the requisite corrupt intent for a violation of the FCPA, but again requires threat of bodily, not economic, harm. Congress was quite clear in the legislative history of the FCPA that economic extortion was insufficient to

provide a defense. As Judge Scheindlin explained in *United States v. Bourke*, citing examples from the legislative history of the FCPA:

> The legislative history of the FCPA makes clear that "true extortion situations would not be covered by this provision." Thus, while the FCPA would apply to a situation in which a "payment [is] demanded on the part of a government official as a price for gaining entry into a market or to obtain a contract," it would not apply to one in which payment is made to an official "to keep an oil rig from being dynamited," an example of "true extortion." The reason is that in the former situation, the bribe payer cannot argue that he lacked the intent to bribe the official because he made the "conscious decision" to pay the official. In other words, in the first example, the payer could have turned his back and walked away -- in the latter example, he could not.

United States v. Bourke, 582 F. Supp. 2d 535, 540 (S.D.N.Y. 2008) (citing S.Rep. No. 95-114, at 10-11 (1977)) (see Appendix D for the full opinion). In the opinion, Judge Scheindlin also noted that it is the definition of extortion under U.S. law, not foreign law, that controls. *Id.*

d. Facilitation Payments

6. Please explain whether the payments in the following hypothetical cases would or would not constitute facilitation payments under the FCPA: i) payment to a foreign tax official to put a stop to excessive tax audits, which are the norm in the foreign country; ii) payment to a foreign government authority to obtain a license or permit for exporting military or dual-use items; iii) payment to a foreign government authority to speed up the process for obtaining a license or permit for exporting agricultural products.

The Department of Justice does not opine on the legality of hypothetical conduct. The Department's Opinion Procedure is available to provide guidance on non-hypothetical prospective conduct. Because any analysis of the legality of a particular payment is a fact-intensive inquiry, the limited information provided in the question would be insufficient to form the basis of an informed analysis in any event. Please see the answers to question 3.6 in the main questionnaire.

7. Are payments exempted under the affirmative defense for facilitation payments tax deductible in the US? Please summarize any guidance provided to tax and accountancy professionals on this issue.

As an initial matter, it is not an "affirmative defense" to say that a payment is a facilitation payment. Rather, such payments are excepted from the scope of the FCPA. This is a significant difference, as an affirmative defense requires that a target or defendant meet a burden of proof, whereas something that falls outside the scope of the law, including under an enumerated exception as in this case, is not chargeable in the first instance.

Payments that fall within the facilitation payments exception to the general bribery prohibition under the FCPA are not illegal under U.S. law, and thus they may be deductible

under section 162 of the Internal Revenue Code if the payments otherwise qualify as ordinary and necessary business expenses. *See* 26. U.S.C. § 162(a) and (c)(1).[10] The United States has not issued any guidance to tax or accountancy professionals regarding whether payments exempted under the facilitation payments exception are tax deductible.

8. Please comment on the use of investigatorial and prosecutorial discretion in the treatment of facilitation payments.

Investigatorial and prosecutorial discretion does not play a role in the treatment of facilitation payments. Such inquiries are factual matters. Where a payment is to facilitate routine action, it does not fall within the scope of the FCPA; where it is to secure a discretionary action, it does. Please see the response to question 3.6 in the main questionnaire and the answer to Question 1 (Recommendation 4) above.

9. Would accounting fraud for the purpose of paying or hiding a facilitation payment violate the books and records provisions of the FCPA or SEC regulations? Does the legal status of the payments under local law affect the company's liability under the FCPA or SEC regulations? Please also explain whether the issue of "materiality" is relevant in such cases.

Section 13(b)(2)(a) of the Exchange Act of 1934 requires issuers to make and keep books, records, and accounts that, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer. Failure to accurately record facilitation payments in corporate books and records would constitute a violation of this section. Regardless of whether the payment itself is lawful under local law, it must be recorded accurately. Further, there is no materiality requirement. Thus, failure to accurately record payments that are quantitatively immaterial would still constitute a violation of Section 13(b)(2)(a).

II. Liability of Legal Persons

10. In practice, has the United States been able to obtain convictions against legal persons without prosecuting and/or convicting a natural person?

There have been a number of instances where the United States has secured convictions (guilty pleas) against legal persons where natural persons have not been charged/convicted, or have yet to be charged/convicted. Examples in the last three years include BAE Systems plc (Case 4 in Appendix C), Latin Node Inc. (Case 19 in Appendix C), Siemens AG (Case24 in Appendix C), Vitol SA (Case 38 in Appendix C), Baker Hughes (Case 52 in Appendix C), and Vetco International (Case 55 in Appendix C).

[10] In a business context, an "ordinary" expense is one that a business person would ordinarily incur in order to meet the particular business activities and circumstances involved. If payments for an expense are made regularly and arise from transactions that commonly or frequently occur in the type of business involved, the expense is ordinary in the generally accepted meaning of that word. The requirement that the expense be "necessary" is liberally construed to be synonymous with appropriate or helpful to the taxpayer, rather than absolutely essential, in his business activity.

There have been cases where prosecution of or settlement of charges against a legal person has been followed by sanctions against a natural person, such as Faro Technologies (Case 12 in Appendix C), Kellogg Brown & Root (Case 20 in Appendix C – natural persons charged both before and after legal persons), and Schnitzer Steel Industries (Case 37 in Appendix C). In other cases, natural persons have been charged before legal persons, such as Innospec Inc. (Case 3 in Appendix C), Control Components Inc. (Case 16 in Appendix C), and Willbros Group (Case 30 in Appendix C). On occasion, legal and natural persons have also been charged together, such as Nature's Sunshine (Case 13 in Appendix C), United Industrial Corporation (Case 17 in Appendix C), and Nexus Technologies Inc. (Case 27 in Appendix C).

11. Please comment on whether corporate liability has been used more sparingly since the proceedings against Arthur Anderson and issuing the DOJ Principles of Federal Prosecution of Business Organizations in 2008.

A large number of legal persons have been prosecuted – including guilty pleas – under the FCPA and other statutes since 2008. In some cases, that prosecution has resulted in the termination of a company's business operations, such as *United States v. Nexus Technologies Inc.*, Case 27 in Appendix C.

III. Sanctions and related Issues

12. Please explain whether a request by a foreign country for asset recovery as foreseen under the UN Convention against Corruption would be available when a violation of the FCPA has been dealt with by a deferred prosecution agreement or a non-prosecution agreement.

The United States has flexible authority to assist in the recovery of the proceeds of foreign official corruption located in the United States, either by initiating its own non-conviction based forfeiture action against the proceeds of such offenses or by enforcing a foreign judgment of forfeiture. Because a bribe recipient would not typically be a party to such an agreement, entry into a deferred prosecution agreement or a non-prosecution agreement with a bribe payer should not preclude the United States from providing assistance in response to requests from other countries to recover bribe payments made to its foreign officials. Indeed, to the extent that such an agreement requires a bribe payer to provide assistance to U.S. law enforcement, the existence of such agreements may enhance the U.S.'s ability to recover foreign corruption proceeds. However, the success of the United States in finding, restraining, forfeiting and repatriating such corruption proceeds in response to an UNCAC or other MLA request likely will be more dependent upon the degree to which the victim state can provide information regarding the location of the assets and either evidence of the underlying offense or a forfeiture judgment resulting from successful criminal prosecution or non-conviction based forfeiture proceedings.

13. Please comment on the impact of the increase in litigation collateral to FCPA proceedings (e.g. civil suits brought by foreign governments, shareholder derivative suits, security fraud actions).

Over the years, there has been litigation collateral to FCPA proceedings. As the U.S. brings more FCPA cases, it is anticipated that collateral suits may also increase. Likewise, as more foreign regulators bring cases, there may be an increase in civil suits brought by foreign governments. Often, collateral suits are filed after the FCPA violations are disclosed in a publicly filed proceeding by a U.S. authority. Thus, collateral litigation usually has no direct impact on FCPA proceedings brought by U.S. authorities. For example, a class action suit was filed against Siemens AG after U.S. authorities filed its matter. Collateral suits have been brought against companies as well as against officers and directors. The claims involved in collateral suits may involve securities law, ERISA, employment, derivative shareholder, commercial, and bankruptcy law claims. Foreign sovereigns have also filed various collateral suits alleging fraud, RICO, and FCPA violations.

14. Please comment on whether a contract obtained through the bribery of a foreign public official in violation of the FCPA would be enforceable in the United States.

Contracts obtained through bribery would not be enforceable in the United States. It is a long-standing tenet of the common law that a contract is unenforceable if it violates public policy. *Bank of the U.S. v. Owens*, 27 U.S. (2 Pet.) 527 (1829) ("no court of justice can in its nature be made the handmaid of iniquity"). *See also Wong v. Tenneco, Inc*., 39 Cal. 3d 126, 135, 216 Cal. Rptr. 412, 418, 702 P.2d 570, 576 (1985) ("No principle of law is better settled than that a party to an illegal contract cannot come into a court of law and ask to have his illegal objects carried out."); *Lewis & Queen v. N.M. Ball Sons*, 48 Cal. 2d 141, 150, 308 P.2d 713, 719 (1957) ("the courts generally will not enforce an illegal bargain or lend their assistance to a party who seeks compensation for an illegal act"). Where enforcing a contract would contravene the purpose of a statute, such as the FCPA, it is axiomatic that it violates public policy. *See Trotter v. Nelson*, 684 N.E.2d 1150, 1153 (Ind. 1997) ("If an agreement is in direct contravention of a statute, then the court's responsibility is to declare the contract void.").

If a parallel civil suit seeking to void a contract obtained through bribery has been filed, the Department can request that a court stay the civil proceeding until the criminal case is resolved. The Department has done this on occasion in FCPA cases.

15. Please explain whether 'collateral consequences' such as debarment on contracting with the government affects the options available to prosecutors (e.g. by limiting the financial penalties available through court settlements due to judicial concerns of overall proportionality).

The USAM requires that collateral consequences, such as debarment, impact on pension funds, disproportionate harm to shareholders and others who are not personally culpable, and the impact on the public arising from a prosecution be taken into consideration in prosecution. USAM 9-28.1000. In addition, the U.S. Sentencing Guidelines provide for a reduction in the fine where "the organization is not able and, even with the use of a reasonable installment

schedule, is not likely to become able to pay the minimum fine required…." U.S.S.G. § 8C3.3(b). For example, in the matter of *United States v. Innospec Inc.* (Case 3 in Appendix C), under the sentencing guidelines, the company normally would have faced a criminal fine in the range of $101.5-203 million, but was ultimately ordered to pay a criminal fine of $14.1 million due to the threat posed to the continuing viability of the company by a larger fine (as well as the need to accommodate fines being levied by other enforcement authorities, including the United Kingdom). Similarly, in the Siemens matter (Case 24 in Appendix C), the BAE Systems plc matter (Case 4 in Appendix C), and the Daimler matters (Case 2 in Appendix C), the harm such potential debarment would case to the public, both in the U.S. and abroad, as well as to the corporate defendants, was taken into consideration in prosecution and sentencing.

In circumstances where the potential for collateral consequences is severe and the threat of disproportionate harm is great, prosecutors must determine if certain charges will result in unfair or unjust consequences to the company, its shareholders, its employees, and the general public, among others. Where the collateral consequences of a corporate conviction for innocent third parties would be significant, it may be appropriate to consider a non-prosecution or deferred prosecution agreement with conditions designed, among other things, to promote compliance with applicable law and to prevent recidivism. Because of the range of charging options and mechanisms available to prosecutors, including DPAs and NPAs and the ability to proceed on alternate charges that might carry different risks, such unfair or unjust results can be mitigated while still permitting prosecution.

IV. Jurisdiction

16. Please comment on whether it has been possible to apply territorial jurisdiction in practice to foreign companies that are not listed on a U.S. stock exchange. If this has been possible, please provide examples of what has qualified in these cases as an act "within the territory of the United States".

It is possible to apply territorial jurisdiction to a foreign company not listed on a U.S. stock exchange. There are numerous foreign subsidiaries of U.S. companies and U.S. issuers that have been prosecuted on the basis of territorial jurisdiction due to wire transactions or bank transactions transiting or involving the United States, including the Vetco companies (Case 55 in Appendix C), subsidiaries of Siemens (Case 24 in Appendix C), and subsidiaries of Daimler AG (Case 2 in Appendix C). DPC Tianjin (Case 65 in Appendix C) fell within the jurisdiction of the United States due to a fax communication with the United States.

Any interstate or international wire communication in furtherance of violating the FCPA, including telephone calls, faxes, emails, and bank transfers, to, from, or through the United States would be sufficient to fall within the territorial jurisdiction of the United States. Travel to or from the United states, or otherwise actively taking an action in the United States, would also be sufficient to establish U.S. territorial jurisdiction.

17. Has the United States ratified the OECD Anti-Bribery Convention for any of its dependencies? If so, has the United States applied the FCPA in practice to any of the

following cases: i) the bribery of a foreign public official that took place within the territory of a US dependency, and if so, what constituted the territorial link with that dependency; or ii) or a company that was registered or headquartered in a US dependency and bribed a foreign public official in a foreign country?

Please see the answer to question 2.3 in the main questionnaire. The U.S. brought an FCPA enforcement action in Puerto Rico in the 1980s, although such enforcement has not been common. In that case, the jurisdictional nexus included wire transfers from Puerto Rico to places outside the United States. In addition, some of the defendants were residents of Puerto Rico and one of the companies was incorporated in Puerto Rico.

V. Enforcement

a. General

18. Please explain whether in practice the FCPA has been applied to the bribery of a foreign public official in relation to illegal international business transactions, such as drug trafficking, human smuggling, or illicit arms trading.

There have been such cases. For example, Robert Novak (Case 64 in Appendix C) was prosecuted for bribing Liberian officials in connection with a fraudulent on-line diploma ring.

19. Please provide information about recently issued guidelines on preventing, investigating and prosecuting bribery of foreign public officials in relation to government contracting opportunities for humanitarian relief and overseas development aid.

United States Government foreign assistance acquisition and assistance processes are regulated under the Federal Acquisition Regulation (FAR) and Agency for International Development Acquisition Regulations (AIDAR). Humanitarian relief and overseas development aid are generally provided through direct contracting with the U.S. Agency for International Development (USAID), and do not involve foreign public officials. Such contracts are awarded pursuant to FAR and AIDAR rules and are subject to the oversight of the Office of the Inspector General of USAID. In addition, the Government Accountability Office (GAO) may investigate all matters related to the disbursement and use of public money. There is a significant system of oversight of such contracts in the United States, even when such contracts are being awarded on an urgent basis.[11]

[11] The general rule in deciding between a public and private tender is that a full and open competition standard should be applied that permits all interested suppliers to participate in the procurement. However, under certain circumstances, including unusual or compelling urgency, limited competition is permitted. *See* the Federal Acquisition Regulations, Part 6.3. A Federal agency may not commence a procurement under this authority unless the agency justifies the use of such actions, or it is a violation of federal law. The justification must include the description of the supplies or services, the suppliers' unique qualifications, and a description of efforts made to ensure that offers are solicited from as many offerors as possible - to fully support the action.

Such contracts provide little opportunity for bribery of foreign officials to obtain or retain business, as the contracts are with the U.S., rather than a foreign, government. The pressure point for foreign corruption in such matters generally is related to the theft or misuse of such aid, rather than bribery to obtain or retain business. In February 2009, the Office of the Inspector General of USAID issued Guidelines for Financial Audits Contracted by Foreign Recipients, which assists in preventing such corruption. The Guidelines are designed to provide guidance to independent auditors who are reviewing the accounts of foreign-based recipients of USAID funding, including humanitarian assistance and development aid, whether through grants, contracts, or other means. In addition to Inspector General investigations and/or the use of audit standards promulgated by the Inspector General, federal contractors are subject to FAR cost accounting standards, as outlined in FAR Part 31, and audits by USAID, the Defense Contract Audit Agency (DCAA) pursuant to a memorandum of understanding between the USAID Office of Inspector General and DCAA, or other accounting entities (depending on type of entity) applying those standards.

As far as expedited procedures that may or may not be used to award or modify contracts for humanitarian response, such would not be any more (or less) susceptible to enabling corruption than the "normal" contracting procedures. While competition and/or source/origin restrictions may be waived in such procedures, all of the same checks prohibiting recovery for unallowable costs and proscribing illegal activities still apply. Moreover, payments to cooperating country officials in violation of FCPA still would not assist an entity in receiving a federal contract even under such expedited procedures. To the degree that FCPA violations occur in conjunction with procurements by a contractor in the cooperating country (or elsewhere) authorized under a Source, Origin and Nationality waiver, the same audit/cost accounting checks would still apply to such procurements.

In terms of direct contracting with foreign governments for humanitarian or development aid, such as contracting under the United Nations Oil for Food Program (OFFP) or with the multilateral development banks, U.S. enforcement has been robust and there is substantial expertise in investigating and prosecuting bribery of foreign public officials in such circumstances within the Department of Justice, the SEC, and the FBI. More than a dozen OFFP cases have been prosecuted in the United States, and bribery schemes involving funds of multilateral development banks have also been prosecuted.

20. Please comment on whether the recent use of undercover operations in FCPA investigations affects the options available to prosecutors (e.g. by making it more or less difficult to use deferred prosecution agreements or non-FCPA offenses).

The law enforcement techniques used to investigate a particular case have no impact on the options available to prosecutors in resolving a particular matter.

21. Please comment on whether the recent trend to target FCPA actions at specific high-risk sectors such as pharmaceuticals and life sciences, and defense contracting has

affected the options available to prosecutors (e.g. by making it more or less difficult to use deferred prosecution agreements or non-FCPA offenses).

Whether an investigation is directed at a particular company or an entire industry has no effect on the options available to prosecutors in resolving a particular matter.

22. Please comment on whether there has been an increase in the detection of FCPA cases through means other than voluntary disclosures.

Cases have long been detected through means other than voluntary disclosure. As enforcement has increased and awareness of the FCPA has grown, reporting to the Department of Justice and other law enforcement agencies has increased. In 2008, the Department of Justice estimated that approximately one-third of its active investigations were derived from voluntary disclosures and two-thirds were derived from other sources. The Department, FBI, and SEC continue to receive tips from emails, telephone calls, anonymous letters, agency referrals, media reports, foreign law enforcement, embassies overseas, and other sources, in addition to finding potential violations through the use of traditional law enforcement techniques. Indeed, it continues to be the U.S. Government's experience that voluntary disclosures make up approximately one-third of its active investigations.

23. Please comment on the detection of FCPA violations during mergers and acquisitions activities.

A company may have successor liability for FCPA violations. The violations may include conduct that occurred pre-acquisition/merger or conduct that continued after the acquisition/ merger was completed. Given the increase in companies held liable for FCPA violations pursuant to successor liability principles, more companies are implementing a robust pre-acquisition due diligence review of their intended merger partner or acquisition target. FCPA violations can be detected during the due diligence review if appropriate steps are taken. Some of the steps that can be used by a company to detect FCPA violations include assessing the corruption risks of the target company's line of business and countries in which the target company operates; reviewing the use of third-party intermediaries and agents; conducting FCPA focused audits; reviewing the target company's FCPA policies and procedures; and evaluating the company's handling of known compliance issues.

For example, the GE InVision case (Case 58 in Appendix C) involved FCPA violations that were detected during General Electric's pre-acquisition due diligence of InVision. General Electric reported the conduct to the U.S. authorities. Another example is the York International Corp. matter (Case 41 in Appendix C). York International engaged in FCPA violations prior to and during its acquisition by Johnson Controls. Johnson Controls worked with the U.S. authorities to detect the conduct. In the Titan Corporation matter (Case 60 in Appendix C), Titan's FCPA violations were uncovered as Lockheed Martin was contemplating a merger. Lockheed and Titan reported the conduct to the U.S. authorities. Ultimately, Lockheed did not proceed with the merger. A company anticipating a merger or acquisition has a range of options when it discovers FCPA violations by an intended merger partner or acquisition target. The company can decline going forward with the transaction or it can implement controls to prevent

future FCPA violations. Prompt reporting of the FCPA violations discovered during pre-acquisition due diligence is a factor considered by U.S. authorities in reaching a resolution.

FCPA violations can also be detected during post-acquisition activities. It is vital that companies take steps to immediately incorporate the new entity into its compliance program. During this critical stage, companies can detect red flags of FCPA violations. Finding such FCPA violations can ensure that the violations do not continue after the acquisition/ merger is complete. Prompt reporting of FCPA violations discovered post-acquisition is a factor considered by U.S. authorities in reaching a resolution. In addition, steps taken to quickly and fully integrate the new entity into the acquiring company's compliance program is also a factor considered by U.S. authorities.

In Opinion Procedure Release 08-02, the Department of Justice provided guidance on post-acquisition due diligence and disclosure to law enforcement authorities. A summary of that opinion is provided in section 2.1(b)(i) of the main questionnaire.

24. Please explain the DOJ policy on the use of FCPA proceedings against foreign companies when actions are pending against them in their home countries, and comment on whether pending or completed actions overseas affect the options available to US prosecutors (e.g. by making it more or less difficult to use deferred prosecution agreements or non-FCPA offenses).

There is no legal *ne bis in idem*, or double jeopardy, bar to successive prosecutions in the United States where the prior prosecution was by a separate sovereign. The Supreme Court has ruled that prosecutions for the same conduct by multiple sovereigns are constitutionally permissible. *See Abbate v. United States*, 359 U.S. 187, 195 (1959).[12]

Successive prosecution as a policy matter is addressed in the USAM 9-27.240. In determining whether prosecution should be declined because the target is subject to effective prosecution in another jurisdiction, the prosecutor should weigh all relevant considerations, including: (1) the strength of the relative interests of the U.S. and the other sovereign in prosecution; (2) the ability and willingness of the other jurisdiction to prosecute the matter effectively; and (3) the probable sentence upon conviction. In cases where there is a foreign sovereign involved, another important consideration is whether or not the foreign sovereign will make a decision regarding prosecution prior to the expiration of the U.S. statute of limitations.

In practice, in FCPA cases where there is concurrent jurisdiction, the analysis of which jurisdiction should prosecute (or whether there should be successive prosecution in the United States) generally involves extensive consultation with the foreign sovereign and includes the factors present in international and treaty law, as well as domestic policy and law in many

[12] U.S. constitutional jurisprudence regarding prosecution by dual sovereigns has developed primarily around the issue of successive prosecution by the federal government following prosecution by one of the constituent states of the United States (e.g., prosecution by the Southern District of Texas following prosecution for the same conduct by the state of Texas). This jurisprudence has evolved into what is known as the "Petite Policy," enumerated in USAM 9-2.031, but the Petite Policy does not apply to foreign sovereigns. Nonetheless, some of the principles inherent in the Petite Policy are applicable to foreign sovereigns, as described *infra* and in USAM 9-27.240.

countries, including, but not limited to: (1) location of the misconduct; (2) nationality and location of the defendants; (3) nationality and location of the victims; (4) location of evidence and witnesses; (5) the possibility of dividing the prosecution among the sovereigns; (6) delay in prosecution; and (7) investment of investigative resources.[13]

In addition, in the commentary to the U.S. Sentencing Guidelines § 5G1.3(b), expressly provides that, where a defendant is convicted for an offense for which they have already been convicted and sentenced by a state, the federal sentence should run concurrently with the state sentence. In keeping with this Guideline, the Department of Justice has reduced fines assessed under the Guidelines, or eliminated them altogether, in light of fines levied by foreign sovereigns. *See* Flowserve (Case 33 in Appendix C) and Akzo Nobel (Case 36 in Appendix C).

Because foreign prosecution is not a bar to prosecution in the U.S., such an issue has no impact on the ability to use DPAs or prosecute non-FCPA offenses. It may, however, have an impact on the ability of the United States to extradite an individual. On the other hand, the use by the U.S. of a DPA or an NPA as opposed to a plea agreement may alter a *foreign* jurisdiction's analysis of *ne bis in idem* issues.

25. Please comment on the detection of FCPA violations in the course of investigating entirely different conduct, such as antitrust and cartel conduct, securities fraud, and environmental crimes.

There have been a number of cases where FCPA violations have arisen in the course of investigations of other crimes. For example, the Nexus Technologies, Inc. case (Case 27 in Appendix C) arose out of an investigation of export violations; the marine hose case (Case 25 in Appendix C) came to light during a cartel investigation into the marine house business; the Nature's Sunshine case (Case 13 in Appendix C) arose during a securities fraud investigation; and the Saybolt International case (Case 83 in Appendix C) began as an investigation into violations of the Clean Air Act by the Environmental Protection Agency.

b. Plea Agreements, Deferred Prosecution Agreements (DPAs) and Non-Prosecution Agreements (NPAs)

26. Please explain the difference between a plea agreement, DPA, and NPA.

Under an NPA with a company, the government generally maintains the right to file charges but agrees not to do so, in exchange for a commitment on the part of the potential defendant to particular undertakings, generally including a waiver of the statute of limitations, ongoing cooperation, admission of the material facts, and compliance and remediation commitments, in addition to a reduced fine.[14] If the company complies with the agreement

[13] *See, e.g.*, Eurojust Guidelines, Annual Report 2003, "Which Jurisdiction Should Prosecute;" United Kingdom's Crown Prosecution Service Legal Guidance on Jurisdiction; Article 4 of the Agreement regarding the Sharing of Forfeited or Confiscated Assets or their Equivalent Funds, *2003 U.S.T. Lexis 20*, March 31, 2003.

[14] NPAs are also signed on occasion with individuals. Such NPAs generally do not require a fine or other punishment of the individual, nor compliance or remediation commitments. NPAs are usually signed with

throughout its term, the Department does not file criminal charges. NPAs do not require court approval not publicly filed with the court, although they are made available to the public through the Department's website.

Under a DPA, the Department files a charging document with the court,[15] but requests that the prosecution be "deferred" for the duration of the agreement.[16] Like NPAs, DPAs require commitments including waivers of the statute of limitations, admission of the relevant facts, compliance and remediation commitments, and the payment of a fine. Unlike NPAs, DPAs are subject to judicial review and approval. If the company completes the term of the agreement in full compliance, the Department will withdraw the charges. When a company successfully completes a DPA, it is not treated as a criminal conviction.

Plea agreements are governed by Rule 11 of the Federal Rules of Criminal Procedure. Rule 11 provides for a variety of options in entering a guilty plea. Under a plea agreement, the defendant admits to all the facts contained in a charging document (an indictment or information), admits guilt, and is convicted of the charged crimes. The plea agreement may jointly recommend a sentence or fine; it may jointly recommend an analysis under the U.S. Sentencing Guidelines; or it may leave such items open for argument at the time of sentencing. Plea agreements with legal persons almost always contain a jointly recommended fine pursuant to subsection (c)(1)(C) of Rule 11.[17] The plea agreement is presented to the court, which may accept the plea, reject the plea, or modify the plea (with certain exceptions). Rule 11 in its entirety is attached at Appendix 1.

Guilty pleas, DPAs, and NPAs may also require the appointment of an independent compliance monitor, although that is more common in the context of guilty pleas and DPAs than NPAs.

27. Please explain the criteria for deciding whether it is appropriate to use a plea agreement, DPA or NPA, including by referencing the 2008 DOJ Principles of Federal Prosecution of Business Organizations.

Determinations of when a DPA or NPA, as opposed to a plea or a determination to decline prosecution altogether, is most appropriate are based on the Principles of Federal Prosecution of Business Organizations, attached to the main questionnaire in Appendix F. For example, where there are significant collateral consequences to a prosecution, such as mandatory debarment for a company in the U.S. or overseas, a DPA might be more appropriate than a plea.

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individuals who are cooperating with an investigation and agreed to cooperate early on in the investigation. Unlike corporate NPAs, individual NPAs are generally not made public.

[15] Previously, the Department had occasionally agreed to DPAs with companies that were not filed with the court. That is no longer the practice of the Department.

[16] DPAs with individuals (often called pre-trial diversion) are very rare, and none have been signed in the context of an FCPA case.

[17] The notable exception is the Nexus Technologies, Inc. plea (Case 27 in Appendix C), where the U.S. Sentencing Guidelines required termination of all business operations and the surrender of all assets to the court.

The attached chart (Appendix 2), based on the Government Accountability Office's analysis of DPAs and NPAs, demonstrates the continuum of the application of the Principles.

28. Please describe the level of court involvement in practice in each of these types of agreements. If the court is not involved in any of these types of agreements, please explain what kind of system is in place to review a prosecutor's use of discretion in this regard.

As described above, plea agreements and DPAs require the approval of a court; NPAs do not. Any settlement decision, whether plea, DPA, or NPA, goes through an approval process within the Department, which requires the review and approval of at least one Deputy Chief and the Chief of the Fraud Section. Depending on the circumstances, they may also require the approval of a Deputy Assistant Attorney General and the Assistant Attorney General for the Criminal Division.

29. Please explain the process and criteria for nominating an external monitor for DPAs by referencing the DOJ Guidelines on Corporate Monitors in Criminal Cases (March 2008), and including whether there is a bidding process for the monitoring contracts, how monitors are paid, how much they are usually paid, how their independence is ensured, and what role the DOJ can play if there are conflicts between the company in question and the monitor.

The March 2008 Guidelines on Corporate Monitors has been supplemented by the June 2009 guidelines on the Selection of Monitors in Criminal Division Matters, attached as Appendix 3.

There is no bidding process for monitor contracts. Rather, the company that will be subject to the monitorship nominates three candidates for the monitorship. Those candidates are evaluated by the Department of Justice (and the SEC, if appropriate) to determine their qualifications. If a candidate is determined to be unqualified, the company can nominate a new candidate to replace them. The Department then interviews each of the candidates and selects one of the three. The selection is reviewed by the Standing Committee on the Selection of Monitors, which is comprised of a Deputy Assistant Attorney General, the Chief of the Fraud Section, and the Deputy Designated Agency Ethics Official for the Criminal Division. The recommendation of the Committee is then reviewed by the Assistant Attorney General for the Criminal Division and the Office of the Deputy Attorney General. In some cases, the court before which the matter was filed may reserve final approval of the candidate.

How a monitor is paid is determined by agreement between the company and the monitor, which may be by hourly fee, or may be a fixed fee per year, or other arrangements.

If there are conflicts between the monitor and the company, the monitorship agreements generally require that those disagreements be brought to the Department for resolution to ensure the independence of the monitor. In addition, monitors cannot have previously represented the company and cannot represent the company for a certain number of years after the conclusion of the monitorship.

In the Innospec matter (Case 3 in Appendix C), the judge presiding over the case retained oversight of the monitor as well, requiring that the monitor's reports also be submitted to the court. In that matter, disputes between the company and the monitor may also be brought to the attention of the court for resolution, including concerns about the monitor's fees.

30. Please explain whether a company that has entered a DPA or NPA for an FCPA violation is automatically barred from any forms of government contracting or licensing. Please comment on the interaction between the terms of FCPA sanctioning (e.g. plea agreement, DPA or NPA) and the application of consequential discretionary debarment by other US government agencies.

As discussed in the answer to question 15 above, collateral consequences, including debarment from U.S. or foreign government contracting, must be taken into consideration in making charging decisions pursuant to USAM 9-28.1000. With respect to a company entering a plea, DPA, or NPA, USAM 9-28.1300 also provides that where a corporation is a U.S. government contractor, permanent or temporary debarment may be appropriate. Pursuant to the regulations promulgated in the Federal Acquisition Regulations Subpart 9.4, independent debarment authorities, such as the Department of Defense or the General Services Administration, analyze a number of factors to determine whether a company should be suspended, debarred or otherwise determined to be ineligible from government contracting. While pleas, DPAs, and NPAs do not result in automatic debarment from U.S. government contracting, committing a federal crime and the factual admissions underlying a resolution are factors that the independent agencies may consider. Where the company was engaged in fraud against the government, a prosecutor may not negotiate away an agency's right to debar or delist the legal person. USAM 9-28.1300.

In making debarment determinations, contracting agencies, including on the state and local level, may consult with the Department in advance of awarding a contract. Depending on the circumstances, the Department may agree to make certain representations about the facts underlying the criminal conduct and remediation measures to contracting authorities in the context of the corporate settlement. In some situations, the contracting agency may impose its own oversight requirements in order for a company that has admitted to violations of federal law to be awarded federal contracts, such as the Corporate Integrity Agreements often required by the Department of Health and Human Services.

Other regulatory regimes, such as arms export licensing pursuant to the Arms Export Control Act (AECA), 22 U.S.C. §§ 2751, et *seq.*, and the International Traffic in Arms Regulations (ITAR), 22 C.F.R. §§ 120, *et seq*., are also implicated by pleas, DPAs, or NPAs related to FCPA. The AECA and ITAR set forth certain factors for the Department of State to consider when determining whether to grant, deny, or return without action license applications for certain types of defense materials. One of those factors is whether there is reasonable cause to believe that an "applicant" for a license has violated (or conspired to violate) the FCPA; if so, the Department of State "may disapprove the application." 22 U.S.C. §§ 2778(g)(1)(A)(vi) and (g)(3)(B). In addition, it is the policy of the Department of State not to consider applications for licenses involving any persons who has been convicted of violating the AECA or convicted of conspiracy to violate the AECA. 22 C.F.R. § 127.7.

31. Please summarize the application of the U.S. Sentencing Guidelines to plea agreements.

As a matter of policy, the Department of Justice follows the U.S. Sentencing Guidelines in all of its resolutions, including pleas, DPAs, and NPAs, with appropriate reductions for cooperation, remediation, pre-existing compliance programs, and the like. In the specific case of plea agreements, the Department must explain the U.S Sentencing Guidelines analysis to the judge at the time of the plea, and if there is a variation from the Guidelines it must also be explained. A judge may reject a plea agreement if he or she does not agree that the proposed sentence appropriately reflects the Guidelines or the seriousness of the conduct. In many cases involving individuals, in fact, the Department does not agree on a particular sentence in advance, but rather presents an agreed assessment of the applicability of certain aspects of the Guidelines. Relevant aspects of the Guidelines are attached to the main questionnaire at Appendix G.

c. <u>Securities and Exchange Commission</u>

32. Please describe the extensive internal administrative changes at the SEC in 2009 and 2010 to increase the effectiveness of FCPA enforcement, and plans to introduce new enforcement tools.

On January 13, 2010, the Enforcement Division of the SEC announced the creation of a specialized unit that will focus on violations of the Foreign Corrupt Practices Act. 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 here and abroad.

Also on January 13, 2010, the Enforcement Division announced additional enhancements to its program to recognize cooperation. 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 our 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. Our new program will provide similar incentives to individuals and it will give the Division more options in terms of resolutions with defendants. We expect that the FCPA program will benefit from these enhancements because individuals will have greater incentives to come forward and alert us to potential violations. The enhancements include cooperation agreements, which are formal written agreements in which the Division of Enforcement will agree to recommend to the Commission that a cooperator 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 tool. 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.

33. Please comment on the recent statement of Cheryl Scarboro, Chief of the new FCPA unit at the SEC that the SEC will be less reliant on self-reporting and more proactive through for instance targeted sweeps. Please comment on whether this policy will affect the regulatory and sanctioning options available to the SEC (e.g. by making it more or less difficult to coordinate settlements with the DOJ).

A primary mission of the SEC Enforcement Division's FCPA Unit is to devise ways to be more proactive. Members of the FCPA Unit will gain in-depth knowledge of industries and regional practices. This will help them to uncover corrupt practices that might otherwise go undetected. In addition, since corruption is often systemic in nature, the Unit will conduct more targeted sweeps and sector-wide investigations, alone and with other regulatory counterparts, both here and abroad. The SEC conducts its FCPA enforcement program in close coordination with its criminal regulatory counterparts at the Department of Justice. DOJ has announced a similar focus on proactive enforcement measures and the SEC and DOJ will continue to work closely in these efforts. The SEC and DOJ coordinate the investigation and the resolution of most FCPA matters, and both agencies expect to continue to do so going forward.

VI. Mutual Legal Assistance

34 Please comment on whether and if so how the United States has obtained disclosure from multilateral financial institutions (MFIs), such as the World Bank, concerning FCPA violations detected by those institutions. Please comment on whether reliance on disclosures from MFIs affects the options available to prosecutors (e.g. by making it more or less difficult to use deferred prosecution agreements or non-FCPA offenses).

The United States has worked with MFIs on a number of occasions, including the prosecution of an employee of the World Bank for FCPA violations (Case 72 in Appendix C). The U.S. has both provided information to and received information from MFIs to assist in investigations and prosecutions, when it is possible to share such information. Such cooperation has no impact on the options available to prosecutors in resolving a particular matter.

35. Please describe the use of informal assistance when requested by the United States regarding FCPA violations and when provided by the United States regarding foreign proceedings for the bribery of a foreign public official, including when requested from and provided to Parties of the Convention and non-Parties to the Convention. Please comment on whether reliance on informal assistance affects the options available to

prosecutors (e.g. by making it more or less difficult to use deferred prosecution agreements or non-FCPA offenses).

The United States both provides and uses informal assistance in investigating and prosecuting foreign bribery violations. The use of informal assistance has no impact on the options available to prosecutors in resolving a particular matter.