



DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS

CANADA: PHASE 2

**FOLLOW-UP REPORT ON THE IMPLEMENTATION
OF THE PHASE 2 RECOMMENDATIONS ON THE APPLICATION OF
THE CONVENTION AND THE 1997 RECOMMENDATION ON
COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN
INTERNATIONAL BUSINESS TRANSACTIONS**

This report was approved and adopted by the Working Group on Bribery in International Business Transactions on 21 June 2006.

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SUMMARY AND CONCLUSIONS BY THE WORKING GROUP ON BRIBERY

a) Summary of Findings

1. Canada presented its Written Follow-Up to the Phase 2 Report¹, outlining its responses to the Recommendations adopted by the Working Group on Bribery (WGB), at the March 2006 meeting of the WGB. Since its evaluation under Phase 2, Canada has taken important steps in a number of areas to implement the Recommendations adopted by the Working Group.

2. Since the Phase 2 Report, Canada has recorded one conviction for violation of the Corruption of Foreign Public Officials Act (CFPOA), resulting in the sentencing of a legal person to a CDN 25 000 fine (EUR 17 710; USD 21 580).² No additional investigations or prosecutions have been reported. It was commented that the absence of more cases is surprising given the extent of Canada's international economic engagement.

3. Canada has taken a number of initiatives to further raise the level of awareness of the foreign bribery offence and the OECD Convention. Notably, the Canadian Department of Foreign Affairs and Trade (DFAIT) reports that it has made efforts to include material on corporate social responsibility and bribery in official publications. In addition, DFAIT transmitted, in September 2003 and March 2006, messages to its staff in Canada and in missions abroad regarding promotion of corporate social responsibility, including issues of foreign bribery. These messages also recalled DFAIT policy in terms of reporting concerns of foreign bribery by Canadian individuals or corporations. Canada reports that agencies with major involvement with Canadian companies operating abroad, such as the Canadian International Development Agency (CIDA) and Export Development Canada (EDC), have provided training for their staff, and undertaken further awareness raising initiatives for applicants. Canada further stated that it was conscious that such awareness raising efforts should be maintained at all times, and plans to pursue such efforts accordingly.

4. The Canadian authorities also reported noteworthy efforts in the area of coordination among law enforcement authorities. Since 2004, a formal information gathering and sharing process has been put in place. Under this mechanism, the federal government and provincial prosecution authorities exchange information at least once a year on foreign bribery prosecutions and investigations, including with regard to the charges laid or foreseen, the status of the inquiry or prosecution, etc. at one of their regular meetings. This information is then included in the Annual Report to Parliament regarding enforcement of the CFPOA. However, at the police level, although the Royal Canadian Mounted Police (RCMP) has put in place measures to help ensure better coordination, there is still no national coordinating agency. Canada assured the Working Group that the system functions well in practice.

5. In its Phase 2 evaluation, the Working Group adopted a number of Recommendations with respect to accounting and auditing legislation. Since then, consideration has been given to

¹ The Phase 2 Report of Canada was approved by the Working Group on Bribery in March 2004.

² Rate as of 20 March 2006.

strengthening the false accounting offence under federal legislation. Given that the Canada Business Corporations Act (CBCA) is due to be reviewed by a Committee of the Canadian Parliament starting December 2006, this is an issue that Parliament may decide to address. Following the review, the Committee may recommend legislative amendments that would address concerns raised by the Working Group. This initiative was encouraged by the Working Group. As concerns internal company controls, provincial and territorial securities regulatory bodies in every Canadian jurisdiction other than British Columbia³ are in the process of adopting a multilateral instrument regarding reporting on internal controls, which will be applicable to the majority of reporting issuers in Canada. With regard to reporting by auditors, the Working Group acknowledged that Canada has in place mechanisms for auditors to report material misstatements to audit committees or the equivalent level of management. Nonetheless, the Working Group was of the opinion that the system of reporting might work more effectively by providing auditors with the possibility of directly reporting to the prosecutorial authorities. The Working Group also remained concerned over issues of auditor independence, which is provided for only through professional rules but not legal provisions, and of auditing of private companies (pursuant to the CBCA, only public companies are required to submit to an independent external audit), an issue which has not been revisited by Canadian authorities since the last amendment of the CBCA in 1994.

6. Canada reported key developments in the area of reporting and detecting foreign bribery offences. Most notably, as concerns whistleblower protection, the Public Servants Disclosure Protection Act, adopted by Parliament and which received Royal Assent on 25 November 2005. Although the PSDPA is law, it has not yet come into force. The PSDPA provides the possibility for public servants to report alleged offences within their own agency or to the Public Sector Integrity Commissioner, and protects those who make disclosures. Additionally, and with regard to all employees, the Criminal Code was amended in 2005 to prohibit any employer from taking retaliatory action against an employee in cases where that employee reported a breach of a federal or provincial law to a law enforcement authority. Canada also reported that detection of foreign bribery offences may be enhanced with the adoption by EDC of its Anti-Corruption Policy Guidelines, formalised in January 2004, which include a section on the reporting of credible foreign bribery allegations to EDC's Management and Legal Services (who may then refer these to law enforcement authorities). However, Canada has taken no action to implement the Recommendation concerning information sharing by tax authorities, and has maintained the prohibition against reporting non-tax criminal offences detected in the course of tax audits. The reasons provided to the Working Group during the Phase 2 evaluation were reiterated. This response was not considered satisfactory by the Working Group, which continues to consider this as a serious deficiency.

7. Regarding the foreign bribery offence, the Working Group acknowledged that the question of the definition of small facilitation payments dealt with in Recommendation 5(a) was an issue for a number of Parties to the Convention. The Working Group requested that Canada keep the Working Group abreast of developments in this respect, as case law develops. Regarding the other element of the offence – i.e. the requirement that the purpose of the bribe be for obtaining an advantage in the course of business “for profit” – that had been raised as an issue in Phase 2, the Working Group noted that the Convention does not draw a distinction between transactions that are “for profit” and “not for profit.” Therefore, the Working Group continues to consider that this additional criterion imposed by the CFPOA could create a problem in the enforcement of the foreign bribery offence in Canada, notably as many non-profit organisations operating internationally are based in Canada.

³ It should be recalled that, under the Canadian accounting and securities law system, the federal government has limited constitutional competence. It is the provinces, which coordinate through the Canadian Securities Administrators, who legislate through the adoption of multilateral instruments and policies.

8. Regarding prosecution of the offence, Canada reported that it has amended the Federal Prosecution Service (FPS) Deskbook to include therein an obligation for prosecutors to set out in writing the grounds for not prosecuting “in the public interest” although there is sufficient evidence to do so. While the Working Group acknowledged that this constitutes a significant step in increasing transparency of prosecutorial decisions not to prosecute, the Working Group noted that Canada has not similarly amended the FPS Deskbook to clarify that, in investigating and prosecuting the bribery of a foreign public official, there are no proper considerations of national economic interest, the potential effect on relations with another state, or the identity of the natural or legal entities involved, as prescribed under Article 5 of the Convention and Recommendation 5(d) of the Phase 2 Report of Canada. Canada reminded the Working Group of the letter Canada sent at the time of ratification and pointing out its “clear understanding that the obligation contained in [Article 5] is to ensure that investigation and prosecution of bribery is not influenced by improper considerations of national economic interest, the potential effect on relations with another state, or the identity of the natural or legal entities involved” [underlining added]. While the Working Group acknowledges that this letter was indeed circulated at the time of ratification of the Convention by Canada, the WGB underlines that the Convention’s preamble recognises that achieving equivalence among measures to be taken by the Parties is an essential object and purpose of the Convention and that this requires that the Convention be ratified “without derogations affecting this equivalence.”

9. An area of major concern identified during the Phase 2 evaluation was that Canada does not provide for nationality jurisdiction for the foreign bribery offence. Canada takes the view that, under the Convention, Parties are only required to review whether their current basis for jurisdiction is effective to fight corruption, that Canadian courts have applied broadly territorial jurisdiction, and that, consequently, Canada’s current basis for jurisdiction is effective for the purpose of enforcing the foreign bribery offence. As discussed in the Phase 2 evaluation, the Working Group considered that the application of territorial jurisdiction in Canada is in fact much narrower than in most other Parties to the Convention, as existing case law requires substantial links between the offence and Canada. Furthermore, the Working Group underlines that Article 4.2 of the Convention requires those Parties that have established nationality jurisdiction for other offences to apply it for the foreign bribery offence. As indicated in the Phase 2 Report, Canada has established extraterritorial jurisdiction over offences including the following: air piracy, the sexual exploitation of children, terrorist acts, offences against internationally protected persons, the protection of nuclear material, torture, war crimes, murder and bigamy. The Canadian authorities explained, at the time of the Phase 2 evaluation, that nationality jurisdiction was not established over the foreign bribery offence because it has generally been the policy to only take extraterritorial jurisdiction where there has been a treaty obligation to do so. Since Canada has established nationality jurisdiction for a number of serious offences but not the foreign bribery offence, the Working Group considers that Canada should be in a position to adopt a similar approach pursuant to Article 4.2 of the Convention and establish nationality jurisdiction for foreign bribery. Furthermore, the Working Group noted that Canada is the only Party to the Convention which has still not established nationality jurisdiction for the foreign bribery offence.

10. With regard to sanctions, the Working Group welcomed steps taken by the EDC and CIDA to review their policies to consider debarment procedures for applicants convicted of foreign bribery, and encouraged the Public Works and Government Services Canada to adopt similar policies in the context of public tenders. In the area of statistics gathering, Canada has made significant efforts to develop a system to collect information on sanctions for foreign bribery offences, including sentences handed out to natural and legal persons, and related accounting offences. However, this issue will require continued follow-up to verify whether this collection of information will be adequate to provide useful statistical information to enable an evaluation on the appropriateness of sanctions. The Working Group also encouraged Canada to pursue its efforts in ensuring that all quantitative and

qualitative information on sanctions, including where these result from a plea-bargaining process and are not confidential, is made available to the Working Group.

b) Conclusions

11. Based on the findings of the Working Group on Bribery with respect to Canada's implementation of its Phase 2 Recommendations, the Working Group reached the overall conclusion that Recommendations 1, 3(c), 3(d), and 4(a) have been implemented satisfactorily or dealt with in a satisfactory manner. Recommendations 2, 3(a), 4(b), 4(d), 5(d), 5(e), and 5(f) have been partially implemented. Recommendations 3(b), 4(c), and 5(c) have not been implemented. Recommendation 5(b) requires further consideration from Canada. The Working Group acknowledged that Recommendation 5(a) is a general issue for several Parties to the Convention.

12. The Canadian authorities agreed to report orally on the implementation of Recommendations 2, 3(a), 3(b), 3(c), 4(b), 4(c), 4(d), 5(b), 5(c), 5(d), 5(e), and 5(f), within one year, i.e. by 31 March 2007.

WRITTEN FOLLOW-UP TO PHASE 2 REPORTS

Name of country: Canada

Date of approval of Phase 2 Report: 25 March 2004

Date of information: 08 March 2005

Part I: Recommendations for Action

Text of Recommendation 1:

The Working Group recommends that, with respect to promoting awareness of the Convention and the CFPOA, Canada establish a more systematic and coordinated approach to promoting awareness, and increase efforts to promote awareness of the CFPOA in all the government agencies involved in the implementation of the CFPOA. (Revised Recommendation, Paragraph I)

Actions taken as of the date of the follow-up report to implement this recommendation:

The Department of Foreign Affairs and International Trade (DFAIT)

On March 01, 2006, a broadcast message was sent to all staff of the Department both in Canada and abroad reminding employees of the Department's policy regarding Canadian companies and individuals involved in cases of corruption and bribery. The message mentioned the OECD Convention and the *Corruption of Foreign Public Officials Act (CFPOA)* and indicated that staff who have concerns regarding the conduct of Canadian companies or individuals should bring these concerns to the attention of their supervisors, the Post Support Unit or to the Values and Ethics Division of DFAIT. Commencing in September 2006, one day of the introductory training program for incoming Foreign Service officers will be dedicated to issue of Values and Ethics including issues of corruption and foreign bribery.

In September 2003, the deputy ministers of International Trade Canada and Foreign Affairs Canada transmitted a message to Canadian missions abroad regarding recommendations on how they should promote Corporate Social Responsibility (CSR) to Canadian businesses abroad and that the promotion of CSR was a departmental priority. These recommendations included specific instructions on how to promote the *CFPOA* and to counsel businesses against engaging in foreign bribery. Preventing and combating foreign bribery is an important component of the Department's CSR agenda. The Department of Foreign Affairs and International Trade is in the midst of preparations for a series of roundtables that will take place across Canada in 2006. The roundtables are being organized to include representatives of the private sector, civil society, various levels of government, and other stakeholders. The objective of the roundtables is to discuss issues arising out of the report of the Parliamentary Standing Committee on Foreign Affairs and International Trade on "Mining in

Developing Countries and Corporate Social Responsibility” which was submitted to the Parliamentary Standing Committee on June 22, 2005.

DFAIT has added a corruption page to its website with, among others, links to the *CFPOA*, the Annual Report to Parliament on Enforcement of the *CFPOA*, the *Guide to the CFPOA*, the OECD “Bribery in International Business” site and various civil society sites such as TI. The Minister of Foreign Affairs submits an Annual Report to Parliament on the enforcement of the *CFPOA* and the implementation of the OECD Convention, the latest version of the report can be found at:

http://www.dfait-maeci.gc.ca/internationalcrime/6-report_parliament-en.asp

The Trade Commissioner Service Renewal Division has included anti-bribery, anti-corruption and Corporate Social Responsibility (CSR) discussions, illustrations and case studies into the "Global Learning Initiative for Commercial Section Staff", a professional development course developed for the needs of the Trade Commissioner Service. By March 31, 2006, 534 Trade Commissioner Service staff from 94 missions in Canada and abroad will have received this training. Approximately 360 additional staff from 67 missions will receive this training in fiscal year 2006/07. The issues of anti-bribery, anti-corruption and CSR have generated substantial discussion among participants with many requesting further guidelines and guidance from Ottawa on these important issues.

In March 2003, all 116 trade program managers representing our missions abroad received a package containing a “Core Values” learning tool, designed to assist managers in communicating and discussing the Trade Commissioner Service’s six core values in an engaging and informative way. This tool is available to all trade staff through their program managers. The tool is a series of practical exercises and scenario dilemmas intended to discuss and address staff handling of instances of alleged corruption and other difficult situations. One module in this learning tool concerns “integrity” including foreign bribery. Additionally, a handbook with further guidelines to help employees deal with questions and situations regarding integrity is currently being developed and will be available to all employees.

The Trade Commissioner Service of International Trade Canada recently added the promotion of CSR, which includes counselling Canadian businesses against engaging in foreign bribery, to its list of roles and activities. Horizons, one of the Department’s intranet websites, now provides information to Canadian trade officers on how to counsel businesses abroad on the *CFPOA* and the risks of bribery.

In March 2004, International Trade Canada implemented a pilot training course in CSR for all Manila-based trade staff as well as participants from other missions in SE Asia. A module of this two-day course was devoted to foreign bribery and corruption. This pilot has been evaluated and feedback from participants factored into similar training tools. A kit has been developed that can be used by Trade Program Managers in the missions to train their staff re issues of foreign bribery and corruption. One such course took place in Mexico City in May 2005 and others are expected to follow.

Canadian International Development Agency (CIDA)

Over the past decade CIDA's governance programming has comprised roughly 3000 projects valued at more than C\$3 billion. In 2004-05, spending on good governance amounted to approximately C\$587 million. In general, CIDA invests roughly 18-20% of its programming money on good governance.

In October 2003, CIDA included the *CFPOA* and international anti-corruption conventions, including the OECD Convention, in its training program for new officers and locally-engaged Professionals. An anti-corruption network parallel to the existing governance network was created within CIDA for more direct and active consultations between the various branches of CIDA and its field staff.

In December 2003, a policy paper entitled "Corruption and the Development Challenge" was published in CIDA's Journal of Development Policy and Practice, a journal for the Canadian development community. This was followed up by a Feb 11, 2005 seminar on Corruption and Development Effectiveness held at CIDA's HQ. In late 2004, CIDA created a link to the OECD Convention on its website for general public knowledge and use.

In June 2004, CIDA circulated an Anti-Corruption Scoping Study which provides an overview of anti-corruption policy and programming activity in the agency. This was followed by updating the Scoping Study and presenting to the anti-corruption network the potential anti-corruption activities CIDA might consider pursuing. CIDA is exploring the possibility of developing other initiatives with the objective of main-streaming anti-corruption throughout the Agency's activities. In its recent Strategic Directions Paper, anti-corruption is depicted as a critical component of CIDA's good governance work, thereby raising the strategic importance of the issue. CIDA Policy has upgraded the focus on anti-corruption as a potential flagship initiative of the Agency.

Export Development Canada (EDC)

EDC recognizes that it is essential to build awareness among its customers about this important aspect of international trade, which for EDC begins with educating its employees. As such, EDC provided training to all its employees on the OECD Convention, the Action Statement on Bribery and Officially Supported Export Credits, and the policy and procedures in place at EDC to combat bribery in international transactions. Upon commencing their employment with EDC, new employees receive this training and each year Board Members, all executive staff and managers and team leaders are given a refresher on its Code of Business Ethics/Code of Conduct (which contains provisions on anti-corruption) and all employees sign that they have re-read and will abide by said Code.

With respect to informing its customers, EDC has devoted an entire page on its web-site to post information about EDC's Anti-Corruption Program as well as links to the *CFPOA*, the OECD Convention, and the OECD Export Credits Group Action Statement on Bribery. As well, EDC developed an anti-corruption brochure that is systematically distributed every quarter to its new customers to inform them of the potential risks they face if exposed to corrupt business practices, and to encourage the development of corporate best practices in this area. The brochure is a practical guide and explains the challenges of avoiding corruption in international trade, and suggests actions companies might take to protect themselves. In addition to the distribution of its brochure, EDC continues to exploit other opportunities to communicate to its customers and will do so, for example, via articles in its quarterly magazine, *ExportWise*, on this subject, and/or through industry association trade publications.

Public Service Human Resources Management Agency of Canada (PSHRMAC)

The Office of Public Service Values and Ethics is in the process of developing a three-year communications strategy to strengthen values and ethics in the public sector. As part of this strategy, the Office will develop a comprehensive communications plan in preparation for the potential implementation of disclosure protection legislation.

Canada Revenue Agency (CRA)

The CRA has developed a section in its Audit Manual to deal with the application of section 67.5 of the Income Tax Act as it relates to outlays and expenses incurred under section 3 of the *CFPOA*, September 2004. As well, CRA revised its Investigation Manual to include a reference to the *CFPOA* and a link from the reference to the *CFPOA* to the section of the Manual dealing with non-deductibility of illegal payments in February 2005. In conjunction with the changes to the Audit and Investigations Manuals, auditors were advised of the manual changes by a "What's New" reference on the Audit Manual Intranet site to make them aware of the implications of the Act.

If no action has been taken to implement this recommendation, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

Text of Recommendation 2:

Concerning the investigation and prosecution of cases involving the bribery of foreign public officials, the Working Group recommends that Canada consider establishing a coordinating role for one of the principal agencies responsible for the implementation of the CFPOA for purposes including the following: 1. Collecting information from the police and prosecutorial authorities at the federal and provincial levels about investigations and prosecutions to ensure that, for instance, resources are not duplicated where more than one authority has jurisdiction; and 2. Maintaining specialized knowledge on the CFPOA to be available to the provincial (and where applicable, municipal) authorities involved in the enforcement of the offence. (Revised Recommendation, Paragraph I)

Actions taken as of the date of the follow-up report to implement this recommendation:

1. Collecting Information

The criminal offence of bribing a foreign public official found in the *CFPOA* can be prosecuted by provincial Attorneys General and by the Attorney General of Canada. When *CFPOA* offences are not prosecuted by the Attorney General for Canada, it is however expected that the Federal Prosecution Service will still be involved in a number of these prosecutions because of their international component.

Information on on-going prosecutions is included in an Annual Report to Parliament that the Minister of Foreign Affairs, the Minister of International Trade, and the Minister of Justice are required by law to prepare on the implementation of the OECD Convention, and on the enforcement of the *CFPOA*. The Department of Justice collects information on prosecutions under the *CFPOA* from provincial authorities and this information, when it exists, is included in the Annual Report to Parliament. The collection of this information was formalized in 2004. The federal government gathers information once a year from its Regional Directors and from the Heads of the provincial Prosecution Services on prosecutions under the *CFPOA* on the occasion of the Summer Meeting of Federal-Provincial Heads of Prosecution. A formal request for information is made to all jurisdictions in advance of the meeting. The jurisdictions are invited to complete a form if prosecutions have been commenced. This form includes: information on the accused, a summary of the facts, the current status of the case, next steps, and the outcome of the case, if completed. In addition, inquiries are made by federal officials to update this information, using a well-established network of contacts, just before finalizing the Annual Report.

Meetings of the Federal and Provincial Heads of Prosecution are held a few times a year. This is a standing mechanism and these meetings provide a forum for discussing issues of common interest and concern, dealing with issues of coordination as required and sharing information.

Canada is of the view that the above-mentioned processes are effective and ensure the collection of complete information on *CFPOA* prosecutions across the country.

Investigations of a sensitive nature are tracked and monitored on a case by case basis by the Royal Canadian Mounted Police (RCMP) Commercial Crime Branch. Despite shared jurisdiction for the *CFPOA*, given current practice and experience the RCMP is confident that the nature of existing municipal, provincial and federal law enforcement relationships and responsibilities will result in *CFPOA* complaints/matters being referred to the RCMP Commercial Crime Branch. As has been observed, Justice Canada collects information from provincial authorities about prosecutions under the *CFPOA* for inclusion in the Annual Report to Parliament. This collection of information concerning *CFPOA* prosecutions which was formalized in 2004 can be used as a check to ensure that *CFPOA* matters are coming to the attention of the RCMP.

In January 2005, the RCMP for the first time appointed a commissioned officer to provide functional oversight of its anti-corruption programs. The RCMP is also developing a protocol to track *CFPOA* cases being handled by the Force and other police agencies. Furthermore, the *RCMP's PROOF Criteria and Weights: Commercial Crime* system, which determines the priority to be assigned to incoming cases and already placed high priority on fact situations involving corruption, was amended in February 2005 to specifically include the *CFPOA* as a positive criterion.

2. *Maintaining centralized knowledge*

Experts on the OECD Convention and the *CFPOA* work in the RCMP, the Department of Justice, and the Department of Foreign Affairs and International Trade. These experts are prepared to assist federal and provincial prosecutors, as well as federal, provincial and municipal law enforcement authorities. In addition, as mentioned, there is shared federal-provincial jurisdiction for the prosecution of *CFPOA* offences, it is expected that the Federal Prosecution Service will be involved in a majority of these prosecutions given their international component. The one conviction under the *CFPOA* to date was obtained by a provincial crown attorney following an investigation conducted by RCMP Commercial Crime. The RCMP's Commercial Crime Sections would also provide the necessary expertise and would consult and notify the national program office at RCMP Headquarters.

If no action has been taken to implement this recommendation, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

Text of Recommendation 3 (a):

With respect to the prevention and detection of the bribery of foreign public officials through accounting requirements, external audit and internal company controls, the Working Group recommends that Canada:

Consider the introduction of amendments to the federal Canada Business Corporations Act (*CBCA*) to prohibit the making of off-the-books accounts and transactions, the recording of non-existent transactions, and the use of false documentation, and consult with the provinces in an effort to ensure that the provincial legislation also meets these standards [Convention, Article 8.1; Revised Recommendation, Paragraph V. A. (i)]

Actions taken as of the date of the follow-up report to implement this recommendation:

Canada's approach is that it is more appropriate that such prohibitions be dealt with through criminal

law and that they be reinforced by the self-regulating accounting institutions and oversight bodies. The recent establishment of the Canadian Public Accountability Board (CPAB) by the federal and provincial governments and chartered accountants will also have a strong influence on standards, rules of professional conduct and governance practices. Corporate legislation in Canada plays a role in recognizing the standards of self-regulating bodies and giving them regulatory authority. Canada believes that if persons establish off-the-books accounts, make off-the-books or inadequately identified transactions, record non-existent expenditures, enter liabilities with incorrect identification of their object, or use false documents, for the purpose of bribing foreign public officials or of hiding such bribery, a number of *Criminal Code* provisions may come into play.

Key *Criminal Code* provisions that are particularly relevant include: ss. 321 (definition of “false document”), 362 (false pretence or false statement - maximum imprisonment 10 years), 366 (forgery - maximum imprisonment 10 years), 380 (fraud - maximum imprisonment 10 years), 397 (falsification of books and documents - five years) and 400 (false prospectus - 10 years).

If no action has been taken to implement this recommendation, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

The *CBCA* does not govern accounting standards. Instead, the Regulations to the *CBCA* specifically state that financial statements be prepared with generally accepted accounting principles as set out in the Handbook of the Canadian Institute of Chartered Accountants. In earlier consultations related to *CBCA* reform, it was generally agreed upon by stakeholders that the *CBCA* not be prescriptive in such areas.

The *CBCA* sets out the legal and regulatory framework for federally-incorporated business corporations, excluding financial institutions. While more than 155,000 businesses, including about half of the 100 largest corporations in Canada, are incorporated under the *CBCA*, the rest are incorporated in one of the 13 provinces and territories; most in Ontario. The *CBCA*, therefore, governs only some 15 percent of all corporations listed in Canadian stock exchanges.

An argument can be made that changes to the *CBCA* would, in time, be adopted by the provinces, thereby creating a harmonized regime in Canada. However, while it is true that provincial corporate administrators often look to the federal government as standard-setters in the area of corporate governance, there is no guarantee that they will follow suit, particularly in the short to medium term. For any regime to work properly, it would have to cover not only *CBCA* corporations, but financial institutions, cooperatives, provincial and territorial corporations and perhaps not-for-profit corporations (in all jurisdictions). The Working Group's recommendation, as is, would at best be a stop-gap measure.

That being said, there is a statutorily required review of the *CBCA* that must be commenced by a Parliamentary Committee before the beginning of December, 2006. The Government of Canada will consider the Working Group's recommendation if called upon to suggest topics for examination by the Committee.

Canada is the only country to have received such a prescriptive recommendation regarding this issue during a Phase 2 examination. Canada's treatment of this issue is similar to that of at least one other Country reviewed under Phase 2 which also criminalizes false documentation in its *Penal Code* while not expressly prohibiting off-the-books or inadequately identified transactions in its *Accounting Act*. However, that country received no recommendation in this area.

Text of Recommendation 3 (b):

With respect to the prevention and detection of the bribery of foreign public officials through accounting requirements, external audit and internal company controls, the Working Group recommends that Canada:

Review the relevant legislation in consultation with the provinces to consider: 1. whether the requirements to submit to an independent external audit are adequate, in view of the rule that permits large private corporations to exempt themselves from the requirement; and 2. broadening the prohibitions for participating in audits in order to improve auditor independence. [Revised Recommendation, Paragraphs V. B. (i) and (ii)]

Actions taken as of the date of the follow-up report to implement this recommendation:

2. Broadening the Prohibitions for Participating in Audits in Order to Improve Auditor Independence

The Canadian Public Accountability Board (CPAB) was established on October 01 2004. CPAB is a non-governmental standard-setting body but counts among its Council of Governors members representatives from both levels of government; i.e. the federal institution responsible for regulating financial institutions (Office of Superintendent of Financial Institutions) and representatives of provincial securities regulators. The CPAB's Mission Statement is: "**CPAB's mission is to contribute to public confidence in the integrity of financial reporting of reporting issuers by promoting high quality, independent auditing.**" On March 30 2004 Canadian Securities Administrators (CSA) Rule 52-108 took effect which required auditors of reporting issuers to be registered with the CPAB. Auditors registered with the CPAB must agree to abide by the CPAB's Rules:

<http://www.cpab-ccrc.ca/421ce6b22e98e.pdf>

The CPAB conducts inspections of the professional accounting and auditing firms over which it has oversight responsibility. Firms with 50 or more reporting issuer clients will be inspected annually while those with less than 50 will be inspected on a three year cycle. CPAB will enter into memoranda of understanding (MOUs) with the provincial accounting oversight bodies under which those institutes will inspect the smaller firms on behalf of CPAB. CPAB has developed a comprehensive inspection program to review the quality control systems in place in participating audit firms. The Second Annual Report of the CPAB can be found at:

<http://www.cpab-ccrc.ca/41636b335f6cc.pdf> - First Public Report of CPAB

<http://www.cpab-ccrc.ca/430497ca4da3b.pdf> - Second Annual Report of CPAB

<http://www.cpab-ccrc.ca/43a638727e764.pdf> - Third Annual Report of CPAB

If no action has been taken to implement this recommendation, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

1. Private Companies and External Audit

The *CBCA* amendments made in 1994 specifically permitted private corporations to dispense with the audit requirement. These amendments were made following significant consultation with stakeholders.

Text of Recommendation 3 (c):

With respect to the prevention and detection of the bribery of foreign public officials through accounting requirements, external audit and internal company controls, the Working Group recommends that Canada:

Consider requiring the auditor to report indications of foreign bribery to the competent authorities. [Revised Recommendation, Paragraph V. B. (iv)]

Actions taken as of the date of the follow-up report to implement this recommendation:

Auditing standards, which have regulatory force in corporate legislation, require auditors to report any illegal or possibly illegal acts to the audit committee. As members of the board, the committee owe a fiduciary duty to shareholders and must act accordingly.

This is an issue that features regularly in Phase 2 reviews. Recommendations in other reviews of Working Group on Bribery members recommend that measures be put in place for auditors to report suspicions or illegal acts to the “appropriate corporate bodies” and to consider reporting to external authorities. In Canada, auditors do have a responsibility to report to “appropriate corporate bodies”, i.e. audit committees and thus Canada implements Paragraph V. B. (iv) of the 1997 Revised Recommendation. That responsibility is found in s. 171 of the *CBCA* (reproduced in part below) and similar provisions are found in the majority of provincial and territorial corporate governance statutes:

“171. (1) Subject to subsection (2), a corporation described in subsection 102(2) shall, and any other corporation may, have an audit committee composed of not less than three directors of the corporation, a majority of whom are not officers or employees of the corporation or any of its affiliates.

(2) The Director may, on the application of a corporation, authorize the corporation to dispense with an audit committee, and the Director may, if satisfied that the shareholders will not be prejudiced, permit the corporation to dispense with an audit committee on any reasonable conditions that the Director thinks fit.

3) An audit committee shall review the financial statements of the corporation before such financial statements are approved under section 158.

....

(6) A director or an officer of a corporation shall forthwith notify the audit committee and the auditor of any error or mis-statement of which the director or officer becomes aware in a financial statement that the auditor or a former auditor has reported on.

(7) An auditor or former auditor of a corporation who is notified or becomes aware of an error or mis-statement in a financial statement on which they have reported, if in their opinion the error or mis-statement is material, shall inform each director accordingly.

(8) When under subsection (7) the auditor or former auditor informs the directors of an error or mis-statement in a financial statement, the directors shall:

(a) prepare and issue revised financial statements; or

(b) otherwise inform the shareholders and, if the corporation is one that is required to comply with section 160, it shall inform the Director of the error or mis-statement in the same manner as it informs the shareholders.

(9) Every director or officer of a corporation who knowingly fails to comply with subsection (6) or (8) is guilty of an offence and liable on summary conviction to a fine not exceeding five thousand dollars or to imprisonment for a term not exceeding six months or to both.”

If no action has been taken to implement this recommendation, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

Text of Recommendation 3 (d):

With respect to the prevention and detection of the bribery of foreign public officials through accounting requirements, external audit and internal company controls, the Working Group recommends that Canada:

Encourage the development and adoption of adequate internal company controls, including standards of conduct. [Revised Recommendation, Paragraph V. C. (i)]

Actions taken as of the date of the follow-up report to implement this recommendation:

Provincial and territorial securities regulatory bodies have taken the lead in this area. On February 4, 2005, the securities regulatory authorities in every Canadian jurisdiction other than British Columbia, published for comment a proposed instrument regarding reporting on internal controls. Multilateral Instrument 52-111 Reporting on Internal Control over Financial Reporting and Companion Policy 52-111CP can be found at:

http://www.osc.gov.on.ca/Regulation/Rulemaking/Current/Part5/csa_20050729_52-310_not-pro-timing.jsp.

Once in force, this policy will apply to the majority of reporting issuers in Canada.

If no action has been taken to implement this recommendation, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

Text of Recommendation 4 (a):

With respect to other measures for preventing and detecting foreign bribery, the Working Group recommends that Canada:

Consider clarifying the policy statements on reporting wrongdoing and illegal acts in the workplace with a clear statement that an employee may either follow the internal disclosure procedure or report an offence directly to the law enforcement authorities, and that there should be no administrative or disciplinary measures applied to an employee who, in good faith, does decide to report directly to the law enforcement authorities. (Revised Recommendation, Paragraph I)

Actions taken as of the date of the follow-up report to implement this recommendation:

The current Policy on the Internal Disclosure of Information Concerning Wrongdoing in the Workplace has been in place since 2001. On September 29, 2003, the then-President of the Treasury Board of Canada announced creation of a Working Group on Disclosure of Wrongdoing. The Working Group was given a wide mandate to look at international approaches and outline options for change, including legislative approaches that fit the Government of Canada's operating requirements and reflect Canadian values and ethics. This group tabled a report to the President of the Treasury Board at the end of January 2004 recommending legislation to establish a disclosure of wrongdoing regime.

Bill C-11, an Act to establish a procedure for the disclosure of wrongdoings in the federal public sector (*Public Servants Disclosure Protection Act (PSDPA)*), was unanimously adopted by the House of Commons and the Senate, and received Royal Assent on November 25, 2005. Its purpose is to encourage public servants to report wrongdoing in the public sector, protect those who make disclosures and ensure a fair and objective process for those against whom allegations are made. This legislation is expected to further strengthen transparency, accountability, financial responsibility and ethical conduct in the public sector.

The *PSDPA* provides legislated processes for reporting wrongdoing and strong legislated reprisal protections for employees who make disclosures. Employees can choose to make a disclosure to a senior officer within their own organization, or they can make a disclosure directly to the Public Sector Integrity Commissioner. The Public Sector Integrity Commissioner is a neutral third party, reporting directly to Parliament.

Although the *PSDPA* is law, it is not yet in force. Until the Act comes into force, the current *Policy on the Internal Disclosure of Information Concerning Wrongdoing in the Workplace* (internal disclosure policy) continues to apply to the core public administration, but not to the separate agencies and Crown corporations which will be covered under the *PSDPA*. The new government is working on an Accountability in Government Act which will amend the *PSDPA*. The Government has announced its intent to table this bill in the near future.

The *Criminal Code* was amended in 2005 to prohibit any employer from taking retaliatory action against an employee in cases where that employee reported a breach of a federal or provincial law to a law enforcement authority. Bill C-13, an Act to amend the Criminal Code (capital markets fraud and evidence-gathering) entered into force on September 15, 2004. The Act created a new criminal offence prohibiting an employer from threatening or retaliating against employees for disclosing unlawful conduct and includes threats or retaliation against an employee who has already provided information. The new offence expanded the pre-existing law which prohibited violent intimidation or threats, to include within its ambit includes threats of dismissal, pecuniary loss, demotion, and disciplinary measures. Criminal proceedings for a section 425.1 offence can be initiated by way of indictment or summary conviction; if by indictment, the maximum term of imprisonment is five years. Section 425.1 includes all employers. Section 425.1 also extends the criminal offence to threats or retaliation against an employee who has already provided information.

Related documents and information can be found at:

http://www.hrma-agrh.gc.ca/veo-bve/index_e.asp.

The *PSDPA* can also be found at

<http://www.parl.gc.ca/LEGISINFO/index.asp?Lang=E&Chamber=C&StartList=2&EndList=200&Session=13&Type=0&Scope=I&query=4218&List=toC>

The Canadian Armed Forces are exempt from Bill C-11. However, the CAF already has a well-developed internal system of reporting of allegations of misconduct. Furthermore, the Queen's

Regulations for the Canadian Forces impose a positive duty on officers and non-commissioned officers report to the proper internal authorities any breach of the regulations or legislation and this includes corruption of foreign officials.

Provincial treatment of whistleblower protection varies from jurisdiction to jurisdiction. Many jurisdictions include protection from reprisal for disclosure in their labour and employment laws or public service laws and policies.

If no action has been taken to implement this recommendation, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

Text of Recommendation 4 (b):

With respect to other measures for preventing and detecting foreign bribery, the Working Group recommends that Canada:

Issue specific instructions to foreign representations, including embassy personnel, concerning the steps that should be taken where credible allegations arise that a Canadian company or individual has bribed or taken steps to bribe a foreign public official, including the reporting of such allegations to the competent authorities in Canada. (Revised Recommendation, Paragraph I)

Actions taken as of the date of the follow-up report to implement this recommendation:

The Trade Commissioner Service of DFAIT has developed specific instructions to foreign representations, including embassy personnel, concerning the steps that should be taken where credible allegations arise that a Canadian company or individual has bribed or taken steps to bribe a foreign public official, including the reporting of such allegations to the competent authorities in Canada. In April 2004, an internal committee was established, chaired by the Chief Trade Commissioner, to consider and review cases where Canadian individuals or companies have been found guilty of bribery or corruption overseas. On March 01, 2006, a broadcast message was sent to all staff of the Department in Canada advising employees of the Department's policy regarding Canadian companies and individuals involved in cases of corruption and bribery. The message mentioned the OECD Convention and the *CFPOA* and indicated that staff who have concerns regarding the conduct of Canadian companies or individuals should bring these concerns to the attention of their supervisors, the Post Support Unit or to the Values and Ethics Division of DFAIT. To date no cases have yet been referred to the Committee.

If no action has been taken to implement this recommendation, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

Text of Recommendation 4 (c) :

With respect to other measures for preventing and detecting foreign bribery, the Working Group recommends that Canada:

Review the prohibition under the federal Income Tax Act against reporting non-tax criminal offences detected in the course of tax audits performed by the Canadian Customs and Revenue Agency to the law enforcement authorities. (Revised Recommendation, Paragraph I)

Actions taken as of the date of the follow-up report to implement this recommendation:

If no action has been taken to implement this recommendation, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

Confidentiality of taxpayer information has always been a cornerstone of the self-reporting tax system in Canada. Exceptions to section 241 of the *Income Tax Act (ITA)* have been made over the years on a very restrictive basis taking into consideration the limitations imposed by the *Charter of Rights and Freedoms*. For example, the exception that was introduced for investigations in relation to designated substance offences and criminal organizations requires the police to apply to a judge for a disclosure order under section 462.48 of the *Criminal Code*. Even the disclosure under paragraph 241(f.1) of the *ITA*, introduced in the *Anti-Terrorism Act* (Bill C-36), is restricted. This approach attempts to balance the rights of taxpayers with law enforcement's need to investigate serious crimes. Spontaneous reporting to law enforcement authorities of criminal offences detected in the course of a tax audit would be a major departure from this approach. A review of this prohibition would also need to address constitutional considerations.

Text of Recommendation 4 (d):

With respect to other measures for preventing and detecting foreign bribery, the Working Group recommends that Canada:

Review the disclosure policy and procedure of the Canadian International Development Agency (CIDA) and Export Development Canada (EDC) to ensure that there is disclosure to the law enforcement authorities or the Federal Prosecution Service of the Department of Justice, where, in the course of transacting business with a company, credible evidence arises that a violation of the *CFPOA* has occurred. (Revised Recommendation, Paragraph I)

Actions taken as of the date of the follow-up report to implement this recommendation:

Export Development Canada (EDC)

EDC's Anti-Corruption Policy Guidelines, formalized in January 2004, include a section on disclosure to law enforcement authorities. This section states that EDC will notify Canadian authorities (namely

the RCMP and/or the Department of Justice) if in the context of transacting business with a company or individual EDC receives credible evidence (whether during its due diligence process or after support has been provided) that there has been a violation of the *CFPOA* or the *Criminal Code*. All transactions in respect of which there is evidence or suspicion of bribery must be brought to the attention of EDC's Management and Legal Services, who will then review whether or not the evidence received is credible. In determining whether evidence received by EDC is credible, EDC's Legal Services may decide to consult experts in matters of corruption, such as forensic accountants, criminal lawyers, and legal firms with such expertise. Decisions to disclose will be made by the Executive Management in consultation with Legal Services. Disclosure pursuant to these guidelines will be made by EDC's Legal Services to Canadian authorities (namely, the RCMP and/or the federal Department of Justice). As of time of writing there have been no disclosures.

Canadian International Development Agency (CIDA)

CIDA's existing Protocol for Dealing with Allegations of Corruption clearly states that "situations involving allegations of criminal activity may require referral to police authorities or other actions which are different from the procedures outlined in this Protocol" and includes specific internal procedures for reporting allegations of corruption to the relevant Director and of the Director of the Internal Audit Division for appropriate action. The Protocol ensures a thorough assessment of the allegations regarding CIDA financing so that senior management can ascertain whether 'credible evidence' of a violation of the *CFPOA* has occurred. If the allegations are substantiated, then informing law enforcement authorities falls within the ambit of the Protocol.

If no action has been taken to implement this recommendation, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

Text of Recommendation 5 (a):

The Working Group recommends that Canada:

Consider issuing some form of guidance to assist in the interpretation of the exception under section 3 (4) of the *CFPOA* for facilitation payments. (Convention, Article 1; Commentary 9 to Convention)

Actions taken as of the date of the follow-up report to implement this recommendation:

Subsection 3(4) intends to implement and clarify the comment found in the Commentaries of the Convention that "small facilitation payments" do not constitute an offence. The Commentaries neither define what a "facilitation payment" is nor what a "small" facilitation payment means. While the *CFPOA* could have been silent on this issue, it was believed that it would be more fair and appropriate to attempt to give some legislative guidance on this point.

Canada is of the view that the legislation itself includes guidance for its interpretation. In addition, a Guide to the *CFPOA* was prepared by the Department and has been made public. Such an initiative is rare, but was undertaken in respect of this Act.

The Department of Justice considered issuing guidelines to assist in the interpretation of subsection 3(4) of the *CFPOA* but has decided not to do so. It is a long-standing practice of the Government of

Canada not to issue guidelines on the interpretation of the criminal law. There is shared jurisdiction for prosecutions under the *CFPOA*. If any federal guidelines were issued, they would not necessarily be determinative, as a provincial Attorney General could decide to prosecute in a given case, notwithstanding the existence of any guidelines indicating that prosecution should not take place in this case. Once the legislation is passed, the law speaks for itself. The opinion of the government is not binding on the courts that, alone, are responsible for the interpretation of the law and its application to specific cases. For these reasons, the Department of Justice did not issue guidelines.

The Department of Justice will monitor the interpretation that the courts give to subsection 3(4). So far, the exemption of subsection 3(4) has never been used in court. The long title of the *CFPOA* is *An Act respecting the corruption of foreign public officials and the implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, and to make related amendments to other Acts*. The title makes it clear that the legislation is meant to implement the Convention and therefore that it must be given a meaning that meets the requirements of the Convention, as clarified by the Commentaries. It is expected that the courts would take the Convention into account in interpreting the legislation. If the court interpreted the provision in a manner inconsistent with the spirit of the Convention, consideration would be given to addressing the matter through an amendment to section 3(4) excluding the inconsistent interpretation.

If no action has been taken to implement this recommendation, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

Text of Recommendation 5 (b):

The Working Group recommends that Canada:

Consider amending the part of the definition of “business” in section 2 of the *CFPOA* that results in the requirement that the purpose of the bribe be for obtaining an advantage in the course of business for profit. (Convention, Article 1)

Actions taken as of the date of the follow-up report to implement this recommendation:

Canada considered carefully whether the definition of business in the *CFPOA* was consistent with the requirements of the Convention.

Section 2 of the *CFPOA* defines business as “any business, profession, trade, calling, manufacture or undertaking of any kind carried on in Canada or elsewhere for profit.”

The title of the Convention is *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*. In French, it is even clearer, as business transaction is referred to as “**transactions commerciales**”. Business transactions imply a profit motive. Therefore, the Convention applies to transactions that are carried on to generate some form of profit.

Canada did consider amending the definition of business in the *CFPOA*, and came to the conclusion that the definition, as drafted, is consistent with the language and spirit of the Convention.

If no action has been taken to implement this recommendation, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

Text of Recommendation 5 (c):

The Working Group recommends that Canada:

Reconsider the decision to not establish nationality jurisdiction over the offence of bribing a foreign public official. In the event that Canada does not change its position, the Working Group recommends that this issue continue to be monitored. (Convention, Article 4.2 and 4.4; Phase 1 Evaluation)

Actions taken as of the date of the follow-up report to implement this recommendation:

The Convention does not require Parties to exercise jurisdiction on the basis of nationality. Article 4 of the Convention requires Parties to review whether its current basis for jurisdiction is effective to fight corruption of foreign public officials and take remedial steps if it is not. Canada conducted such review and is of the view that territorial jurisdiction, as interpreted by Canadian courts, is effective to fight corruption.

Canadian courts have clarified that Canada's territorial criminal jurisdiction extends to activities constituting an offence in a foreign country when there is a "real and substantial link" between the offence and Canada, i.e. when a significant portion of the activities constituting this offence took place in Canada (*R. v. Libman* (1985) 2 SCR 178).

Canada has prosecuted only one case so far under the *CFPOA* and jurisdiction was not an issue. Canada continues to monitor the situation. We would report to the Working Group on any case where this issue arises. Canada's position would be reconsidered if there was evidence that nationality jurisdiction is necessary to implement the Convention effectively.

If no action has been taken to implement this recommendation, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

Text of Recommendation 5 (d):

The Working Group recommends that Canada:

With respect to prosecutorial discretion and the guidelines in the FPS Deskbook, clarify that, in investigating and prosecuting the bribery of a foreign public official, there are no proper

considerations of national economic interest, the potential effect on relations with another state, or the identity of the natural or legal entities involved, and establish guidance to prosecutors on how to proceed when they decline to prosecute a case that potentially involves one of the public interest factors listed in the FPS Deskbook. (Convention, Article 5)

Actions taken as of the date of the follow-up report to implement this recommendation:

Canada has established specific guidelines for prosecutors concerning the process to be followed when they decide not to prosecute a case of bribery of foreign public official. Chapter 33 of the Federal Prosecution Service Deskbook dealing with the *CFPOA* was amended to ask prosecutors to “bear in mind the provisions of the Decision to Prosecute Policy dealing with the recording of reasons for deciding not to institute proceedings. Such reasons may be highly relevant if allegations are made that improper political concerns influenced prosecutorial decision-making.” This policy provides that “Where a decision is made not to institute proceedings, it is recommended that a record be kept of the reasons for that decision.” This policy also lists criteria that are irrelevant to a decision to prosecute. These factors include, inter alia, a possible political advantage or disadvantage to the government or any political group or party, and the possible effect of the decision on the personal or professional circumstances of those responsible for the prosecution decision.

In a letter accompanying the instruments of ratification, Canada indicated that it understood that the language of Article 5 of the Convention, which provides that investigations and prosecutions will not be influenced by “considerations of national economic interest, the potential effect on relations with another state, or the identity of the natural or legal identities involved” was meant to ensure that investigation and prosecution of the bribery of foreign officials is not influenced by improper considerations. This letter was accepted.

Canada believes that concerns pertaining to whether the consideration of improper factors might result in a decision not to prosecute have been addressed by having the prosecutor set out in writing the grounds for not prosecuting “in the public interest” when there is sufficient evidence to do so. Guidelines have been issued accordingly to federal prosecutors.

If no action has been taken to implement this recommendation, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

Text of Recommendation 5 (e):

The Working Group recommends that Canada:

Consider revisiting the policies of agencies such as Export Development Canada (EDC), the Canadian International Development Agency (CIDA) and Public Works and Government Services Canada (PWGSC) on dealing with applicants convicted of bribery and corruption, given that Canada does not impose additional civil or administrative sanctions upon a person or company convicted of the bribery of a foreign public official. [Convention, Article 3.4, Revised Recommendation, Paragraphs II v) and VI ii)]

Actions taken as of the date of the follow-up report to implement this recommendation:

Export Development Canada (EDC)

EDC's Anti-Corruption Policy Guidelines, formalized in January 2004, state that any party that has been convicted of bribery will be debarred from EDC support until it considers that such party has taken appropriate measures to deter further bribery. In conjunction with its Anti-Corruption Policy Guidelines, EDC has developed an internal procedure outlining the measures to be applied when dealing with parties who have been convicted of bribery. The procedure states that EDC will exercise due diligence and care in determining whether such party has taken appropriate measures to deter further bribery, such as replacing individuals who have been involved in bribery; adopting an effective anti-corruption program; submitting to audit; making the results of such audit available; and any other measure that may be considered appropriate under the circumstances.

Furthermore, EDC will monitor the implementation of any anti-corruption program by requiring a report in this regard from an officer of the company, the internal auditors of the company, or the company's external auditors. EDC's Legal Services will review whether measures taken are sufficient to deter further bribery; and, in determining whether those measures are sufficient, it may retain experts such as forensic accountants, criminal lawyers, and/or legal firms with expertise in matters of corruption. Legal Services may recommend imposing additional conditions on the provision of further support to previously convicted companies.

Canadian International Development Agency (CIDA)

In December 2003, CIDA implemented a policy that requires entities wishing to take part in CIDA development projects to declare previous corruption-related offences. New clauses have been included in corporate contract models for dealing with entities convicted or under a sanction for an offence involving bribery or corruption. The new policy requires entities wishing to enter into a contract/contribution agreement with CIDA to declare previous corruption-related convictions and sanctions under non-CIDA financing. From now on, entities must confirm that, in the three years before signing a contract or a contribution agreement, they have not been convicted of, and are not under sanction for, any corruption-related offence. If an entity has been convicted or is under sanction, it will have the opportunity to make representations to CIDA, to show that steps have been taken to counter the problem. However, CIDA reserves the right to accept, to accept conditionally or simply to refuse to do business with an entity convicted of, or sanctioned for, a corruption-related offence.

Public Works and Government Services Canada (PWGSC)

The general terms and conditions of Requests For Proposals and contracts contain provisions regarding bribery and conflict of interest. Bidders are notified in Request for Proposals (VPP SACC clause A9100T) that their bid may be rejected if their employees or subcontractors included as part of the bid have been convicted under sections 121, 124 or 418 of the *Criminal Code* (certain corruption-related offences):

“ Canada may reject a bid where any of the following circumstances is present:

(a) the Bidder, or any employee or subcontractor included as part of the bid, has been convicted under section 121 ("Frauds on the government" & "Contractor subscribing to election fund"), 124 "Selling or purchasing office"), or 418 ("Selling defective stores to Her Majesty") of the *Criminal Code*.”

If no action has been taken to implement this recommendation, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such

measures or the reasons why no action will be taken:

Text of Recommendation 5 (f):

The Working Group recommends that Canada:

Compile statistical information on the sanctions for the offence of bribing a foreign public official as well as related omissions and falsifications in respect of the books, records and accounts of companies, in a manner that differentiates between the sanctions for legal persons versus natural persons and includes information about the forfeiture of bribes and the proceeds of bribery. It is also recommended that Canada consider differentiating between the sanctions obtained through the plea-bargaining process and those obtained through ordinary trial proceedings (Convention, Article 3.1, 3.3 and 8.2).

Actions taken as of the date of the follow-up report to implement this recommendation:

Statistical information on the sanctions for the offence of bribing a foreign public official

Justice Canada has put in place a system whereby the Federal Prosecution Service of the Department of Justice gathers information once a year from its Regional Directors and from Heads of the provincial Prosecution Services on prosecution of offences under the *CFPOA*. Provincial Heads of Prosecution are invited to complete a form once prosecutions are commenced. This form would indicate; a summary of the facts, the parties (individuals and legal persons) implicated, the current status of the case, the next steps and anticipated date(s), and the outcome of the case and sentence given to individuals and corporations, if the case is concluded. The process is set out in Chapter 33 of the Federal Prosecution Service DeskBook.

Statistical information on omissions and falsifications in respect of the books, records and accounts of companies

When the offence of falsification is in relation to a Convention offence prosecuted under the *CFPOA*, the information would be gathered through the system put in place by the Federal Prosecution Services (described above), as the process would provide information on any additional charges related to the offence.

When the offence of falsification is not in relation to a Convention offence, i.e. when the offence is not related to the bribery of a foreign public official, some limited information is available from a survey conducted by Statistics Canada. The *Adult Criminal Court Survey* gathers information received from provincial jurisdictions on charges, outcome and sentences related to domestic *Criminal Code* offences. There are data on the number of charges, convictions and sentences for the offence of making a false document (section 366) and the offence of uttering a false document (section 368). However, these offences cover any false documents, including but not limited to those related to books, records and accounts of companies. Separating these from the rest of the false documents would require information that could not be obtained easily. It would require a person to read all the court files relating to sections 366 and 368 to determine the kind of documents that were involved.

Statistical information on sanctions obtained through the plea-bargaining process and those obtained

through ordinary trial proceedings.

Information on plea-bargaining is not information that is made public during court proceedings. Unless a person is part of the bargaining process, there is no way of knowing whether the accused who pleads guilty is doing so because the Crown has agreed to charge a lesser offence or to recommend a lesser sentence to the judge, or for any reason unrelated to plea-bargaining.

If this information were available, it would likely be protected by solicitor-client privilege, as this kind of bargaining would be done by the lawyer on instructions from the client.

It is therefore not possible for Canada to provide this kind of information.

If no action has been taken to implement this recommendation, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

Part II: Issues for Follow-up by the Working Group

Text of issue for follow-up:

The Working Group will follow-up the following issues once there has been sufficient practice under the CFPOA:

Application of the revised law on the liability of legal persons [Bill C-45 “An Act to amend the *Criminal Code* (criminal liability of organizations)”], which was introduced in the House of Commons on 12 June 2003, to CFPOA cases. (Convention, Article 2; Phase 1 Evaluation)

With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:

Bill C-45, was passed on November 7, 2003 and came into force on March 31, 2004. The Bill legislated corporate criminal liability in new sections 22.1 and 22.2 of the *Criminal Code*.

We are not aware of any reported decision on sections 22.1 and 22.2.

Text of issue for follow-up:

The Working Group will follow-up the following issues once there has been sufficient practice under the CFPOA:

Application of the exception under section 3 (3) of the CFPOA for reasonable expenses incurred in good faith.

With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:

This exception has to date not been used.

Text of issue for follow-up:

The Working Group will follow-up the following issues once there has been sufficient practice under the *CFPOA*:

Application of sanctions to natural and legal persons for offences under the *CFPOA* as well as related omissions and falsifications in respect of the books, records and accounts of companies. [Convention, Article 3.1, 3.3 and 8.2; Phase 1 Evaluation; Revised Recommendation, Paragraph V. A. (ii)]

With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:

There has been one successful prosecution under the *CFPOA*. Hector Ramirez Garcia, a U.S. immigration officer who worked at the Calgary International Airport, pleaded guilty in July 2002 to accepting bribes from Hydro Kleen Group Inc (a company based in Red Deer, Alberta). Garcia received a 6 month sentence and was subsequently deported to the United States. Hydro Kleen, its president and an employee, were charged under the *CFPOA* with, among other things, two counts of bribing Garcia. Hydro-Kleen entered a plea of guilty in the Court of Queen's Bench in Red Deer, Alberta on January 10, 2005. The company admitted to one count under s. 3(1)(a) of the *CFPOA* and was ordered to pay a fine of \$25,000. Two other charges against a director and an officer of the company were stayed. In that case, the convicted party was a legal person and the sanctions levied in that case are consistent with those imposed on legal persons in similar positions for other economic offences under the *Criminal Code*.

Text of issue for follow-up:

In addition, the Working Group will follow-up implementation of the various initiatives announced by the Government of Canada following the on-site visit.

i.e.: Following the on-site visit, the Canadian authorities announced that it would be undertaking initiatives including the following:

- Ensure that the DFAIT media relations division has an accurate understanding of the *CFPOA* (in response to the release of erroneous information about the application of the *CFPOA* to the media).
- Amend the CIDA document "Anti-Corruption Programming: A Primer" to provide accurate information about the facilitation payments exception in the *CFPOA*.
- RCMP will take steps to add the *CFPOA* to the list of offences for which it has the mandate

to investigate in its PROOF document.

- The CRA began developing a section in its Audit Manual to deal with the application of section 67.5 of the *Income Tax Act* as it relates to outlays and expenses incurred under section 3 of the *CFPOA*. As well, CRA undertook to revise its Investigation Manual to include a reference to the *CFPOA*.
- Team Canada plans to add links on the *CFPOA* to its Export Source website and will refer to the *CFPOA* in the next edition of “Step-by-Step Guide to Exporting”.
- Awareness training sessions will be held in order to assist federal public servants in interpreting the two policy documents regarding the internal disclosure of information on offences committed by government officials.
- The Minister of Finance of Québec announced in the budget speech of March 11 2003 that the Québec *Income Tax Act* would be amended to disallow payments for the purpose of doing anything that is an offence under section 3 of the *CFPOA*, and that the amendment would operate retroactively to the date the *CFPOA* came into force.
- In order to reinforce the practice that has evolved concerning the sharing of information about cases between the police agencies, the RCMP has undertaken to work with its partners to establish a protocol whereby police agencies would inform the RCMP about cases involving the *CFPOA*.
- The FPS Deskbook will be amended to reinforce the recommendation already contained therein about the recording of reasons for decisions to not prosecute.
- CIDA’s auditors are exploring the possibility of conducting joint audits with other donors to more effectively verify and trace the use of funds where an applicant has been convicted of bribery.
- The Government of Canada announced that on 12 June 2003 a Bill was introduced into Parliament [Bill C-46 “An Act to amend the *Criminal Code* (Capital Markets fraud and evidence-gathering)”), which, inter alia, 1. creates an offence of threatening or retaliating against employees who report unlawful conduct to the law enforcement authorities, and 2. establishes the authority for a justice or judge to issue general and specific production orders for the obtaining of documents from persons, including financial institutions, other than those under investigation.
- Establish a legislative and regulatory framework regarding the reporting by lawyers and legal firms of money laundering transactions to competent authorities.

With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:

- Ensure that the DFAIT media relations division has an accurate understanding of the *CFPOA* (in response to the release of erroneous information about the application of the *CFPOA* to the media). The media relations division was advised of the confusion following the on-site visit and a question and answer document clarifying the application of the *CFPOA* was prepared for the media relations division.
- Amend the CIDA document “Anti-Corruption Programming: A Primer” to provide accurate information about the facilitation payments exception in the *CFPOA*. The Primer has been amended to read: ‘*The Canadian Foreign Public Officials Act (CFPOA)* exempts certain facilitation payments.’
- RCMP will take steps to add the *CFPOA* to the list of offences for which it has the mandate to investigate in its PROOF document. The *CFPOA* was included in the PROOF document in March 2005.
- The CRA began developing a section in its Audit Manual to deal with the application of section 67.5 of the *Income Tax Act* as it relates to outlays and expenses incurred under section 3 of the

CFPOA. As well, CRA undertook to revise its Investigation Manual to include a reference to the *CFPOA*.

This section has been included in the Audit Manual in September 2004. The Investigations Manual was updated in February 2005 to include a reference to the *CFPOA* with a link to the new section of the Audit Manual dealing with section 67.5 of the *Income Tax Act*.

- Team Canada plans to add links on the *CFPOA* to its Export Source website and will refer to the *CFPOA* in the next edition of “Step-by-Step Guide to Exporting”.

The Export Source website now makes reference to the *CFPOA*. Reference to the *CFPOA* has also been made in the “Step by Step Guide to Exporting.”

- Awareness training sessions will be held in order to assist federal public servants in interpreting the two policy documents regarding the internal disclosure of information on offences committed by government officials.

Please see the response to Recommendation #1

The Minister of Finance of Québec announced in the budget speech of 11 March 2003 that the Québec *Income Tax Act* would be amended to disallow payments for the purpose of doing anything that is an offence under section 3 of the *CFPOA*, and that the amendment would operate retroactively to the date the *CFPOA* came into force.

The amendments necessary to harmonize the *Taxation Act* of Québec with section 67.5(1) of the *Income Tax Act* of Canada was approved by Bill no. 36 which was approved on June 07, 2004.

In order to reinforce the practice that has evolved concerning the sharing of information about cases between the police agencies, the RCMP has undertaken to work with its partners to establish a protocol whereby police agencies would inform the RCMP about cases involving the *CFPOA*.

- Despite shared jurisdiction for the *CFPOA*, given current practice and experience the RCMP is confident that the nature of existing municipal, provincial and federal law enforcement relationships and responsibilities will result in *CFPOA* complaints / matters being referred through to the RCMP Commercial Crime Branch. As has been observed, Justice Canada collects information from provincial authorities about prosecutions under the *CFPOA* for inclusion in the Annual Report to Parliament. This collection of information concerning *CFPOA* prosecutions which was formalized in 2004 can be used as a check to ensure that *CFPOA* matters are coming to the attention of the RCMP.

- The FPS Deskbook will be amended to reinforce the recommendation already contained therein about the recording of reasons for decisions to not prosecute.

This has been done.

- CIDA’s auditors are exploring the possibility of conducting joint audits with other donors to more effectively verify and trace the use of funds where an applicant has been convicted of bribery.

CIDA’s auditors remain open to the possibility of conducting joint audits with the other donors to more effectively verify and trace the use of funds where an applicant has been convicted of bribery. A preliminary discussion with the Department of International Development of the UK has remained inconclusive.

- The Government of Canada announced that on 12 June 2003 a Bill was introduced into Parliament [Bill C-46 “An Act to amend the *Criminal Code* (Capital Markets fraud and evidence-gathering)”, which, inter alia, 1. creates an offence of threatening or retaliating against employees who report unlawful conduct to the law enforcement authorities, and 2. establishes the authority for a justice or judge to issue general and specific production orders for the obtaining of documents from persons, including financial institutions, other than those under investigation.

Bill C-13 (formerly Bill C-46), An Act to amend the *Criminal Code* (capital markets fraud and evidence-gathering) received Royal Assent on March 29, 2004. The Act creates a new offence to prohibit threatening or retaliating against employees for disclosing unlawful conduct.

Establish a legislative and regulatory framework regarding the reporting by lawyers and legal firms of money laundering transactions to competent authorities.

In November 2001, the Federation of Law Societies of Canada (Federation) launched a petition in the Province of British Columbia challenging the constitutionality of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act (PCMLTFA)* and its regulations as applied to legal counsel and legal firms. The Federation argued that the application of the reporting requirements (suspicious transaction and large cash transaction reporting) and other elements of the regime to the legal profession violates solicitor-client privilege and the principle of independent legal counsel.

In January 2002, the Federation and the Law Society of British Columbia were granted an exemption by the Court from reporting suspicious transactions pending the outcome of a hearing on the constitutionality of the current provisions. Similar exemptions were subsequently granted to other provincial jurisdictions. As a result of litigation with the Federation, the Government elected to review the provisions of the *PCMLTFA* that applied to the legal profession and it decided not to retain the regime in its current form.

In March 2003, the Government of Canada voluntarily repealed the provisions of the *PCMLTFA* which subject the legal profession to requirements under the Act with a view to developing a replacement regime that would better take into account the special duties of legal counsel. The litigation was subsequently adjourned. The Courts have not heard the substantive case on the issue of whether legal counsel should be included in Canada's AML/ATF regime. Thus, the application of the regime to legal counsel has not been found unconstitutional.

The Act is structured in such a way that the repeal of the provisions relating to suspicious transaction reporting simultaneously triggered the repeal of provisions relating to client identification, due diligence, record keeping and internal compliance requirements. At that time, the Government also issued a news release stating the following:

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“The Government believes it is important that Canada’s anti-money laundering and anti-terrorist financing regime cover all entities that act as financial intermediaries, including legal counsel, in order to be effective. The Government intends, following consultations, to put in place a new regime for legal counsel.

The inclusion of the legal profession in Canada’s anti-money laundering regime is important to comply with international standards. The Financial Action Task Force on Money Laundering (FATF) is the key international standard setting body in this area. It revised its 40 Recommendations on Money Laundering in 2003 to strengthen the standards relating to lawyers and other professionals. Like other FATF members, Canada is working to bring its current anti-money laundering and anti-terrorist financing regime into line with these revised recommendations. Since March 2004, the Government has been consulting with the legal profession on possible modalities of a replacement regime, which would cover legal counsel and legal firms.”

- Government of Canada Press Release issued March 24, 2003
www.fin.gc.ca/news03/03-020e.html
- Regulations Repealing the PCMLTFA’s Application to Legal Council
<http://canadagazette.gc.ca/partII/2003/20030325-x/pdf/g2-137x2.pdf>
- Government of Canada Consultation Paper
http://www.fin.gc.ca/activty/consult/regime_e.html