

## **RESPONSES TO THE CONSULTATION PAPER ON THE REVIEW OF THE OECD ANTI-BRIBERY INSTRUMENTS**

### **Comments from The Institute of Internal Auditors, Global Headquarters**

The Institute of Internal Auditors (IIA) welcomes the opportunity to respond to the OECD Consultation Paper. The Consultation Paper provides an excellent summary of major issues that have arisen in the course of monitoring implementation of the OECD instruments on combating bribery of foreign public officials ten years after adoption. We commend the OECD for consulting with stakeholders and partners to strengthen the fight against bribery and corruption.

For this response, The IIA has focused on 3 principal topics, which if addressed would enhance significantly the effectiveness of the proposed instruments:

- The importance of good governance overall,
- The vital role of internal auditing in combating bribery and corruption, and
- The necessity of increased and broadened awareness on the issue of bribery and corruption.

Additional comments you may find useful to strengthen the instruments are included in Attachment A.

The OECD anti-bribery instruments are more relevant and important today than 10 years ago. The issues and elements that brought about the 1997 Revised Recommendations opened the eyes of a broader international audience, but it only scratched the surface of corruption and bribery around the globe. Companies today are expanding their operations into new markets worldwide, and while this provides great business opportunities and efficiencies of scale, there are even bigger corruption risks.

The OECD anti-bribery instruments have effectively brought into focus many issues related to bribery of government officials. By their nature, the instruments are effective in promoting proper design of activities to prevent and detect bribery of government officials. However, they can never be fully effective in ensuring execution of these activities as each party decides the level of vigor with which to execute activities.

### ***The Role of Good Governance in Combating Corruption and Bribery***

The issue of corruption and bribery must be linked with the broader issue of governance and principles of good governance. There cannot be effective and efficient measures to fight bribery and corruption without addressing the issue of governance in the private and the public sectors. We agree with Section 96 of the Consultation Paper that sound principles of corporate governance and management commitment to those principles form the foundation for preventing foreign bribery. Without these principles in place, key stakeholders involved in preventing and detecting foreign bribery — such as internal auditors — cannot adequately perform their roles. An organization with strong governance in place, operating in an environment where strong governance prevails in the public sector, is less likely to experience cases of corruption and bribery.

#### ***Recommendation:***

We strongly recommend adding the following language to stress the key role of governance as a prerequisite to any effective anti-bribery and anti-corruption schemes:

Governance is the combination of processes and structures implemented by committed senior leadership to inform, direct, manage, and monitor the organization's activities toward achieving its

objectives. Governance activities exist to help the organization meet its objectives in being well-run and accountable to its stakeholders. Good governance in both environments (the administration where public officials are employed and in the enterprises dealing with public foreign nationals) is essential to eliminating bribery and corruption. Senior leadership in the public and private sectors must be aware of the potential weaknesses in their respective environments in terms of governance and must establish and monitor systems for effective governance. In relation to anti-bribery and corruption, a key part of this is evaluating risks, designing adequate response to those risks, and establishing ethics policies and codes of conduct that govern acceptable employee behavior.

### ***Internal Auditing's Role in Combating Corruption and Bribery***

Internal auditing has a true leadership role in corruption and bribery mitigation. A strong and independent internal audit function is critical in anti-corruption. The internal auditor provides ongoing assurance and consulting services to the organization in an independent and objective manner.

Through accomplishing its mission effectively, and by complying with the *International Standards for the Professionals Practice of Internal Auditing*, the internal auditor can be a key contributor to the battle against bribery and corruption, complementing the roles played by others.

#### ***Recommendation:***

Your instruments would be greatly enhanced by adding, in Section III, 4.1, *Internal Audit Function*, the following regarding the role of internal audit:

Internal auditing is an independent, objective assurance and consulting activity designed to add value and improve an organization's operations. It helps an organization accomplish its objectives by bringing a systematic, disciplined approach to evaluate and improve the effectiveness of risk management, control, and governance processes. A well-designed and supported internal audit function — that conforms with The Institute of Internal Auditor's (The IIA's) *International Standards for the Professional Practice of Internal Auditing (Standards)* — is essential to assist senior leadership by providing independent, objective information and evaluation.

Internal auditing acts as a catalyst for change, advising or advocating improvements to enhance organizational practices. By detecting issues and escalating them appropriately — including the risk of fraud, bribery, and corruption — internal auditing can impact and reduce the opportunities for misconduct to occur by helping management strengthen its internal control systems. Internal auditing can help management instill appropriate values to help reduce the motivation and rationalization that can lead to misconduct as well as design and implement effective detective and prevention systems and programs.

Parties (those employing Public Officials and those companies whose employees may deal with Foreign Public Officials) should maintain and effectively use internal auditors — ensuring the adequacy of their independence, resources, scope of activities, and effectiveness of operations — and adopt the *Standards*. To gain a complete understanding of the organization's operations, it is essential that senior leadership consider the internal auditor's work including work regarding matters such as culture, tone, ethics, transparency, and internal and external interactions.

#### ***Increasing Awareness***

We agree that the levels of awareness of law enforcement authorities, public agencies or institutions directly or indirectly involved in the Convention, accounting and auditing professionals, and small and medium-sized companies affects every aspect of the implementation of the Convention. One additional specific awareness issue that should be given greater attention is in the area of anti-corruption education

for business employees. These are typically the people who are involved in providing bribes to government officials. Usually, while employees are generally aware that bribery is wrong, they often are not aware of the severe penalties that both they and their organization face for violations. The value of education and awareness cannot be overstated.

*Recommendation:*

We encourage the instruments to refer to a much broader and more comprehensive awareness and prevention campaign that addresses all players.

We are available, and welcome the opportunity, to meet with you to discuss these comments and recommendations further. In addition, we look forward to participating in the Working Group and continuing our dialogue and working relationships on these important issues.

## **About The Institute of Internal Auditors**

The IIA is the global voice, acknowledged leader, principal educator, and recognized authority of the internal audit profession and maintains the *International Standards for the Professional Practice of Internal Auditing (Standards)*. These principles-based standards are recognized globally and are available in 29 languages. The IIA represents more than 150,000 members across the globe, and has 99 institutes in 165 countries that serve members at the local level.

## **Attachment A**

### II, 1.3 – Facilitation Payments, p. 8

More clarity and discussion is needed regarding facilitation payments and the risks they pose. Serious consideration should be placed on allowing no exceptions for facilitation payments.

### II, 1.4 – Definition of Foreign Public Officials, p. 9

The growth of interaction with state-owned enterprises makes a clear definition of a public official/public enterprise critical. The instruments should clearly define these terms and reference how they are encountered today.

### II, 1.5 – Solicitation of Foreign Public Officials, p. 9

Whether a bribe was solicited or not, the end result is still a bribe; no consideration should be given to whether a bribe was solicited in addressing the company paying the bribe. Neither significant past economic investment nor reporting the bribe after the fact makes a compelling case to acknowledge bribery as an acceptable policy.

### II, 1.7 – Bribery of Foreign Private Sector Agents, p. 11

The area of bribery of a foreign private sector agent needs further attention. This area may be a prevalent problem area. Individuals, who may not want to risk the criminal sanctions of bribing a government official, may look at bribery of a private sector person as less risky.

### II, 3.1 – Confiscation, p. 14

Confiscation is an effective method of deterrence and should be strongly encouraged. The concerns raised and implementation issues should be defined and resolved.

### II, 3.2 – Additional Civil or Administrative Sanctions, p. 14

Additional sanctions are effective and should be strongly encouraged or required. To avoid a conflict of interest situation between the government's interest in stopping bribery and its interest in completing objectives, the nature and size of these additional sanctions should be well defined and able to be applied objectively. In addition, the expansion of the sanctions to legal persons is necessary.

### II, 4.2 – Nationality Jurisdiction, p. 16

The Convention should establish a treaty obligation to establish nationality jurisdiction for the bribery of foreign public officials.

### II, 5.0 – Investigative and Prosecutorial Discretion, p. 18

We agree that enforcement should be one of the horizontal issues in the monitoring phase. In the United States we are seeing an increased use of Deferred Prosecutions (DP) rather than wholesale indictments. Indictments and convictions are detrimental to corporations, but a DP and a Corporate Integrity Agreement are reasonable alternatives. However, the overuse of these indictment alternatives can give a criminally minded organization a false sense of security that even if they violate bribery statutes, they can escape the most severe of penalties.

Safeguarding investigative and prosecutorial decisions from economic and political influence is absolutely critical. It could be easy to justify a decision to not investigate or prosecute a bribe because of the short-term negative impact. However, this does not adequately consider the larger long-term positive impact of eliminating bribery of government officials. It is a difficult matter to ensure the absence of this influence. Promoting transparency of decisions not to investigate or prosecute would help. In addition, entrusting the decision to investigate or prosecute to the highest reasonable level within a country may help ensure a decision free of undue influence.

## II, 7.0 – Money Laundering, p. 20

The effectiveness of anti-money laundering (AML) systems is negatively impacted by a lack of expertise in AML detection and investigations. The parties should be encouraged to increase training in AML and the use of experienced professionals to promote this training and awareness.

## II, 8.0 – Fraudulent Accounting, p. 21

We agree that rules of fraudulent accounting can be improved and fraudulent accounting in relation to bribery of foreign public officials should be specifically prohibited. While organizations are required to maintain accurate books and records, a scant few have ever been found to actually label bribes as bribes in their books and records. Strong compliance audits can be effective in rooting out suspicious payments and fostering prevention.

Fraudulent accounting elements should apply to all companies — public and private — and all persons within a company directly engaged in the fraudulent accounting. Companies should be expected to have adequate accounting records to support compliance with these laws and regulations as they are required to have accounting records to support tax and statutory financial statement filings.

## II, 10 – Monitoring and Follow-up, p. 24

We encourage sharing the peer-review monitoring system developed by the Working Group with the internal audit function to incorporate applicable elements of the examination into their work programs and risk assessments. Sharing this information may lead to improved compliance with the Convention.

## III, 2.2 – Reporting by Public Officials from Agencies Not Having Contractual Relationships, p. 27

In many countries where the rule of law is not fully in place, tax authorities and public officials sometimes play a major role in that tax rules may be the only means of ensuring compliance of some sort. This should be given a higher priority in order to ensure a larger number of issues are reported.

## III, 2.2 – Whistleblower Protections, p. 28

We agree that in the absence of whistleblower protections, suspicions of the bribery of foreign public officials involving other public officials as well as suspicions involving companies or individuals are unlikely to be reported. One of the main concerns of employees is the fear of retribution for whistleblowing. This key area of focus should be expanded as whistleblowers are another important weapon in detecting bribery and corruption.

## III, 3.0 – Tax Treatment of Bribe Payments, p. 28

Tax deductibility of bribe payments should be expressly prohibited, either as a stand-alone provision of the tax law or as part of a general provision disallowing deduction of costs related to any criminal

offense. As tax authorities will often be examining detail related costs, there should be a requirement that if tax authorities become aware of foreign bribery, then they are required to report it to the proper authorities.

### III, 4.2 – Independent External Audit, p. 33

It is critical that the conflict between possible imposed duties on external auditors to report suspicions of bribe versus the duty of confidentiality be addressed. Confidentiality requirements appear to conflict with rules on reporting. Current accounting standard ISA240 precludes reporting fraud to a party outside the client entity. The level of proof and materiality could possibly be the trigger requiring such reporting. A discussion and agreement on the topic needs to occur.

Although external auditors might not be obligated to report suspicions of crimes to outside authorities, they are obligated to report such suspicions to the audit committee, which in turn is obligated to report such activities (in some parties) to the proper authorities.

### III, 5.0 – Public Procurement, p. 35

The focus on fighting corruption in public procurement is proper. Parties should be strongly encouraged or required to disqualify persons from public procurement that have admitted to, consented to, had an administrative order concluding that they had committed bribery, or convicted of domestic bribery, private bribery, or foreign public bribery, in any country within a reasonable time period (e.g., three to five years).

### III, 6.0 – Foreign Bribery in Relation to ODA-Funded, p. 37

Whether or not suspicions exist concerning a consultant's use of bribery, consideration should be given to requiring due diligence or a background check being performed before hiring the consultant.

### III, 7.0 – Co-operation with Non-parties to the Convention, p. 39

Internal auditing, police enforcement, and general awareness about foreign bribery training should be added to the list of aids given to non-member countries, and proper assurance measures should be taken by members of the Convention.