

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

Comments from Mr. Joseph E. Murphy (Corporate Compliance and Ethics Professional)

Introduction. The following comments are submitted by Joseph E. Murphy, an attorney in the compliance and ethics field, an editor of ethikos (www.ethikosjournal.com), and a certified compliance and ethics professional, in response to the Consultation Paper: Review of the OECD Instruments on Combating Bribery of Foreign Public Officials in International Business Transactions Ten Years after Adoption issued January 2008 (“Consultation Paper”). Although I have included references to other organizations in this paper, my comments do not necessarily represent the views of any other person or organization. The OECD is to be commended for opening up this commentary process to all interested persons, and for its diligence in pursuing the fight against corruption. These comments are based on my review of the Consultation Paper, the Mid-Term Study of Phase 2 Reports (“Mid-Term Study”), and the 1997 Revised Recommendation of the Council on Combating Bribery in International Business Transactions. They are also based on my experience working in the compliance and ethics field for companies, law firms and governments for the past 30 years, including serving as a witness for the United States in the OECD Phase 2 review of compliance with the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (“the OECD Treaty”).

Scope of these comments. These comments address matters relating to the use of compliance and ethics programs as an anti-bribery tool, and the associated use of voluntary disclosure programs by governments and public international organizations. They respond to elements in the Consultation Paper and the Mid-Term Study. The 20 paragraphs in these comments address:

- a. The value of getting governments to promote compliance programs and how the compliance and ethics profession should be part of this process (3-4);
- b. How to reach small and medium-sized enterprises (5);
- c. The need to avoid mistakes in dealing with compliance programs, such as using codes to conclude that large companies do have such programs (6-11);
- d. How to ensure companies have safe reporting systems (12);
- e. Avoiding mistakes in assessing whether nations are actually promoting programs (13-15);
- f. The need for OECD to address the use of national privacy laws to subvert compliance and ethics programs (16);
- g. How to reach tax and other governmental agencies (17);
- h. Assessing “imposed supervision” as a form of penalty (18); and
- i. Voluntary disclosure and the World Bank’s model program (19-20)

Assessing efforts to promote compliance and ethics programs. The Mid-Term Study recommends that the OECD include assessment of the various nations’ efforts to promote effective compliance and ethics programs in the Post Phase 2 assessments. Compliance and ethics programs are critical in preventing illegal and unethical conduct in corporations¹ and other organizations involved in international

¹ References herein to “corporation” or “company” extend to any form of organization, including non-profits, universities, unions, corporations, partnerships, and governmental bodies.

transactions. Whether a corporation has 100,000 employees or only 200, compliance and ethics programs are the one tool through which the law and public policy are converted into reality. If the OECD Treaty is to change the face of global corruption, it is essential that company compliance and ethics programs are part of this solution. Given this fact, OECD should include compliance and ethics professionals and their organizations in this process. This would include non-governmental organizations like the Society of Corporate Compliance and Ethics (SCCE)(www.corporatecompliance.org). The SCCE, an international membership organization of those interested in compliance and ethics, has as its mission “to champion ethical practice and compliance standards in all organizations and to provide the necessary resources for compliance professionals and others who share these principles.” SCCE would be well positioned to assist OECD in understanding this important profession and its role in preventing and detecting all forms of company misconduct, including foreign bribery.

Study of compliance and ethics programs. Paragraph 172 of the Mid-Term Study called for the Working Group to do a comparative analysis of compliance programs and identify the key elements of an effective program. This is an admirable direction, but it should be informed by the experience of compliance and ethics professionals. Like internal auditing, this field has its own experts, literature, ethical code, professional organizations, and standards. In internal auditing there are accepted standards for professional conduct, and accepted standards for what makes an audit effective. So, too, in the compliance and ethics field, there is a store of knowledge and professional experience that should be used by the OECD. Paragraph 103 of the Consultation Paper references the professional standards of internal auditors as a factor that suggests enlisting internal auditors in the fight against corruption. This same conclusion applies with even more force with respect to compliance and ethics professionals. The OECD should be aware that compliance and ethics professionals have adopted strong professional and ethical standards. See the Code of Ethics for Compliance and Ethics Professionals, <http://www.corporatecompliance.org/Content/NavigationMenu/Resources/ProfessionalCode/SCCECodeOfEthics.pdf>. Compliance and ethics professionals have a duty to take action to prevent and detect corporate crime, including corruption. The OECD should actively recruit this profession in its efforts to combat corruption.

Small and medium-sized enterprises. The Consultation Paper, paragraph 100, raises a concern that small and medium-sized enterprises (“SMEs”) have not followed the lead of larger companies in adopting compliance and ethics programs. This is another area that deserves separate focus and study in consultation with compliance and ethics professionals. The SCCE’s sister organization, the Health Care Compliance Association (“HCCA”), has been extremely successful in meeting this challenge in the healthcare field in the United States, which has a high proportion of SMEs. In fact, HCCA’s membership of 5500 likely makes it the world’s largest compliance and ethics membership organization. If the OECD were to reach out to compliance and ethics professionals on a cooperative basis there is much more likelihood of developing effective solutions to reach SMEs. For example, organizations like SCCE can develop systems for sharing resources that enable smaller enterprises to adopt effective programs that are appropriate for the resources and risk profiles of those entities. It can also work with larger companies to develop approaches to supply chain management that encourage and assist smaller suppliers to adopt such programs.

Consistency in defining the compliance and ethics field. OECD should approach the subject of compliance and ethics on a methodologically sound basis, and not on an ad hoc or partial approach. Compliance and ethics is the field of internal management steps to prevent and detect misconduct. The elements of an effective compliance and ethics program are fairly well defined in the United States Organizational Sentencing Guidelines, chapter 8, which spells out a series of management steps for preventing and detecting organizational misconduct. These same types of steps can also be seen in a number of other instruments such as Australia’s standard on compliance programs, AS 3806, the compliance elements in South Africa’s King II Report, and the United Kingdom’s Office of Fair Trading’s

guidance document on competition law compliance programs, see <http://www.corporatecompliance.org/Content/NavigationMenu/International/UnitedKingdom/achieveCompliance.pdf>. In contrast, the OECD's documentation shows some uncertainty on this point. For example, it uses terms like "internal control," "management commitment" and "corporate reporting mechanism" at times as if they were separate subjects, but all of these activities fall under the field of compliance and ethics and would be essential parts of any effective program.

OECD should not re-invent compliance and ethics. OECD's focus on compliance and ethics programs should not be in isolation. National governments should be promoting effective compliance and ethics programs across the board, not narrowly focused on only one area such as bribery. A good program will work in all public policy areas, including those related to corruption like fraudulent accounting and money-laundering, and others deeply connected with policy concerns like environment, privacy, and competition law. OECD need not re-discover compliance and ethics techniques that have worked well for years. While each risk area, such as bribery, has its special characteristics, there are a number of common, core elements that are part of any effective compliance and ethics efforts. OECD should be fully conversant in these, and its anti-corruption efforts should incorporate them. For example, programs need a strong, independent, high-level officer to drive the program. They need a reporting system where employees and others can feel free to raise compliance and ethical concerns. They should seek to develop a culture of compliance and ethics. But if these types of functions are splintered along different risk lines they become inefficient, diluted, and ultimately ineffective.

"Governance" is not compliance and ethics. OECD should also exercise great care in assessing compliance and ethics efforts not to be misled with respect to what is actually being done in each nation and by corporations and other organizations. Compliance and ethics is very different from some of the other areas discussed in the Mid-Term Study. For example there is occasional reference to "governance" practices. "Governance" relates to how an organization is run and overseen, often in a rather mechanical and formalistic sense. It also touches on some rather esoteric issues, like shareholder democracy and other rights. But the area of compliance and ethics is sharply focused on misconduct, not the mechanics of corporate oversight or operations. For example, how the board is elected or who takes notes at the board meetings will likely not prevent bribery in an oil field in Nigeria. But training, audits, and investigations will affect that and other types of misconduct. It is important to keep the focus clear, and not be distracted by irrelevant terms and references unrelated to compliance and ethics.

Defining compliance and ethics programs. Paragraph 101 of the Consultation Paper refers to 3 categories in standards on internal controls: a) effective compliance programs; b) commitment by management, and c) effective reporting of suspicions of foreign bribery. This highlights the need for clarity in OECD's approach to this critical area, since these three "categories" are all part of the same thing. That is, a company could not possibly have "a" if it did not have "b" and "c," because they are essential components of a compliance and ethics program. It is a bit like saying there are three categories of cars: a) cars; b) engines; and c) drive trains. If you do not have b) and/or c), you do not have a). OECD should also consider substituting the term "compliance and ethics program" for "internal controls," which will help clarify this discussion.

Codes are not programs. The Mid-Term Study shows the need to re-focus the OECD's discussion on compliance and ethics programs. There is disproportionate attention to codes of conduct, for example, as proof that larger companies have compliance programs. In paragraph 367 the Mid-Term Study concludes that "an overview of company codes of conduct reviewed during the Phase 2 process reveals that large companies generally have well-developed and well-implemented integrity systems." In point of fact, however, codes of conduct generally have little or no independent value and are indicative of only the existence of the code itself. Simply having a code does nothing to deter or detect bribery. Codes are only tools. If you do not know who is using the tool or what they are doing with it, then you cannot reach any

conclusions about its effectiveness. In fact, there is a significant risk that management will have wasted a disproportionate amount of time on a code, without paying attention to more meaningful steps such as empowering a chief compliance and ethics officer, instituting compliance auditing, and developing professional investigation protocols. However, there is an unfortunate tendency to promote and study codes for the single reason that they are easy to quantify. But simply because something is easy does not make it valuable.

Large companies are not finished with their work. Paragraph 100 of the Consultation Paper broadly concludes that “large multinational companies generally have adequate internal compliance controls.” Paragraph 367 of the Mid-Term Study reached a similar conclusion based on a mere review of codes. This is a startling leap of faith by the OECD. Indeed, it would seem impossible that OECD could reach this conclusion without having undertaken the very difficult step of actually analyzing each company’s program. Having done this for decades as part of my practice, I am of the opinion that OECD could not reasonably reach such a conclusion. In assessing a program, compliance and ethics professionals spend weeks or even months conducting audits, employee surveys, employee interviews, often in remote locations, intensive deep dives of riskier subject matter areas and business units, and numerous additional, often difficult steps in order to attempt to distinguish a paper program from an effective one. One need only look at the record at Siemens (whose code of conduct was described as the “read, laughed and filed code”), or the long, legalistic (and ineffective) code that existed at Enron to see the great danger in such sweeping conclusions. This also underscores the need for clarity in the OECD’s use of terms. It is likely that most large companies do effectively manage their businesses, and in this sense probably have adequate “governance” and “internal controls.” But terms like governance, internal controls, risk management, and corporate responsibility, which all may have their place, are not substitutes for the discipline of compliance and ethics. The existence of governance or controls, or other functions still tells one very little about whether there is an adequate compliance and ethics program intended to prevent and detect criminal conduct.

Corporate reporting mechanisms and whistleblower protections. The Mid-Term Study, in paragraphs 388-391, addresses the need for systems for employees to be able to raise concerns without fear of retaliation. This is treated as if it were a separate topic, but in fact this is a constituent part of any effective compliance and ethics program. The Mid-Term Study, in paragraph 389, noted that in Australia companies did tend to offer such protection; this is not a coincidence nor is it attributable to efforts regarding the OECD Treaty. Rather, it is because Australia, under the guidance of the competition law authority, the ACCC, has actively promoted the field of compliance and ethics; Australia is one of the global leaders in this commitment and the Australasian Compliance Institute, a non-governmental organization, deserves great credit for promoting strong compliance and ethics programs in all sectors of the economy. Rather than devoting special attention to reporting mechanisms, OECD could more effectively promote the availability of safe mechanisms for employees and others to report concerns internally in companies by promoting the compliance and ethics field and all its constituent parts. When governments promote effective programs, and effective programs are correctly defined to include such reporting systems, then they will become more widespread. This is the model that has worked in Australia and that can be applied anywhere there is a serious commitment to prevent corporate crime, including corruption.

Compliance and ethics programs – burden of proof. In its assessments of national governments’ efforts to reward those companies with compliance and ethics programs, the OECD should be wary of any standard that places the burden on the government to prove that a program is ineffective, and standards that reward paper efforts. The company is always in the best position to explain its program and to show that it was designed to be effective. In the Mid-term Study, paragraph 168, there is discussion of the reported Korean approach. There is a statement from the government that there may be protection if there is a “control” such as a code of conduct. This suggests a misunderstanding about compliance and ethics

programs. A code of conduct, no matter what it says or prohibits, is not a “control,” it is just words on paper or on a computer screen. It is laudable and appropriate for governments to recognize that a company that makes real efforts to prevent bribery should benefit and not be treated the same as a company that has been indifferent. But this can only work if the standard is a real one, and not merely paper. If a company has taken the management steps necessary to have a real program – things like an empowered and independent compliance officer, practical training, consistent discipline, incentives promoting compliance, compliance auditing and monitoring, etc. – it will certainly be able to prove this to the government. But allowing a company to escape enforcement merely because it copied a code and placed it on its website is not an effective way to strengthen corporate anti-bribery efforts.

Measuring nations’ promotion of programs. The SCCE is developing a program aimed at measuring national governments’ efforts to promote compliance and ethics programs globally, starting with anti-corruption programs, but eventually including other legal risk areas. This study includes a number of steps that do not appear to have been considered in the Mid-Term Study. OECD should consider revisiting its questions addressed to national governments, including coverage of a greater variety of incentives and promotional steps governments could take.

Do nations really promote compliance and ethics programs? OECD has shown great insight in its recognition that it is the actions of governments that generally induce companies to adopt truly effective compliance and ethics programs. Based on the discussion in the Mid-Term Study, the OECD may want to more actively challenge various nations’ assertions that they have undertaken efforts to promote compliance and ethics programs, whether focused on bribery or on compliance more generally. It may be wise to test such assertions against the perceptions among companies, since promotional efforts are wasted if they are unknown or unimportant to industry. Industry surveys might be appropriate, for example. The experience of compliance and ethics professionals with respect to such promotional efforts should also be examined.

Using privacy laws to subvert compliance and ethics. OECD should consider addressing the recent use of national privacy laws, particularly in Europe, to thwart compliance and ethics efforts. These laws have been used to interfere with companies’ efforts to establish reporting systems to encourage employees to raise compliance and ethical concerns without fear of retaliation. One of the key tools for this purpose is to allow anonymous reporting (with the caveat that no such report is acted upon until allegations are sufficiently verified). However, starting with the French privacy council, there have been efforts to prohibit anonymous reporting, and lesser but nevertheless troublesome steps such as the imposition of impractical limitations on how such channels of communication may be operated. The net result has been to make it more difficult for those employees who might witness misconduct to report it. National privacy standards that require reporting employees to first conduct a legal analysis of the nature of their concerns, and then require management to actively discourage employees from making a report anonymously, appear to be using misdirected concerns about data privacy to disrupt essential efforts by companies to develop effective self-policing efforts. In addition, these so-called privacy rulings introduce a note of official hostility to voluntary company compliance programs, and add bureaucratic obstacles in an environment where companies become reluctant to take innovative and diligent steps to promote compliance and ethics. And merely carving out overly legalistic exceptions to this red tape for bribery violations is not of much assistance to the bewildered employee who only knows that something is wrong, but does not know its correct legal categorization.

Reaching tax and other governmental agencies. The Consultation Paper discusses how public agencies and institutions that come into contact with businesses conducting international business should play a role in preventing and reporting corrupt practices. To bring this to fruition there should be active consideration of the value of such agencies themselves instituting compliance and ethics programs. For example, a nation’s tax agency could institute its own internal compliance and ethics program that would

include ensuring compliance with the terms of the OECD Treaty and that nation's anti-corruption commitments. Tax agencies, customs offices, embassies and other governmental organizations could adopt such internal steps as compliance training for their employees, designation of a compliance and ethics officer, and internal compliance reviews to ensure that such legal and ethical commitments are being consistently followed.

Imposed supervision as a penalty. In assessing penalties and what nations do in response to violations, the OECD should consider imposed supervision as a potent form of sanction, rather than as a lesser alternative to actual convictions and fines. In imposed supervision, an agreed-upon, independent third party supervises a company's compliance reform efforts aimed at ensuring that there is no recurrence of the underlying violation. This person, typically designated as a monitor, has broad powers to test and assess a company's compliance and ethics efforts and essentially looks over the shoulders of senior management. The OECD should consider the possibility that when a publicly traded company is subject to traditional enforcement efforts and pays a fine, no matter how large, management is effectively paying with someone else's money – the stockholders'. This may significantly vitiate the deterrent effect of such fines. Managements paying fines consistently announce to the press that they are putting this "behind them." And it is not unusual for a company's stock to go up on the day a fine is announced (because the market favors certainty). On the other hand, if fines and other punishments are truly big enough to cause disruption in large companies and other organizations this typically results in broad harm to numerous innocent persons – employees and their families, neighboring communities, shareowners (including pension funds, etc), suppliers, and even customers. As an alternative, imposed supervision may be a much more effective means to obtain management's continued attention, and may serve as more of a deterrent than merely taking money from the shareholders (who typically have had no role in any violations). In assessing nations' enforcement records, the OECD should examine the actual role of these imposed arrangements, their impact on corporate culture, and the deterrent effect of facing these as a form of punishment.

Including public international organizations. The OECD should consider including public international organizations like the World Bank, the International Monetary Fund, and the United Nations, which fund projects or retain contractors, in its examination of steps to prevent bribery. The World Bank in particular has instituted a quite noteworthy voluntary disclosure program that includes the requirement for those making disclosures to institute compliance and ethics programs. This is a model that all such organizations should be invited to follow. In fact, it offers a model for national governments as well.

The World Bank INT model. If the OECD's concern is the prevention and detection of bribery, it should not appear to emphasize conviction records over actual compliance. While deep skepticism is certainly warranted for any nation that claims none of its companies have ever engaged in bribery, the model adopted by the World Bank's anti-corruption office, the INT, to promote voluntary disclosure of bribery has much to commend itself. If a contractor discovers bribery and voluntarily reports to the World Bank and remedies its misconduct, it is then spared from debarment, which is the Bank's one form of punishment. The contractor must then implement a compliance and ethics program, which must be monitored by an outside expert. This is an approach not aimed at building impressive external penalty statistics, but at actually ferreting out bribery. Through this method the Bank can learn much more about what is happening in real operations in the field, corruption at the national government level can be surfaced (and even corrupt conduct by the disclosing company's peers), and companies can join as partners in the war against bribery. This contrasts with the recent approach reportedly being used in the United States, where apparent concern within the government about developing impressive penalty statistics has led to the perception that it is exactly those companies who are foolish enough to voluntarily disclose who will be hit with the hardest penalties. The United States offers no amnesty for voluntary disclosure in the field of overseas bribery (in stark contrast to its highly successful Corporate Leniency Program in antitrust); rather, companies that have voluntarily disclosed FCPA violations have been pummeled with

enormous penalties. Whether American companies will begin to re-think the wisdom of voluntary disclosure, and whether companies that flout the law and refuse to disclose will be seen as smarter competitors (on the theory that enforcers will be tied up punishing those who voluntarily disclosed) remains to be seen. Before concluding or implying that enforcement statistics are the primary goal, the OCED would do well to compare the World Bank model with the enforcement statistics model. There is great value, of course, in serious and strong enforcement against those who flout the law, but when enforcement and penalties are focused on those who voluntarily disclose and cooperate then the one thing that is deterred is disclosure – not corruption.