



PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN THE UNITED STATES

October 2010

This Phase 3 Report on the United States by the OECD Working Group on Bribery evaluates and makes recommendations on the United States' implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2009 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions. It was adopted by the Working Group on 15 October 2010.

This document and any map included herein are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area.

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EXECUTIVE SUMMARY

The Phase 3 Report on the United States by the OECD Working Group on Bribery in International Business Transactions (Working Group) evaluates and makes recommendations on implementation by the United States and enforcement of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Anti-Bribery Convention) and related instruments. The Working Group commends the United States for its visible and high level of support for the fight against the bribery of foreign public officials, including engagement with the private sector, substantial enforcement, and stated commitment by the highest echelon of the Government.

Since Phase 2, U.S. enforcement has increased steadily and resulted in increasingly significant prison sentences, monetary penalties and disgorgement. Increased enforcement was enabled by the good practices developed within the U.S. legal and policy framework, including the dedication of resources to specialised units in the Department of Justice (DOJ), the Federal Bureau of Investigation (FBI) and the Securities and Exchange Commission (SEC). New legislation has also strengthened accounting and auditing standards, including those introduced in the 2002 Sarbanes-Oxley Act, covered in the U.S. Phase 2 written follow-up report, and whistleblower protections under the July 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act.

Good practices developed within the U.S. legal and policy framework that have helped achieve a significant enforcement level are described in several areas of this report. The U.S. has investigated and prosecuted cases involving various business sectors and various modes of bribing foreign public officials. In addition, it has been conducting proactive investigations, using information from a variety of sources and innovative methods like plea agreements (PAs), Deferred Prosecution Agreements (DPAs), Non-Prosecution Agreements (NPAs), and the appointment of corporate monitors. Vigorous enforcement and record penalties, alongside increased private sector engagement, has encouraged the establishment of robust compliance programmes and measures, particularly in large companies, which are verified by the accounting and auditing profession and monitored by senior management. Less is known of the effect increased FCPA enforcement has had on small- to medium-sized enterprises (SMEs), which is an issue shared by all Parties to the Convention.

Ways in which implementation of the Convention could be made more effective have also been identified. For instance, the Working Group recommends that the U.S., in its periodic review of its policies and approach on facilitation payments, consider the views of the private sector and civil society... The evaluation also recommended the consolidation and summarisation of publicly available information on the application of the FCPA, including information regarding the affirmative defence for reasonable and bona fide expenses. This could be especially useful for SMEs. Similarly, given that the U.S. authorities are increasingly enforcing the FCPA by using DPAs and NPAs, the Working Group believes that transparency and public awareness of these measures could be enhanced if the U.S. made public, where appropriate, more detailed reasons on issues such as why a particular type of agreement is used, the choice of an agreement's terms and duration, and how a company has met the agreement's terms. The Working Group also recommends that the U.S. ensure that the overall limitation period applicable to the foreign bribery offence is sufficient to allow adequate investigation and prosecution.

The report and the recommendations therein, which reflect findings of experts from Argentina and the United Kingdom, were adopted by the OECD Working Group. Within one year of the Group's approval of the report, the United States will make an oral follow-up report on its implementation of certain recommendations. It will further submit a written report within two years. The Report is based on the laws, regulations and other materials supplied by the United States, and information obtained by the evaluation team during its three-day on-site visit to Washington D.C. on 7 to 9 June 2010, during which the team met representatives of the United States' public administration, private sector and civil society.

A. INTRODUCTION

1. The on-site visit

a) *Background*

1. From 7 to 9 June 2010, an evaluation team representing the OECD Working Group on Bribery in International Business Transactions (Working Group on Bribery) conducted its Phase 3 on-site visit to the United States. The purpose of the visit was to help the Working Group on Bribery assess the United States' implementation of the OECD Convention on Combating the Bribery of Foreign Public Officials in International Business Transactions (Convention) and related instruments.¹ The three-day visit was held in Washington D.C., and involved extensive meetings with representatives of the United States Government and non-government representatives.

2. The Phase 2 evaluation of the United States took place in October 2002, and the United States Phase 2 written follow-up report was presented in June 2005. The Phase 3 on-site visit therefore focused on developments on the United States' implementation of the Convention and related instruments since 2002. The on-site visit to the United States took place contemporaneously with the Phase 3 on-site visit to Finland. These visits were the first under the new Phase 3 evaluation process. The United States and the evaluation team therefore viewed this visit as an important opportunity for testing the implementation of the more focused and concise Phase 3 evaluation process.

3. The evaluation team spent equal time meeting with government and non-government representatives. This was a significant departure from previous on-site visits in Phase 2, which were much more focused on government. However, the team felt that splitting the time equally was appropriate given the extensive enforcement record in the United States and the implication this had for private sector engagement. The team also felt that splitting the meetings equally would ensure adequate time to assess the impact of the high level of enforcement by the United States' authorities on corporate compliance. Moreover, it was important to learn about non-governmental views in light of the recently adopted 2009 OECD *Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions* (2009 Anti-Bribery Recommendation), which states that Parties to the Convention should encourage companies to develop and adopt adequate internal controls, ethics and compliance programmes or measures.

4. The following United States Government ministries and bodies participated in the on-site visit: Department of Justice (DOJ), Securities and Exchange Commission (SEC), Department of State, Department of Commerce, Federal Bureau of Investigation (FBI), Internal Revenue Service (IRS), and Office of Special Counsel.

5. Non-government meetings were attended by twenty-nine private sector representatives, including nineteen companies, three business associations, and seven accounting and auditing firms. All the major

¹ Related instruments include: 1. 2009 Recommendation of Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions; 2. 2009 Recommendation of Council on Tax Measures for Further Combating Bribery of Foreign Public Officials in International Business Transactions; and 3. 2006 Recommendation of Council on Bribery and Officially Supported Export Credits.

sectors at risk for the bribery of foreign public officials were represented, including six aerospace and defence companies, five companies from the extractive industry, one telecommunications company, three financial services companies, one pharmaceutical company and three construction and manufacturing companies. Seven representatives of the legal profession, including compliance experts, participated in the meetings, as well as one academic, and representatives of two civil society organisations.

6. The evaluation team was composed of experts from Argentina and the United Kingdom as well as the OECD Secretariat.²

7. In preparation for the on-site visit, the United States Government provided extensive materials and responses to the Phase 3 Questionnaire, which is a general questionnaire that must be answered by all Parties to the Convention for their Phase 3 evaluations. The United States also provided answers to supplementary questions, prepared by the evaluation team in accordance with the Phase 3 procedure. Supplementary questions are specific to the country being evaluated and focus on outstanding issues remaining from Phase 2, as well as any other developments since Phase 2 relevant to a Party's effective implementation of the Convention and related instruments. The examination team understands that the United States Government will make these responses publicly available once the Phase 3 Report is finalised.

8. All these materials were reviewed by the evaluation team before the on-site visit. In addition, the team conducted independent research, which included, *inter alia*, reports on the United States by the Group of States against Corruption (GRECO) and the Financial Action Task Force (FATF).

b) Conduct of the On-Site Visit and Follow-Up

9. Leading up to, during and following the on-site visit, the United States' authorities afforded the highest level of co-operation and transparency. The responses to the Phase 3 and supplementary questionnaire provided an excellent basis for the on-site meetings, enabling the evaluation team to focus on the most important issues, and make the most efficient use of their three days in Washington D.C. Following the on-site visit, the United States' authorities responded to a large number of requests for clarifications and confirmations to help the evaluation team fully understand certain unique features of the U.S. legal system. The requested information was provided by the U.S. authorities despite competing demands on their time caused by significant FCPA enforcement actions taking place simultaneously.

10. An important feature of the Phase 3 on-site visit was that, due to the large number of FCPA enforcement actions, and high level of engagement between the government and the private sector, the evaluation team was able to discuss in great detail how the FCPA works in practice. As a result, the level of information in this report on these matters of central importance to Phase 3 is unprecedented. It also afforded an incomparable opportunity to identify challenges and highlight good practices developed in the United States for implementing the Convention.

11. The evaluation team noted the extremely strong and visible commitment by the United States Government at the highest levels to the effective implementation of the Convention and the Working

² Argentina was represented by: Gerardo E. Bompadre, Legal Department, Ministry of Foreign Affairs, International Trade and Worship; and José M. Ipohorski Lenkiewicz, Co-ordinator, Investigation Division, Anti-Corruption Office, Ministry of Justice, Human Rights and Security. The United Kingdom was represented by: Nicholas van Benschoten, Head, Anti-Corruption Unit, Department of Business, Innovation and Skills; Kathleen Harris, Head, Policy and Standards and the Individual Investment Domain, Serious Fraud Office; and Nimesh Jani, Senior Policy Advisor on International Issues, Crown Prosecution Service. OECD Secretariat was represented by: Christine Uriarte, Anti-Corruption General Counsel, Anti-Corruption Division, Directorate for Financial and Enterprise Affairs; William Loo, Senior Legal Analyst, Anti-Corruption Division; and Mary Crane, Communications Officer, Anti-Corruption Division.

Group on Bribery's monitoring process. At the on-site visit, opening addresses were given by four high-ranking U.S. officials: Lanny Breuer, Assistant Attorney General, Criminal Division, DOJ; Lorin Reisner, Deputy Director, Division of Enforcement, SEC; Anna Borg, Acting Assistant Secretary for Economic, Energy and Business Affairs, Department of State; and Cameron Kerry, General Counsel, Department of Commerce. They talked about important advances since the Phase 2 evaluation that have resulted in record enforcement levels and a remarkable level of engagement with the private sector, as well as planned future advances to maintain the momentum, such as increasing the focus on enforcement against individuals, and conducting more industry sweeps. They stated they wanted to share good practices, but also invited constructive criticism from the evaluation team, which they recognised as a fundamental part of the peer-review evaluation process.

12. The high-level political commitment was not restricted to the on-site visit. For instance, one week before the on-site visit, Attorney General Eric Holder gave a keynote address at the OECD in which he highlighted the priority that the United States is giving to implementation of the Convention and the monitoring process. On the occasion of the tenth anniversary of the entry into force of the Anti-Bribery Convention on 9 December 2009, Secretary of State Hilary Rodham Clinton sent a video-taped message to the OECD in which she spoke about how the U.S. was looking forward to being one of the first countries to be evaluated in Phase 3. Secretary of Commerce Gary Locke attended and participated in the 9 December proceedings, as well as Cameron Kerry, General Counsel for the Department of Commerce.

13. Due to the flexibility and openness of the U.S. authorities, the evaluation team was able to make efficient use of their time during the on-site visit to explore how the United States' regime for combating the bribery of foreign public officials operates in practice. Given the extensive amount of United States enforcement activity, the evaluation team found the following features particularly helpful in this regard:

- Meetings with non-government representatives, who were selected by the evaluation team, took place outside of government premises³ and were not attended by U.S. Government representatives.⁴ Both the U.S. authorities and the evaluation team felt that this arrangement would encourage frank discussion.
- Equal time was dedicated to meeting with government and non-government participants, thus providing the evaluation team with various points of view to make its assessment.
- With the consent of the U.S. Government, the evaluation team began consulting early with the accounting and auditing panellists by sending them a list of issues for discussion on which they provided preliminary input before the on-site visit.⁵ The evaluation team could therefore focus on the most significant aspects of these complex accounting and auditing issues during the on-site visit.

Commentary

The evaluators commend the United States Government's visible and high level of support for the fight against the bribery of foreign public officials, including as demonstrated by

³ The evaluation team is grateful to the OECD Washington Centre for hosting the non-government meetings.

⁴ See paragraph 26 of the Phase 3 Procedure, which provides that an evaluated country may attend, but should not intervene, during the course of non-government panels.

⁵ The evaluation team is also grateful to the Center for Audit Quality (www.thecaq.org), which coordinated input from the accounting and auditing profession for the evaluation team, including an extensive written submission prior to the on-site visit, which they used to conduct their meeting with the accounting and auditing profession during the on-site visit.

engagement with the private sector, substantial enforcement, and stated commitment by the highest echelon of the Government. The evaluators believe that the overall implementation of the Convention results from good practices developed within the U.S. legal and policy framework, which are described in detail in this report. These practices might be considered by other Parties to the Convention, where appropriate and feasible, depending on their legal and political frameworks, always bearing in mind the underlying principle of ‘functional equivalence’ in the Convention.

The evaluators consider the practice of the United States is compliant with the Convention. However, the evaluators point out areas where they believe implementation of the Convention and the 2009 Recommendation might be enhanced.

2. Outline of the Report

14. This Report follows a general outline that is used for all Phase 3 reports. However, in line with the goals of Phase 3, the Report gives greater focus to matters that the evaluation team considered most significant for the United States, including a few recommendations from Phase 2 that were not fully implemented, and other country-specific issues that the evaluation team deemed important, including good practices developed within the U.S. legal and policy framework, which are discussed in this review where appropriate. These examples are drawn from the United States’ substantial record of bringing enforcement actions ranging in size and complexity. In addition, in line with the goals of Phase 3, the report addresses issues identified by the Working Group on Bribery as cross-country horizontal issues, to demonstrate how the United States has addressed them since Phase 2.

15. The main part of this report, Part B, provides the findings of the evaluation team based on the on-site visit and its review of written responses of the United States to the Phase 3 questionnaire, supplementary questionnaire and questions after the on-site visit. Part B also provides commentaries by the evaluation team on those matters that it believes warrant further action by the United States, and by the Working Group on Bribery for matters that affect the Working Group as a whole. Part C of the report presents the recommendations of the Working Group to the United States for further action as well as areas that it will follow-up according to the Phase 3 procedure.

3. Brief overview of the United States’ Economy

16. The United States has the largest economy in the world, with a gross domestic product of USD 14 trillion⁶. It is also the largest foreign investor in the world with U.S. direct investment abroad that totalled \$268.7 billion in 2009⁷ and accounted for roughly 22 percent of total world foreign direct investment outflows⁸, and exports that totalled USD 1.6 trillion⁹ (goods and services) and accounted for roughly 10 percent of world exports in 2009.¹⁰ Countries with which the U.S. does the most business include:

⁶ U.S. Bureau of Economic Analysis (BEA) data on the U.S. Gross Domestic Product can be found at <http://www.bea.gov/national/index.htm#gdp>

⁷ BEA International Economic Accounts found at <http://www.bea.gov/international/index.htm#bop>

⁸ Source: OECD and IMF figures for 2009

⁹ BEA International Economic Accounts

¹⁰ OECD Economic Outlook No. 87 (May 2010) found at http://www.oecd.org/document/4/0,3343,en_2649_33733_20347538_1_1_1_1,00.html

Table 1. Largest U.S. Trade Partners by Exports (2009)¹¹

Rank	Country	Exports (Goods) ¹	Imports (Goods)	Total Trade (Exports + Imports)
1	Canada	204,658	226,248	430,906.4
2	Mexico	128,892	176,654	305,546.5
3	China	69,497	296,374	365,870.6
4	Japan	51,134	95,804	146,937.9
5	United Kingdom	45,704	47,480	93,183.5
6	Germany	43,306	71,498	114,804.5
7	Netherlands	32,242	16,099	48,340.0
8	Korea	28,612	39,216	67,827.5
9	France	26,493	34,236	60,729.0
10	Brazil	26,095	20,070	46,165
-	ASEAN	53,779	92,100	145,879
-	EU-27	220,599	281,801	502,400
	Top 10 Total	656,633	1,023,679	1,680,312
	World Total	1,056,043	1,559,625	2,615,668
	Top 10 % Share	62%	66%	64%

1. All trade figures are in millions of dollars.

17. As an indication of the financial power U.S. multinational enterprises (MNEs) command outside U.S. borders, the U.S. Government also estimates that, in 2008, worldwide capital expenditures by U.S. MNEs were USD 708.2 billion, while capital expenditures abroad by their majority-owned foreign affiliates were \$188.5 billion. Sales by U.S. parent MNEs were USD 9,509 billion, up from USD 3,329 billion in 1989 (the earliest year for which figures are available), while sales by their majority-owned foreign affiliates have gone up from USD 1,094 to USD 5,520.2 billion over the same time period.¹² The FCPA applies to both U.S. multinational enterprises (MNEs) as well as foreign multinational enterprises (FMNEs) that are U.S. issuers. While some MNEs and FMNEs that are U.S. issuers might not be subject to anti-bribery laws in their home countries due to either the laws not existing or the countries' failure to enforce those laws for various reasons, they must abide by the FCPA. Given the wide-ranging number of countries in which MNEs and FMNEs are based, the evaluators did not include similar statistics to show their financial power outside U.S. borders or their worldwide capital expenditures.

4. Cases involving the bribery of foreign public officials

18. The United States has investigated and prosecuted the most foreign bribery cases among the Parties to the Anti-Bribery Convention. From 1998 to 16 September 2010, 50 individuals and 28 companies have been criminally convicted of foreign bribery, while 69 individuals and companies have been held civilly liable for foreign bribery. In addition, 26 companies have been sanctioned (without being convicted) for foreign bribery under non-prosecution agreements (NPAs) and deferred prosecution agreements (DPAs). Sanctions have also been imposed for accounting misconduct and money laundering related to foreign bribery.

19. These cases have resulted in increasingly significant penalties. From 1998 to 2003, the maximum monetary sanctions levelled against a company in an FCPA case were USD 2.5 million. Since then, 23 companies have received monetary sanctions in excess of USD 10 million. In one case, monetary sanctions totalling USD 800 million were ordered against a single company. In 2010, an 87-month sentence was imposed against an individual in an FCPA case. Since 2004, over USD 1 billion in foreign bribery proceeds have been recovered through disgorgement actions. The SEC also obtains civil penalties in

¹¹ U.S. International Trade Administration, 'Top U.S. Trade Partners', found at: http://www.trade.gov/mas/ian/build/groups/public/@tg_ian/documents/webcontent/tg_ian_003020.pdf

¹² BEA, 'Summary Estimates for Multinational Companies: Employment, Sales, and Capital Expenditures for 2008', 16 April 2010 (<http://www.bea.gov/newsreleases/international/mnc/mncnewsrelease.htm>)

addition to DOJ criminal fines. In the first 9 months of 2010 alone, the SEC obtained over USD 404 million in disgorgement, interest and civil penalties from thirteen companies and eight individuals. Representatives of the private sector told the evaluators that these increasingly heavy sanctions combined with the increased number of prosecutions against companies and individuals have significantly raised the FCPA's profile. They are also felt to be the main reason why many companies have taken steps to improve their anti-bribery measures, internal controls, books and records, and compliance systems.

20. These cases come to the authorities' attention through a myriad of means. A significant number (but not the majority) of investigations result from voluntary self-reporting by companies. Other sources include corporate securities filings; suspicious activity reports from financial institutions; the media, including keyword searches of the Internet; whistleblowers, employees, customers, competitors, and agents; *qui tam*¹³ and civil complaints; referral from other U.S. government agencies, including overseas embassies; international financial institutions such as the World Bank; reports through a 'hotline' email address and website; and information from foreign states, including requests for mutual legal assistance (MLA). A recent case resulted from an undercover sting operation.¹⁴ Investigations also originate from research and traditional law enforcement operations to determine where corruption may exist. The U.S. utilizes statistics that it compiles and information obtained in prior and current FCPA cases to identify trends and patterns of behaviour that warrant investigation. The U.S. also conducts industry sweeps, which are targeted investigations focusing on a particular industry or market. The U.S. believes that the use of such proactive tools keeps its regulators ahead of trends and allows them to combat corruption in a timely fashion. The U.S. did not provide statistics on the sources of investigations, due to the need to protect investigative sources and methods, but confirms that no one source accounted for a majority.

21. These FCPA enforcement figures are expected to increase in the near future. Presently, the United States has more than 150 criminal and 80 civil ongoing FCPA investigations.¹⁵ The U.S. authorities recently announced new initiatives including investigations of specific industries ('targeted sweeps' or 'industry-wide sweeps') and an increased emphasis of prosecuting natural persons in addition to companies. These efforts will likely lead to more prosecutions and convictions.

Commentary

The evaluators commend the United States for its substantial enforcement, which has increased steadily since Phase 2. These cases involve various business sectors, and various modes of bribing foreign public officials. During the same period, U.S. enforcement has also resulted in increasingly significant monetary penalties and disgorgement for the bribery of foreign public officials.

In addition, the evaluators believe that the record of United States FCPA enforcement, including case summaries from 1998 to 2010 and court opinions, provides an excellent compendium of practice, which could serve as a valuable resource for other Parties and non-Parties on: 1) the modus operandi of foreign bribery transactions; and 2) U.S. enforcement procedures and outcomes.

¹³ The False Claims Act (31 U.S.C. § 3729-3733) allows any person to file a legal action, known as a *qui tam* action, against government contractors on the basis that the contractor has committed a fraud against the government. The person bringing the action is entitled to recover a portion of the proceeds of the action.

¹⁴ A discussion of sources of allegations is also available under Section B.1.e.i.

¹⁵ Many are parallel criminal and civil investigations of the same alleged misconduct.

B. IMPLEMENTATION AND APPLICATION BY THE UNITED STATES OF THE CONVENTION AND THE 2009 RECOMMENDATIONS

1. Investigation and prosecution of the foreign bribery offence

a) Introduction

22. In addition to recommending periodic reviews of Members' laws for implementing the Convention, Paragraph V of the 2009 Recommendation recommends that Member countries periodically review their 'approach to enforcement in order to effectively combat' the bribery of foreign public officials.

23. The high level of enforcement of the FCPA by the DOJ and the SEC is discussed in various parts of this Report, including the recent increase in enforcement. It is beyond dispute that the United States treats the bribery of foreign public officials as high priority, and that this has translated into vigorous law enforcement. The rate of enforcement has substantially increased in recent years. Prosecutions have increased from 4.6 per year from 2001 to 2005, to 18.75 per year from 2006 to 2009. A comprehensive statistical breakdown of the U.S. enforcement actions is provided in Annex 4 to this report.

24. This part of the Report, first and foremost, looks at how the United States has succeeded in achieving a record level of enforcement, particularly through recent trends in investigating and prosecuting FCPA violations. It reviews recent trends such as the sources of allegations, and the use of deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs). Since the use of agreements is also thoroughly explained in the part of this report on sanctions, this part focuses on their deterrent value. It also revisits the adequacy of the statute of limitations, an issue that was flagged for further consideration in Phase 2, and U.S. policy and practice on parallel proceedings in other jurisdictions. This part of the report also reviews the reasons for terminations of investigations and declinations to prosecute, including how the United States legal system ensures that, consistent with Article 5 of the Convention, 'considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved' do not influence investigative and prosecutorial decision-making in the United States.

25. This part of the report opens by providing an updated description of the roles and responsibilities of the DOJ, SEC and FBI in FCPA enforcement, and assessing remaining issues from Phase 2 on the compilation of enforcement statistics, and the need for a clear policy statement by the U.S. Government on the priorities of the DOJ and the SEC in prosecuting FCPA cases.

b) The roles and responsibilities of the DOJ, SEC, and FBI

26. Three government agencies are primarily responsible for FCPA enforcement actions: the DOJ, SEC and FBI. All three now have specialised units dealing exclusively with FCPA matters.

27. The Fraud Section of the DOJ Criminal Division in Washington, D.C. is the body responsible for all criminal prosecutions and for civil proceedings against non-issuers under the FCPA.¹⁶ The Fraud

¹⁶ USAM 9-47.110 and 9-47.130

Section formed a dedicated FCPA Unit in 2006 to handle prosecutions, opinion releases, interagency policy development, and public education. The Unit consists of a Deputy Chief, two Assistant Chiefs and a number of trial attorneys. Some Fraud Section attorneys outside the Unit also handle FCPA cases on a part-time basis. In total, the Fraud Section has the equivalent of 12-16 attorneys working full-time on FCPA matters. The goal is to increase this figure to 25. Prosecutors from a local United States Attorney's Office may assist Criminal Division attorneys in specific cases.

28. The Federal Bureau of Investigation (FBI) conducts criminal investigations into FCPA violations under the DOJ Criminal Division's supervision. In 2008, the FBI created the International Corruption Unit (ICU) to oversee the increasing number of corruption and fraud investigations emanating overseas. Within the ICU, the FBI further created a national FCPA squad in its Washington, D.C. Field Office to investigate or to support other FBI units investigating FCPA cases. The squad has 1 Supervisory Special Agent, 12 Special Agents, 1 Investigative Analyst, and 1 administrative support officer. The ICU also provides annual training on FCPA investigations to agents from the FBI and other law enforcement agencies nationwide.

29. The SEC Enforcement Division is responsible for civil enforcement of the FCPA with respect to 'issuers'.¹⁷ The FCPA defines an 'issuer' as any person who issues or proposes to issue any security, with some exceptions.¹⁸ The SEC may apply to the court for an injunction, civil penalty, and disgorgement of ill-gotten gains plus pre-judgment interest against an issuer and those acting on behalf of the issuer for a violation of the FCPA's anti-bribery, books and records, and internal controls provisions. In January 2010, the Division created a specialized FCPA unit with approximately 30 attorneys. In addition, the SEC has other trained investigative and trial attorneys outside the FCPA Unit who pursue additional FCPA cases. The FCPA Unit also has in-house experts, accountants, and other resources such as specialised training, state-of-the-art technology and travel budgets to meet with foreign regulators and witnesses.

30. The possibility of concurrent criminal and civil proceedings against an issuer in the same matter calls for co-ordination. This co-ordination begins from the outset of an investigation. For example, the DOJ and FBI could be responsible for gathering information through criminal processes and formal MLA, while the SEC may gather evidence from overseas foreign securities regulators through memoranda of understanding. The evidence gathered may then be shared with criminal authorities. Co-ordination also occurs when proceedings are commenced or settled, *e.g.* because the existence of civil proceedings or penalties affects the decision of whether to commence criminal proceedings, and what level of criminal sanctions would be appropriate in case of a settlement. New databases on cases described below also enhance co-ordination.

31. The evaluators note that the United States has devoted significant resources to FCPA enforcement. The creation of dedicated FCPA units in the DOJ, SEC and FBI allows economies of scale, concentrates expertise and helps guard against inconsistencies in approach. This is particularly vital because of the complexity of FCPA cases and the requirement that all FCPA cases are dealt with centrally by the DOJ Fraud Section and the SEC's FCPA Unit. At the same time, investigative and prosecutorial teams often blend attorneys and investigators from these central units with those from local offices. This allows the flexible use of resources and takes advantage of local expertise while maintaining central co-ordination and oversight of cases.

32. The DOJ and SEC also utilise their Offices of International Affairs (OIA) to assist in FCPA investigations. Given that a significant amount of documents, bank records, and witnesses are overseas, the DOJ and SEC encounter numerous legal and political obstacles in investigating and prosecuting FCPA

¹⁷ 15 U.S.C. § 78u; USAM 9-47.130

¹⁸ 15 U.S.C. § 78C

violations. OIA provides expertise in handling the processing of requests under MLA treaties, the Multilateral Memorandum of Understanding and other mechanisms to obtain documents (see section below on ‘International Co-operation’). OIA also provides expertise and guidance on handling data protection issues and other challenges to U.S. requests for evidence of corruption.

Commentary

Overall, the approach of the United States on combating the bribery of foreign public officials has resulted in a substantial level of enforcement. In particular, the evaluators note that since the DOJ Fraud Section formed a dedicated FCPA Unit in 2006, the rate of enforcement has significantly increased. The evaluators note that the creation in 2008 of the FBI International Corruption Unit has strengthened this trend. The establishment of a specialised FCPA unit in the SEC Enforcement Division should further strengthen efforts in the United States to enforce the FCPA. The dedication of resources and specialisation of law enforcement functions in the United States to combating the bribery of foreign public officials reflects the high priority that the U.S. gives to this issue.

c) Remaining issues from Phase 2

33. The Phase 2 Recommendations on the need for comprehensive enforcement statistics has been fully implemented. The U.S. has compiled comprehensive enforcement statistics, which are provided in the U.S. responses to the Phase 3 questionnaire, which the U.S. will make public once the Phase 3 Report is finalised. These statistics show the number of charges filed against natural and legal persons, the nature of the charges, the status of the proceedings, and whether concluded proceedings have resulted in guilty pleas, trial convictions or acquittals. Statistics of this nature have been compiled for both natural and legal persons, and for criminal and civil proceedings. Tables have also been produced on the nature of the sanctions imposed on natural and legal persons. For natural persons, the relevant table shows whether the sanction was reduced for co-operation. For legal persons, the relevant table shows whether the disposition was made through a guilty plea, DPA or NPA. It also shows whether a corporate compliance monitor was required as part of the disposition, and other monetary penalties, such as disgorgement and civil penalties. Information is also broken down for related accounting and money laundering misconduct, and statistics are provided on the number of ongoing investigations.

34. The U.S. Government has also established mechanisms to enable effective internal tracking and evaluation of FCPA enforcement efforts. The Enforcement Division of the SEC maintains a computerised database of all investigations and filed enforcement actions, and the FCPA Unit of the DOJ Fraud Section maintains a database of its active inventory, including detailed information on filed actions, such as defendants’ names, relevant facts, substantive charges and monetary relief. The DOJ Fraud Section also maintains a non-public, computerised case tracking system that monitors the status of all investigations that have been formally opened. Similarly, the FBI identifies FCPA investigations opened by it by a Case Classification, which can be searched to compile statistics to periodically assess the FBI’s enforcement efforts. Case reviews are periodically conducted by the DOJ with prosecutors to evaluate progress in investigations and prosecutions, as well as for strategic planning purposes.

35. The Phase 2 Recommendation on the need for a public statement on current FCPA enforcement priorities was predicated on the absence of objective statistics and documentation to facilitate case management and the allocation of resources. In light of the enforcement statistics compiled since Phase 2 to support case tracking and evaluation, the grounds for this recommendation have been addressed. In addition, the U.S. has explained to the evaluators how this information has been used to allocate resources and prioritise cases, analyse foreign bribery trends and patterns, and understand corrupt behaviour in specific industries and sectors. The evaluators do not believe that the absence of a ‘public statement on

current FCPA enforcement priorities’ remains relevant, in view of the number of public statements including by high level government officials on the priority of FCPA enforcement, and the clear signal that the high level of enforcement activity gives regarding the U.S. government’s prioritisation of the fight against foreign bribery.

Commentary

The evaluators welcome the compilation of extensive statistics on enforcement of the FCPA, and its extensive use in facilitating case management and the allocation of resources. The evaluators also consider that the Phase 2 Recommendation for a public statement on current FCPA enforcement priorities no longer remains relevant, in light of successive statements and actions since Phase 2. In conclusion, the evaluators consider the two remaining issues from Phase 2 fully implemented.

d) Statute of limitations

36. Criminal and civil proceedings under the FCPA must be commenced within five years after the offence has been committed. This limitations period may be extended in some cases. Of note, the statute of limitations does not apply to fugitives fleeing from justice. The statute is also ‘tolled’ (i.e. suspended) for up to three years if the prosecution has officially requested from a foreign state evidence of an offence in that country. The limitations period begins to run again when the requested state takes final action on the request. If subsequent or follow-up requests are made, the limitations period is tolled again, but the total of all periods of suspensions cannot exceed three years.¹⁹ In practice, prosecutors routinely apply for and obtain the tolling of the limitations period in FCPA cases.²⁰ The limitation period for many FCPA cases is therefore up to eight years from the commission of the offence.

37. There are circumstances that extend further the statute of limitations in FCPA cases. Since bribes are often paid in instalments, the statute of limitations would begin to run from when the last instalment was made.²¹ A similar technique is to proceed on a charge of conspiracy to commit foreign bribery. The limitations period begins to run with the last overt act in furtherance of the conspiracy, not when the conspiratorial agreement was initially made.²² However, in such circumstances, only the conspiracy can be charged, not the substantive underlying offence, if that offence is outside the statute of limitations. The target of an investigation may also agree to toll the statute of limitations.

38. The statute of limitations impacts the SEC differently than the DOJ. The statute does not prevent the SEC from bringing an action under the FCPA’s anti-bribery, books and records, or internal controls provisions. It also does not affect the SEC’s ability to obtain disgorgement and pre-judgment interest of illicit gains obtained from the violations. However, the statute of limitations can impact the SEC’s ability to obtain a civil penalty. Like the DOJ, the SEC typically obtains agreements to toll the statute of limitations.

39. The Working Group has considered previously the adequacy of the FCPA’s statute of limitations. During the 2002 Phase 2 evaluation and again in 2005, DOJ officials assured the Working Group that, while the five-year period could ‘conceivably’ give rise to problems in the future, the statute of limitations

¹⁹ 18 U.S.C. §§ 3282, 3290 and 3292.

²⁰ OECD (2002), *Phase 2 Report: United States*, para. 95.

²¹ OECD (2002), *Phase 2 Report: United States*, para. 96.

²² *United States v. Kissel*, 218 U.S. 601, 607 (1910); *United States v. Pizzonia*, 577 F.3d 455, 465 (2d Cir. 2009); *Grunewald v. United States*, 353 U.S. 391, 396; see also Congressional Research Service (2007), ‘Statutes of Limitation in Federal Criminal Cases: An Overview’, pp. 11-14.

was sufficient. They also noted that the five-year period plus up to three years' tolling (due to seeking foreign evidence) was applicable to all non-capital federal offences.²³ In the response to the Phase 3 questionnaire, however, the United States stated that the statute of limitations 'can pose challenges when the schemes are complicated, well concealed, and involve multiple jurisdictions'. Parallel investigations raise issues (described below) can also cause significant delay. At the on-site visit, some discussants also expressed concerns about the FCPA's limitations period, but others were content with the present arrangement.

40. One difficulty in assessing this issue is the absence of statistics on the number of time-barred FCPA cases. The U.S. authorities could not provide such data in the Phase 2 evaluation and again in Phase 3. However, since Phase 2 some FCPA charges were dismissed on statute of limitations grounds in at least one case.²⁴ Another case had to be referred to foreign authorities for investigation because the alleged bribery took place more than five years ago.

41. When compared to other economic crimes, a case could be made for extending the statute of limitations for foreign bribery. The limitations period for most non-capital federal offences is five years. However, the limitations period is ten years for many types of federal fraud, theft and embezzlement offences,²⁵ seven years for major fraud against the United States,²⁶ and six years for tax crimes.²⁷ Extending the statute of limitations for foreign bribery to eight or even ten years would not appear to leave the offence out-of-step with other economic crimes.

Commentary

The evaluators note that the five-year statute of limitations has led to some FCPA criminal charges being dropped or transferred to other countries. This period for FCPA enforcement actions may no longer be adequate. As the Working Group noted in Phase 2, techniques for paying and concealing bribes are increasingly sophisticated. Foreign bribery offences may potentially remain undetected for many years.²⁸ In addition, the continuing growth in the DOJ's FCPA caseload could also increase the time required to complete an investigation and prosecution. The evaluators therefore recommend that the United States ensure that the overall limitation period applicable to the foreign bribery offence is sufficient to allow adequate investigation and prosecution. They also recommend that the Working Group examine, on a priority basis, the adequacy of statutes of limitations as a horizontal issue.

²³ OECD (2002), *Phase 2 Report: United States*, para. 96; OECD (2005), *Phase 2 Written Follow-up Report: United States*, para. 13.

²⁴ *United States v. Kozeny, et al.*, 493 F. Supp. 2d 518 (S.D.N.Y. 2007) and 493 F. Supp. 2d 693 (S.D.N.Y. 2007); affirmed Court of Appeals, Second Circuit, No. 07-3107-cr (29 August 2008).

²⁵ For example, theft, embezzlement, or misapplication by bank officer or employee (18 U.S.C. § 656); embezzlement by lending, credit and insurance institution officers or employees (18 U.S.C. § 657); fraud concerning bank entries, reports and transactions (18 U.S.C. § 1005); fraud concerning federal credit institution entries, reports and transactions (18 U.S.C. § 1006); fraud concerning Federal Deposit Insurance Corporation transactions (18 U.S.C. § 1007); fraud concerning loan and credit applications generally; renewals and discounts; crop insurance (18 U.S.C. § 1014); crimes by or affecting persons engaged in the business of insurance (18 U.S.C. § 1033); bank fraud (18 U.S.C. § 1344); mail fraud affecting a financial institution (18 U.S.C. § 1341); wire fraud affecting a financial institution (18 U.S.C. § 1343); and RICO violation involving bank fraud (18 U.S.C. § 1963).

²⁶ 18 U.S.C. § 1031

²⁷ 26 U.S.C. § 6531

²⁸ *Phase 2 Report: United States*, Commentary following para. 126.

e) ***Recent trends in investigating and prosecuting FCPA violations***

(i) *Sources of allegations*

42. Allegations of FCPA violations come from a variety of sources. This part of the report canvasses a few of the most important sources. According to the DOJ, voluntary disclosures are the source of a significant proportion of investigations, although not the majority. Many recent FCPA enforcement actions, including some settled through DPAs followed voluntary disclosures. Voluntary disclosures are encouraged by U.S. Government policy guidelines, such as the DOJ's Principles of Federal Prosecution of Business Organisations, and the U.S. Sentencing Guidelines, which require the government to consider a company's voluntary disclosure or failure to disclose in charging, settling and sentencing decisions. One non-governmental organisation (NGO) feels that incentives for such disclosure might be even greater if it were made clearer in the terms of settlements that it had played a role in the settlement negotiations. The NGO also advocated guidelines on the benefits that may accrue from voluntary disclosure and the conditions under which they may be provided.

43. In any case, companies consider it in their interest to be co-operative, and seem willing to settle more often than not when they have voluntarily disclosed. While some companies self-report violations of the FCPA, some companies do not. Representatives of companies in the extractive industry explained that it is very common for a company to uncover one discrete violation of the FCPA and voluntarily disclose it, following which the DOJ or SEC asks the company to look further to see if the conduct is pervasive and occurring in other places. In some cases, the conduct is pervasive and is fully investigated by the DOJ and SEC. In other cases, the conduct is limited in scope and no additional violations are uncovered. Some companies may find this very cumbersome and expensive, and try to settle the case without a full investigation. However, the DOJ and SEC advise that they require companies to complete their investigations before finalising settlement discussions.

44. The DOJ agrees that it is very much in a company's interest to be co-operative. Once a company voluntarily discloses, the company is strongly encouraged to provide all relevant information, which is carefully reviewed by the DOJ. The SEC also carefully tests the authenticity of information provided to it in any investigation of violations of the FCPA. If the DOJ is concerned that a company's internal investigation is not resulting in effective disclosure, it uses traditional investigative methods to complete the investigation. The DOJ points out that obstruction of an investigation can substantially increase a sentence under the U.S. Sentencing Guidelines (USSG).

45. Proactive investigative steps by the DOJ and SEC, such as industry-wide sweeps, can also produce information that leads to enforcement actions. In November 2009, an industry-wide investigation into the pharmaceutical industry was announced by Assistant Attorney General, Lanny Breuer. An investigation into the medical device industry has also been discussed publicly. The Oil-for-Food cases involved a sweep of companies that paid kickbacks to the Iraqi Government during the United Nations Oil-for-Food Programme. The sweep was very effective and more than fifteen companies have been charged to date.

46. Such investigations may be commenced by sending 'sweep letters' requesting co-operation from industry members on a voluntary basis. If a company chooses to not respond to such a letter, the DOJ and SEC consider whether a subpoena should be issued to compel the production of relevant documents and the testimony of individuals. Recently, the SEC announced that it will be conducting more industry-wide sweeps. Investigations of this kind enable the DOJ and SEC to develop specialised expertise identifying illegal conduct and conducting prosecutions involving various industries. In addition, due to the cross-connections between various members of the same industry, an investigation into one company can produce leads about other companies, including those in the supply-chain.

47. More traditional sources of allegations also continue to be useful, such as anonymous whistleblower reports. Such reports are often received from current and former employees, competitors, and others, and are analysed by the FBI to ensure their veracity. The DOJ provides a ‘hotline’ to report anonymously directly to the FCPA Unit. The SEC also has a hotline and a detailed process for analysing tips, complaints and reports of FCPA violations.

48. Section 922 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, which was signed into law by President Obama on 21 July 2010, amends the Securities Exchange Act of 1934 to include incentives and protections for whistleblowers that provide the SEC with new information that leads to an SEC enforcement action.²⁹ Qualified whistleblowers will be awarded between 10% and 30% of the monetary sanctions imposed and collected, including amounts collected in related actions brought by the Attorney General of the United States, regulatory authorities, self-regulatory organizations and/or criminal cases brought by a State Attorney General. The SEC has the discretion to set the amount of the award based on the following criteria: (1) the significance of the information provided by the whistleblower; (2) the degree of assistance provided; (3) the programmatic interest of the SEC; and (4) other additional relevant factors the SEC may establish. The following individuals are not eligible for an award: (1) those who are criminally convicted in a related action; (2) those who acquire the information through financial statement audits; and (3) those who fail to submit the information in the form required by the SEC or knowingly provide false, fictitious, or fraudulent information to the SEC.

49. In addition to the financial incentives provided by the Dodd-Frank amendments, the statute also provides protection for individual whistleblowers who provide information to the SEC. The Act bars employers from retaliating against whistleblowers. Whistleblowers who are the victims of retaliation are entitled to be reinstated at their pre-whistle-blowing level of employment, double back pay with interest, and compensation for reasonable attorneys’ fees, litigation costs, and expert witness fees.³⁰ The U.S. authorities believe that in light of this new legislation, reporting violations of the FCPA is likely to increase.

50. MLA requests from foreign jurisdictions also provide a basis for allegations, although to a lesser extent than other sources.

51. United States embassy staff are also important sources of information about FCPA violations. The DOJ cited examples of full-blown investigations that were launched due to information provided by an embassy and referrals from State Department and Commercial Services branches. In one of these investigations, the embassy stayed involved throughout.

52. The U.S. Government also cites other sources, such as money laundering information from the Financial Crimes Enforcement Network (FinCEN), the U.S. financial intelligence unit, and foreign countries which have some kind of link to the FCPA violations. The U.S. remarks that information from foreign countries is more likely to be provided in a multi-lateral context, such as Eurojust, the European Union’s judicial co-operation agency. The U.S. also believes that annual voluntary meetings of law enforcement officials at the OECD provide an excellent opportunity to liaise with foreign counterparts on good practice in sharing information on foreign bribery allegations.

²⁹ A discussion of whistleblower protections is also available under Section B.10.b.

³⁰ Dodd-Frank was passed during the course of this evaluation. The Commission has 270 days following the enactment of the Dodd-Frank amendments to issue final regulations implementing the whistleblower incentives and protections. However, individuals who provide information prior to the effective date of the regulations are eligible to receive an award, if they meet the requirements of the statute.

Commentary

The evaluators note that the United States authorities have successfully acted on allegations and information regarding FCPA violations from a variety of sources, including voluntary disclosures, proactive investigative steps, such as industry-wide sweeps, anonymous whistleblower reports, MLA requests, embassy staff, and money laundering information. New federal legislation that includes provisions on whistle-blowing is also expected to increase detection of FCPA violations. The evaluators believe that the effective use of a variety of sources of information on FCPA violations is one of the main reasons for the high level of FCPA enforcement.

(ii) Impact of DPAs and NPAs

53. Due to their increasing importance in law enforcement actions by the DOJ, the evaluators sought information about the deterrent effect of DPAs and NPAs. The evaluators were also conscious that the SEC intends to also begin using DPAs and NPAs to encourage companies and individuals to co-operate with SEC investigators.

54. It seems quite clear that the use of these agreements is one of the reasons for the impressive FCPA enforcement record in the U.S. However, their actual deterrent effect has not been quantified; although the DOJ hears anecdotally from companies that their use has made FCPA compliance high priority.

55. Two civil society organisations called for more work identifying the impact of NPAs and DPAs, and in its December 2009 Report on the use of NPAs and DPAs, the U.S. Government Accountability Office (GAO) stated that the DOJ lacks performance measures to assess how these agreements contribute to efforts to combat corporate crime.

Commentary

The evaluators encourage the United States to share with the Working Group on Bribery any information about the impact of NPAs and DPAs on deterring the bribery of foreign public officials that arises following the GAO 2009 Report.

f) Reasons for terminations of investigations and declinations to prosecute

56. The DOJ very usefully explained in general terms why sometimes investigations are terminated or prosecutions are declined. Regarding the former, the most common reasons have been: (1.) Credible evidence is not available in the United States or the jurisdiction in which the offence of bribing a foreign public official allegedly occurred (e.g. the parties were located abroad); (2.) Information provided to the authorities cannot be verified (e.g. no evidence to support a media report); and/or (3.) The statute of limitations has expired (e.g. a whistleblower report concerns acts that allegedly took place more than five years earlier).

57. Declinations to prosecute are guided by the Principles of Federal Prosecution (for natural persons) and the Principles of Federal Prosecution of Business Organisations (for legal persons). So far, such declinations have been due in general to: (1) Lack of credible, admissible evidence; (2) Lack of jurisdiction; (3) Expiration of the statute of limitations; (4) Misconduct did not violate the FCPA; and/or (5) Mitigating factors such as voluntary self-disclosure, remediation, co-operation, and limited scope of the misconduct.

58. The evaluators considered the following issues regarding declinations to prosecute FCPA cases: (1) How the test of ‘substantial federal interest’ in the Principles of Federal Prosecution has been applied; (2) Whether the national economic interest could come into play under the factors that may be considered in the Principles of Federal Prosecution of Business Organizations; and (3) What rules are applied when a foreign bribery case affects national security.³¹

59. The evaluators wondered if the test of a ‘substantial federal interest’ in section 9-27.230 (‘Initiating and Declining Charges – Substantial Federal Interest’) in the Principles of Federal Prosecution would be satisfied if the bribery of a foreign public official by a U.S. company or individual did not adversely affect a U.S. competitor. The DOJ assured them that there could be a ‘substantial federal interest’ in prosecuting a case even if no U.S. company were adversely affected, and supported its position by pointing to a major prosecution in which there was no U.S. victim.

60. Under section 9-28.300 (‘Factors to be Considered’) in the ‘Principles of Federal Prosecution of Business Organizations’, a decision of prosecutors on whether to charge a corporation, negotiate a plea or other agreement, may consider ‘collateral consequences, including whether there is disproportionate harm to shareholders, pension holders, employees, and others not proven personally culpable, as well as the impact on the public arising from the prosecution’. The evaluators questioned whether these considerations could feasibly include the national economic interest, contrary to Article 5 of the Convention. The U.S. reassured them that a decision based on ‘disproportionate harm’ would not result in terminating proceedings. Instead, the DOJ would carefully consider whether a DPA or NPA might lessen the potential harm to innocent third parties. In addition, the DOJ would make the same kind of determination if the potential for ‘disproportionate harm’ were to non-U.S. companies and individuals.

61. The United States Attorney’s Manual (USAM) addresses steps that must be taken by U.S. attorneys in FCPA investigations and prosecutions that implicate national security considerations. These steps provide safeguards against an abuse of the use of such considerations to stop prosecutions. Under sub-Chapter 9-2.111 (‘Statutory Limitations – Declinations’) of Chapter 9-2.000 (‘Authority of the United States Attorney in Criminal Division Matters/Prior Approvals’), only the Assistant Attorney General, Criminal Division, the Deputy Attorney General, or the Attorney General, can authorise a declination of a prosecution for national security reasons. In addition, the Internal Security Section, Criminal Division, must be consulted when there is a possibility that a prosecution might be declined for national security reasons.

62. Further safeguards are provided in Chapter 9-90.000 of the USAM on ‘National Security’, Sub-Chapter 9-90.100 (‘General Policies Concerning Prosecutions for Crimes Directed at National Security and for other Crimes in which National Security Issues may Arise’), which states that when national security issues arise in United States Attorney’s Offices in the course of prosecutions of offences not related to national security, that district’s National/International Security Co-ordinator must notify the Chief of the Counterespionage Section, who shall be responsible for making sure that the Assistant United States Attorney assigned to the case complies with DOJ policies on prosecutions involving national security. Furthermore, sub-Chapter 9-90.200 (‘Policies and Procedures for Criminal Cases that involve Classified Information’) states that, in cases involving classified information, only the Attorney General, Deputy Attorney General, Associate Attorney General or Assistant Attorney General, National Security Division, can authorise the declination of a prosecution for national security reasons, and such declinations must be included in a report submitted to Congress.

³¹ The role of national security considerations and other politically sensitive matters in prosecutorial and investigative decision-making has been addressed in previous monitoring reports by the Working Group on Bribery, including Australia Phase 2, Canada Phase 2, Germany Phase 1, and the United Kingdom Phase 2*bis*.

63. The United States authorities confirmed that there has not been a discontinuation of any investigation or prosecution for an FCPA violation due to national security factors since Phase 2, and they are not aware of any discontinuations before Phase 2. They noted that when national security considerations are implicated in an FCPA case, investigators and prosecutors normally consult regularly with the agencies whose interests might be involved, or where additional information or evidence might be obtained. This could, for instance, involve consultation with the National Security Division of the DOJ and other regulatory agencies, such as the investigatory and regulatory units of the Office of the Export Enforcement of the Department of Commerce, the Office of the Foreign Asset Control of the Department of the Treasury, and the Political/Military Bureau of the Department of State. Where classified information is involved, an investigation and prosecution must be conducted in compliance with the Classified Information Procedures Act, which provides rules on presenting such evidence in court, and making it available, as appropriate, to defence counsel.

Commentary

The evaluators welcome confirmation from the United States that the national economic interest is not a factor to be considered in investigative and prosecutorial decision-making under the FCPA, and that pursuant to the ‘Principles of Federal Prosecution of Business Organizations’ a decision of prosecutors on whether to charge a corporation, or negotiate a plea or other agreement, would also consider the potential harm to innocent third parties in all cases, including those involving non-U.S. companies and individuals.

g) Parallel investigations or proceedings in other jurisdictions

64. As a transnational crime, foreign bribery occasionally results in parallel investigations or proceedings in multiple jurisdictions. In many instances, the United States has taken FCPA enforcement actions while the jurisdiction of the bribed foreign official conducted concurrent proceedings against the official and sometimes the briber. A third country may also commence proceedings, such as a jurisdiction where the proceeds of crime were laundered or where the bribe was arranged or paid. However, the U.S. states that, in many instances, the foreign jurisdiction declined or took no action, even after U.S. authorities provided evidence to assist their efforts.

65. Whether the United States would pursue an FCPA enforcement action despite concurrent foreign proceedings depends on the circumstances of the case. A foreign prosecution or conviction does not bar a U.S. prosecution *per se*. The principle of *ne bis in idem* (double jeopardy) does not apply in United States courts where prosecutions are conducted by a different sovereign. In deciding whether to commence a U.S. prosecution, prosecutors are required to consider factors such as the strength of the relative interests of the U.S. and the foreign state; the ability and willingness of the foreign state to prosecute effectively; the probable sentence upon conviction; and whether the foreign state will decide whether to prosecute before the U.S. statute of limitations expires.³² Additional factors may be considered, such as the location of the misconduct; nationality and location of the defendants and victims; location of evidence and witnesses; the possibility of dividing the prosecution among the states; delay in prosecution; and investment of investigative resources. A decision to prosecute is generally made only after extensive consultation with the foreign state.

66. Concurrent investigations or prosecutions can be beneficial. There have been examples in which foreign states have made the fruits of their investigations readily available to the United States for use in an FCPA prosecution. The United States has also reciprocated, such as by voluntarily providing evidence, turning cases over to foreign sovereigns in their entirety, and applying to the court to transmit evidence

³²

USAM 9-27.240

gathered by grand juries to foreign states. The United States also routinely requires parties to plea agreements (PAs), NPAs and DPAs to co-operate with foreign authorities.

67. The United States further states that it has initiated co-operation with foreign authorities on many occasions, but it is rare for other countries to initiate co-ordination with the United States. The U.S. authorities expressed their commitment to continuing to enhance and promote such co-operation and co-ordination through mechanisms such as the Working Group's meetings of law enforcement officials, which provide an excellent opportunity for such discussion. The United States also participates in Eurojust and has brought several cases to that body for co-ordination.

68. Parallel cases can also bring challenges, however. Complications often arise when the law in the U.S. is different from that of the foreign state. For example, in one case confidential plea discussions in the U.S. were publicly disclosed in foreign proceedings. In that instance, the U.S. was not informed that harmful confidential information would be publicly disclosed until after it was too late to protect U.S. interests and ongoing investigations. Another issue that might arise is the impact of the use of NPAs and DPAs in the United States on potential enforcement actions in other countries, depending on whether these countries recognise NPAs and DPAs for the purpose of applying protections against 'double jeopardy'. In another example, a company initially assisted U.S. authorities in an investigation, but eventually ceased all co-operation when it became the target of an investigation in a foreign jurisdiction. The U.S. also believes that some foreign jurisdictions are reluctant to investigate and prosecute under their laws. Rather than aid the U.S., these jurisdictions are slow to assist. Significant time can also be spent on understanding the complexities of each jurisdiction's laws while the U.S.' statute of limitations continues to run. As these examples show, an investigation and/or prosecution in one jurisdiction can delay or even jeopardise a case in another.

Commentary

The evaluators welcome the United States' attempts to encourage close co-operation between the United States and foreign authorities, and the regular initiation of direct prosecutor-to-prosecutor and investigator-to-investigator interaction by the United States. The evaluators consider that this is essential to ensuring an effective global fight against corruption, and that co-ordination among countries on issues arising from parallel proceedings is a horizontal issue affecting other Parties to the Convention.

2. Foreign bribery offence

a) Introduction

69. FCPA enforcement has significantly increased since the United States was evaluated in Phase 2 in October 2002. Even before 2002, the U.S. had prosecuted more foreign bribery cases than any country in the world. As a result, there is substantial practice to draw upon to further demonstrate how the offences of bribing a foreign public official in the FCPA are applied.

70. This part of the Report looks at the two remaining issues from Phase 2 concerning the foreign bribery offences in the FCPA: (1.) Whether the United States has considered developing specific guidance on facilitation payments; and (2.) whether appropriate guidance has been provided on the defence of reasonable and bona fide expenses. This part of the Report also considers developments concerning the 'business nexus' test in the FCPA, and the definition of 'foreign public official'. Furthermore, this part of the Report discusses the application of the FCPA to U.S. overseas possessions or territories – an issue that was not addressed in Phase 2.

71. Comments by the evaluators regarding the foreign bribery offences in the FCPA are for the purpose of further increasing effectiveness of combating the bribery of foreign public officials in international business transactions.

Commentary

Pursuant to Paragraph V of the 2009 Recommendation, Parties to the Convention are recommended to periodically review their laws implementing the Convention and their approach to enforcement, to effectively combat bribery of foreign public officials. Overall, the practice in the last eight years shows that the offences in the FCPA are effective. In a few respects, the effectiveness of the offences could be enhanced. A review as envisaged in Paragraph V by the U.S. could be informed by the observations in this regard in this Report.

b) Guidance on facilitation payments³³

72. In Phase 2, the Working Group on Bribery recommended that the United States consider developing specific guidance on the application of the exception in the FCPA for facilitation payments (exception for ‘routine governmental action’). This recommendation arose due to the absence of published guidelines on the exception at that time as well as concerns voiced by certain members of the private sector that they were unsure of the scope of the exception. In Phase 2, the Working Group did not consider that the ‘Lay-Person’s Guide to the Foreign Corrupt Practices Act’ provided sufficient guidance on this issue.³⁴ The DOJ published the Guide in lieu of formal guidelines, and has made it available on numerous websites and distributed it widely to the private sector. At the time of the Phase 2, the DOJ had not received a request for an Opinion Procedure Release on this issue.

73. The ‘Layperson’s Guide to the Foreign Corrupt Practices Act’, essentially reproduces the text of the exception in the FCPA and the definition of a ‘routine governmental action’. It also recommends that questions regarding the application of the exception be referred to counsel, or that consideration be given to using the DOJ Foreign Corrupt Practices Opinion Procedure. The DOJ Criminal Resource Manual³⁵ provides a similar description. The DOJ confirms that no company or individual from the private sector has ever submitted a request for an Opinion Procedure Release³⁶ on the application of the exception for facilitation payments. The U.S. Government believes that this confirms that there is sufficient guidance on the exception. The U.S. Government points out that in enforcement actions the private sector rarely raises the facilitation payments exception, and believes that this further shows that FCPA practitioners find the exception clear. The U.S. also points out that it looks at all payments to foreign officials when conducting FCPA investigations, including facilitation payments, to determine whether they constitute an exception to the FCPA or merely represent a guise to hide FCPA violations, and cites supporting cases.³⁷

74. The exception for facilitation payments in the FCPA is more detailed than the description of facilitation payments in Commentary 9 to the Convention, except that it does not explicitly require that the payment is ‘small’. Comments in this section of the report on the level of guidance in the U.S. on

³³ A discussion of facilitation payments is also available under Sections B.7.d and B.8.

³⁴ The Layperson’s Guide to the FCPA can be found at: www.justice.gov/criminal/fraud/fcpa/docs/lay-persons-guide.pdf

³⁵ The Criminal Resource Manual can be found at: www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm01018.htm

³⁶ The DOJ’s FCPA Opinion Procedure is available to enable issuers and domestic concerns to obtain an opinion of the Attorney-General as to whether certain specified, prospective – not hypothetical – conduct conforms to the Department’s present enforcement policy regarding the anti-bribery provisions in the FCPA.

³⁷ See *inter alia* the following cases involving small payments: *Helmerich & Payne, United States v. Kay, UTStarcom, Natco Group Inc., Veraz Networks, and Avery Dennison Corp.*

facilitation payments do not therefore relate to compliance with the Convention, which does not require the criminalisation of small facilitation payments. (Non-criminal aspects of facilitation payments are also discussed in Section 7 of this report on accounting requirements, external audit, and company compliance and ethics programmes, and in Section 8 on tax measures for combating bribery.) Instead, the evaluation team's comments on guidance are offered for consideration by the U.S. when it periodically reviews its policies and approach on facilitation payments, in line with the recommendations in Paragraph VI.i of the 2009 Recommendation.

75. Although the U.S. maintains that the exception is clear for the reasons already cited, Lanny Breuer, Assistant Attorney General of the Criminal Division, DOJ, stated in his welcoming address to the evaluation team during the on-site visit that the exception for facilitation payments will continue to come under review, as recommended by Paragraph VI of the 2009 Recommendation. The U.S. might therefore consider the comments of the private sector and compliance experts, as summarised below, in the context of such a review.

76. Representatives from all the business sectors involved in the panel discussions at the on-site visit were of the opinion that the scope of the exception for facilitation payments is unclear, particularly what kinds of decision-making are discretionary and non-discretionary. The policies and practices regarding such payments varied to a certain extent between the companies represented, depending on risk factors, including the sector and location of activities. However, the sector representatives – aerospace and defence, extractive industry, financial services, construction, and manufacturing – almost unanimously called for further guidance concerning the scope of the exception for facilitation payments. All but one compliance expert believed that further guidance was necessary. This call for further guidance was echoed by civil society, which at the same time welcomed recent public statements by the United States Government that make it very clear that such payments are not condoned and that companies should take steps to eliminate them.

77. Another issue that was repeatedly raised by private sector representatives was the continued high level of demand for facilitation payments by foreign officials, especially customs officers and for the implementation of operating and maintenance contracts. They also cited a lack of enforcement of foreign laws that prohibit the solicitation of such payments as a major problem. One civil society organisation believes these governments should be encouraged to increase enforcement through, for instance, implementation of the United Nations Convention against Corruption (UNCAC).

Commentary

The evaluators commend the United States Government for recent steps taken in line with the 2009 Anti-Bribery Recommendation to encourage companies to prohibit or discourage the use of facilitation payments. That said, however, the evaluators recommend that the United States, in its periodic review of facilitation payments pursuant to the 2009 Anti-Bribery Recommendation, consider the views of the private sector and civil society, particularly on ways of clarifying the 'grey' areas identified by them, including what kinds of decision-making are discretionary and non-discretionary. One avenue for such clarification might be the 'Layperson's Guide to the Foreign Corrupt Practices Act'.

Furthermore, the evaluators consider that the extensive concerns of the private sector and civil society about continuing demands for facilitation payments by foreign public officials is a horizontal issue affecting all Parties to the Convention.

c) ***Reasonable and bona fide expenses***

78. In Phase 2, the Working Group on Bribery raised questions about the need for the affirmative defence for reasonable and *bona fide* expenses. Due to concerns raised in the report that the defence might be open to uncertain interpretation, the Working Group recommended that, if the defence is to be maintained, the United States provide appropriate guidance.

79. Extensive guidance, which is easily accessible on the DOJ website, has been provided since Phase 2 to clarify the scope of this defence. Five Opinion Procedure Releases have been issued on this topic, and five enforcement actions have included a determination of whether travel or entertainment expenses were bribes under the FCPA or came under the defence for reasonable and *bona fide* expenses.

80. Some private sector representatives at the on-site visit described policies and practices regarding this defence, which varied to a certain extent between the companies depending on risk factors, including the sector and location of activities. Some companies from the extractive, and aerospace and defence industries, also described frustration about the high level of resources needed for determining whether certain payments fall within the defence, and called for further guidance to reduce the burden in this regard.

Commentary

The evaluators consider that recent Opinion Procedure Releases and enforcement actions involving determinations on what constitutes reasonable and bona fide expenses provide important clarification to companies on the application of this affirmative defence. They encourage the United States Government to consolidate and summarise the publicly available information in these various sources.

d) ***Business nexus test***

81. One important aspect of the foreign bribery offence in the FCPA is different from the description of the offence in Article 1 of the Convention. Under the FCPA, the bribery of a foreign public official must be committed in order to assist the briber ‘in obtaining or retaining business for or with, or directing business to, any person’ (known as the ‘business nexus test’). In Article 1 of the Convention, the corresponding formulation is: ‘in order to obtain or retain business or other improper advantage in the conduct of international business.’

82. Thus, unlike Article 1 of the Convention, the FCPA language does not specifically convey that the case is covered where the purpose of the bribe is to obtain or retain other improper advantage in the conduct of international business, such as obtaining an operating license or permit to operate a business, or a reduction in tax or import duty. In other words, the FCPA language might be read to only address bribes for the purpose of obtaining or retaining business *per se*. Reference is made to ‘improper advantage’ elsewhere in the FCPA, but in a different context – *i.e.*, the offences in the FCPA *inter alia* cover the case where the purpose of a bribe to a foreign public official is to secure ‘any improper advantage...in order to assist such [person/issuer/domestic concern] in obtaining or retaining business for or with, or directing business to, any person’.

83. However, it has been the position of the United States Government throughout that the FCPA formulation is very broadly interpreted and covers in practice the kinds of advantages required to be

covered by the Convention. The evaluation team notes that this position has been largely confirmed by jurisprudence, in the 2007 decision of the United States Court of Appeals in *United States v. Kay*³⁸.

84. In *U.S. v. Kay*, the Court of Appeals held that a payment to customs officials to reduce import duties on rice falls within the parameters of the ‘business nexus’ test because when Congress enacted the FCPA it was concerned about: (1.) Bribery that leads to discrete business contract arrangements; and (2.) Payments that even indirectly assist in obtaining business or maintaining existing business operations in a foreign country. The Court of Appeals also stated that:

...bribes paid to foreign officials in consideration for unlawful evasion of customs duties and sales taxes could fall within the purview of the FCPA’s proscription. We hasten to add, however, that this conduct does not automatically constitute a violation of the FCPA: It must be shown that the bribery was intended to produce an effect – here through tax savings – that would ‘assist in obtaining or retaining business’.

85. The decision of the Court of Appeals in *U.S. v. Kay* is therefore helpful, in that it clarifies that payments to, for instance, reduce import duty ‘could’ satisfy the ‘business nexus test’. The United States has also successfully enforced the FCPA in cases involving similar advantages, such as payments to customs officials to import goods and materials (*Helmerich & Payne*; and *Natures Sunshine*), and payments to tax officials to reduce tax obligations, and to judicial officials for favourable treatment in pending litigation (*Willbros Group*). On the other hand, the clarification by the Court of Appeals leaves open the possibility that there might be cases where a bribe to a foreign public official to facilitate international business does not violate the FCPA, although it does meet the test of ‘other improper advantage in the conduct of international business’ in Article 1 of the Convention.

86. Moreover, the Criminal Resource Manual (Title 9, 1018 Prohibited Foreign Corrupt Practices) states that in order to violate the FCPA, ‘the payment must be intended to induce the recipient to misuse his official position to direct business wrongfully to the payer or to any other person’.

Commentary

The evaluators welcome the decision of the Court of Appeals in U.S. v. Kay, and consider that it supports the position of the United States authorities that the ‘business nexus test’ in the FCPA can be broadly interpreted. Consistent with this positive legal development, the evaluators recommend that the U.S. authorities revise the Criminal Resource Manual to reflect the decision in U.S. v. Kay, which supports their position that bribes to foreign public officials to obtain or retain business or ‘other improper advantage in the conduct of international business’ violate the FCPA.

e) Definition of ‘foreign public official’

87. Due to an absence of explicit language in the definition of ‘foreign official’ in the FCPA, two questions arise concerning the scope of the definition: (1.) Whether, in compliance with the Convention, it covers a person holding a ‘judicial office of a foreign country’; and (2.) Whether it covers a person ‘exercising a public function for a foreign country, including for a...public enterprise’ (i.e. a state-owned or controlled enterprise).

88. Concerning the first question on the coverage of persons holding a foreign judicial office, the DOJ confirms that, although the definition does not specifically refer to judicial officers, they would be covered by the following part of the FCPA definition of a ‘foreign official’: ‘any officer or employee of a

³⁸ *U.S. v. Kay*, 513 F.3d 432; 2007 U.S. App. LEXIS 24946

foreign government'. The DOJ explains that its practice supports this interpretation, as it has pursued allegations of bribery of a foreign judicial officer.

89. Since Phase 2, there have been positive legal developments regarding the second question on the bribery of employees of state-owned or controlled enterprises, in *U.S. v. Nam Quoc Nguyen, et al.* (E.D. Pa., September 4, 2008), in which the District Court recently held in favour of the United States Government in a case involving allegations that the defendants bribed employees of a foreign state-owned company. The defendants argued that the definition of 'foreign official' in the FCPA does not include employees of state-owned enterprises, because in order for an organisation to be considered an 'agency or instrumentality' of a foreign government, it must serve a 'purely public purpose'. The United States Government, citing the legislative history of the FCPA, responded by arguing that 'public purpose' is only one of the many factors in determining that an organisation is an 'agency or instrumentality' of a foreign government, and that Congress expressly intended to include employees of state-owned enterprises in the definition of 'foreign official'.

90. Although the Court ruled in favour of the United States, it did not issue a written opinion, and the defendants did not file an appeal. In addition, District Court opinions are not binding on higher courts or courts of other U.S. jurisdictions. The DOJ informed the evaluators that this means the Government interpretation could be disputed again. However, the DOJ believes the argument would fail again given the FCPA's legislative history, and because numerous cases have been brought by the DOJ and SEC in which the definition of 'foreign official' has been broadly interpreted.³⁹

Commentary

The evaluators welcome positive legal developments concerning the application of the definition of 'foreign official' in the FCPA to members of the judiciary and employees of state-owned or controlled enterprises.

f) Application of the FCPA to United States' Overseas Possessions or Territories

91. An issue that was not addressed in Phase 2 is whether the FCPA applies to United States' 'insular areas' (American Samoa, Guam, Commonwealth of Northern Mariana Islands, and the U.S. Virgin Islands) and Puerto Rico, which is a self-governing unincorporated territory of the U.S. Given terminology in the FCPA, such as the definition of 'foreign territory', which includes 'self-governing dominions or territories under mandate or trusteeship' and the 'interstate nexus' requirement (i.e., the briber must 'make use of the mails or any means or instrumentality of interstate commerce') the examination team sought to confirm whether the FCPA could be applied in practice to such areas. The DOJ confirmed at the on-site visit that the FCPA applies to companies and individuals in the U.S. insular areas or Puerto Rico that bribe foreign public officials, because these areas are treated like a part of the United States. They also explained that they successfully prosecuted a company based in Puerto Rico in the 1980s for FCPA violations.

Commentary

92. The evaluators welcome the confirmation that the U.S. Government can prosecute bribery in the United States' 'insular areas' (American Samoa, Guam, Commonwealth of Northern Mariana Islands, and the U.S. Virgin Islands) and Puerto Rico.

³⁹ For instance *Willbros Group* involved the bribery of foreign judicial officials, *Siemens AG* involved payments to various persons from state-owned companies, and *Diagnostic Products*, involved payments to doctors of state-owned hospitals. The United States explains that in each of these cases, pursuant to Federal Rule of Criminal Procedure 11, a court had to determine whether all the elements of the offence have been proven including that the receiving individual was a foreign public official.

g) Guidance in general

93. Guidance in the United States on the application of the FCPA includes the following sources, all of which are in the public domain: relevant Opinion Procedure Releases⁴⁰, jurisprudence, and law enforcement actions (e.g. plea agreements, non-prosecution agreements, and deferred prosecution agreements), including charging documents, as well as the ‘Lay Person’s Guide to the FCPA’. In addition, the DOJ and SEC have been undertaking extensive public outreach and awareness-raising activities (see discussion on “U.S. government awareness-raising activities” below).

94. So far, the FCPA Opinion Procedure has been used very little by the private sector to obtain DOJ advice on prospective transactions. Thirty-three opinions have been issued since the new Opinion Procedure came into effect in 1993. Twenty-two of these releases were issued between 1977 and 1992. The non-governmental participants in the on-site meetings cited several reasons for the infrequent use of the Opinion Procedure. For instance, legal and private sector representatives felt that the Opinion Procedure is only useful in limited situations where the prospective fact situation is narrow and not going to change. They also find that the response time, which is 30 days after the request is complete, is too long in certain situations, such as entering joint ventures and mergers and acquisitions, where a company normally needs to make decisions relatively quickly. The U.S. states it has issued opinions on an expedited basis when requested, such as Opinion Procedure Release 08-02.

95. The most pervasive concern of the private sector representatives was that availing themselves of the Opinion Procedure could expose them to potential enforcement actions by the DOJ, as well as provide competitors with information about their prospective international business activities. The DOJ disagrees with these perceptions, and states that the use of the Opinion Procedure has been increasing in recent years. Nevertheless, the evaluation team believes that the concerns have become so deeply engrained and pervasive that the DOJ should consider whether these non-governmental perceptions are having an impact on the effective use of the Opinion Procedure.

96. In addition, although enforcement under the FCPA is strong and increasing, there is relatively little jurisprudence that has developed since its entry into force 30 years ago (only a small number of judicial opinions regarding interpretation of the FCPA have been given since June 2005).

97. Participants from the compliance profession, private sector and civil society almost unanimously called for further guidance on the FCPA. On the other hand, the U.S. authorities feel that the FCPA and supplementary information in publicly available documents, such as the Lay Person’s Guide to the FCPA and Opinion Procedure Releases, provide sufficiently clear information. The evaluation team understands the private sector’s desire for as much guidance as possible to assist their compliance efforts; however, the evaluators also understand that it is not possible or necessarily appropriate for the DOJ to provide binding interpretive guidance, since this is the role of the courts and the legislature. Nevertheless, a workable compromise might be found by simply consolidating and summarising the various interpretive sources already available.

Commentary

The evaluators note that the United States provides extensive information on application of the FCPA in a variety of sources. The evaluators recommend that the United States consider consolidating and summarising all the relevant sources – i.e. jurisprudence, Opinion

⁴⁰ The DOJ’s FCPA Opinion Procedure is available to enable issuers and domestic concerns to obtain an opinion of the Attorney-General as to whether certain specified, prospective – not hypothetical – conduct conforms to the Department’s present enforcement policy regarding the anti-bribery provisions in the FCPA.

Procedure Releases, charging documents, plea agreements, etc. – to ensure easy accessibility, especially for SMEs, which face resource limitations.

3. Responsibility of legal persons

a) Introduction

98. In the United States, legal persons are liable for crimes committed by employees acting within the scope of their employment. This standard of liability is simple and direct, and has resulted in an impressive record of law enforcement actions. Since 1998, 66 legal persons have resolved FCPA violations, with the rate of resolution increasing substantially since 2007. In previous years, the number of legal persons charged per year averaged about 1.7. Since 2007 the average has been almost 13 per year. Such legal liability, coupled with robust enforcement by the U.S. Government, is a strong incentive for companies to establish strong compliance programmes and measures.

99. Since 1998, of 66 legal persons charged with FCPA violations, 25 have been sentenced for foreign bribery and 10 for related accounting misconduct. In addition, 26 have been subject to sanctions for foreign bribery and 25 for related accounting misconduct through agreements between the U.S. Government and the companies, without prosecutions taking place (i.e. non-prosecution agreements and deferred prosecution agreements). Twenty-eight companies have pleaded guilty to foreign bribery violations and 12 to related accounting misconduct.

100. Corporate compliance has become an important factor in the prevention and detection of foreign bribery in the United States. In view of a clearly effective record of enforcing the FCPA, especially in the last three years when enforcement has been very vigorous, the evaluation team sought information on how companies' corporate compliance programmes and measures have evolved in response. In meetings during the on-site visit with about 30 private sector representatives, the discussions therefore centred on what steps they have taken to ensure compliance with the FCPA, and more generally, their impressions about U.S. FCPA enforcement against companies.

b) Corporate Compliance

101. In meetings with the 29 private sector representatives, of which the vast majority were large multi-national companies, it was clear that serious efforts have been taken to ensure effective compliance with the FCPA. These companies have a high level of sensitivity to risk areas, and what needs to be done to address them. Across the board, these companies cited active enforcement by the DOJ and the SEC, in particular recently imposed large financial penalties, as the main thrust for putting into place these measures. A recent 'sting operation' involving mid-sized firms, was also believed to have had a significant impact, particularly on SMEs,⁴¹ making them more aware of the need for effective compliance. However, since only one SME was able to attend the meetings, it was not possible to test in practice this theory, although to some extent the interests of SMEs were represented by certain NGOs that attended the on-site visit.⁴² Indeed, the SME in attendance pointed out that SMEs need to respond differently to the increased risk of enforcement, in particular with robust internal audit procedures, because they do not have the resources to hire employees specifically to administer an anti-foreign bribery compliance programme. The U.S. Government recognises the limitations faced by some SMEs, and therefore takes into consideration the facts and circumstances of each company, including its size and resources, during the investigation and enforcement recommendation stages.

⁴¹ A discussion of small- to medium-sized enterprises (SMEs) is also available in Sections B.7.e.ii and B.10.b.

⁴² The United States and the evaluators made extensive efforts to include more SMEs in the on-site visit, but due to the expense and time needed to travel to Washington, D.C., few were able to participate.

102. Meetings with the private sector enabled the evaluation team to identify several positive trends and common challenges across the various business sectors in complying with the FCPA. Unsurprisingly, many non-governmental representatives referred to the U.S. Federal Sentencing Guidelines and various forms of guidance on SEC requirements as providing government encouragement to establish effective compliance policies and procedures. Representatives from all the business sectors cited an internal audit as the most important compliance measure for preventing and detecting the bribery of foreign public officials, in addition to frequent training, and a visible commitment from senior management. To be effective, the internal audit must include foreign subsidiaries. However, it can be difficult obtaining access to the books and records of foreign subsidiaries due to data protection laws in certain foreign jurisdictions. The companies also emphasised the need for an internal audit to check whistleblower hotline logs. Without exception, all the private sector participants had hotlines for anonymous reporting.

103. Across the board, the business sectors also highlighted that the following risk areas require robust measures and procedures: (1) third parties, including local agents and joint venture partners; (2) facilitation payments, especially to customs officials; and (3) payments for travel, gifts and hospitality. One company pointed out that the risk of bribing foreign public officials includes officials from regulatory and environmental agencies.

104. Three common themes that emerged in the private sector meetings were a high degree of frustration due to: (1) Losing contracts to competitors from major emerging economies where the bribery of foreign public officials has not yet been criminalised; (2) losing contracts to competitors from economies that do not enforce their foreign bribery laws; and (3) continuing demand-side issues, especially for the solicitation of facilitation payments, which they claim are endemic in certain markets even though they are unlawful in those countries. Regarding the first point, the companies would like to see the major emerging economies not yet Parties to the Convention establish similar rules for deterring their companies from bribing foreign public officials. Regarding the third point, there was some sense that the demand for bribes in return for the award of contracts has lessened. Nevertheless, some companies made a strong call to help countries address the demand for bribes relating to the operation of contracts, including facilitation payments. Companies from the aerospace and defence industry and the extractive industry have observed that the bidding process for contracts in their sectors of activity have become ‘cleaner’ in recent years, particularly for the larger contracts. For them, the bribery challenge is most serious at what they call the ‘second tier’ touch points, in particular customs. Certain U.S. enforcement actions have focused on customs payments.⁴³

105. According to some private sector representatives at the on-site visit and a compliance expert, a by-product of vigorous enforcement in the United States has been a fear in companies to delve too deeply into past conduct through the application of compliance measures, in case they discover FCPA violations. They said that through the use of conspiracy laws, it is possible to prosecute conspiracies to violate the FCPA that occurred in the 1990s, if acts in furtherance of the conspiracy occurred within the last five years. They also said that it is regrettable that some companies are afraid to look at past conduct, because they can learn important compliance lessons by doing so. In addition, it is difficult to implement effective controls in the absence of an assessment of previous potential misconduct.

106. A number of non-governmental representatives questioned whether there was any real incentive to look for past misconduct. The U.S. Government disagrees with this position, stating that while internal anti-bribery controls are not a defence *per se*, under the U.S. Federal Sentencing Guidelines, they can be a factor for mitigating a penalty, and are an important factor in qualifying for a DPA or NPA. Furthermore, their effective application might result in a determination that a company did not possess the requisite criminal intent.

⁴³ See for example, *Helmerich & Payne, Natures Sunshine, and Con-way Inc.*

107. The evaluators underline that although all the companies they met had a heightened sense of concern about not violating the FCPA, only a few said that this concern would discourage them from looking for past violations. Indeed the Sarbanes-Oxley Act requires that issuers look at the sufficiency of controls in past years. Overall, the evaluators believe that the heightened concern has had a very positive impact on the development of corporate controls in the United States, and thereby the prevention and detection of foreign bribery. The evaluators therefore believe that the U.S. authorities, through their high level of engagement with the private sector, are best placed to find a way to encourage companies to explore past conduct through their internal controls.

Commentary

The evaluators recognise the important and widespread impact of the vigorous enforcement policies applied by the United States' authorities, and high level of engagement with the private sector, especially in recent years, on encouraging the establishment of robust compliance programmes and measures, particularly in large companies. In the absence of more SME participation in the on-site visit, the evaluators do not feel competent to extend this assessment beyond large companies.

Moreover, the evaluators regret that the on-site visit did not afford an opportunity to meet with more SMEs, but recognise that the U.S. authorities made best efforts to secure their participation. The evaluators note that reaching out to SMEs is a horizontal issue that affects virtually all the Parties to the Convention, and recommends that the Working Group on Bribery explore ways to more effectively involve them in its activities.

The perception of the private sector about competition from companies from major emerging economies that have not criminalised foreign bribery, competition from companies from countries that do not enforce their foreign bribery laws, and continuing demand-side issues, are horizontal issues for the Working Group on Bribery as a whole.

4. Sanctions

a) DOJ's use of PAs, DPAs and NPAs

108. The DOJ resolves most FCPA matters through plea agreements (PAs), deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs). The United States strongly believes that such agreements are an efficient way to resolve foreign bribery cases. In their view, these agreements provide both appropriate punishment and flexibility to reward voluntary disclosures and co-operation. This practice has worked well in the U.S. legal system, resulting in strong enforcement and private sector compliance efforts.

109. PAs are written, negotiated agreements between the prosecution and a defendant setting out each side's obligations when the defendant enters a guilty plea. The agreement may specify, for example, that the prosecution will not bring or move to dismiss certain charges. The prosecution may also agree to recommend or not oppose a defendant's request for a particular sentence or sentencing range; agree that a particular sentence or sentencing range is appropriate; or agree that a provision of the Sentencing Guidelines does or does not apply. The defendant agrees to admit to the facts described in a charging document. When the defendant enters the guilty plea, the PA is disclosed to the court. The court then accepts, modifies or rejects the PA.⁴⁴

⁴⁴ Federal Rules of Criminal Procedure, Rule 11. See also USAM 9-27.400.

110. Unlike PAs, DPAs and NPAs do not lead to convictions (absent a breach of the agreement). Under a DPA, the prosecution files a charging document with the court but requests that the prosecution be ‘deferred’ for the duration of the agreement. DPAs generally require the defendant to toll (i.e. waive) the statute of limitations, admit relevant facts, commit to certain compliance and remediation measures, and pay a fine. If the defendant complies with the agreement, then the prosecution withdraws the charge. DPAs are technically subject to judicial review and approval, but most judges do not appear to scrutinise DPAs.⁴⁵ Unlike a DPA, an NPA does not involve the court. The government maintains a right to file charges but agrees not to do so. In return, the defendant is subject to terms similar to those often found in DPAs.

111. Although DPAs and NPAs have existed since 1993, their use has grown dramatically in recent years. Since 2004, the annual average number of DPAs and NPAs entered into by the DOJ has grown from less than 5 to over 20 and a high of 38 in 2007.⁴⁶ In FCPA cases, DPAs and NPAs were not used until 2004. Since then, they have been used in 30 out of 39 concluded criminal enforcement actions against companies.

112. Explanations for this phenomenon vary. The dramatic increase occurred shortly after the prosecution and collapse of the accounting firm Arthur Andersen which led to thousands of jobs lost. Avoiding such collateral consequences of prosecution is generally cited as why DPAs and NPAs are used.⁴⁷ In FCPA cases, factors such as the protection of employees and shareholders also play a role, according to U.S. authorities. The U.S. authorities also believe that companies often prefer to resolve matters through DPAs and NPAs in lieu of going to court and undergoing a potentially lengthy process and resulting press scrutiny. As well, the DPAs and NPAs in FCPA cases generally cite factors such as the defendants’ co-operation and self-reporting of the crime as the reasons for the agreement. These agreements are thus used as an incentive for voluntary disclosure and co-operation. The U.S. authorities also use DPAs and NPAs to resolve cases quickly. Finally, FCPA cases usually involve obtaining evidence from foreign countries, which can be time-consuming and unsuccessful. DPAs and NPAs can be used to secure a company’s co-operation and obtain overseas evidence where the MLA process is cumbersome or unavailable.⁴⁸

113. Guidance on when prosecutors may use PAs, DPAs and NPAs exists but is slightly uneven and indirect. The Federal Rules of Criminal Procedure and the U.S. Attorney’s Manual (USAM) contain extensive rules on the content of and the procedure for negotiating plea agreements.⁴⁹ The USAM also contains extensive guidelines on whether the prosecution should enter into an NPA in return for co-operation.⁵⁰ Guidance for DPAs is more implicit. Prosecutors state that the use of DPAs is governed by the USAM’s Principles of Federal Prosecution of Business Organisations, which apply to corporate prosecutions generally. The Principles, however, mention DPAs only briefly twice. Furthermore, DPAs are available for individuals in the form of “pre-trial diversion” (though they have not been used in FCPA

⁴⁵ Government Accountability Office (December 2009), ‘DOJ Has Taken Steps to Better Track Its Use of Deferred and Non-Prosecution Agreements, but Should Evaluate Effectiveness’, GAO-10-110, pp. 25-26.

⁴⁶ *Ibid.*, pp. 13-14.

⁴⁷ *Ibid.*, p. 1.

⁴⁸ Government Accountability Office (28 June 2009), “Preliminary Observations on DOJ’s Use and Oversight of Deferred Prosecution and Non-Prosecution Agreements”, GAO-09-636T, p. 9.

⁴⁹ Federal Rules of Criminal Procedure, Rule 11; USAM 9-27.400 - 9.27.450 and 9-28.1300, as revised under Deputy Attorney General Filip on 28 August 2008. The prior memoranda, which are superseded by these provisions of the USAM, were issued by Deputy U.S. Attorneys General Paul J. McNulty (12 December 2006), Larry Thompson (January 2003), and Eric Holder (June 1999).

⁵⁰ USAM 9-27.600 – 9-27.650

cases to date). The Principles, as their name suggests, apply to prosecutions of business organisations and not individuals. A separate set of Principles of Prosecution for individuals apply to pre-trial diversion.

114. A few private sector participants at the on-site visit believed that more guidance, particularly on when a particular type of agreement would be used, would lead to greater consistency. On the other hand, a recent report suggests that a significant part of the private sector did not believe that guidance would be useful.⁵¹ During this Phase 3 evaluation, the U.S. authorities were of the view that such guidance was unnecessary.

115. Instead, the U.S. authorities have attempted to enhance consistency and oversight by requiring senior approval of settlement decisions. At least one Deputy Chief and the Chief of the Fraud Section must review and approve all such decisions. The approval of a Deputy Assistant Attorney General and the Assistant Attorney General of the Criminal Division is sometimes also required. If a company does not agree with the settlement decision, it may informally appeal the decision to the Assistant Attorney General.

116. The U.S. authorities have also sought to increase transparency by informing the public of settlements. The DOJ publishes on its website PAs, NPAs and DPAs. For PAs, the U.S. also publishes the associated sentencing memoranda, which are its written submissions to the court. The sentencing memoranda are especially informative. They explain the DOJ's views on how the Sentencing Guidelines and Principles of Federal Prosecution of Business Organizations apply to the case. The memoranda may describe further details such as how the defendant co-operated with the authorities by producing certain witnesses and documents. They may elaborate remedial measures taken by the defendant, such as hiring an outside compliance expert or reforming its compliance system etc. The memorandum may also specify aggravating factors, such as the defendant's failure to report the offence in a timely manner. In some cases, the memorandum can therefore provide insights into the DOJ's reasons for entering into the plea agreement and for seeking certain terms in the agreement.

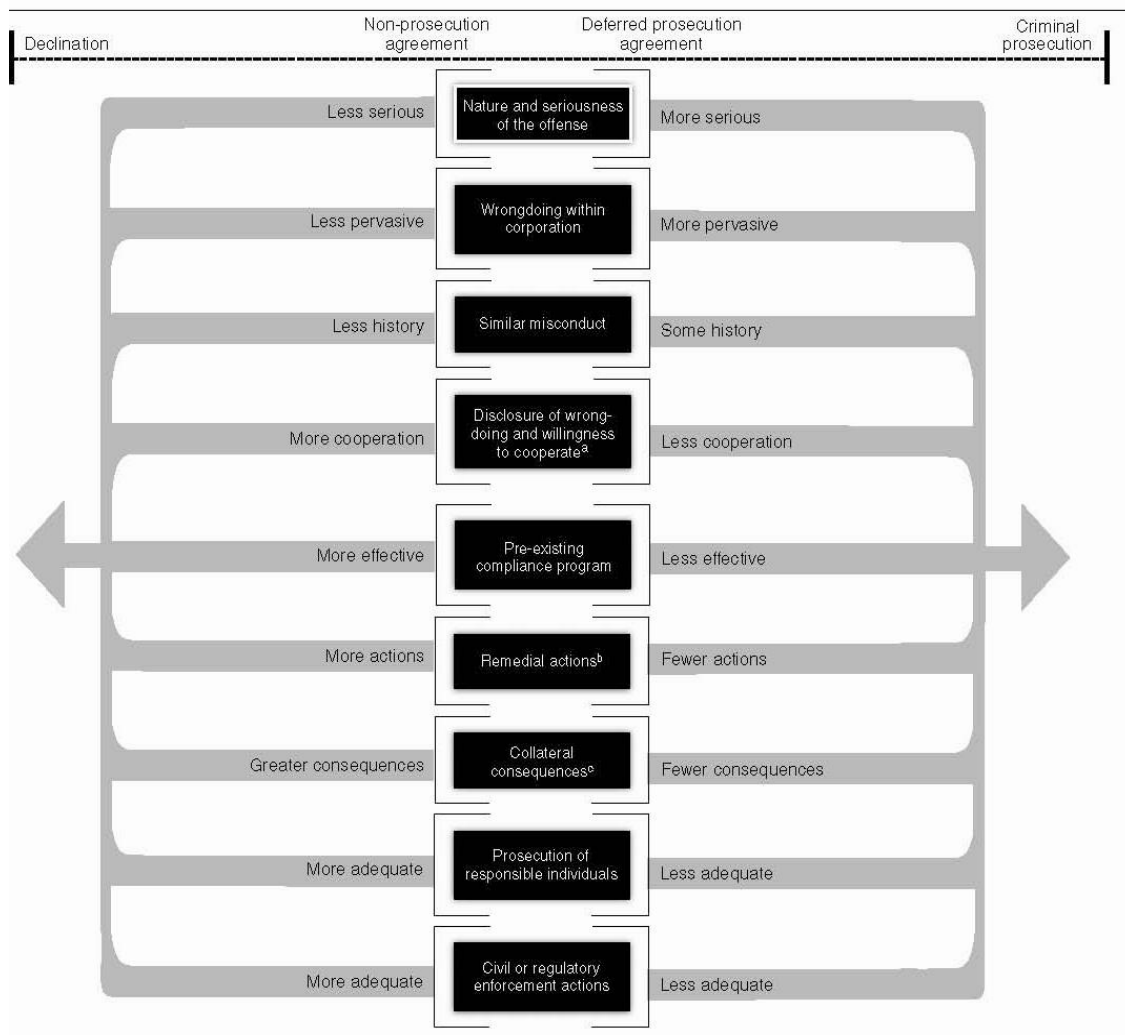
117. Similar information about DPAs and NPAs is often unavailable, however. Sentencing memoranda are not prepared for DPAs and NPAs, as these cases are resolved by agreement and do not require the imposition of sentence by a court. The DOJ makes public DPAs with companies and individuals, and NPAs with companies. NPAs with natural persons are not made public as a matter of internal policy.⁵² These agreements may provide less information regarding the defendants' remedial measures and co-operation in the investigation. Some DPAs and NPAs also state that the DOJ entered into the agreement based 'in part' on certain listed factors,⁵³ which suggests that there are other undisclosed factors motivating the decision. Publishing more detailed reasons for entering into DPAs and NPAs would give more insight into the DOJ's choice of settlement agreements and thus enhance accountability and transparency of the process.

⁵¹ Government Accountability Office (25 June 2009), "Preliminary Observations on DOJ's Use and Oversight of Deferred Prosecution and Non-Prosecution Agreements", GAO-09-636T, pp. 11-12.

⁵² USAM 9-27.760.

⁵³ For example, see the NPAs with Helmerich & Payne, Inc. (29 July 2009) and UTStarcom, Inc. (31 December 2009).

Box 1. How the Principles of Federal Prosecution of Business Organizations Influence Prosecutors' Decisions to Decline Prosecution, Enter into a DPA or NPA, or Prosecute the Offense



Source: GAO analysis of DOJ's Principles of Federal Prosecution of Business Organizations.

^aWillingness to cooperate includes cooperation in the government's investigation of the company's agents.

Source : <http://www.gao.gov/new.items/d10110.pdf>

b) SEC's use of co-operation agreements, DPAs and NPAs

118. In January 2010, the SEC announced that it would begin using co-operation agreements, DPAs and NPAs in FCPA cases. A co-operation agreement is similar to a plea agreement in criminal proceedings. An individual or company must provide substantial assistance to an SEC investigation and co-operate fully and truthfully. In return, the SEC Enforcement Division agrees to make certain recommendations to the Commission, such as the individual or company should receive credit for co-operating. DPAs and NPAs require the company or individual to co-operate fully and truthfully, and to agree to comply with prohibitions and/or undertakings. DPAs also require the company or individual to

admit to or not contest certain alleged facts. NPAs are available only in ‘limited and appropriate circumstances’. All three types of agreements require the company or individual to agree to toll the statute of limitations. The SEC has not yet used one of these agreements, given that the policy to use them was adopted only recently.

119. The SEC has relatively detailed guidance on the use of these three types of agreements.⁵⁴ The SEC considers four broad measures of a company’s co-operation: self-policing before the discovery of the misconduct; self-reporting of misconduct; remediation; and co-operation with law enforcement authorities. These four measures are broken down into a non-exhaustive list of 13 criteria. Additional guidance is given for evaluating co-operation by individuals. The guidance also requires publication of the benefits of co-operation by an individual or company.

c) Corporate monitors

120. PAs, DPAs and NPAs in FCPA cases often require a company that has violated the FCPA to enter into an agreement to retain a corporate monitor. The purpose of a corporate monitor is ‘to assess and monitor a corporation’s compliance with the terms of the agreement specifically designed to address and reduce the risk of recurrence of the corporation’s misconduct, and not to further punitive goals’.⁵⁵ Since 1998, 23 of the 44 criminal FCPA enforcement actions have resulted in corporate monitors, in most cases for three years.

121. The DOJ and SEC highly value the use of corporate monitors as part of its enforcement and compliance efforts. In their view, such monitors reduce the likelihood of continuing violations of the law, ensure compliance programmes are implemented, and provide a mechanism for evaluating compliance with the terms of the agreements and probation without the extensive investment of additional prosecutorial resources. The United States Sentencing Guidelines provide for such monitoring by the court. In practice, a company that has entered into a PA, DPA or NPA bears the cost of the monitor since courts do not have sufficient financial resources to do so.

122. According to testimony before a subcommittee of the United States Government Accountability Office, as of October 2009, among 48 companies required to hire monitors to oversee their compliance with a DPA or NPA, 23 of the monitors previously worked with the DOJ, and 13 did not. Of the remaining 13, six had previous experience at a state or local government agency, including the SEC.⁵⁶ The DOJ does not have statistics on how many monitors in FCPA cases are ex-DOJ attorneys, but indicates that the ‘majority’ were not. The same testimony refers to the concerns of some companies that monitors with prior association with the DOJ may not be independent or may be partial in favour of the DOJ, according to a recent report.⁵⁷ However, the report observed that there was no evidence that this had in fact occurred and judged that the DOJ adhered to a merit-based process. Moreover, many companies held the view that a

⁵⁴ SEC Enforcement Manual, Chapter 6 ‘Fostering Co-operation’. See also SEC (2001), Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions (‘Seaboard Report’).

⁵⁵ Acting Deputy Attorney General Craig S. Morford (7 March 2008), ‘Memorandum on Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations’ (the ‘Morford Memorandum’).

⁵⁶ The U.S. authorities stress that these data related to monitors in all cases and were not specific to FCPA cases.

⁵⁷ Government Accountability Office (19 November 2009), ‘Prosecutors Adhered to Guidance in Selecting Monitors for Deferred Prosecution and Non-Prosecution Agreements, but DOJ Could Better Communicate Its Role in Resolving Conflicts, GAO-10-260T, pp. 10-11.

monitor with DOJ experience was desirable.⁵⁸ Similarly, the evaluation team heard that the DOJ did not favour its former attorneys as monitors in FCPA cases, but believed that a monitor with FCPA experience is beneficial. Indeed, the U.S. authorities point out that much of the criticism that has been raised about monitors did not originate from FCPA cases.

123. In order to address some of the concerns, the DOJ has produced detailed guidance on the procedure for selecting corporate monitors under DPAs and NPAs.⁵⁹ There is no bidding process for monitor contracts. Rather, the company subject to the monitorship nominates three candidates. DOJ attorneys choose one of the three nominees, having regard to factors such as a candidate's qualifications; experience in compliance programmes and the industry in which the company operates; knowledge of the relevant criminal laws, including the FCPA; objectivity and independence; and available resources. If none of the three candidates is acceptable, then the company must nominate additional candidates.⁶⁰

124. Senior officials must further confirm the chosen candidate. The DOJ attorneys must prepare a written memorandum describing, among other things, why a monitor is required and a description of their preferred candidate's qualifications. The memorandum is considered by a Standing Committee on the Selection of Monitors that comprise a Deputy Assistant Attorney General, Chief of the Fraud Section, and the Deputy Designated Agency Ethics Official for the Criminal Division. If the Standing Committee accepts the recommendation, then it is sent to the Assistant Attorney General for further review, and to the Office of the Deputy Attorney General for approval. The guidance repeatedly emphasizes the importance of merit-based selection and adherence to conflict of interest guidelines.

125. Companies that have been subject to monitorships in FCPA cases have also raised general concerns about the monitor's fee and the scope of the monitor's work. The company negotiates the fee with the monitor. The scope of the monitor's work is defined in the DPA, NPA or PA. Some companies have felt, however, that the scope was too expansive, which increased the overall cost of the monitorship.⁶¹ Several participants at the on-site visit shared this view, though it was also pointed out that a competent, proactive monitor can help advance the company's reform process. The evaluation team heard that a monitor can also help the company's compliance officer convince the company board of the need to reform or maintain compliance resources, thereby supporting corporate prevention of bribery.

126. The court is generally not directly involved in the monitoring process. The DOJ ordinarily chooses the monitor, sets the scope of the monitorship, receives progress and final reports from the monitor, and determines whether the company has met the requirements. There has been one notable exception, however. In *United States v. Innospec, Inc.*, the judge retained oversight of a monitor, requiring the monitor's reports be submitted and maintained jurisdiction to resolve disputes between the monitor and the company, including over the monitor's fees. Nevertheless, a recent report indicates that a

⁵⁸ The U.S. authorities stress again that the testimony before the GAO pertained to all cases and was not specific to FCPA cases.

⁵⁹ Acting Deputy Attorney General Craig S. Morford (7 March 2008), 'Memorandum on Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations' (the 'Morford Memorandum'). Additional guidance for the DOJ Criminal Division is found in the memorandum of Assistant Attorney General Lanny A. Breuer (24 June 2009), 'Selection of Monitors in Criminal Division Matters'.

⁶⁰ See 'Government's Opposition to Defendant's Motion and Proposed Order for Extension of the Period Both to Engage the Monitor and the Maximum Term of the Monitor' (31 May 2010) in *United States v. BAE Systems plc.*, 1:10-cr-00035-JDB (D.C.).

⁶¹ Government Accountability Office (25 June 2009), 'Preliminary Observations on DOJ's Use and Oversight of Deferred Prosecution and Non-Prosecution Agreements', GAO-09-636T, p. 5; Government Accountability Office (19 November 2009), 'Prosecutors Adhered to Guidance in Selecting Monitors for Deferred Prosecution and Non-Prosecution Agreements, but DOJ Could Better Communicate Its Role in Resolving Conflicts', GAO-10-260T, pp. 11-13.

significant number of companies, DOJ officials and even judges do not favour greater judicial involvement in monitors.⁶² Concerns ranged from the lack of judicial time and resources, to judicial interference of prosecutorial discretion and functions of the executive government. The report accordingly did not recommend increasing court involvement in monitorships.

127. The SEC has also used corporate monitors extensively in FCPA and other cases. However, it does not appear to have issued guidance on the selection and use of monitors. According to the U.S., the SEC has internal policies and procedures that aid the SEC in determining when a monitor is needed and the terms of the monitorship. The SEC works closely with the company and determines flexibly the need for a monitor. In some instances, a corporate monitor is retained by the company. The SEC may also allow a consultant already working for the company to act as a corporate monitor. In other cases, the SEC may not require a monitor and instead allow the company to self-report enhancements to its compliance programme. The SEC states that it also co-ordinates with the DOJ on the selection of a monitor and conducts an independent review of the adequacy of the monitor selection and the terms of the monitor agreement. The terms of all monitor agreements (and undertakings where no monitors are appointed) are publicly available.

128. The U.S. believes that the public availability of its settlement agreements creates transparency. It considers that its flexibility on how and when it uses monitors also reflects its desire to take into account the particular facts and circumstances of each company, including the company's size and efforts to implement a reasonable compliance programme. The U.S. also considers that the use of monitors and self-reporting mechanisms ensures that companies take FCPA violations seriously. Companies also learn from their mistakes by looking at past violations, and implementing and testing controls to prevent further violations.

Commentary

The evaluators note that PAs, DPAs, NPAs and the appointment of corporate monitors are an innovative method for resolving cases, and has evolved into an important feature of the U.S. criminal justice system, which has helped to enable a high level of enforcement activity. These measures have been used extensively in FCPA cases, especially in recent years. Guidance exists on the use of these agreements. Some private sector representatives would like more guidance but the U.S authorities disagree.

A useful compromise may be for the DOJ and the SEC, where appropriate, to make public in each case in which a DPA or NPA is used, more detailed reasons on the choice of a particular type of agreement, and the choice of the agreement's terms and duration; and the basis for imposing monitors. The DOJ already does so for PAs through sentencing memoranda. Greater transparency on these issues would add accountability and enhance public confidence in the DOJ's and SEC's enforcement of the FCPA. Making public this information would also raise awareness of how these agreements enhance foreign bribery enforcement efforts.

d) Level of Sanctions

129. The statutory maximum sanctions for FCPA violations have not changed since Phase 2:

- (a) A legal person violating the FCPA's foreign bribery provisions is punishable by a criminal fine of USD 2 million or twice the gross pecuniary gain or loss resulting from the offense,

⁶² Government Accountability Office (December 2009), 'DOJ Has Taken Steps to Better Track Its Use of Deferred and Non-Prosecution Agreements, but Should Evaluate Effectiveness', GAO-10-110, pp. 27-28.

whichever is greatest. The legal person may also be subject to a civil penalty of up to USD 10 000.⁶³

- (b) An officer, director, employee or agent of a legal person, or stockholder acting on behalf of a legal person, who commits foreign bribery is punishable by 5 years' imprisonment, a criminal fine of USD 100 000 or twice the gross pecuniary gain or loss resulting from the offense, whichever is greatest, or both a fine and imprisonment. The person may also be subject to a civil penalty of up to USD 10 000.⁶⁴ The gain or loss has been interpreted as the amount of the bribes that were received by any persons as a result of the offence⁶⁵ or, if they can be calculated, the benefits secured as a result of the offense (such as profits), whichever is greater
- (c) Wilful violation of other FCPA provisions (including those on books and records and/or internal controls) and wilfully and knowingly making a statement that was false or misleading with respect to a material fact is punishable by 20 years' imprisonment and/or a fine of USD 5 million for natural persons, and USD 25 million for legal persons. As with foreign bribery offences, the maximum fine may be increased to twice the pecuniary gain or loss resulting from the offence.⁶⁶ The gain or loss is also interpreted as the amount of the bribes that were received by any persons as a result of the offence or, if they can be calculated, the benefits secured as a result of the offense (such as profits), whichever is greater. The legal person can also be subject to a civil penalty of up to USD 250 000 or the gross pecuniary gain, whichever is greatest. A natural person can be subject to a civil penalty of up to USD 50 000 or the gross pecuniary gain, whichever is greatest.
- (d) An issuer that fails to file information, documents or reports as required shall forfeit USD 100 for each day of such failure.⁶⁷

130. For (a) to (c) above, the court may also impose five years' probation and a mandatory special assessment of USD 400 for legal persons and 100 for natural persons.⁶⁸ The statutory maximum sentences for multiple counts can be aggregated and may run consecutively.

131. In practice, the USSG are key to determining the actual penalties. The USSG determine a sentencing range based on numerous factors such as the presence of an effective compliance and ethics programme, and whether the offender voluntarily-reported the offence and co-operated with the authorities. The USSG are expected to be amended on 1 November 2010 to add guidance on the steps that a legal person should take after detecting criminal conduct. The amended USSG will also offer credit to organisations that require individuals with responsibility for compliance and ethics to report directly to the organisation's governing authority.

132. Unlike at the time of the Phase 2 evaluation, the sentencing ranges determined under the USSG are only advisory.⁶⁹ The court now has significant discretion over the sentence imposed. Fines pursuant to

⁶³ 15 U.S.C. §§ 78dd-2(g)(1), 78dd-3(e)(1) and 78ff(c)(1); 18 U.S.C. § 3571.

⁶⁴ 15 U.S.C. §§ 78dd-2(g)(2), 78dd-3(e)(2) and 78ff(c)(2); 18 U.S.C. § 3571.

⁶⁵ For instance, see *United States v. Bourke*, S2 05 Cr. 518 (SAS) (S.D.N.Y.), Government's Sentencing Memorandum, pp. 34-35; Transcript of Sentencing Hearing, pp. 17-18.

⁶⁶ 15 U.S.C. § 78ff(a) and 18 U.S.C. § 3571.

⁶⁷ 15 U.S.C. § 78ff(b).

⁶⁸ 18 U.S.C. §§ 3013 and 3561.

⁶⁹ *United States v. Booker*, 543 U.S. 220 (2005).

DPA and NPA can be below the bottom of the guidelines range to reflect voluntary reporting, extensive internal investigation, co-operation, remediation and similar mitigating factors. In some cases, the departure from the range can be very significant. One company received a criminal fine of USD 450 million even though the Guidelines range was USD 1.35 to 2.7 billion (not taking into account other provisions of the Guidelines on mitigating factors to which the DOJ's Sentencing Memorandum referred).⁷⁰

133. Significant criminal sanctions have been imposed against legal and natural persons for FCPA violations. Since 1998, over USD 2 billion in criminal fines have been imposed against legal persons. Of the 36 individuals who have been convicted of FCPA violations and sentenced during this period, 25 received sentences of imprisonment. The average length of the sentences was just over 30 months. In a recent case, a defendant was sentenced to 87 months in prison for FCPA violations. It is notable that the U.S. private sector representatives at the on-site visit universally perceived that enforcement by other Parties to the Convention is not comparable and that U.S. companies and FMNEs listed in the U.S. may be handicapped in international business dealings.

134. The SEC has also regularly sought civil penalties for FCPA violations. More than USD 63 million in civil penalties has been imposed in 48 cases since 2000. The highest penalty in a single case was USD 16.5 million. In deciding whether to seek civil penalties against a corporation, the SEC mainly considers whether the corporation directly benefited from the violation, and the degree to which the penalty will recompense or further harm shareholders. Also relevant are factors such as the need to deter others, injury to innocent parties, widespread complicity in the company, the perpetrator's level of intent, difficulty in detecting the crime, and the company's efforts to remediate and co-operate.⁷¹ Unlike criminal fines, funds from civil penalties may be used to compensate victims of crime, though this has not occurred in FCPA cases. Disgorgement, which is discussed below, has also resulted in sanctions of significantly larger sums. The observation in the Phase 2 report (para. 48) that most FCPA cases result in moderate fines and non-custodial sentences no longer holds true.

Commentary

The United States has a significant record of sanctions, particularly since Phase 2, including a record level of monetary penalties and disgorgement, which should provide a major disincentive to bribing foreign public officials by U.S. companies, FMNEs listed in the U.S., and individuals and a major incentive for establishing effective compliance programmes and measures.

e) Denial of public advantages

135. The 2009 Anti-Bribery Recommendation encourages countries to 'permit authorities to suspend, to an appropriate degree, from competition for public contracts or other public advantages, including public procurement contracts and contracts funded by official development assistance, enterprises determined to have bribed foreign public officials in contravention of that Member's national laws and, to the extent a Member applies procurement sanctions to enterprises that are determined to have bribed domestic public officials, such sanctions should be applied equally in case of bribery of foreign public officials'. This part of the report considers the United States' implementation of this recommendation.

⁷⁰ *United States v. Siemens Aktiengesellschaft*, 08-CR-367-RJL (D.C.)

⁷¹ Statement of the Securities and Exchange Commission Concerning Financial Penalties, 4 January 2006.

(i) *Debarment*

136. A person or firm that violates the FCPA or other criminal statutes may be suspended or debarred from contracting with the United States federal government. Grounds for suspension and debarment are based upon a determination of the ‘present responsibility’ of a government contractor, and can include a conviction of or a civil judgment for committing bribery, falsification or destruction of records, and making false statements. If a contractor is indicted for such conduct, it may be suspended from contracting with the government. A decision to debar or suspend is discretionary. The decision is not made by the prosecuting authority, but instead is based upon an independent determination of a separate agency having regard to factors such as whether the contractor self-reported the misconduct, co-operated with the authorities, and has taken remedial measures. Each federal department and agency determines the eligibility of contractors with whom it deals. However, if one department or agency debars or suspends a contractor, the debarment or suspension applies to the entire executive branch of the federal government, unless a department or agency shows compelling reasons not to debar or suspend the contractor. Debarment is generally for up to three years, while suspensions are at most 18 months.⁷²

137. A violation of the FCPA may also result in the denial of advantages provided by the federal government. A debarment regime similar to the one for government contracts described above applies to ‘nonprocurement transactions’ such as grants, contracts of assistance, loans, loan guarantees, subsidies, insurances and payment for specified uses.⁷³ In addition, the Export-Import Bank may decline an application for export credit, guarantees and other support if there is evidence of fraud or corruption, or if any participants in the transaction have engaged in or been associated with fraud or corruption in the past. The Commodity Futures Trading Commission and the Overseas Private Investment Corporation may also suspend or debar an entity from its programmes due to an FCPA violation.

138. One important feature of this debarment regime is that it is not intended to be punitive. Federal regulations governing both procurement and non-procurement transactions require that debarment and suspension are ‘imposed only in the public interest for the Government’s protection and not for purposes of punishment.’⁷⁴ That said, the federal regulations permit authorities to debar enterprises determined to have bribed foreign public officials from public contracts. The regulations also, on their face, apply equally to foreign and domestic bribery, as recommended by the 2009 Anti-Bribery Recommendation.

139. Publicly available information does not indicate that debarment due to FCPA violations is used regularly, and this impression was shared by one civil society participant at the on-site visit. It is not possible to verify this perception, because the United States does not have consolidated information on the use of debarment for this purpose. The U.S. authorities explain that debarment offices are diffused throughout the federal, state, and local levels of government, and statistics on the use of debarment have not been maintained. Likewise, they are unable to provide examples of debarments due to FCPA violations. The apparent underuse of debarment recently attracted the attention of Congress. At the time of this report, the House of Representatives had passed a Bill which, if also passed by the Senate and signed by the President, would specifically require issuers and domestic concerns that are convicted of foreign bribery under the FCPA to be proposed for debarment.⁷⁵

⁷² Federal Acquisition Regulation, 48 CFR Part 9, Subpart 9.4.

⁷³ 5 CFR Part 919.

⁷⁴ 48 CFR Part 9, Subpart 9.4, 9.402. See also 5 CFR Part 919, 919.110.

⁷⁵ H.R. 5366. The Bill allows a Federal agency to waive the requirement of proposing a company for debarment, however.

140. The U.S. does not believe that the use of NPAs and DPAs has an impact on the use of debarment and asserts that the admissions of misconduct contained in NPAs and DPAs could be used as a basis for debarment. They could not, however, confirm whether this has occurred in practice. The U.S. does not consider that resolutions of charges with the DOJ foreclose actions by other U.S. government agencies to suspend or debar companies from government contracting, since the relevant provisions in plea agreements bind only the DOJ (or a part of the Department). There have been instances in which the DOJ decided to use an NPA or DPA in order to avoid imposing mandatory debarment by jurisdictions such as the European Union in circumstances where this was considered a disproportionate sanction or would lead to unintended collateral consequences.

141. A DPA or NPA may also allow the DOJ to contribute to debarment decisions by other agencies. According to U.S. authorities, a government contracting agency may consult the DOJ during debarment determinations. Thus, the DOJ may agree in a DPA or NPA to make representations about a company's criminal conduct and remediation measures to a government contracting agency. A recent Congressional Committee identified two such examples, including one DPA in an FCPA case that contained the following term committing the DOJ to assist the company in debarment determinations:

With respect to [the Company's] present reliability and responsibility as a government contractor, the Department agrees to cooperate with [the Company], in a form and manner to be agreed, in bringing facts relating to the nature of the conduct underlying this Agreement and to [the Company's] co-operation and remediation to the attention of governmental and other debarment authorities, including the [multilateral development banks], as requested.⁷⁶

142. This practice led the Committee to express concerns that 'settlements of civil and criminal cases by the DOJ are being used as a shield to foreclose other appropriate remedies, such as suspension and debarment, which protect the government from continuing to do business with contractors who do not have satisfactory records of quality performance and business ethics.'⁷⁷

143. One further concern relates to the implementation of the debarment system. As noted earlier, the decision to debar is made by federal government departments and agencies. The DOJ consults these bodies in some but not all instances when a NPA, DPA or PA is being negotiated, so that debarment is taken into account when determining the overall penalty against a company.

(ii) *Arms export licences*

144. Section 38 of the Arms Export Control Act (AECA) provides the President (delegated to the Department of State) with the discretionary authority to deny arms export licences where the applicant or any party to the export has been indicted or convicted of foreign bribery under the FCPA. Convictions under other statutes, including Section 38 of the AECA, may also preclude the issuance of a licence. Exceptions may be made on a case-by-case basis by the Department of State after consultation with the Secretary of the Department of Homeland Security, and after a review of the circumstances surrounding the conviction or ineligibility to export and a finding by the Department of State that appropriate steps have been taken to mitigate any law enforcement concerns.

145. In addition, the International Traffic in Arms Regulations (ITAR) provide for statutory debarment, and states that it is the policy of the Department of State not to consider applications for

⁷⁶ DPA in *United States v. Daimler*, No. 1:10-CR-063 (D.C.), para. 21.

⁷⁷ Letter of the Committee on Oversight and Government Reform, House of Representatives, to the Honourable Attorney General Eric Holder dated 18 May 2010. The Attorney General's reply to the Committee was not available at the time of the adoption of the report.

licenses or requests for other approvals involving any person who has been convicted of violating or a conspiracy to violate the AECA. Such persons shall be notified in writing that they are statutorily debarred pursuant to this policy. Statutory debarments are based solely upon the outcome of a criminal proceeding, conducted by a court of the United States that established guilt beyond a reasonable doubt in accordance with due process. Statutory debarments are generally for a three year period, but in any event continue until lifted by the Department of State. The Department of State will begin accepting requests for reinstatement one year after the imposition of the statutory debarment.

146. In accordance with Section 120.1 of the ITAR, U.S. persons who have been convicted of violating certain criminal statutes, including Section 104 of the FCPA and Section 38 of the AECA, are considered generally ineligible under the ITAR. In practice, foreign nationals who have been convicted of violations of such criminal statutes are likewise treated as generally ineligible.

147. It is not clear whether arms export licences have been denied for FCPA violations since relevant statistics are not available. At the on-site visit, representatives of the aerospace and defence industry stated that the potential denial of licenses was a significant deterrent and a factor in the industry's FCPA compliance efforts. However, one representative stated that export licence denials can be for less than the standard period or tailored to apply to only part of the overall company. This representative also opined that denials were not frequent, and that there was a high threshold for denials against a company providing the United States government with essential products. The evaluators note also that, in a recent FCPA case, a company pleaded guilty to conspiring to violate the AECA and ITAR on 1 March 2010. That same day, the State Department issued a Web notice indicating that it was reviewing whether the conviction and plea agreement affected this company's licence applications. The notice was taken down a few days later. The Department of State stated that, at the time of this report, it has not published a statutory debarment in the case but has placed pending license applications on hold. It was determining its policy going forward but had not made a final decision.

Commentary

As noted in the 2009 Anti-Bribery Recommendation, denial of public contracts and other advantages can be a sanction for foreign bribery in appropriate cases. The United States has a legal framework for denying arms export licences, and for debarring participation in procurement and nonprocurement transactions, where a company has engaged in foreign bribery. Yet it appears that it has rarely done so in foreign bribery cases, which is particularly striking given the significant number of resolved FCPA enforcement actions. Furthermore, the legal framework for licence denial and debarment, on its face, applies equally to domestic and foreign bribery cases. However, whether this equality occurs in practice could not be verified, given the unavailability of relevant statistics.

The evaluators therefore recommend that the United States take appropriate steps to verify that, in accordance with the 2009 Anti-Bribery Recommendation, debarment and arms export license denials are applied equally in practice to domestic and foreign bribery, for instance by making more effective use of the 'Excluded Parties Lists System'⁷⁸ (EPLS).

⁷⁸

The EPLS is a public service by General Services Administration (GSA) for the purpose of efficiently and conveniently disseminating information on parties that are excluded from receiving Federal contracts, certain subcontracts, and certain Federal financial and nonfinancial assistance and benefits, pursuant to the provisions of 31 U.S.C. 6101, note, E.O. 12549, E.O. 12689, 48 CFR 9.404, and each agency's codification of the Common Rule for Nonprocurement suspension and debarment. Available online at: <https://www.epls.gov/>

5. Confiscation of the Bribe and the Proceeds of Bribery

148. Two remedies are available for confiscating a bribe and the proceeds of bribery: disgorgement and forfeiture.

149. The SEC seeks disgorgement (with pre-judgment interest) of ill-gotten gains in civil FCPA prosecutions against an issuer and those acting on the issuers' behalf for violations of the anti-bribery, books and records, and internal controls provisions of the FCPA. The remedy, which is available against legal and natural persons, derives from equity, not statute. The aim is to ensure that offenders do not profit from their illegal activities. A secondary objective is to compensate investors that may have been harmed by the violation.⁷⁹

150. The SEC has sought disgorgement in FCPA cases since the Act came into force. It has sought and obtained disgorgement of commissions made to a third party who facilitated bribery on behalf of an issuer. The SEC has also sought and obtained disgorgement of corporate bonuses and other monetary benefits from corporate officers and employees who violated the FCPA. Since 2004, disgorgement has become a regular feature in FCPA civil actions, with courts making such an order in 43 cases for a total of more than USD 1 billion. The average disgorgement order is approximately USD 25 million. In many cases, the disgorgement order is in addition to a criminal fine of a comparable size. In short, disgorgement has become a very significant remedy in corporate FCPA enforcement actions.

151. A violation of the FCPA may also result in the civil and criminal forfeiture of assets that represent proceeds or instrumentalities of a crime. Any property that constitutes or is derived from proceeds obtained directly or indirectly as the result of an FCPA violation, or a conspiracy to violate the FCPA, may be forfeited. Forfeiture may take the form of a money judgment, direct forfeiture of property, or substitute assets.⁸⁰ Unlike disgorgement, forfeiture is not limited to issuers or those acting on their behalf.

152. Forfeiture of the proceeds of foreign bribery accruing to the briber is rare in practice, having occurred in approximately five FCPA criminal enforcement actions. In many cases, this is because forfeiture of the profits would be duplicative of the disgorgement of profits secured by the SEC. Most of the cases involve forfeiture of money, but one case resulted in forfeiture of the bribers' residence, vehicle and interest in a pension plan.⁸¹ In several recent FCPA indictments, the DOJ has given notice of its intention to seek forfeiture.⁸² At the time of this report, the DOJ was also pursuing a significant forfeiture action related to the *Siemens* prosecution. The Assistant Attorney General also stated recently of the DOJ's intention to 'seek forfeiture in all appropriate cases going forward.'⁸³ This would be a welcome development.

153. Forfeiture of the proceeds of foreign bribery accruing to the bribed foreign official in FCPA cases is understandably rare, since the bribe is usually located in a foreign country and the U.S. rarely has jurisdiction over the bribe recipient. DOJ states that efforts to obtain bank records and other necessary

⁷⁹ *SEC v. Texas Gulf Sulphur Co.*, 312 F. Supp. 77 (S.D.N.Y. 1970), affd. on this point, 446 F. 2d 1301 (2d Cir.), Cert. denied, 404 U.S. 1005 (1971); Government Accountability Office (1994), 'Improvements Needed in SEC Controls Over Disgorgement Cases' (GAO/GGD-94-188), pp. 2-3.

⁸⁰ 18 U.S.C. §§ 981 and 1956; 21 U.S.C. § 853; 28 U.S.C. § 2461.

⁸¹ *United States v. Green*, CR No. 08-59(B) -GW (C.D. Cal. 16 January 2008)

⁸² For example, *United States v. Spiller*, 09-cr-00350-RJL (D.C.) and *United States v. Haim Geri*, 09-CR-00342-RJL (D.C.)

⁸³ Breuer, L. (17 November 2009), 'Prepared Address to the 22nd National Forum on Foreign Corrupt Practices Act'.

information can be slow or unsuccessful in some cases where mutual legal assistance is unavailable or otherwise cumbersome. Nevertheless, a court in one case has forfeited USD 1.58 million in bribes that were received by a foreign public official and laundered in the United States.⁸⁴ In a second case, the DOJ is seeking enforcement of a forfeiture judgment of foreign bribery held by a foreign official in a Singapore bank account.⁸⁵ The United States adds that it has recovered and repatriated millions of dollars that were hidden in the United States and which were generated by bribery offences over which the United States did not have jurisdiction, including assets of former Peruvian president Alberto Fujimori.

154. The United States has also committed to returning the proceeds of corruption to foreign victim states where appropriate. Since 2006, it has adopted a 'No Safe Haven' policy to deny entry of the corrupt, those who corrupt them, and their assets. The policy commits the United States, among other things, to vigorously prosecute foreign corruption offences and seize illicitly acquired assets, and to develop and promote mechanisms that capture and dispose of recovered assets for the benefit of the citizens of countries victimised by high-level public corruption. The United States is also committed to targeting technical assistance and focusing international attention on building capacity to detect, prosecute, and recover the proceeds of high-level public corruption. In one on-going case in which the DOJ sought civil forfeiture, the United States has agreed to use the seized funds to finance social and public programmes in Kazakhstan.⁸⁶ A new Kleptocracy Asset Recovery Initiative was also announced on 25 July 2010. According to the U.S., the Initiative aims to increase the recovery of public funds of foreign governments that were lost through large-scale official corruption, and return them for the benefit of the people of these foreign countries.

155. Asset recovery is covered by Paragraph XIII.i of the 2009 Anti-Bribery Recommendation. In addition, the Working Group on Bribery decided to compile information on this issue in all Phase 3 evaluations. Asset sharing remains rare in FCPA cases. The enormous fines and forfeited or disgorged funds in FCPA cases largely have not been shared with the states of the bribed officials. The U.S. considers asset recovery and repatriation to be highly controversial, given the competing concerns about returning sovereign assets and ensuring that returned assets are not simply stolen again by the same official. The U.S. states that in the vast majority of FCPA cases, the officials' home countries do not prosecute and the bribe recipients may still be in power.

Commentary

The Working Group has stated repeatedly that confiscation is an important component of an effective sanctions regime for foreign bribery. The SEC has consistently obtained confiscation of FCPA proceeds through disgorgement actions against issuers and those acting on issuers' behalf. The DOJ has sought criminal and civil forfeiture infrequently in FCPA cases. However, the evaluators are mindful that in many cases forfeiture would duplicate SEC disgorgement actions. Significant criminal fines have also been imposed. Nevertheless, forfeiture may have an important role since disgorgement is only available against issuers and those acting on their behalf. The recent statement of the Assistant Attorney General that the DOJ intends to seek forfeiture in appropriate FCPA cases is therefore welcomed.

⁸⁴ *United States v. Antoine*, No. 09-21010-CR-MARTINEZ (S.D. Fla. 2009).

⁸⁵ DOJ Press Release (9 January 2009), 'Department of Justice Seeks to Recover Approximately \$3 Million in Illegal Proceeds from Foreign Bribe Payments'.

⁸⁶ *United States v. Giffen, et al.* (S.D.N.Y., 2 April 2003).

6. Money laundering

156. Since Phase 2, the United States' money-laundering offences, as applied to foreign bribery cases have not changed significantly but there has been increased enforcement. In 2002, the Working Group noted that there were 'few on-going money-laundering cases involving foreign bribery'.⁸⁷ But from 2003 to 16 September 2010, 54 natural persons have been charged with money laundering in foreign bribery cases and 19 have been convicted. At least two of these convictions were for laundering of the bribe received by an official.⁸⁸ The figure is substantially lower for legal persons, with only one charged and one convicted. Civil proceedings launched against a second legal person were discontinued without sanctions. Nonetheless, the United States' enforcement of money-laundering offences in foreign bribery cases has significantly improved since the Phase 2 evaluation. The United States has also repatriated significant amounts of proceeds of corruption committed by foreign officials (see Section 5 on 'Confiscation of the Bribe and the Proceeds of Bribery').

157. The laws and regulations for preventing and detecting the laundering of the proceeds of foreign bribery are also substantially the same as in Phase 2. As noted above, the United States has adopted a No Safe Haven policy to deny entry of the assets of the corrupt and those who corrupt them. To prevent money laundering, a financial institution is required to conduct due diligence by taking reasonable steps to ascertain the identity of the nominal and beneficial owner of, and the source of funds deposited into, a 'private banking account' requested or maintained by, or on behalf of, a non-United States person. The financial institution must also ascertain whether this person is a 'senior foreign political figure', i.e. a politically exposed person (PEP). If this is the case, then the financial institution must conduct 'enhanced scrutiny' of the account to detect and report transactions that may involve proceeds of foreign corruption. Additionally, financial institutions must obtain and retain information on the beneficial ownership of accounts opened or maintained in the United States by foreign persons (other than listed companies) resident in jurisdictions designated to be of high money laundering concern.⁸⁹

158. One limitation of these provisions is their limited scope. First, they apply only to correspondent accounts and 'private banking accounts'. The latter is defined as an account (or combination of accounts) of not less than USD 1 million. This restriction to high-value accounts has been called 'surprising' and a 'significant weakness' in principle.⁹⁰ Due diligence for lower value accounts and non-correspondent accounts is recommended by the 2001 'Guidance on Enhanced Security for Transactions that May Involve the Proceeds of Foreign Corruption' issued by the Federal Banking Agencies and the State Department. However, this Guidance is not legally binding. Second, the PEP requirements do not explicitly apply to insurance companies, money services businesses, investment advisers, and commodity trading advisers. For these reasons, the United States is not 'fully compliant' with the Financial Action Task Force's (FATF) Recommendation on PEPs and beneficial ownership.⁹¹

159. Some concerns have also been raised about this system's effectiveness in preventing and detecting the laundering of the proceeds of corruption. The discovery and prosecution of Riggs Bank in 2004-5 was one of the most high profile examples of extensive money laundering by PEPs in the U.S. financial system. More recently, a Senate Subcommittee identified four cases in which PEPs laundered proceeds of corruption in the United States with the help of U.S. lawyers, real estate and escrow agents,

⁸⁷ *Phase 2 Report: United States*, para. 125.

⁸⁸ The Haiti Telco case and the Green case.

⁸⁹ 31 U.S.C. §§ 5318(i)(3) and 5318A(a); C.F.R. § 103.178.

⁹⁰ FATF (2006), Mutual Evaluation Report: United States, para. 514.

⁹¹ FATF (2006), Mutual Evaluation Report: United States, paras. 445-455, 516 and Sections 3.2.2 and 3.2.3.

lobbyists, and bankers.⁹² In some cases, PEPs exploited loopholes and exemptions in the legislative framework. In others, financial institutions with inadequate PEP lists failed to detect their clients' PEP status. Such difficulty in identifying PEPs appears to be common within the financial sector and regulators.⁹³ The U.S. authorities state that there have been foreign bribery investigations that were started as a result of a suspicious transaction report filed by a financial institution. Yet how frequently this occurs is not clear.

Commentary

The evaluators consider that effectively detecting money laundering transactions involving foreign public officials who are politically exposed persons (PEPs) has presented challenges for many Parties to the Convention. Since enhancing such detection would increase the effectiveness of the implementation of the Convention by all Parties, they recommend that this issue be identified for further work on a horizontal basis.

7. Accounting requirements, external audit, and company compliance and ethics programmes

a) U.S. accounting and auditing requirements

160. Section 10A of the Securities Exchange Act ('Section 10A')⁹⁴ requires audits of issuers to include procedures designed to provide reasonable assurance of detecting illegal acts⁹⁵ that would have a direct and material effect on the financial statements of the company. Illegal acts encompassed by Section 10A include violations of the FCPA's books and records and internal controls provisions, which exist alongside the FCPA's anti-bribery provisions. These provisions require issuers that must file periodic reports with the SEC to maintain books and records that accurately reflect business transactions and the disposition of corporate assets and to maintain effective internal accounting controls.

161. Section 10A does not alter the responsibilities of auditors with respect to the detection of fraud and illegal acts.⁹⁶ However, it does impose on auditors certain additional responsibilities if they become aware of illegal acts and if management of an SEC registrant client fails to take timely and appropriate remedial action in response to an illegal act brought to their attention by the auditor that has a material effect on the financial statements of the issuer.

162. Auditors who detect information indicating an illegal act may have occurred are required to follow certain procedures and, when appropriate, communicate the possible illegal act as soon as practicable to senior management and assure themselves that the audit committee (or board of directors in the absence of an audit committee) is adequately informed. If, after determining the audit committee or

92 U.S. Senate Permanent Subcommittee on Investigations (2010), Keeping Foreign Corruption Out of the United States: Four Case Histories.

93 FATF (2006), Mutual Evaluation Report: United States, para. 513.

94 The Securities and Exchange Act of 1934 is available at <http://www.sec.gov/about/laws/sea34.pdf>

95 Section 10A defines an 'illegal act' as: 'an act or omission that violates any law, or any rule or regulation having the force of law.'

96 According to the Public Company Accounting Oversight Board (PCAOB) Interim Auditing Standard section 110, 'The auditor has a responsibility to plan and perform the audit to obtain reasonable assurance about whether the financial statements are free of material misstatement, whether caused by error or fraud. Because of the nature of audit evidence and the characteristics of fraud, the auditor is able to obtain reasonable, but not absolute, assurance that material misstatements are detected. The auditor has no responsibility to plan and perform the audit to obtain reasonable assurance that misstatements, whether caused by errors or fraud, that are not material to the financial statements are detected.' (More information on the PCAOB and its auditing standards follows in section 7.b.)

board of directors has been made aware of the possible illegal act, the auditor concludes that: (i) the act has a material effect on the financial statements; (ii) senior management has failed to take timely and appropriate remedial action; and (iii) the failure to take remedial action is reasonably expected to warrant departure from a standard report of the auditor or warrant resignation from the audit engagement, then the firm is required to directly report its conclusions to the board of directors.

163. If a board of directors receives a report with the above conclusions from an auditor, then the issuer has one business day after receiving such a report to inform the SEC and to provide a copy of that notification to the auditor. If the auditor does not receive a copy of the notice before the expiration of the required one-business-day period, the firm must either: (i) resign from the engagement, or (ii) provide to the SEC a copy of its report (or the documentation of any oral report given) no later than one business day following the failure to receive notice from the issuer. If the auditor resigns from the engagement, the firm must furnish a copy of the communication to the board of directors with respect to the illegal act within one business day following the auditor's failure to receive such notice from the issuer.

164. Section 10A provides that no auditor can be found liable in a private action for any finding, conclusion or statement expressed in the report described above. However, if an auditor does not receive a copy of the notice required to be furnished to the SEC by the issuer and does not either resign from the engagement and furnish to the SEC a copy of the report or furnish a copy of the report to the SEC while remaining on the engagement, the SEC may impose a civil penalty against the auditor and any other person that the SEC finds was a cause of such violation.

b) *Changes in accounting and auditing requirements since Phase 2*

165. Additional reporting requirements were imposed on auditors of issuers with the enactment of the Sarbanes-Oxley Act of 2002, whose section 404 requires, first, management of issuers to report to the public on their assessment of internal controls and procedures for financial reporting and, second, auditors of issuers to attest to, and report on, this assessment by management. The management reporting requirement applied to issuers of all sizes as of 2007,⁹⁷ but the auditor reporting requirement initially only applied to larger issuers (generally those with outstanding shares held by public investors of USD 75 million or above). Subsequent to the on-site visit, the Dodd-Frank Wall Street Reform and Consumer Protection Act (the 'Dodd-Frank Act') was passed.⁹⁸ (Also see discussion under B.1.e.i. on 'Sources of allegations.') Section 989G of the Dodd-Frank Act amended the provisions of Section 404 of SOX, such that issuers with market capitalization of less than USD 75 million are not required to include an auditor's attestation on management's report on internal control over financial reporting in their filings with the SEC.⁹⁹ All issuers, regardless of size, remain subject to the requirements of Section 404(a) of SOX, which requires that an issuer's annual report include a report of management on the issuer's internal control over financial reporting.

166. The Sarbanes-Oxley Act created the Public Company Accounting Oversight Board (PCAOB) to oversee auditors of public companies through its authority to set auditing and related professional practice standards and other rules, to inspect accounting firms for compliance with PCAOB standards and rules, as well as SEC rules, and to take disciplinary actions, when needed, to compel compliance or impose sanctions and fines. Auditors of public companies are bound by these PCAOB standards.

⁹⁷ Certain larger issuers were required to report as early as 2004.

⁹⁸ Pub. L. No. 111-203 (July 21, 2010).

⁹⁹ Section 404(b) legally required auditor attestation of management's assessment of internal controls for all issuers. The SEC extended the compliance date of this requirement for small issuers, in part, in order to assess the benefits and costs for small issuers. The Dodd-Frank Act now exempts this requirement for small issuers.

167. The responsibility of auditors of public companies—all of whom must register with the PCAOB—is outlined in PCAOB Interim Auditing Standard¹⁰⁰ section 317, *Illegal Acts by Clients* (‘AU 317’)¹⁰¹, which prescribes the nature and extent of the consideration an independent auditor should give to the possibility of legal acts by a client in an audit of financial statements.¹⁰² It also provides guidance on the auditor’s responsibility when a possible illegal act is detected. PCAOB Interim Auditing Standard section 316 (‘AU 316’), *Consideration of Fraud in a Financial Statement Audit*, establishes requirements for auditors to detect fraud,¹⁰³ which would result in a material misstatement of the financial statements.¹⁰⁴

168. In attesting to and reporting on management’s assessment of internal controls and procedures for financial reporting under Section 404 of the Sarbanes-Oxley Act, auditors of public companies must also comply with PCAOB Auditing Standard No. 5 (AS 5), *An Audit of Internal Control Over Financial Reporting that is Integrated with an Audit of Financial Statements*. AS 5 provides the requirements and direction to auditors who are engaged to perform an audit of management’s assessment of the effectiveness of their internal controls over financial reporting. It also provides direction to auditors in applying the concept of materiality and the consideration of fraud risks, including acts of bribery that could have a material effect on the financial statements.

169. In 2009, the PCAOB issued Auditing Standard No. 7,¹⁰⁵ *Engagement Quality Review*, which requires engagement quality reviewers to evaluate the audit team’s judgments about materiality and the effect of those judgments on the engagement strategy, and to evaluate the audit engagement team’s assessment of and audit responses to fraud risks. Additionally, the PCAOB recently issued for SEC approval a set of standards, collectively referred to as the ‘risk assessment standards’ that integrate the existing requirements for auditors’ considerations of fraud that could result in a material misstatement of the financial statements with the requirements to identify and respond to risks of material misstatement in the financial statements.¹⁰⁶ Further, the ‘risk assessment standards’ include a standard related to the auditor’s consideration of materiality in planning and performing the audit that would supersede the existing requirements and guidance related to materiality in the auditing standards. This standard contains new and revised requirements for determining materiality for particular accounts or disclosures, determining materiality for individual locations or business units in multi-location engagements, and reassessing materiality and the scope of audit procedures. The risk assessment standards were finalised by the PCAOB in 2010 and are pending approval by the SEC.

170. Management’s assessment of the effectiveness of their internal controls over financial reporting must be in accordance with a suitable framework’s definition of effective internal controls. Such

¹⁰⁰ PCAOB Interim Auditing Standards consist of generally accepted auditing standards, as described in the American Institute of Certified Public Accountants’ (AICPA) Auditing Standards Board’s Statement of Auditing Standards No. 95, as in existence on April 16, 2003 and standards adopted by the Board subsequent to PCAOB’s creation .

¹⁰¹ PCAOB standards are available at <http://pcaobus.org/Standards/Auditing/Pages/default.aspx>

¹⁰² 2009 Anti-Bribery Recommendation, par. X.B

¹⁰³ In this report, ‘fraud’ is defined as an intentional act, versus an ‘illegal act’, which is not always intentional. Auditing literature describes fraud, generally, as an intentional act that results in a material misstatement in financial statements arising from fraudulent and/or misappropriation of assets.

¹⁰⁴ AU 316 and AU 317 do not necessarily represent significant changes in the U.S. government’s accounting and auditing requirements. Both replace or supersede part of the ‘U.S. Generally Accepted Auditing Standards’, which have been required to be followed for the audits of all issuers since the 1980s.

¹⁰⁵ PCAOB Auditing Standard No. 7 is available at [pcaobus.org/Standards/Auditing/Pages/Auditing Standard 7.aspx](http://pcaobus.org/Standards/Auditing/Pages/Auditing%20Standard%207.aspx)

¹⁰⁶ PCAOB Release No. 2009-007, Proposed Auditing Standards Related to the Auditor’s Assessment of and Response to Risk and Related Amendments to PCAOB standards, available at [pcaobus.org/Rules/Rulemaking/Docket%202009-12-16 Release No 2009-007.pdf](http://pcaobus.org/Rules/Rulemaking/Docket%202009-12-16%20Release%20No%202009-007.pdf).

frameworks define elements of internal control that are expected to be present and functioning in an effective internal control system. The most commonly recognised framework is that set out by the Committee of Sponsoring Organisations' ('COSO') *Internal Control—Integrated Framework*, which defines 'internal control' as a process designed to provide reasonable assurance regarding the achievement of objectives in: the reliability of financial reporting; the effectiveness and efficiency of operations; and the compliance with applicable laws and regulations.

171. In 2005, COSO issued *Guidance for Smaller Public Companies Reporting on Internal Control over Financial Reporting* to supplement COSO's *Internal Control—Integrated Framework*. The guidance focuses on the needs of smaller organisations in regard to compliance with Section 404 of the Sarbanes-Oxley Act, and outlines fundamental principles associated with the five key components of internal control: control environment; risk assessment; control activities; information and communication; and monitoring

172. In 2007, the SEC issued interpretive guidance¹⁰⁷ for management regarding its evaluation and assessment of internal control over financial reporting. The guidance sets forth an approach by which management can conduct a top-down, risk-based evaluation of internal controls over financial reporting. This guidance includes direction for management in identifying financial reporting risks and controls and evaluating evidence of the operating effectiveness of internal control over financial reporting. Further, this guidance contains information to assist management in developing disclosures about their internal control over financial reporting, including disclosures about material weaknesses that may be identified.

Commentary

Evaluators welcome the clarification of auditing standards since enactment of the Sarbanes-Oxley Act in 2002, especially as to materiality and strengthened controls over auditors in order to enhance the detection of foreign bribery. The evaluators also note the exemption of the auditor attestation requirement for smaller issuers under the Dodd-Frank Act. The evaluators consider this remaining issue from Phase 2 fully implemented.

c) Compliance with and awareness of the FCPA in the accounting and auditing profession

173. Since Phase 2 and since the passage of the Sarbanes-Oxley Act, the level of awareness of the FCPA among the accounting and auditing profession has increased greatly. In the past two years, SEC and DOJ enforcement actions—often heavily publicised—have grabbed the attention not only of U.S. companies, but also of the accounting, consulting and legal firms that serve those companies. The creation in January 2010 of a specialized unit within the SEC's Enforcement Division that focuses on violations of the FCPA has also gained the attention of professionals in this field.

174. According to representatives from the accounting and auditing profession, increased awareness among their members is also due to progress made in organizing and providing training on fraud since the issuance of AU 316 in 2002. In addition, educational institutions' curricula now incorporate courses on fraud and forensic accounting to equip students with the knowledge and skills required for today's entry-level accounting positions. According to statements made by the American Institute of Certified Public Accountants' (AICPA) Certified in Financial Forensics Committee, approximately 50 U.S. colleges offer undergraduate and graduate degrees or a certification in forensic accounting, which is five times higher than five years ago.

¹⁰⁷ The 'Commission Guidance Regarding Management's Report on Internal Control Over Financial Reporting Under Section 13(a) or 15(d) of the Securities Exchange Act of 1934' is available at <http://www.sec.gov/rules/interp/2007/33-8810.pdf>

175. That said, however, a recent survey by the Institute of Internal Auditors found that the accounting and auditing profession could benefit from more training not just on the FCPA, but also on how to manage situations where an FCPA violation is discovered. Training was also identified as the No. 1 organisational practice in ensuring compliance with FCPA.¹⁰⁸

Commentary

The evaluators note that, since Phase 2, the level of awareness of the FCPA among the accounting and auditing professions has increased significantly, due in large part to the stepped-up enforcement of the FCPA books and records and internal controls provisions, as well as the introduction of the Sarbanes-Oxley Act in 2002 and the creation of the PCAOB.

d) Treatment of facilitation payments under accounting and auditing requirements¹⁰⁹

176. While the anti-bribery provisions of the FCPA permit facilitation payments, the accounting and recordkeeping provisions of the statute nevertheless require companies making such payments to accurately record them in their books and records. The evaluators therefore sought to understand the impact of this practice on overall FCPA enforcement of the foreign bribery offences, as well as compliance efforts by companies regarding facilitation payments. In particular, they wondered if companies were recording payments as facilitation payments, and if they did, whether the SEC would verify if the payment was in fact a bribe to a foreign public official in contravention of the FCPA. The evaluators also wondered if facilitation payments might be recorded as other expenses to conceal their purpose, and in such cases whether the SEC would take enforcement action for not accurately recording them in the books and records.

177. The SEC informed the evaluators that SEC cases have been clear that in some instances where a company alleges payments are facilitation payments according to the FCPA, the facts show that the payments are in fact bribes. In every SEC investigation, the SEC conducts an analysis of all payments to a foreign public official to determine whether they are lawful or not. The SEC also looks to determine whether the payments were accurately recorded in the books and records and whether there was adequate internal accounting control concerning the payments, such that they were reviewed by internal accountants and sometimes outside auditors. The SEC believes that the use of many layers of reviews of the books and records and internal compliance of U.S. and foreign issuers has reduced to number of facilitation payments that may be underreported or inaccurately reported.

178. The SEC has brought numerous cases charging companies for violating the books and records and internal controls provisions of the FCPA. The SEC informs the evaluators that these include SEC enforcement actions against issuers misreporting facilitation payments. In one such case, charges included misreporting by the foreign subsidiary of a U.S. company of monthly payments of approximately USD 1,000 to low-level employees of a state-owned oil company in order to assure the timely processing of monthly crude oil revenues.¹¹⁰ There are also cases that involve the misreporting of facilitation payments concerning customs, immigration and visa processing, inspections, training, gifts, travel and entertainment. See, for example, *Lucent*, *UTStarcom*, *Natco*, *Veraz Networks*, and *Avery Dennison*.

¹⁰⁸ *Knowledge Briefing: Internal Auditing and the Foreign Corrupt Practices Act*, released by the Institute of Internal Auditors in April 2010, is available at <http://www.theiia.org/guidance/benchmarking/gain/knowledge-services/new-report-provides-recommendations-to-enhance-fcpa-compliance-efforts/>.

¹⁰⁹ A discussion of facilitation payments is also available under Sections B.2.b and B.8.

¹¹⁰ *SEC v. Triton Energy Corporation, Philip W. Keever, and Richard L. McAdoo*, No. 97-CV-00401, (D.D.C. 1997)

179. Certain private sector representatives believed that facilitation payments are underreported in companies' books and records, which led the evaluation team to ask the United States authorities for their assessment of why there were not more SEC enforcement cases against misreporting of facilitation payments. The SEC indicated that, in its investigations of potential books and records violations, it looks for misreported payments, including facilitation payments. The SEC also explained that its FCPA Unit will continue to review all payments to foreign officials as part of its investigative responsibilities. In addition, it conducts trainings and interacts with its Division of Corporate Finance, which reviews company filings. The SEC also provides information about the types of books and records and internal controls violations that it has seen regarding bribery and facilitation payments at numerous conferences and other public events on accounting and internal controls.

180. A number of private sector and compliance industry representatives also commented on a growing trend for companies to establish a 'zero-tolerance' policies against the making of facilitation payments, partly in response to misreporting concerns and partly in line with broader concerns such as facilitation payments being typically illegal in overseas markets and the corrosive effect of regular facilitation payments on internal controls. For example, the evaluation team heard private sector concerns that making exceptions from a general company prohibition of bribery undermined internal training and communication with overseas business partners and provided a 'slippery slope,' whereby regular facilitation payments could easily cross the line into payments for discretionary official action. One company noted that they allowed the making of facilitation payments in an overseas market where low-level payments were not illegal, but applied additional controls on customs brokers in recognition of the risk of misreporting and payments for discretionary official action.

181. Given these broader private sector concerns, the evaluation team asked the United States Government for their assessment of whether regular use of the facilitation payment exception was a risk factor in SEC investigations. The SEC acknowledged compliance industry concerns about misreporting but commented that a policy of 'zero-tolerance' was impractical to implement and could give rise to more serious control weaknesses, such as local employees making payments without company authorisation, controls or reporting. The Department of Commerce echoed this view and noted that, while some compliance officers prefer not to provide training on the facilitation payments exemption, a 'zero-tolerance' policy still required training on special exceptions to the policy, such as duress or employee health and safety.

Commentary

The evaluators commend the United States for diligently pursuing books and records violations under the FCPA, including facilitation payments, and encourage the U.S to raise awareness of this effort.

e) Compliance with and awareness of accounting and auditing requirements among issuers

182. The requirements for auditors to report to the SEC instances where management or the board of directors fails to take appropriate action provides a strong incentive for companies to act on information concerning illegal acts. Increased enforcement of these requirements since Phase 2 has resulted in greater awareness of and compliance with the FCPA's books, records and controls provisions. (During the period 1998 through 2010, approximately 63 percent of all FCPA administrative and/or civil enforcement decisions taken involved violations of the anti-bribery provisions, while nearly all had some books, records, and internal controls component.)

183. Issuers and auditors of issuers have taken notice of the increased enforcement of the FCPA books, records and internal controls provisions. As a result of increased enforcement, the accounting and

auditing profession has seen an increase in FCPA compliance audits/reviews that is not related to an enforcement initiative or internal investigation (i.e., pre-emptive or pro-active audits and reviews). There has also been an increase in the use of internal audit departments to review FCPA compliance. Representatives from the accounting and auditing profession also observed that, since 2002, executives are paying closer attention to their accounting and auditing requirements under U.S. law as part of a wider enterprise risk-management approach. A special area of close attention, representatives from a number of private sector industries responded, is due diligence on third parties.

184. A number of senior compliance officers and representatives from the accounting and auditing profession observed that many companies are providing FCPA-focused training to these internal audit departments. They also noted that risk-based training at companies is becoming more common, especially for those in the finance and accounting, sales and marketing, or global legal and compliance job functions.

185. These representatives believe that companies that approach these types of programmes as part of a risk-management strategy tend to be much stronger on implementation, training and ongoing monitoring. They also told the evaluation team that there is significant variance between companies that conduct robust due diligence on third parties and joint ventures and those that do not. In addition, levels of awareness and implementation of compliance programmes by local staff in high-risk jurisdictions remain a challenge.

186. Private sector representatives from the aerospace and defence industry, as well as representatives from the accounting and auditing profession noted that the availability of resources is increasingly an issue for companies, both large and small, in terms of designing, implementing and maintaining an FCPA compliance programme. Over-burdened finance and internal audit functions at many firms, therefore, are finding it increasingly difficult to test the effectiveness of their anti-bribery programmes. This is particularly true of smaller companies. However, independent auditors surveyed as part of a recent study on the cost of complying with Section 404 by the Office of Economic Analysis of the SEC found this process of compliance has become more efficient and less costly since the initial implementation of the requirements in 2004.¹¹¹

187. Finally, for reasons beyond the control of the U.S. authorities (explained earlier in this report in par. 103), the evaluators were only able to meet with one SME at the on-site visit and it was not possible to assess SME's general level of awareness of their obligations under the FCPA. However, some representatives from large companies and the accounting and auditing profession felt smaller issuers likely need to increase their awareness of compliance issues, including particularly challenging issues as third-party due diligence.

Commentary

The evaluators note that the United States has devoted significant resources to the enforcement of the FCPA's books and records and internal controls provisions. The creation of a dedicated FCPA unit in the SEC, continued enforcement of books and records and internal controls provisions by the DOJ and SEC, increased focus on the prosecution of individuals and the size of sanctions have had a deterrent effect and, combined with guidance on the implementation of these standards, has raised awareness of U.S. accounting and auditing requirements among all issuers.

¹¹¹ Office of Economic Analysis of the SEC, *Study of the Sarbanes-Oxley Act of 2002 Section 404 Internal Control over Financial Reporting Requirements*, found at: http://www.sec.gov/news/studies/2009/sox-404_study.pdf

Engaging with SMEs is a horizontal issue faced by all Parties to the Convention. The U.S. should pursue additional opportunities to raise awareness with SMEs for the purpose of preventing and detecting foreign bribery.

f) Accounting and auditing practices among non-issuers

188. In its Phase 2 evaluation of the U.S., the Working Group on Bribery recommended the U.S. consider making the books and records provisions of the FCPA applicable to certain non-issuers based on the level of foreign business they transact, so as to possibly improve the level of deterrence and detection of FCPA violations. The U.S. continues to believe that the level of deterrence provided by the FCPA is generally reasonable and that other laws and regulations, including those governing bank fraud, tax fraud, and wire and mail fraud cover non-issuers and may provide a basis for prosecutions based on false books and records. The U.S. provided numerous examples of cases where they have prosecuted non-issuers of all sizes for foreign bribery and other related offences, for example, money-laundering for falsified invoices.¹¹² Therefore, it does not intend to expand the coverage of the books and records provisions of the FCPA to non-issuers.

189. Even though the FCPA books and records and internal controls provisions do not apply to non-issuers, the accounting and auditing profession observed that these companies are increasingly voluntarily applying the books and records provisions to themselves and establishing more robust internal controls as a result of increased overall enforcement of the FCPA by the DOJ and the SEC. This is especially true of more sophisticated non-issuers, who perceive a business case for wide-reaching compliance initiatives.

Commentary

The lead examiners acknowledge that despite the non-application of the books and records provisions in the FCPA to non-issuers, numerous cases of foreign bribery involving them have been detected and prosecuted. The evaluators therefore feel that it might be useful for the Working Group to follow practice in this regard.

8. Tax measures for combating bribery¹¹³

190. Discussions at the on-site visit and after focussed on how United States tax law treats facilitation payments, which constitute an exception to the FCPA, as well as how the U.S. tax authorities – the IRS – deals with them in practice.¹¹⁴ The evaluators decided to focus on this issue, because: 1. There might be a potential for some companies to identify a payment as a facilitation payment when it is in fact a payment for discretionary official action that violates the FCPA; and 2. It is possible that, in certain instances, regular facilitation payments without appropriate internal controls might signal that a company is also engaging in corrupt conduct that violates the FCPA.

191. Pursuant to U.S. law, a ‘payment that is unlawful under the Foreign Corrupt Practices Act of 1977’ is not tax deductible. The DOJ confirmed that facilitation payments ‘may’ be tax deductible in the United States where they are properly classified as ‘ordinary and necessary expenses’, because they are not ‘unlawful under the FCPA’.

¹¹² See, for example: *Aibel Group Limited; BAE Systems plc; Control Components, Inc.; Latin Node Inc.; Micrus Corporation; Nexus Technologies, Inc.; Paradigm, B.V.; and Vetco Gray Controls, Inc.*

¹¹³ A discussion of facilitation payments is also available under Sections B.1.b and B.7.d.

¹¹⁴ The evaluators chose to focus on facilitation payments, because they have been given increased priority in the new 2009 Recommendation, and because their tax treatment in the United States was not addressed in Phase 2.

192. The representative of the IRS who participated in the on-site visit stated that he did not know if tax audit teams have seen facilitation payments in companies' tax returns. He was also not sure how the IRS would process claims for facilitation payments. He explained that such an expense would only be tax deductible if it were an 'ordinary and necessary expense' paid or incurred during the taxable year in carrying on a trade or a business according to the tax law. Nonetheless, he believed that a claim for a tax deduction for a facilitation payment would probably raise questions by a tax audit team. The DOJ commented that it was unsurprising that IRS tax audit teams were not familiar with facilitation payments as only IRS agents see the details of companies' tax ledgers. The IRS commented that the typically small monetary value of facilitation payments renders them a minor aspect of companies' accounts, and that IRS audits are therefore unlikely to identify this level of detail.

193. A number of private sector representatives felt that facilitation payments were underreported, raising the question of whether they are claimed for a tax deduction under a different description. One company that participated in the private sector panel discussions stated that it keeps a special ledger item in its accounting records for facilitation payments. This company and another private sector representative felt, however, that uncertainty about the overseas legal status of facilitation payments makes it unsafe to claim tax deductibility.

Commentary

The evaluators believe that the effectiveness of the United States' implementation of the 2009 Recommendation of Council on Tax Measures for Further Combating Bribery of Foreign Public Officials in International Business Transactions could be enhanced by addressing uncertainty about how the U.S. tax authorities deal in practice with facilitation payments for which tax deductions are claimed. They therefore recommend that the United States clarify the policy in this regard, and give guidelines on red flags to help tax auditors identify payments claimed as facilitation payments that are in fact in violation of the FCPA and/or signal that corrupt conduct in violation of the FCPA is also taking place. The evaluators believe that such guidance could also be of assistance to companies claiming tax deductibility for facilitation payments.

9. International co-operation

194. The United States relies on three main channels for seeking international co-operation in foreign bribery cases: (1.) formal requests for co-operation in criminal matters based on international treaties, letters rogatory or letters of requests from ministries of justice; (2.) requests based on memoranda of understanding; and (3.) requests through informal means.

a) Formal requests

195. A number of treaties are available for seeking international co-operation. The United States is party to 80 bilateral treaties on mutual legal assistance in criminal matters (MLATs) and 133 on extradition. All bilateral MLATs have provisions on proceeds of crime. In addition, as a party to the UNCAC and the OECD Anti-Bribery Convention, it may also use these multilateral conventions to seek co-operation. Requests under bilateral treaties, if available, are preferred, though the United States has made a number of requests under multilateral instruments. In addition, the United States may execute requests made in the absence of a treaty, *e.g.* requests through letters rogatory or letters from ministries of justice.

196. The United States has received a fair number of MLA requests in foreign bribery-related cases. From July 2002 to March 2010, the United States completed 31 incoming MLA requests, of which

assistance was granted in 24 cases. Several requests were withdrawn. Others were refused, mostly because the evidence sought was not in the United States, or because the requesting state did not provide sufficient supporting information. Requests typically sought banking, corporate and Internet-related records.

197. During the same period, the United States also made 65 outgoing formal requests in FCPA cases with varying degrees of success. Co-operation has been excellent in some instances and non-existent in others. Obstacles are sometimes legal in nature, such as the absence of dual criminality or the inability to execute civil forfeiture orders. At other times, however, requested states have been unresponsive. In one example, the U.S. made an MLA request and supplemental request in 2007 and follow-up inquiries in 2008 and 2009. It has yet to receive a response. In some cases, the United States has raised the issue of non-cooperation with foreign authorities at the highest level of government. The DOJ and SEC also participate in numerous international forums that encourage vigorous enforcement of the FCPA and foreign bribery laws. The U.S. states that if it could obtain more assistance from foreign jurisdictions, especially from jurisdictions that are not yet members of the Convention, the rate of prosecutions for foreign bribery would increase. This is especially the case in prosecutions against the individuals that orchestrate the bribery and the third parties who pass the bribes to foreign officials.

Commentary

A major horizontal issue facing all Parties to the Convention is the challenge in obtaining international assistance and co-operation in foreign bribery cases. The United States' efforts to overcome these hurdles are commendable. The evaluators welcome continuing dialogue by all Parties to the Convention on this issue (as discussed further below). This discussion could include a consideration of how to increase transparency on the issues that cause the delay or failure of requests for assistance under MLA treaties and other instruments.

b) Requests under memoranda of understanding and Convention on Mutual Administrative Assistance in Tax Matters

198. The SEC can also seek co-operation in foreign bribery cases through memoranda of understanding (MOUs) signed with its counterparts in other jurisdictions. These include the International Organization of Securities Commissions (IOSCO) Multilateral Memorandum of Understanding (MMoU), to which 71 securities and derivatives regulators are signatories. The MMoU allows the SEC to request information such as documents held by a securities regulator, bank and brokerage account information, and witness testimony. The SEC may use the information obtained in its civil or administrative proceedings and share it with self-regulatory organizations and criminal authorities. In addition, the SEC has bilateral information-sharing MOUs with 20 securities authorities.

199. This system of MOUs usefully complements the formal criminal channels of international co-operation, according to the U.S. authorities. Evidence obtained by the SEC through MOUs can subsequently be used in criminal proceedings and hence alleviates the obstacles to formal MLA in criminal cases. There have been examples where the United States has received better and faster co-operation through an MOU than through a treaty or rogatory request, according to U.S. authorities. One drawback, however, is that MOU requests do not toll the statute of limitations in criminal or civil FCPA proceedings.

200. The United States is also a party to the Convention on Mutual Administrative Assistance in Tax Matters. The Convention provides for the sharing of information between parties mainly for administrative and tax purposes. However, information received by the U.S. under the Convention may be used for other purposes (e.g. a criminal bribery investigation) if the laws of the supplying party and the competent authority of that party authorises the use for such purposes (Convention Article 24(4)).

c) *Informal requests*

201. The United States may also provide or seek assistance through informal channels, such as direct communication between law enforcement and/or prosecutors in other jurisdictions. In many cases such informal requests have been very successful. Informal requests are used as a first step before resorting to other channels. The U.S. has obtained and provided information to and from multilateral financial institutions, such as the World Bank. In some cases, informal assistance is not possible, *e.g.* when the evidence sought requires formal authentication or the requested state does not permit informal requests.

d) *MLA and the use of PAs, NPAs, and DPAs*

202. The use of PAs, DPAs, and NPAs do not restrict the seeking or providing of assistance to or from foreign states. Many of these agreements have been based on information and evidence obtained through the means described above, including informal requests. These agreements can also facilitate the provision of assistance to foreign countries because they generally require the party to the agreement to co-operate fully with investigations conducted by foreign law enforcement authorities.

e) *Foreign data protection laws*

203. The United States authorities report that foreign data protection laws regularly impede their ability to obtain evidence. In several cases, companies under investigation wanted to provide certain evidence to U.S. authorities but claimed that they were prevented from doing so by laws implementing the European Union's Data Protection Directive.¹¹⁵ In other cases, companies in similar circumstances had no concerns about disclosing evidence. This inconsistent approach is due to inadequate guidance on the application of data protection laws to the disclosure of evidence to foreign law enforcement agencies, according to U.S. authorities.

10. Public awareness and the reporting of foreign bribery

204. In the view of the evaluators, there is a generally high level of awareness of the FCPA. Interviews during the on-site visit with representatives from the private sector and civil society indicated that increased FCPA enforcement has been the single-most important factor in increased awareness. In particular, representatives from high-risk industries during the on-site visit told the evaluators that the size of recent fines (*i.e.*, as in the Siemens case) and associated international media coverage,¹¹⁶ industry-wide sweep investigations and targeting of individuals¹¹⁷ have had a broad deterrent value. One representative from the accounting and auditing profession noted that, for example, the pharmaceuticals and healthcare industry are more likely to act proactively in terms of FCPA compliance because of their being previously targeted for FCPA action.

¹¹⁵ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995.

¹¹⁶ The lead evaluators noted no representatives of the media participated in the on-site visit. However, evaluators learned from civil society this may have been because members of the media may consider participating in such an evaluation a conflict of interest.

¹¹⁷ For example, Ernst & Young's 11th Global Fraud Survey (May 2010), finds 76 percent of North American boards of directors are very or fairly concerned about their personal liability for actions carried out by their company. ([http://www.ey.com/Publication/vwLUAssets/EY_11th_GLOBAL_FRAUD_Survey/\\$FILE/EY_11th_GLOBAL_FRAUD_Survey.pdf](http://www.ey.com/Publication/vwLUAssets/EY_11th_GLOBAL_FRAUD_Survey/$FILE/EY_11th_GLOBAL_FRAUD_Survey.pdf))

a) *U.S. Government awareness-raising activities*

(i) *Outreach*

205. Since Phase 2, anti-corruption has become a top United States Government policy issue. Government representatives noted U.S. President Barack Obama, as well as the heads of relevant U.S. government agencies, have underscored publicly and repeatedly the importance of fighting corruption internationally. A civil society representative added that almost every major U.S. foreign policy speech mentions corruption in some form.

206. At present, the U.S. Government speaks approximately 40 to 50 times per year at conferences, seminars, webinars and the like, both in the United States and abroad, with some conferences featuring multiple U.S. Government speakers. Such conferences are attended by U.S. companies and foreign companies that are U.S. issuers. The conferences are also widely attended by large companies and SMEs alike. At the conferences, considerable time is spent reviewing recent DOJ and SEC cases that describe in detail the types of conduct that lead to anti-bribery, books and records, and internal controls violations. The U.S. feels that cases that have been subject to enforcement actions are a useful resource for training by companies of their employees, accountants, and internal controls and compliance officers.

207. The Department of Commerce and Justice also maintain websites with information on the FCPA and the Anti-Bribery Convention for the general public, including translations of the FCPA into four languages (Arabic, Chinese, Spanish and Russian).¹¹⁸ Allegations of foreign bribery in violation of non-U.S. laws may also be submitted electronically via the Department of Commerce bribery hotline.¹¹⁹ FCPA allegations may also be submitted via the Department of Justice hotline email (FCPA.Fraud@usdoj.gov).

(ii) *Training*

208. The Department of Commerce provides training to U.S. and Foreign Commercial Service officers on the Anti-Bribery Convention and the FCPA. Between financial year 2003 and financial year 2007, 94 percent of Commercial Service Officers completed training on the FCPA. New officers also received training in fiscal year 2008. In the autumn of 2009, the Department of Commerce conducted global training via a series of FCPA webinars that reached an additional 80 Commercial Service staff. In fiscal year 2010, the Department of Commerce provided FCPA training to 533 Commercial Service staff in 48 countries. Since 2000, the Department of Commerce has also provided training to State Department Foreign Service Officers, training approximately 50 officers, four times per year. Additionally, since its creation in 2008 to oversee corruption and fraud investigations emanating overseas, the FBI's International Corruption Unit has conducted annual training on FCPA investigations for law enforcement agents from all over the U.S. The SEC and DOJ conducted training on investigating and prosecuting foreign bribery for over 100 prosecutors, SEC attorneys and FBI agents.

(iii) *The 2009 Anti-Bribery Recommendation and Annex II*

209. Departments of Commerce and State trainings of U.S. Commercial and Foreign Service officers now highlight the 2009 Anti-Bribery Recommendation and its Annex II, the *Good Practice Guidance on Internal Controls, Ethics and Compliance*. The Anti-Bribery Recommendation is also included on the Department of Commerce's anti-corruption websites and in the Exporters' Guide on the Department of Commerce's Trade Compliance Center website.¹²⁰ Presentations by the Departments of Commerce and

¹¹⁸ Translations are found at www.ogc.doc.gov/trans_anti_bribery.html

¹¹⁹ Department of Commerce hotline is found at tcc.export.gov/Report_a_Barrier/index.asp

¹²⁰ The Exporter's Guide is found at www.tcc.export.gov/Bribery/Exporter's_Guide/index.asp

Justice and the SEC at industry conferences also refer to the Anti-Bribery Recommendation and its Annex II in reference to compliance programmes. Finally, in April 2010, the Department of Justice revised the required elements of corporate compliance programmes contained in all corporate settlements to incorporate Annex II.

(iv) *Assistance abroad*

210. The Department of Commerce's International Trade Administration's (ITA) United States and Foreign Commercial Service has a network of export and industry specialists located in more than 100 U.S. cities and in more than 80 countries worldwide. These trade professionals provide counselling and a variety of products and services to assist U.S. businesses in exporting their products and services. They also provide general information to U.S. companies on the FCPA; however, they do not provide specific legal advice and advise companies to refer specific legal questions to the DOJ Opinion Procedure or private counsel.

211. The Commercial Service provides detailed financial reports to U.S. companies on prospective overseas sales representatives or partners. These reports, called International Company Profiles (ICPs) include a listing of the company's key officers and senior management, banking relationships and other financial information about the company; and market information, including sales and profit figures and potential liabilities. ICPs also provide an opinion as to the viability and reliability of the overseas company selected, as well as an opinion on the relative strength of that company's industry sector. Reports on SMEs¹²¹ cost \$500USD and \$900USD for large companies. They are delivered within 10 days and are often required by many banks and government export financing organizations. They are not, however, intended to substitute for a company's own due diligence.

212. Representatives from the aerospace and defence and construction and manufacturing sectors appreciated the value of this service. However, they reported to the evaluators that the reports more often cost closer to \$900USD, that the quality of information is inconsistent and, in some cases, 'not reliable'. More generally, private sector representatives noted the level of business- and FCPA-related assistance they receive from U.S. embassies abroad varies. One business organisation stated that, while some embassy staff 'don't have a baseline understanding of the FCPA, this is not frequent.'

Commentary

The evaluators are of the view that there is a generally high level of awareness of the FCPA, though the evaluators are unable to assess the level of awareness among SMEs. Interviews during the on-site visit with representatives from the accounting and auditing and legal professions, the private sector and civil society, indicated that increased FCPA enforcement has been the single-most important factor in increased awareness. The evaluators were encouraged by the strong degree of commitment across the U.S. Government to raising awareness of the FCPA. U.S. Government presence at industry conferences was remarked upon by nearly all private sector industries present during the on-site visit.

The evaluators consider that how to ensure that Parties' foreign representations, including commercial attachés, effectively disseminate information on combating foreign bribery to their companies transacting business abroad is a horizontal issue for all Parties. They believe that the U.S. experience in this respect provides valuable lessons that could be included in a future horizontal analysis of this issue

¹²¹ The Department of Commerce considers any company with 500 or fewer employees an SME.

b) Whistleblower protections^{122,123}

213. Whistleblower protections are required of issuers under Sarbanes-Oxley¹²⁴ and are provided for auditors under Section 10A.¹²⁵ There are currently no federal legal whistleblower protections required of non-issuers, though retaliation against a whistleblower (whether in a privately- or publicly-held company) could in many cases constitute obstruction of justice, which provides a measure of protection to all those who report potential violations. Eighteen states¹²⁶ have state legislation that provides protection of whistleblowers of non-issuers and non-government employees.

214. The majority of the private sector participants in on-site visit panels represented issuers. Across the board, these representatives reported their companies have institutionalised no-retaliation whistleblower protection policies and hotlines for anonymous reporting via a variety of means, including letters, faxes, emails and calls. All noted the usefulness of having such protections, while one representative from the extractive industries reported having terminated an individual for retaliation. Another representative from the same industry noted they receive reports or questions on a number of FCPA-type issues, usually on facilitation payments, immigration and customs.

215. These opinions being noted, the accounting and auditing profession notes that, according to a 2009 National Business Ethics Survey,¹²⁷ 15 percent of employees who reported a violation experienced some form of retaliation at their company.

11. Public advantages¹²⁸

a) Measures to enhance transparency in public procurement

216. At the federal level, the U.S. Government has several legislative provisions to ensure fair and transparent public procurement contracting. Relevant provisions require the use of measures such as sealed bidding, negotiated procurement when sealed bidding is not appropriate, detailed requirements for acquiring commercial items, and establishing price reasonableness for commercial acquisitions.

217. Federal legislation also provides oversight powers to certain bodies, such as the authority of: (1.) the Comptroller General of the Government Accountability Office to investigate all matters regarding the disbursement and use of public money; (2.) the Chief Acquisition Officers Council to monitor and evaluate the performance of acquisition activities and programs and make recommendations for their improvement; (3.) the Offices of the Inspectors General to conduct and supervise audits and investigations of executive branch agencies and departments; and (4.) The Acquisitions Advisory Panel to review relevant laws, regulations and policies and make any necessary modifications.

¹²² Subsequent to the on-site visit, the Dodd-Frank Act was passed. Section 922 of the Dodd-Frank Act expands the whistleblower protections previously provided under U.S. law. Under the Act, the SEC is required to pay out between 10 to 30 percent of monetary sanctions recovered by the government through civil or criminal proceedings. The new rule applies to whistleblowers who provide 'original information' to the SEC that leads to a successful enforcement action.

¹²³ A discussion of whistleblower protections is also available under section B.1.e.i., par.49-50.

¹²⁴ 15 U.S.C. § 7201 *et seq.*

¹²⁵ 2009 Anti-Bribery Recommendation X.B.iii

¹²⁶ California, Connecticut, Florida, Hawaii, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Nebraska, New Hampshire, New Jersey, New York, North Dakota, Ohio, Oregon, Rhode Island, and Tennessee

¹²⁷ NBES Survey found at <http://www.ethics.org/nbes/files/nbes-final.pdf>

¹²⁸ A discussion of debarment from public contracting is available under Section 3.d.

218. Additionally, the False Claims Act enables any person to file a *qui tam* action¹²⁹ in the appropriate District Court against federal contractors on the basis that they have committed fraud against the government. In such cases, the person bringing the action is entitled to recover a portion of the proceeds of the action.

b) Officially supported export credits

219. The United States authorities report that the U.S. official export credit agency – the Export-Import Bank of the United States (Ex-Im) – has fully integrated the 2006 OECD Council Recommendation on Bribery and Officially Supported Export Credits into its rules, policies and operations. It therefore reserves the right to require that exporters and, where appropriate, applicants, disclose upon request the identity of persons acting on their behalf in connection with any relevant transaction, and the amount and purpose of commissions and fees paid to such persons.

220. In addition, Ex-Im may decline to process or discontinue processing any application if it determines there is evidence of fraud or corruption, or any of the participants has been previously involved directly or indirectly in fraud or corruption.

221. Ex-Im co-operates with foreign and domestic law enforcement authorities and refers credible allegations of corruption to such authorities. Ex-Im has referred credible allegations of FCPA violations to the DOJ.

222. Ex-Im has adopted Transaction Due Diligence Best Practices (<http://www.exim.gov/pub/pdf/Due-Diligence-Guidelines.pdf>) to encourage parties that do business with it to develop, apply and document appropriate anti-corruption controls.

¹²⁹ In a *qui tam* action, the plaintiff sues for him/herself as well as for the state.

C. RECOMMENDATIONS AND ISSUES FOR FOLLOW-UP

223. The Working Group on Bribery commends the United States Government for its visible and high level of support for the fight against the bribery of foreign public officials, including, engagement with the private sector, substantial enforcement, and stated commitment by the highest echelon of the Government. The Working Group welcomes the significant enforcement efforts, enabled by the good practices developed within the U.S. legal and policy framework. Indeed, enforcement has increased steadily since Phase 2, and cases have involved various business sectors, and various modes of bribing foreign public officials. Enforcement during this period has also resulted in increasingly significant prison sentences, monetary penalties and disgorgement for the bribery of foreign public officials.

224. The Working Group notes that all recommendations from Phase 2 that were considered partially or not implemented are now fully implemented (outstanding issues from Phase 2 are identified in Annex 1 to this report). The Working Group notes that the practice of the United States is compliant with the Convention. The U.S. evaluation identified, however, certain areas in which implementation of the Convention and the 2009 Recommendation might be enhanced. In the course of this Phase 3 evaluation, the Working Group has also identified several horizontal cross-cutting issues that affect all the Parties to the Convention.

225. In conclusion, based on the findings in this report regarding implementation by the United States of the Convention and the 2009 Recommendation, the Working Group: (1) makes the following recommendations to enhance implementation of the Convention in Part I; and (2) will follow-up the issues identified in Part II. The Working Group invites the United States to report orally on the implementation of Recommendations 2 and 6 within one year of this report (i.e. in October 2011). It further invites the United States to submit a written follow-up report on all recommendations and follow-up issues within two years (i.e. in October 2012).

I. Recommendations of the Working Group

Recommendations for ensuring effective investigation, prosecution and sanctioning of foreign bribery

1. Regarding the statute of limitations, the Working Group recommends that the United States ensure that the overall limitation period applicable to the foreign bribery offence is sufficient to allow adequate investigation and prosecution (Convention, Article 6).
2. Concerning the foreign bribery offences in the FCPA, for the purpose of further increasing effectiveness of combating the bribery of foreign public officials in international business transactions, the Working Group recommends that the United States:
 - a. In its periodic review of its policies and approach on facilitation payments pursuant to the 2009 Anti-Bribery Recommendation, consider the views of the private sector and civil society, particularly on ways of clarifying the ‘gray’ areas identified by them (Convention, Article 1, 2009 Anti-Bribery Recommendation VI.i).

- b. Consolidate and summarise publicly available information on the application of the FCPA in relevant sources, including on the affirmative defence for reasonable and bona fide expenses in recent Opinion Procedure Releases and enforcement actions (Convention, Article 1); and
 - c. revise the Criminal Resource Manual to reflect the decision in *U.S. v. Kay*, which supports the position of the United States that the ‘business nexus test’ in the FCPA can be broadly interpreted, such that bribes to foreign public officials to obtain or retain business or ‘other improper advantage in the conduct of international business’ violate the FCPA (Convention, Article 1).
3. Regarding the use of NPAs and DPAs, the Working Group recommends that the United States:
- a. Make public any information about the impact of NPAs and DPAs on deterring the bribery of foreign public officials that arises following the Government Accountability Office 2009 Report (Convention, Article 3); and
 - b. Where appropriate, make public in each case in which a DPA or NPA is used, more detailed reasons on the choice of a particular type of agreement; the choice of the agreement’s terms and duration; and the basis for imposing monitors (Convention, Article 3).
4. The Working Group recommends that the United States take appropriate steps to verify that, in accordance with the 2009 Anti-Bribery Recommendation, debarment and arms export license denials are applied equally in practice to domestic and foreign bribery, for instance by making more effective use of the ‘Excluded Parties List System’ (EPLS) (2009 Anti-Bribery Recommendation XI.i).

Recommendations for ensuring effective prevention and detection of foreign bribery

5. The Working Group recommends that the U.S. pursue additional opportunities to raise awareness with SMEs for the purpose of preventing and detecting foreign bribery (2009 Anti-Bribery Recommendation, III.i).
6. The Working Group encourages the U.S. to raise awareness of the diligent pursuit of books and records violations under the FCPA, including for misreported facilitation payments (Convention Article 8 and 2009 Anti-Bribery Recommendation VI.ii and X.A.iii).
7. In order to enhance the effectiveness of the implementation of the 2009 Anti-Bribery Recommendation of Council on Tax Measures for Further Combating Bribery of Foreign Public Officials in International Business Transactions, the Working Group recommends that the United States clarify the policy on dealing with claims for tax deductions for facilitation payments, and give guidance to help tax auditors identify payments claimed as facilitation payments that are in fact in violation of the FCPA and/or signal that corrupt conduct in violation of the FCPA is also taking place (2009 Anti-Bribery Recommendation on Tax Measures for Further Combating Bribery of Foreign Public Officials in International Business Transactions I.i).

II. Follow-up by the Working Group

1. The Working Group will follow-up the detection and prosecution of violations of the bribery provisions of the FCPA by non-issuers, which are not subject to the books and records provisions in the FCPA (2009 Anti-Bribery Recommendation II).

**ANNEX 1: PHASE 2 RECOMMENDATIONS OF THE WORKING GROUP,
AND ISSUES FOR FOLLOW-UP**

Recommendations in Phase 2		<i>Written follow-up*</i>
<i>Recommendations for ensuring effective measures for preventing and detecting foreign bribery</i>		
The Working Group recommends that the United States:		
1.	Enhance existing efforts to reach small and medium sized enterprises doing business internationally, both in order to raise the level of their awareness of the FCPA and to equip them with tools and information which are specifically tailored to their needs and resources. (Revised Recommendation, Article 1)	<i>Satisfactorily implemented</i>
2.	Undertake further public awareness activities for the purpose of increasing the level of awareness of the FCPA in the accounting profession. (Revised Recommendation, Article 1)	<i>Satisfactorily implemented</i>
With respect to other preventive measures, the Working Group recommends that the United States, based on the expertise built up during years of applying and interpreting the FCPA:		
3.	Consider issuing public guidance, whether as guidelines or otherwise, suitable to assist businesses in complying with the FCPA generally, and in particular to equip them with risk management tools useful in structuring international transactions. (Revised Recommendation, Article 1)	<i>Satisfactorily implemented</i>
4.	Consider developing specific guidance in relation to the facilitation payments exception. (Convention, Commentary 9; Phase 1 Evaluation, paragraph 1.3)	<i>Requires further consideration from the U.S.</i>
5.	With respect to the defence of reasonable and bona fide expenditure, there were questions raised concerning the need for this defence. If it is to be maintained, the Working Group recommends that appropriate guidance be provided. (Phase 1 Evaluation, paragraph 1.3)	<i>Requires further consideration from the U.S.</i>
The Working Group further recommends that the United States:		
6.	Encourage the development and adoption of compliance programs tailored to the needs of SMEs doing business internationally. (Revised Recommendation, Article V. C (i))	<i>Satisfactorily implemented</i>
7.	Consider making the books and records provisions of the FCPA applicable to	<i>Requires</i>

	certain non-issuers based on the level of foreign business they transact, so as to possibly improve the level of deterrence and detection of FCPA violations. (Convention, Article 8; Revised Recommendation, Article V)	<i>further consideration from the U.S.</i>
With respect to detection, the Working Group recommends that the United States:		
8.	Advocate clarification of auditing standards especially as to materiality, and strengthen controls over auditors in order to enhance the detection of foreign bribery. (Convention, Article 8; Revised Recommendation, Article V)	<i>Partially implemented</i>
9.	Undertake to maintain statistics as to the number, sources and subsequent processing of allegations of FCPA violations in order to put in place measures to enhance the capabilities of the United States in detecting foreign bribery. (Revised Recommendation, Article 1; Annex to the Revised Recommendation, paragraph 6)	<i>Partially implemented</i>
<i>Recommendations for Ensuring Adequate Mechanisms for the Effective Prosecution of Foreign Bribery Offences and the related Accounting and Money Laundering Offences</i>		
The Working Group recommends that the United States:		
10.	Make a clear public statement, in the light of the OECD Convention, identifying the criteria applied in determining the priorities both of the Department of Justice and of the Securities and Exchange Commission in prosecuting FCPA cases. (Convention, Article 5)	<i>Not implemented</i>
11.	Enhance the existing organisational enforcement infrastructure by setting up a mechanism, including the compilation of relevant statistics, for the periodic review and evaluation of the overall FCPA enforcement effort (Convention, Article 5).	<i>Not implemented</i>
12.	Consider whether more focus should be given to criminal prosecutions in the framework of anti-money laundering legislation for failure to report suspicious activity, to enhance the overall effectiveness of the FCPA. (Convention, Article 7)	<i>Satisfactorily implemented</i>
13.	Consider whether the statute of limitations applicable to the offence of bribery of a foreign public official, as well as to other criminal offences involving the obtaining of evidence located abroad, allows for an adequate period of time for the investigation and prosecution of the offence, and if necessary, take steps to secure an appropriate increase in the period. (Convention, Article 6)	<i>Satisfactorily implemented</i>
14.	Consider amendments to the FCPA to clarify that it is an offence to offer, promise or give a bribe “in order to obtain or retain business or other improper advantage in the conduct of international business”. (Convention, Article 1; Phase 1 Evaluation, paragraph 1.4)	<i>Satisfactorily implemented</i>

* The right-hand column sets out the findings of the Working Group on Bribery on the United States' written follow-up report to Phase 2, considered by the Working Group in July 2005.

Follow-up by the Working Group based on the development of litigation

The Working Group will follow up the issues below, as the case-law continues to develop, to examine:

- a) Whether amendments are required to the FCPA to supplement or clarify the existing language defining the elements of the offence of foreign bribery with regard to (i) cases where a benefit is directed to a third party by a foreign official; and (ii) the scope of the definition of a “foreign public official”, in particular with respect to persons holding judicial office and the directors, officers and employees of state-controlled enterprises or instrumentalities (Convention, Article 1; Phase 1 Evaluation, paragraphs 1.2)
- b) Whether the current basis for nationality jurisdiction, as established by the 1998 amendments to the FCPA, is effective in the fight against bribery of foreign public officials (Convention, Article 4)

The Working Group will furthermore monitor developments in the following area:

- a) Whether, by November 2002, the base level offence classification of foreign bribery for sentencing purposes has been increased so that penalties are comparable to those applicable to domestic bribery (Convention, Article 3; Phase 1 Evaluation, paragraph 2.1).

ANNEX 2 LIST OF PARTICIPANTS IN THE ON-SITE VISIT

Government Ministries and Bodies

- Department of Commerce
- Department of Justice
- Department of State
- Federal Bureau of Investigation
- Internal Revenue Service
- Office of Special Counsel
- Securities and Exchange Commission

Private Sector

Private enterprise

- 6 representatives from the aerospace & defense industries
- 5 representatives from the extractive industries
- 1 representative from the telecommunications industry
- 3 representatives from financial services industry
- 1 representative from the pharmaceuticals industry
- 3 representatives from the construction and manufacturing industries

Business associations

- 3 representatives

Legal profession

- 7 representatives

Academics

- 1 representative

Accounting and auditing profession

- 7 representatives

Civil Society

- 2 representatives

ANNEX 3 LIST OF ABBREVIATIONS, TERMS AND ACRONYMS

AECA	Arms Export Control Act
AICPA	American Institute of Certified Public Accountants
ASB	Auditing Standards Board
BEA	U.S. Bureau of Economic Analysis
COSO	Committee of Sponsoring Organisations
DOC	Department of Commerce
DOJ	Department of Justice
DPA	Deferred prosecution agreement
EPLS	Excluded Parties List System
Ex-Im	Export-Import Bank of the United States
FATF	Financial Action Task Force
FBI	Federal Bureau of Investigation
FCPA	Foreign Corrupt Practices Act
FinCEN	Financial Crimes Enforcement Network
FMNE	Foreign multinational enterprise
GAO	Government Accountability Office
GDP	Gross domestic product
GRECO	Group of States against Corruption
ICP	International Company Profile
ICU	International Corruption Unit
IOSCO	International Organisation of Securities Commissions
IRS	Internal Revenue Service

ITA	International Trade Administration
ITAR	International Traffic in Arms Regulations
MLA	Mutual legal assistance
MLAT	Mutual legal assistance treaty
MMOU	Multilateral memorandum of understanding
MNE	Multinational enterprise
MOU	Memorandum of understanding
NGO	Nongovernmental organisation
NPA	Non-prosecution agreement
OECD	Organisation for Economic Cooperation and Development
OIA	Office of International Affairs
PA	Prosecution agreement
PCAOB	Public Company Accounting Oversight Board
PEP	Politically exposed person
SEC	Securities and Exchange Commission
UNCAC	United Nations Convention against Corruption
USAM	U.S. Attorney's Manual
USSG	U.S. Sentencing Guidelines