(OECD) SUPPLEMENTAL RESPONSE TO PHASE 1 QUESTIONNAIRE

Note: Subsequent to filing its response to the Phase I questionnaire, the United States supplemented its answers with the following additional information and clarifications. The United States has also provided additional information in response to questions received from other OECD members.

ARTICLE 1 THE OFFENSE OF BRIBERY OF FOREIGN PUBLIC OFFICIALS

1.1.2 The legislative history also refers to "evil motive or purpose". Does this imply that intent alone, without "evil motive", would not be enough for violation of the FCPA?

The FCPA is a specific intent crime. This means that the government does not satisfy its burden of proof merely by showing that the defendant intended to do a particular act and that he thereby violated the statute, as is required for general intent crimes. Instead, the government is required to prove that the defendant acted "corruptly," or as set forth in the legislative history, with an "evil motive or purpose, an intent to wrongfully influence the recipient." S. Rep. No. 114, 95th Cong. 1st Sess. 10 (1977). The language in the legislative history is not an additional requirement but a definition of "corrupt intent." As explained in *United States v. Liebo*, 923 F.2d 1308, 1312 (8th Cir. 1991), "An act is 'corruptly' done if done voluntarily and intentionally, and with a bad purpose of accomplishing either an unlawful end or result, or a lawful end or result by some unlawful method or means. The term 'corruptly' is intended to connote that the offer, payment, and promise was intended to induce the recipient to misuse his official position." *Cf. Bryan v. United States*, 118 S.Ct. 1939, 1945 (1998) (approving a similar definition of "willful"). Thus, an intent that is not corrupt will not violate the statute.

1.1.3 Since the Convention prescribes that the offence be directed at the offering, promising or giving of any undue pecuniary or other advantage, the precise meaning of "*acts in furtherance of*" is unclear. Does this encompass the simple communication of a bribe in person? Additionally, the "act in furtherance" of the bribe is not consistent in relation to the different categories of persons (*see* part 4 Jurisdiction).

The "act in furtherance" element is intended to ensure that the defendant does more than merely conceive the idea of paying a bribe without actually undertaking to do so. Proof of an act in furtherance establishes that the defendant did not merely think about and then reject the idea of paying a bribe but instead committed himself to doing it and thereafter took some act to accomplish his objective. Further, in most cases, several individuals may be involved in authorizing or making a bribe payment or offer at different stages in the process. The "act in furtherance" requirement makes it clear that a person does not have to have been a participant in every stage of the process to be prosecuted under the Act.

It is not required that the defendant actually pay the bribe. The simple offer, whether conveyed in person or through intermediaries, is sufficient to complete the crime.

The FCPA, as amended, is consistent in its requirement of an "act in furtherance" regardless of the identity of the defendant. All defendants, regardless of their nationality, must have taken some act in furtherance of the unlawful payment.(1)

The FCPA does distinguish between U.S. companies and nationals, on the one hand, and foreign companies and nationals, on the other, in terms of the requisite location of the act (anywhere in the world for U.S. companies and nationals *vs.* in the U.S. for foreign companies and nationals) and the requisite nature of the act (use of interstate means or instrumentalities for U.S. companies and nationals while in the U.S. *vs*. any act in the U.S. for foreign companies and nationals). The basis of this jurisdictional distinction is the limited jurisdiction granted to the federal government in the U.S. Constitution "to regulate commerce with foreign Nations, and among the several States." U.S. Const., Art. I, sec. 8. cl.3; *see also* U.S. Const., amend. X ("The powers not delegated to the United States by

the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."). As set forth in the legislative history for the 1998 amendments, this interstate commerce nexus is satisfied for non-U.S. nationals and businesses who, by their very nature, are acting in international commerce when they enter the U.S. to take an action in furtherance of a bribe overseas. Similarly, when a U.S. national or business acts abroad, it necessarily acts in international commerce. *See* S. Rep. 277, 105th Cong., 2nd Sess. (1998); H. Rep. 802, 105th Cong., 2nd Sess. (1998).

1.1.4 Can the U.S. clarify whether the term "anything of value" in the FCPA is as comprehensive as "other advantage" in the Convention?

The United States views "anything of value" as being as comprehensive as "other advantage." "Anything of value" means anything that is of value to the recipient. It therefore is interpreted according to its plain meaning and encompasses anything that is given to an official to obtain an improper advantage in a business transaction. For instance, in the very first FCPA prosecution, *U.S. v. Kenny Int'l Corp.* (D.D.C. 1979), the bribe was provided to pay the cost of chartering an aircraft to fly voters to the Cook Islands to re-elect the Premier.

Can the U.S. cite case law on either of the affirmative defenses, particularly for "reasonable and bona fide expenditure"?

There is no case law on this issue. However, the issue has arisen in the context of FCPA Review Procedure requests.(2)

In Release 81-02 (December 11, 1981), the Department stated it would take no enforcement action where the requestor wished to provide samples of its products to officials of the Soviet Ministry of Foreign Trade. The Department stated that the FCPA was not implicated where (i) the samples were intended for the officials' inspection, testing, and sampling; (ii) the samples were not intended for their personal use; and (iii) the Soviet government had been informed that the company intended to provide the samples.

In Releases 82-01 (January 27, 1982), 83-03 (July 26, 1983), and 85-01 (July 16, 1985), the Department stated it would take no enforcement action where the requestor intended to host foreign officials while they were attending meetings, site inspections, and product demonstrations and to pay "reasonable and necessary expenses, including meals, lodging, entertainment, and traveling." Similarly, in Releases 92-01 (February 1992) and 96-01 (November 25, 1996), the Department found that the FCPA was not implicated by agreements to provide training to government personnel as part of joint ventures with foreign governments.

In Release 83-02 (July 26, 1983), the Department stated that it would take no enforcement action where an American company proposed to invite the general manager of a foreign government entity to extend his vacation in the United States to take a promotional tour of the company's facilities. The company would pay the reasonable and necessary actual expenses of the general manager and his wife during the time he spent touring its facilities. The Department concluded that the FCPA was not implicated where the expenses would be paid directly to the service providers and not to the general manager and the expenses would be accurately recorded in the company's books and records.

1.1.6 *Public Enterprises*: Is there case law on this point?

There is no case law on this issue. However, in several FCPA Review Procedure Releases, the Department has treated entities that were owned or controlled by a foreign government as instrumentalities of the foreign government. *See* Release 80-04 (October 29, 1980) (Saudia, the Saudi government-owned airline), Release 83-2 (July 26, 1983) (expenses of a general manager of a foreign entity that was owned and controlled by the foreign government); Release 93-01 (April 20, 1993) (a quasi-commercial entity wholly owned and supervised by a foreign government); Release 96-02 (November 26, 1996) (state-owned enterprise).

***Official capacity vs. public function*: Is there case law on this point?**

The phrase "official capacity" is self-explanatory. It is intended to distinguish between acts that an official does or is able to do because he holds a position as a public official as opposed to acts that he may do as a private person.

This issue was addressed in part in FCPA Review Procedure Release 95-02 (September 14, 1995), the Department stated that it would take no enforcement action concerning a proposed creation of a company in a foreign country in which a majority of the investors would be foreign officials. The Department concluded that the FCPA was not implicated where, *inter alia*, no official of the relevant ministry of foreign country would be an investor in the company and none of the investors were in positions which would enable them to grant or deny business to the company. In addition, the government officials who were investors in the company certified to the Department that they would recuse themselves from any government decision with respect to any matter affecting the company, that their official duties did not include responsibility for deciding or overseeing the award of business by the government to the parties to this request, and that they would not seek to influence other foreign government officials whose duties include such responsibilities.

In Release 95-03 (September 14, 1995), the Department stated that it would take no enforcement action concerning a joint venture with a relative of the leader of a foreign country who was a prominent businessman and was also, due to his holding various public and party offices, a foreign official. The Department concluded that the FCPA was not implicated where the foreign joint venturer's official duties did not involve awarding or denying business to the company and he undertook to notify the company if his duties changed, where the joint venture partner agreed to initiate no meetings with government officials, and where he agreed, when meeting with government officials, to certify to the most senior official present that he was acting solely in a private capacity.

1.1.9 It is not clear whether the addition of "to secure any improper advantage" to that list is meant to comply with the Convention's requirements here, and if so, how in fact this would operate.

The Commentaries define "improper advantage" as "something to which the company concerned was not clearly entitled, for example, an operating permit for a factory which fails to meet the statutory requirements." OECD Commentaries at ¶ 4. The United States has long interpreted the three pre-existing elements of the FCPA (payments to influence any official act or decision of an official, to induce the official to do or omit to do any act in violation of his official duty, or to induce the official to use his influence to affect any act or decision of the government) to encompass payments "to secure any improper advantage," as defined in the Commentaries. The insertion of the Convention's language into the statute merely clarified and lent a Congressional imprimatur to that interpretation.

For example, in a recent prosecution, under the pre-1998 version of the FCPA, the United States charged a corporation and two of its executives with authorizing a payment to Panamanian officials to obtain a favorable lease in the Panama Canal Zone. The United States, and the jury, interpreted this payment as being intended to assist the defendant corporation in obtaining or retaining business because the lease would improve its competitiveness and profitability. *See United States v. Saybolt Inc.* (98 Cr 10266 WGY) D. Mass. 1998; *United States v. David Mead & Frerik Pluimers* (Cr. 98-240-01) D.N.J., Trenton Div. 1998.

***Routine governmental action*: Is there case law on this point?**

There is no published case law on this matter. As noted, in the recent Saybolt matter, the U.S. prosecuted the company under the theory that payment to Panamanian officials to obtain a favorable lease was intended to obtain or retain business. The United States did not, in that case, consider the awarding of a lease a routine governmental action.

ARTICLE 2 - RESPONSIBILITY OF LEGAL PERSONS

2.1.2 Will accountability lie even when there have been no unlawful acts by a "superior"?

Under U.S. law, corporate liability is not predicated upon authorization by a "superior" or manager. A corporation is liable for the acts of its employees, of whatever rank, if they act within the scope of their duties and for the benefit of the corporation. Whether the corporate management condoned or condemned the employee's conduct is irrelevant.

ARTICLE 3 - SANCTIONS

3.3 Could the U.S. confirm that these penalties are sufficient to enable compliance with requests for mutual legal assistance?

The United States will honor requests for mutual legal assistance premised on the Convention. The United States generally does not link the providing of mutual legal assistance to other States with the penalty that it imposes for the analogous domestic violation.

3.4 Could the U.S. confirm that these penalties are sufficient to enable the compliance with requests for extradition?

Generally, our extradition treaties provide for extradition for any offense that is punishable under the laws of both the requesting and requested State by a maximum term of imprisonment exceeding one year. The penalty for a violation of the FCPA is well in excess of one year. Accordingly, even prior to the U.S. becoming a Party to the OECD Convention, if the foreign State requesting extradition under such a treaty had also penalized foreign commercial bribery by a maximum term of imprisonment exceeding one year, extradition would be have been possible, subject to the other terms of the treaty. In any event, once the United States became party to the OECD Convention, under Article 10(1) of the Convention all of our extradition treaties with countries that have also ratified the Convention were automatically deemed to incorporate the offenses criminalized in Article 1 of the Convention.

A number of our older extradition treaties determine whether extradition should be granted on the basis of a list of extraditable offenses. As stated above, once the United States became a party to the OECD Convention, under Article 10(1) of the Convention our extradition treaties with countries that have ratified the Convention were automatically deemed to incorporate the offenses criminalized in Article 1 of the Convention.

3.6 Since there is a ceiling on the possible fine, the full value of the bribe and proceeds of bribery, or the property the value of which corresponds to that of such proceeds, may not be fully recovered. Could the U.S. clarify what factors determine the amount of sanctions?

There is, in fact, no ceiling on the possible fine. Fines imposed for violations of the FCPA, like those imposed in all federal criminal cases are governed by the Alternative Fines Act, 18 U.S.C. § 3571. This Act states:

Alternative fine based on gain or loss. -- If any person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss, unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process.

This section, therefore, ensures that a fine well in excess of the full value of the bribe and the proceeds of bribery may be imposed. It is sufficient to assure that "the bribe and the proceeds of the bribery of a foreign official, or property the value of which corresponds to that of such proceeds, are subject to seizure and confiscation *or that monetary sanctions of comparable effect* are applicable." OECD Convention, art. 3, ¶ 3.

In practice, sentencing of individuals and businesses in the United States is governed by the Sentencing Guidelines. These Guidelines require the Court to impose a fine based upon an offense level that is tied directly to "the value of the bribe or the improper benefit to be conferred." *See* U.S.S.G. § 2B4.1(b)(1). The commentary makes it clear that the "value of the improper benefit" refers to the "value of the action to be taken or effected in return for the bribe." U.S.S.G. § 2B4.1 comment. (n.2). The commentary also provides an example:

[I]f a bank officer agreed to the offer of a $25,000 bribe to approve a $250,000 loan under terms for which the applicant would not otherwise qualify, the court, in increasing the offense level, would use the greater of the $25,000 bribe, and the savings in interest over the life of the loan compared with alternative loan terms. If a gambler paid a player $5,000 to shave points in a nationally televised basketball game, the value of the action to the gambler would be the amount that he and his confederates won or stood to gain.

U.S.S.G. §2B4.1 comment. (backg'd).

The same rules apply to domestic corruption cases. *See* U.S.S.G. 2C1.1. As set forth in the commentary to that Guideline:

The value of "the benefit received or to be received" means the net value of such benefit. Examples: (1) A government employee, in return for a $500 bribe reduces the price of a piece of surplus property offered for sale by the government from $10,000 to $2,000; the value of the benefit received is $8,000. (2) a $150,000 contract on which $20,000 profit was made was awarded in return for a bribe; the value of the benefit received is $20,000. Do not deduct the value of the bribe itself in computing the value of the benefit received or to be received. In the above examples, therefore, the value of the benefit received would be the same regardless of the value of the bribe.

Id. at comment. (n.2). The commentary continues:

In determining the net value of the benefit received or to be received, the value of the bribe is not deducted from the gross value of such benefit; the harm is the same regardless of value of the bribe paid to receive the benefit. Where the value of the bribe exceeds the value of the benefit or the value of the benefit cannot be determined, the value of the bribe is used because it is likely that the payer of such a bribe expected something in return that would be worth more than the value of the bribe. Moreover, for deterrence purposes, the punishment should be commensurate with the gain to the payer or the recipient of the bribe, whichever is higher.

Id. at comment. (backg'd).

In practice, assume, as set forth in the example above, that a bribe is paid for a contract that results in a benefit to an individual or a corporation of $20,000. Applying the Guidelines and not making any adjustments for acceptance of responsibility, role in the offense, or criminal history, that benefit results in an offense level of 12. *See* U.S.S.G. § 2B4.1, 2F1.1. With that offense level, the court is required to impose a fine between $3,000 and $30,000. For a corporate defendant, again making no adjustments, the court is required to impose a fine between $40,000 and $80,000, and the fine could be even more depending on the actual pecuniary gain to the corporation. *See* U.S.S.G. §§ 8C2.4, 8C2.5, and 8C2.6.

***Sharing of forfeited assets with foreign countries*: Please confirm.**

The United States has a firm policy of sharing with foreign governments property that has been forfeited to the United States with the assistance of foreign authorities. Since 1989, the United States has shared more than $173.2 million with the governments of thirty different nations in recognition of their efforts in achieving forfeitures under United States law. Other nations have shared approximately $19.6 million in forfeited assets with the United States. We believe that mutual asset forfeiture sharing creates an additional

incentive for law enforcement authorities to cooperate with one another and, as a result, an atmosphere in which more assets are actually forfeited and more criminal enterprises are dismantled.

Under United States law, there are three statutory bases through which the Attorney General and/or the Secretary of the Treasury may transfer forfeited property to a foreign country that participated directly or indirectly in acts leading to the seizure and forfeiture of the property: 18 U.S.C. § 981(i)(1) (for money laundering forfeitures), 21 U.S.C. § 881(e)(1)(E) (for drug related forfeitures) and 31 U.S.C. § 973(h)(2) (for property forfeited under laws enforced by the Department of the Treasury). All three statutes condition such a transfer upon: (1) approval by the Attorney General or the Secretary of the Treasury, (2) approval by the Secretary of State, (3) authorization for such a transfer in an international agreement between the United Sates and the foreign country to which the property would be transferred; and (4) if applicable, certification of the foreign country under 22 U.S.C. § 2291(h) (Section 481(h) of the Foreign Assistance Act of 1961). As a result, to the extent that property involved in offenses covered under the OECD Convention on Combating Bribery of Foreign Officials in International Business Transactions is forfeited to the United States as a result of money laundering offenses, the United States could share that property with foreign governments.

To facilitate international sharing, the United States has entered into numerous agreements that permit the transfer of assets to other nations, including at least seven that could apply should property involved in offenses covered under the OECD Convention on Combating Bribery of Foreign Officials in International Business Transactions be forfeited to the United States. In addition, forfeiture articles in Mutual Legal Assistance Treaties between the United States and several additional nations include provisions that would permit international sharing. Where no standing agreement on the sharing of forfeited assets exists between the United States and other nations, the United States typically negotiates case-specific agreements that permit the transfer of such property.

ARTICLE 4 - JURISDICTION

4.2. Can the US comment on whether it expects that U.S. jurisdiction over nationals will be more frequently invoked in relation to offenses committed in contravention of the FCPA?

The United States does not expect the addition of nationality jurisdiction to have a significant impact upon the volume of prosecutions. The territorial jurisdiction in place since 1977 is extremely broad and requires only that some act in furtherance, one that need not even be criminal in and of itself, take place in the United States. The amendment of the statute to include nationality jurisdiction, however, eases the government's burden by enabling a prosecution to proceed on that basis alone without the need to prove an act was committed within U.S. territory.

4.3 Are there any legal instruments requiring consultation and eventual transfer of a case to another Party?

Apart from the obligation to consult contained in Article 4, the United States is not a party to any international legal instrument that absolutely obligates it to consult regarding, or eventually transfer to another Party for investigation or prosecution, a criminal case covered by this Convention. As a practical matter, as stated in our previous response provided, we consult regularly with our law enforcement partners in such matters.

4.4 Could the U.S. comment on the rationale for the difference in treatment and whether this may lead to uneven application of the legislation?

As set forth above, the difference in treatment is due to federal constitutional principles and the requirement that a federal crime have a federal nexus, here the use of means or an instrumentality of interstate commerce. The United States does not believe that this will result in an uneven application of the legislation. It would be a rare case in which a business in the United States succeeded in authorizing or paying a bribe without making use of the mails or other means or instrumentalities of interstate commerce. For example, such means and instrumentalities include phone lines, thus encompassing all phone calls, fax transmissions, telexes, and email messages, air, sea, rail, and auto travel, as well as interstate and international bank wire transfers. Moreover, the communication or travel need not actually cross interstate or international boundaries; it is sufficient if the defendant made use of interstate instrumentalities even for intrastate communication or travel. *See* 15 U.S.C. §§ 78c(a)(17), 78dd-2(h(5), 78dd-2(f)(5).

ARTICLE 5 - ENFORCEMENT

5.1. Is there scope for the Department of Justice to refuse to prosecute a case? If so, under what circumstances? Is the refusal to prosecute made public?

The United States respectfully refers the Secretariat to Section 5 of its response to the Phase 1 questionnaire. The decision whether to initiate or decline charges in a particular case is governed by the following factors:

1. Federal law enforcement priorities;

2. The nature and seriousness of the offense;

3. The deterrent effect of prosecution;

4. The person's culpability in connection with the offense;

5. The person's history with respect to criminal activity;

6. The person's willingness to cooperate in the investigation or prosecution of others; and

7. The probable sentence or other consequences if the person is convicted.

***Principles of Federal Prosecution*, U.S. Attorney's Manual §9-27.230.**

The Department's decision not to prosecute generally is not made public. The Department, however, may notify a target individual or company that an investigation has been concluded, and the company may choose to release that information.

ARTICLE 9 - MUTUAL LEGAL ASSISTANCE

9.2 Could the U.S. confirm whether in a case where, pursuant to a treaty between the U.S. and another Party, mutual legal assistance is conditional or dual criminality, it will be deemed to exist if the offence in question is within the scope of the conviction?

The United States generally does not require dual criminality as a condition precedent to the providing of mutual legal assistance. Where a request for mutual legal assistance from another State requires the taking of extremely intrusive measures (for example, the issuance and execution of a warrant for search and seizure), dual criminality may be required. However, where required, the dual criminality principle has always been interpreted liberally in favor of providing international cooperation. Indeed, with respect to the offenses covered by the Convention, as set forth in Article 9(2), seeking mutual legal

assistance for an offense established pursuant to Article 1 of the Convention will satisfy any dual criminality requirement imposed under U.S. laws or treaties.

9.3 Does this mean that it is possible to decline assistance on the ground of bank secrecy?

When seeking court orders on behalf of foreign States that seek mutual legal assistance, the United States has taken the position before its courts that assistance may not be declined as a result of privacy provisions of U.S. banking law. Moreover, it is the policy of the United States that where a domestic law provides for executive discretion in denying assistance, the executive branch does not decline assistance on that basis.

ARTICLE 10 - EXTRADITION

10.2 What is the situation in cases where the U.S. does not have a bilateral treaty in force and there is a request for extradition for the offences covered by the Convention? Where bilateral treaties exist, is it possible that in practice their efficacy could be limited because extradition may be limited to offences specifically listed in the treaty?

Under U.S. law, extradition for the offenses established by the Convention may be carried out only if there is an extradition treaty in force between the United States and the State seeking extradition. With respect to the second question, as stated in the response to question 3.4 above, a number of our older extradition treaties determine whether extradition should be granted on the basis of a list of extraditable offenses. However, once we became party to the OECD Convention, under Article 10(1) of the Convention, our older "list" extradition treaties were automatically deemed to incorporate the offenses criminalized in Article 1 of the Convention.

10.3 Can the U.S. clarify whether it is possible to decline extradition on the ground of nationality. If so, under which circumstances?

It is the policy of the United States not to decline extradition on the ground of nationality. Moreover, under Title 18, United States Code, Section 3196, the extradition of U.S. nationals is authorized (subject to the other requirements of the applicable treaty) even where the applicable extradition treaty does not obligate the United States to do so.

1. If, however, a group of individuals is charged with conspiracy to violate the FCPA under 18 U.S.C. § 371, the government must only prove that each defendant entered into the criminal *agreement* and that, thereafter, at least one conspirator did an overt act in furtherance of the agreement.

2. The Releases discussed herein are intended only as examples of the Department of Justice's interpretation and application of the FCPA in particular contexts. Pursuant to the FCPA, the Department has promulgated regulations that permit issuers and domestic concerns to obtain a statement from the Department "as to whether a certain, specified, prospective -- not hypothetical -- conduct conforms with the Department's present enforcement policy." *See* 28 C.F.R. § 80.1.An Opinion Release issued pursuant to these regulations is binding on the Department of Justice only, and not other agencies of the United States Government, is applicable only to parties which join in the request, and provides a safe harbor only to the extent that a request or accurately describes the proposed transaction. *See* 28 C.F.R. §§ 80.4, 80.10, 80.11, 80.13.