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Biden administration releases U.S. Strategy on Countering Corruption report

December 15, 2021 | Client Update | 8-minute read

The Biden administration issued the first United States Strategy on Countering Corruption on December 6, 2021, as directed in President Biden's June 3, 2021, National Security Study Memorandum. The Strategy resulted from an interagency review, and provides insight into the Biden administration's areas of focus for anti-corruption efforts, including increased use of data analytics to combat corruption, heightened focus on specific high-risk countries and regions, and specific regulation and enforcement of corrupt activity by private equity firms, investment advisers, and other professional financial service providers.

On June 3, 2021, President Biden issued the Memorandum on Establishing the Fight Against Corruption as a Core United States National Security Interest (the Anti-Corruption Memo). The Anti-Corruption Memo directed senior figures from the administration's national security team to oversee an interagency review to take stock of existing U.S. government anti-corruption efforts and to identify and seek to rectify perceived gaps in the fight against corruption.

On December 6, 2021, the Biden administration released the United States Strategy on Countering Corruption (the Strategy) as the first major step pursuant to the Anti-Corruption Memo. The Strategy outlines the administration's plans to elevate and modernize its fight against corruption, and in doing so, provides insights into certain methods and areas of focus of enforcement.

The key takeaways, described more fully below, include: (1) the Biden administration's increased focus on corruption, (2) enforcement authorities' increased use of corruption-related data analytics, (3) heightened focus on the role played by private equity, investment advisers, and other professional financial service providers in corrupt transactions, (4) heightened focus on

"priority," high-risk countries (though those countries have yet to be identified by the administration), (5) bolstering capacity of foreign countries and multilateral initiatives to combat corruption, (6) continued suspension and debarment of federal contractors who engage in corrupt activities, (7) boosting anti-money laundering (AML) enforcement linked to corruption, and (8) establishing rewards for information to help recover assets linked to corruption.

1. Increased focus on corruption

It is notable that the Biden administration continues to study, analyze, and issue pronouncements related to anti-corruption efforts, this Strategy being the latest such pronouncement. The Strategy echoes recent statements by, among others, Deputy Attorney General (DAG) Lisa Monaco, Principal Associate Deputy Attorney General (PADAG) John Carlin, DOJ's Criminal Division Chief Kenneth Polite, and Chief of DOJ's Foreign Corrupt Practices Act (FCPA) Unit David Last about ramped up enforcement in this area, among other white collar enforcement more generally.

Continued messaging from the Biden administration around anti-corruption signals that enforcement in this area will continue—and likely increase—in the future. The Strategy points towards the use of new investigatory and prosecutorial tools to assist in increased enforcement, such as the Anti-Money Laundering Act of 2020's (AMLA) recent expansions of subpoena power over financial records maintained abroad. Additionally, the Strategy reiterates the administration's focus on the potential of cryptocurrency to facilitate illicit payments by noting the DOJ's newly established National Cryptocurrency Enforcement Team, which focuses exclusively on investigations and prosecutions of criminal misuses of cryptocurrency.

2. Data analytics

In order to further prioritize and amplify anti-corruption efforts, the Strategy highlights the need to enhance corruption-related research and data analytics in order to more effectively map corruption networks, proceeds, and dynamics. In line with its objective to modernize corruption-related research, the Strategy seeks to improve information-sharing both domestically and with international partners. The Strategy, as a whole, places heavy emphasis on both international cooperation and the use of modern data analytics in executing its anti-corruption plans.

These dual emphases also mirror themes that were evident in the recent statements of DAG Monaco, PADAG Carlin, and Criminal Division Chief Kenneth Polite about the use of data to detect and investigate corruption and other corporate crimes. All three DOJ officials alluded to the Biden administration's utilization of data analysis tools to better detect fraud and evaluate compliance programs.

Additionally, the administration emphasizes the need to leverage technological innovations in combating corruption, including through an Anti-Corruption Solutions through Emerging Technology program, which will engage diverse stakeholders to collaborate on tracking, developing and applying technological solutions to the prevention and detection of corruption. The Strategy spotlights the State Department's project to create an open platform that will assist foreign partners through the use of distributed ledger technology and data analytics in enhancing transparency and oversight of illicit assets, detection of money laundering trends, and identification of suspicious transactions and sanctioned entities.

3. Curbing illicit finance and focus on private equity, investment advisers, and other professional financial service providers

The Strategy notes the potential roles played in facilitation of corrupt activity by private equity and investment advisors, and forecasts additional regulation and reporting requirements in these sectors. To that end, the Strategy announces that Treasury will re-examine its 2015 Notice of Proposed Rule Making that would prescribe minimum standards for anti-money laundering programs and suspicious activity reporting requirements for certain investment advisors. The Strategy's focus on investment advisers and private equity funds demonstrates the administration's push toward additional regulation across historically more opaque segments of the financial services industry.

Significantly, the Strategy also highlights plans to heighten scrutiny (and expand investigative and enforcement authority where necessary) of professional financial service providers, including lawyers, accountants, trust and company service providers, and others typically retained as registered agents or nominees.

4. Focus on particular countries

The Strategy announces that the administration will develop anti-corruption action plans targeting "priority countries," as part of enhanced country-specific and regional strategies. Although the Strategy does not name specific "priority" countries, anti-corruption enforcement has been particularly active in Latin America, Asia, and Africa. Given these signals that the administration plans to focus its anti-corruption efforts on high-risk countries and regions, expectations for companies operating in such areas will be correspondingly high. While it is unclear what methodology the administration will use to identify "priority countries," several organizations already index countries by corruption risk, such as Transparency International, the international Financial Action Task Force (FATF), and the World Bank.

5. Bolstering capacity of foreign countries and multilateral initiatives

The administration highlights its international focus by emphasizing its aim to bolster the capacity of foreign partners and to enhance support to civil society initiatives and projects. To that end, the Strategy expands the use of diplomacy and foreign assistance as leverage in seeking international cooperation to bolster partner governments' capacities and willingness to counter corruption, for instance, through the consistent application of transparency and accountability criteria in evaluating foreign government assistance. Specifically, the administration pledged through the DOJ and State Departments, among others, to "deepen cooperation with and assistance to countries with the political will for meaningful anti-corruption efforts . . . including, where appropriate, partnering with countries in joint investigations and prosecutions." For instance, the Strategy indicates plans to coordinate multilaterally on sanctions, law enforcement, and detecting and disrupting kleptocracy. These plans include establishment of an interagency Democracies Against Safe Havens Initiative, led by the State Department, to engage with foreign partners in these areas.

The Strategy also announces the administration's commitment to strengthening the international anti-corruption "architecture," which includes bolstering multilateral initiatives, agreements, and standards. In advancing its objective, the Strategy commits the U.S. to assist international partners, including through financial support, in strengthening their implementation of existing anti-corruption frameworks and institutions, such as the UN Convention Against Corruption (UNCAC), the Organization for Economic Cooperation and Development's (OECD) Anti-Bribery Convention, and the FATF. Notably, the OECD released new anti-bribery recommendations last month, which promoted heightened law enforcement and international cooperation, revision of tax regulations, strengthening of corporate accounting and internal controls functions, and the use of suspension and debarment in public procurement programs.

The Strategy also expands new and existing rapid response capabilities for emerging areas of corruption risk. Among other programs, the DOJ and State Department will co-administer a Global Anti-Corruption Rapid Response Fund, with the aim of facilitating mentorship and assistance to foreign anti-corruption counterparts.

Lastly, the Strategy aims to integrate corruption considerations into security assistance and military operations. Of note to clients that serve as security or military contractors, the Strategy announces that the government will conduct more frequent security cooperation evaluations in countries with significant risk of corruption.

These efforts would follow increased cooperation and coordination more generally in the anti-corruption space, as demonstrated by a host of coordinated resolutions between the DOJ, SEC, and foreign authorities in Brazil, France, and the U.K., among others. Notably, while the Strategy promises expanded partnerships with foreign countries and increased diplomacy, it does not set forth a specific plan to counter the advent of blocking statutes restricting the provision of

information to the Department of Justice, such as the International Criminal Judicial Assistance Law in China.

6. Implications for suspension and debarment

The Strategy also offers potential implications for federal contractors, including through continued efforts to remove corrupt individuals, companies, and other entities from the federal marketplace and supply chain by suspending or debarring such actors from federal procurement and subcontracting programs.

Given the Deputy Attorney General's recent indication that companies may more frequently face the prospect of a guilty plea, the Strategy's reference to continued use of suspension and debarment could portend significant effects on government contractors.

7. Boosting AML enforcement linked to corruption

The administration elaborates on its strategic objective to significantly boost existing AML laws and enforcement tools. This critical focus on AML enforcement as a vector for anti-corruption enforcement activity comes on the heels of the most extensive revisions to AML law in recent decades, AMLA, and the June 30, 2021 publication of national AML/CFT priorities by Treasury's Financial Crimes Enforcement Network (FinCEN). Coordinated with the Strategy's release were the issuance of two notable FinCEN Notices of Proposed Rulemaking. On December 6, FinCEN issued an Advanced Notice of Proposed Rulemaking regarding the expansion of reporting requirements for real estate transactions, and the following day, a Notice of Proposed Rulemaking to implement Treasury's planned corporate beneficial ownership registry (both subjects were addressed in the Strategy). The Strategy likewise seeks to substantially increase funding for FinCEN, among other things, to facilitate the creation of this beneficial owner database.

8. Rewards for information to help recover kleptocracy assets

The Strategy also places emphasis on enhancing the government's capacity to enhance, track, and disrupt kleptocracy. Notably, it announces the pilot establishment of the Kleptocracy Assets Recovery Rewards Program, which will provide payments to individuals for information leading to the identification and recovery of stolen assets held at U.S. financial institutions that have been linked to foreign government corruption.

For reference, 2021 was a record-breaking year for the Securities and Exchange Commission's (SEC) whistleblower program, marked by the highest number of awards, both in terms of dollars and individuals awarded, and the largest number of whistleblower tips received. More

specifically, the SEC made more whistleblower awards in 2021 than in all prior years combined. Given the SEC's increased payouts pursuant to its Dodd-Frank whistleblower program and corresponding resolutions, this could serve to further incentivize individuals to come forward to identify potentially corrupt conduct.

The United States Strategy on Countering Corruption report can be found here.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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Deputy Attorney General Lisa Monaco announces significant DOJ corporate enforcement policy changes

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On Thursday, October 28, 2021, Deputy Attorney General Lisa Monaco announced significant changes to the DOJ's corporate enforcement program during her speech at the ABA's National Institute on White Collar Crime. The changes address: (1) corporate cooperation requirements; (2) the treatment of a corporation's history of prior resolutions with the Department; and (3) the imposition of corporate compliance monitors.

Together these new or revised policies will likely have a significant impact on DOJ's corporate enforcement program, and they signal harsher treatment of corporate actors who are confronted with a DOJ investigation and resolution. DAG Monaco also announced a new Corporate Crime Advisory Group to evaluate DOJ's corporate policies and said that more changes are coming. Notably, the DAG also forecasted heightened scrutiny of companies' compliance with the requirements of their prior criminal resolutions with the Department, which follows the disclosures made by two companies that the DOJ has declared them in breach of existing resolution agreements, one a Non-Prosecution Agreement (NPA) and one a Deferred Prosecution Agreement (DPA). Taken together, along with the DAG's commitment to "surge resources" to white collar enforcement, the DOJ is following through on recent messaging that it will ratchet up white collar enforcement and will treat companies more harshly than in prior administrations.

1. Changes to cooperation requirements

First, the DAG announced that the DOJ would revert to an earlier formulation in its memorandum on "Individual Accountability for Corporate Wrongdoing" (the so-called Yates Memo), which

required that, in order to receive cooperation credit, companies under investigation would need to provide information related to *all* individuals involved in the alleged misconduct. In 2018, the Trump Administration narrowed the Yates Memo's effect by requiring companies only to provide information related to individuals "substantially involved in or responsible for" the alleged misconduct.

According to the DAG, the "substantially involved in or responsible for" limitation is "confusing in practice and afford[s] companies too much discretion in deciding who should and should not be disclosed to the government," and also "ignores the fact that individuals with a peripheral involvement in misconduct may nonetheless have important information to provide to agents and prosecutors." Whether this change will allow the government to charge more corporate officers and employees engaged in misconduct is unclear, but the change will require companies to meet a heightened standard to receive cooperation credit.

2. Treatment of prior misconduct

Second, the DAG announced that in reaching a resolution, prosecutors should consider "all prior misconduct . . . when it comes to decisions about the proper resolution with a company, whether or not that misconduct is similar to the conduct at issue in a particular investigation." Thus, "[a] prosecutor in the FCPA unit needs to" determine whether the company has "run afoul of the Tax Division, the Environment and Natural Resources Division, the money laundering sections, the U.S. Attorney's Offices, and so on," as well as "whether this company was prosecuted by another country or state, or whether this company has a history of running afoul of regulators."

This change will significantly broaden the scope of misconduct that prosecutors consider when determining whether and how to resolve a corporate criminal investigation. Many companies – particularly large corporations – routinely face regulatory scrutiny by different authorities, both domestic and foreign. Such actions – even those involving the lowest level employees and totally unrelated conduct – are now fair game for DOJ to consider as part of any resolution. And while the DAG conceded that "[s]ome prior instances of misconduct may ultimately prove to have less significance," the consideration of prior misconduct and resolutions will almost certainly lead to harsher treatment of corporations.

In addressing what changes are yet to come, the DAG stated that the DOJ will be reviewing "whether and how to differently account for companies that become the focus of repeated DOJ investigations" and whether NPAs and DPAs are appropriate for such companies. If a decision is made that companies with prior DOJ resolutions will automatically be forced to resolve matters by pleading guilty, this may decrease the incentives these companies have to self-disclose misconduct to the government and cooperate with the government's investigation.

3. Resurgence of monitorships

Third, the DAG stated that, to the extent that prior DOJ guidance suggested that monitors were "the exception and not the rule" or that "monitorships [were] disfavored," she is "rescinding that guidance." The DAG's remarks signal a meaningful increase in the appointment of monitors.

Clients should expect heightened scrutiny of their compliance programs and a frequency of monitors more akin to 2016 when, for example, eight FCPA monitors were imposed in that year alone, as compared to the six FCPA monitorships that were imposed in the last five years combined. It will become increasingly important that clients continue to review and enhance their compliance programs and, with the help of defense counsel, appropriately communicate to DOJ the effectiveness of these programs early and often throughout the investigation and resolution process.

4. More to come

In addition to the changes announced Thursday, the DAG also revealed the creation of a Corporate Crime Advisory Group composed of representatives from across the DOJ with corporate enforcement experience, to review and evaluate existing corporate enforcement policies and to determine what additional changes should be made. The group will "consider some of the issues [the DAG] previewed," including "monitorship selection, recidivism and NPA/DPA non-compliance — as well as other issues, like what benchmarks we should use to measure a successful company's cooperation." The DAG also announced that this group will "consult broadly," which suggests that it may engage in outreach to the business community and defense bar for feedback on potential changes.

One of the issues on the Corporate Crime Advisory Group's agenda will be a consideration of how to treat companies that violate the terms of existing resolution agreements. According to the DAG, DOJ will have "no tolerance for companies that take advantage of [DPAs and NPAs] by going on to continue to commit crimes, particularly if they then compound their wrongdoing by knowingly hiding it from the government," and noted that "[i]t is hard for me to think of more outrageous behavior by a company that has entered into a DPA or NPA in the first place." This comes on the heels of disclosures by two multinational companies that each had received a breach notification from the DOJ, declaring them in breach of existing resolution agreements.

The DAG also reiterated what PADAG Carlin had previously noted – that the DOJ would "surge resources" to white collar enforcement, providing as an example "a new squad of FBI agents [that] will be embedded in the Department's Criminal Fraud Section," responsible for FCPA cases, financial fraud, and healthcare fraud. She further indicated that "[t]his team model has a

cases, financial fraud, and healthcare fraud. She further indicated that "[t]his team model has a proven track record and is one we've used in numerous high-profile cases."

5. Takeaways

Overall, DAG Monaco underscored the DOJ's commitment to increased—and harsher—enforcement of companies that engage in corporate crimes. The speech presents a compelling reason for companies to ensure that both company and counsel understand the DOJ's expectations and communicate effectively with the Department. Companies should also continue to prioritize the implementation of effective compliance programs. These factors will allow clients to distinguish themselves from companies that may face the imposition of a monitor and overall harsher resolutions. But more importantly, implementing these mechanisms increases a company's ability to avoid a DOJ investigation altogether.

DAG Monaco's speech can be found here.

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Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions

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Background Information

The Recommendation for Further Combating Bribery of Foreign Officials was originally adopted by the OECD Council on 26 November 2009 (the "2009 Anti-Bribery Recommendation"), succeeding the 1997 Revised Recommendation of the Council on Bribery in International Business Transactions, and sought to enhance the ability of Parties to the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions [OECD/LEGAL/0293] (the "Anti-Bribery Convention") to prevent, detect, and investigate allegations of foreign bribery.

In order to address challenges, good practices and cross-cutting issues that have emerged in the global anti-corruption landscape since 2009, the OECD Council adopted a revised Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions on 26 November 2021 (hereafter the "2021 Anti-Bribery Recommendation") on the proposal of Working Group on Bribery in International Business Transactions (hereafter the "Working Group on Bribery").

The Working Group on Bribery's membership comprises all Parties to the Anti-Bribery Convention, all of whom are required to become Adherents to the 2021 Anti-Bribery Recommendation and three other Recommendations. related to the Anti-Bribery Convention when they accede to the Anti-Bribery Convention. The three other related Recommendations are:

- The Recommendation of the Council on Bribery and Officially Supported Export Credits [OECD/LEGAL/0447]
- The Recommendation of the Council on Tax Measures for Further Combating Bribery of Foreign Public Officials in International Business Transactions [OECD/LEGAL/0371]
- The Recommendation of the Council for Development Co-operation Actors on Managing the Risk of Corruption [OECD/LEGAL/0431]

Rationale for revising the Recommendation

The 2021 revision seeks to update and expand upon the 2009 Anti-Bribery Recommendation with a view to further supporting the full implementation of the Anti-Bribery Convention by reflecting recent trends and challenges in the foreign bribery field, thereby ensuring that the Recommendation remains relevant and effective. These evolving challenges, good practices, and cross-cutting issues emerged in particular in the context of the Working Group on Bribery's systematic and rigorous monitoring of Parties' implementation of the Anti-Bribery Convention and related Recommendations, as well as the wide body of thematic work carried out by the Working Group on Bribery on the detection of foreign bribery, liability of legal persons, non-trial resolutions, and the demand side of bribery.

Process for developing the revised Recommendation

The Working Group on Bribery agreed to open discussions on a review of the 2009 Anti-Bribery Recommendation in March 2018. Following a survey to identify priorities areas, the Working Group engaged in an extensive review process – including two rounds of public consultations, a stocktaking exercise of ten years of implementation of the 2009 Anti-Bribery Recommendation, multiple written member country consultations, and eight dedicated meetings of Working Group on Bribery members. The Working Group on Bribery also sought the input of other relevant bodies, groups and stakeholders – including the informal meeting of the Law Enforcement Officials – and consulted six other relevant OECD committees and other subsidiary bodies in writing.

Scope of the 2021 Anti-Bribery Recommendation

The 2021 Anti-Bribery Recommendation expands upon the 2009 version. The preamble has been updated to include reference to key concepts in the fight against foreign bribery, including potential linkages between gender and corruption and the potential role of innovative technologies in anti-foreign bribery efforts. Following the outbreak of the COVID-19 pandemic and related challenges, the revised preamble also stresses the importance of vigorous implementation of the Anti-Bribery Convention in periods of crisis.

New sections have been included on key topics that have emerged or significantly evolved in the anti corruption area since 2009, in particular:

- Addressing the Demand Side of Foreign Bribery Cases;
- Sanctions and Confiscation;
- Non-Trial Resolutions;
- International Co-operation;
- Protection of Reporting Persons;
- Incentives for Compliance; and
- Data Protection.

The draft revised Recommendation also updates or broadens the scope of provisions on pre-existing topics, including enforcement as well as awareness raising, training and guidance.

Follow-up, monitoring of implementation and dissemination tools

In addition to its rigorous and systematic peer-review monitoring of Parties' implementation of the Anti-Bribery Convention, the 2021 Anti-Bribery Recommendation, and the three other related Recommendations, the Working Group on Bribery will also report on the implementation of the 2021 Anti-Bribery Recommendation to the Council every five years following its adoption.

For further information, please consult: https://www.oecd.org/fr/corruption/2019-review-oecd-anti-bribery-recommendation.htm.

Contact info: antibribery@oecd.org.

Implementation

The Working Group will continue carrying out its monitoring of member countries' implementation of the Anti-Bribery Convention, the Anti-Bribery Recommendation, and the three other related Recommendations to promote their full implementation, in accordance with Article 12 of the Anti-Bribery Convention. All Parties to the Convention are subject to this rigorous peer-review monitoring process, carried out in successive phases, with each country evaluated by examiners from other Parties to the Convention. Transparency International has referred to this monitoring mechanism as the "gold standard" of monitoring.

For further information: www.oecd.org/daf/anti-bribery/countrymonitoringoftheoecdanti-briberyconvention.htm.

THE COUNCIL,

HAVING REGARD to Articles 3, 5a) and 5 b) of the Convention on the Organisation for Economic Co-operation and Development of 14 December 1960;

HAVING REGARD to the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of 21 November 1997 [OECD/LEGAL/0293] (hereinafter "the OECD Anti-Bribery Convention");

HAVING REGARD to the Revised Recommendation of the Council on Bribery in International Business Transactions of 23 May 1997 [C(97)123/FINAL] and the Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions of 26 November 2009 [C(2009)159/REV1/FINAL and C(2010)19] (hereinafter "the 2009 Recommendation") to which the present Recommendation succeeds;

HAVING REGARD to the Recommendation of the Council on Tax Measures for Further Combating Bribery of Foreign Public Officials in International Business Transactions [OECD/LEGAL/0371], the Recommendation of the Council for Development Cooperation Actors on Managing the Risk of Corruption [OECD/LEGAL/0431], the Recommendation of the Council on Bribery and Officially Supported Export Credits [OECD/LEGAL/0447], the Recommendation of the Council on Guidelines on Anti-Corruption and Integrity in State-Owned Enterprises [OECD/LEGAL/0451], the OECD Guidelines for Multinational Enterprises [OECD/LEGAL/0144], the Recommendation of the Council on Public Integrity [OECD/LEGAL/0435], and the Recommendation of the Council on the OECD Due Diligence Guidance for Responsible Business Conduct [OECD/LEGAL/0443];

CONSIDERING the progress which has been made in the implementation of the OECD Anti-Bribery Convention and the 2009 Recommendation and reaffirming the continuing importance of the OECD Anti-Bribery Convention and the Commentaries to the Convention;

CONSIDERING that bribery of foreign public officials is a widespread phenomenon in international business transactions, including trade and investment, raising serious moral and political concerns, undermining good governance and sustainable economic development, and distorting international competitive conditions;

ACKNOWLEDGING the harmful effects caused by foreign bribery and considering the importance of effectively combatting foreign bribery in order to address and prevent those effects on society;

CONSIDERING that all countries share a responsibility to combat bribery of foreign public officials in international business transactions;

REITERATING the importance of the vigorous and comprehensive implementation of the OECD Anti-Bribery Convention, including in periods of crisis, and reaffirming member countries' commitment to robust enforcement of the laws implementing the foreign bribery offence, as reiterated in the Statement on a Shared Commitment to Fight Against Foreign Bribery, adopted by Ministers of the Parties to the OECD Anti-Bribery Convention on 21 November 2007, the Policy Statement on Bribery in International Business Transactions, adopted by the Working Group on Bribery on 19 June 2009, the Conclusions adopted by the OECD Council Meeting at Ministerial Level on 25 June 2009 [C/MIN(2009)5/FINAL], and the Ministerial Declaration at the OECD Anti-Bribery Ministerial Meeting of 16 March 2016;

RECOGNISING that the OECD Anti-Bribery Convention and the United Nations Convention against Corruption (UNCAC) are mutually supporting and complementary, and that ratification and implementation of the UNCAC supports a comprehensive approach to combating the bribery of foreign public officials in international business transactions;

WELCOMING other developments which further advance international understanding and co-operation regarding bribery in international business transactions, including actions of the Council of Europe, the European Union, and the Organization of American States;

WELCOMING the efforts of companies, business organisations and trade unions, non-governmental organisations, and the media to contribute to the fight against bribery of foreign public officials;

RECOGNISING the need to improve our understanding of linkages between gender and corruption, including bribery of foreign public officials, how corruption can affect genders differently, and the importance of promoting gender equality and women's empowerment;

RECOGNISING the potential role of innovative technologies in advancing public and private sector efforts to combat foreign bribery;

RECOGNISING that achieving progress in this field requires not only efforts on a national level but also multilateral co-operation, as well as rigorous and systematic monitoring and follow-up;

On the proposal of the Working Group on Bribery in International Business Transactions:

General

I. **NOTES** that the present Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions applies to OECD Member countries and other countries party to the OECD Anti-Bribery Convention (hereinafter "member countries").

II. **NOTES** that the present Recommendation is to be implemented in conformity with member countries' jurisdictional and other basic legal principles.

III. **RECOMMENDS** that member countries continue taking effective measures to deter, prevent and combat the bribery of foreign public officials in connection with international business transactions.

IV. **RECOMMENDS** that each member country take concrete and meaningful steps to examine or further examine the following areas:

i. awareness-raising and training initiatives in the public sector for the purpose of preventing and detecting foreign bribery;

ii. awareness-raising in the private sector, in particular among enterprises operating abroad, including small and medium size enterprises, for the purpose of preventing and detecting foreign bribery as well as, where appropriate, through targeted, profession and sector-specific initiatives, including on the Good Practice Guidance on Internal Controls, Ethics and Compliance, as set out in Annex II hereto, which is an integral part of this Recommendation, and through collective action and partnerships between the private and public sector in awareness-raising activities;

iii. criminal laws, their application and enforcement, in accordance with the OECD Anti-Bribery Convention, as well as sections V to XVIII of this Recommendation, and the Good Practice Guidance on Implementing Specific Articles of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, as set out in Annex I hereto, which is an integral part of this Recommendation;

iv. international co-operation in investigations and other legal proceedings, in accordance with section XIX of this Recommendation;

v. tax legislation, regulations and practice, to eliminate any indirect support of foreign bribery, in accordance with the 2009 Council Recommendation on Tax Measures for Further Combating Bribery of Foreign Public Officials in International Business Transactions [OECD/LEGAL/0371], and section XX of this Recommendation;

vi. provisions and measures to ensure the reporting of foreign bribery and protection of reporting persons, in accordance with sections XXI and XXII of this Recommendation;

vii. company and business accounting, external audit, as well as internal control, ethics, and compliance requirements and practices, in accordance with section XXIII of this Recommendation;

viii. laws and regulations on banks and other financial institutions to ensure that adequate records are kept and made available for inspection and investigation;

ix. public subsidies, licences, public procurement contracts, contracts funded by official development assistance, officially supported export credits, or other public advantages, so that advantages could be suspended or denied as a measure to combat foreign bribery in appropriate cases, and compliance incentives provided for appropriate remediation, in accordance with sections XXIV and XXV of this Recommendation;

x. civil, commercial, and administrative laws and regulations, to combat foreign bribery.

Criminalisation and Enforcement of the Offence of Bribery of Foreign Public Officials

V. RECOMMENDS, in order to ensure the vigorous and comprehensive implementation of the OECD Anti-Bribery Convention, including enforcement of the offence of bribery of foreign public officials, that member countries take fully into account the Good Practice Guidance on Implementing Specific Articles of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, set forth in Annex I hereto.

VI. RECOMMENDS that member countries:

i. periodically review their laws implementing the OECD Anti-Bribery Convention and their approach to enforcement in order to effectively combat international bribery of foreign public officials;

ii. take all necessary measures to ensure that law enforcement authorities act promptly and proactively so that complaints of bribery of foreign public officials are seriously investigated and credible allegations are assessed by competent authorities;

iii. take a proactive approach to the investigation and prosecution of bribery of foreign public officials, with respect to both natural and legal persons, including by ensuring that the competent authorities are provided with adequate training and guidance on effective methods to detect and investigate foreign bribery.

VII. RECOMMENDS that member countries provide adequate resources to law enforcement authorities so as to permit effective investigation and prosecution of bribery of foreign public officials in international business transactions, taking into consideration Commentary 27 to the OECD Anti Bribery Convention.

VIII. RECOMMENDS that member countries encourage law enforcement authorities to proactively gather information from diverse sources to increase detection of foreign bribery and enhance investigations, such as the media, reporting persons, public agencies, including those referred to under Section XXI, foreign investigative authorities and the private sector.

IX. RECOMMENDS that member countries:

i. ensure that cases of bribery of foreign public officials are investigated and prosecuted without undue delay;

ii. where delays occur in investigations, prosecutions, and judicial or administrative proceedings, take reasonable steps to ensure that these do not unduly impede effective enforcement of the offence of bribery of foreign public officials and do not result in the expiry of limitation periods in such bribery cases.

X. RECOMMENDS that member countries:

i. ensure that a broad range of investigative measures is available in foreign bribery investigations and prosecutions, such as access to financial, banking and company information, including on

beneficial ownership, asset tracing, forensics, and special investigative techniques, where appropriate;

ii. where appropriate and proportionate, and to the extent permitted and under the conditions prescribed by domestic laws, ensure that competent authorities make full use of the broad range of investigative measures available in foreign bribery investigations and prosecutions, including special investigative techniques;

iii. consider measures to encourage persons who participated in, or have been associated with, the commission of bribery of foreign public officials, to supply information useful to competent authorities for investigating and prosecuting foreign bribery, and ensure that appropriate mechanisms are in place for the application of such measures in foreign bribery investigations and prosecutions.

XI. RECOMMENDS that member countries permit and promote effective and timely co-operation and information sharing among and within national competent authorities with a view to improving the detection, investigation, and prosecution of bribery of foreign public officials. In particular, member countries should consider adequate methods and tools for facilitating such co-operation.

Addressing the Demand Side

XII. RECOMMENDS that member countries:

i. raise awareness of bribe solicitation risks among relevant public officials, particularly those posted abroad, and the private sector, with particular attention to high-risk geographical and industrial sectors of operation;

ii. provide training to their public officials posted abroad on information and steps to be taken to assist enterprises confronted with bribe solicitation, where appropriate, and provide clear instructions on the authorities to whom allegations of solicitation and foreign bribery should be reported;

iii. where appropriate, undertake coordinated actions with other member and non-member countries, with a view to engaging with the host country on addressing the solicitation and acceptance of bribes;

iv. consider fostering, facilitating, engaging, or participating in anti-bribery collective action initiatives with private and public sector representatives, as well as civil society organisations, aiming to address foreign bribery and bribe solicitation.

XIII. URGES all countries to:

i. raise awareness of their public officials on their domestic bribery and solicitation laws with a view to stopping the solicitation and acceptance of bribes and small facilitation payments;

ii. publish on a publicly available website their rules and regulations governing gifts, hospitality, entertainment, and expenses for domestic public officials so that individuals and enterprises are aware of such rules and can abide by them.

XIV. RECOMMENDS, in view of the corrosive effect of small facilitation payments, particularly on sustainable economic development and the rule of law, that member countries:

i. undertake to periodically review their policies and approach on small facilitation payments in order to effectively combat the phenomenon;

ii. encourage companies to prohibit or discourage the use of small facilitation payments in internal controls, ethics, and compliance programmes or measures, recognising that such payments are generally illegal in the countries where they are made and must in all cases be accurately accounted for in such companies' books and financial records.

Sanctions and Confiscation

XV. **RECOMMENDS** that member countries:

i. take appropriate steps, such as through providing guidance and/or training to law enforcement authorities and the judiciary without prejudice to the discretionary powers of judicial or other relevant authorities, to help ensure that sanctions against natural and legal persons for foreign bribery are transparent, effective, proportionate, and dissuasive in practice, including by taking into account the amounts of the bribe paid and the value of the profits or other benefits derived and other mitigating or aggravating factors;

ii. with a view to incentivising and rewarding good corporate behaviour, consider taking into account mitigating factors, such as:

   a. fulsome, timely, and voluntary disclosures to law enforcement authorities of misconduct;

   b. full cooperation with law enforcement authorities including the disclosure of all facts relevant to the wrongdoing at issue;

   c. acceptance of responsibility; or

   d. timely and appropriate remediation including the implementation or enhancement of an effective ethics and compliance programme;

iii. make public and accessible, consistent with data protection rules and privacy rights, as applicable, and through any appropriate means, important elements of resolved cases of bribery of foreign public officials and related offences under Articles 7 and 8 of the OECD Anti-Bribery Convention (hereinafter “related offences”), including the main facts, the natural or legal persons sanctioned, the approved sanctions, and the basis for applying such sanctions.

XVI. **RECOMMENDS** that member countries, in order to assist with ensuring that foreign bribery offences are punishable by effective, proportionate, and dissuasive sanctions:

i. make full use, whenever possible and appropriate, of the measures available in their national laws for the identification, freezing, seizure, and confiscation of bribes and the proceeds of bribery of foreign public officials, or property the value of which corresponds to that of such proceeds;

ii. develop a proactive approach to the identification, freezing, seizure, and confiscation of bribes and the proceeds of bribery of foreign public officials or property the value of which corresponds to that of such proceeds, including in the context of proceedings involving legal persons;

iii. raise awareness among law enforcement and other competent authorities of the importance of conducting thorough financial investigations to detect and recover bribes and the proceeds of bribery of foreign public officials, and confiscating bribes and the proceeds of bribery of foreign public officials, or property the value of which corresponds to that of such proceeds; and

iv. consider developing, publishing, and disseminating to law enforcement authorities guidelines for identifying, quantifying, and confiscating bribes and the proceeds of bribery of foreign public officials, or property the value of which corresponds to that of such proceeds.

Non-Trial Resolutions

XVII. **RECOMMENDS** that member countries consider using a variety of forms of resolutions when resolving criminal, administrative, and civil cases with both legal and natural persons, including non-trial resolutions. Non-trial resolutions refer to mechanisms developed and used to resolve matters without a full court or administrative proceeding, based on a negotiated agreement with a natural or legal person and a prosecuting or other authority.

XVIII. **RECOMMENDS** that member countries ensure that non-trial resolutions used to resolve cases related to offences under the OECD Anti-Bribery Convention follow the principles of due process, transparency, and accountability, and in particular:

i. adopt a clear and transparent framework regarding non-trial resolutions, including the authorities entitled to enter into non-trial resolutions, whether these resolutions are available to natural and/or legal persons, and the requirement for the alleged offender to admit facts and/or guilt, where applicable;

ii. develop clear and transparent criteria regarding the use of non-trial resolutions including, where appropriate, voluntary self-disclosure of misconduct, cooperation with law enforcement authorities, and remediation measures;

iii. provide clear and publicly accessible information on the advantages that an alleged offender may obtain by entering into a non-trial resolution;

iv. where appropriate, and consistent with data protection rules and privacy rights, as applicable, make public elements of non-trial resolutions, including:

   a. the main facts and the natural and/or legal persons concerned;

   b. the relevant considerations for resolving the case with a non-trial resolution;

   c. the nature of sanctions imposed and the rationale for applying such sanctions;

   d. remediation measures, including the adoption or improvement of internal controls and anti-corruption compliance programmes or measures and monitorship;

v. ensure that foreign bribery resolved by non-trial resolutions is punishable by transparent, as well as effective, proportionate and dissuasive sanctions as required by Article 3 of the OECD Anti-Bribery Convention;

vi. ensure that the non-trial resolution of foreign bribery cases does not constitute an obstacle to the effective investigation and prosecution of natural or legal persons in other countries, and generally allows for effective international cooperation, as provided under Articles 9 and 10 of the OECD Anti-Bribery Convention;

vii. ensure that the conclusion of a non-trial resolution with a natural or legal person is without prejudice to an enforcement action against other relevant natural or legal persons, where appropriate;

viii. ensure that non-trial resolutions are subject to appropriate oversight, such as by a judicial, independent public, or other relevant competent authority, including law enforcement authorities.

International Co-operation

XIX. **RECOMMENDS** that member countries, in order to effectively combat bribery of foreign public officials in international business transactions, in conformity with their jurisdictional and other basic legal principles, consult and otherwise co-operate with competent authorities in other countries, and, as appropriate, international and regional law enforcement networks involving member and non-member countries, in investigations and other legal proceedings concerning specific cases of such bribery, through such means as the sharing of information spontaneously or upon request, the provision of evidence, extradition, and the identification, freezing, seizure, confiscation, and recovery of the proceeds of bribery of foreign public officials. In this regard:

A. Mutual legal assistance procedures

Member countries should, in order to effectively combat bribery of foreign public officials in international business transactions:

i. make full use of existing agreements and arrangements for mutual international legal assistance and where necessary, enter into new agreements or arrangements for this purpose;

ii. ensure that clearly publicised and easily accessible channels are in place for incoming and outgoing mutual legal assistance requests;

iii. in accordance with Articles 9 and 10 of the OECD Anti-Bribery Convention, ensure that their national laws afford an adequate basis for mutual legal assistance, for any purposes, consistent with relevant laws, treaties, agreements and arrangements, including provision of evidence, executing searches, seizures, and freezing, identifying and tracing proceeds of crime, property or instrumentalities, and confiscation and recovery of the proceeds of bribery of foreign public officials;

iv. to the fullest extent possible under national laws, relevant treaties and arrangements, provide mutual legal assistance in non-criminal investigations and proceedings within the scope of the OECD Anti-Bribery Convention involving a legal person, including when the non-criminal investigations and proceedings are not directly related to criminal proceedings involving a natural person;

v. consider ways for facilitating mutual legal assistance between member countries and with countries not party to the OECD Anti-Bribery Convention in cases of such bribery, including regarding evidentiary thresholds for some member countries;

vi. provide prompt and effective processing of outgoing and incoming mutual legal assistance requests;

vii. ensure that their statute of limitations allows for adequate time to promptly and effectively provide and request mutual legal assistance in foreign bribery cases;

viii. ensure that an effective institutional framework for mutual legal assistance is in place and that resources for the provision and requesting of mutual legal assistance are adequate and efficiently used. In particular, member countries should ensure that authorities responsible for receiving incoming mutual legal assistance and managing outgoing requests are provided with an adequate number of staff with relevant expertise and that adequate training is available to relevant staff, including on the mutual legal assistance framework and on drafting requirements and policies applicable to outgoing requests, where relevant;

ix. consider the use of technologies for greater efficiency of the mutual legal assistance process, including adequate equipment to monitor the progress made on incoming and outgoing mutual legal assistance requests, presentation of outgoing mutual legal assistance requests in digital format, and presentation of information provided in response to mutual legal assistance requests in a digital format suitable for use by the requesting country;

x. adopt a proactive approach in seeking international cooperation for offences under the OECD Anti-Bribery Convention, including by raising awareness and providing training to competent authorities to identify foreign bribery cases requiring mutual legal assistance, with a view to ensuring that an outstanding outgoing mutual legal assistance request does not jeopardise an ongoing investigation.

B. Enhancing international cooperation

Member countries should:

i. take effective measures to develop direct co-operation with competent authorities in other member countries, as appropriate, including by:

   a. entering into bilateral agreements or arrangements for mutual legal assistance with other member countries and making full use of existing agreements;

   b. actively participating in regional and international law enforcement networks specialised in anti-corruption matters and involving member and non-member countries; and

   c. promoting the exchange of personnel and experts where applicable, including the posting of liaison officers in other countries or international organisations;

ii. without prior request, consider transmitting information, where appropriate and in a manner consistent with national laws and relevant treaties and arrangements, to a competent authority in another member country where such information could assist the member country in undertaking investigations or successfully concluding proceedings. The transmission of information spontaneously should be without prejudice to inquiries and proceedings carried out by the competent authority in the member country providing the information;

iii. consider, in a manner consistent with national laws and relevant treaties and arrangements, complementary forms of international exchange of information through other mechanisms, such as by facilitating (a) exchange of financial intelligence by Financial Intelligence Units; (b) exchange of tax information; (c) exchange of information with financial regulators; and (d) cooperation, as appropriate, within relevant international and regional networks;

iv. promptly investigate credible allegations of bribery of foreign public officials referred to them by international governmental organisations, such as the multilateral and regional development banks and, where applicable, seek from international governmental organisations the lifting of secrecy of internal investigation.

C. Multijurisdictional cases

Member countries should:

i. encourage direct coordination in concurrent or parallel investigations and prosecutions, where appropriate, including through such means as the sharing of information and evidence;

ii. consistent with Article 4.3 of the OECD Anti-Bribery Convention, when more than one member country has jurisdiction over an alleged offence described in the OECD Anti-Bribery Convention, consider, where appropriate, consultations during the investigation, prosecution, and conclusion of the case, in conformity with their legal systems. Member countries should also pay due attention to the risk of prosecuting the same natural or legal person in different jurisdictions for the same criminal conduct;

iii. consider coordination as early in the process as is feasible and where appropriate, and in such a way that respects the independence of the individual jurisdictions and recognises the benefits of co-operation in achieving effective law enforcement. Member countries should take steps to reasonably ensure that their coordination efforts do not unduly impact the effectiveness of investigations and prosecutions in other jurisdictions;

iv. consider using relevant international and regional organisations which can assist with consultations between countries, where appropriate;

v. where appropriate and in conformity with their national laws and relevant treaties and arrangements, consider setting up joint or parallel investigative teams when conducting investigations and prosecutions of bribery of foreign public officials that may necessitate coordinated and concerted action with one or several other member countries.

Tax Deductibility

XX. **RECOMMENDS** that member countries:

i. fully and promptly implement the 2009 Council Recommendation on Tax Measures for Further Combating Bribery of Foreign Public Officials in International Business Transactions [OECD/LEGAL/0371], which recommends in particular “that Member countries and other Parties to the OECD Anti-Bribery Convention explicitly disallow the tax deductibility of bribes to foreign public officials, for all tax purposes in an effective manner”, and that “in accordance with their legal systems” they “establish an effective legal and administrative framework and provide guidance to facilitate reporting by tax authorities of suspicions of foreign bribery arising out of the performance of their duties, to the appropriate domestic law enforcement authorities”;

ii. support the monitoring carried out by the Committee on Fiscal Affairs as provided for under the 2009 Council Recommendation on Tax Measures for Further Combating Bribery of Foreign Public Officials in International Business Transactions [OECD/LEGAL/0371].

Reporting Foreign Bribery

XXI. RECOMMENDS that member countries:

i. establish and publicise clear policies and procedures by which any natural person, including public officials, can report suspicions of bribery of foreign public officials and related offences to competent authorities, including by allowing for confidential and, where appropriate, anonymous reporting;

ii. provide easily accessible and diversified channels for the reporting of suspected acts of bribery of foreign public officials and related offences and raise awareness of these channels and of the importance of reporting such suspicions, including by providing guidance and follow-up to encourage and support reporting persons;

iii. ensure that appropriate measures are in place to allow public officials to report or bring to the attention of competent authorities suspected acts of foreign bribery and related offences detected in the course of their work, in particular for officials in public agencies that interact with, or that are exposed to information regarding companies operating abroad, including foreign representations, financial intelligence units, tax authorities, trade promotion authorities, relevant securities and financial market regulators, anti-corruption agencies and procurement authorities;

iv. encourage proactive detection by public officials, in particular those that interact with or that are exposed to information regarding companies operating abroad, through appropriate means including media monitoring and alerts, as well as early reporting of suspicions of bribery of foreign public officials and related offences;

v. periodically review the effectiveness of reporting policies, procedures, and channels and consider making publicly available the results of these periodical reviews;

vi. raise awareness through regular training and other means about the foreign bribery offence and reporting obligations to officials in government agencies that could play a role in preventing and/or detecting and reporting foreign bribery, including diplomatic missions, export credit agencies, and official development aid agencies, with a view to informing their companies operating abroad on foreign bribery laws and the importance of effective compliance programmes.

Protection of Reporting Persons

XXII. RECOMMENDS, in view of the essential role that reporting persons can play as a source of detection of foreign bribery cases, that member countries establish, in accordance with their jurisdictional and other basic legal principles, strong and effective legal and institutional frameworks to protect and/or to provide remedy against any retaliatory action] to persons working in the private or public sector who report on reasonable grounds suspected acts of bribery of foreign public officials in international business transactions and related offences in a work-related context, and in particular:

i. ensure that sufficiently-resourced and well-trained competent authorities implement the legal framework for the protection of reporting persons, and receive, investigate or otherwise process complaints of retaliation;

ii. afford protection to the broadest possible range of reporting persons in a work-related context, including as appropriate to those whose work-based relationship has ended, to persons who acquire information on suspected acts of foreign bribery during advanced stages of the recruitment process or the contractual negotiations, and who could suffer retaliation, for instance in the form of negative employment references or blacklisting, and consider extending protection to third persons connected to the reporting person who could suffer retaliation in a work-related context;

iii. ensure appropriate measures are in place to provide for the confidentiality of the identity of the reporting person and the content of the report, in a manner consistent with national laws, in particular on investigations by competent authorities or judicial proceedings;

iv. consider allowing for anonymous reports, and ensure that all relevant protections are available to those who are subsequently identified and may suffer retaliation;

v. ensure appropriate measures are in place to prohibit or render invalid any contractual provisions designed or intended to waive, terminate, diminish, or modify the claims and legal protections of persons who make reports that qualify for protection to competent authorities;

vi. provide a broad definition of retaliation against reporting persons that is not limited to workplace retaliation and can also include actions that can result in reputational, professional, financial, social, psychological, and physical harm;

vii. ensure appropriate remedies are available to reporting persons to compensate direct and indirect consequences of retaliatory action following a report that qualifies for protection, including financial compensation, and interim relief pending the resolution of legal proceedings;

viii. provide for effective, proportionate, and dissuasive sanctions for those who retaliate against reporting persons;

ix. in administrative, civil, or labour proceedings, shift the burden of proof on retaliating natural and legal persons and entities to prove that such allegedly adverse action against a reporting person was not in retaliation for the report;

x. ensure that reporting persons are not subject to disciplinary proceedings and liability based on the making of reports that qualify for protection;

xi. consider introducing incentives for making reports that qualify for protection;

xii. raise awareness and provide training on the design and implementation of the legal and institutional frameworks to protect reporting persons and protections and remedies available;

xiii. periodically review the effectiveness of the legal and institutional frameworks for the protection of reporting persons and consider making publicly available the results of these periodical reviews;

xiv. with due regard to data protection rules and privacy rights, ensure that such rules and laws that prohibit transmission of economic or commercial information do not unduly impede reports by and protection of reporting persons.

Accounting Requirements, External Audit, and Internal Controls, Ethics and Compliance

XXIII. RECOMMENDS that member countries take the steps necessary, taking into account where appropriate the individual circumstances of a company, including its size, type, legal structure and geographical and industrial sector of operation, so that laws, rules or practices with respect to accounting requirements, external audits, and internal controls, ethics and compliance are in line with the following principles and are fully used in order to prevent and detect bribery of foreign public officials in international business, according to their jurisdictional and other basic legal principles. To this effect:

A. Adequate accounting requirements

i. member countries shall, in accordance with Article 8 of the OECD Anti-Bribery Convention, take such measures as may be necessary, within the framework of their laws and regulations regarding the maintenance of books and records, financial statement disclosures, and accounting and auditing standards, to prohibit the establishment of off-the-books accounts, the making of off-the-books or inadequately identified transactions, the recording of non-existent expenditures, the entry of liabilities with incorrect identification of their object, as well as the use of false documents, by companies subject to those laws and regulations, for the purpose of bribing foreign public officials or of hiding such bribery;

ii. member countries shall, in accordance with Article 8 of the Convention, provide effective, proportionate and dissuasive civil, administrative or criminal penalties for such omissions and falsifications in respect of the books, records, accounts, and financial statements of such companies, and should ensure that both natural and legal persons can be held liable for the full range of conduct described in Article 8.1 of the Convention;

iii. member countries should require companies to disclose in their financial statements the full range of material contingent liabilities;

iv. member countries should ensure that competent authorities also give due consideration to proceeding against the involved natural or legal persons for accounting offences committed for the purpose of bribing foreign public officials or hiding such bribery, as defined under Article 8 of the OECD Anti-Bribery Convention;

B. Independent External Audit

i. member countries should consider whether requirements on companies to submit to external audit are adequate;

ii. member countries and professional associations should maintain adequate standards to ensure the independence of external auditors which permits them to provide an objective assessment of companies' accounts, financial statements and internal controls;

iii. member countries should require the external auditor who discovers indications of a suspected act of bribery of a foreign public official to report this discovery to management and, as appropriate, to corporate monitoring or governance bodies;

iv. member countries should encourage companies that receive reports of suspected acts of bribery of foreign public officials from an external auditor to actively and effectively respond to such reports;

v. member countries should consider requiring the external auditor to report suspected acts of bribery of foreign public officials to competent authorities independent of the company, such as law enforcement or regulatory authorities, and for those countries that permit such reporting, ensure that auditors making such reports on reasonable grounds are protected from legal action.

C. Internal controls, ethics, and compliance

Member countries should encourage:

i. companies, including state-owned enterprises, to develop and adopt adequate internal controls, ethics and compliance programmes or measures for the purpose of preventing and detecting foreign bribery, taking into account the Good Practice Guidance on Internal Controls, Ethics, and Compliance, set forth in Annex II;

ii. business organisations and professional associations, where appropriate, in their efforts to encourage and assist companies, in particular small and medium size enterprises, in developing internal controls, ethics, and compliance programmes or measures for the purpose of preventing and detecting foreign bribery, taking into account the Good Practice Guidance on Internal Controls, Ethics, and Compliance, set forth in Annex II hereto;

iii. company management to make statements in their annual reports or otherwise publicly disclose their internal controls, ethics and compliance programmes or measures, including those which contribute to preventing and detecting bribery;

iv. the creation of monitoring bodies, independent of management, such as audit committees of boards of directors or of supervisory boards;

v. companies to implement frameworks for the protection of persons reporting potential violations of law, as well as channels for reporting, including as part of an internal controls, ethics and compliance programme or measures for preventing and detecting bribery of foreign public officials, and to take appropriate action based on such reporting.

D. Incentives for compliance

Member countries should:

i. encourage their government agencies to consider, where international business transactions are concerned and as appropriate, internal controls, ethics and compliance programmes or measures for the purpose of preventing and detecting foreign bribery in their decisions to grant public advantages, including public subsidies, licences, public procurement contracts, contracts funded by official development assistance, and officially supported export credits;

ii. where member countries implement measures to incentivise enterprises to develop such compliance programmes or measures, provide training and guidance to their relevant government agencies, on how internal controls, ethics and compliance programmes or measures are taken into consideration in government agencies' decision-making processes, and ensure such guidance is publicised and easily accessible for companies;

iii. encourage law enforcement authorities, in the context of enforcement of the foreign bribery and related offences, to consider implementing measures to incentivise companies to develop effective internal controls, ethics, and compliance programmes or measures, including as a potential mitigating factor. Member countries should nevertheless ensure that the mere existence of internal controls, ethics and compliance programmes or measures does not fully exonerate the legal person from its liability, that the final consideration of such programmes or measures remains the sole responsibility of judicial, law enforcement, or other public authorities, and that sanctions remain effective, proportionate and dissuasive, in accordance with Article 3 of the OECD Anti-Bribery Convention;

iv. where member countries implement measures to incentivise companies to develop such compliance programmes or measures, ensure that competent authorities consider providing training and guidance on assessing the adequacy and effectiveness of internal controls, ethics and compliance programmes or measures for the purpose of preventing and detecting foreign bribery, as well as on how such programmes or measures are taken into consideration in the context of foreign bribery enforcement, and ensure such information or guidance is publicised and easily accessible for companies, where appropriate.

Public Advantages, including Public Procurement

XXIV. RECOMMENDS that:

i. member countries' laws and regulations permit authorities to suspend or debar, to an appropriate degree, from competition for public contracts or other public advantages, including public procurement contracts and contracts funded by official development assistance, companies determined to have bribed foreign public officials in contravention of that member country's national laws, considering mitigating factors. To the extent that a member country's laws and regulations permit the application of such measures to companies that are determined to have bribed domestic public officials, such measures should also be permitted in case of bribery of foreign public officials;

ii. member countries ensure that relevant government agencies are able to access information on companies sanctioned for foreign bribery, or, if this is not possible, to obtain this information from companies;

iii. where appropriate and to the extent possible, in making such decisions on suspension and debarment, member countries take into account, as mitigating factors, remedial measures developed by companies to address specific foreign bribery risks, as well as any gaps in their existing internal controls, ethics, and compliance programmes or measures;

iv. member countries provide guidance and training to relevant government agencies on such suspension and debarment measures applicable to companies determined to have bribed foreign public officials and on remedial measures which may be adopted by companies, including internal controls, ethics and compliance programmes or measures, which may be taken into consideration;

v. in accordance with the 2016 Recommendation of the Council for Development Cooperation Actors on Managing the Risk of Corruption [OECD/LEGAL/0431], member countries require anti-corruption provisions in bilateral aid-funded procurement, promote the proper implementation of anti-corruption provisions in international development institutions, including multilateral development banks, and work closely with development partners to combat corruption in all development co-operation efforts;

vi. member countries support the efforts of the OECD Public Governance Committee to implement the principles contained in the Recommendation of the Council on Public Procurement [OECD/LEGAL/0411], as well as work on transparency in public procurement in other international governmental organisations such as the United Nations, the World Trade Organisation (WTO), and the European Union, and are encouraged to adhere to relevant international standards such as the WTO Agreement on Government Procurement.

Officially Supported Export Credits

XXV. **RECOMMENDS** that:

i. countries Party to the OECD Anti-Bribery Convention that are not OECD Members adhere to and implement the OECD Recommendation of the Council on Bribery and Officially Supported Export Credits [OECD/LEGAL/0447];

ii. member countries support the efforts of the OECD Working Party on Export Credits and Credit Guarantees to monitor implementation of the OECD Recommendation of the Council on Bribery and Officially Supported Export Credits [OECD/LEGAL/0447].

Data Protection

XXVI. **RECOMMENDS** that, with due regard to data protection rules and privacy rights:

i. member countries ensure that compliance with data protection rules and laws that prohibit transmission of economic or commercial information does not unduly impede effective international co-operation in investigations and prosecutions of foreign bribery and related offences, in accordance with Articles 9 and 10 of the OECD Anti Bribery Convention;

ii. member countries ensure that compliance with data protection rules and laws that prohibit transmission of economic or commercial information does not unduly impede the effectiveness of anti-corruption internal controls, ethics, and compliance programmes or measures, including internal reporting mechanisms, due diligence, and internal investigation processes;

iii. member countries with applicable data protection rules provide guidance to companies and where appropriate, consider issuing regulations that allow for the processing of data in conducting anti-corruption related due diligence and internal investigation processes.

Follow-Up and Institutional Arrangements

XXVII. **INSTRUCTS** the Working Group on Bribery in International Business Transactions to carry out an ongoing programme of systematic follow-up to monitor and promote the full implementation of the OECD Anti-Bribery Convention and this Recommendation, in co-operation with the Committee for Fiscal Affairs, the Development Assistance Committee, the Investment Committee, the Public Governance Committee, the Working Party on Export Credits and Credit Guarantees, and other OECD bodies, as appropriate. This follow-up will include, in particular:

i. continuation of the programme of rigorous and systematic monitoring of member countries' implementation of the OECD Anti-Bribery Convention and this Recommendation to promote the full implementation of these instruments, including through an ongoing system of mutual evaluation, where each member country is examined in turn by the Working Group on Bribery, on the basis of a report which will provide an objective assessment of the progress of the member

country in implementing the OECD Anti-Bribery Convention and this Recommendation, and which will be made publicly available;

ii. receipt of notifications and other information submitted to it by the member countries concerning the authorities which serve as channels of communication for the purpose of facilitating international cooperation on implementation of the OECD Anti-Bribery Convention and this Recommendation;

iii. periodic reporting in Working Group on Bribery meetings on steps taken by member countries to implement the OECD Anti-Bribery Convention and this Recommendation, including non-confidential information on investigations and prosecutions of bribery of foreign public officials, as well as where appropriate on steps taken to enforce the demand side of such foreign bribery cases;

iv. voluntary meetings of law enforcement officials directly involved in the enforcement of the foreign bribery offence to discuss best practices and horizontal issues relating to the investigation and prosecution of the bribery of foreign public officials, in addition to voluntary participation by such law enforcement officials in Working Group on Bribery plenary sessions, country monitoring and other relevant activities;

v. examination of prevailing trends, issues and counter-measures in foreign bribery, including through work on typologies and cross-country studies;

vi. development of tools and mechanisms to increase the impact of monitoring and follow-up, and awareness raising, including through research, bribery threat assessments and the annual submission and public reporting of non-confidential enforcement data;

vii. provision of regular information to the public on its work and activities and on implementation of the OECD Anti-Bribery Convention and this Recommendation; and

viii. reporting to the Council on the implementation of this Recommendation no later than five years following its adoption and at least every five years thereafter.

XXVIII. NOTES the obligation of member countries to co-operate closely in this follow-up programme, pursuant to Article 3 of the Convention on the Organisation for Economic Co-operation and Development of 14 December 1960, and Article 12 of the OECD Anti-Bribery Convention.

Co-operation with Non-Members

XXIX. APPEALS to non-member countries that are major exporters and foreign investors to adhere to and implement the OECD Anti-Bribery Convention and this Recommendation and participate in any institutional follow-up or implementation mechanism.

XXX. INSTRUCTS the Working Group on Bribery in International Business Transactions to provide a forum for consultations with countries which have not yet adhered, in order to promote wider participation in the OECD Anti-Bribery Convention and this Recommendation, and their follow-up.

Relations with International Governmental and Non-Governmental Organisations and the Private Sector

XXXI. INVITES the Working Group on Bribery in International Business Transactions, to consult and co-operate with the international organisations and international financial institutions active in the fight against bribery of foreign public officials in international business transactions, and consult regularly with the non-governmental organisations and representatives of the business community active in this field.

Annex I: Good Practice Guidance on Implementing Specific Articles of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions

Having regard to the findings and recommendations of the Working Group on Bribery in International Business Transactions in its programme of systematic follow-up to monitor and promote the full

implementation of the OECD Convention on Combating Bribery in International Business Transactions (the OECD Anti-Bribery Convention), as required by Article 12 of the Convention, good practice on fully implementing specific articles of the Convention has evolved as follows:

A. Article 1 of the OECD Anti Bribery Convention: The Offence of Bribery of Foreign Public Officials

1. Article 1 of the OECD Anti-Bribery Convention should be implemented in such a way that it does not provide a defence or exception where the foreign public official solicits a bribe.

2. Member countries should undertake public awareness-raising actions and provide specific written guidance to the public on their laws implementing the OECD Anti-Bribery Convention and the Commentaries to the Convention.

3. Member countries should provide information and training as appropriate to their public officials posted abroad on their laws implementing the OECD Anti-Bribery Convention, so that such personnel can provide basic information to their companies in foreign countries and appropriate assistance when such companies are confronted with bribe solicitations.

B. Article 2 of the OECD Anti Bribery Convention: Responsibility of Legal Persons

1. Member countries should ensure that state-owned enterprises can be held liable for the bribery of foreign public officials in international business transactions.

2. Member countries systems for the liability of legal persons for the bribery of foreign public officials in international business transactions should not restrict the liability to cases where the natural person or persons who perpetrated the offence are prosecuted or convicted.

3. Member countries systems for the liability of legal persons for the bribery of foreign public officials in international business transactions should take one of the following approaches:

a. the level of authority of the person whose conduct triggers the liability of the legal person is flexible and reflects the wide variety of decision-making systems in legal persons; or

b. the approach is functionally equivalent to the foregoing even though it is only triggered by acts of persons with the highest level managerial authority, because the following cases are covered:

   - a person with the highest level managerial authority offers, promises, or gives a bribe to a foreign public official;
   - a person with the highest level managerial authority directs or authorises a lower level person to offer, promise, or give a bribe to a foreign public official; and
   - a person with the highest level managerial authority fails to prevent a lower level person from bribing a foreign public official, including through a failure to supervise him or her or through a failure to implement adequate internal controls, ethics, and compliance programmes or measures.

4. Consistent with Articles 2 and 4 of the OECD Anti-Bribery Convention and related Commentary, member countries should:

a. explore all jurisdictional bases available under their law when investigating and prosecuting legal persons for foreign bribery offences, including to establish territoriality and nationality jurisdiction;

b. in asserting nationality jurisdiction over legal persons for the purpose of investigating and prosecuting bribery of foreign public officials, consider criteria such as, but not limited to, the laws under which the legal person was formed or is organised, or the legal person’s headquarters or effective management and control;

c. ensure that they are able to exercise appropriate jurisdiction over legal persons regardless of whether they have jurisdiction over the natural person who committed the bribery of a foreign public official.

5. Member countries should have appropriate rules or other measures to ensure that legal persons cannot avoid liability or sanctions for foreign bribery and related offences by restructuring, merging, being acquired, or otherwise altering their corporate identity.

C. Responsibility for Bribery through Intermediaries

1. Member countries should ensure that in accordance with Article 1 of the OECD Anti-Bribery Convention and the principle of functional equivalence in Commentary 2 to the OECD Anti-Bribery Convention, a legal person cannot avoid responsibility by using intermediaries, including related legal persons and other third parties, irrespective of their nationality, to offer, promise, or give a bribe to a foreign public official on its behalf.

2. Member countries should undertake awareness-raising activities within both the public and private sectors and in particular among relevant law enforcement authorities in this regard.

D. Article 5: Enforcement

1. Member countries should be vigilant in ensuring that investigations and prosecutions of the bribery of foreign public officials in international business transactions are not influenced by considerations of national economic interest, the potential effect upon relations with another country or the identity of the natural or legal persons involved, in compliance with Article 5 of the OECD Anti-Bribery Convention.

2. Member countries should ensure, in conformity with their legal system, that the evidentiary threshold or any other standard necessary for initiating investigations is not applied in a way that prevents the effective investigation and prosecution of bribery of foreign public officials.

Annex II: Good Practice Guidance on Internal Controls, Ethics and Compliance

Introduction

This Good Practice Guidance (hereinafter “Guidance”) is addressed to companies, including state-owned enterprises, for establishing and ensuring the effectiveness of internal controls, ethics, and compliance programmes or measures for preventing and detecting the bribery of foreign public officials in their international business transactions (hereinafter “foreign bribery”), and to business organisations and professional associations, which play an essential role in assisting companies in these efforts. It recognises that to be effective, such internal controls, ethics, and compliance programmes or measures should be interconnected with a company’s overall compliance framework. It is intended to serve as non-legally binding guidance to companies in establishing effective internal controls, ethics, and compliance programmes or measures for preventing and detecting foreign bribery. This Guidance is flexible, and intended to be adapted by companies, in particular small and medium sized enterprises (hereinafter “SMEs”), according to their individual circumstances, including their size, type, legal structure, and geographical and industrial sector of operation, as well as the jurisdictional and other basic legal principles under which they operate.

A. Good Practice Guidance for Companies

Effective internal controls, ethics, and compliance programmes or measures for preventing and detecting foreign bribery should be developed on the basis of a risk assessment addressing the individual circumstances of a company, in particular the foreign bribery risks facing the company (such as its geographical and industrial sector of operation, and regulatory environment, potential clients and business partners, transactions with foreign governments, and use of third parties). Such circumstances and risks should be regularly monitored, re-assessed, and taken into account as necessary, to determine the allocation of compliance resources and ensure the continued effectiveness of the company’s internal controls, ethics,

and compliance programme or measures. Companies should consider, inter alia, the following good practices for ensuring effective internal controls, ethics, and compliance programmes or measures for the purpose of preventing and detecting foreign bribery:

1. strong, explicit and visible support and commitment from the board of directors or equivalent governing body and senior management to the company's internal controls, ethics and compliance programmes or measures for preventing and detecting foreign bribery with a view to implementing a culture of ethics and compliance;

2. a clearly articulated and visible corporate policy prohibiting foreign bribery, easily accessible to all employees and relevant third parties, including foreign subsidiaries, where applicable and translated as necessary;

3. compliance with this prohibition and the related internal controls, ethics, and compliance programmes or measures is the duty of individuals at all levels of the company;

4. oversight of ethics and compliance programmes or measures regarding foreign bribery, including the authority to report matters directly to independent monitoring bodies, senior management, the board of directors or equivalent governing body, the supervisory board or their relevant committees, are the duty of one or more senior corporate officers, such as a senior compliance officer, with an adequate level of autonomy from management and other operational functions, resources, access to relevant sources of data, experience, qualification, and authority;

5. ethics and compliance programmes or measures designed to prevent and detect foreign bribery, applicable to all directors, officers, and employees, and applicable to all entities over which a company has effective control, including subsidiaries, on, inter alia, the following areas:

   i. gifts;
   ii. hospitality, entertainment and expenses;
   iii. travel, including customer travel;
   iv. political contributions;
   v. charitable donations and sponsorships;
   vi. facilitation payments;
   vii. solicitation and extortion;
   viii. conflicts of interest;
   ix. hiring processes;
   x. risks associated with the use of intermediaries, especially those interacting with foreign public officials; and
   xi. processes to respond to public calls for tender, where relevant.

6. ethics and compliance programmes or measures designed to prevent and detect foreign bribery applicable, where appropriate and subject to contractual arrangements, to third parties such as agents and other intermediaries, consultants, representatives, distributors, contractors and suppliers, consortia, and joint venture partners (hereinafter "business partners"), including, inter alia, the following essential elements:

   i. properly documented risk-based due diligence pertaining to the hiring, as well as the appropriate and regular continued oversight of business partners throughout the business relationship;
   ii. informing business partners of the company's commitment to abiding by laws on the prohibitions against foreign bribery, and of the company's ethics and compliance programme or measures for preventing and detecting such bribery;

iii. seeking a reciprocal commitment from business partners;

iv. implementing mechanisms to ensure that the contract terms, where appropriate, specifically describe the services to be performed, that the payment terms are appropriate, that the described contractual work is performed, and that compensation is commensurate with the services rendered;

v. where appropriate, ensuring the company's audit rights to analyse the books and records of business partners and exercising those rights as appropriate;

vi. providing for adequate mechanisms to address incidents of foreign bribery by business partners, including for example contractual termination rights.

7. a system of financial and accounting procedures, including a system of internal controls, reasonably designed to ensure the maintenance of fair and accurate books, records, and accounts, to ensure that they cannot be used for the purpose of foreign bribery or hiding such bribery;

8. the use of internal control systems to identify patterns indicative of foreign bribery, including as appropriate by applying innovative technologies;

9. measures designed to ensure effective periodic communication and documented training for all levels of the company, on the company's ethics and compliance programme or measures regarding foreign bribery, as well as, where appropriate, for business partners;

10. appropriate measures to encourage and provide positive support and incentives for the observance of ethics and compliance programmes or measures against foreign bribery at all levels of the company including by integrating ethics and compliance in human resources processes], with a view to implementing a culture of compliance;

11. measures to address cases of suspected foreign bribery, which may include:

i. processes for identifying, investigating, and reporting the misconduct and genuinely and proactively engaging with law enforcement authorities;

ii. remediation, including, inter alia, analysing the root causes of the misconduct and addressing identified weaknesses in the company's compliance programme or measures;

iii. appropriate and consistent disciplinary measures and procedures to address, among other things, violations, at all levels of the company, of laws against foreign bribery, and the company's ethics and compliance programme or measures regarding foreign bribery; and

iv. appropriate communication to ensure awareness of these measures and consistent application of disciplinary procedures across the company.

12. effective measures for providing guidance and advice to directors, officers, employees, and, where appropriate, business partners, on complying with the company's ethics and compliance programme or measures, including when they need urgent advice on difficult situations in foreign jurisdictions, as well as measures to ensure there is no retaliation against any person within the company who is instructed or pressured, including from hierarchical superiors, to engage in foreign bribery and chooses not to do so;

13. a strong and effective protected reporting framework, including:

i. internal, confidential, and where appropriate, anonymous, reporting by, and protection against any form of retaliation for, directors, officers, employees, and, where appropriate, business partners, not willing to violate professional standards or ethics under instructions or pressure from hierarchical superiors, as well as for reporting persons willing to report breaches of the law or professional standards or ethics occurring within the company on reasonable grounds; and

ii. clearly defined procedures and visible, accessible, and diversified channels for all reporting persons to report breaches of the law or professional standards or ethics occurring within the company.

14. periodic reviews and testing of the internal controls, ethics and compliance programmes or measures, including training, designed to evaluate and improve their effectiveness in preventing and detecting foreign bribery, both on a regular basis and upon specific developments, taking into account the company's evolving risk profile, such as:

i. changes in the company's activity, structure and operating model,

ii. results of monitoring and auditing,

iii. relevant developments in the field,

iv. evolving international and industry standards, and

v. lessons learned from a company's possible misconduct and that of other companies facing similar risks based on relevant documentation and data.

15. in cases of mergers and acquisitions, comprehensive risk-based due diligence of acquisition targets; prompt incorporation of the acquired business into its internal controls and ethics and compliance programme; and training of new employees and post-acquisition audits;

16. external communication of the company's commitment to effective internal controls and ethics and compliance programmes.

B. Actions by Business Organisations and Professional Associations

Business organisations and professional associations may play an essential role in assisting companies, in particular SMEs, in the development of effective internal control, ethics, and compliance programmes or measures for the purpose of preventing and detecting foreign bribery. Such support may include, inter alia:

1. dissemination of information on foreign bribery issues, including regarding relevant developments in international and regional forums, and access to relevant databases;

2. making training, prevention, due diligence, and other compliance tools available;

3. general advice on carrying out due diligence; and

4. general advice and support on resisting extortion and solicitation, including, where appropriate, by promoting collective action.

Professional associations that exercise regulatory powers over certain professions may also play a significant role in adopting and implementing robust ethics standards for their members, including by setting out frameworks on actions to be taken by their members to prevent bribery or when confronted with suspected acts of foreign bribery and related offences committed by clients or employers.

About the OECD

The OECD is a unique forum where governments work together to address the economic, social and environmental challenges of globalisation. The OECD is also at the forefront of efforts to understand and to help governments respond to new developments and concerns, such as corporate governance, the information economy and the challenges of an ageing population. The Organisation provides a setting where governments can compare policy experiences, seek answers to common problems, identify good practice and work to co-ordinate domestic and international policies.

The OECD Member countries are: Australia, Austria, Belgium, Canada, Chile, Colombia, Costa Rica, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea, Latvia, Lithuania, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, the Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States. The European Union takes part in the work of the OECD.

OECD Legal Instruments

Since the creation of the OECD in 1961, around 460 substantive legal instruments have been developed within its framework. These include OECD Acts (i.e. the Decisions and Recommendations adopted by the OECD Council in accordance with the OECD Convention) and other legal instruments developed within the OECD framework (e.g. Declarations, international agreements).

All substantive OECD legal instruments, whether in force or abrogated, are listed in the online Compendium of OECD Legal Instruments. They are presented in five categories:

- **Decisions** are adopted by Council and are legally binding on all Members except those which abstain at the time of adoption. They set out specific rights and obligations and may contain monitoring mechanisms.

- **Recommendations** are adopted by Council and are not legally binding. They represent a political commitment to the principles they contain and entail an expectation that Adherents will do their best to implement them.

- **Substantive Outcome Documents** are adopted by the individual listed Adherents rather than by an OECD body, as the outcome of a ministerial, high-level or other meeting within the framework of the Organisation. They usually set general principles or long-term goals and have a solemn character.

- **International Agreements** are negotiated and concluded within the framework of the Organisation. They are legally binding on the Parties.

- **Arrangement, Understanding and Others**: several other types of substantive legal instruments have been developed within the OECD framework over time, such as the Arrangement on Officially Supported Export Credits, the International Understanding on Maritime Transport Principles and the Development Assistance Committee (DAC) Recommendations.