COMMENTS OF THE AMERICAN BAR ASSOCIATION SECTION OF INTERNATIONAL LAW REGARDING THE PROPOSED UPDATE TO THE 9 DECEMBER 2009 RECOMMENDATION OF THE COUNCIL FOR FURTHER COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS CURRENTLY UNDER CONSIDERATION BY THE ORGANIZATION OF ECONOMIC COOPERATION AND DEVELOPMENT'S WORKING GROUP ON BRIBERY

The views stated in these Comments are presented on behalf of the Section of International Law. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and therefore may not be construed as representing the policy of the American Bar Association.

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The American Bar Association Section of International Law (SIL) appreciates the opportunity to submit these comments on the proposed update to the Organization of Economic Cooperation and Development’s (OECD’s) 9 December 2009 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions (the “2009 Recommendation”).¹ The SIL welcomes the effort by the OECD Working Group on Bribery (WGB) to update its prior guidance to parties to the 1999 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the “Convention”).² These comments reflect the SIL’s experience and expertise with respect to the application of anti-corruption laws around the world and with important related international best practices, as reflected in: guidance from U.S. authorities, including but not limited to the U.S. Department of Justice’s and U.S. Securities and Exchange Commission’s November 2012 A Resource Guide to the U.S. Foreign Corrupt Practices Act (FCPA Guide)³; the International Organization for Standardization’s (ISO’s) standard ISO 37001: Anti-Bribery Management Systems⁴; and the OECD’s 18 February 2010 Good Practice Guidance on Internal Controls, Ethics and Compliance.⁵

The SIL’s comments focus on the consultation questionnaire the WGB created to solicit feedback.

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¹ Available at: https://www.oecd.org/corruption/anti-bribery/OECD-Anti-Bribery-Recommendation-ENG.pdf.


³ A copy of the FCPA Guide is available at: https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf.

⁴ Available at: https://www.iso.org/iso-37001-anti-bribery-management.html.

⁵ Available at: https://www.oecd.org/daf/anti-bribery/44884389.pdf.
GENERAL QUESTIONS FOR CONSULTATION

GQ1. What are your general impressions concerning the effectiveness and implementation of the 2009 Anti-Bribery Recommendation?

Overall, the OECD’s 2009 Recommendation was effective in focusing the anti-corruption efforts of parties to the Convention.

The global anti-corruption landscape has changed significantly since the OECD’s issuance of the 2009 Recommendation. Among other things, the world has seen a surge in countries enacting and bolstering local laws intended to prohibit the bribery of foreign public officials, an increase in anti-corruption enforcement, and a rise in cross-border collaboration among enforcement authorities from a range of countries that are party to the Convention. The 2009 Recommendation, aided by continuing reporting and comment process by the WGB, deserves significant credit for these trends, as it urged Convention members to continue to take meaningful steps to deter, prevent, and combat the bribery of foreign public officials, not only on a national level, but also on a multi-national level, with rigorous and systemic follow-up.

Specifically, parties to the Convention have made significant progress in implementing several of the recommendations set forth in the 2009 Recommendation, including:

- Taking effective measures to deter, prevent and combat the bribery of foreign public officials in connection with international business transactions (Rec. II);
- Ensuring vigorous and comprehensive implementation of the Convention, in particular its provisions requiring the criminalization of the bribery of foreign public officials (Rec. IV);
- Explicitly disallowing the tax deductibility of bribes to foreign public officials (Rec. VIII); and
- Consulting and cooperating with competent authorities in other countries, and, as appropriate, international and regional law enforcement networks involving member and non-Convention members, in investigations and other legal proceedings (Rec. XIII).

However, efforts to implement other recommendations set forth in the 2009 Recommendations have been less effective, including:

- Implementing appropriate whistleblower protections for employees who report in good faith and on reasonable grounds to competent authorities suspected acts of bribery of foreign public officials (Rec. IX(iii));
- Taking the steps necessary to ensure the laws, rules or practices with respect to accounting requirements, external audits, and internal controls, ethics and compliance are standardized and used to prevent and detect the bribery of foreign public officials (Rec. X); and
- Effectively using debarment to punish those suspected of bribery of foreign officials (Rec. XI).

In this context, the SIL:

- Recognizes that there are certain topic areas where there continues to be vigorous debate with reasonable opinions on both sides;
- Recognizes that there will never be any one single approach to combatting corruption. In a globalized economy with countries that have different legal systems and companies that face varying levels of competitive challenges, there is value in allowing diverse approaches to combatting corruption; and
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- Recommends that any update to the 2009 Recommendation focus the greatest amount of attention on those topic areas that history has shown are most effective at combatting the bribery of foreign officials.

In particular, the SIL recommends renewed focus on the following topic areas:
- Transparency and cooperation measures to address the “demand side” of foreign bribery while respecting important international legal principals of sovereign immunity and comity;
- Continued criminal and civil liability for legal persons, even as enforcement against natural persons increases in certain jurisdictions;
- The use of negotiated criminal and civil settlements consistent with the requirement for effective, proportionate, and dissuasive sanctions under the Convention;
  - Such guidance should cover the appropriate use of mitigating factors such as voluntary disclosure, cooperation, and compliance systems to ensure they are consistently and coherently applied by parties to the Convention, while recognizing the potential for formal “compliance defenses” against prosecution to create perverse incentives;
- Renewed focus on Article 4.3 of the Convention as a means to facilitate multi-jurisdictional enforcement; and
- The need to balance privacy rules and employee protections against the effective detection and prevention of foreign bribery within an organization.

**GQ2. Is there a need to increase impact of the OECD anti-bribery monitoring work and, if so, how?**

**Guidance on Article 1 of the OECD Anti Bribery Convention**

1. What recommendation could be envisaged to provide greater clarity with respect to certain elements of the foreign bribery offence?

2. How could foreign bribery awareness-raising and training actions be further addressed?

**Other defences**

3. What recommendation could be envisaged to address other defences applicable to the foreign bribery offence?

**Other issues related to criminalisation of foreign bribery**

4. What recommendation(s) could be envisaged to address issues related to foreign bribery, concerning, for instance the demand side of bribery or the bribery of officials from sports organisations, bearing also in mind the specific focus of the Anti-Bribery Convention and the work carried out in other fora on these issues?

Prosecution of the demand side of bribery lags for a variety of reasons, including a lack of transparency and cooperation among Convention members. In this context, the SIL supports OECD recommendations on transparency and cooperation measures specifically aimed at combatting the demand side of bribery. Particularly helpful in combatting the demand side of bribery, we believe, would be a commitment of Convention members that any country whose enforcement authorities identify misconduct by foreign officials during the course of an investigation disclose such information to the appropriate jurisdictions – including the country of the implicated foreign official, any countries in which the implicated foreign official may have transferred funds or assets, along with any other countries that may have jurisdiction to prosecute. Such disclosures could be made on a public or non-public basis, including multi-laterally between only the countries involved.
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The SIL would also support the idea of enlisting the support of international financial institutions such as the World Bank and International Monetary Fund (“IMF”) to combat the demand side of bribery. For example, such institutions could use their positions to encourage Convention members receiving assistance to prosecute their own officials when official corruption is suspected.

The SIL is mindful of the legal and political issues that can arise when one Convention member seeks to combat demand-side bribery by officials of another member, such as the principle of sovereign immunity, the act of state doctrine, and considerations of comity, in particular with regard to one member’s prosecution of another member’s officials. However, the SIL submits that measures proposed above serve to increase transparency and cooperation and would not encourage one Convention member to bring a criminal or civil enforcement action against officials of another Convention member. Accordingly, our proposed measures would allow Convention members to take steps to combat the demand side of bribery while fully respecting the important legal and political issues noted above.

Guidance on Article 2 of the OECD Anti Bribery Convention [Annex I, B]

Legal Persons

5. What further Guidance on liability of legal persons could be envisaged?

Civil and criminal penalties against legal persons, including corporations and other entities and organizations, can be a powerful deterrent to future corruption-related violations. Accordingly, while the SIL recognizes that Convention members differ in their treatment of legal persons, we approve of the WGB’s efforts to encourage all Convention members to adopt minimum standards of liability for legal persons that engage in foreign bribery.

We also emphasize that prosecution of legal persons and natural persons (i.e., individuals) are both important tools for combating corruption, such that increased emphasis on enforcement against natural persons should not necessarily imply a decrease in enforcement against legal persons. While enforcement actions against natural persons can help deter individual wrongdoing, the prosecution of legal persons encourages individuals at all levels within a company or organization, including shareholders, board members, senior executives, mid-level management, rank-and-file employees, and agents and representatives – to prioritize compliance over competing concerns and helps to prevent the scapegoating of individual bad actors that could allow a legal person to deflect from the need to address underlying organization or cultural problems. The prosecution of legal persons also serves an important purpose in protecting shareholders’ legitimate interests in both profitability and compliance.

6. What recommendation could be envisaged to further address the issues of responsibility of legal persons for foreign bribery through intermediaries?

Compliance

7. How could the Good Practice Guidance on Internal Controls, Ethics, and Compliance (the GPG) annexed to the 2009 Anti-Bribery Recommendation be revised to reflect evolving global standards?

8. What recommendation could be envisaged to address the issue of incentivising antibribery compliance?

The SIL supports the use of structured criminal and civil settlements to resolve anti-corruption violations, provided they are consistent with the requirement for effective, proportionate, and dissuasive sanctions under the Convention. Structured settlements with legal persons can provide an opportunity
for enforcement authorities to require the adoption of a compliance program (or make changes to an existing compliance program) consistent with the OECD’s Good Practice Guidance on Internal Controls, Ethics, and Compliance, particularly in connection with policies and procedures that could have addressed any alleged misconduct. The imposition of such compliance measures can affect real change within a legal person’s organization and culture and serve to prevent future misconduct.

In connection with such structured settlements, the SIL also favors the consideration of mitigating factors such as voluntary disclosure, cooperation, remediation, and the implementation of effective compliance systems, while seeking to ensure that these factors are consistently and coherently applied by Convention members. Voluntary disclosures by legal persons can serve as a useful source of valuable information to anti-corruption enforcement authorities and should be encouraged. Similarly, cooperation in the face of corruption allegations, where appropriate, can benefit all parties involved, incentivizing compliance and good behavior by alleged violators and producing enormous savings for enforcement authorities, both in terms of costs and resources, during the investigation of the alleged misconduct. These savings that can increase the effectiveness of Convention members anti-corruption laws and result in the prosecution of violations that may otherwise have gone unpunished.

The SIL does, however, have concerns about the adoption of formal “compliance defenses” to anticorruption enforcement because of their potential to create unanticipated incentives that could undermine the Convention’s underlying purpose. While it is certainly appropriate for enforcement authorities to consider the existence of a compliance programs when negotiating settlements with corporate defendants, the availability of a formal compliance defense could incentivize so-called “paper” compliance programs that are designed to placate anti-corruption enforcement authorities rather than actually detect and prevent misconduct. Specifically, companies may begin designing their compliance programs for the purpose of meeting the criteria of the compliance defense rather than for the purpose of actually preventing bribes.

**Periodic review of laws and approach to foreign bribery enforcement [Rec. V]**

**Effectiveness of enforcement actions**

9. What recommendation(s) could be envisaged to further enhance the effectiveness of foreign bribery enforcement?

Article 4.3 of the Convention provides that:

When more than one Party has jurisdiction over an alleged offence described in this Convention, the Parties involved shall, at the request of one of them, consult with a view to determining the most appropriate jurisdiction for prosecution.

In the SIL’s view, drawing attention to Convention members’ obligations under Article 4.3 could alleviate some of the issues and concerns that have arisen in connection with the recent increase in multi-jurisdictional enforcement actions, particularly as Convention members have increased their anti-corruption enforcement efforts. However, in the Section’s experience, Convention members rarely consider Article 4.3 in their enforcement decisions.

The SIL recommends discussion on a mechanism for a private party to officially request that Convention members confer and determine the most appropriate jurisdiction for prosecution.

The SIL also supports increased protections for whistleblowers. The task for law enforcement to spot disguised cash on an organization’s books or accounts without the benefit of knowing where to look is near-impossible. Yet in many countries, there are few incentives for whistleblowers to report concerns.
about potential misconduct, either within their companies or organizations or to the relevant enforcement authorities. The Section therefore recommends that the OECD (1) make further efforts to encourage Convention members to require legal persons provide sufficient internal channels for the effective reporting of employee concerns; and (2) advocate for Convention members to implement legislation that not only protects whistleblowers but also provides a financial incentive for them to come forward. In connection with such efforts, however, it is critical to properly balance whistleblower protections and measures intended to hold culpable individuals to account. Whistleblower protections should be carefully drafted so as to minimize the risk of abuse by the most culpable individuals. In particular, whistleblower protections should be conditioned on full disclosure of all relevant facts about the alleged corrupt conduct, which should ensure that that enforcement officials obtain useful information while limiting the potential for abuse.

10. What recommendation could be envisaged to usefully address investigative means in foreign bribery investigations?

While the SIL supports individual privacy rules and protections for employees, we note that such rules can conflict with the need for foreign bribery enforcement. Often, it can be difficult for legal persons to detect and prevent foreign bribery when underlying data is unavailable or employees have little incentive to speak with compliance personnel about potential misconduct. While employee protections are important, legal persons must be able to terminate bad actors for corrupt conduct, both to prevent future misconduct and to send clear signals about the importance of anti-corruption compliance. The SIL welcomes the opportunity to discuss how to develop recommendations that can resolve these competing demands.

11. What recommendation could be envisaged on the issue of transparency of beneficial ownership information, given this issue is currently already addressed in other fora?

12. What recommendation could be envisaged to further support the enforcement of Article 5 of the Convention?

13. What recommendation could be envisaged to address the independence of the judiciary as it relates to foreign bribery enforcement?

14. What recommendation could be envisaged to address non-trial resolutions in the enforcement of the foreign bribery offence?

In general, the SIL supports non-trial resolutions as a potential means of increasing enforcement of national anti-bribery laws. We applaud the work of the Recommendation 6 Network in developing Principles for the Implementation and Use of Non-trial Resolutions of Foreign Bribery Cases and agree that non-trial resolutions advance the purpose of the Treaty.

At the same time, the SIL recommends that Convention members encourage their enforcement authorities to publicly enumerate the elements of an anti-corruption violation and produce evidence in support of each element for all non-trial resolutions. In the Section’s experience, non-trial resolutions can encourage both enforcement authorities and legal persons to reach settlements for dubious violations, in particular in connection with corruption-related accounting charges. We submit that publication of supporting evidence for each anti-corruption element will reduce the incentives on both sides to reach such dubious settlements.
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While we support the OECD’s efforts to highlight the potential benefits of non-trial resolutions, we also recognize that they remain controversial and may not be the right solution for increasing enforcement across the board for all Convention members.

15. What recommendation could be envisaged to further address the effective, proportionate and dissuasive nature of sanctions for foreign bribery?

16. What recommendation could be envisaged to further address the enforcement challenges of confiscation—including challenges to identify and quantify proceeds?

17. What recommendation could be envisaged to address issues such as effective enforcement and publicity of sanctions?

The SIL recommends greater disclosure of sanctions, including disclosure of sanctions against individuals to all countries of which that individual is a citizen, is a permanent resident, or holds funds related to the misconduct that led to the sanction. Such transparency and cooperation measures may prove a powerful tool for anti-corruption enforcement without impinging on important concerns such as due process and privacy.

18. Which other enforcement challenges (e.g. the interaction of remedies in cross-border corruption cases) could be addressed as part of the review of the Anti-Bribery Recommendation?

19. What recommendation could be envisaged to address the issue of mitigating circumstances in foreign bribery cases?

20. What recommendation could be envisaged to address the issue of tax treatment of sanctions?

The SIL is opposed to the tax deductibility of sanctions imposed as a result of corrupt activities. We support OECD efforts to standardize the non-deductibility of pecuniary sanctions across Convention members.

21. What recommendation could be envisaged to address the issue of judicial specialisation and training?

22. What step could the Working Group take to further address small facilitation payments?

23. What recommendation could be envisaged to address the issue of awareness-raising in the public and private sectors?

24. What step could the Working Group envisage to address the particular foreign bribery risks in certain sensitive sectors?