RESOLVED, that the American Bar Association supports the United States’ ratification of the
Council of Europe’s Criminal Law Convention on Corruption ("COE Convention"), provided
that a significant number of eligible states have demonstrated that they are also prepared to
accede to this agreement, and further provided that the terms of such accession by other acceding
States provide satisfactory evidence that the Convention will not be used by States to dilute their
commitments under other international anti-corruption instruments.

FURTHER RESOLVED, that the American Bar Association’s support of the United States’
ratification of the COE Convention is subject to the adoption of reservations, understandings and
interpretative statements, as appropriate, to the following effect:

1. (1) existing federal laws would be relied upon to implement Article 14
   (account offices), Articles 7, 8 (commercial bribery), Article 5 (active and
   passive bribery of foreign public officials), Articles 13 and 19 (money
   laundering), and no new legislation would be required to implement these
   provisions;

2. (2) a reservation would be taken to Article 12 (trading in influence), to ensure that
   no U.S. obligation to criminalize lobbying or other similar activities currently
   permitted under U.S. law would be created by ratification, and recognizing that,
   to the extent that Article 12 prohibits the bribery of a public official, such
   activity is already addressed by other obligations under the Convention and by
   existing U.S. law;
a reservation would be taken to Article 17 (nationality jurisdiction), affirming that the United States will follow its traditional principles of territorial jurisdiction, except where otherwise provided by law;

(4) breach of duty would be required as an element of the bribery offenses specified in Articles 5, 6, 9, 10 and 11 of the Convention; and

(5) U.S. participation in the Convention would not derogate from its obligations in other anticorruption instruments, which would be governed by their own terms.

FURTHER RESOLVED, that the American Bar Association strongly favors the signing, ratification and implementation of the COE Convention by member States of the Council of Europe, and by other States that are eligible to accede to the COE Convention, subject to minimal reservations, understandings and interpretive statements, and provided that such accession will not be used by States to dilute their commitments under other international anti-corruption instruments.

FURTHER RESOLVED, that, to ensure consistent implementation and active enforcement of international anti-corruption instruments and agreements, including those of the Organisation for Economic Cooperation and Development, the Organization of American States, and the Council of Europe, the American Bar Association supports ongoing and transparent monitoring efforts, and the provision by participating States, including the United States, of adequate resources for such monitoring efforts, and encourages the participation not only of the State Parties to the international anti-corruption instruments and agreements, but also that of multiparty, non-governmental organizations, and the private sector, in such monitoring efforts.

FURTHER RESOLVED, that the American Bar Association recognizes the need for prompt, full, and consistent implementation of international anti-corruption instruments and for full cooperation and active enforcement at the national level.
I. INTRODUCTION

The Council of Europe’s Criminal Law Convention on Corruption ("COE Convention"),\(^1\) negotiated by the member states of the Council of Europe, with the participation of observers, including the United States, was adopted by the Council of Ministers on November 4, 1998, and opened for signature on January 27, 1999 in Strasbourg, France. As of October 2, 2000, five states have ratified the COE Convention; it will enter into force once 14 states have ratified it.

In addition, the Council of Europe adopted a separate monitoring mechanism, the "Group of States Against Corruption—GRECO," which began functioning on May 1, 1999.\(^2\) As of October 2, 2000, 25 states— including the United States— have joined the GRECO. Membership in the GRECO overlaps, but is not identical to, membership in the COE Convention. Although a State Party automatically joins the GRECO when it ratifies the COE Convention, the reverse is not true; a State Party may choose to participate only in the GRECO, but not accede to the COE Convention.

Where they have not already done so, States Parties to the COE Convention are required to criminalize the active and passive bribery of domestic and foreign government officials, and officials of public international organizations; bribery in private commercial transactions; "trading in influence;" laundering of the proceeds of bribery and corruption offenses; and accounting and record-keeping violations. States Parties are further required to implement appropriate domestic measures to deter, investigate, and prosecute corruption offenses, as well as to provide effective legal assistance to other States Parties, \textit{sua sponte} and upon request. Further, through their participation in the GRECO, the States Parties will be able to review, assist, and enhance one another’s implementation of the COE Convention and their adherence to the "Twenty Guiding Principles for the Fight Against Corruption" ("Guiding Principles"), adopted by the Council of Europe’s Committee of Ministers in November 1997.

The COE Convention is the third multinational anti-corruption convention. The ABA has supported two prior, similar conventions which are now in force—the Organisation for Economic Co-operation and Development’s ("OECD") Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("OECD Convention") and the Organization of American States' ("OAS") Inter-American Convention Against Corruption ("Inter-American Convention"). The United States is a party to both of these conventions.

While the bribery of domestic public officials is universally prohibited, the prohibition against the bribery of other states’ officials is a new development for most countries. To the extent that national laws—particularly those governing the corruption of foreign officials—are non-existent, inconsistent, or are inconsistently enforced, the creation of international treaty obligations is an important means of preventing and reducing the incidence of cross-border corruption. Moreover, the COE Convention may have a more far-reaching impact on the prevention and prosecution of transnational bribery than its predecessors, because it seeks to criminalize both the solicitation and receipt of illicit offers or payments, as well as the making of corrupt offers or payments.


This memorandum recommends that the American Bar Association ("ABA") support the ratification and implementation of the COE Convention, by the members of the Council of Europe as well as by non-member states eligible to accede to this agreement. The ABA has been a guiding force in promoting the rule of law and the eradication of corruption in international business transactions. Through the ABA, its members—many of whom have substantial experience and expertise in this arena—can support these objectives by placing their resources at the disposal of governments, international organizations, and non-governmental organizations to assist in the effective implementation of the COE Convention and the GRECO. Therefore, subject to certain guiding principles, which are more fully articulated in this Report, the ABA recommends the adoption, ratification and implementation of the COE Convention by the United States and other countries.

That is, because of the extensive overlap between the membership in the Council of Europe and the OECD, and the approach to certain key issues in the COE Convention, there is a risk that the COE Convention could be used by some states to dilute their commitments to the OECD Convention or to retard the development of common international standards. Therefore, the ABA suggests conditioning the ratification of the COE Convention on the development of a critical mass of support in OECD and non-OECD countries for its adoption and implementation, as well as a strong indication that countries with membership in both the Council of Europe and the OECD will not use their participation in the COE Convention to undercut their commitments to fully implement the OECD Convention.

II. BACKGROUND

A. The Development of the COE Convention

The COE Convention was negotiated following a directive issued by the European Ministers of Justice at their 19th Conference in Valletta, Malta, in 1994. The Justice Ministers recommended the creation of a Multidisciplinary Group on Corruption ("le Groupe multidisciplinaire sur la corruption" or "GMC"), which was created in September 1994 and charged with the task of examining what measures should be included in an international "programme of action," as well as to examine the possibility of drafting model laws or codes of conduct, including international conventions and follow-up mechanisms. Beginning in March 1995, the GMC prepared and submitted to the Ministers a draft "Programme of Action against Corruption." The Committee of Ministers adopted the Programme of Action in November 1996 and instructed the GMC to implement it before December 31, 2000.

Beginning in February 1996, the Criminal Law Working Group of the GMC ("le Groupe multidisciplinaire sur la corruption penale" or "GMCP") began drafting a criminal law convention. In November 1997, the GMCP transmitted the draft text to the GMC. The final draft was submitted to the Committee of Ministers in November 1998, at which time the Ministers adopted the COE Convention. It was opened for signature on January 27, 1999.

B. Development of the GRECO Agreement

In its Programme of Action, the Committee of Ministers directed the GMC to develop a follow-up mechanism that would monitor the implementation of the "Twenty Guiding Principles for the Fight Against Corruption" ("Guiding Principles") adopted on November 6, 1997 by the Committee of Ministers, the COE Convention, and any other international instruments that might be adopted. The GMC therefore proposed the creation of a monitoring mechanism called the "Group of States against Corruption—GRECO." On May 5, 1998, the Committee of Ministers adopted Resolution (98)7, which authorized the establishment of the GRECO in the form of a partial and enlarged agreement. Participation in the GRECO is open to member and non-member states that have adopted the Guiding Principles, or acceded to the
COE Convention. Full membership of the GRECO is limited to those countries that participate fully in the mutual evaluation process and agree to be evaluated.

C. Other Multilateral Anti-Corruption Conventions

The COE Convention is the third in a series of multi-lateral anti-corruption conventions. It follows two other landmark conventions—the OECD Convention’ and the Inter-American Convention. The Inter-American Convention was opened for signature on March 29, 1996, and entered into force on March 6, 1997. As of October 2, 2000, this convention has been signed by 26 countries and ratified by 20 countries, including the United States. On December 17, 1997, the OECD Convention was opened for signature. The OECD Convention entered into force on February 15, 1999 and, as of October 2, 2000, has been ratified by 26 countries including the United States.

While all three conventions are similar in that they require States Parties to criminalize certain specified bribery and corruption offenses, and to cooperate with one another in the investigation and prosecution of such offenses, there are distinct differences between them. The OECD Convention, modeled on the United States Foreign Corrupt Practices Act of 1977 (“FCPA”), as amended, 15 U.S.C. §§ 78dd-1, et seq., is the most narrowly focused of the three. It requires States Parties to criminalize corrupt offers, promises or gifts of any undue pecuniary or other advantage to a foreign public official to induce or influence that official to act or refrain from acting in his or her official capacity, where the offeror intended to obtain or retain business or other improper advantage in the conduct of international business, in effect adopting the U.S. Foreign Corrupt Practices Act (“FCPA”) as an international standard. Similarly, the Inter-American Convention requires States Parties to criminalize offers or gifts of financial or other benefits to a foreign public official, in connection with a commercial transaction, in order to influence or induce the official to do some act, or refrain from acting, in his or her official capacity. In addition, both the COE and the Inter-American Conventions require their States Parties to criminalize other acts, including the bribery of domestic public officials.

Both the OECD and Inter-American Conventions are “supply-side” agreements with respect to transnational bribery. That is, like the FCPA, they require States Parties to criminalize only “active bribery” or the making of illicit offers or payments to foreign public officials in connection with commercial activities. With respect to the bribery and corruption of domestic public officials, the COE and the Inter-American Conventions also require their States Parties to criminalize demand-side or “passive” bribery (the solicitation or acceptance of bribes) by the official in connection with his or her official functions, but without the requirement of a commercial nexus. Only the COE Convention requires its States Parties to criminalize the passive bribery of foreign officials. Further, the COE Convention requires only that the illicit act have a commercial nexus in connection with the bribery of private parties. As discussed below, the COE Convention also directs States Parties to criminalize conduct that, under some circumstances, may be lawful under U.S. domestic law, for example, lobbying legislators or regulators, or contributing to political campaigns.

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III. SUMMARY OF THE COUNCIL OF EUROPE’S CRIMINAL LAW CONVENTION ON CORRUPTION

This section of this Report reviews and summarizes certain articles of the COE Convention, discusses how these provisions relate to U.S. domestic law, highlights the unresolved issues surrounding the language adopted by the COE Convention, and notes where the COE Convention’s text appears to diverge from U.S. law.5

In certain instances, if read broadly, the COE Convention would require substantial changes to U.S. law (e.g., the creation of false accounting or recordkeeping offenses for non-publicly held companies and individuals), or to call for the criminalization of currently lawful conduct (e.g., lobbying public officials or making political campaign contributions). The ABA therefore suggests that, because U.S. federal law sufficiently addresses the substantive criminal offenses required by the COE Convention, where its language is subject to multiple interpretations the COE Convention should be interpreted to prohibit only those activities that are currently illegal under federal law (e.g., bribery of legislators), and not to require the criminalization of lawful conduct (e.g., lobbying). To that end, if the U.S. ratifies the COE Convention subject to the guiding principles articulated in the proposed reservations, declarations, and interpretive statements discussed herein, it will not be necessary to amend U.S. federal law to comply with this agreement.

Moreover, certain of the provisions in the COE Convention, notably the narrow definition of the covered public officials, conflict with similar, but broader, definitional language in the OECD and Inter-American Conventions. Therefore, the ABA further recommends that compliance with the COE Convention by those States Parties that are also parties to the OECD or the Inter-American Conventions, or both, should not derogate from their compliance with these prior-adopted conventions. Where any of the three anti-corruption conventions are in conflict on specific points, States Parties should adhere to the provisions of the stricter agreement, in order to effect each of these treaties’ principles and goals.

A. The Structure of the COE Convention

The COE Convention is divided into 42 articles, which are organized into five chapters. Chapter I, entitled “Use of Terms,” supplies the definitions of the terms “public official,” “judge” and “legal person,” as used in the COE Convention. Chapter II—“Measures to be Taken at the National Level”—requires States Parties to enact various criminal laws addressing the bribery of domestic and foreign officials, as well as officials of certain public international organizations. Most of the substantive (and hence potentially more controversial) provisions are contained within this Chapter. Chapter III—“Monitoring of Implementation”—provides that “GRECO” will monitor States Parties’ implementation of the COE Convention and adherence to the Guiding Principles. In Chapter IV, the COE Convention requires States Parties to undertake a variety of measures to enhance international legal assistance and cooperation, including the development of information-sharing systems and, where necessary, extradition procedures. Chapter V contains a number of procedural and technical provisions.

Chapter II, containing the COE Convention’s substantive prohibitions, is divided into 22 articles.6 The first ten articles are organized by the identity of the intended recipient of the corrupt offer. Where applicable, they are further broken down along parallel lines into

5 Because of the COE Convention’s length, this Report only addresses those Articles that are most relevant to the COE Convention’s objectives, or which appear to be inconsistent with U.S. law.

6 Although the COE Convention is organized into chapters, the articles are numbered consecutively from the beginning of Chapter I. Thus, the twenty-two articles of Chapter II are numbered 2-23.
prohibitions on active and passive bribery. These ten articles address: domestic bribery (Articles 2-4); bribery of foreign officials including legislators (Articles 5-6); private sector bribery (Articles 7-8); bribery of other foreign bodies (Articles 9-11); trading in influence (Article 12); and derivative or bribery-related offenses, specifically money laundering, accounting violations and participatory liability (Articles 13-15). The following seven articles of the Chapter relate to such matters as immunity (Article 16), jurisdiction (Article 17), corporate liability (Article 18), sanctions (Article 19), specialised authorities (Article 20), witness protection (Article 22), and mutual legal assistance (Articles 21 and 23).

1. Chapter I—Use of Terms (Article 1)

Chapter I, Article 1 defines the term “public official” by referring “to the definition of ‘official,’ ‘public officer,’ ‘mayor,’ ‘minister’ or ‘judge’ in the national law of the State in which the person in question performs that function and as applied in its criminal law.” Article 1 further defines “judge” to include prosecutors as well as holders of “judicial offices.” This article also defines “legal person” as “any entity having such status under the applicable national law, except for States or other public bodies in the exercise of State authority and for public international organisations.” In addition, Article 1 provides that “in the case of proceedings involving a public official of another State, the prosecuting State may apply the definition of public official only insofar as that definition is compatible with its national law.”

While the definition of “legal person” is essentially coextensive with similar definitions under U.S. law, the definition of “public official” is narrower than those in the OECD or Inter-American Conventions. Because Article 1 refers to definitions found in the local law of both the requesting and the requested states, rather than adopting an autonomous standard, it will result in a lack of uniformity among States Parties. For example, Article 1 does not cover officials of state-owned enterprises, persons serving in quasi-official capacities, or those who perform other public functions. By contrast, both the Inter-American and OECD Conventions prohibit the bribery of those who perform public functions, and of officials of state-owned enterprises. In addition, the inclusion of “mayors” leads to anomalous results where persons who are relatively low-level officials in many countries will be subject to the COE Convention’s strictures, whereas persons operating at a higher level of government might be excluded if they are not considered “public officials” under domestic law.

Because U.S. federal law is well-developed in this area, the narrow scope of these definitions does not pose a problem for compliance by the United States. In two respects, however, the narrow definition of the covered officials raises questions about whether the COE Convention will be fully effective. First, the COE Convention may not achieve its anti-corruption goals in States Parties where public functions are performed by individuals who do not hold official government positions or who hold positions other than those specified in Article 1. Second, inconsistencies in the obligations imposed by the various conventions will complicate the efforts of States Parties to comply with these conventions and with their national legislation. This may be of particular concern in cases of transnational bribery, where the laws of more than one State Party are often at issue. For this reason, the ABA reaffirms its position concerning the crucial importance of developing consistent and effective mechanisms for deterring corruption.

2. Chapter II—Bribery (Articles 2-11)

Articles 2-11 of the COE Convention require each State Party to criminalize both active and passive bribery (i.e., the giving and taking of bribes), under its domestic law, and to
enforce that law to the extent of its jurisdiction.\textsuperscript{7} Articles 2 and 3 establish the offenses of active and passive bribery of domestic public officials; the remaining articles extend the same prohibitions to the bribery of members of domestic public assemblies, foreign public officials and members of foreign public assemblies, private sector entities, and to officials, members and judges of international organizations, parliamentary assemblies and courts.

Article 2 defines active bribery as the intentional “promising, offering or giving by any person, directly or indirectly, of any undue advantage to any of its public officials . . . to act or refrain from acting in the exercise of his or her functions,” whether the undue advantage accrues to the official or to a third party. Article 3 mirrors Article 2, defining the substantive offense of passive bribery as the “request or receipt . . . or the acceptance of an offer or a promise of such an [undue] advantage” by a public official under such circumstances. The term “undue advantage” is not defined within the COE Convention; whether a particular transaction confers an “undue advantage” will have to be determined by reference to domestic law.

The COE Convention shares with the OECD and the Inter-American Conventions a basic definition of the elements of the offense of active bribery. In essence, these agreements prohibit illicit offers or payments to or for an official, as defined, with the intent to induce or cause that person to misuse his or her office, to the benefit of the offeror. However, unlike the FCPA, the OECD Convention and Article VIII of the Inter-American Convention (Transnational Bribery), which prohibit active transnational bribery only in the commercial context, the COE Convention requires States Parties to criminalize both the active and passive

\textsuperscript{7} Although the COE Convention appears ambitious in its scope, U.S. federal law already prohibits most of the substantive offenses covered by this convention. The U.S. has long prohibited: (1) the bribery of domestic public officials through various federal and state laws; (2) the bribery of foreign public officials through the FCPA; (3) money laundering through various criminal and civil statutes; (4) misleading accounting and recordkeeping practices for public companies through federal securities statutes and regulations, as well as through the Internal Revenue Code where appropriate. In addition, U.S. law prohibits the deduction of bribe payments through the Internal Revenue Code.

Moreover, in 1998, the United States amended the FCPA to comply with the OECD Convention. In addition to its previous restrictions on U.S. companies, U.S. and foreign “issuers” of publicly-traded securities, and U.S. citizens and residents’ payments to foreign officials, political parties, party officials, and candidates for political office, the FCPA now prohibits offers or payments made by any person while in the territorial jurisdiction of the United States, to or for any foreign government official or official of any public international organization designated by executive order. U.S. federal jurisdiction now extends to U.S. nationals and companies that commit FCPA offenses while outside the territory of the United States, regardless of whether a means or instrumentality of interstate commerce was used in furtherance of an illicit offer or payment. Where appropriate, other U.S. federal laws also may be used to prosecute bribery and corruption offenses. For example, the federal bribery and gratuity statute, 18 U.S.C. § 201, prohibits offers of bribes or gratuities to, or the solicitation or receipt of bribes and gratuities by, federal officials. The Travel Act, 18 U.S.C. § 1952, prohibits travelling or causing others to travel across state lines, or using facilities in interstate commerce, with the intent to promote, carry on or facilitate an unlawful activity, including bribery in violation of state law. The United States also may prosecute corrupt officials and others who devise any scheme or artifice to defraud citizens of “the intangible right to honest services.” See 18 U.S.C. §§ 1341, 1343, 1346. Other U.S. statutes, including 18 U.S.C. § 1001 (false statements), and 26 U.S.C. § 162 (illegal deduction of bribe payments), may be used to prosecute bribery and corruption offenses.

Because there are substantial similarities between the acts to be criminalized by the COE Convention and present U.S. law as well as prior international law, there is no need to modify U.S. federal law to comply with the COE Convention.
bribery of foreign public officials regardless of whether the offeror’s purpose relates to a commercial activity.

Because the COE Convention would prohibit all corrupt payments to foreign officials, for whatever purpose, it is broader in scope than the OECD and Inter-American Conventions. It is also broader than U.S. federal law, which does not specifically prohibit payments to foreign public officials for non-commercial purposes. Although, in appropriate circumstances, such acts may be prosecuted under statutes other than the FCPA, there does not seem to be a groundswell of support to expand the law in this area. Thus, the United States may be required to file a declaration that Articles 5-6 and 9-11 apply only to the bribery of the foreign officials in connection with commercial transactions and that U.S. law, primarily the FCPA, sufficiently criminalizes these offenses.

a. Bribery of Domestic Public Officials and Assembly Members (Articles 2-4)

Articles 2 through 4 prohibit active and passive bribery of domestic “public officials” or any “member of a domestic public assembly exercising legislative or administrative powers.” Bribery of domestic public officials, including legislators, is already a criminal offense under U.S. federal law. Further, like the COE Convention, U.S. law criminalizes both the active and passive bribery of federal officials, although it does not use those terms. Because of the structure of the U.S. legal system, in which the federal government and each state government prohibits the bribery of officials within its own jurisdiction, these overlapping legal regimes may be somewhat inconsistent. However, as a practical matter, most of these legal regimes overlap, and through the use of a variety of federal statutes (e.g., the mail and wire fraud statutes, 18 U.S.C. §§ 1341, 1343, and 1346; the Hobbs Act, 18 U.S.C. § 1951; the Travel Act, 18 U.S.C. § 1952; etc.) federal jurisdiction can and does often extend to state and local corruption. For this reason, the U.S. may need to file a declaration to the effect that it understands that its obligation is to address the acts described in Articles 2-4 at the “national” level, and that because federal law sufficiently prohibits these offenses, no change to U.S. law is required to comply with the COE Convention.

b. Transnational Bribery (Articles 5-6 and 9-11)

These articles prohibit the active or passive bribery of foreign public officials, members of foreign public assemblies, officials of public international organizations, members of international assemblies, and judges and officials of international courts. Like the other international anti-corruption conventions, the COE Convention sets a baseline standard describing the acts to be criminalized. The specific details of the offenses are left to any necessary implementing legislation to be enacted by the States Parties.

Thus, the COE Convention is both broader and narrower in scope than the FCPA. Unlike the FCPA, the COE Convention does not limit its prohibitions against illicit offers and payments only to those made in connection with a commercial activity. Moreover, it is unique in that it requires the criminalization of passive transnational bribery. Consistent with other international treaties, it is silent on whether States Parties should enact implementing legislation concerning exceptions or affirmative defenses to any criminal statutes.

The COE Convention more narrowly defines the pool of covered foreign officials than the FCPA. Under the COE Convention, the bribery of officials of public international organizations and members of international assemblies is prohibited only where the intended recipient is a member of those organizations and assemblies of which the State Party is a member. Bribery of judges and officials of international courts is similarly prohibited only for courts whose jurisdiction has been accepted by the State Party. U.S. law does not make these distinctions. With the exception of the requirement that the president designate the “public
international organizations” covered by the FCPA—of which the U.S. may or may not be a member—U.S. law does not distinguish among foreign officials.

c. Private Sector Bribery (Articles 7-8)

Articles 7-8 prohibit the active and passive bribery of private individuals when committed “in the course of business activity,” a limitation not present in the rest of the COE Convention. Article 7 provides in pertinent part that States Parties shall adopt measures to criminalize the active bribery of private individuals under their domestic law “when committed intentionally in the course of business activity, the promising, offering or giving, directly or indirectly, of any undue advantage to any persons who direct or work for, in any capacity, private sector entities, for themselves or for anyone else, for them to act, or refrain from acting, in breach of their duties.” Similarly, Article 8 requires that States Parties establish as a criminal offense under their laws the “request or receipt, directly or indirectly, by any persons who direct or work for, in any capacity, private sector entities, of any undue advantage or the promise thereof for themselves or for anyone else, or the acceptance of an offer or a promise of such an advantage, to act or refrain from acting in breach of their duties.

Chapter II calls for “measures to be taken at the national level.” While there are differing views as to whether some states would be required to adopt implementing legislation, existing U.S. federal law would meet the obligation to criminalize private sector bribery. In large measure, under current U.S. federal and state law, private sector bribery that does not involve federal officials is prohibited either by common-law principles of fiduciary obligation, or by state statutes. Where state law supplies the predicate offense, the Travel Act provides for federal prosecution of the commercial bribery of private individuals.

3. Trading in Influence (Article 12)

The COE Convention’s requirement that States Parties criminalize illicit “trading in influence” may be one of the most controversial elements of this Convention. Under Article 12, States Parties to the COE Convention are required to adopt laws criminalizing the giving or receiving of “any undue advantage” in exchange for “improper influence” over the decisions of domestic or foreign officials, legislators, judges, or employees of international organizations. Article 12 applies to both direct and indirect promises of “undue advantage” by anyone who “asserts or confirms” that he or she is able to exert improper influence over a public official’s decisionmaking functions, regardless of whether he or she is actually able to do so. The prohibitions of Article 12 apply regardless of whether the desired influence is exerted, and regardless of whether the claimed influence leads to the intended result.

While this provision has been drafted to address situations in which an individual or entity offers a corrupt payment to a third party who claims to have sufficient influence over the decisionmaker to produce the sought-after result, its broad language may capture lawful activities as well. In particular, compliance with this article could be read to require the criminalization of certain otherwise legal activities including lobbying or making political campaign contributions. Moreover, because of the multiplicity of U.S. federal and state laws and regulations governing lobbying and campaign finance, the potential for inconsistent legal regimes is extremely high.

Despite these concerns, Article 12 reasonably may be interpreted to be consistent with present U.S. federal and state law. Although its terms are undefined, Article 12 requires the criminalization of offers of “undue advantage” to obtain “improper influence.” This suggests that merely offering something of value in exchange for an assertion that the recipient will make efforts to exert influence on a decision-maker—i.e., lawful campaign contributions and/or lobbying—is not within the scope of this provision. Indeed, the use of the terms “undue” and
“improper” strongly suggests that Article 12 is intended to reach only those activities that are already illegal under U.S. law.

4. Derivative Offenses (Article 13-14)
   
a. Money laundering of proceeds from corruption offences (Article 13)
   
In addition to calling for the criminalization of various bribery offenses, the COE Convention also requires States Parties to adopt laws covering acts intended to conceal or launder the proceeds of bribery, or both. Article 13 requires States Parties to adopt the bribery offenses set forth in Articles 2-12 as money laundering predicates, consistent with the Council of Europe’s Convention on Laundering, Search, Seizure and Confiscation of the Products of Crime, “to the extent that the Party has not made a reservation or a declaration with respect to these offences or does not consider such offences as serious ones for the purpose of their money laundering legislation.” U.S. federal law already provides that bribery may be a predicate offense to money laundering. Recently enacted amendments to the federal forfeiture statutes provide for the civil or criminal forfeiture of bribe payments, and the proceeds of bribery and corruption. In addition, federal law also prohibits the laundering of funds in order to conceal the source of bribe payments.

b. Account Offences (Article 14)
   
The COE Convention mandates that all entities maintain accurate accounting records, or the individuals responsible for any false statements or representations may potentially face a significant penalty. Article 14 requires States Parties to “adopt such legislative and other measures as may be necessary to establish as offences liable to criminal or other sanctions under its domestic law the following acts or omissions, when committed intentionally, in order to commit, conceal or disguise the offences referred to in Articles 2-12, to the extent the Party has not made a reservation or a declaration” where the offender has created or used false or incomplete invoices or records or “unlawfully” omitted to make a record of a payment.

Although punishment under Article 14 may only be imposed where the inaccurate records were created to conceal or disguise bribery offenses, this article goes further than U.S. law in imposing accounting and recordkeeping standards on non-publicly-traded companies. The United States does not impose the same rigorous accounting and recordkeeping requirements on privately-held companies or individuals that it does on publicly-held companies. U.S. federal law does, of course, prohibit individuals and privately-held companies from supplying false records to the government including in connection with filing tax returns, obtaining government benefits, or conducting business with the government. However, because Article 14 is broader than U.S. law, the United States will need to file a declaration or an interpretive statement that, except as provided under U.S. federal law with respect to making false statements, or supplying false information, to the government, Article 14 applies only to public companies or other companies that file periodic reports with the SEC.

It should be noted that Articles 13-14 expressly invite reservations to the criminalization of these offenses. Indeed, Article 13 goes so far as to say that countries are not required to criminalize money laundering if the signatory “does not consider such offences as serious ones.” Such an open invitation to avoid addressing money laundering in particular through domestic criminal law weakens an important deterrent to corruption offenses, and may leave gaps in the national laws of some States Parties. The ABA recommends that adoption and implementation of the COE Convention be subject to minimal reservations and interpretations.
5. Participatory Acts (Article 15)

Article 15 covers “participatory acts,” which are defined as “aiding or abetting the commission of any of the criminal offences established in accordance with this Convention.” Although the Article does not provide any definition of “aiding or abetting,” it does not appear that this provision would require changes to U.S. law. However, because foreign officials may not be prosecuted under the FCPA for conspiring to receive, or aiding and abetting their receipt of, illicit payments, the U.S. government may consider clarifying that, because other U.S. laws may permit the prosecution of the recipient official, the United States will not be required to modify its law to comply with this Article.

6. Jurisdiction (Article 17)

States Parties to the COE Convention are required to enact legislation establishing territorial and/or nationality based jurisdiction over the domestic bribery, international bribery, money laundering, and accounting and recordkeeping offenses described in Articles 2-14 of the Convention where: (1) the offense is committed in the State Party’s territory; (2) the offender is one of the State Party’s nationals or public officials; or (3) the offense involves one of the State Party’s public officials, a member of a domestic public assembly, or a national who is a member of an international organization or court.

The COE Convention’s jurisdictional scope is similar to that of the present version of the FCPA. Until 1998, the FCPA’s jurisdictional provisions were predicated solely on principles of territorial jurisdiction where a means of interstate commerce was used in furtherance of the corrupt offer or payment. Following its amendment in 1998 to comply with the OECD Convention, the FCPA now provides for nationality jurisdiction where U.S. nationals or the officers, directors, agents or shareholders of U.S. issuers commit FCPA offenses outside the United States. In addition, the FCPA now prohibits foreign entities and individuals, while within the United States, from undertaking acts in furtherance of a corrupt offer or payment to a foreign official. Thus, the United States’ nationality and territoriality jurisdictional scope is as broad as, and may well be broader than, that required by the COE Convention with respect to the bribery of foreign officials.

The U.S. follows its traditional rules of territorial jurisdiction with respect to the bribery of domestic officials. As a practical matter, it is unlikely that a bribe-giver will bribe a domestic public official wholly outside the territory of the United States, or without using a means or instrumentality of interstate commerce, however, the United States may consider filing a reservation stating that it has no intention of revising its general principles of territorial jurisdiction to comply with the COE Convention on this point.

7. Corporate Liability (Article 18)

Traditionally, very few countries have shared the United States’ concept of corporate criminal liability. The COE Convention incorporates the legal concept of collective wrongdoing by requiring all States Parties to adopt measures to ensure that legal persons (corporations or organizations) can be held liable for active bribery, trading in influence, and money laundering where those offenses were committed for the corporation’s benefit by a natural person with a “leading position” within the organization. Unlike the FCPA, the COE Convention does not include accounting and bookkeeping violations within the offenses for which a corporation may be criminally liable (this omission is anomalous in that Article 14 imposes accounting and recordkeeping requirements on business entities). The COE Convention mandates corporate liability for failing to supervise or control an employee or other person under the entity’s authority who engages in the prohibited offenses for the benefit of the
corporation. Because this provision substantially reflects the American concept of corporate liability, the U.S. will not be required to modify its laws in this area.

8. Sanctions (Article 19)

Article 19 of the COE Convention provides that “each Party shall provide, in respect of those criminal offences established in accordance with Articles 2 to 14, effective, proportionate and dissuasive sanctions and measures, including, when committed by natural persons, penalties involving deprivation of liberty which can give rise to extradition.” It further provides that legal persons shall be subject to “effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.” Altogether, such sanctions may include, where appropriate, imprisonment, extradition, confiscation of proceeds, monetary and other criminal and civil penalties. If necessary, States Parties must enact laws enabling them to confiscate the instrumentalities, proceeds or other property (the value of which corresponds to such proceeds) resulting from criminal offenses.

Article 19 is intended for those countries without well-defined sanctions for bribery-related violations, unlike the United States, which already has strict penalties for such offenses. Because U.S. money laundering statutes provide for the seizure of substitute assets only in limited circumstances, the U.S. may need to append an understanding to its instruments of ratification that its money laundering statutes satisfy Article 19.

9. Procedural Requirements

a. Specialized Authorities (Articles 20–21)

The COE Convention requires each State Party to ensure that those persons or entities charged with enforcing anti-bribery legislation have the necessary independence, training, and funding to carry out their functions effectively and free from undue pressure.

The U.S. government’s resources are already stretched thin from participating in the OECD monitoring process, and with its involvement in the work of other international organizations, as well as from investigating and prosecuting transnational bribery offenses. Participation in the GRECO and in whatever monitoring mechanism is developed by the OAS to monitor the Inter-American Convention will require additional resources. These efforts should not be permitted to drain resources from the U.S. government’s commitment to the OECD process. Thus, it appears worthwhile to stress that the U.S. government will need to commit sufficient resources to adequately investigate and prosecute transnational bribery offenses, and to implement the various monitoring mechanisms, and that non-governmental organizations and private sector organizations can provide an additional source of assistance in the area of monitoring implementation.

b. Witness Protection and Evidentiary Issues (Articles 22–23)

The COE Convention requires each State Party to adopt measures to effectively protect individuals who report a corruption offense, cooperate with the investigating or prosecuting authorities, or give testimony. Furthermore, States Parties must enact legislation permitting the use of undefined “special investigative techniques” to facilitate the gathering of evidence related to criminal offenses established pursuant to the COE Convention. Because it is unclear what form these “techniques” are expected to take, this appears to be an area for review by the GRECO. States Parties similarly must adopt measures empowering their courts or other authorities to order that bank, financial, or commercial records be made available for evidentiary purposes. Finally, bank secrecy laws may not be used as a basis for prohibiting
access to such information. Because U.S. law is sufficiently developed in this area, it appears that no special steps are required to comply with the COE Convention.

States Parties other than the United States that do not have effective systems for protecting witnesses, or offer immunity to public officials by reason of their status, or which place significant limitations on the ability of investigators and prosecutors to gather probative evidence, will need to address these sensitive and important issues within their political and legal systems, before they can effectively implement the COE Convention’s objectives. Efforts should be made by the GRECO, with the support of the States Parties, non-governmental organizations, and others, to assist such States Parties to develop effective law enforcement tools to achieve the objectives of the COE Convention and the GRECO.

10. Monitoring (Article 24)

The States Parties’ implementation of the COE Convention will be monitored by the GRECO, which was created for the purposes of using mutual evaluation and peer pressure to monitor the States Parties’ observance of the Guiding Principles and the implementation of other international anti-corruption instruments that may be adopted by the Council of Europe. Non-member states may join GRECO at any time by notifying the Secretary General of the Council of Europe; the notification must be accompanied by a declaration that the State undertakes to apply the Guiding Principles.

GRECO’s monitoring mechanisms rely primarily on first-hand evaluations by a peer review investigative team. This process is similar to that implemented in Phase I by the parties to the OECD Convention. However, GRECO provides for confidential reporting; by contrast, the OECD has published its country reports, a step that GRECO is strongly urged to undertake.

The GRECO process begins with a questionnaire, and may be followed by a site visit by the review team for the purpose of seeking additional information. On the basis of the information gathered, the team will prepare a preliminary report evaluating the State Party’s anti-corruption laws and practices. These confidential reports are not strictly evaluative, but provide recommendations for improvement, if necessary. Although the evaluation reports are confidential, GRECO’s Statutory Committee may issue public statements if the Committee believes that a member remains passive or has taken insufficient action in respect to recommendations made concerning its application of the Guiding Principles.

11. International Cooperation (Articles 25–31)

While the text calls for cooperation between national authorities, the COE Convention requires the States Parties to cooperate only to the extent of their “national law.” Despite that limitation, and perhaps recognizing that countries otherwise may refuse to provide legal assistance to a requesting state on the basis of a difference in national law, the COE Convention does not require dual criminality as a basis for cooperation. Mutual legal assistance may be refused, however, if the requested state believes that compliance with the request would undermine its fundamental interests, national sovereignty, security, or for any other valid reason. While this article respects each State Party’s sovereign authority, in many ways it turns a legal decision to cooperate into a political decision. Such a result should be strongly discouraged in the implementation of the COE Convention.

The offenses established under the COE Convention are extraditable offenses under any existing treaty between the parties, and are to be included in any future bilateral or multilateral extradition treaties between them. Those parties without such treaties may consider the COE Convention as a legal basis for extradition with respect to criminal offenses committed thereunder. If extradition is refused on nationality grounds, or where the requested party claims
jurisdiction, the requested party is required to submit the case to its authorities for prosecution, unless otherwise agreed, and to report the outcome to the requesting state.

12. Declarations and Reservations (Articles 36–38)

The COE Convention provides for certain limited declarations and reservations. For example, any State Party may declare that it will establish as a criminal offense the bribery of foreign public officials, officials of international organizations, or of judges or official of international courts only to the extent that public official is alleged to have acted or refrained from acting in breach of his or her duties. The COE Convention permits reservations only to certain articles, up to a maximum of five. Despite the limitation on the number of reservations permitted, because of their scope this provision has given rise to concern that the COE Convention, rather than promoting consistency, will produce “Swiss cheese.” In fact, a careful review of the provisions to which reservations are permitted reveals that they are the most controversial in the COE Convention. The ABA encourages States Parties to judiciously limit the number and the breadth of their reservations.

13. Dispute Resolution (Article 40)

In case of a dispute between States Parties as to the interpretation or application of the COE Convention, the States Parties must negotiate a settlement through any peaceful means of their choice. The dispute may be submitted to: (1) the European Committee on Crime Problems; (2) a tribunal for binding arbitration; or (3) the International Court of Justice. Both parties must agree to the forum.

IV. IMPACT ON U.S. LAW

The United States has long been a leader in combating and deterring the bribery of foreign public officials. Moreover, the United States has a long history of fighting domestic corruption at the federal, state and local levels. Full adoption of the COE Convention by the United States, and the encouragement of full adoption and implementation by members of the Council of Europe and other states, is wholly consistent with U.S. law and policy. However, as discussed above, if interpreted broadly, the language of some articles of the COE Convention potentially could lead to conflicts with U.S. law. For this reason, as discussed above in Part II, the ABA recommends that the U.S. government issue appropriate statements reflecting its understandings and interpretations of certain articles.

A. Proposed U.S. Reservations, Declaration and Interpretive Statements

Following discussions with U.S. government representatives, the ABA understands that the U.S. government does not propose, in ratifying the COE Convention, to modify existing law, and that it instead proposes to append the following draft Reservations, Declarations, Understandings (or Interpretative Statements) to the COE Convention.

- **Reservations**

  (1) **Active and Passive Bribery of members of foreign and international public assemblies (Articles 6 and 10):** The federal “honest services” fraud statute (18 U.S.C. § 1346), which could be relied upon to implement these criminalization obligations, entails a breach of duty element. Pursuant to Article 37(1), a party may limit by reservation its obligations under the Convention to criminalize the conduct referred to in, *inter alia*, Articles 6 and 10. The U.S. intends to do so in order to specify that breach of duty would be an element of these offenses under U.S. law. Article 37(4) stipulates that reservations with respect to these two articles count as one.
(2) Trading in Influence (Article 12): This article would oblige a party to criminalize the promising, giving or offering of an undue advantage for the purpose of exercising “improper” influence over official decision-making. However, neither the text nor the explanatory report fully clarifies whether “improper” influence would extend beyond bribery to conduct which may not be criminal in the United States, e.g., certain types of lobbying activities. The United States therefore intends to reserve to this obligation in whole, as permitted under Article 37(1). To the extent that the conduct addressed by this article entails bribery of a public official, it is already addressed by other obligations under the Convention, and by existing U.S. law.

(3) Nationality Jurisdiction (Article 17): Article 17(2) permits a party to reserve to the obligation contained in Article 17(1)(b) to establish jurisdiction over all of the offenses under the Convention where the offender is, inter alia, one of its nationals. Since U.S. law provides for nationality-based jurisdiction only to a very limited extent, the available reservation would be exercised to reflect our limited jurisdictional scope in this respect.

- Declaration

Active and Passive Bribery of foreign officials, officials of international organizations, and of judges and officials of international courts (Articles 5, 9 and 11): Article 36 permits a party to declare that its criminal laws satisfy these obligations only to the extent that the public official or judge acts or refrains from acting in breach of his duties. Since the federal “honest services” fraud statute, which could be relied upon to implement these criminalization obligations, entails a breach of duty element, the U.S. would make such a declaration. The declaration would not apply to active bribery prosecutions under the Foreign Corrupt Practices Act.

- Interpretive Statements

(1) Account Offenses (Article 14): Article 14 would oblige a party to criminalize the creation of false records to disguise bribery offenses. While the Explanatory Report notes that this is to be implemented “in the framework of a Party’s laws and regulations” regarding books and records, this clarification is not in the text. U.S. representatives stated during the negotiations that we would interpret this obligation as applying only to publicly-traded companies subject to existing federal law on the subject. The interpretive statement would reiterate this understanding.

(2) Relationship to other conventions (Article 35): Article 35(3) sets forth a standard for applying pre-existing agreements or treaties on the same subject as the Convention, which preserves such instruments but uses a formulation for this purpose not common to U.S. treaty practice (“if it facilitates international cooperation”). In order to underscore our understanding that this Convention does not derogate from obligations the United States and other parties have assumed under other anti-corruption instruments, the interpretive statement would stipulate that such pre-existing obligations are governed only by their terms.

B. ABA’s Response to the U.S. Government’s Draft Proposals

The proposed Reservations, Declaration, and Interpretive Statements are generally consistent with this Report’s analysis. Although the government’s proposals substantially address those areas of the COE Convention that diverge from U.S. law or potentially affect other treaty obligations, the declaration concerning the impact of Articles 5, 9, and 11 could more clearly state that U.S. law, specifically the FCPA, effectively addresses the bribery of
foreign officials, and that the U.S. does not intend to modify its law with respect to establishing as a separately defined criminal violation, the passive bribery of foreign officials. The ABA further recommends that the United States submit its understanding that the money laundering provisions of Articles 13 and 19 are sufficiently implemented by present federal laws in this area, and that the United States is not required to enact additional statutes permitting the seizure of substitute assets in order to be in full compliance with this article.

With respect to the Interpretive Statement concerning Article 35, the ABA strongly supports the U.S. government’s position that ratification and implementation of this Convention should not be interpreted to derogate from any treaty or other similar obligations already undertaken by a party. The question—and the reason we recommend a “wait and see” attitude towards the COE Convention—is what other countries, which are not bound by the United States’ interpretation, will do.

Moreover, many of the Council of Europe’s member states are parties to the OECD Convention, and a few are parties to the Inter-American Convention. Because each of these conventions differs somewhat in its approach to criminalizing corruption offenses, the ABA encourages parties fully to perform their obligations under each of these conventions, but where there are conflicts or discrepancies between them, States Parties should adhere to the obligations of whichever is the stricter of the conflicting Conventions. To achieve the anti-corruption goals of each of these treaties, the ABA urges States Parties to agree that the provisions of each are cumulative and not exclusive, and to adhere to the OECD Convention’s definitions in drafting and enforcing their domestic laws.

Finally, the ABA urges that the U.S. not move towards ratification until it has greater evidence that the COE Convention has attracted a critical mass of support from COE Member States, both OECD members and non-members, and that States Parties to the OECD Convention will not use their participation in the COE Convention to dilute their commitments to the OECD Convention. Thus, the U.S. should defer ratification efforts until the COE Convention has come close to or achieved the support of 14 states required for its entry into force, there is evidence that ratifying states will include larger as well as smaller states, and that states that are OECD Convention members are approaching the COE Convention in a way that is consistent with their OECD obligations.

V. Recommended Action

The COE Convention represents another step in a series of ongoing international efforts to deter corruption. Its broad scope and geographic coverage offer unique opportunities and, at the same time, the potential for undermining anti-corruption conventions now in force as well as ongoing efforts of a similar nature in other fora. In view of the high priority that the ABA has given to promoting the rule of law, subject to the principles outlined in the accompanying Recommendation, which are more fully described in this Report, the ABA supports the adoption and ratification and implementation as appropriate of the COE Convention by the United States, members of the Council of Europe and states eligible to accede to this convention and to the accompanying GRECO agreement. Similarly, the ABA urges the United States, members of the Council of Europe, and other eligible states to participate in and fully support the adequate provision of resources to the GRECO in its monitoring efforts.

Respectfully submitted,

Daniel B. Magraw, Chair

February 2001
GENERAL INFORMATION FORM

Submitting Entity:
Section of International Law and Practice

Submitted by:
Daniel B. Magraw, Chair
Section of International Law and Practice

1. Summary of Recommendation.

The recommendation states that the ABA supports the U.S. government’s ratification and support of the Council of Europe’s Criminal Law Convention Against Corruption ("COE Convention"), with certain reservations, interpretative statements and declarations, and the related “Group of States Against Corruption—GRECO” monitoring instrument. The recommendation further suggests that the U.S. Government ratify the COE Convention once a significant number of eligible states have demonstrated that they are prepared to accede to the Convention, and once it is clear that other States Parties will not use their compliance with the COE Convention to dilute their commitments under other international anti-corruption agreements. The Convention must be ratified by 14 states to enter into force; until the number of ratifications approaches this threshold, the U.S. should not consider moving forward and even then should assess the mix and commitments of ratifying states.

The recommendation further notes that the ABA favors the accession to and ratification of the COE Convention by eligible states, provided that they do not use their compliance with the COE Convention to dilute their commitments under other international anti-corruption agreements, particularly the OECD Antibribery Convention.

The resolution also supports the consistent implementation and active enforcement of these international anti-corruption instruments, and open and transparent monitoring efforts by various governmental and non-governmental organizations.

2. Approval by Submitting Entity.

These recommendations were approved by the Council of the Section of International Law and Practice at its meeting on October 28, 2000.

3. Has this or a similar recommendation been submitted to the House or Board previously?

This recommendation has not been submitted previously to the House or Board.

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?

The ABA has strongly supported U.S. ratification of two earlier international anticorruption treaties, the OECD Antibribery Convention, and the OAS Anticorruption Convention. Both have been ratified by the United States. The ABA has established itself as a key leader on this rule of law issue and its position on the COE Convention will be important. Because of ABA support for the OECD Antibribery Convention, which of the three instruments has the greatest impact on the United States, the ABA would not want the OECD Convention to be undercut by the COE Convention. Thus,
the “wait and see” position advocated in this report and recommendation fits with other ABA policies and the goal of having convergent, not divergent, international standards in this area. At the same time, approval of this Recommendation and Report by the House of Delegates at this meeting is needed because the U.S. government has signed the COE Convention, and the issue of whether the U.S. should begin ratification efforts will likely arise in the year 2001.

5. What urgency exists which requires action at this meeting of the House?

We understand that the government will move to implement this treaty soon. The ABA has an opportunity to participate in the discussions surrounding that ratification, which will not be available at a later date.


The United States will not need to adopt implementing legislation.

7. Cost to the Association (both direct and indirect costs).

None known.

8. Disclosure of Interest (if applicable).

N/A.

9. Referrals.

Section of Business Law
Section of Litigation
Section of Criminal Justice
Standing Committee on Law and National Security

10. Contact Person (Prior to the meeting).

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12. Contact Person Regarding Amendments to this Recommendation

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EXECUTIVE SUMMARY

1. **Summary of the recommendation.**

   The recommendation states that the ABA supports the U.S. government’s ratification and support of the Council of Europe’s Criminal Law Convention Against Corruption (“COE Convention”), with certain reservations, interpretative statements and declarations, and the related “Group of States Against Corruption—GRECO” monitoring instrument. The recommendation further suggests that the U.S. Government ratify the COE Convention once a substantial number of eligible states have demonstrated that they are prepared to accede to the Convention, and once it is clear that other States Parties will not use their compliance with the COE Convention to dilute their commitments under other international anti-corruption agreements.

   The resolution also supports the consistent implementation and active enforcement of these international anti-corruption instruments, and open and transparent monitoring efforts by various governmental and non-governmental organizations.

2. **Summary of the issue which the recommendation addresses:**

   The issue addressed by the proposed recommendation is whether the United States should ratify the COE Convention, and if so, under what circumstances.

3. **An explanation of how the proposed policy position will address the issue:**

   The proposed policy position suggests that the ABA support ratification of the COE Convention, with certain reservations, interpretative statements and declarations. It further recommends that the United States delay ratification until it is clear that a significant number of other Western European states express their intent to ratify this treaty, because of a concern that some countries might use their compliance with the COE Convention to excuse a lack of commitment to the full implementation of other international anti-corruption conventions.

4. **A summary of any minority views or opposition which have been identified:**

   We are not aware of any minority or opposing views.