

**AMERICAN BAR ASSOCIATION  
SECTION OF  
INTERNATIONAL LAW AND PRACTICE**

**RECOMMENDATION**

- RESOLVED**, that the American Bar Association supports the prompt ratification and implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention) by the United States, by other members of the Organization for Economic Co-operation and Development (OECD), and by other countries that are eligible to accede to the OECD Convention. 1  
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- FURTHER RESOLVED**, that the American Bar Association urges 7
- 1) that such ratification be subject to minimal reservations and 8  
understandings; and 9  
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  - 2) that such implementation be full, effective and consistent. 12  
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- FURTHER RESOLVED**, that the American Bar Association supports the prompt enactment of the legislative changes proposed by the Administration to conform the Foreign Corrupt Practices Act to the OECD Convention. 14  
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- FURTHER RESOLVED**, that, to assure consistency and effectiveness, the American Bar Association supports, through the OECD and other fora, meaningful and ongoing efforts to monitor the effective and consistent implementation and enforcement of the OECD Convention as well as continuing efforts to further develop the OECD Convention so as to establish the most effective means for deterring corrupt practices in the conduct of international business. 18  
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## REPORT

I. INTRODUCTION

On November 21, 1997, 28 members of the Organization for Economic Co-operation and Development ("OECD"), along with Argentina, Brazil, Bulgaria, Chile and the Slovak Republic, adopted the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("OECD Convention").<sup>1</sup> Full implementation and active enforcement of the OECD Convention will, for the first time, mean that developed countries other than the United States will impose similar restrictions on their companies and nationals as those imposed on U.S. companies and nationals by the Foreign Corrupt Practices Act ("FCPA").<sup>2</sup>

Since the American Bar Association ("ABA") first took a position to support efforts in the international community to deter corrupt practices in the conduct of international business,<sup>3</sup> there have been a number of important developments. Yet none of these other developments offer as potentially as effective a set of measures as the OECD Convention. To avoid reducing the OECD Convention to no more than a set of hortatory principles, the current momentum must not be lost. Every effort should be made to ensure its prompt ratification and implementation as well as its active and effective enforcement by the United States, by other OECD member countries and by other countries eligible to accede.

II. BACKGROUND

The international community began to examine the incidence and effects of corrupt practices in the conduct of international business in a number of fora in the 1970s. Much of the impetus was prompted by disclosures concerning the foreign activities of U.S. companies. As part of these efforts, the OECD in 1976 issued the OECD Declaration and Decisions on International Investment and Multinational Enterprises to establish a comprehensive set of guidelines for multinational corporations.<sup>4</sup> Although no enforcement mechanism was provided, the guidelines prohibited making improper benefits to holders of public office.

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<sup>1</sup>The Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("OECD Convention"), OECD/DAFFE/IME/BR(97)16/FINAL (Dec. 18, 1997), *reprinted in* 37 I.L.M. 1 (1998), was signed in Paris, France by representatives of the participating countries on December 17, 1997. Australia, the only OECD member not to sign the OECD Convention, is expected to sign in the near future.

<sup>2</sup>15 U.S.C. §§ 78m, 78dd-1, 78dd-2, 78ff.

<sup>3</sup>ABA Recommendation and Report, Report No. 117A (Feb. 1995), *reprinted in* 30 INT'L LAW. 193 (1996).

<sup>4</sup>Declaration and Decisions on International Investment and Multinational Enterprises, OECD/GD(92)16 (1976). *See also* Note, *Foreign Corrupt Practices Act of 1977: A Solution or a Problem?*, 11 CAL. W. INT'L L. J. 111, 125 (1981).

A multitude of factors, including the U.S. initiative prompted by the Omnibus Trade and Competitiveness Act of 1988,<sup>5</sup> spawned a resurgence of activity by the OECD and other international organizations in recent years. Among the more important developments was the consideration of the criminalization of the bribery of foreign public officials begun by the OECD Working Group on Bribery in International Business Transactions. Its work led to the adoption in 1994 of an OECD Recommendation on Combating Bribery in International Business Transactions ("OECD Recommendation").<sup>6</sup> Later, in 1996, the OECD adopted a Recommendation on the Tax Deductibility of Bribes of Foreign Public Officials ("OECD Tax Recommendation"), which called on member countries to eliminate the tax deductibility of bribes to foreign public officials as a business expense.<sup>7</sup>

In adopting a Revised Recommendation of the Council on Combating Bribery in International Business Transactions ("OECD Revised Recommendation") on May 23, 1997,<sup>8</sup> the OECD agreed to a firm time frame for working towards a multilateral approach to criminalizing the bribery of foreign public officials. But possibly the most important aspect of the OECD Revised Recommendation was the "Agreed Upon Common Elements of Criminal Legislation and Related Action" set forth in its Annex.<sup>9</sup> In both language and approach, these "Common Elements" were fundamentally in accord with the basic principles of the FCPA and the approach taken in the transnational bribery provisions of the Inter-American Convention Against Corruption ("Inter-American Convention").<sup>10</sup>

### III. SUMMARY OF OECD CONVENTION

There are two major components to the OECD Convention. First of all, it requires parties to criminalize the bribery of foreign public officials and sanction such bribery on a comparable basis to domestic bribery. Secondly, it commits parties to cooperate in the investigation and

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<sup>5</sup>Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1424, § 5003(d)(1) (1988).

<sup>6</sup>Council Recommendation on Bribery in International Business Transactions ("OECD Recommendation"), OECD/C(94)75/FINAL (May 27, 1994), *reprinted in* 33 I.L.M. 1389 (1994)

<sup>7</sup>Council Recommendation on the Tax Deductibility of Bribes and Foreign Public Officials ("OECD Tax Recommendation"), OECD/C(96)27/FINAL (Apr. 17, 1996), *reprinted in* 35 I.L.M. 1311 (1996)

<sup>8</sup>Revised Recommendation of the Council on Combating Bribery in International Business Transactions ("OECD Revised Recommendation"), OECD/C(97)123/FINAL (May 23, 1997), *reprinted in* 36 I.L.M. 1016 (1997).

<sup>9</sup>*Id.* at 7-9.

<sup>10</sup>Inter-American Convention Against Corruption ("Inter-American Convention"), OEA/Ser.K/XXXIV.1, CICOR/doc.14/96 rev.2 (Mar. 29, 1996), at Art. VIII, *reprinted in* 35 I.L.M. 724 (1996).

enforcement of transnational anti-bribery laws. Broader than the FCPA in some key respects, and narrower in others, on a few issues the impact of the OECD Convention is uncertain and will likely depend on how it is implemented and enforced.

#### A. Anti-bribery Offense Created

Parties to the OECD Convention are required to make it a criminal offense under their national laws for any person intentionally to offer, promise or give any undue pecuniary or other advantage, directly or through intermediaries, to foreign public officials, to obtain or retain business or to obtain any other improper advantage.<sup>11</sup> This is conceptually similar to the FCPA. It applies only to foreign public official bribery, not to foreign commercial bribery, and focuses on the so-called "supply" side of such bribery. Similarly, complicity in the bribery of a foreign public official is also prohibited.<sup>12</sup>

##### 1. *Payors Covered and Jurisdiction*

Parties to the OECD Convention are to establish jurisdiction over offenses that are committed in whole or in part by "any person" acting within their territories. This means that, regardless of citizenship, any natural or legal person acting within a party's territory will be covered.<sup>13</sup> A broader category of bribe payors is therefore established under the OECD Convention than under the FCPA, currently limited to "domestic concerns" and "issuers."<sup>14</sup>

Each party is to apply its law extraterritorially in accordance with its own legal principles.<sup>15</sup> Parties may rely on the general jurisdictional principles -- nationality or territoriality -- recognized by their legal systems.<sup>16</sup> In cases where more than one party has jurisdiction, the OECD Convention directs the parties to consult "with a view to determining the most appropriate jurisdiction for prosecution."<sup>17</sup>

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<sup>11</sup>OECD Convention, Art. 1, ¶ 1.

<sup>12</sup>*Id.*, Art. 1, ¶ 2.

<sup>13</sup>*Id.*, Art. 4, ¶ 1.

<sup>14</sup>*Id.*, Art. 1, ¶ 1. Compare 15 U.S.C. §§ 78dd-1(a)(classes of "issuers" subject to FCPA) and 78dd-2(h)(1)(definition of "domestic concern").

<sup>15</sup>*Id.*, Arts. 4, ¶¶ 2, 4.

<sup>16</sup>*Id.*, Art 4, ¶¶ 1 and 2. The territorial basis for jurisdiction is to be interpreted broadly so that an extensive physical connection to the act of bribery is not required. Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("OECD Commentaries"), OECD/DAFFE/IME/BR(97)17/FINAL (Nov. 21, 1997) at ¶ 25, reprinted in 37 I.L.M. 8 (1998).

<sup>17</sup>OECD Convention, Art. 4, ¶ 3.

## 2. Who Is an "Official"

Like the Inter-American Convention and the FCPA, the OECD Convention has its own definition of "public official." Individuals who may not be considered "public officials" under national law could be treated as public officials under the OECD Convention. A "public official" is any person exercising a public function.<sup>18</sup> Covered are officials of any branch of government as well as part-time or unpaid officials, private individuals carrying out official functions and officials of state-owned enterprises.<sup>19</sup>

The OECD Convention does not specifically cover payments to political parties, party officials or candidates for political office.<sup>20</sup> This creates a narrower category of bribe recipients than the FCPA. However, negotiators did agree to an accelerated work plan to address several outstanding issues, including acts of bribery relating to foreign political parties and to persons in anticipation of their becoming foreign public officials.<sup>21</sup> The results of this review will be reported to OECD ministers by the Council meeting in 1999.

Although payments to political parties are not expressly covered, the OECD Convention will apply to such payments in some circumstances: for example, where political parties serve as intermediaries for bribes made to foreign public officials and where the officials of political parties are the ultimate recipients of bribes directed to them by public officials.<sup>22</sup> In addition, persons not formally designated as public officials but who perform a public function may, under the legal principles of some parties to the OECD Convention, be considered foreign officials.<sup>23</sup> Similarly, depending upon the legal system, the prohibitions may apply to an advantage promised or given to a person in anticipation of becoming a public official.<sup>24</sup>

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<sup>18</sup>A "public function" is any activity in the public interest, delegated by a foreign country, such as a delegated task connected to public procurement. OECD Commentaries, ¶ 12. An official of a public enterprise shall be considered to perform a public function unless the enterprise operates on a normal commercial basis in the relevant market, *i.e.*, on a basis which is substantially equivalent to that of a private enterprise, without preferential subsidies or other privileges. OECD Commentaries, ¶ 15.

<sup>19</sup>*Id.*, Art. 1, ¶¶ 4(a)-(b).

<sup>20</sup>"Summary of OECD Anti-Bribery Convention," Joint Statement of the U.S. Department of Commerce, U.S. Department of Justice and U.S. Department of State, at 1 (Jan. 2, 1998) ([www.com.ita.doc.gov/legal/oecdsum.html](http://www.com.ita.doc.gov/legal/oecdsum.html)).

<sup>21</sup>*Id.* See also OECD Commentaries, ¶ 10.

<sup>22</sup>"Summary of OECD Anti-Bribery Convention" at 1. See OECD Convention, Art. 1, ¶ 1.

<sup>23</sup>OECD Commentaries, ¶ 16. An example could be political party officials in countries with single political parties. *Id.*

<sup>24</sup>*Id.*, ¶ 10.

### 3. State-Owned Enterprises

Bribes to officials of state-owned enterprises ("parastatals") and other government instrumentalities are covered by the OECD Convention.<sup>25</sup> State ownership or control is defined to include traditional indicia of control, including majority stock ownership.<sup>26</sup> This is a somewhat less expansive test than that currently applied by U.S. authorities in enforcing the FCPA. According to the official Commentaries to the OECD Convention, however, privately-held companies could be treated as parastatals if they carry out public functions or receive government subsidies, potentially a broader test than under the FCPA.<sup>27</sup>

Yet not all parastatals necessarily carry out a public function. The Commentaries to the OECD Convention therefore suggest an exception in relatively rare circumstances for officials of parastatals that operate on a normal commercial basis substantially equivalent to that of a private enterprise, without preferential subsidies or other privileges.<sup>28</sup> The OECD Convention thus introduces new and potentially complicating considerations into the assessment of whether officials of parastatals are "public officials."

### 4. Transfers of Value

Similar to the FCPA, transfers other than pecuniary payments are prohibited under the OECD Convention.<sup>29</sup> No *de minimis* "safe harbors" are provided.<sup>30</sup> While "facilitating" or "grease" payments are not expressly excluded from the OECD Convention's coverage as they are under the FCPA,<sup>31</sup> the Commentaries accompanying the OECD Convention indicate that they are also excluded under the OECD Convention since they are not designed "to obtain or retain business . . . ."<sup>32</sup>

### 5. Scope of Business Activity

Under the OECD Convention, the anti-bribery offense covers payments to "obtain or

<sup>25</sup>OECD Convention, Art. 1, ¶ 4(a).

<sup>26</sup>OECD Commentaries, ¶ 14.

<sup>27</sup>OECD Convention, Art. 1, ¶4(a); OECD Commentaries, ¶¶ 12, 14-15.

<sup>28</sup>*Id.*, ¶ 15.

<sup>29</sup>OECD Convention, Art 1, ¶ 1; OECD Commentaries ¶ 7.

<sup>30</sup>*Id.*, ¶ 7-

<sup>31</sup>See 15 U.S.C. §§ 78dd-1(b), dd-2(b).

<sup>32</sup>OECD Commentaries, ¶ 9.

retain business" as well as those made to secure any "other improper advantage in the conduct of international business."<sup>33</sup> Its coverage extends to a wide range of government activities beyond the procurement context: for example, licenses, permits, exemptions and incentives. This is functionally equivalent to how the FCPA has been interpreted and applied by U.S. authorities.

#### *6. Intent and Vicarious Liability*

Indirect as well as direct payments to public officials are covered by the OECD Convention.<sup>34</sup> Like the FCPA, the anti-bribery offense is made an "intent" crime. While the FCPA establishes vicarious liability based on "knowledge," the OECD Convention's standard is unclear as to whether intent will be found and liability vicariously imposed for payments by third parties in cases of "willful blindness" or disregard of traditional indicia of questionable payments often referred to as "red flags." This appears to be a question to be resolved by each party in its implementation and manner of enforcement of the OECD Convention.

#### *7. Sanctions and Corporate Criminal Responsibility*

The OECD Convention calls for parties to impose on violators "effective, proportionate and dissuasive criminal penalties, comparable to those applicable to the bribery of the Party's own public officials."<sup>35</sup> If a party's legal system does not provide for criminal sanctions against legal persons such as corporations, then "effective, proportionate and dissuasive" non-criminal penalties, such as monetary sanctions, must be applied.<sup>36</sup> Parties must also be able to seize or confiscate the bribe and bribe proceeds or property of similar value or impose monetary sanctions of comparable effect.<sup>37</sup>

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<sup>33</sup>OECD Convention, Art. 1, ¶ 1.

<sup>34</sup>*Id.* (covering payments "through intermediaries").

<sup>35</sup>*Id.*, Art. 3, ¶ 1.

<sup>36</sup>*Id.*, Art. 3, ¶ 2. Germany and Japan are examples of such countries.

<sup>37</sup>*Id.*, Art. 3, ¶ 3.

## 8. Enforcement

Investigation and prosecution of anti-bribery offenses will be subject to the applicable rules and principles of each party governing prosecutorial discretion. Specifically prohibited are considerations of national economic interest and the identity of the persons involved in the offense in the exercise of those principles.<sup>38</sup>

### B. Books and Records

Like the FCPA,<sup>39</sup> parties are required to take necessary measures, within the framework of their relevant laws and regulations, to prohibit the establishment of off-the-books accounts and similar practices used to bribe foreign public officials or to hide such bribery.<sup>40</sup> "[E]ffective, proportionate and dissuasive" penalties for omissions or falsifications are to be included within these measures.<sup>41</sup> Parties are not required to expand or change the universe of persons to whom such laws and regulations generally apply. This means that the books and records provisions will continue to apply only to "issuers" in the United States.<sup>42</sup>

### C. Relationship to Other Domestic Laws

Broadening the impact of the OECD Convention's anti-bribery offense, parties which have made bribery of their own public officials a predicate offense for the application of their money laundering statutes must do so on the same terms for the bribery of a foreign public official.<sup>43</sup>

### D. International Cooperation

The OECD Convention contains a number of provisions designed to increase international cooperation in the investigation and enforcement of the anti-bribery offense it establishes:

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<sup>38</sup>*Id.*, Art. 5; OECD Commentaries, ¶ 27.

<sup>39</sup>15 U.S.C. § 78m(b)(2)(A). The FCPA also requires that issuers establish systems of internal controls; the OECD Convention does not expressly address this point, *id.*, § (b)(2)(B), although the OECD Revised Recommendation does. See OECD Commentaries, ¶ 29.

<sup>40</sup>OECD Convention. Art. 8, ¶ 1.

<sup>41</sup>*Id.*, Art. 8, ¶ 2.

<sup>42</sup>15 U.S.C. § 78m(b)(2).

<sup>43</sup>OECD Convention. Art. 7. A felony violation of the FCPA is already considered a predicate offense under U.S. money laundering laws. 18 U.S.C. § 1956 (c)(7)(D).



### 1. Mutual Legal Assistance

The OECD Convention requires parties to give "prompt and effective" legal assistance to other parties in connection with criminal investigations and proceedings brought by a party concerning offenses within its scope.<sup>44</sup> Dual criminality is deemed to exist for such offenses where parties condition assistance on the existence of dual criminality<sup>45</sup> and bank secrecy is removed as a ground on which assistance may be refused.<sup>46</sup> A party not recognizing corporate criminal responsibility cannot deny assistance since the same assistance is required for non-criminal proceedings within the scope of the OECD Convention "brought by a Party against a legal person."<sup>47</sup>

### 2. Extradition

The OECD Convention seeks to facilitate extradition, while still leaving it subject to the domestic laws and treaties of parties.<sup>48</sup> It supplies the treaty basis for extradition where a party from which extradition is requested requires there to be a treaty in force with the requesting country as well as the element of dual criminality.<sup>49</sup> It requires parties to follow the "extradite or prosecute" rule with respect to nationals, so that countries that decline an extradition request solely on the ground of nationality must prosecute that individual.<sup>50</sup>

The United States has numerous extradition treaties and treaties on mutual legal assistance in criminal matters, including many of the OECD countries. Most of these extradition treaties require dual criminality as a condition for extradition or providing assistance. This has hindered many investigations of possible violations of the FCPA by U.S. authorities. These provisions should therefore facilitate U.S. prosecutions as well as enhance the likelihood of prosecutions by other parties to the OECD Convention.

### 3. Responsible Authorities

Parties are required to designate an authority or authorities to serve as a channel for

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<sup>44</sup>OECD Convention, Art. 9, ¶ 1.

<sup>45</sup>*Id.*, ¶ 2.

<sup>46</sup>*Id.*, ¶ 3.

<sup>47</sup>*Id.*

<sup>48</sup>*Id.*, ¶ 4.

<sup>49</sup>*Id.*, ¶¶ 2, 4.

<sup>50</sup>*Id.*, ¶ 3.

communications of requests for extradition or assistance as well as consultations when concurrent jurisdiction is involved.<sup>51</sup>

#### E. Implementation

As part of the OECD Revised Recommendation, OECD member states were called on to submit to national legislatures by April 1, 1998 implementing legislation to criminalize bribery of foreign public officials and to seek the enactment of such laws by the end of 1998.<sup>52</sup> Several parties have already done so; the U.S. implementing legislation, submitted in May of 1998, is discussed below.

#### F. Monitoring and Follow-Up

International cooperation is essential to effective enforcement even though actual enforcement of the OECD Convention is left to the parties. An important component of the OECD Convention is the provision requiring parties to cooperate in a follow-up program, within the framework of the OECD, to monitor and promote full implementation and consistent enforcement.<sup>53</sup> The OECD Working Group on Bribery in International Business Transactions will carry out this function until a different body is designated to do so.

### IV. U.S. IMPLEMENTING LEGISLATION

The Administration has recently transmitted the OECD Convention to the U.S. Senate for its advice and consent. No reservations or understandings were requested in the transmittal. However, to conform U.S. law to the OECD Convention, the Administration has proposed several amendments to the FCPA.

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<sup>51</sup>*Id.*, Art. 11.

<sup>52</sup>Prior to 1999, the OECD Convention will enter into force when five of the OECD's ten largest exporting countries, representing 60 percent of the combined total exports of those ten countries, deposit their instruments of ratification. OECD Convention, Art. 15, ¶¶ 1-2. Thereafter, it will enter into force when at least two signatories have deposited their instruments of ratification and declared their willingness to be bound.

<sup>53</sup>*Id.*, Art. 12. This program is expected to resemble in many respects the Financial Action Task Force for Money Laundering ("FATF"), which was established at the 1989 Summit of Industrialized Nations to examine measures to combat money laundering. With 26 member countries, including territories, and two regional organizations, FATF's membership is similar to that of the OECD. It is a multi-disciplinary body that meets several times each year and brings together legal, financial and law enforcement experts. One of the main tasks of the FATF is monitoring members' progress in implementing measures to counter money laundering through a two-fold process of annual self-assessment and a more detailed mutual evaluation.

A. Expansion of Prohibited Acts

The FCPA currently criminalizes payments made to a foreign public official "in obtaining or retaining business for or with, or directing business to, any person."<sup>54</sup> Consistent with the language of the OECD Convention, the proposed amendments would expand the FCPA's scope to include payments made to public officials for the purpose of "securing any improper advantage."<sup>55</sup> This change would clarify that the FCPA applies not only to improper payments made to obtain the award of a contract, but also payments made to obtain benefits unrelated to the underlying transaction. Such a change would effectively codify existing policy and case law followed by U.S. authorities.

B. Definition of Foreign Public Official

Officials of international organizations are included within the definition of a foreign public official in the OECD Convention. As a result, the proposed amendments would expand the FCPA to include any official or employee of a public international organization,<sup>56</sup> or any person acting on behalf of a public international organization.<sup>57</sup>

C. Scope and Jurisdiction

As noted earlier, the OECD Convention prohibits illicit payments made by "any person" and recognizes the application of both the territorial and nationality principles of jurisdiction. Each party is required to establish jurisdiction over bribery of a foreign public official when the offense is committed in whole or in part in its territory.<sup>58</sup> Where a party applies the nationality principle of jurisdiction to offenses committed abroad by its nationals, it shall also do so with respect to the bribery of a foreign public official.<sup>59</sup>

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<sup>54</sup>15 U.S.C. §§ 78dd-1(a)(1); 78dd-2(a)(1).

<sup>55</sup>International Anti-Bribery Act of 1998 ("International Anti-Bribery Act"), Legislative History, Section-by-Section Analysis, § 3 at 4.

<sup>56</sup>The public international organizations to be covered by the FCPA are those organizations designated by Executive Order pursuant to the International Organizations Immunities Act, 22 U.S.C. § 288. It includes such organizations as the Organization of American States, the European Space Agency and the Hong Kong Economic and Trade Offices.

<sup>57</sup>International Anti-Bribery Act, Section-by-Section Analysis, § 3 at 5.

<sup>58</sup>OECD Convention, Art. 4, ¶ 1.

<sup>59</sup>OECD Convention, Art., ¶ 2.

In contrast, the FCPA currently applies to "issuers" and "domestic concerns."<sup>60</sup> Through the requirement that "an instrumentality of interstate commerce" be used in furtherance of a bribe to a foreign public official, minimal territorial nexus to the United States must exist in order for there to be jurisdiction.<sup>61</sup> But in practical effect, the scope of the FCPA is limited to U.S. companies and to U.S. citizens, nationals and residents.<sup>62</sup> It generally does not apply to foreign nationals or to foreign corporations and their foreign national employees,<sup>63</sup> even if they commit an act prohibited by the FCPA within U.S. territory.

### *1. Foreign Persons and Entities*

Under the proposed amendments, the scope of the FCPA would be expanded to cover foreign natural and legal persons that commit any act in furtherance of the bribery of a foreign public official "while in the territory of the United States." This conforms the FCPA to the OECD Convention requirement that "any person" who commits all or a part of the prohibited conduct within the territory of a party should be subject to prosecution by that party.<sup>64</sup>

### *2. Nationality Principle of Jurisdiction*

The proposed amendments would expand the jurisdictional basis for prosecutions of U.S. companies and U.S. nationals under the FCPA. It would apply the nationality principle of jurisdiction to prohibited payments made by U.S. nationals or U.S. companies that take place wholly outside of the United States, regardless of whether an "instrumentality of interstate

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<sup>60</sup>The term "issuer" refers to a corporation which has a class of securities registered under the Securities Exchange Act of 1934 or is required to file reports under the Exchange Act. The term "domestic concern" means any U.S. citizen, national or resident, and any legal entity which has its principal place of business in the United States or is incorporated in the United States. This includes any officer, director, employee or agent thereof, or any stockholder acting on behalf of such entities.

<sup>61</sup>15 U.S.C. §§ 78dd-1(a) and 78dd-2(a). The term "interstate commerce" covers trade, commerce, transportation or communication among the states or between any foreign country and any state. This would include a telephone call or the transnational use of computers, like e-mail, made in furtherance of payment or offer to pay to obtain or retain business.

<sup>62</sup>The FCPA may also apply to foreign nationals who are employees of U.S. companies or foreign nationals acting as agents for and on behalf of a U.S. company.

<sup>63</sup>Foreign corporations which are "issuers" (i.e. which have ADRs listed on the New York Stock Exchange) are also subject to the FCPA. Nonetheless, they are less likely to meet the jurisdictional requirement under the FCPA that there be a use of "an instrumentality of interstate commerce." Yet regardless of whether an instrumentality of interstate commerce is involved, such entities are subject to the record-keeping requirements of the FCPA. See, e.g., *Montedison, S.p.A.*, SEC Litigation Release No. 15164 (Nov. 21, 1996).

<sup>64</sup>OECD Convention, Art. 4, ¶ 1.

commerce" is used in furtherance of the prohibited conduct.<sup>65</sup> With the current territorial nexus requirement being minimal, this does not represent a significant change. Furthermore, this change has the benefit of mirroring the likely implementation of the OECD Convention in civil law countries, which tend to use nationality jurisdiction. Foreign subsidiaries of U.S. companies have not been covered by the FCPA unless they qualified as issuers. Under the proposed amendments, they will now be covered to the extent that they act improperly within U.S. territory.

#### D. Sanctions

Under the FCPA, foreign national employees and agents of U.S. companies who use an instrumentality of interstate commerce in furtherance of a prohibited payment to a foreign public official are currently subject to civil rather than criminal penalties.<sup>66</sup> The proposed amendment to the penalty section of the FCPA would ensure that foreign nationals who are employees or agents of U.S. companies will be subject to civil and criminal penalties, and thereby accorded the same treatment as U.S. citizens who are employees or agents of U.S. companies.<sup>67</sup>

#### V. RECOMMENDED ACTION

In 1995, the ABA adopted a Recommendation supporting efforts "by the international community, by national governments, and by non-government organizations to encourage the adoption and implementation of effective legal measures and mechanisms to deter corrupt practices in the conduct of international business."<sup>68</sup> At that time, it was unclear as to what extent these international initiatives, then in their initial stages, would produce "hard" rather than "soft" law.<sup>69</sup> In 1997, the ABA adopted a Recommendation calling for the prompt ratification

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<sup>65</sup>While the United States has traditionally followed the territorial principle in the application of its criminal laws, there is precedent for the application of the nationality principle of jurisdiction under U.S. law. *See, e.g.*, the Economic Espionage Act of 1996, 18 U.S.C. § 1831-1839 (the statute applies to conduct outside the United States if (1) the offender is a natural person who is a citizen or permanent resident alien of the United States, or an organization organized under the laws of the United States); Monetary Transactions Involving Criminally Derived Products, 18 U.S.C. § 1956(f) ("There is extraterritorial jurisdiction over the conduct prohibited . . . if - (1) the conduct is by a United States citizen . . .") and § 1957(d) ("the offense . . . takes place outside the United States . . . but the defendant is a United States person . . ."). *See also* Foreign Assets Control Regulations, 31 C.F.R. Part 500.

<sup>66</sup>International Anti-Bribery Act, Section-by-Section Analysis, § 4 at 5. Officers and directors of U.S. companies are currently subject to criminal penalties under the FCPA. 15 U.S.C. § 78dd-2(g).

<sup>67</sup>International Anti-Bribery Act, Section-by-Section Analysis, § 4 at 5.

<sup>68</sup>ABA Recommendation and Report, Report No. 117A.

<sup>69</sup>*Id.*

and implementation of the Inter-American Convention as one of the first critical steps in transforming "soft" law into binding obligations that could result in effective mechanisms to prevent bribery and related conduct in the course of international business.<sup>70</sup>

The next meaningful step in this transformation from "soft" to "hard" law is for parties to promptly ratify and fully implement the OECD Convention. Through its adoption and active enforcement of the FCPA, the United States has been viewed as a credible leader in efforts to deter corrupt practices in the conduct of international business. The manner of and speed by which the United States now considers ratification and implementation will have a direct impact on the ultimate success of the OECD Convention. It will signal to other signatories the sincerity of the U.S. commitment as well as the degree to which they are expected to fulfill their commitments.

Prompt ratification and full implementation are therefore critical for the United States and other parties to the OECD Convention. The amendments to the FCPA proposed by the Administration represent a careful attempt at good faith and full implementation of the OECD Convention, without reopening the FCPA more broadly for reexamination. To facilitate compliance, it is also important that the implementing legislation of the various parties have a high degree of consistency. In this regard, the proposed amendments to the FCPA further the goal of consistent implementation.

Finally, the oversight envisioned by the OECD Convention will be a critical element in promoting full implementation and consistent enforcement. But the oversight should not be limited to mechanisms established by the OECD Convention. In addition to other organizations, the ABA and its members must play an active role in overseeing the ratification and implementation of the OECD Convention.<sup>71</sup> The ABA's efforts must also be ongoing to ensure effective and consistent enforcement. This includes monitoring implementation and enforcement, moving to eliminate barriers and loopholes and supporting the further development of the OECD Convention so as to establish the most effective means of deterring corrupt practices in the conduct of international business.

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<sup>70</sup> ABA Recommendation and Report, Report No. 301 (Aug. 1997), reprinted in 31 INT'L LAW. 1122 (1977).

<sup>71</sup> As previously noted with respect to the ABA support of the Inter-American Convention, the ABA has a distinctive role to play in these efforts. *Id.* U.S. lawyers have years of experience addressing the multitude of issues associated with such legal regimes. The United States is the only country to have had in place for an extended period an actively enforced legal regime that penalizes foreign corrupt practices on the part of its citizens, residents and businesses. The ABA therefore represents a community of lawyers uniquely qualified to address the range of issues associated with guiding the development and implementation of effective measures to deter corrupt practices in the conduct of international business.

Respectfully submitted.

Timothy L. Dickinson  
Chair  
August, 1998<sup>72</sup>

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<sup>72</sup>The Task Force on International Standards for Corrupt Practices of the Section of International Law and Practice took the lead in preparing the foregoing Recommendation and Report. The Task Force is chaired by Stuart H. Deming and John A. Detzner.

GENERAL INFORMATION FORM

Submitting Entity: Section of International Law and Practice

Submitted By: Timothy L. Dickinson, Chair of the Section of International Law and Practice

1. Summary of Recommendation.

The Recommendation asks the American Bar Association to support the prompt ratification and implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention) by the United States, by other members of the Organization for Economic Co-operation and Development (OECD), and by other countries that are eligible to accede to the OECD Convention. The Recommendation also asks that the ABA support the prompt enactment of legislative changes proposed by the Administration to conform the Foreign Corrupt Practices Act to the OECD Convention.

2. Approval by Submitting Entity.

This Recommendation was approved by the Council of the Section of International Law and Practice at its meeting on August 1, 1998, in Toronto, Canada.

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

In 1995, the ABA adopted a Recommendation supporting efforts "by the international community, by national governments, and by non-government organizations to encourage the adoption and implementation of effective legal measures and mechanisms to deter corrupt practices in the conduct of international business." In 1997, the ABA adopted a Recommendation calling for the prompt ratification and implementation of the Inter-American Convention as one of the first critical steps in transforming the international consensus on this issue into binding obligations that could result in effective mechanisms to prevent bribery and related conduct in the course of international business.

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

See section 3 above. This Recommendation, if adopted by the ABA, would represent the next meaningful step in the policy initiative embarked upon in 1995 and 1997.

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

In the 1970s, the international community began to examine the incidence and effects of corrupt practices in the conduct of international business. A number of factors, including the U.S. initiative prompted by the Omnibus Trade and Competitiveness Act of 1988, recently spawned a resurgence of



activity by the OECD and other international organizations. It is crucial that the ABA supports this Convention, as the ABA and its members must play an active role in overseeing the ratification and implementation of the OECD Convention. The ABA must monitor implementation and enforcement, moving to eliminate barriers and loopholes and supporting the further development of the OECD Convention so as to establish the most effective means of deterring corrupt practices in the conduct of international business.

6. Status of Legislation. (If applicable.)

On November 21, 1997, 28 members of the OECD, along with Argentina, Brazil, Bulgaria, Chile and the Slovak Republic, adopted this Convention.

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

None.

8. Disclosure of Interest. (If applicable.)

None.

9. Referrals.

Not applicable.

10. Contact Person. (Prior to the meeting.)

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12. Contact Person Regarding Amendments to This Recommendation: (Are there any known proposed amendments at this time? If so, please provide the name, address, telephone, fax and ABA/net number of the person to contact below.)

No proposed amendments have been received. The persons to contact concerning proposed amendments are:

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