



# **The Integrity Pact**

Between

## **The Government of Pakistan and the Foreign / Multinational / National Companies Operating in Pakistan**

### **Introduction**

Corruption can have many manifestations, and countries typically develop a complex set of institutions, laws, rules and regulations (the "integrity system") in order to combat corruption.

Bribery and Extortion in the public sector either for Investment or Procurement of goods and services are key manifestations of corruption. "Public Sector" in this context includes national or provincial governments, administrations of cities or local communities as well as other organizations carrying out public functions.

While, until now the bribery of public officials of another country has not been a criminal act under the laws of any country (except in the United States under the Foreign Corrupt Practices Act of 1977), the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, signed in December 1997 by the member states of the OECD and five additional countries (Argentina, Brazil, Chile, Bulgaria and Slovakia), and coming into force on 15 February 1999, will bring about a major change:

Henceforth International Bribery of Public Officials will be a criminal act in all ratifying states. Some of the largest trading nations such as Japan, Germany and the United Kingdom, in addition to the United States, have already ratified the Convention. Also, all signatory states **will abolish the tax deductibility of bribe payments**. Thus companies doing international business will face a totally new legal situation with regard to their business practices.

Many governments and business leaders have recognized the high risk and cost of bribery and extortion and seek ways to curb and eventually eliminate corruption in such transactions. Many business leaders have expressed their desire to stop paying bribes but are held back by the fear of losing orders if their competitors continue to pay bribes.

If a government has embarked on a program to curb corruption, the establishment of the **"Integrity Pact" (IP) concept for Transparency in Investment or Procurement Procedures and good Business Practices** could be an important part of that program. Thus if National and International Investment is to be encouraged, the Government must first provide Procedures which facilitate and expedite investment. This can only come about if the government commits itself to Transparency in all its Investment and Procurement procedures.

### **Purpose of the Integrity Pact (IP).**

The Integrity Pact (IP) is intended to accomplish two objectives:

- a) To enable companies to abstain from bribing by establishing Transparent procedures in accordance with the "OECD Convention on combating Bribery of Public Officials" the "OECD Guidelines for Multinational Enterprises" the "US Foreign Corrupt Practices Act 1977" and Transparency International's "Business Principles for



combating Bribery” that will discourage the need for bribing either by them or their competitors.

- b) That government / agencies will undertake to prevent corruption, by committing itself to establish Transparent procedures in accordance with the guidelines set out by Transparency International and the “ADB-OECD Anti Corruption Initiative” to which Pakistan is a signatory that will provide the necessary checks and balances to reduce appreciably the possibility of collusion or of extortion by their officials. This will help the government not only in its **Image Building Process** but at the same time will reduce the high cost and disproportionate impact of corruption in Business Practices.
- c) It will enable Transparency International – Pakistan along with Management Association of Pakistan and other like minded CSO / NGO’s to act as “catalysts” or as “intermediaries” in bringing together all the stakeholders in an effort to combat corruption. It will also act as “Watch Dogs” in the Implementation and Monitoring of the cooperation between the Business Community and the Government of Pakistan.

**Note:** One must point out that in practically all countries, all forms of domestic corruption including bribery are illegal, and one should assume that our government will continue to prosecute all offenders. Unfortunately either due to expediency or other pressures, corruption seems to have taken over and is now the norm.

The IP however focuses on bribery of officials in order to obtain or retain a contract or other improper advantage. This includes any payments or other favors offered or granted in order to:

- Facilitate procedures in the form of ‘Speed Money’
- Or win a contract award in the form of ‘Bribery’
- Circumvent tax, duty, license or other legal obligations, or
- Induce an official to breach his/her official duties in any other way.

**Note:** This language is taken from the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, dated 17 December 1997.

#### **Main Features of the Integrity Pact.**

The IP is an agreement between the government / government agency and the Investor / companies, who either intend to establish new Ventures within Pakistan or participate in the bidding process for the supply of goods or services for a selected contract / project. That bribes will not be offered, granted or sought, either during all stages of setting up of a new venture or in the bidding / implementation of the contract by the successful bidder.

#### **The IP shall have the following main features:**

- A formal signed no-bribery commitment by all Foreign / Multinational / national companies operating in Pakistan to be implemented by the OICCI and the ABC as a pre-requisite in the **Image Building Process** supported by a “Company Code of Conduct and a Compliance of the US FCPA 1977 revised 1988 and the OECD Convention 1997 on combating Bribery of Pakistani Public Officials in all its transactions.
- A corresponding commitment of the government followed by a definite program to establish Transparent procedures to prevent extortion and the acceptance of



- bribes by its officials in accordance with the ADB-OECD Anti Corruption initiative to which Pakistan is a signatory.
- The involvement of Civil Society, in this case Transparency International – Pakistan, the Management Association of Pakistan, and other NGO's in helping the Government establish Transparent Procedures for Investment and Procurement and in monitoring the Total Image Building Process proposed by TI-Pakistan.

Applying the Integrity Pact concept would be one step for the government towards bringing increased Transparency and Credibility into its procurement process. The "Integrity Pact" if adopted by the Government and the Business Community, would be just a part albeit an essential part of the **Image Building Process** and will go a long way in allaying the fears of the potential Investor and a tool towards developing Investor confidence. The broader government program to combat corruption through investigative and systemic change in its administrative, financial and public procurement procedures should be implemented concurrently and as rapidly as possible.

#### **The Integrity Pact as applied to Procurement Procedures.**

The government / government agency, when inviting contractors or supplies of goods or services to tender for a specific contract, informs the potential bidders that their tender offer must contain a formal commitment, on behalf and in the name of the bidder's CEO, not to offer or grant any payments or favors in order to obtain or retain this contract or other improper advantage, and not to collude with other actual or potential bidders with the aim of restricting competition.

The bidder's commitment in the form of a "Code of Conduct" will have to cover all managers and employees of the company as well as gents, consultants, subcontractors and consortium partners of the bidder. It will include:

- An unequivocal statement of the company's policy prohibiting all forms of bribery and collusion;
- The company's policy regarding gifts and entertainment, travel and lodging expenses, political contributions etc;
- Distribution of the policy (in appropriate languages) to all managers and employees;
- An acknowledgment of receipt and acceptance by the employees, to be renewed annually;
- Training of employees in the application of the policy;
- Internal controls, external audit and record keeping; and
- Application of appropriate sanctions (including possibly termination of employment) in case of violation.

The government on its part will commit itself to prevent extortion and the acceptance of bribes by its officials, and to establish and follow transparent procurement rules. In substance, these commitments are nothing other than an agreement to respect and apply the existing laws of the country.



## **GENERAL ELEMENTS OF AN EFFECTIVE CORPORATE COMPLIANCE PROGRAM**

An effective corporate compliance program is one that ultimately yields intended results: education, detection, and deterrence. In structuring your corporate compliance program, you may want to consider the following general elements typically found in successful compliance programs.

### **Full support of upper management.**

It is crucial that all of the elements of your company's corporate compliance program receive the full support of upper management.

- The corporate compliance program must be enforced at all levels within the company
- If upper level management does not take efforts to combat corruption seriously, then neither will employees.

### **Establish and adhere to a written corporate code of conduct.**

Corporate directors, officers, employees, and agents put themselves at risk of incurring criminal or civil liability when they do not adhere to the FCPA or similar anticorruption laws of other countries.

- A corporate code of conduct generally consists of a clearly written set of legal and ethical guidelines for employees to follow.
- A comprehensive and clearly articulated code of conduct — as well as clear policies and procedures relative to seeking guidance and making disclosures — may reduce the likelihood of actionable misconduct by your employees.
- It is important that a company's code of conduct be distributed to everyone in the company and, if necessary, translated into the languages of the countries abroad where your company operates.
- Finally, developing a code of conduct should not be the final act. The code must be effectively implemented and enforced at all times.

### **Establish an organizational compliance structure.**

A compliance program may be run by one person or a team of compliance or ethics officers, depending on the size of your business.

- Implementation and responsibility for a corporate compliance program by high-level management employees are vital for accountability.
- Corporate compliance officers and committees can play key roles in drafting codes of conduct and educating and training employees on compliance procedures. Committee compliance members may include senior vice presidents for marketing and sales, auditing, operations, human resources, and other key offices.
- Past experience has shown that empowering compliance officers with access to senior members of management and with the capacity to influence overall company policy on integrity issues can be of utmost importance.

### **Provide anticorruption training and education seminars.**

The overall success of a compliance program depends on promoting legal and ethics training at every level of the company.

- Regular ethics and compliance training programs should be held for all company employees, including board members and senior management officials.



- Compliance programs should educate employees at all levels of the company about the FCPA and, when necessary, other countries' anticorruption laws.
- More specific legal and ethical training may be necessary for employees in high-risk areas.
- A company should also take reasonable measures to communicate its values and procedures in an open environment to encourage participation and feedback.
- Employees should be informed as to whom they should contact to report violations or ask questions.
- Training materials which are both interactive and cost effective can help build employee support for a compliance program.
- Most importantly, compliance issues should not be limited to training classes and the compliance team: compliance should be stressed as an integral part of the company's way of doing business.

#### **Undertake due diligence.**

Conducting prompt and thorough due diligence reviews is vital for ensuring that a compliance program is efficient and effective. Due diligence reviews are also key for preventing potential harm to the company's reputation.

- Self-monitoring, monitoring of suppliers, and reports to the Board of Directors are all good tools for ensuring that a compliance program is being followed.
- Moreover, from vetting new hires, agents, or business partners to assessing risks in international business dealings (e.g., mergers, acquisitions, or joint ventures), due diligence reviews can uncover questionable conduct and limit liability.

#### **Auditing and internal accounting controls.**

Auditing and monitoring of systems of internal accounting controls contribute toward building an effective compliance program by the early detection of inaccuracies and misconduct (e.g., bribery, fraud, or other corporate malfeasance). Financial disclosure and reporting should be an integral part of a company's internal accounting controls.

- Companies should have a clear and concise accounting policy that prohibits off-the-books accounts or inadequately identified transactions.
- Companies should monitor their accounts for inaccuracies and for ambiguous or deceptive bookkeeping entries that may disguise illegal bribery payments made by or on behalf of a company. The FCPA requires compliance with various accounting and record-keeping provisions.

#### **Compliance Mechanisms.**

Enforcement of a company's code of conduct is critical. Compliance officers should be accessible so that employees will feel comfortable discussing any of their compliance questions or concerns.

- Creating reporting mechanisms with adequate policies on confidentiality and non-retaliation as well as other safeguards related to reporting is extremely important.
- Whistleblowing protections, suggestion boxes, or "Help-lines" facilitate detection and reporting of questionable conduct.

**"I think I may have made a mistake."**

**An effective and non-threatening environment that encourages reporting and questions is important to assist employees and agents (especially those in the field) when confronted with questionable situations.**



- Companies should provide guidance to assist employees and agents on how to cope with and resolve difficult situations. Such counseling not only protects the person in the field, it also protects the company.

**Discipline.**

A company should ensure that all employees understand that failure to comply with its compliance policy and procedures will result in disciplinary action, ranging from minor sanctions to more severe punishment, including termination of employment.

- In instances of non-compliance, a company should take the necessary preventive steps to ensure that the questionable conduct does not recur in the future.

**Note:**

*The measures listed above are general elements for developing an anticorruption corporate compliance program. Note that compliance programs' emphasis on specific elements will vary from one company to another depending on the particular risks engendered by the company's business (e.g., antitrust, healthcare fraud, or environmental issues).*

*You should seek the advice of legal counsel to learn more about what kind of corporate compliance program is most appropriate for your business.*



## **ACCOUNTABILITY — GOOD GOVERNANCE IS GOOD FOR BUSINESSES AND GOVERNMENTS**

***“A responsible corporate citizen is also a citizen in the democratic process.”***

The emphasis on good governance is timely. Globalization has put a premium on developing the incentives and adjustments necessary to attract investments and capital in foreign markets.

***“Accountability, transparency, disclosure, protection of shareholders’ rights and building long-term value are the core values of good corporate governance. These values are also the pillars of a functioning market economy.”***

You are the most effective advocate in the fight against corruption because you play a part in controlling jobs and investment in the global economy.

Good corporate governance procedures provide fair, reliable, and transparent rules that foster trust and confidence for doing business. As corporate citizens, businesspeople are members of and leaders in their communities. Your efforts to establish and adhere to corporate codes of conduct and personal ethical standards have a beneficial effect that ripples through the community. By working with governments and civil society to promote good governance in global economies, your company will help foster a synergy between economic goals and social progress.

Good governance principles for governments, such as those listed on page 9, also benefit their economies. Good governance reduces market volatility, encourages foreign direct investment and capital inflows, promotes sustainable economic growth, and produces a more equitable distribution of resources to the people (“fruits of development”).

While it is increasingly clear that corporate governance and sound business practices are generally good for business, good governance practices by governments also enhance the Integrity of the markets and promote the integration of economies into the global trading system.

Thus, governments and businesses alike have a mutual interest in working together to strengthen public-private governance practices that promote and reward efficiency, innovation, and openness. Moreover, public and corporate governance principles are also important in nurturing the investment climate and building a more democratic rule of law-based society.



## **RECOGNIZING AND MAKING ANTICORRUPTION ISSUES PART OF THE BUSINESS-GOVERNMENT DIALOGUE**

*“Think Globally, Act Locally.”*

As you conduct your business overseas, or if you are considering entering a new foreign market, let foreign government officials and business partners know that anticorruption and good governance policies will help their economy — and your company — sustain long-term growth.

Government policies, such as the following, that emphasize transparency, due process, and accountability, make for a strong anticorruption regime:

- Commercial codes that provide protection for international contracts as well as effective dispute settlement and arbitration methods.
- Law enforcement and judicial procedures that promote due process and the rule of law.
- Independent systems to promote and ensure the integrity and efficiency of governmental agencies.
- Civil service reforms and competitive wages for government employees.
- Integrity of capital markets and financial disclosure on the issuance of securities.
- Predictable and transparent administrative and bidding processes in areas such as procurement and privatization.
- Improved and standardized public accounting, auditing, and management systems.
- Effective bankruptcy and insolvency laws.
- Limits on discretionary authority for officials who perform inspections or audits, oversee procurement, grant licenses and permits, or provide final approval for contracts or projects.
- Oversight mechanisms and appellate remedies to challenge arbitrary or unlawful actions.
- Protection for whistleblowers and the media.
- Disclosure of and access to public records and information.
- Encouragement of civil society’s participation in implementing these policies and anticorruption efforts.



## **KEY GOALS OF U.S. INTERNATIONAL ANTICORRUPTION POLICY:**

- Full ratification, implementation, and enforcement of the OECD Bribery Convention by all signatories.
- Ratification by U.S. of the Inter-American Convention Against Corruption and full ratification, implementation, and enforcement by all hemispheric partners.
- Nurture stability in democratic institutions and strengthen the rule of law in transitional economies.
- Promote global and regional anticorruption norms and initiatives that deter and punish corruption.
- Ensure transparency in government procurement procedures to enhance openness, disclosure, and predictability.
- Develop ethical and administrative codes of conduct that promote the highest levels of professionalism and integrity in government.
- Engage the business community to join the U.S. and other governments in promoting corporate governance, transparency, and integrity in business operations.
- Foster an active civil society that is involved in participatory governance and upholds democratic principles.



## **Transparency International – Pakistan**

**Initiative for the Implementation and Monitoring  
of the OECD Convention & ADB-OECD Initiative  
against bribery of Public Officials  
by Foreign Companies operating in Pakistan.**

### **SEMINAR**

<b>THE SEMINAR</b>	“AN INTRODUCTION TO THE OECD CONVENTION AND THE ADB-OECD INITIATIVE“
<b>THE DATE</b>	<b>FRIDAY 15<sup>th</sup>. FEBRUARY 2002</b>
<b>VENUE</b>	HOTEL AWARI - KARACHI
<b>CHIEF GUEST</b>	Lt. Gen. MOINUDDIN HAIDER – FEDERAL MINISTER OF INTERIOR
<b>CHAIRPERSON</b>	Barrister SHAHIDA JAMIL – FEDERAL MINISTER OF LAW, PARLIAMNTARY AFFAIRS.
<b>CONTACT POINT (Coordinator)</b>	Dr. ABDUL HAFEEZ SHAIKH – PROVINCIAL MIISTER OF FINANCE.
<b>ORGANIZERS</b>	TRANSPARENCY INTERNATIONAL – PAKISTAN
<b>SPONSORS</b>	MANAGEMENT ASSOCIATION OF PAKISTAN.
<b>SPEAKERRS</b>	<b>REPRESENTATIVE OECD -</b> “An introduction to the OECD Convention – Its policies – its implementation” <b>REPRESENTATIVE TRANSPARENCY INTERNATIONAL-</b> “Its Monitoring through the Integrity Pact.” <b>REPREENTATIVE BUSINESS COMMUNITY</b> “Problems being faced by the Business Community.” <b>REPRESENTATIVE GOVERNMENT OF PAKISTAN</b> “Assurances and present action being taken.” <b>QUESTION &amp; ANSWER SESSION</b>

**Note The above may be modified by the Speakers**

## **DETAILS**

The program being initiated by Transparency International – Pakistan is to inform the Foreign and Multinational companies operating in Pakistan of the OECD convention and the ADB-OECD initiative on combating bribery of public officials in business transactions and to implement in word and in action its policies.

It is expected that the business community through the cooperation of the Overseas Investors Chamber of Commerce and Industry (OICCI) and the American Business Council (ABC) in the light of the existing government procedures and regulations, will put forward to the government of Pakistan its recommendations so as to simplify and facilitate procedures of investment and provide a favourable climate for business development.

At the same time we have requested the Government of Pakistan to come forward and assure the business community of its cooperation. And that the government of Pakistan must as far as possible, take seriously and comply with the recommendations of the business community and where the need be, modify and revamp if necessary its procedures and regulations to comply with the recommendations.

## **THE INTENTION**

**TO REDUCE THE NEED FOR BRIBERY BY FOREIGN & MULTINATIONAL COMPANIES OPERATING IN PAKISTAN AND HELP PAKISTAN IN ITS IMAGE BUILDING PROCESS AS AN INVESTOR FRIENDLY COUNTRY**

## **THE INSTRUMENT**

THROUGH THE ESTABLISHMENT OF AN “INTEGRITY PACT” BETWEEN THE BUSINESS COMMUNITY AND THE GOVERNMENT OF PAKISTAN, IN THAT THE INTEGRITY PACT IS INTENDED TO ACCOMPLISH TWO OBJECTIVES:

- d) To enable foreign companies to abstain from bribing by establishing Transparent procedures that will eliminate the need for bribing either by them or their competitors.
- e) That government will undertake to prevent corruption, by committing itself to establish Transparent procedures that will provide the necessary checks and balances to reduce appreciably the possibility of collusion or of extortion by their officials. This will help the government not only to reduce the high cost and disproportionate cost of corruption but will support it in its image building process in its drive to encourage foreign investment.

**(Details of the Integrity Pact are attached along with)**

# **THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES**

## **I. Concepts and Principles**

1. The Guidelines are recommendations jointly addressed by governments to multinational enterprises. They provide principles and standards of good practice consistent with applicable laws. Observance of the Guidelines by enterprises is voluntary and not legally enforceable.

2. Since the operations of multinational enterprises extend throughout the world, international co-operation in this field should extend to all countries. Governments adhering to the Guidelines encourage the enterprises operating on their territories to observe the Guidelines wherever they operate, while taking into account the particular circumstances of each host country.

3. A precise definition of multinational enterprises is not required for the purposes of the Guidelines. These usually comprise companies or other entities established in more than one country and so linked that they may co-ordinate their operations in various ways. While one or more of these entities may be able to exercise a significant influence over the activities of others, their degree of autonomy within the enterprise may vary widely from one multinational enterprise to another. Ownership may be private, state or mixed. The Guidelines are addressed to all the entities within the multinational enterprise (parent companies and/or local entities). According to the actual distribution of responsibilities among them, the different entities are expected to co-operate and to assist one another to facilitate observance of the Guidelines.

4. The Guidelines are not aimed at introducing differences of treatment between multinational and domestic enterprises; they reflect good practice for all. Accordingly, multinational and domestic enterprises are subject to the same expectations in respect of their conduct wherever the Guidelines are relevant to both.

5. Governments wish to encourage the widest possible observance of the Guidelines. While it is acknowledged that small- and medium-sized enterprises may not have the same capacities as larger enterprises, governments adhering to the Guidelines nevertheless encourage them to observe the Guidelines recommendations to the fullest extent possible.

6. Governments adhering to the Guidelines should not use them for protectionist purposes nor use them in a way that calls into question the comparative advantage of any country where multinational enterprises invest.

7. Governments have the right to prescribe the conditions under which multinational enterprises operate within their jurisdictions, subject to international law. The entities of a multinational enterprise located in various countries are subject to the laws applicable in these countries. When multinational enterprises are subject to conflicting requirements by adhering countries, the governments concerned will co-operate in good faith with a view to resolving problems that may arise.

8. Governments adhering to the Guidelines set them forth with the understanding that they will fulfil their responsibilities to treat enterprises equitably and in accordance with international law and with their contractual obligations.

9. The use of appropriate international dispute settlement mechanisms, including arbitration, is encouraged as a means of facilitating the resolution of legal problems arising between enterprises and host country governments.

10. Governments adhering to the Guidelines will promote them and encourage their use. They will establish National Contact Points that promote the Guidelines and act as a forum for discussion of all matters relating to the Guidelines. The adhering Governments will also participate in appropriate review and consultation procedures to address issues concerning interpretation of the Guidelines in a changing world.

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## **II. General Policies**

Enterprises should take fully into account established policies in the countries in which they operate, and consider the views of other stakeholders. In this regard, enterprises should:

1. Contribute to economic, social and environmental progress with a view to achieving sustainable development.
2. Respect the human rights of those affected by their activities consistent with the host government's international obligations and commitments.
3. Encourage local capacity building through close co-operation with the local community, including business interests, as well as developing the enterprise's activities in domestic and foreign markets, consistent with the need for sound commercial practice.
4. Encourage human capital formation, in particular by creating employment opportunities and facilitating training opportunities for employees.
5. Refrain from seeking or accepting exemptions not contemplated in the statutory or regulatory framework related to environmental, health, safety, labour, taxation, financial incentives, or other issues.
6. Support and uphold good corporate governance principles and develop and apply good corporate governance practices.
7. Develop and apply effective self-regulatory practices and management systems that foster a relationship of confidence and mutual trust between enterprises and the societies in which they operate.
8. Promote employee awareness of, and compliance with, company policies through appropriate dissemination of these policies, including through training programmes.
9. Refrain from discriminatory or disciplinary action against employees who make bona fide reports to management or, as appropriate, to the competent public authorities, on practices that contravene the law, the Guidelines or the enterprise's policies.

10. Encourage, where practicable, business partners, including suppliers and sub-contractors, to apply principles of corporate conduct compatible with the Guidelines.
  11. Abstain from any improper involvement in local political activities.
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### **III. Disclosure**

1. Enterprises should ensure that timely, regular, reliable and relevant information is disclosed regarding their activities, structure, financial situation and performance. This information should be disclosed for the enterprise as a whole and, where appropriate, along business lines or geographic areas. Disclosure policies of enterprises should be tailored to the nature, size and location of the enterprise, with due regard taken of costs, business confidentiality and other competitive concerns.
  2. Enterprises should apply high quality standards for disclosure, accounting, and audit. Enterprises are also encouraged to apply high quality standards for non-financial information including environmental and social reporting where they exist. The standards or policies under which both financial and non-financial information are compiled and published should be reported.
  3. Enterprises should disclose basic information showing their name, location, and structure, the name, address and telephone number of the parent enterprise and its main affiliates, its percentage ownership, direct and indirect in these affiliates, including shareholdings between them.
  4. Enterprises should also disclose material information on:
    - a. The financial and operating results of the company;
    - b. Company objectives;
    - c. Major share ownership and voting rights;
    - d. Members of the board and key executives, and their remuneration;
    - e. Material foreseeable risk factors; f.
    - f. Material issues regarding employees and other stakeholders;
    - g. Governance structures and policies.
  5. Enterprises are encouraged to communicate additional information that could include:
    - a. Value statements or statements of business conduct intended for public disclosure including information on the social, ethical and environmental policies of the enterprise and other codes of conduct to which the company subscribes. In addition, the date of adoption, the countries and entities to which such statements apply and its performance in relation to these statements may be communicated;
    - b. Information on systems for managing risks and complying with laws, and on statements or codes of business conduct;
    - c. Information on relationships with employees and other stakeholders.
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## **IV. Combating Bribery**

Enterprises should not, directly or indirectly, offer, promise, give, or demand a bribe or other undue advantage to obtain or retain business or other improper advantage. Nor should enterprises be solicited or expected to render a bribe or other undue advantage. In particular, enterprises should:

1. Not offer, nor give in to demands, to pay public officials or the employees of business partners any portion of a contract payment. They should not use subcontracts, purchase orders or consulting agreements as means of channelling payments to public officials, to employees of business partners or to their relatives or business associates.
2. Ensure that remuneration of agents is appropriate and for legitimate services only. Where relevant, a list of agents employed in connection with transactions with public bodies and state-owned enterprises should be kept and made available to competent authorities.
3. Enhance the transparency of their activities in the fight against bribery and extortion. Measures could include making public commitments against bribery and extortion and disclosing the management systems the company has adopted in order to honour these commitments. The enterprise should also foster openness and dialogue with the public so as to promote its awareness of and co-operation with the fight against bribery and extortion.
4. Promote employee awareness of and compliance with company policies against bribery and extortion through appropriate dissemination of these policies and through training programmes and disciplinary procedures.
5. Adopt management control systems that discourage bribery and corrupt practices, and adopt financial and tax accounting and auditing practices that prevent the establishment of "off the books" or secret accounts or the creation of documents which do not properly and fairly record the transactions to which they relate.
6. Not make illegal contributions to candidates for public office or to political parties or to other political organizations. Contributions should fully comply with public disclosure requirements and should be reported to senior management.

# THE OECD CONVENTION

ON

## Combating Bribery of Foreign Public Officials in International Business Transactions

*On 21 November 1997, OECD Member countries and five non-member countries, Argentina, Brazil, Bulgaria, Chile and the Slovak Republic, adopted a Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. Signature of the Convention took place in Paris on 17 December 1997.*

### Preamble

#### *The Parties,*

**Considering** that bribery is a widespread phenomenon in international business transactions, including trade and investment, which raises serious moral and political concerns, undermines good governance and economic development, and distorts international competitive conditions;

**Considering** that all countries share a responsibility to combat bribery in international business transactions;

**Having regard** to the Revised Recommendation on Combating Bribery in International Business Transactions, adopted by the Council of the Organisation for Economic Co-operation and Development (OECD) on 23 May 1997, C(97)123/FINAL, which, *inter alia*, called for effective measures to deter, prevent and combat the bribery of foreign public officials in connection with international business transactions, in particular the prompt criminalisation of such bribery in an effective and co-ordinated manner and in conformity with the agreed common elements set out in that Recommendation and with the jurisdictional and other basic legal principles of each country;

**Welcoming** other recent developments which further advance international understanding and co-operation in combating bribery of public officials, including actions of the United Nations, the World Bank, the International Monetary Fund, the World Trade Organisation, the Organisation of American States, the Council of Europe and the European Union;

**Welcoming** the efforts of companies, business organisations and trade unions as well as other non-governmental organisations to combat bribery;

**Recognising** the role of governments in the prevention of solicitation of bribes from individuals and enterprises in international business transactions;

**Recognising** that achieving progress in this field requires not only efforts on a national level but also multilateral co-operation, monitoring and follow-up;

**Recognising** that achieving equivalence among the measures to be taken by the Parties is an essential object and purpose of the Convention, which requires that the Convention be ratified without derogations affecting this equivalence;

**Have agreed as follows:**

### **Article 1 - The Offence of Bribery of Foreign Public Officials**

1. Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.

2. Each Party shall take any measures necessary to establish that complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official shall be a criminal offence. Attempt and conspiracy to bribe a foreign public official shall be criminal offences to the same extent as attempt and conspiracy to bribe a public official of that Party.

3. The offences set out in paragraphs 1 and 2 above are hereinafter referred to as "bribery of a foreign public official".

4. For the purpose of this Convention:

a. "foreign public official" means any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organisation;

b. "foreign country" includes all levels and subdivisions of government, from national to local;

c. "act or refrain from acting in relation to the performance of official duties" includes any use of the public official's position, whether or not within the official's authorised competence.

### **Article 2 - Responsibility of Legal Persons**

Each Party shall take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official.

### **Article 3 - Sanctions**

1. The bribery of a foreign public official shall be punishable by effective, proportionate and dissuasive criminal penalties. The range of penalties shall be comparable to that applicable to the bribery of the Party's own public officials and shall, in the case of natural persons, include deprivation of liberty sufficient to enable effective mutual legal assistance and extradition.

2. In the event that, under the legal system of a Party, criminal responsibility is not applicable to legal persons, that Party shall ensure that legal persons shall be subject to effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions, for bribery of foreign public officials.

3. Each Party shall take such measures as may be necessary to provide that the bribe and the proceeds of the bribery of a foreign public official, or property the value of which corresponds to that of such proceeds, are subject to seizure and confiscation or that monetary sanctions of comparable effect are applicable.

4. Each Party shall consider the imposition of additional civil or administrative sanctions upon a person subject to sanctions for the bribery of a foreign public official.

#### **Article 4 - Jurisdiction**

1. Each Party shall take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory.

2. Each Party which has jurisdiction to prosecute its nationals for offences committed abroad shall take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official, according to the same principles.

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

4. Each Party shall review whether its current basis for jurisdiction is effective in the fight against the bribery of foreign public officials and, if it is not, shall take remedial steps.

#### **Article 5 - Enforcement**

Investigation and prosecution of the bribery of a foreign public official shall be subject to the applicable rules and principles of each Party. They shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved.

#### **Article 6 - Statute of Limitations**

Any statute of limitations applicable to the offence of bribery of a foreign public official shall allow an adequate period of time for the investigation and prosecution of this offence.

#### **Article 7 - Money Laundering**

Each Party which has made bribery of its own public official a predicate offence for the purpose of the application of its money laundering legislation shall do so on the same terms for the bribery of a foreign public official, without regard to the place where the bribery occurred.

#### **Article 8 - Accounting**

1. In order to combat bribery of foreign public officials effectively, each Party shall take such measures as may be necessary, within the framework of its laws and regulations regarding

the maintenance of books and records, financial statement disclosures, and accounting and auditing standards, to prohibit the establishment of off-the-books accounts, the making of off-the-books or inadequately identified transactions, the recording of non-existent expenditures, the entry of liabilities with incorrect identification of their object, as well as the use of false documents, by companies subject to those laws and regulations, for the purpose of bribing foreign public officials or of hiding such bribery.

2. Each Party shall provide effective, proportionate and dissuasive civil, administrative or criminal penalties for such omissions and falsifications in respect of the books, records, accounts and financial statements of such companies.

### **Article 9 - Mutual Legal Assistance**

1. Each Party shall, to the fullest extent possible under its laws and relevant treaties and arrangements, provide prompt and effective legal assistance to another Party for the purpose of criminal investigations and proceedings brought by a Party concerning offences within the scope of this Convention and for non-criminal proceedings within the scope of this Convention brought by a Party against a legal person. The requested Party shall inform the requesting Party, without delay, of any additional information or documents needed to support the request for assistance and, where requested, of the status and outcome of the request for assistance.

2. Where a Party makes mutual legal assistance conditional upon the existence of dual criminality, dual criminality shall be deemed to exist if the offence for which the assistance is sought is within the scope of this Convention.

3. A Party shall not decline to render mutual legal assistance for criminal matters within the scope of this Convention on the ground of bank secrecy.

### **Article 10 - Extradition**

1. Bribery of a foreign public official shall be deemed to be included as an extraditable offence under the laws of the Parties and the extradition treaties between them.

2. If a Party which makes extradition conditional on the existence of an extradition treaty receives a request for extradition from another Party with which it has no extradition treaty, it may consider this Convention to be the legal basis for extradition in respect of the offence of bribery of a foreign public official.

3. Each Party shall take any measures necessary to assure either that it can extradite its nationals or that it can prosecute its nationals for the offence of bribery of a foreign public official. A Party which declines a request to extradite a person for bribery of a foreign public official solely on the ground that the person is its national shall submit the case to its competent authorities for the purpose of prosecution.

4. Extradition for bribery of a foreign public official is subject to the conditions set out in the domestic law and applicable treaties and arrangements of each Party. Where a Party makes extradition conditional upon the existence of dual criminality, that condition shall be deemed to be fulfilled if the offence for which extradition is sought is within the scope of Article 1 of this Convention.

### **Article 11 - Responsible Authorities**

For the purposes of Article 4, paragraph 3, on consultation, Article 9, on mutual legal assistance and Article 10, on extradition, each Party shall notify to the Secretary-General of the OECD an authority or authorities responsible for making and receiving requests, which shall serve as channel of communication for these matters for that Party, without prejudice to other arrangements between Parties.

### **Article 12 - Monitoring and Follow-up**

The Parties shall co-operate in carrying out a programme of systematic follow-up to monitor and promote the full implementation of this Convention. Unless otherwise decided by consensus of the Parties, this shall be done in the framework of the OECD Working Group on Bribery in International Business Transactions and according to its terms of reference, or within the framework and terms of reference of any successor to its functions, and Parties shall bear the costs of the programme in accordance with the rules applicable to that body.

### **Article 13 - Signature and Accession**

1. Until its entry into force, this Convention shall be open for signature by OECD members and by non-members which have been invited to become full participants in its Working Group on Bribery in International Business Transactions.
2. Subsequent to its entry into force, this Convention shall be open to accession by any non-signatory which is a member of the OECD or has become a full participant in the Working Group on Bribery in International Business Transactions or any successor to its functions. For each such non-signatory, the Convention shall enter into force on the sixtieth day following the date of deposit of its instrument of accession.

### **Article 14 - Ratification and Depositary**

1. This Convention is subject to acceptance, approval or ratification by the Signatories, in accordance with their respective laws.
2. Instruments of acceptance, approval, ratification or accession shall be deposited with the Secretary-General of the OECD, who shall serve as Depositary of this Convention.

### **Article 15 - Entry into Force**

1. This Convention shall enter into force on the sixtieth day following the date upon which five of the ten countries which have the ten largest export shares (see [annex](#)), and which represent by themselves at least sixty per cent of the combined total exports of those ten countries, have deposited their instruments of acceptance, approval, or ratification. For each signatory depositing its instrument after such entry into force, the Convention shall enter into force on the sixtieth day after deposit of its instrument.
2. If, after 31 December 1998, the Convention has not entered into force under paragraph 1 above, any signatory which has deposited its instrument of acceptance, approval or ratification may declare in writing to the Depositary its readiness to accept entry into force of this Convention under this paragraph 2. The Convention shall enter into force for such a signatory on the sixtieth day following the date upon which such declarations have been deposited by at least two signatories. For each signatory depositing its declaration after

such entry into force, the Convention shall enter into force on the sixtieth day following the date of deposit.

#### **Article 16 - Amendment**

Any Party may propose the amendment of this Convention. A proposed amendment shall be submitted to the Depositary which shall communicate it to the other Parties at least sixty days before convening a meeting of the Parties to consider the proposed amendment. An amendment adopted by consensus of the Parties, or by such other means as the Parties may determine by consensus, shall enter into force sixty days after the deposit of an instrument of ratification, acceptance or approval by all of the Parties, or in such other circumstances as may be specified by the Parties at the time of adoption of the amendment.

#### **Article 17 - Withdrawal**

A Party may withdraw from this Convention by submitting written notification to the Depositary. Such withdrawal shall be effective one year after the date of the receipt of the notification. After withdrawal, co-operation shall continue between the Parties and the Party which has withdrawn on all requests for assistance or extradition made before the effective date of withdrawal which remain pending.

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## Annexure

### STATISTICS ON OECD EXPORTS

	1990-1996 US\$ million	1990-1996 % of total OECD	1990-1996 % of total 10
United States	287 118	15.9	19.7
Germany	254 746	14.1	17.5
Japan	212 665	11.8	14.6
France	138 471	7.7	9.5
United Kingdom	121 258	6.7	8.3
Italy	112 449	6.2	7.7
Canada	91 215	5.1	6.3
Korea (1)	81 364	4.5	5.6
Netherlands	81 264	4.5	5.6
Belgium-Luxembourg	78 598	4.4	5.4
<b>Total 10</b>	<b>1 459 148</b>	<b>81.0</b>	<b>100</b>
Spain	42 469	2.4	
Switzerland	40 395	2.2	
Sweden	36 710	2.0	
Mexico (1)	34 233	1.9	
Australia	27 194	1.5	
Denmark	24 145	1.3	
Austria*	22 432	1.2	
Norway	21 666	1.2	

Finland	17 296	1.0	
Poland (1) **	12 652	0.7	
Portugal	10 801	0.6	
Turkey *	8 027	0.4	
Hungary **	6 795	0.4	
New Zealand	6 663	0.4	
Czech Republic ***	6 263	0.3	
Greece *	4 606	0.3	
Iceland	949	0.1	
<b>Total OECD</b>	<b>1 801 661</b>	<b>100</b>	

Notes: \* 1990-1995; \*\* 1991-1996; \*\*\* 1993-1996

Source: OECD, (1) IMF

Concerning Belgium-Luxembourg: Trade statistics for Belgium and Luxembourg are available only on a combined basis for the two countries. For purposes of Article 15, paragraph 1 of the Convention, if either Belgium or Luxembourg deposits its instrument of acceptance, approval or ratification, or if both Belgium and Luxembourg deposit their instruments of acceptance, approval or ratification, it shall be considered that one of the countries which have the ten largest exports shares has deposited its instrument and the joint exports of both countries will be counted towards the 60 percent of combined total exports of those ten countries, which is required for entry into force under this provision.



# FOREIGN CORRUPT PRACTICES ACT

## ANTIBRIBERY PROVISIONS

United States Department of Justice  
Fraud Section, Criminal Division  
1400 New York Avenue, NW  
Washington, D.C. 20038  
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United States Department of Commerce  
Office of the Chief Counsel for International  
Commerce  
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### INTRODUCTION

The 1988 Trade Act directed the Attorney General to provide guidance concerning the Department of Justice's enforcement policy with respect to the Foreign Corrupt Practices Act of 1977 ("FCPA"), 15 U.S.C. §§ 78dd-1, *et seq.*, to potential exporters and small businesses that are unable to obtain specialized counsel on issues related to the FCPA. The guidance is limited to responses to requests under the Department of Justice's Foreign Corrupt Practices Act Opinion Procedure (described below at p. 10) and to general explanations of compliance responsibilities and potential liabilities under the FCPA. This brochure constitutes the Department of Justice's general explanation of the FCPA.

U.S. firms seeking to do business in foreign markets must be familiar with the FCPA. In general, the FCPA prohibits corrupt payments to foreign officials for the purpose of obtaining or keeping business. The Department of Justice is the chief enforcement agency, with a coordinate role played by the Securities and Exchange Commission (SEC). The Office of General Counsel of the Department of Commerce also answers general questions from U.S. exporters concerning the FCPA's basic requirements and constraints.

*This brochure is intended to provide a general description of the FCPA and is not intended to substitute for the advice of private counsel on specific issues related to the FCPA. Moreover, material in this brochure is not intended to set forth the present enforcement intentions of the Department of Justice or the SEC with respect to particular fact situations.*

## **BACKGROUND**

As a result of SEC investigations in the mid-1970's, over 400 U.S. companies admitted making questionable or illegal payments in excess of \$300 million to foreign government officials, politicians, and political parties. The abuses ran the gamut from bribery of high foreign officials to secure some type of favorable action by a foreign government to so-called facilitating payments that allegedly were made to ensure that government functionaries discharged certain ministerial or clerical duties. Congress enacted the FCPA to bring a halt to the bribery of foreign officials and to restore public confidence in the integrity of the American business system.

The FCPA was intended to have and has had an enormous impact on the way American firms do business. Several firms that paid bribes to foreign officials have been the subject of criminal and civil enforcement actions, resulting in large fines and suspension and debarment from federal procurement contracting, and their employees and officers have gone to jail. To avoid such consequences, many firms have implemented detailed compliance programs intended to prevent and to detect any improper payments by employees and agents.

Following the passage of the FCPA, the Congress became concerned that American companies were operating at a disadvantage compared to foreign companies who routinely paid bribes and, in some countries, were permitted to deduct the cost of such bribes as business expenses on their taxes. Accordingly, in 1988, the Congress directed the Executive Branch to commence negotiations in the Organization of Economic Cooperation and Development (OECD) to obtain the agreement of the United States' major trading partners to enact legislation similar to the FCPA. In 1997, almost ten years later, the United States and thirty-three other countries signed the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. The United States ratified this Convention and enacted implementing legislation in 1998. See Convention and Commentaries on the DOJ web site.

The anti-bribery provisions of the FCPA make it unlawful for a U.S. person, and certain foreign issuers of securities, to make a corrupt payment to a foreign official for the purpose of obtaining or retaining business for or with, or directing business to, any person. Since 1998, they also apply to foreign firms and persons who take any act in furtherance of such a corrupt payment while in the United States.

The FCPA also requires companies whose securities are listed in the United States to meet its accounting provisions. See 15 U.S.C. § 78m. These accounting provisions, which were designed to operate in tandem with the anti-bribery provisions of the FCPA, require corporations covered by the provisions to make and keep books and records that accurately and fairly reflect the transactions of the corporation and to devise and maintain an adequate system of internal accounting controls. This brochure discusses only the anti-bribery provisions.

## **ENFORCEMENT**

The Department of Justice is responsible for all criminal enforcement and for civil enforcement of the antibribery provisions with respect to domestic concerns and foreign companies and nationals. The SEC is responsible for civil enforcement of the antibribery

provisions with respect to issuers.

## **ANTIBRIBERY PROVISIONS**

### **Basic Prohibition**

The FCPA makes it unlawful to bribe foreign government officials to obtain or retain business. With respect to the basic prohibition, there are five elements which must be met to constitute a violation of the Act:

**A. Who** -- The FCPA potentially applies to *any* individual, firm, officer, director, employee, or agent of a firm and any stockholder acting on behalf of a firm. Individuals and firms may also be penalized if they order, authorize, or assist someone else to violate the antibribery provisions or if they conspire to violate those provisions.

Under the FCPA, U.S. jurisdiction over corrupt payments to foreign officials depends upon whether the violator is an "issuer," a "domestic concern," or a foreign national or business.

An "issuer" is a corporation that has issued securities that have been registered in the United States or who is required to file periodic reports with the SEC. A "domestic concern" is any individual who is a citizen, national, or resident of the United States, or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a State of the United States, or a territory, possession, or commonwealth of the United States.

Issuers and domestic concerns may be held liable under the FCPA under *either* territorial or nationality jurisdiction principles. For acts taken within the territory of the United States, issuers and domestic concerns are liable if they take an act in furtherance of a corrupt payment to a foreign official using the U.S. mails or other means or instrumentalities of interstate commerce. Such means or instrumentalities include telephone calls, facsimile transmissions, wire transfers, and interstate or international travel. In addition, issuers and domestic concerns may be held liable for any act in furtherance of a corrupt payment taken *outside* the United States. Thus, a U.S. company or national may be held liable for a corrupt payment authorized by employees or agents operating entirely outside the United States, using money from foreign bank accounts, and without any involvement by personnel located within the United States.

Prior to 1998, foreign companies, with the exception of those who qualified as "issuers," and foreign nationals were not covered by the FCPA. The 1998 amendments expanded the FCPA to assert territorial jurisdiction over foreign companies and nationals. A foreign company or person is now subject to the FCPA if it causes, directly or through agents, an act in furtherance of the corrupt payment to take place within the territory of the United States. There is, however, no requirement that such act make use of the U.S. mails or other means or instrumentalities of interstate commerce.

Finally, U.S. parent corporations may be held liable for the acts of foreign subsidiaries where they authorized, directed, or controlled the activity in question, as can U.S. citizens or residents, themselves "domestic concerns," who were employed by or acting on behalf of such foreign-incorporated subsidiaries.

**B. Corrupt intent** -- The person making or authorizing the payment must have a corrupt intent, and the payment must be intended to induce the recipient to misuse his official position to direct business wrongfully to the payer or to any other person. You should note that the FCPA does not require that a corrupt act *succeed* in its purpose. The *offer* or *promise* of a corrupt payment can constitute a violation of the statute. The FCPA prohibits any corrupt payment intended to *influence* any act or decision of a foreign official in his or her official capacity, to induce the official to do or omit to do any act in violation of his or her lawful duty, to *obtain* any improper advantage, or to *induce* a foreign official to use his or her influence improperly to affect or influence any act or decision.

**C. Payment** -- The FCPA prohibits paying, offering, promising to pay (or authorizing to pay or offer) money or anything of value.

**D. Recipient** -- The prohibition extends only to corrupt payments to a *foreign official, a foreign political party or party official*, or any candidate for foreign political office. A "foreign official" means any officer or employee of a foreign government, a public international organization, or any department or agency thereof, or any person acting in an official capacity. You should consider utilizing the Department of Justice's Foreign Corrupt Practices Act Opinion Procedure for particular questions as to the definition of a "foreign official," such as whether a member of a royal family, a member of a legislative body, or an official of a state-owned business enterprise would be considered a "foreign official."

The FCPA applies to payments to *any* public official, regardless of rank or position. The FCPA focuses on the *purpose* of the payment instead of the particular duties of the official receiving the payment, offer, or promise of payment, and there are exceptions to the antibribery provision for "facilitating payments for routine governmental action" (see below).

**E. Business Purpose Test** -- The FCPA prohibits payments made in order to assist the firm in *obtaining or retaining business* for or with, or *directing business* to, any person. The Department of Justice interprets "obtaining or retaining business" broadly, such that the term encompasses more than the mere award or renewal of a contract. It should be noted that the business to be obtained or retained does *not* need to be with a foreign government or foreign government instrumentality.

### **Third Party Payments**

The FCPA prohibits corrupt payments through intermediaries. It is unlawful to make a payment to a third party, while knowing that all or a portion of the payment will go directly or indirectly to a foreign official. *The term "knowing" includes conscious disregard and deliberate ignorance.* The elements of an offense are essentially the same as described above, except that in this case the "recipient" is the intermediary who is making the payment to the requisite "foreign official."

Intermediaries may include joint venture partners or agents. To avoid being held liable for corrupt third party payments, U.S. companies are encouraged to exercise due diligence and to take all necessary precautions to ensure that they have formed a business relationship with reputable and qualified partners and representatives. Such due diligence may include investigating potential foreign representatives and joint venture partners to determine if they are in fact qualified for the position, whether they

have personal or professional ties to the government, the number and reputation of their clientele, and their reputation with the U.S. Embassy or Consulate and with local bankers, clients, and other business associates. In addition, in negotiating a business relationship, the U.S. firm should be aware of so-called "red flags," *i.e.*, unusual payment patterns or financial arrangements, a history of corruption in the country, a refusal by the foreign joint venture partner or representative to provide a certification that it will not take any action in furtherance of an unlawful offer, promise, or payment to a foreign public official and not take any act that would cause the U.S. firm to be in violation of the FCPA, unusually high commissions, lack of transparency in expenses and accounting records, apparent lack of qualifications or resources on the part of the joint venture partner or representative to perform the services offered, and whether the joint venture partner or representative has been recommended by an official of the potential governmental customer.

*You should seek the advice of counsel and consider utilizing the Department of Justice's Foreign Corrupt Practices Act Opinion Procedure for particular questions relating to third party payments.*

## **PERMISSIBLE PAYMENTS AND AFFIRMATIVE DEFENSES**

The FCPA contains an explicit exception to the bribery prohibition for "facilitating payments" for "routine governmental action" and provides affirmative defenses which can be used to defend against alleged violations of the FCPA.

### **Facilitating Payments for Routine Governmental Actions**

There is an exception to the antibribery prohibition for payments to facilitate or expedite performance of a "routine governmental action." The statute lists the following examples: obtaining permits, licenses, or other official documents; processing governmental papers, such as visas and work orders; providing police protection, mail pick-up and delivery; providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products; and scheduling inspections associated with contract performance or transit of goods across country.

*Actions "similar" to these are also covered by this exception.* If you have a question about whether a payment falls within the exception, you should consult with counsel. You should also consider whether to utilize the Justice Department's Foreign Corrupt Practices Opinion Procedure, described below on p. 10.

"Routine governmental action" does *not* include any decision by a foreign official to award new business or to continue business with a particular party.

### **Affirmative Defenses**

A person charged with a violation of the FCPA's antibribery provisions may assert as a defense that the payment was lawful under the written laws of the foreign country or that the money was spent as part of demonstrating a product or performing a contractual obligation.

Whether a payment was lawful under the written laws of the foreign country may be difficult to determine. You should consider seeking the advice of counsel or utilizing the

Department of Justice's Foreign Corrupt Practices Act Opinion Procedure when faced with an issue of the legality of such a payment.

Moreover, because these defenses are "affirmative defenses," the defendant is required to show in the first instance that the payment met these requirements. The prosecution does not bear the burden of demonstrating in the first instance that the payments did not constitute this type of payment.

## **SANCTIONS AGAINST BRIBERY**

### **Criminal**

The following criminal penalties may be imposed for violations of the FCPA's antibribery provisions: corporations and other business entities are subject to a fine of up to \$2,000,000; officers, directors, stockholders, employees, and agents are subject to a fine of up to \$100,000 and imprisonment for up to five years. Moreover, under the Alternative Fines Act, these fines may be actually quite higher -- the actual fine may be up to twice the benefit that the defendant sought to obtain by making the corrupt payment. You should also be aware that fines imposed on individuals may *not* be paid by their employer or principal.

### **Civil**

The Attorney General or the SEC, as appropriate, may bring a civil action for a fine of up to \$10,000 against any firm *as well as* any officer, director, employee, or agent of a firm, or stockholder acting on behalf of the firm, who violates the antibribery provisions. In addition, in an SEC enforcement action, the court may impose an additional fine not to exceed the greater of (i) the gross amount of the pecuniary gain to the defendant as a result of the violation, or (ii) a specified dollar limitation. The specified dollar limitations are based on the egregiousness of the violation, ranging from \$5,000 to \$100,000 for a natural person and \$50,000 to \$500,000 for any other person.

The Attorney General or the SEC, as appropriate, may also bring a civil action to enjoin any act or practice of a firm whenever it appears that the firm (or an officer, director, employee, agent, or stockholder acting on behalf of the firm) is in violation (or about to be) of the antibribery provisions.

### **Other Governmental Action**

Under guidelines issued by the Office of Management and Budget, a person or firm found in violation of the FCPA may be barred from doing business with the Federal government. *Indictment alone can lead to suspension of the right to do business with the government.* The President has directed that no executive agency shall allow any party to participate in any procurement or nonprocurement activity if any agency has debarred, suspended, or otherwise excluded that party from participation in a procurement or nonprocurement activity.

In addition, a person or firm found guilty of violating the FCPA may be ruled ineligible to receive export licenses; the SEC may suspend or bar persons from the securities business and impose civil penalties on persons in the securities business for violations of the FCPA; the Commodity Futures Trading Commission and the Overseas Private Investment Corporation both provide for possible suspension or debarment from agency

programs for violation of the FCPA; and a payment made to a foreign government official that is unlawful under the FCPA cannot be deducted under the tax laws as a business expense.

### **Private Cause of Action**

Conduct that violates the antibribery provisions of the FCPA may also give rise to a private cause of action for treble damages under the Racketeer Influenced and Corrupt Organizations Act (RICO), or to actions under other federal or state laws. For example, an action might be brought under RICO by a competitor who alleges that the bribery caused the defendant to win a foreign contract.

## **GUIDANCE FROM THE GOVERNMENT**

The Department of Justice has established a Foreign Corrupt Practices Act Opinion Procedure by which any U.S. company or national may request a statement of the Justice Department's present enforcement intentions under the antibribery provisions of the FCPA regarding any proposed business conduct. The details of the opinion procedure may be found at 28 CFR Part 80. Under this procedure, the Attorney General will issue an opinion in response to a specific inquiry from a person or firm within thirty days of the request. (The thirty-day period does not run until the Department of Justice has received all the information it requires to issue the opinion.) Conduct for which the Department of Justice has issued an opinion stating that the conduct conforms with current enforcement policy will be entitled to a presumption, in any subsequent enforcement action, of conformity with the FCPA. Copies of releases issued regarding previous opinions are available on the Department of Justice's FCPA web site.

For further information from the Department of Justice about the FCPA and the Foreign Corrupt Practices Act Opinion Procedure, contact Peter B. Clark, Deputy Chief, or Philip Urofsky, Senior Trial Attorney, Fraud Section, Criminal Division, U.S. Department of Justice, P.O. Box. 28188, McPherson Square, Washington, D.C. 20038, (202) 514-7023.

Although the Department of Commerce has no enforcement role with respect to the FCPA, it supplies general guidance to U.S. exporters who have questions about the FCPA and about international developments concerning the FCPA. For further information from the Department of Commerce about the FCPA contact Eleanor Roberts Lewis, Chief Counsel for International Commerce, or Arthur Aronoff, Senior Counsel, Office of the Chief Counsel for International Commerce, U.S. Department of Commerce, Room 5882, 14th Street and Constitution Avenue, N.W., Washington, D.C. 20230, (202) 482-0937.

Last Updated: October 24, 2001  
[usdoj/criminal/fraud/dlj](http://usdoj/criminal/fraud/dlj)



## **Transparency International – Pakistan**

### **Initiative**

for the Implementation and Monitoring  
of the OECD Convention against bribery of Public Officials  
by Foreign and Multinational Companies  
& ADB-OECD Anti Corruption Initiative.

### **“THE INTEGRITY PACT”**

**PRESENTED AT A MEETING OF THE BUSINESS COMMUNITY**

REPRESENTED BY

**THE OVERSEAS INVESTMENT CHAMBER OF COMMERCE AND INDUSTRY**

AND THE

**AMERICAN BUSINESS COUNCIL**

CONVENED BY

**Dr. ABDUL HAFEEZ SHAIKH**

**PROVINCIAL MINISTER OF FINANCE**

ON

**WEDNESDAY 16<sup>TH</sup>. JANUARY 2002**

**KARACHI**

# **ADB OECD Anti-Corruption Initiative for Asia-Pacific**

Combating Corruption In the New Millennium

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## **Draft Anti-Corruption Action Plan for Asia and the Pacific<sup>1</sup>**

**Expert Drafting Group  
Manila, 23-25 may 2001**

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<sup>1</sup> Prepared by a working party consisting of the Asian Development Bank, Indonesia, Japan, the Republic of Korea, Malaysia, the Organisation for Economic Co-operation and Development, Pakistan, the People's Republic of China, the Philippines, Singapore, Thailand, Transparency International, the United Kingdom Department for International Development, the United Nations Development Programme and the World Bank.

## PREAMBLE<sup>2</sup>

**WE**, the partners of the ADB OECD Anti-Corruption Initiative for Asia-Pacific, building on objectives identified at the Manila Conference and subsequently at the Seoul Conference;

**CONVINCED** that corruption is a widespread phenomenon, which raises serious moral and political concerns, undermines good governance, erodes the rule of law, hampers economic growth and efforts for the poverty reduction and distorts competitive conditions in business transactions;

**ACKNOWLEDGING** that fighting corruption is a complex undertaking and requires the involvement of all social partners;

**CONSIDERING** that regional co-operation is critical to the effective fight against corruption;

**RECOGNIZING** that national anti-corruption measures can benefit from existing relevant regional and international instruments and good practices such as those developed by the Asian Development Bank (ADB), the Asia-Pacific Economic Co-operation (APEC), the Financial Action Task Force on Money Laundering (FATF), the Organisation for Economic Co-operation and Development (OECD), the Pacific Basin Economic Council (PBEC), the United Nations and the World Trade Organisation (WTO)<sup>3</sup>.

**AGREE**, as governments of the region, to take concrete and meaningful priority steps to deter, prevent and combat corruption at all levels, without prejudice to existing international commitments and in accordance with our jurisdictional and other basic legal principles;

**WELCOME** the support of the private business sector and civil society in the anti-corruption effort of the region, and pledge to work together with them in the implementation of the Action Plan;

**COMMIT**, as donor countries and international organisations from outside and within the region, to support the countries of the region in their anti-corruption effort through technical co-operation programmes.

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<sup>2</sup> The Action Plan, together with its implementation plan, is a legally non-binding document which contains a number of principles and standards towards policy reform which interested governments of the region politically commit to implement.

<sup>3</sup> In particular: the Anti-Corruption Policy of the ADB, the APEC Public Procurement Principles, the 40 Recommendations of the FATF as supported by the Asia/Pacific Group on Money Laundering, the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the Revised Recommendation, the OECD Council Recommendation on Improving Ethical Conduct in the Public Service, the OECD Principles on Corporate Governance, the PBEC Charter on Standards for Transactions between Business and Government, the United Nations Convention on Transnational Organised Crime and the WTO Agreement on Government Procurement.

## PILLARS OF ACTION

In order to meet the above objectives, participating Governments in the region endeavour to take concrete steps under the following three pillars of action with the support, as appropriate, of ADB, OECD and other donor organisations and countries:

### Pillar 1 - Developing effective and transparent systems for public management

#### *Integrity in Civil Service*

Establish systems of government hiring of public officials that assure openness, equity and efficiency and promote hiring of individuals of the highest levels of competence and integrity through:

- Development of systems for compensation adequate to sustain appropriate livelihood;
- Development of systems for transparent hiring and promotion to help avoid abuses of patronage, nepotism and favouritism, help foster the creation of an independent civil service, and help promote a proper balance between political and career appointments;
- Development of systems to provide appropriate oversight of discretionary decisions and of personnel with authority to make discretionary decisions;
- Development of personnel systems that include regular and timely rotation of assignments to reduce insularity that would foster corruption;

Establish ethical and administrative codes of conduct that proscribe conflict of interests, ensure the proper use of public resources, and promote the highest levels of professionalism and integrity through:

- Prohibitions or restrictions governing conflicts of interest;
- Systems to promote transparency through disclosure and monitoring of assets and liabilities;
- Limitations on contacts between government officials and public service users, notably in the area of taxation and customs, taking due account of international good practices;
- Promotion of codes of conduct in line with existing relevant international standards, and regular training of officials to ensure proper understanding of their responsibilities and the ethical rules governing their activities as well as their own professionalism and competence;
- Measures which ensure that officials report acts of corruption and to protect the safety and professional status of those who do.

#### *Accountability and Transparency*

Safeguard accountability of public administration through effective legal frameworks, management practices and auditing procedures through:

- Measures and systems to promote fiscal transparency;
- Adoption of existing relevant international standards and practices for regulation and supervision of financial institutions;
- Appropriate auditing procedures applicable to public administration and the public sector, and measures and systems to provide timely public reporting on performance and decision making;
- Appropriate transparent procedures for public procurement that promote fair competition and deter corrupt activity, and adequate simplified administration procedures.
- Enhancing institutions for public scrutiny and oversight such as parliaments and related institutions, and systems for information availability including on issues such as application processing proceedings, funding of political parties and electoral campaigns and expenditure;

## Pillar 2 – Strengthening Anti-Bribery Actions and Promoting Integrity in Business Operations

### *Effective Prevention, Investigation and Prosecution*

Take effective measures to combat active and passive bribery by:

- Ensuring the existence of legislation with dissuasive sanctions which effectively prohibit the offence of active and passive bribery of public officials as well as, where appropriate, bribery offences outside the public sector;
- Ensuring the existence and effective enforcement of anti-money laundering legislation that provide for substantial criminal penalties for the laundering of the proceeds of crime;
- Ensuring the existence and enforcement of rules to ensure that bribery offences are thoroughly investigated and prosecuted by competent authorities; these authorities should be empowered to order that bank, financial or commercial records be made available or be seized and that bank secrecy be lifted.
- Strengthening of investigative and prosecutorial capacities by fostering inter-agency co-operation by ensuring that investigation and prosecution are free from improper influence and have effective means for gathering evidence, by protecting those persons helping the authorities in combating corruption, and by providing appropriate training and financial resources.
- Strengthening bilateral regional and international co-operation in investigations and other legal proceedings by developing effective systems such as those that enhance effective sharing of evidence and, where expedient, extradition, as well as prompt international seizure and repatriation of forfeitable assets, and by becoming parties, as appropriate, to applicable multilateral legal instruments containing provisions that address corruption.

### *Corporate Responsibility and Accountability*

Take effective measures to promote corporate responsibility and accountability on the basis of existing relevant international standards through:

- Promotion of good corporate governance which would provide for adequate internal company controls such as codes of conduct, the establishment of channels for communication, the protection of employees reporting corruption, and staff training;
- The existence and the effective enforcement of legislation to eliminate any indirect support of bribery such as tax deductibility of bribes;
- The existence and thorough implementation of legislation requiring transparent company accounts and providing for effective, proportionate and dissuasive penalties for omissions and falsifications for the purpose of bribing a public official, or hiding such bribery, in respect of the books, records, accounts and financial statements of companies;
- Review of laws and regulations governing public licenses, government procurement contracts or other public undertakings, so that access to public sector contracts could be denied as a sanction for bribery of public officials.

## Pillar 3 – Supporting Active Public Involvement

### *Public discussion of corruption*

Take effective measures to encourage public discussion of the issue of corruption through:

- Initiation of public awareness campaigns at different levels;
- Support of non-governmental organisations that promote integrity and combat corruption by, for example, raising awareness of corruption and its costs, mobilising citizen support for clean government, and documenting and reporting cases of corruption;
- Preparation and/or implementation of education programs aimed at creating an anti-corruption culture.

### *Access to information*

Ensure that the general public and the media have freedom to receive and impart public information and in particular information on corruption matters in a manner that would not compromise the operational effectiveness of the administration or, in any other way, be detrimental to the interest of governmental agencies, through:

- Establishment of public reporting requirements for justice and other governmental agencies that include disclosure about efforts to promote integrity and accountability and combat corruption;
- Implementation of measures providing for a meaningful public right of access to appropriate information.

### *Public participation*

Encourage public participation in anti-corruption activities, in particular through:

- Co-operative relationships with civil society groups such as chambers of commerce, professional associations, NGOs supporting vulnerable populations, labor unions, housing associations, the media, and other organisations;
- Protection of whistleblowers.

## **IMPLEMENTATION**

In order to implement these three pillars of action, participating countries of the region agree with the attached Implementation Plan and pledge to comply with its terms.

Participating countries of the region further commit to widely publicise the Action Plan throughout government agencies and the media and, in the framework of the annual Steering Group Meetings, to meet and to assess progress in the implementation of the actions contained in the Action Plan.

# IMPLEMENTATION PLAN

## 1 Introduction

The Action Plan contains legally non-binding principles and standards towards policy reform which interested governments of the Asia-Pacific region (hereinafter: participating countries) voluntarily commit to implement in order to attack corruption in a co-ordinated and comprehensive manner. This section describes the implementation of the Action Plan.

Implementation will draw upon existing international instruments and good practices, in particular those developed by the Asian Development Bank, the Asia-Pacific Economic Co-operation, the Organisation for Economic Co-operation and Development and the United Nations.

By building upon existing actions and through better co-ordination of all efforts, and relying on high-level political commitment, the Action Plan intends to give an impetus to the fight against corruption in the region. Implementation thus focuses on a few key sectors and is action-oriented.

## 2 Core principles of Implementation

### *Country priorities*

While the Action Plan recalls the need to fight corruption and identifies priority areas, the situation in each country of the region is specific.

To address these differences and target country-specific technical assistance, each participating country will endeavour, in consultation with the Secretariat of the Initiative, to identify up to three priority actions per year under each pillar.

The first consultation will take place in the framework of the Tokyo Conference, immediately after the formal endorsement of the Action Plan. Subsequent identification of target areas will be done in the framework of the annual meetings of the Regional Steering Group that will be set up to review progress in the implementation of the Action Plan's three pillars.

### *Country ownership*

Real progress will come from the efforts of the governments and civil society in each participating country, with the support of the international donor community. In order to promote emulation and responsibilities as well as target bilateral and international technical assistance, a regular country-review process will be established.

Review of progress achieved will be conducted according to annual rounds. A round is the period of time between the Initiative's annual meetings, during which progress of participating countries in complying with the principles contained in the Action Plan will be reviewed.

The review exercise will reflect on all relevant elements of the regulatory and institutional framework so as to provide a complete picture of the conformity of policies with the principles laid out in the Action Plan. It will be based on a *self-review report* submitted by participating countries that volunteer for the exercise, and based on the a questionnaire prepared by the Secretariat of the Initiative.

The questionnaire will solicit information on implementation of the principles laid out under the three pillars of the Action Plan. All participating countries will be expected to reply to the questionnaire by a given date. The replies to the questionnaire should be precise and provide an assessment of conformity of laws, regulations and institutions with the objectives of the Action Plan.

The Secretariat will collect the replies and, to ensure that they are complete, possibly complement them with other available information and, if necessary, request additional information from the respective country.

### ***International support***

While the main responsibility for fighting corruption is local, the regional and international community also has a key role to play in supporting the countries' efforts through capacity-building programs aimed at facilitating adoption of new or amended legislation, establishment of appropriate institutions, and implementation of reform.

Donor countries and other assistance providers participating in the Initiative will endeavour to provide the assistance required in order to enhance the capacity of regional participating countries to meet the policy objectives of the Action Plan. Technical assistance will be provided on a bilateral, or multilateral, ad hoc basis.

Participating countries of the region will endeavour to make known their specific assistance requirements to meet the policy objectives under the Action Plan and will co-operate with the assistance providers in the elaboration, organisation and implementation of programmes.

Providers of technical assistance will support countries' anti-corruption efforts by building upon programmes and initiatives already in place, avoiding duplications and facilitating, whenever possible, joint ventures. This process will be supported by the Initiative's web site ([www.oecd.org/daf/ASIAcom](http://www.oecd.org/daf/ASIAcom)) which provides information on on-going and planned assistance programmes and initiatives.

## **3 Mechanisms**

### ***Country Representatives***

To facilitate the implementation of the Action Plan, each participating country in the region shall designate a contact person. This country representative shall have sufficient authority as well as adequate staff support and resources to oversee the fulfilment of the objectives and goals of the Action Plan on behalf of his/her Government.

### ***Regional Steering Group***

A Regional Steering Group will be established in the framework of the Initiative's annual conferences to review progress achieved by participating countries of the region. It will be composed of governmental representatives of countries that voluntarily committed themselves under the Action Plan as well as representatives of the Initiative's Secretariat and Advisory Group (see below).

The Regional Steering Group meetings will serve three main purposes : (i) to take stock of anti-corruption performance and progress in the region; (ii) to serve as a forum for addressing issues that arise in the connection of the implementation of the principles laid down in the Action Plan; (iii) to promote a dialogue with representatives of the international donor community in order to target technical assistance programmes.

Consultations in the Steering Group will take place on the day preceding the Initiative's annual meeting. This shall allow the Steering Group to report on progress achieved in the implementation of the principles laid down in the Action Plan, present regional good practices and enlarge support for anti-corruption efforts among ADB regional member countries.

### ***Secretariat***

The Asian Development Bank and the Organisation for Economic Co-operation and Development will act as the Secretariat of the Initiative in liaison with an informal Advisory Group. The role of the Advisory Group will be to help mobilise resources for technical assistance programmes and advise on priorities for the implementation of the Action Plan. The Group will be composed of donor countries and international donor organisations actively involved in the implementation of the Action Plan, as well as representatives of the current and the two previous host countries of the Initiative's annual meeting.

### ***Funding***

Technical assistance programmes and policy advice aiming at implementing the Action Plan will be financially supported by international organisations, governments and other parties from inside and outside the region actively involved in the ADB/OECD Anti-Corruption Initiative for Asia-Pacific.

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