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## American Bar Association Section of International Law and Practice Report to the House of Delegates

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# CRIMINAL LAW CONVENTION ON CORRUPTION

## American Bar Association Section of International Law and Practice Report to the House of Delegates\*

### RECOMMENDATIONS

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

**Be It Further Resolved**, that the American Bar Association's support of the United States' ratification of the COE Convention is subject to the adoption of reservations, understandings and interpretative statements, as appropriate, to the following effect:

- (1) existing federal laws would be relied upon to implement article 14 (account offices), articles 7, 8 (commercial bribery), article 5 (active and passive bribery of foreign public officials), articles 13 and 19 (money laundering), and no new legislation would be required to implement these provisions;
- (2) a declaration would be made regarding article 12 (trading in influence), to ensure that no U.S. obligation to criminalize lobbying or other similar activities currently permitted under U.S. law would be created by ratification, and recognizing that, to the extent that article 12 prohibits the bribery of a public official, such activity is already addressed by other obligations under the Convention and by existing U.S. law;
- (3) a reservation would be taken to article 17 (nationality jurisdiction), affirming that the United States will follow its traditional principles of territorial jurisdiction, except where otherwise provided by law;

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\*This Recommendation and Report was prepared by a working group of the Task Force on International Standards for Corrupt Practices of the Section of International Law and Practice with the assistance of other interested parties. The task force is chaired by Lucinda A. Low and Nancy Zucker Boswell. The working group was chaired by Nicole M. Healy with assistance from Elena Baylis, Donald J. Munro, and Amy Wilsey Miller.

- (4) breach of duty would be required as an element of the bribery offenses specified in articles 5, 6, 9, 10 and 11 of the Convention; and
- (5) U.S. participation in the Convention would not derogate from its obligations in other anticorruption instruments, which would be governed by their own terms.

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

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

**Be It Further Resolved**, that the American Bar Association recognizes the need for prompt, full, and consistent implementation of international anti-corruption instruments and for full cooperation and active enforcement at the national level.

## REPORT

### I. Introduction

The COE Convention,<sup>1</sup> negotiated by the member states of the Council of Europe,<sup>2</sup> with the participation of observers, including the United States,<sup>3</sup> was opened for signature on

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1. Council of Europe Criminal Law Convention on Corruption, Jan. 27, 1999, 38 I.L.M. 505, *available at* <http://conventions.coe.int/treaty> (visited Oct. 2, 2000).

2. The Council of Europe was formed on May 5, 1949. Statute of the Council of Europe, E.T.S. 1, May 5, 1949, *available at* <http://conventions.coe.int/treaty> (last visited Sept. 19, 2001) [hereinafter COE Statute]. The present Council of Europe member states, with their dates of accession in parentheses, are Albania (July 13, 1995), Andorra (Oct. 11, 1994), Armenia (Jan. 25, 2001), Austria (Apr. 16, 1956), Azerbaijan (Jan. 25, 2001), Belgium (May 5, 1949), Bulgaria (May 7, 1992), Croatia (Nov. 6, 1996), Cyprus (May 24, 1961), Czech Republic (June 30, 1993), Denmark (May 5, 1949), Estonia (May 14, 1993), Finland (May 5, 1989), France (May 5, 1949), Georgia (Apr. 27, 1999), Germany (July 13, 1950), Greece (Aug. 9, 1949), Hungary (Nov. 6, 1990), Iceland (Mar. 7, 1950), Ireland (May 5, 1949), Italy (May 5, 1949), Latvia (Feb. 10, 1995), Liechtenstein (Nov. 23, 1978), Lithuania (May 14, 1993), Luxembourg (May 5, 1949), Malta (Apr. 29, 1965), Moldova (July 13, 1995), Netherlands (May 5, 1949), Norway (May 5, 1949), Poland (Nov. 26, 1991), Portugal (Sept. 22, 1976), Romania (Oct. 7, 1993), Russian Federation (Feb. 28, 1996), San Marino (Nov. 16, 1988), Slovakia (June 30, 1993), Slovenia (May 14, 1993), Spain (Nov. 24, 1977), Sweden (May 5, 1949), Switzerland (May 6, 1963), the former Yugoslav Republic of Macedonia (Nov. 9, 1995), Turkey (Apr. 13, 1950), Ukraine (Nov. 9, 1995), and the United Kingdom (May 5, 1949).

The Council of Europe's founding statute describes as its aims "to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress." *Id.* art. 1(a). The statute further explains that

January 27, 1999, in Strasbourg, France.<sup>4</sup> As of September 19, 2001, ten states have ratified the COE Convention.<sup>5</sup> It will enter into force once fourteen states ratify it, or otherwise agree to be bound by its terms.<sup>6</sup>

The COE Convention's purpose is expressed in its Preamble. In adopting this convention, the signatories were "[c]onvinced of the need to pursue, as a matter of priority, a common criminal policy aimed at the protection of society against corruption, including the adoption of appropriate legislation and preventive measures;" domestically and through international cooperation in criminal matters.<sup>7</sup> Once ratified and implemented, the COE Convention will require its States Parties to implement a broad range of anti-corruption measures within their domestic laws, and to cooperate with other States Parties' regulatory and law enforcement agencies. Where they have not already done so, States Parties to the COE Convention are required to criminalize the active and passive bribery of domestic and foreign government officials and officials of public international organizations; bribery in private commercial transactions; "trading in influence;" laundering the proceeds of bribery and corruption offenses; and accounting and record-keeping violations. States Parties are further required to implement appropriate domestic measures to deter, investigate, and prosecute corruption offenses, as well as to provide effective legal assistance to other States Parties, *sua sponte*, and upon request.

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those aims would be "pursued through the organs of the Council by discussion of questions of common concern and by agreements and common action in economic, social, cultural, scientific, legal and administrative matters and in the maintenance and further realisation of human rights and fundamental freedoms." *Id.* art. 1(b).

3. Certain non-member states are permitted to participate in the Council of Europe's functions. On May 14, 1993, the Committee of Ministers adopted Statutory Resolution (93)26 on Observer Status, according to non-member states, including the United States, either special-guest or observer status. The special guests to the Parliamentary Assembly are Armenia (Jan. 26, 1996), Azerbaijan (June 28, 1996), and Bosnia and Herzegovina (Jan. 28, 1994). The Observers to the Committee of Ministers are Canada (May 29, 1996), Holy See (Mar. 7, 1970), Japan (Nov. 20, 1996), Mexico (Dec. 1, 1999), and the United States of America (Jan. 10, 1996). The observers to the Parliamentary Assembly are Canada (May 28, 1997), Israel (Feb. 12, 1957) and Mexico (Nov. 4, 1999). *Id.*

4. The Council of Europe has also negotiated a Civil Law Convention on Corruption, which is not the subject of this report nor does the ABA take any position with respect to that convention.

5. As of September 19, 2001, the COE Convention has been ratified by Albania (July 19, 2001), Croatia (Nov. 8, 2000), Cyprus (Jan. 17, 2001), the Czech Republic (Sept. 8, 2000), Denmark (Aug. 2, 2000), Hungary (Nov. 22, 2000), Latvia (Feb. 9, 2001), Slovakia (June 6, 2000), Slovenia (May 12, 2000), and the former Yugoslav Republic of Macedonia (July 28, 1999). It has been signed but not ratified by the following Council of Europe member states: Austria, Belgium, Bulgaria, Estonia, Finland, France, Georgia, Germany, Greece, Iceland, Ireland, Italy, Lithuania, Luxembourg, Malta, Moldova, Netherlands, Norway, Poland, Portugal, Romania, Russia, Sweden, Switzerland, Ukraine, and the United Kingdom; as well as by the non-member states, Belarus, Bosnia and Herzegovina, and the United States. Information concerning the dates upon which States Parties have signed and ratified the COE Convention is available at <http://conventions.coe.int/Treaty/EN/cadreprincipal.htm> (last visited Sept. 19, 2001).

6. Article 32 of the COE Convention provides that the States Parties "may express their consent to be bound by (a) signature without reservation as to ratification, acceptance or approval; or (b) a signature subject to ratification, acceptance or approval, followed by ratification, acceptance or approval." COE Statute, *supra* note 2, art. 32(1). Article 32 further provides that the COE Convention "shall enter into force on the first day of the month following the expiration of a period of three months after the date on which fourteenth [sic] States have expressed their consent to be bound by the Convention in accordance with the provisions of paragraph 1." *Id.* art. 32(3).

7. *Id.* at Preamble.

In addition, the Council of Europe has adopted a separate monitoring mechanism, the "Group of States Against Corruption—GRECO," which began functioning on May 1, 1999.<sup>8</sup> As of September 19, 2001, thirty-one states, including the United States, had joined the GRECO.<sup>9</sup> Membership in the GRECO overlaps, but is not identical to, membership in the COE Convention.<sup>10</sup> Through their participation in the GRECO, the States parties will review, assist, and enhance one another's implementation of the COE Convention and their adherence to the "Twenty Guiding Principles for the Fight Against Corruption" (Guiding Principles), adopted by the Council of Europe's Committee of Ministers in November 1997.<sup>11</sup>

The COE Convention is the third multinational anti-corruption convention to be opened for signature. The American Bar Association (ABA) has supported two prior, similar conventions, which are now in force—the Organisation for Economic Cooperation and Development's (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention) and the Organization of American States' (OAS) Inter-American Convention against Corruption (Inter-American Convention). The United States was a key player in negotiating each of these agreements, and is a party to both of them.

The negotiation of multinational anti-corruption agreements represents a significant step in the effort to eradicate cross-border corruption. While the bribery of domestic public officials is universally prohibited, the prohibition against the bribery of other states' officials is a new development for most countries. To the extent that national laws—particularly those governing the corruption of foreign officials—are nonexistent, inconsistent, or are inconsistently enforced, the creation of international treaty obligations is an important means of preventing and reducing the incidence of cross-border corruption. To this end, the COE Convention may have a more far-reaching impact on the prevention and prose-

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8. GRECO is described more fully in the partial and enlarged agreement establishing this monitoring body, which is open to both Council of Europe member and non-member states. COMMITTEE OF MINISTERS, COUNCIL OF EUROPE, PARTIAL AND ENLARGED AGREEMENT ESTABLISHING THE "GROUP OF STATES AGAINST CORRUPTION—GRECO" (1998), available at <http://conventions.coe.int/treaty> [hereinafter GRECO AGREEMENT]. The GRECO members are responsible for evaluating the measures adopted or used by the signatories to the COE Convention, as well as for monitoring adherence to the "Twenty Guiding Principles" drafted by the Council of Europe in its Programme of Action Against Corruption.

9. As of September 19, 2001, the following Council of Europe member states have joined GRECO: Albania (Apr. 26, 2001), Belgium (May 1, 1999), Bulgaria (May 1, 1999), Croatia (Dec. 1, 2000), Cyprus (May 1, 1999), Denmark (Aug. 2, 1999), Estonia (May 1, 1999), Finland (May 1, 1999), France (May 1, 1999), Georgia (Sept. 15, 1999), Germany (May 1, 1999), Greece (May 1, 1999), Hungary (July 8, 1999), Iceland (May 1, 1999), Ireland (May 1, 1999), Latvia (July 26, 2000), Lithuania (May 1, 1999), Luxembourg (May 1, 1999), Malta (May 10, 2001), Moldova (May 10, 2001), Norway (Jan. 5, 2001), Poland (May 19, 1999), Romania (May 1, 1999), Slovakia (May 1, 1999), Slovenia (May 1, 1999), Spain (May 1, 1999), Sweden (May 1, 1999), United Kingdom (Sept. 17, 1999), and the former Yugoslav Republic of Macedonia (Oct. 6, 2000). Non-member states Bosnia and Herzegovina (Feb. 24, 2000) and the United States (Sept. 19, 2000) have also joined GRECO. For more information on states that are members of the GRECO, visit the following Web site: <http://conventions.coe.int/Treaty/EN/cadreprincipal.htm> (last visited Sept. 19, 2001).

10. Although a state party automatically joins the GRECO when it ratifies the COE Convention, the reverse is not true; a state party may choose to participate only in the GRECO but not accede to the COE Convention. See COE Statute, *supra* note 2, art. 33(2); GRECO AGREEMENT, *supra* note 8, art. 4.

11. The Guiding Principles require adherents to take effective measures to prevent and eradicate corruption, as well as to raise public awareness of corruption issues. *Reply of the Committee of Ministers*, Eur. Consult. Ass., 101st Sess., Doc. No. (97)24 (1997) [hereinafter Resolution (97)24].

cution of transnational bribery than its predecessors because it seeks to criminalize “passive” bribery, or the solicitation and receipt of corrupt offers or payments, as well “active” bribery, or the making of such offers or payments. By contrast, the OECD and Inter-American Conventions, address only the “active” component of transnational corruption in commercial activities.

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

The ABA cautions that it is crucial, however, that the COE Convention, like the OECD and Inter-American Conventions, receive a “critical mass” of support from the member states of the Council of Europe. In particular, the COE Convention raises issues not found in the other two anti-corruption conventions, which require careful monitoring. Because of the extensive overlap between the membership in the Council of Europe and the OECD, and the approach to certain key issues in the COE Convention, there is a risk that the COE Convention could be used by some states to dilute their commitments to the OECD Convention or to retard the development of common international standards. Therefore, the ABA suggests conditioning the ratification of the COE Convention on the development of a critical mass of support in OECD and non-OECD countries for its adoption and implementation, as well as a strong indication that countries with membership in both the Council of Europe and the OECD will not use their participation in the COE Convention to undercut their commitments to fully implement the OECD Convention.

## II. Background

### A. THE DEVELOPMENT OF THE COE CONVENTION

The COE Convention was negotiated following a directive issued by the European Ministers of Justice at their 19th Conference in Valletta, Malta in 1994. The Justice Ministers recommended the creation of a Multidisciplinary Group on Corruption (*le Groupe multidisciplinaire sur la corruption* or GMC). The GMC was created in September 1994 and charged with the task of examining what measures should be included in an international “programme of action,” and asked to address the possibility of drafting model laws or codes of conduct, including international conventions and follow-up mechanisms.<sup>12</sup> Beginning in March 1995, the GMC prepared and submitted to the Ministers a draft “Programme of Action against Corruption.” The Committee of Ministers adopted the Programme of Ac-

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12. Both the text of the COE Convention and background information concerning this treaty are available on the Council of Europe’s treaty website at <http://conventions.coe.int>.

tion in November 1996 and instructed the GMC to implement it before December 31, 2000.<sup>13</sup>

At the 21st Conference of European Ministers of Justice, held in Prague, Czech Republic in June 1997, the Justice Ministers recommended hastening the implementation of the Programme of Action with a view to the early adoption of a criminal law convention providing for the "coordinated criminalisation of corruption offences and for enhanced co-operation in the prosecution of such offences."<sup>14</sup> They further recommended to the Committee of Ministers that a convention provide for an effective follow-up mechanism that would be open to participation by both member and non-member states. Later that year, at the Second Summit of the Heads of State and Government, held in Strasbourg, France, on October 10–11, 1997, the attendees determined that they would "seek common responses to the challenges posed by the growth in corruption and organised crime."<sup>15</sup> The Heads of State and Government adopted an Action Plan, in which they instructed the Committee of Ministers,

to adopt guiding principles to be applied in the development of domestic legislation and practice, to secure the rapid completion of international legal instruments pursuant to the Programme of Action against Corruption and to establish without delay an appropriate and efficient mechanism, for monitoring observance of the guiding principles and the implementation of the said international instruments.<sup>16</sup>

Thereafter, on November 6, 1997, the Committee of Ministers adopted the "Guiding Principles."<sup>17</sup>

Beginning in February 1996, the Criminal Law Working Group of the GMC (*le Groupe multidisciplinaire sur la corruption penal* or GMCP) began drafting a criminal law convention. In November 1997, the GMCP transmitted the draft text to the GMC for consideration.<sup>18</sup>

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13. COE CONVENTION, COUNCIL OF EUROPE, EXPLANATORY REPORT TO THE COE CONVENTION, *available at* <http://conventions.coe.int/Treaty/en/Reports/Html/173.htm> (last visited July 21, 2000) [hereinafter EXPLANATORY REPORT]. The GMC was charged with addressing a broad range of issues:

Under the responsibility of the European Committee on Crime Problems ["Comité européen pour les problèmes criminels"] (CDPC) and the European Committee on Legal Co-operation ["Comité européen de coopération juridique"] (CDCJ):

- to elaborate as a matter of priority one or more international conventions to combat corruption, and a follow-up mechanism to implement undertakings contained in such instruments, or any other legal instrument in this area;
- to elaborate as a matter of priority a draft European Code of Conduct for Public Officials;
- after consultation of the appropriate Steering Committee(s) to initiate, organise or promote research projects, training programmes and the exchange at national and international level of practical experiences of corruption and the fight against it;
- to implement the other parts of the Programme of Action against Corruption, taking into account the priorities set out therein;
- to take into account the work of other international organisations and bodies with a view to ensuring a coherent and co-ordinated approach; and
- to consult the CDCJ and/or CDPC on any draft legal text relating to corruption and take into account its/their views.

*Id.* art 10.

14. *Id.*

15. *Id.*

16. *Id.*

17. GRECO AGREEMENT, *supra* note 8; Resolution (97)24, *supra* note 11.

18. EXPLANATORY REPORT, *supra* note 13.

The final draft was submitted to the Committee of Ministers on November 4, 1998, at which time the Ministers adopted the COE Convention.<sup>19</sup> It was opened for signature on January 27, 1999.<sup>20</sup>

## B. DEVELOPMENT OF THE GRECO AGREEMENT

In its Programme of Action, the Committee of Ministers directed the GMC to develop a follow up mechanism that would monitor the implementation of the Guiding Principles, the COE Convention, and any other international instruments that might be adopted. The GMC therefore proposed the creation of a monitoring mechanism called the "Group of States Against Corruption—GRECO." On May 5, 1998, the Committee of Ministers adopted Resolution (98)7, which authorized the establishment of the GRECO in the form of a partial and enlarged agreement.<sup>21</sup> Participation in the GRECO is open to member and non-member states that have adopted the Guiding Principles or acceded to the COE Convention.<sup>22</sup> Full membership in the GRECO is limited to those countries that participate fully in the mutual evaluation process and agree to be evaluated.<sup>23</sup>

## C. EXISTING LAW: OTHER MULTILATERAL ANTI-CORRUPTION CONVENTIONS AND U.S. LAW

Because the COE Convention was negotiated against the backdrop of existing international and U.S. federal law, it is helpful first to review these legal antecedents, before launching into a detailed discussion of the COE Convention.

### 1. *Multilateral Conventions*

The COE Convention is the third in a series of multi-lateral anti-corruption conventions. It follows two other landmark conventions—the OECD Convention<sup>24</sup> and the Inter-American Convention.<sup>25</sup> Both of these agreements are in force. The Inter-American Con-

19. *Id.*

20. *Id.*

21. The Council of Europe distinguishes between "conventions and agreements" and "partial agreements," which are not international treaties, but are described as

merely a particular form of co-operation within the Organisation. Partial Agreements allow member states of the Council of Europe to abstain from participating in a certain activity advocated by other member states. From a statutory point of view, a partial agreement remains an activity of the Organisation in the same way as other programme activities, except that a partial agreement has its own budget and working methods which are determined solely by the members of the partial agreement.

GRECO AGREEMENT, *supra* note 8.

22. GRECO AGREEMENT, *supra* note 8, art. 4.

23. *See id.*

24. OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, 37 I.L.M. 1 (1998), available at [www.oecd.org/daf/nocorruption/](http://www.oecd.org/daf/nocorruption/) (last visited July 10, 2000) [hereinafter OECD Convention].

25. Although the Inter-American Convention does not provide for a follow-up mechanism, on February 3, 2000, the finance ministers of the western hemisphere called on OAS members "to support establishment of a follow-up OAS mechanism for multilateral and mutual review and evaluation of progress." On June 5, 2000, the OAS General Assembly adopted a resolution calling for an analysis of existing mechanisms and for a recommendation by the end of 2000 on the most appropriate model for the Inter-American Convention. *Enhancement of Probity in the Hemisphere and Follow-up on the Inter-American Program for Cooperation in the Fight Against Corruption*, OEA/Ser. P, AG/RES. 1723, para. 9 (June 5, 2000).



vention was opened for signature on March 29, 1996, and entered into force on March 6, 1997.<sup>26</sup> As of September 19, 2001, it had been signed by twenty-six countries<sup>27</sup> and ratified by twenty countries, including the United States.<sup>28</sup>

On December 17, 1997, the OECD Convention was opened for signature.<sup>29</sup> The OECD Convention entered into force on February 15, 1999<sup>30</sup> and, as of September 18, 2001, has been ratified by thirty-two countries, including the United States.<sup>31</sup>

While all three conventions are similar in that they require their States Parties to criminalize certain specified bribery and corruption offenses, and to cooperate with one another in the investigation and prosecution of such offenses, there are distinct differences between them. The OECD Convention, modeled on the United States Foreign Corrupt Practices

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26. Inter-American Convention against Corruption, Mar. 6, 1997, 35 I.L.M. 724 [hereinafter Inter-American Convention]; Specialized Conference on the Draft Inter-American Convention Against Corruption, OEA/Ser.K/XXXIV.1 CICOR/doc.16/96 rev. 2, 9, at 6 (Sept. 1996). Information about the signatories' execution and ratification of the Inter-American Convention is available at [www.oas.org](http://www.oas.org) (last visited Oct. 2, 2000).

27. The signatories to the Inter-American Convention are Argentina, Bahamas, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, St. Vincent and Grenadines, Suriname, Trinidad and Tobago, the United States, Uruguay, and Venezuela.

28. As of September 19, 2001, the Inter-American Convention has been ratified by Argentina (Oct. 9, 1997), Bahamas (Commonwealth) (Mar. 14, 2000), Bolivia (Feb. 4, 1997), Canada (June 6, 2000), Chile (Oct. 27, 1998), Colombia (Jan. 19, 1999), Costa Rica (June 3, 1997), Dominican Republic (June 8, 1999), Ecuador (June 2, 1997), El Salvador (Mar. 18, 1999), Guatemala (July 3, 2001), Guyana (Feb. 15, 2001), Honduras (June 2, 1998), Jamaica (Mar. 30, 2001), Mexico (June 2, 1997), Nicaragua (May 6, 1999), Panama (Oct. 8, 1998), Paraguay (Jan. 28, 1997), Peru (June 4, 1997), Trinidad and Tobago (Apr. 15, 1998), the United States (Sept. 16, 2000), Uruguay (Dec. 7, 1998), and Venezuela (June 2, 1997). Inter-American Convention, *supra* note 26. For further information regarding States that have ratified the Convention, go to [www.oas.org](http://www.oas.org) (last visited Sept. 19, 2001).

29. Twenty-eight of the twenty-nine OECD members signed the Convention at that time, as did five non-member states (Argentina, Brazil, Bulgaria, Chile, and the Slovak Republic). Later, Australia, the remaining member state, signed the Convention. The signatories committed themselves to ensuring that their governments would ratify the convention and enact any necessary implementing legislation. Information concerning the signatories' execution and ratification of the OECD Convention is available at [www.oecd.org/daf/nocorruption/](http://www.oecd.org/daf/nocorruption/) (last visited July 10, 2000).

30. The OECD Convention provided that it would enter into force

on the sixtieth day following the date upon which five of the ten countries which have the ten largest export shares [per an annexed list], 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.

OECD Convention, *supra* note 24, art. 15.

31. The countries that have deposited their instruments of ratification are Argentina (Feb. 8, 2001), Australia (Oct. 18, 1999), Austria (May 20, 1999), Belgium (July 27, 1999), Brazil (Aug. 24, 2000), Bulgaria (Dec. 22, 1998), Canada (Dec. 17, 1998), Chile (Apr. 18, 2001), Czech Republic (Jan. 21, 2000), Denmark (Sept. 5, 2000), Finland (Dec. 10, 1998), France (July 31, 2000), Germany (Nov. 10, 1998), Greece (Feb. 5, 1999), Hungary (Dec. 4, 1998), Iceland (Aug. 17, 1998), Japan (Oct. 13, 1998), Korea (Jan. 4, 1999), Luxembourg (Mar. 21, 2001), Mexico (May 27, 1999), Netherlands (Jan. 12, 2001), New Zealand (June 25, 2001), Norway (Dec. 18, 1998), Poland (Sept. 8, 2000), Slovak Republic (Sept. 24, 1999), Slovenia (Sept. 6, 2001), Spain (Jan. 14, 2000), Sweden (June 8, 1999), Switzerland (May, 31 2000), Turkey (July 26, 2000), United Kingdom (Dec. 14, 1998), and the United States (Dec. 8, 1998). As of October 2, 2000, Brazil, Poland and Turkey had not yet adopted implementing legislation. OECD, *Combating Bribery of Foreign Public Officials in International Business Transactions*, OECD ONLINE, at [www.oecd.org/daf/nocorruption/](http://www.oecd.org/daf/nocorruption/) (last visited Oct. 2, 2000).

Act of 1977 (FCPA), as amended, 15 U.S.C. §§ 78dd-1, *et seq.*<sup>32</sup> is the most narrowly focused of the three.<sup>33</sup> It requires States Parties only to criminalize corrupt offers, promises, or gifts of any undue pecuniary or other advantage to a foreign public official to induce or influence that official to act or refrain from acting in his or her official capacity, where the offeror intended to obtain or retain business or other improper advantage in the conduct of international business. In effect, the OECD Convention adopts the FCPA as an international standard.

The Inter-American Convention addresses both transnational and domestic bribery. In the context of transnational bribery, like the OECD Convention, the Inter-American Convention requires States Parties to criminalize illicit offers or gifts of financial or other benefits to a foreign public official, in connection with a commercial transaction, in order to influence or induce that official to do some act, or refrain from acting, in his or her official capacity.

Both the OECD and Inter-American Conventions are supply-side agreements with respect to transnational bribery. That is, like the FCPA, they require their States Parties to criminalize only "active" bribery, or the making of illicit offers or payments to foreign public officials in connection with commercial activities. The COE Convention, however, requires its States Parties to criminalize both active *and passive* transnational bribery and corruption.<sup>34</sup> Moreover, the COE Convention, unlike its predecessors, does not limit transnational bribery to those offenses relating to commercial transactions; instead, it broadly prohibits all solicitations, receipts, offers or payments regardless of any business purpose. Indeed, it is only in connection with the bribery of *private* parties that the COE Convention limits illicit offers or payments to those having a commercial nexus.

As discussed below, the COE Convention also directs States Parties to criminalize the active and passive bribery of domestic officials. It requires States Parties to criminalize conduct that, at first glance may appear to be lawful under U.S. domestic law, for example, lobbying legislators or regulators, or contributing to political campaigns. If interpreted broadly, these elements of the COE Convention might conflict with U.S. law. This memorandum suggests that by appending certain Reservations, Interpretive Statements and Declarations (*see* section IV.A, *infra*) to the United States' instrument of ratification, these conflicts may be alleviated.

## 2. U.S. Federal Laws Concerning Bribery and Corruption

Although the COE Convention appears ambitious in its scope, in fact, U.S. federal law already proscribes most of the substantive offenses covered by this convention. The United States has long prohibited (1) the bribery of domestic public officials through various federal

32. Foreign Corrupt Practices Act, Pub. L. No. 95-213, Title I, § 102, Title II, §§ 202, 203, 91 Stat. 1494, 1498, 1499 (1977), codified as amended at 15 U.S.C. §§ 78m(b), (d)(1), (g)-(h), 78dd-1, 78dd-2, and 78ff(a) (West 2001) [hereinafter FCPA].

33. The FCPA was enacted in 1977 following Watergate-era congressional hearings "on the matter of improper payments to foreign government officials by American corporations" and subsequent SEC investigations that "revealed corrupt foreign payments by over 300 U.S. companies involving hundreds of millions of dollars." S. Rep. No. 95-114, at 1, 3 (1977), 95th Cong., 1st Sess., *reprinted in* 1977 U.S.C.C.A.N. 4098, 4099, 4101. Following the enactment of the FCPA and until the adoption of the OECD and Inter-American Conventions by their respective member states and others, only the United States prohibited offers or payments to foreign officials in connection with business activities.

34. The Inter-American Convention prohibits passive bribery only with respect to domestic officials. Inter-American Convention, *supra* note 26, art. VI(1)(a).

and state laws; (2) the bribery of foreign public officials through the FCPA; (3) money laundering through various criminal and civil statutes; and (4) misleading accounting and record-keeping practices for public companies through federal securities statutes and regulations, as well as through the Internal Revenue Code where appropriate. In addition, U.S. law prohibits taxpayers from deducting bribe payments through the Internal Revenue Code.

Moreover, in 1998, the United States amended the FCPA to comply with the OECD Convention.<sup>35</sup> In addition to its previous restrictions on illicit offers or payments by U.S. companies, U.S. and foreign "issuers" of publicly traded securities, and U.S. citizens and residents to foreign officials, political parties, party officials, and candidates for political office, the FCPA now prohibits corrupt offers or payments by any person while in the territorial jurisdiction of the United States, to or for any foreign government official or official of any public international organization designated by executive order. U.S. federal jurisdiction also now extends to U.S. nationals and companies that commit FCPA offenses while outside the territory of the United States, regardless of whether a means or instrumentality of interstate commerce was used in furtherance of an illicit offer or payment.<sup>36</sup>

The FCPA is not the only U.S. law to prohibit illicit offers and payments. Other U.S. federal laws may be used to prosecute bribery and corruption offenses, including the bribery and corruption of domestic public officials and private commercial bribery. For example, the federal bribery and gratuity statute, 18 U.S.C. § 201, prohibits the offer or payment of bribes or gratuities to, or the solicitation or receipt of bribes and gratuities by, federal officials. The Travel Act, 18 U.S.C. § 1952, prohibits traveling or causing others to travel across state lines, or using facilities in interstate commerce, with the intent to promote, carry on or facilitate an unlawful activity, including bribery in violation of state law. In appropriate circumstances, federal mail and wire fraud statutes may be used to prosecute bribery-related offenses.<sup>37</sup> The United States also may prosecute corrupt officials and others who devise any scheme or artifice to defraud citizens of "the intangible right to honest services."<sup>38</sup> In addition, where applicable, other U.S. statutes, including 18 U.S.C. § 1001 (false statements), and 26 U.S.C. § 162 (illegal deduction of bribe payments), may be used to prosecute bribery and corruption offenses. Unlike the FCPA, none of these statutes target transnational corruption. However, none of these statutes is restricted to prosecuting only domestic bribery offenses.

### III. Summary of the Council of Europe's Criminal Law Convention on Corruption

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

35. See International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302 (signed Nov. 10, 1998).

36. See 15 U.S.C. §§ 78dd-1(g), 78dd-2(i) (added 1998).

37. See generally 18 U.S.C. §§ 1341, 1343.

38. 18 U.S.C. § 1346. The "honest services" statute is a form of mail or wire fraud. To prove an "honest services" fraud offense, the government must demonstrate that the defendant both intended to deceive the public and intended to deprive them of the official's honest services. See, e.g., *United States v. Sawyer*, 85 F.3d 713, 728 (1st Cir. 1996).

the COE Convention's text appears to diverge from U.S. law.<sup>39</sup> This discussion of the COE Convention both outlines the treaty's provisions, and considers them against the backdrop of U.S. federal law and international law. Finally, this Report concludes that, because there are substantial similarities between the acts to be criminalized by the COE Convention and existing U.S. law, as well as international law, there is no need to modify U.S. federal law to comply with the COE Convention.

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

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

#### A. THE STRUCTURE OF THE COE CONVENTION

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

39. Because of the COE Convention's length, this report addresses only those articles that are most relevant to the COE Convention's objectives, or which appear to be inconsistent with U.S. law.

Chapter II, containing the COE Convention's substantive prohibitions, is divided into twenty-two articles.<sup>40</sup> The first ten articles are organized by the identity of the intended recipient of the corrupt offer. Where applicable, they are further broken down along parallel lines into prohibitions on active and passive bribery. These ten articles address domestic bribery (articles 2 through 4); bribery of foreign officials including legislators (articles 5 and 6); private sector bribery (articles 7 and 8); bribery of other foreign bodies (articles 9 through 11); trading in influence (article 12); and derivative or bribery-related offenses, specifically money laundering, accounting violations and participatory liability (articles 13 through 15). The following seven articles of the Chapter relate to such matters as immunity (article 16), jurisdiction (article 17), corporate liability (article 18), sanctions (article 19), specialized authorities (article 20), witness protection (article 22), and mutual legal assistance (articles 21 and 23).

## B. CHAPTER I—USE OF TERMS (ARTICLE 1)

Chapter I, article 1 defines the term "public official" by referring "to the definition of 'official,' 'public officer,' 'mayor,' 'minister,' or 'judge' in the national law of the State in which the person in question performs that function and as applied in its criminal law."<sup>41</sup> Article 1 further defines "judge" to include prosecutors as well as holders of "judicial offices."<sup>42</sup> This article also defines "legal person" as "any entity having such status under the applicable national law, except for States or other public bodies in the exercise of State authority and for public international organisations."<sup>43</sup> In addition, article 1 provides that "in the case of proceedings involving a public official of another State, the prosecuting State may apply the definition of public official only insofar as that definition is compatible with its national law."<sup>44</sup>

While the definition of "legal person" is essentially coextensive with similar definitions under U.S. law, the definition of "public official" is narrower than those in the OECD or Inter-American Conventions.<sup>45</sup> Because article 1 does not adopt an autonomous standard, but instead refers to definitions found in the local law of both the requesting and the requested states, it may result in a lack of uniformity among States Parties. For example, article 1 does not cover officials of state-owned enterprises, persons serving in quasi-official capacities, or those who perform other public functions. By contrast, both the Inter-American and OECD Conventions prohibit the bribery of those who perform public functions, and of officials of state-owned enterprises. In addition, the inclusion of "mayors" may

40. Although the COE Convention is organized into chapters, the articles are numbered consecutively from the beginning of chapter I. Thus, the twenty-two articles of chapter II are numbered 2–23.

41. COE Statute, *supra* note 2, art. I, ¶ 1(a).

42. *Id.* art. I, ¶ 1(b).

43. *Id.* art. I, ¶ 1(d).

44. *Id.* art. I, ¶ 1(c).

45. Compare COE Statute, ch. I, art. 1 with OECD Convention, art. 1(4)(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 organization"); and Inter-American Convention, art. I:

'public official' 'government official,' or 'public servant' means any official or employee of the State or its agencies, including those who have been selected, appointed, or elected to perform activities or functions in the name of the State or in the service of the State, at any level of its hierarchy.

lead to anomalous results where persons who are relatively low-level officials in many countries will be subject to the COE Convention's strictures, whereas persons operating at a higher level of government might be excluded if they are not considered "public officials" under domestic law.<sup>46</sup>

Because U.S. federal law is well developed in this area, the narrow scope of these definitions does not pose a problem for compliance by the United States. In two respects, however, the narrow definition of the covered officials raises questions about whether the COE Convention will be fully effective. First, the COE Convention may not achieve its anti-corruption goals in states where public functions are performed by individuals who do not hold official government positions, or who hold positions other than those specified in article 1. Second, inconsistencies in the obligations imposed by the various conventions will complicate the efforts of States Parties to this as well as the other anti-corruption conventions to comply with these conventions and with their national legislation. This may be of particular concern in cases of transnational bribery, where the laws of more than one State Party are often at issue. For this reason, the ABA reaffirms its position concerning the crucial importance of developing consistent and effective mechanisms for deterring corruption.<sup>47</sup>

### C. CHAPTER II—BRIBERY (ARTICLES 2–11)

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

Article 2 defines active bribery as the intentional "promising, offering or giving by any person, directly or indirectly, of any undue advantage to any of its public officials . . . to act or refrain from acting in the exercise of his or her functions," whether the undue advantage accrues to the official or to a third party.<sup>48</sup> Article 3 mirrors article 2, defining the substantive offense of passive bribery as the "request or receipt . . . or the acceptance of an offer or a promise of such an [undue] advantage" by a public official under such circumstances.<sup>49</sup> The

46. Despite the COE Convention's narrowly drawn language, the Explanatory Report states that the intent of the drafters was to broadly define the class of covered public officials. In pertinent part, the Explanatory Report states,

The drafters of this Convention wanted to cover all possible categories of public officials in order to avoid, as much as possible, loopholes in the criminalisation of public sector bribery. . . . In reference to the "national law" it should be noted that it was the intention of the drafters of the Convention that Contracting parties assume obligations under this Convention only to the extent consistent with their Constitution and the fundamental principles of their legal system, including, where appropriate, the principles of federalism.

EXPLANATORY REPORT, *supra* note 13, available at <http://conventions.coe.int/treaty/EN/cadreprincipal.htm> (last visited Aug. 17, 2000).

47. See, e.g., Lucinda A. Low, *Recommendation and Report, Inter-American Convention Against Corruption*, 31 INT'L LAW. 1121, 1122 (1997).

48. COE Statute, *supra* note 2, art. 2.

49. *Id.* art. 3.

term "undue advantage" is not defined within the COE Convention; thus, whether a particular transaction confers an "undue advantage" must be determined by reference to the domestic law of the States Parties.

The COE Convention shares with the OECD and the Inter-American Conventions a basic definition of the elements of the offense of active bribery. In essence, these agreements prohibit illicit offers or payments to or for an official, as defined, with the intent to induce or cause that person to misuse his or her office, to the benefit of the offeror.<sup>50</sup> However, unlike the FCPA, the OECD Convention and article VIII of the Inter-American Convention (Transnational Bribery), which prohibit active transnational bribery only in the commercial context,<sup>51</sup> the COE Convention requires States Parties to criminalize both the active and passive bribery of foreign public officials, regardless of whether the offeror's purpose relates to a commercial activity.

Because the COE Convention would prohibit all corrupt payments to foreign officials, for whatever purpose, it is broader in scope than the OECD and Inter-American Conventions.<sup>52</sup> It is also broader than U.S. federal law, which does not specifically prohibit payments to foreign public officials for non-commercial purposes. Although, in appropriate circumstances, such acts may be prosecuted under statutes other than the FCPA, however, there

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50. See generally FCPA, *supra* note 32, 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a) (it is against U.S. law to offer, pay, promise to pay, or authorize the payment of any money, offer, gift, promise to give, or the authorization of the giving of anything of value to any prohibited person, directly or indirectly, to influence that person's acts or decisions, or induce him or her to do or omit to do any act in violation of his or her lawful duty, or to secure an improper advantage, or to use his or her influence with a foreign government agency or instrumentality to affect any act or decision, in order to obtain or retain business with, or direct business to any person); OECD Convention, *supra* note 29, art. 1(1) (requiring States Parties to establish under their domestic law that it is a criminal offense for a person within its jurisdiction to "offer, promise or give any undue pecuniary 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 connection with the conduct of international business); and Inter-American Convention, *supra* note 26, art. VI(1)(b) (Acts of Corruption), defining active bribery as

the offering or granting, directly or indirectly, to a government official or a person who performs public functions, of any article of monetary value, or other benefit, such as a gift, favor, promise or advantage for himself or for another person or entity, in exchange for any act or omission in the performance of his public functions.

and art. VIII (Transnational Bribery), defining transnational bribery as

the offering or granting, directly or indirectly, by its nationals, persons having their habitual residence in its territory, and businesses domiciled there, to a government official of another State, of any article of monetary value, or other benefit, such as a gift, favor, promise or advantage, in connection with any economic or commercial transaction in exchange for any act or omission in the performance of that official's public functions.

51. COE Convention, *supra* note 2, arts. 2-3, 9-11. Like the FCPA, both the COE and OECD Conventions specifically require the prohibited acts to be done intentionally in order for criminal liability to attach. The Inter-American Convention has no such requirement, although domestic implementing legislation may impose such a limitation.

52. For example, the COE Convention appears to require the criminalisation of both a payment made to influence a foreign government agency's purchase of computer software from the bribe-giver, as well as an offer of a free luxury cruise by the president of the same entity to the chief of the hospital operated by a foreign government agency in order to obtain a higher placement on a transplant list for his or her daughter. The first act would be prohibited by the FCPA, the OECD Convention, and the Inter-American Convention whereas the second would not.

does not seem to be a groundswell of support to expand the law in this area.<sup>53</sup> Thus, the United States may be required to file a declaration that articles 2–3 and 9–11 apply only to the bribery of the foreign officials in connection with commercial transactions and that U.S. law, primarily the FCPA, sufficiently criminalizes these offenses.<sup>54</sup>

### 1. *Bribery of Domestic Public Officials and Assembly Members (Articles 2–4)*

Articles 2 through 4 prohibit active and passive bribery of domestic “public officials” or any “member of a domestic public assembly exercising legislative or administrative powers.” Bribery of domestic public officials, including legislators, is already a criminal offense under U.S. federal law.<sup>55</sup> Further, like the COE Convention, U.S. law criminalizes both the active and passive bribery of domestic federal officials, although it does not use those terms.<sup>56</sup> Because of the structure of the U.S. legal system, in which the federal government and each state government prohibits the bribery of officials within its own jurisdiction, these overlapping legal regimes may be somewhat inconsistent. However, as a practical matter, most of these legal regimes overlap, and through the use of a variety of federal statutes (e.g., the mail and wire fraud statutes, 18 U.S.C. §§ 1341, 1343, and 1346; the Hobbs Act, 18 U.S.C. § 1951; the Travel Act, 18 U.S.C. § 1952, etc.) federal jurisdiction can and often does extend to state and local corruption. For this reason, the United States should consider filing a declaration to the effect that it understands that its obligation is to address the acts described in articles 2–4 at the “national” level, and that because federal law sufficiently prohibits these offenses, no change to U.S. law is required to comply with the COE Convention.

### 2. *Transnational Bribery (Articles 5–6 and 9–11)*

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

53. Because there is no humanitarian or *de minimis* exception to these articles, certain types of non-commercial payments to foreign officials, which may be considered unobjectionable, if technically illegal under local law, now would be prohibited under international law. For example, a payment by an international relief agency worker to a police officer to permit a shipment of food to proceed although it lacked necessary government permits might be found to have been intended to cause the officer “to act or refrain from acting in the exercise of his or her functions.” If so, the aid worker, and the agency he or she represents, could be prosecuted locally or extradited under the COE Convention.

54. In fact, the U.S. government has proposed appending certain reservations, interpretive statements, and understandings to the United States’ ratification of the COE Convention. A draft of the U.S. government’s proposals is set forth at part IV.A.

55. 18 U.S.C. § 201(a) (2001) (criminalizing the bribery of federal officials, including members of the U.S. Congress).

56. Under federal law, 18 U.S.C. §§ 201(b)(1) and (c)(1)(A) regulate active bribery, while sections 201(b)(2) and (c)(1)(B) regulate passive bribery, of federal officials. Unlike the COE Convention, section 201 also distinguishes between “corruptly” engaging in the bribery of domestic public officials, by imposing a fifteen-year maximum prison sentence, and otherwise engaging in such bribery or the payment or receipt of illicit gratuities, which carries only a two-year maximum sentence. 18 U.S.C. §§ 201(b)–(c).

Similarly, the Inter-American Convention requires the criminalization of active and passive bribery of domestic officials regardless of whether the offer, payment or solicitation was made in connection with a commercial activity. Inter-American Convention, *supra* note 26, arts. VI(1)–(2).



Party's legislation may be informed in practice by the policies adopted by its law enforcement authorities. Thus, for example, while the FCPA has been criticized by commentators as harsh,<sup>57</sup> in fact, the Department of Justice has exercised care in determining which cases to prosecute.<sup>58</sup> Other domestic legislation may be equally tempered by both practical and policy considerations.

As discussed earlier, unlike the FCPA, and its predecessor conventions, the COE Convention does not limit its prohibitions against illicit offers and payments to foreign officials, but only to those made in connection with a commercial activity. Moreover, it is unique in that it requires the criminalization of passive transnational bribery. Further, like the other international anti-corruption treaties, it is silent concerning whether States Parties should enact implementing legislation that provides for exceptions<sup>59</sup> or affirmative defenses<sup>60</sup> to any criminal statutes.<sup>61</sup>

The COE Convention is weakest where it more narrowly defines the pool of covered foreign officials than the FCPA and the two prior conventions. Under the COE Convention, the bribery of officials of public international organizations and members of international assemblies is prohibited only where the intended recipient is a member of those organizations and assemblies of which the State Party also is a member. Bribery of judges and officials of international courts is similarly prohibited only for courts whose jurisdiction has been accepted by the State Party.

U.S. law does not make these distinctions. With the exception of the requirement that the President designate the "public international organizations" covered by the FCPA—of which the United States may or may not be a member—U.S. law does not distinguish among foreign officials. Thus, depending on the domestic implementing legislation adopted by each State Party, the reach of the COE Convention may be unduly limited to a narrow

57. Commentators have criticized the FCPA for being "severe by global standards" in its approach to foreign commercial bribery. See Steven R. Salbu, *Bribery in the Global Market: A Critical Analysis of the Foreign Corrupt Practices Act*, 54 WASH. & LEE L. REV. 229, 231 (1997).

58. From the earliest days of its enforcement of the FCPA, the U.S. Department of Justice (DOJ) has reviewed prospective business transactions presented by U.S. persons and entities, and provided its opinion concerning whether such transactions would trigger DOJ enforcement activity. See generally 15 U.S.C. §§ 78dd-1(e), 78dd-2(f); U.S. Attorney General's Opinion Procedure Releases (1993 to present), and Review Procedure Releases (1980-1992), available at [www.usdoj.gov/criminal/fraud/fcpa.html](http://www.usdoj.gov/criminal/fraud/fcpa.html) (last visited July 31, 2000). Parties intending to engage in acts that arguably may trigger FCPA enforcement activity may obtain a prior review by the DOJ to determine whether the planned actions can or should be modified to comply with U.S. law. None of the international instruments discussed in this report, including the COE Convention, provides for such a safety valve, although it is possible that domestic laws may do so.

59. Payments made to secure "routine governmental action" commonly known as "facilitating payments" are excepted from the FCPA's prohibitions. This is also sometimes called the "grease payments exception." See generally 15 U.S.C. §§ 78dd-1(b), 78dd-2(b), 78dd-3(b). Neither the OECD nor the OAS Conventions contain a similar exception, although they do not preclude States Parties from enacting such a provision in their domestic legislation.

60. It is an affirmative defense under the FCPA that the payment was made in order to perform a contract, or was permitted under the written laws of the foreign country. See generally 15 U.S.C. §§ 78dd-1(c), 78dd-2(c), 78dd-3(c). Neither the OECD nor the Inter-American Conventions provide for any affirmative defenses, although States Parties may provide for affirmative defenses in their domestic legislation.

61. The COE Convention, like its predecessors, also makes no provision for *de minimis* offers or payments. While no such exception is included within the text of the FCPA, the principles of U.S. federal practice provide prosecutors with discretion to refuse to prosecute if they believe the proposed charges are unsupportable as a matter of policy. Other countries may not grant their prosecutors the same leeway to refuse to charge a *de minimis* case.

set of covered officials. Such an outcome not only would be inconsistent with the drafters' objectives,<sup>62</sup> but it could also undermine the effectiveness of the OECD, and possibly the Inter-American Conventions, for those states with overlapping membership in these treaties, should they contend that their compliance with the COE Convention also satisfies their obligations under the other agreements. For this reason, the ABA urges States Parties to these agreements to develop coordinated and consistent definitions of the offenses within their national legislation, to avoid the potential for weak and ineffective implementation of these agreements.

### 3. *Private Sector Bribery (Articles 7–8)*

Articles 7 and 8 prohibit the active and passive bribery of private individuals when committed “in the course of business activity,” a limitation not present in the rest of the COE Convention. Article 7 provides in pertinent part that States Parties shall adopt measures to criminalize the active bribery of private individuals under their domestic law,

when committed intentionally in the course of business activity, the promising, offering or giving, directly or indirectly, of any undue advantage to any persons who direct or work for, in any capacity, private sector entities, for themselves or for anyone else, for them to act, or refrain from acting, in breach of their duties.<sup>63</sup>

Similarly, Article 8 requires that States Parties establish as a criminal offense under their laws the

request or receipt, directly or indirectly, by any persons who direct or work for, in any capacity, private sector entities, of any undue advantage or the promise thereof for themselves or for anyone else, or the acceptance of an offer or a promise of such an advantage, to act or refrain from acting in breach of their duties.<sup>64</sup>

Chapter II calls for “measures to be taken at the national level.” While there are differing views as to whether some U.S. states would be required to adopt implementing legislation, existing U.S. federal law would meet the obligation to criminalize private sector bribery. In large measure, under current U.S. federal and state law, private sector bribery that does not involve federal officials is prohibited either by common law principles of fiduciary obligation, or by state statutes. Moreover, where state law supplies the predicate offense, the Travel Act provides for the federal prosecution of the bribery of private persons in connection with commercial transactions.<sup>65</sup>

### D. TRADING IN INFLUENCE (ARTICLE 12)

The COE Convention's requirement that States Parties criminalize illicit “trading in influence” may be one of the most controversial elements of this Convention. Article 12 requires States Parties to adopt laws criminalizing the giving or receiving of “any undue advantage” in exchange for “improper influence” over the decisions of domestic or foreign

62. See COE Statute, *supra* note 2.

63. *Id.* art. 7.

64. *Id.* art. 8.

65. See 18 U.S.C. § 1952. The U.S. Supreme Court has held that the Travel Act, extends to the “commercial bribery” of private employees where prohibited by state law. *Perrin v. United States*, 444 U.S. 37 (1979). In addition, where appropriate, bribery may be prosecuted by the federal government under the mail and wire fraud statutes. 18 U.S.C. §§ 1341, 1343.

officials, legislators, judges, or employees of international organizations.<sup>66</sup> Article 12 applies to both direct and indirect promises of “undue advantage” by anyone who “asserts or confirms” that he or she is able to exert improper influence over a public official’s decision-making functions, regardless of whether he or she is actually able to do so.<sup>67</sup> The prohibitions of article 12 apply regardless of whether the desired influence is exerted, and regardless of whether the claimed influence leads to the intended result.

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

Despite these concerns, article 12 reasonably may be interpreted to be consistent with present U.S. federal and state law. Although the article’s terms are undefined, article 12 requires the criminalization of offers of “undue advantage” to obtain “improper influence.” This suggests that merely offering something of value in exchange for an assertion that the recipient will make efforts to exert influence on a decision maker—that is, lawful campaign contributions and/or lobbying—is not within the scope of this provision. In fact, the Explanatory Report accompanying the COE Convention states that “[i]mproper influence must contain a corrupt intent by the influence peddler: acknowledged forms of lobbying do not fall under this notion.”<sup>68</sup> Indeed, the use of the terms “undue” and “improper” strongly suggests that article 12 is intended to reach only those activities that are already illegal under U.S. law.

The ABA therefore recommends that the United States append to its instrument of ratification a declaration that the United States interprets article 12 as being consistent with federal law governing lobbying and campaign contributions, and that it will not be required to modify its law with respect to article 12.<sup>69</sup>

## E. DERIVATIVE OFFENSES (ARTICLES 13–14)

### 1. *Money Laundering of Proceeds from Corruption Offenses (Article 13)*

In addition to calling for the criminalization of various bribery offenses, the COE Convention also requires States Parties to adopt laws covering acts intended to conceal or

66. Article 12 provides,

Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally, the promising, giving or offering, directly or indirectly, of any undue advantage to anyone who asserts or confirms that he or she is able to exert an improper influence over the decision-making of any person referred to in articles 2, 4 to 6 and 9 to 11 in consideration thereof, whether the undue advantage is for himself or herself or for anyone else, as well as the request, receipt or the acceptance of the offer or the promise of such an advantage, in consideration of that influence, whether or not the influence is exerted or whether or not the supposed influence leads to the intended result.

COE Statute, *supra* note 2, art. 12.

67. *Id.*

68. EXPLANATORY REPORT, *supra* note 13, ¶ 65.

69. The U.S. government has proposed a reservation to article 12. See Part IV.A, *infra*, for the text of the government’s draft reservation.

launder the proceeds of bribery, or both. Article 13 requires States Parties to adopt the bribery offenses set forth in articles 2 through 12 as money laundering predicates, consistent with the Council of Europe's Convention on Laundering, Search, Seizure and Confiscation of the Products of Crime,<sup>70</sup> "to the extent that the Party has not made a reservation or a declaration with respect to these offences or does not consider such offences as serious ones for the purpose of their money laundering legislation."<sup>71</sup> U.S. federal law already provides that bribery may be a predicate offense to money laundering.<sup>72</sup> Recently enacted amendments to the federal forfeiture statutes provide for the civil or criminal forfeiture of bribe payments, and the proceeds of bribery and corruption.<sup>73</sup> In addition, federal law also prohibits the laundering of funds in order to conceal the source of bribe payments.<sup>74</sup>

## 2. Account Offenses (Article 14)

The COE Convention mandates that all entities maintain accurate accounting records or potentially face a significant penalty. Article 14 requires States Parties to

adopt such legislative and other measures as may be necessary to establish as offences liable to criminal or other sanctions under its domestic law the following acts or omissions, *when committed intentionally, in order to commit, conceal or disguise the offences referred to in articles 2-12*, to the extent the Party has not made a reservation or a declaration where the offender has created or used false or incomplete invoices or accounting records or "unlawfully" omitted to make a record of a payment.<sup>75</sup>

Although punishment under article 14 may only be imposed where the inaccurate records were created to conceal or disguise bribery offenses, this article goes further than U.S. law in imposing stringent accounting and record-keeping standards on non-publicly traded entities.<sup>76</sup> The United States does not impose the same rigorous accounting and record-keeping requirements on privately held companies or individuals that it does on publicly held companies.<sup>77</sup> U.S. federal law does, of course, prohibit individuals and privately held

70. Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime, Aug. 11, 1990, art. 6, E.T.S., available at [www.coe.int.com](http://www.coe.int.com) (last visited July 21, 2000).

71. *Id.* art. 13.

72. See 18 U.S.C. § 1956.

73. See generally Civil Asset Forfeiture Reform Act of 2000 (CAFRA), Pub. L. No. 106-185, §§ 2(c)(1), 5(a), 6, 8(a), 16, 20, Apr. 25, 2000, 114 Stat. 221, codified at 18 U.S.C. § 981 (civil forfeiture); and 28 U.S.C. § 2461(c) (criminal forfeiture).

74. See 18 U.S.C. § 1956.

75. See COE Statute, *supra* note 2, art. 14 (emphasis added).

76. If applied to individuals, article 14 may violate the U.S. Constitution. Although individuals have no privilege to create false records, where they are compelled to disclose their personal records to the government, pursuant to subpoena or otherwise, where the government compels an individual to disclose evidence against himself or herself, that directive may conflict with the privilege against self-incrimination guaranteed by the Fifth Amendment. See *United States v. Hubbell*, 120 S.Ct. 2037 (2000); see also *United States v. Doe*, 465 U.S. 605 (1984); *Fisher v. United States*, 425 U.S. 391 (1976).

77. The FCPA imposes accounting and record-keeping requirements on companies that have a class of securities registered with the U.S. Securities and Exchange Commission pursuant to section 12 of the Securities Exchange Act of 1934 (Exchange Act) or that are required to file reports under the Exchange Act. See 15 U.S.C. §§ 78m(b)(2), 78l, 78o(d); see also SEC Rules 13b2-1 and 13b2-2. However, through a combination of accounting standards, such as Statement of Auditing Standard No. 82, of requirements under the Internal Revenue Code, and of federal statutes such as 18 U.S.C. § 1001 (false statements), and 18 U.S.C. §§ 1341 (mail fraud) and 1343 (wire fraud), non-public entities are, as a practical matter, subject to significant limitations, especially with respect to taking affirmative steps to conceal illicit activity, or to make false representations to the government.

companies from supplying false records to the government, including in connection with filing tax returns, obtaining government benefits, or conducting business with the government.<sup>78</sup> However, because article 14 is broader than U.S. law, the United States will need to file a declaration or an interpretive statement that, except as provided under U.S. federal law with respect to making false statements or supplying false information to the government, article 14 applies only to public companies or other companies that file periodic reports with the Securities and Exchange Commission.<sup>79</sup>

It should be noted that articles 13 and 14 expressly invite reservations to the criminalization of these offenses. Indeed, article 13 goes so far as to say that countries are not required to criminalize money laundering if the signatory "does not consider such offences as serious ones."<sup>80</sup> Such an open invitation to avoid addressing the laundering of bribe monies or the proceeds of bribery offenses through domestic criminal law weakens an important deterrent to corruption offenses, and may leave gaps in the national laws of some States Parties. For this reason, the ABA recommends that adoption and implementation of the COE Convention be subject to minimal reservations and interpretations.

#### F. PARTICIPATORY ACTS (ARTICLE 15)

Article 15 covers "participatory acts," which are defined as "aiding or abetting the commission of any of the criminal offences established in accordance with this Convention."<sup>81</sup> Although the article does not define "aiding or abetting," it does not appear that this provision would require changes to U.S. law.<sup>82</sup> However, because foreign officials may not be prosecuted under the FCPA for conspiring to receive, or aiding and abetting their receipt of illicit payments, the U.S. government may consider clarifying that, because other U.S. laws may permit the prosecution of the recipient official, the United States will not be required to modify its law to comply with this article.<sup>83</sup>

#### G. JURISDICTION (ARTICLE 17)

States Parties to the COE Convention are required to enact legislation establishing territorial and/or nationality based jurisdiction over the domestic bribery, international bribery, money laundering, and accounting and record-keeping offenses described in articles 2-14 of the Convention where (1) the offense is committed in the State Party's territory; (2) the offender is one of the State Party's nationals or public officials; or (3) the offense involves one of the State Party's public officials, a member of a domestic public assembly, or a national who is a member of an international organization or court.<sup>84</sup>

78. See, e.g., 18 U.S.C. § 1001 (false statements); 26 U.S.C. § 162 (illegal tax deduction of bribe payments).

79. See *infra* part IV.A for the text of the U.S. government's proposed interpretive statement to article 14.

80. COE Statute, *supra* note 2, art. 13.

81. *Id.* art. 15.

82. Although many U.S. federal statutes, including the FCPA, do not contain express complicity provisions, federal law generally permits the punishment of aiders and abettors, as well as conspirators. See 18 U.S.C. § 2 (aiding and abetting); *Pinkerton v. United States*, 328 U.S. 640 (1946).

83. See *United States v. Castle*, 952 F.2d 831 (5th Cir. 1991) (explaining that because foreign officials cannot be prosecuted for soliciting or accepting bribes under the FCPA, they cannot be charged with conspiring with the offerors to receive such bribes).

84. COE Statute, *supra* note 2, art. 17.

The COE Convention's jurisdictional scope is similar to that of the present version of the FCPA. Until 1998, the FCPA's jurisdictional provisions were predicated solely on principles of territorial jurisdiction where a means of interstate commerce was used in furtherance of the corrupt offer or payment.<sup>85</sup> Following its amendment in 1998 to comply with the OECD Convention, the FCPA now provides for nationality jurisdiction where U.S. nationals or the officers, directors, agents or shareholders of U.S. issuers commit FCPA offenses outside the United States.<sup>86</sup> In addition, the FCPA now prohibits foreign entities and individuals, while within the United States, from undertaking acts in furtherance of a corrupt offer or payment to a foreign official.<sup>87</sup> Thus, the United States' nationality and territorial jurisdictional scope is as broad as, and may well be broader than, that required by the COE Convention with respect to the bribery of foreign officials.

The United States follows its traditional rules of territorial jurisdiction with respect to the bribery of domestic officials. As a practical matter, although it is unlikely that a bribe-giver will bribe a domestic public official wholly outside the territory of the United States, or without using a means or instrumentality of interstate commerce, the United States may consider filing a reservation stating that it has no intention of revising its general principles of territorial jurisdiction to comply with the COE Convention on this point.<sup>88</sup>

#### H. CORPORATE LIABILITY (ARTICLE 18)

Traditionally, very few countries have shared the United States' concept of corporate criminal liability. Article 18 incorporates the legal concept of collective wrongdoing by requiring all States Parties to adopt measures to ensure that legal persons (corporations or other organizations) can be held liable for active bribery, trading in influence, and money laundering where those offenses were committed for the corporation's benefit by a natural person with a "leading position" within the organization.<sup>89</sup>

Unlike the FCPA, the COE Convention does not include accounting and bookkeeping violations within the offenses for which a corporation may be criminally liable. The exclusion of these offenses, which are often integral to offenses committed by or on behalf of organizational entities, from those for which corporate liability may be imposed, bears further review by the Council of Europe and in the GRECO. Despite this omission, the COE Convention mandates corporate liability for failing to supervise or control an employee or other person under the entity's authority who engages in the prohibited offenses for the benefit of the corporation.<sup>90</sup> Because this provision substantially reflects the Amer-

85. See 15 U.S.C. §§ 78dd-1(a), 78dd-2(a). Under the former version of the FCPA, the United States obtained personal jurisdiction over foreign nationals and entities (1) through consent to personal jurisdiction by issuers and other entities that file reports with the Securities and Exchange Commission, and their directors, officers, employees and agents (see 15 U.S.C. §§ 78dd-1(a), 78m(b)(2), (5)); or (2) where the defendant was a resident of the United States, or its territories. See 15 U.S.C. §§ 78dd-2(a), 78dd-2(h)(1).

86. The FCPA was amended by the International Anti-Bribery Act of 1998, Pub. L. No. 105-366, 112 Stat. 3306 (1998), which added sections 78dd-1(g) and 78dd-2(i).

87. The 1998 amendments added 15 U.S.C. § 78dd-3 to the statute.

88. In fact, the government has proposed such a reservation. See *infra* Part IV.A for the proposed text of this reservation.

89. See COE Statute, *supra* note 2, art. 18(1). The determination as to whether an offender is a "leading person" within the corporation appears to be a fact-specific evaluation based on the individual's (1) power to represent the corporation, (2) authority to make decisions on behalf of the corporation, or (3) the authority to exercise control within the corporation. *Id.*

90. *Id.* art. 18(2).

ican concept of corporate liability for the illegal acts of an organization's employees and agents, the United States will not be required to modify its laws in this area.

## I. SANCTIONS (ARTICLE 19)

Article 19 of the COE Convention provides that "each Party shall provide, in respect of those criminal offences established in accordance with articles 2 to 14, effective, proportionate and dissuasive sanctions and measures, including, when committed by natural persons, penalties involving deprivation of liberty which can give rise to extradition."<sup>91</sup> It further provides that legal persons shall be subject to "effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions."<sup>92</sup> Altogether, such sanctions may include, where appropriate, imprisonment, extradition, confiscation of proceeds, monetary and other criminal and civil penalties.<sup>93</sup> If necessary, States Parties must enact laws enabling them to confiscate the instrumentalities, proceeds, or other property (the value of which corresponds to such proceeds) resulting from criminal offenses.

Article 19 is intended for those countries without well defined sanctions for bribery-related violations, unlike the United States, which already has strict penalties for such offenses.<sup>94</sup> Because U.S. money laundering statutes provide for the seizure of substitute assets only in limited circumstances,<sup>95</sup> however, the United States may need to append an understanding to its instruments of ratification that its money laundering statutes satisfy Article 19.

## J. PROCEDURAL REQUIREMENTS

### 1. *Specialized Authorities (Articles 20–21)*

The COE Convention requires each State Party to ensure that those persons or entities charged with enforcing anti-bribery legislation have the necessary independence, training, and funding to carry out their functions effectively and free from undue pressure.<sup>96</sup> The U.S. government's resources are already stretched thin from participating in the OECD monitoring process, and with its involvement in the work of other international organizations, as well as from investigating and prosecuting transnational bribery offenses. Participation in the GRECO and in whatever monitoring mechanism is developed by the OAS to monitor the Inter-American Convention will require additional resources. These efforts

91. *Id.* art. 19(1).

92. *Id.* art. 19(2).

93. *Id.* art. 19(3).

94. A conviction for bribing a federal official carries a maximum penalty of two to fifteen years, depending on the severity of the offense. See 18 U.S.C. § 201 (2000). Bribing a foreign government official carries a maximum penalty of five years imprisonment and a \$100,000 fine for natural persons, see 15 U.S.C. § 78dd-2(g)(1)(A) (1997); 15 U.S.C. § 78dd-3(e)(2)(A) (2001); 15 U.S.C. § 78ff(c)(2)(A) (1997); or, for issuers and 'juridical persons' a fine of \$2 million. See *id.* §§ 78dd-3(e)(1)(A), 78ff(c)(1)(A). The FCPA's stringent penalties should satisfy the Convention's penal requirements. See *id.* §§ 78dd-2(g) (penalties of \$2 million for domestic concerns that are not natural persons; five years imprisonment and \$100,000 fine for willful violations by natural persons or \$10,000 civil fine; plus possible injunction), 78dd-3(e) (same, but no injunctive relief), and 78ff(c) (same, no injunctive relief). Further, a corporate entity may not pay the fines of an individual officer, director, shareholder or agent. See *id.* §§ 78dd-2(g)(3), 78dd-3(e)(3), and 78ff(c)(3).

95. See 21 U.S.C. § 853(p) (1999).

96. COE Statute, *supra* note 2, art. 20.

should not be permitted to drain resources from the U.S. government's commitment to the OECD process. Thus, it appears worthwhile to stress that the U.S. government will need to commit sufficient resources to adequately investigate and prosecute transnational bribery offenses, and to implement the various monitoring mechanisms, and that non-governmental organizations and private sector organizations can provide an additional source of assistance in the area of monitoring implementation.

## 2. *Witness Protection and Evidentiary Issues (Articles 22–23)*

The COE Convention requires each State Party to adopt measures to effectively protect individuals who report a corruption offense, cooperate with investigating or prosecuting authorities, or give testimony.<sup>97</sup> Furthermore, States Parties must enact legislation permitting the use of undefined “special investigative techniques” to facilitate the gathering of evidence related to criminal offenses established pursuant to the COE Convention.<sup>98</sup> Because it is unclear what form these “techniques” are expected to take, this appears to be an area for review by the GRECO. States Parties similarly must adopt measures emerging their courts or other authorities to order that bank, financial, or commercial records be made available for evidentiary purposes.<sup>99</sup> Finally, bank secrecy laws may not be used as a basis for prohibiting access to such information.<sup>100</sup> Because U.S. law is sufficiently developed in this area, it appears that no special steps are required to comply with the COE Convention.

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

## K. MONITORING (ARTICLE 24)

The States Parties' implementation of the COE Convention will be monitored by the GRECO.<sup>101</sup> GRECO was created for the purposes of using mutual evaluation and peer pressure to monitor the States Parties' observance of the Guiding Principles<sup>102</sup> and the implementation of other international anti-corruption instruments that may be adopted by the Council of Europe. Non-member states may join GRECO at any time by notifying the Secretary General of the Council of Europe; the notification must be accompanied by a declaration that the State undertakes to apply the Guiding Principles. Any State not already a member of GRECO at the time it ratifies the COE Convention automatically becomes a member on the date the COE Convention enters into force.<sup>103</sup>

97. *Id.* art. 22.

98. *Id.* art. 23(1).

99. *Id.* art. 23(2).

100. *Id.* art. 23(3).

101. *Id.* art. 24.

102. See *supra* note 10 and accompanying text.

103. See COE Statute, *supra* note 2, art. 32(3).



GRECO's monitoring mechanisms rely primarily on firsthand evaluations by a peer review investigative team. This process is similar to that implemented in Phase I by the parties to the OECD Convention.<sup>104</sup> However, GRECO provides for confidential reporting; by contrast, the OECD has made its country reports public, a step that GRECO is strongly urged to undertake.<sup>105</sup>

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

#### L. INTERNATIONAL COOPERATION (ARTICLES 25–31)

While the text calls for cooperation between national authorities, the COE Convention requires States Parties to cooperate only to the extent of their "national law."<sup>106</sup> Despite that limitation, and perhaps recognizing that countries otherwise may refuse to provide legal assistance to a requesting state on the basis of a difference in national law, the COE Convention does not require dual criminality as a basis for cooperation. Mutual legal assistance may be refused, however, if the requested state believes that compliance with the request would undermine its fundamental interests, national sovereignty, security, or for any other valid reason.<sup>107</sup> While this article respects each State Party's sovereign authority, in many ways it turns a legal decision to cooperate into a political decision. Such a result should be strongly discouraged in the implementation of the COE Convention.

The offenses established under the COE Convention are extraditable offenses under any existing treaty between the parties, and are to be included in any future bilateral or mul-

104. The OECD Working Group on Bribery is currently completing the first phase of a mutual evaluation monitoring process to review implementing legislation and will commence a second phase focusing on enforcement in late 2000. This part of the process is critical to the effective enforcement of the OECD Convention and will require adequate financial resources. Progress is still needed on unresolved issues, including bribery as a predicate offense for money laundering, bribes to political parties and party officials, the treatment of offshore finance centers, and foreign subsidiaries.

Fulfilling the potential of the OECD Convention to eliminate bribery as a factor in transnational business will require private sector action. The International Chamber of Commerce's voluntary "Rules of Conduct to Combat Extortion and Bribery," adopted in 1996, and the 1999 "Fighting Corruption" manual on anti-bribery compliance programs, may be useful reference points for private entities seeking practical guidance. See ICC, *FIGHTING BRIBERY, A CORPORATE PRACTICES MANUAL* (F. Vincke et al. eds., April 1999).

105. Following the completion of Phase I of the OECD evaluation process, in which the parties to the OECD Convention participated in peer reviews, the OECD made publicly available its evaluations of whether the States Parties' anti-corruption legislation conforms to the OECD Convention's requirements. See OECD, *COUNTRY REPORTS ON THE IMPLEMENTATION OF THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND THE 1997 REVISED RECOMMENDATION* JUNE 27, 2000 AND MAY 16–17, 2001 (2000), available at [www.oecd.org/daf/nocorruption/report.htm](http://www.oecd.org/daf/nocorruption/report.htm) (last visited Aug. 1, 2000); see also U.S. DEPT. OF COMMERCE, *SECOND ANNUAL REPORT UNDER SECTION 6 OF THE INTERNATIONAL ANTI-BRIBERY AND FAIR COMPETITION ACT OF 1998* (2000), at 52–55 [hereinafter *SECOND ANNUAL REPORT*].

106. COE Statute, *supra* note 2, art. 25.

107. *Id.* art. 26(2).

tilateral extradition treaties between them.<sup>108</sup> Those parties without such treaties may consider the COE Convention as a sufficient legal basis for extradition, with respect to criminal offenses committed thereunder.<sup>109</sup> If extradition is refused on nationality grounds, or where the requested party claims jurisdiction, the requested party is required to submit the case to its authorities for prosecution, unless otherwise agreed, and to report the outcome to the requesting state.<sup>110</sup>

#### M. DECLARATIONS AND RESERVATIONS (ARTICLES 36–38)

The COE Convention provides for certain limited declarations and reservations.<sup>111</sup> For example, any State Party may declare that it will establish as a criminal offense the bribery of foreign public officials, officials of international organizations, or of judges or officials of international courts, only to the extent that public official is alleged to have acted or refrained from acting in breach of his or her duties.<sup>112</sup> Article 37 permits reservations only to certain, specified articles, up to a maximum of five.<sup>113</sup> Despite the limitation on the number of reservations permitted, because of their scope, this provision has given rise to a concern that the COE Convention, rather than promoting consistency, will produce a disparity in the States Parties' domestic laws. In fact, a careful review of the provisions which reservations are permitted reveals that they are the most controversial in the COE Convention. The ABA therefore encourages States Parties to follow the guidance of the Committee of Ministers and judiciously limit the number and the breadth of their reservations.

#### N. DISPUTE RESOLUTION (ARTICLE 40)

In case of a dispute between States Parties as to the interpretation or application of the COE Convention, the States Parties must negotiate a settlement through any peaceful

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108. *Id.* art. 27.

109. *Id.* art. 27(2). Because the United States' policy is not to extradite without an extradition treaty, it is unlikely that the United States will extradite without a separate treaty. This is particularly likely here because the U.S. resolutions of ratification for both the OECD and Inter-American Conventions included understandings that these anti-corruption conventions would not serve as a basis for extradition.

110. *Id.* art. 27(5).

111. The Committee of Ministers has requested that States Parties judiciously limit their reservations to only those necessary to implement the Convention under their laws, stating that

the text of the Convention provides for a certain number of possible reservations. It has transpired that this is necessary so that Parties can make a progressive adaptation to the undertakings enshrined in this instrument. The Committee of Ministers is convinced that regular examination of reservations by the "Group of States Against Corruption – GRECO" will make it possible to bring about a rapid reduction of reservations made upon ratification or accession to the Convention.

Nonetheless, in order to maintain the greatest possible uniformity with regard to the undertakings enshrined in the Convention, and to allow full advantage to be taken of this text from the moment it enters into force, the Committee of Ministers appeals to all States wishing to become party to the Convention to reduce as far as possible the number of reservations that they declare, when expressing their consent to be bound by this treaty, and to States which nevertheless find themselves obliged to declare reservations, to use their best endeavors to withdraw them as soon as possible.

EXPLANATORY REPORT, *supra* note 13.

112. COE Statute, *supra* note 2, art. 36.

113. *Id.* art. 37(1). Parties may file reservations to the "conduct referred to in Articles 4, 6 to 8, 10 and 12 or the passive bribery offences defined in Article 5." *Id.*

means of their choice. Both parties must agree to the forum and the dispute may be submitted to (1) the European Committee on Crime Problems, (2) a tribunal for binding arbitration, or (3) the International Court of Justice.<sup>114</sup>

#### IV. Impact on U.S. Law

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

##### A. PROPOSED U.S. RESERVATIONS, DECLARATION, AND INTERPRETIVE STATEMENTS

Following discussions with U.S. government representatives, the ABA understands that the U.S. government does not propose, in ratifying the COE Convention, to modify existing law, and that it instead proposes to append the following draft Reservations, Declarations, Understandings (or Interpretive Statements) to the COE Convention.<sup>115</sup>

###### ▪ Reservations

(1) *Active and Passive Bribery of Members of Foreign and International Public Assemblies (articles 6 and 10)*: The federal "honest services" fraud statute (18 U.S.C. § 1346), which could be relied upon to implement these criminalization obligations, entails a breach of duty element. Pursuant to article 37(1), a party may limit by reservation its obligations under the Convention to criminalize the conduct referred to in, *inter alia*, articles 6 and 10. The United States intends to do so in order to specify that breach of duty would be an element of these offenses under U.S. law. Article 37(4) stipulates that reservations with respect to these two articles count one.

(2) *Trading in Influence (article 12)*: This article would oblige a party to criminalize the promising, giving or offering of an undue advantage for the purpose of exercising "improper" influence over official decision making. However, neither the text nor the explanatory report fully clarifies whether "improper" influence would extend beyond bribery to conduct that may not be criminal in the United States, for example, certain types of lobbying activities. The United States therefore intends to reserve to this obligation in whole, as permitted under article 37(1). To the extent that the conduct addressed by this article entails bribery of a public official, it is already addressed by other obligations under the Convention, and by existing U.S. law.

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

114. *Id.* art. 40.

115. This subsection is based on information provided to the ABA in draft form in August 2000. Although we are not aware of any changes at this date, because the U.S. government emphasized that these are draft statements, they presumably remain subject to change.

### • Declaration

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

### • Interpretive Statements<sup>116</sup>

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

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

## B. ABA’S RESPONSE TO THE U.S. GOVERNMENT’S DRAFT PROPOSALS

The proposed Reservations, Declaration, and Interpretive Statements are generally consistent with this Report’s analysis. In addition, the United States may consider issuing a declaration that articles 2 through 4 are satisfied with respect to federal officials under current law, and that the requirement to take measures at the “national level” imposes no obligation on the federal government to modify state law in any way to comply with the COE Convention.

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

With respect to the Interpretive Statement concerning article 35, the ABA strongly supports the U.S. government’s position that ratification and implementation of this Conven-

116. The U.S. Government proposes to add the following after the phrase “Interpretive Statement.” “Although the United States has for many years used the term “understanding” as a vehicle for expressing its views with respect to the meaning of a treaty, that term is not universally used or always understood. ‘Interpretive Statement’ is a more generally accepted term for that purpose.”

tion should not be interpreted to derogate from any treaty or other similar obligations already undertaken by a party. The question—and the reason we recommend a “wait and see” attitude toward the COE Convention—is what other countries, which are not bound by the United States’ interpretation, will do.

Many of the Council of Europe’s member states are parties to the OECD Convention and a few are parties to the Inter-American Convention. Because each of these conventions differs somewhat in its approach to criminalizing corruption offenses, the ABA encourages parties fully to perform their obligations under each of these conventions, but suggests that where there are conflicts or discrepancies between them, States Parties should adhere to the obligations of whichever is the stricter of the conflicting Conventions. For example, as discussed above, the definition of public official in the COE Convention—a non-autonomous definition—is significantly narrower than the definition in the OECD or Inter-American Conventions. To achieve the anti-corruption goals of each of these treaties, the ABA urges States Parties to agree that the provisions of each are cumulative and not exclusive, and to adhere to the OECD Convention’s definitions in drafting and enforcing their domestic laws.<sup>117</sup> This example illustrates the need for a coordinated and coherent international approach to addressing the problem of corruption. In any event, the United States should not move towards ratification until it has received confirmation that other states will not use the COE Convention to dilute their commitments to the OECD Convention.

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

### C. THE NEED FOR A COMMON APPROACH

A significant number of nations have now agreed to participate actively in the fight against bribery and corruption by adopting the various conventions, as well as other anti-corruption resolutions and principles, making necessary changes to their domestic law, and otherwise agreeing to discourage, prevent and punish bribery and corruption.<sup>118</sup> However, as each

117. The ABA reaffirms its support for the position expressed in its Recommendation and Report concerning the ratification and implementation of the Inter-American Convention (*see Low, supra* note 46, at 1121) that States Parties to the international anti-corruption instruments, in revising their national laws to implement these agreements, should be guided by the “common elements” set forth in the OECD Bribery Working Group’s 1997 Revised Recommendation. This document, which enumerates the elements of active transnational bribery offenses, supplies guidance to potential legislators. The OECD’s Revised Recommendation was developed by the experts at the Bribery Working Group, who drew on the U.S. experience in combating transnational bribery through the FCPA, as well as their own expertise and experience. OECD, REVISED RECOMMENDATION OF THE COUNCIL ON COMBATING BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS (1997), at [www.oecd.org/daf/nocorruption/](http://www.oecd.org/daf/nocorruption/) (last visited Oct. 2, 2000).

118. Several multilateral institutions have taken significant steps to address corruption. Organizations including the European Union, the World Bank, the Organisation for Security and Cooperation in Europe, the

country begins to develop its own law and experience in this arena, the potential exists for inconsistency and gaps in enforcement and cooperation. Therefore, to implement these conventions promptly, fully and consistently, signatories to international instruments including the COE Convention should adopt clear, consistent, and coordinated provisions within their local laws to support and assist in the enforcement of the international anti-corruption conventions. While each of these instruments is unique, the United States' experience has shown that it is possible to comply with local law, federal law, and international agreements in this arena. Otherwise, if local laws and differing interpretations are permitted to proliferate, the objectives of each of the international conventions and of local law reform will be undermined, and private sector support for the conventions will be threatened. That the United States' efforts to encourage all nations to deter, prevent and punish bribery in connection with international business transactions has begun to take hold is apparent from the recent developments among the OECD, OAS and Council of Europe. The United States must continue to encourage positive developments that are intended to "level the playing field" in the arena of international commerce, and encourage anti-corruption efforts worldwide, but in a way that facilitates private sector compliance and consistency.

## V. Recommended Action

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

Respectfully submitted,  
Daniel B. Magraw  
February 2001

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ministers of eleven African nations, and the United Nations have adopted anti-corruption principles and are undertaking further efforts to strengthen transparency in contracting, prohibiting and punishing bribery and corruption, and developing solutions to the global threat that corruption in commercial transactions poses to the safety and security of peoples and governments.

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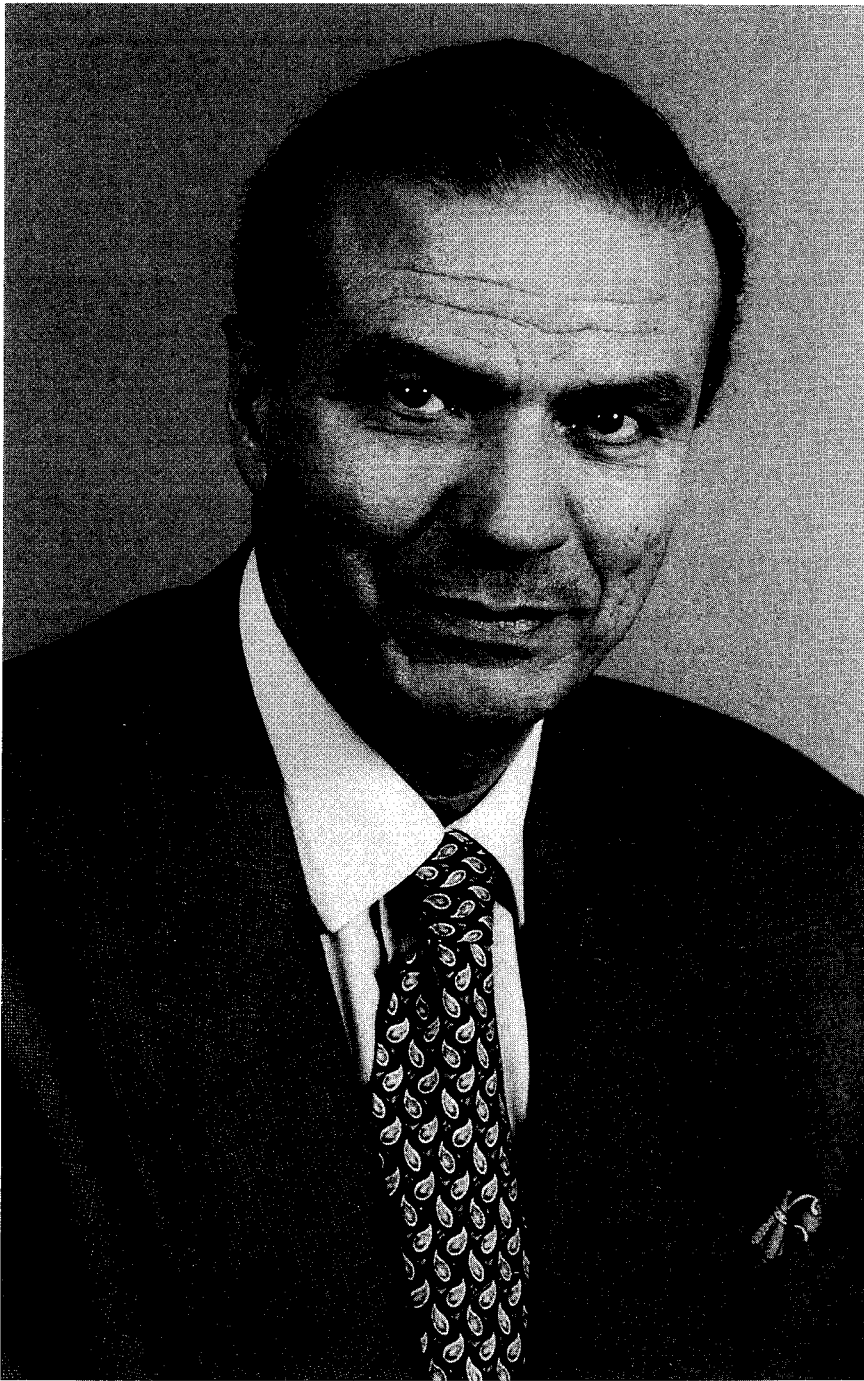
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