



**TRANSPARENCY INTERNATIONAL | USA**

**COMPLIANCE OF THE UNITED STATES OF AMERICA  
WITH  
THE INTER-AMERICAN CONVENTION AGAINST CORRUPTION**

**REPORT OF CIVIL SOCIETY  
TO THE  
COMMITTEE OF EXPERTS**

**NOVEMBER 2, 2007**

**COMMITTEE OF EXPERTS OF THE FOLLOW-UP MECHANISM  
FOR THE IMPLEMENTATION OF THE INTER-AMERICAN  
CONVENTION AGAINST CORRUPTION**

**Commentary by Civil Society on the Questionnaire on Provisions Selected by the  
Committee of Experts for Analysis Within the Framework of the Second Round**

**INTRODUCTION**

November 2, 2007

Pursuant to Rule 34(b) of the Rules for the Follow-up Mechanism for the Inter-American Convention against Corruption, Transparency International-USA (TI-USA) submits the following response to the evaluative questionnaire for consideration by the Committee of Experts. Contributors to this submission include Leslie Benton, TI-USA, Beth Daley, Director of Investigations and Scott Amey, General Counsel, Project on Government Oversight ([www.pogo.org](http://www.pogo.org)); Patricia Wittie, partner in the law firm of Oldaker, Biden & Belair, LLP ([www.obblaw.com](http://www.obblaw.com)); and members of the American Bar Association Section of International Law Anti-Corruption Initiatives and Compliance Issues Committee (<http://www.abanet.org/dch/committe.cfm?com+IC700600>).

We look forward to presenting these and other findings to the Committee of Experts Meeting with Civil Society on June 23, 2008. For further information on this report, please contact the undersigned.

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## CHAPTER ONE

### SYSTEMS OF GOVERNMENT HIRING AND PROCUREMENT OF GOODS AND SERVICES (ARTICLE III (5) OF THE CONVENTION)

#### 2. Government systems for procurement of goods and services

##### *a. Are there laws and/or measures in your country establishing government systems for procurement of goods and services?*

The U.S. government is the largest purchaser of goods and services in the world. Its total annual budget for the procurement of goods and services is approximately \$400 billion (and growing), and the number of separate contract actions exceeds 8 million per year.<sup>1</sup> Given the sheer numbers, the opportunities for corruption are, in theory, substantial. The reality is that the vast majority of those contract actions are performed lawfully and in full compliance with all applicable laws and regulations. Notwithstanding the high-profile corruption cases referred to below, lawyers practicing in the area find that the very small number of prosecutions compared to the enormous number of contract actions testifies to the adequacy of the legal framework and the overall integrity of the process.

As the following description illustrates, there is considerable transparency in the process. The U.S. has a comprehensive system of laws and regulations governing procurement. The principal statutory provisions are set forth at Title 41 of the U.S. Code, and the principal implementing regulations are set forth at Title 48 of the Code of Federal Regulations (referred to here as the “FAR”). These statutes and regulations apply throughout the government<sup>2</sup> and address all aspects of procurement, including bids and solicitations; qualification of bidders and offerors; evaluation of proposals; types of contracts; awards; performance; cost and pricing considerations; modifications during performance; and termination.

By statute, the FAR is issued and maintained by a Council consisting of the Administrator of the Office of Federal Procurement Policy; the Secretary of Defense; and the Administrators of the National Aeronautics and Space Administration and the General Services Administration; or their designees. Individual agencies are permitted to supplement the FAR only to satisfy unique needs of the agency. *A transparent process of public notice and comment rulemaking* is regularly employed to amend and update the

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<sup>1</sup> See <https://www.fpds.gov>. The “trending analysis” on this website shows that in FY 2006, the United States spent more than \$415 billion on procurement.

<sup>2</sup> Two executive branch agencies – the Federal Aviation Administration and the Transportation Security Administration within the Department of Homeland Security -- are exempted from the FAR and from certain acquisition statutes. In each case, however, they have developed parallel acquisition regulations that reflect most of the underlying principles and requirements of the FAR.

FAR to address new legislative requirements, issues that arise in litigation, or policy initiatives that source from the current Administration.

Under the FAR, *in order to promote broad competition*, executive branch agencies are required to define their needs in the least restrictive manner possible. They are encouraged to define the performance they expect rather than soliciting a specific product, so that bidders and offerors may propose competing solutions.

Except in the case of emergencies or where the value of a proposed purchase is very small, agencies *must advertise publicly, and in advance, for all goods and services required, stating their requirements and setting forth the basis on which proposals will be evaluated and an award will be made*. Contracts may be awarded only for goods and services that conform to these advertised requirements and only to contractors who are determined to be “responsible.” It is notable that a ‘responsible’ contractor is, for these purposes, defined to mean that the contractor has, among other things, a satisfactory *record of integrity and business ethics*, and a satisfactory performance record. Pre-qualification of bidders and offerors is permitted in some cases, most notably in the case of major construction and public works contracts or where manufacturing a product to the required specifications is particularly difficult.

Disappointed offerors may *challenge the terms of a solicitation or any award by filing a “protest” with the procuring agency*; with the Government Accountability Office (“GAO”); or with the U.S. Court of Federal Claims. Most protests are filed at GAO, which reports that in Fiscal Year 2006, some 29% of the protests which were decided on the merits were sustained, and in another 10%, the protester obtained some form of relief from the procuring agency.<sup>3</sup> Although the protest mechanism is imperfect, it provides a *meaningful level of transparency* into the source selection process.

Price must be an evaluation factor in all procurements, and where it is the only factor, bids are opened in public. Where price is only one of several factors to be considered and offerors submit substantial written “technical” proposals, they are permitted to request confidential treatment of those proposals; in that case, only the winning proposal, or the relevant portion of the winning proposal, is made public. Where it is necessary to award a contract without a firm fixed price because of uncertainties in the required performance (such as where research and development work in a new area is needed), *the government has authority to perform audits* before and after award in order to determine that the costs charged by the contractor are fair and reasonable.

All solicitations and contracts must include certain standard terms and conditions that are required by law. *Among the mandatory contract terms and conditions that assist in preventing corruption* are those that –

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<sup>3</sup> GAO-07-155R (Nov. 15, 2006), available at <http://www.gao.gov/special.pubs/bidpro06.pdf>. In Fiscal Year 2006, GAO received 1,327 protests. Specific data on protests filed at the agency level and the Court of Federal Claims are not available, but far fewer protests are filed at the Court, probably due to the relative cost and formality of proceedings there.

- *prohibit collusive bidding*
- *prohibit the payment of bribes or gratuities to government personnel*
- *prohibit the payment of contingent fees for obtaining a contract, except where the recipient is a bona fide employee or agent of the seller*
- *prohibit the payment of kickbacks to or for a subcontractor*
- *require disclosure of certain payments made to influence or attempt to influence any Federal official in connection with the award of a contract, and prohibit the use of appropriated funds to make such payments*
- *prohibit the disclosure, before the award of a contract, of (a) contractor bid or proposal information, or (b) source selection information, by any federal official involved with the procurement*
- *prohibit the receipt, before the award of a contract, of (a) contractor bid or proposal information, or (b) source selection information, by any person except as authorized by law*
- *prohibit employment discussions between an offeror and an agency official who is participating personally and substantially in a procurement for a contract for which the offeror is competing*

These requirements are based primarily on criminal statutes found in Title 18 of the U.S. Code or on provisions of the Procurement Integrity Act, 41 U.S.C. § 423. A variety of criminal, civil, and administrative penalties are available for violations, including “debarment” of contractors whose criminal or fraudulent conduct demonstrates that they are substantially lacking in integrity. A debarment is an administrative sanction which precludes a contractor from selling to the U.S. for a period of up to three years. In addition, agencies are authorized in certain instances of contractor misconduct to terminate a contract or insist on a reduction in the contract price.

Where government procurement officials engage in misconduct such as bribery or self-dealing, they are *prosecuted, as demonstrated by several recent high-profile cases.*<sup>4</sup> While the number of such prosecutions is very small in comparison to the number of procurements conducted each year by the U.S. government, the consensus of lawyers in the industry is that the small numbers reflect a system that works well.

Yet, as in any system, there is room for improvement. There are two areas of particular concern. The first is the adequacy of oversight of contracts and contractors who are charged by law with planning, defining, procuring, and supervising the performance of all acquisition contracts. The second is an apparent stagnation, or perhaps decline, in competition due to changes in the nature of the procurement vehicles that are most frequently used by government agencies. Because open competition is so

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<sup>4</sup> See, e.g., “Former Air Force acquisition official released from jail,” [GovExec.com](http://www.govexec.com) (Oct. 3, 2005), available at <http://www.govexec.com/dailyfed/1005/100305k2.htm>; “Former CIA No. 3 indicted for steering contracts to friend,” [CNN.com](http://www.cnn.com), (Feb. 13, 2007), available at <http://www.cnn.com/2007/LAW/02/13/cia.foggo/index.html>; “Report Spells Out Abuses by Former Congressman,” [NYTimes.com](http://www.nytimes.com) (Oct. 18, 2006), available at [http://www.nytimes.com/2006/10/18/washington/18inquire.html?\\_r=1&n=Top/Reference/Times%20Topics/People/C/Cunningham,%20Randy&oref=slogin](http://www.nytimes.com/2006/10/18/washington/18inquire.html?_r=1&n=Top/Reference/Times%20Topics/People/C/Cunningham,%20Randy&oref=slogin).

important to the integrity of any procurement system, declines in competition must be carefully scrutinized.

Acquisition Workforce. A recent study,<sup>5</sup> found that government agencies have not engaged in adequate human capital planning for the acquisition workforce. The result appears to be a decline in the number of qualified and properly trained personnel available for planning and supervision of \$400 billion in annual contract actions. In fact, a recent survey of the skills of the acquisition workforce conducted by the Office of Federal Procurement Policy and the Federal Acquisition Institute, indicates clearly that the existing workforce would prefer to have more and better training in specific areas relating to contract management and administration, negotiation skills, use of performance metrics, and performance-based acquisition.<sup>6</sup> The same survey also confirms that staffing levels in these positions are declining and likely to continue to decline – perhaps dramatically.

An inadequate number of acquisition personnel often translates into inadequate oversight of contracts and contractors. Recently-reported issues with contracting for the Iraq war are a case in point.<sup>7</sup> The Special Inspector General for Iraq Reconstruction (“SIGIR”) has published numerous reports that underscore the risks of fraud and abuse associated with weak contract oversight.<sup>8</sup> It has also noted differences among implementing agencies’ contracting procedures as a source of concern.<sup>9</sup> Both issues should be expeditiously investigated and addressed.

SIGIR is working in conjunction with other agencies involved in oversight in Iraq, including the Office of Inspector General of the Department of Defense, the Department of Homeland Security (DHS), the Federal Bureau of Investigation (“FBI”) and the Department of Justice National Procurement Fraud Task Force to coordinate and

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<sup>5</sup> The Study was conducted by the Acquisition Advisory Panel created pursuant to Section 1423 of the Services Acquisition Reform Act of 2003, which was enacted as part of the National Defense Authorization Act for FY 2004, Pub. L. No. 108-136, 117 Stat. 1663 (2003).

<sup>6</sup> See Federal Acquisition Institute, “2007 Contracting Workforce Competencies Survey – General Analysis,” Oct. 2007, available at [http://www.whitehouse.gov/omb/procurement/workforce/workforce\\_comp\\_survey\\_101707.pdf](http://www.whitehouse.gov/omb/procurement/workforce/workforce_comp_survey_101707.pdf).

<sup>7</sup> See, e.g., “State Dept. Use of Contractors Leaps in 4 Years,” New York Times (Oct. 24, 2007) (study “found that there were too few American officials in Iraq to enforce the rules” that apply to State Department contractors).

<sup>8</sup> To access the SIGIR reports, see <http://www.sigir.mil/reports/Default.aspx>; see also Statement of Stuart W. Bowen, Jr., Special Inspector General for Iraq Reconstruction Before the Subcommittee on State, Foreign Operations and Related Programs, Committee on Appropriations, United States House of Representatives, October 30, 2007, available at [http://www.sigir.mil/reports/pdf/testimony/SIGIR\\_Testimony\\_07-017T.pdf](http://www.sigir.mil/reports/pdf/testimony/SIGIR_Testimony_07-017T.pdf).

<sup>9</sup> Statement of Joseph McDermott, Assistant Inspector General-Audit, Special Inspector General for Iraq Reconstruction Before the United States House of Representatives Appropriations Committee, Subcommittee on Defense, Thursday, May 10, 2007, available at [http://www.sigir.mil/reports/pdf/testimony/SIGIR\\_Testimony\\_07-010T.pdf](http://www.sigir.mil/reports/pdf/testimony/SIGIR_Testimony_07-010T.pdf); Iraq Reconstruction, Lessons in Contracting and Procurement, available at [http://www.sigir.mil/reports/pdf/Lessons\\_Learned\\_July21.pdf](http://www.sigir.mil/reports/pdf/Lessons_Learned_July21.pdf).

enhance procurement fraud investigations.<sup>10</sup> This work has yielded some positive results. SIGIR reports that as of October 30, 2007, it has opened 52 investigations, 30 of which are being prosecuted by the DOJ. It has also suspended 17 companies and individuals and debarred 10.<sup>11</sup>

The effectiveness of SIGIR also highlights the need for an independent and fully funded inspector general function. We address this issue infra at 10.

Decline in Competition. Competition is a touchstone of any procurement system that seeks to be fair, transparent, and efficient. Yet, a shift over the past 20 years by the U.S. government to increasingly rely on large, multi-agency “contract vehicles”<sup>12</sup> may have decreased competition.

The Acquisition Advisory Panel concluded that this may be due to problems in how the process used to award task and delivery orders under these vehicles is used by government personnel, who may not understand either the legal underpinnings or the procedural requirements that apply. The result may be, in fact, that actual competition for substantial quantities of procurement dollars has declined.

The U.S. procurement system could be improved by better oversight over multi-agency contract vehicles which utilize a task or delivery order system for procuring goods and services, more transparency in the award of task orders, and better enforcement of the competition requirements that relate to such orders.

Outsourcing. Some commentators have raised concerns about a lack of adherence to the FAR when procurement is outsourced. There is an increasing tendency of the U.S. to relinquish procurement responsibility and oversight through blanket U.S. contributions to various global initiatives where procurement oversight is weaker. Without diligent U.S. review, the potential for relationships to influence contracting outcomes is increased. Furthermore, contractors hired to replace acquisition personnel are not covered by official ethics rules because they are not government employees. This is an area that deserves attention.

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<sup>10</sup> Statement of Stuart W. Bowen, Jr., Special Inspector General for Iraq Reconstruction Before the United States House of Representatives Committee on the Judiciary, Subcommittee on Crime, Terrorism and Homeland Security, Tuesday, June 19, 2007 available at [http://www.sigir.mil/reports/pdf/testimony/SIGIR\\_Testimony\\_07-012T.pdf](http://www.sigir.mil/reports/pdf/testimony/SIGIR_Testimony_07-012T.pdf).

<sup>11</sup> Statement of Stuart W. Bowen, Jr., Special Inspector General for Iraq Reconstruction Before the Subcommittee on State, Foreign Operations and Related Programs, Committee on Appropriations, United States House of Representatives, October 30, 2007, available at [http://www.sigir.mil/reports/pdf/testimony/SIGIR\\_Testimony\\_07-017T.pdf](http://www.sigir.mil/reports/pdf/testimony/SIGIR_Testimony_07-017T.pdf).

<sup>12</sup> Contract vehicles are awarded to multiple contractors and do not themselves require performance; rather, individual requests are issued under these vehicles to the multiple contractors, who then submit proposals for consideration.

## CHAPTER TWO

### SYSTEMS FOR PROTECTING PUBLIC SERVANTS AND PRIVATE CITIZENS WHO, IN GOOD FAITH, REPORT ACTS OF CORRUPTION (ARTICLE III (8) OF THE CONVENTION)

*a. Are there laws and/or measures in your country establishing systems for protecting public servants and private citizens who, in good faith, report acts of corruption, including protection of their identities?*

*The U.S. has an extensive system of statutory protections, including the Civil Service Reform Act (“CSRA”) and the Whistleblower Protection Act (“WPA”), for federal government employees who report allegations of fraud and corruption. The Sarbanes-Oxley Act of 2002 expanded significantly protection for private sector whistleblowers. These laws protect those who might otherwise face retaliation. Despite this comprehensive framework, organizations working on whistleblower protection find that in practice, some systems to protect whistleblowers could be improved.*

#### **Federal Employees**

*The U.S. Office of Special Counsel (“OSC”), created by the CSRA and reauthorized by the WPA, has as its primary mission to protect federal employees and applicants from reprisal for whistleblowing.<sup>13</sup> OSC receives, investigates, and prosecutes allegations of retaliation, and seeks remedies such as back pay and reinstatement for injuries suffered by whistleblowers and other complainants. OSC is also authorized to file complaints at the Merit Systems Protection Board, the agency authorized to hear whistleblower complaints, to seek disciplinary action against individuals who commit retaliatory acts. OSC provides a secure channel through its Disclosure Unit for federal workers to disclose information about various workplace improprieties, including corruption. OSC allows civil servants to choose to report corruption anonymously, although by statute the OSC has the authority to override that anonymity in the unusual case where the Special Counsel determines there is an imminent danger to public health and safety or violation of criminal law.<sup>14</sup>*

While the OSC has a successful track record, a 2005 report by the U.S. Congressional Research Service noted that “[e]nacting statutory rights for whistleblowers and establishing new executive agencies to protect those rights has not produced the protections that some expected.”<sup>15</sup>

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<sup>13</sup> For additional information, see the OSC web site at <http://www.osc.gov>.

<sup>14</sup> See 5 USC § 1213(h).

<sup>15</sup> “National Security Whistleblowers,” Congressional Research Service, December 30, 2005, available at <http://www.pogo.org/m/gp/gp-crs-nsw-12302005.pdf>. In the past ten years, actions reversing retaliation against whistleblowers have declined. In 2005-06, approximately 2.5 % of OSC cases resulted in a favorable action. Favorable actions declined from 120 in 1995 to 40 in 2006 according to testimony of Beth Daley, POGO, before the House Subcommittee of Federal Workforce, Postal Service and the District of Columbia on “Ensuring a Merit-Based Employment System: An Examination of the Merit Systems

OSC whistleblower protections are not available to some national security federal employees, such as at DHS<sup>16</sup> and the Central Intelligence Agency (“CIA”), FBI, and the National Security Agency (“NSA”).<sup>17</sup> Whistleblowers from these agencies are subject to sometimes inconsistent regulations and procedures<sup>18</sup> that afford them less protection than other federal employees.

Reforms to strengthen this regime are under consideration in the Congress. In March 2007, the U.S. House of Representatives passed legislation to (1) extend protection to national security whistleblowers; (2) extend protection to employees of government contractors; and (3) to clarify the definition of a protected disclosure.<sup>19</sup> Legislation is awaiting action in the Senate.

Private sector whistleblowers were historically protected by state law with varying degrees of protection. *The Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley)*,<sup>20</sup> extended federal whistleblower protection to employees of publicly-traded companies (subject to Securities and Exchange Commission jurisdiction) who lawfully provide evidence of fraud to their supervisors, federal regulatory or law enforcement agencies or Members of Congress.<sup>21</sup> Employees who believe that they have been subject to retaliation or discrimination for reporting, may file a complaint with the Secretary of Labor, which can then be appealed to a district court for a jury trial. Sarbanes-Oxley represents a major breakthrough in establishing whistleblower rights in the private sector.

## Inspectors General

The 1978 Inspector General Act (“IG Act”)<sup>22</sup> creates a network of agency watchdogs to help Congress uncover government corruption, waste, fraud, and abuse of power. *IGs receive information from whistleblowers and have access to all agency records and documents. They report the results of their work both externally to Congress and internally to their agency heads.* IGs have been cost effective in fighting government corruption.

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Protection Board and the Office of Special Counsel,” July 12, 2007, available at <http://www.pogo.org/p/government/gt-070712-osc.html>.

<sup>16</sup> Merit Systems Protection Board ruling, Schott, Jiggetts, Younger v. Department of Homeland Security, August 12, 2004, available at <http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=249068&version=249340&application=ACR OBAT>.

<sup>17</sup> Office of Special Counsel, “The Role of the U.S. Office of Special Counsel,” available at <http://www.osc.gov/documents/pubs/oscrole.pdf>.

<sup>18</sup> “National Security Whistleblowers,” Congressional Research Service, December 30, 2005, available at <http://www.pogo.org/m/gp/gp-crs-nsw-12302005.pdf>.

<sup>19</sup> Whistleblower Protection Enhancement Act of 2007, H.R. 985. For a summary of the bill see <http://oversight.house.gov/documents/20070213145031-52587.pdf>.

<sup>20</sup> The Sarbanes-Oxley Act of 2002, PL 107-204, 116 Stat 745.

<sup>21</sup> 18 USC § 1514A.

<sup>22</sup> 5 USC Appendix § 1.

In recent years, however, some in civil society Congress have raised concerns about IG independence from interference from within their own agencies. IGs appointed under the 1988 amendment to the IG Act are appointed and removed by their entity heads rather than by the President and are not subject to Senate confirmation..<sup>23</sup>

Independence of the IGs is key to their effectiveness. Legislation passed by the U.S. House of Representatives would improve the independence and integrity of the IG system by ensuring that they could only be removed for fraud and by establishing an independent entity to investigate allegations that IGs have abused the public trust.<sup>24</sup> This legislation now awaits Senate action.

### **False Claims Act**

Under the False Claim Act (“FCA”)<sup>25</sup>, a Civil War-era law, an individual with evidence of fraud against government contracts and programs may sue on behalf of the government those alleged to have committed the fraud. The Department of Justice may join the action. If the action is successful, the plaintiff may be rewarded with a percentage of the recovered funds. The FCA provides protection to employees against retaliation by their employers.

*The FCA has become one of the most effective ways for whistleblowers and the government to pursue fraudulent activity, generating some billions of dollars in settlements.*<sup>26</sup> However, recent rulings raising the evidence standard have made it more difficult for plaintiffs to bring suit under the FCA. Some have called upon Congress to clarify the standard and strengthen the Act.<sup>27</sup>

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<sup>23</sup> “IG Frequently Asked Questions,” IGSNet, <http://www.ignet.gov/igs/faq1.html>.

<sup>24</sup> “House Passes Cooper Watchdog Reform Bill by 404-11,” Representative Jim Cooper, October 3, 2007, available at [http://www.cooper.house.gov/index.php?option=com\\_content&task=view&id=145&Itemid=1](http://www.cooper.house.gov/index.php?option=com_content&task=view&id=145&Itemid=1).

<sup>25</sup> 31 U.S.C. § 3729 et seq.

<sup>26</sup> “Fraud Statistics Overview: October 1, 1986 to September 30, 2006,” Department of Justice, available at <http://www.taf.org/stats-fy2006.pdf>.

<sup>27</sup> FraudMailAlert, Fried, Frank, Harris, Shriver & Jacobson LLP, April 11, 2007, available at <http://www.friedfrank.com/siteFiles/Publications/F4B074D166A9A3B25187961F3E3E75.pdf>.

## CHAPTER THREE

### ACTS OF CORRUPTION (ARTICLE VI OF THE CONVENTION)

#### 1. Criminalization of acts of corruption provided for in Article VI (1) of the Convention

*a. Does your country criminalize the acts of corruption provided for in Article VI (1) of the Convention transcribed in this chapter of the questionnaire?*

The United States adequately criminalizes the acts of corruption described in Article VI (1) of the Convention at both the federal and state level, including provisions regarding money laundering (18 U.S.C. § 1956) and accessory/aiding abetting liability (18 U.S.C. § 2).<sup>28</sup>

U.S. laws, in combination with: (a) well-defined liability for legal persons, including corporations; (b) comprehensive asset seizure and forfeiture law; (c) the capacity to conduct undercover operations; and (d) the use of plea bargaining and voluntary disclosure mechanisms make *the U.S. system of anticorruption enforcement highly effective, and the U.S. has become more aggressive in recent years. Many U.S. prosecutions, such as the recent investigation into lobbying abuses and subsequent indictments, are open and actively followed by the media and the public.* Over the five-year period from 2001 to 2005, the DOJ charged 5,749 individuals with public corruption offenses nationwide and obtained 4,846 convictions.

#### **2. Application of the Convention to acts of corruption not described therein, in accordance with Article VI (2)**

*a. Has your State entered into any agreements with other States Parties to apply the Convention to any act of corruption not described therein, in accordance with Article VI (2)? b. If so, briefly state the objective results that have been obtained in the application of the respective agreements or conventions.*

The United States is a party to the United Nations Convention Against Corruption and the Organization for Economic Cooperation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

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<sup>28</sup> See, e.g., 18 U.S.C §§ 201(b)(1) and (c)(1)(A) (bribery of public officials and witnesses); 210 (offer to procure appointive public office); 371 (conspiracy to commit an offense against the United States); 599 (promise of appointment by candidate); 641 (embezzlement of public money, property or records by any person); 645 (embezzlement by federal court officers); 654 (officer or employee of United States converting property of another); 666 (theft or bribery concerning programs receiving federal funds); 1341 (mail fraud); 1343 (wire fraud); 1346 (scheme or artifice to defraud another of the intangible right to honest services); 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises); 1961-63 (racketeer influenced and corrupt organizations, or RICO; and 15 U.S.C. §§ 78m and 78dd-1 *et. seq.* (the Foreign Corrupt Practices Act). A comprehensive list of applicable U.S. anticorruption statutes is available at [www.state.gov/documents/organization/91995.pdf](http://www.state.gov/documents/organization/91995.pdf).

The United States has signed, but not ratified, the Council of Europe Criminal Law Convention on Corruption and is an active participant in other anticorruption efforts, policies, and declarations around the world, including in the Summit of the Americas and the various fora for Asia-Pacific Economic Cooperation.

The United States has been evaluated by the Working Group of the OECD Convention which found it had implemented the foreign bribery criminalization prohibitions in a “detailed and comprehensive manner.”<sup>29</sup> However, it expressed concern over the potential misuse of “facilitation payments” which are exempt from the Foreign Corrupt Practices Act prohibition on foreign bribery.<sup>30</sup> According to the Commentary to the OECD Convention, “small ‘facilitation’ payments do not constitute payments made ‘to obtain or retain business or other improper advantage’ within the meaning of paragraph 1 and, accordingly, are also not an offence. Such payments, which, in some countries, are made to induce public officials to perform their functions, such as issuing licenses or permits, are generally illegal in the foreign country concerned.” It suggests that countries “address this corrosive phenomenon by such means as support for programmes of good governance.” There is growing support in the private sector to eliminate the use of facilitation payments, which are not expressly permitted by the Inter-American Convention Against Corruption or the United Nations Convention Against Corruption.

The US has vigorously prosecuted cases under the Foreign Corrupt Practices Act (“FCPA”). As of October 31, 2007, the DOJ has instituted fourteen prosecutions, a record number for a single year. Many recent FCPA enforcement actions have arisen because companies voluntarily disclosed potential violations to the government. The decision whether and when a company should make disclosure of an actual or potential violation of its anti-bribery program to the U.S. government is often difficult. The U.S. Government has emphasized that voluntary disclosures, when combined with other forms of cooperation, including, in some cases, waiver of the work product doctrine and the attorney-client privilege, may substantially mitigate or even eliminate penalties that would be imposed if the FCPA violations were uncovered by the government in the first instance. However, the system would benefit from greater clarity of the benefits of such disclosure, including its impact on the attorney-client privilege.

The increase in enforcement activity continues to strain the resources of the DOJ and the Securities and Exchange Commission resources, which have overlapping jurisdiction in FCPA cases. The budget and staffing of both agencies should be increased.

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<sup>29</sup> OECD Working Group on Bribery, Phase 1 Report on the United States Implementation.

<sup>30</sup> The exemption reads, “Subsections (a) and (i) of this section shall not apply to any facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party official.”

The United States undertakes comprehensive efforts to promote mutual legal assistance and technical cooperation (see Chapter Five of the Report of Civil Society to the Committee of Experts, January 31, 2005). It is participating in the pilot program for a monitoring mechanism for the United Nations Convention Against Corruption, and is actively supporting efforts to expand the reach and implementation of the Convention worldwide. It is critical that it fully support and participate actively in an effective monitoring mechanism.