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Ms. Kathryn Gordon
Senior Economist
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Via email

OECD Public Consultation on Liability of Legal Persons

Dear Ms. Gordon and Mr. Hickman:

The Association of Corporate Counsel ("ACC") appreciates the opportunity to comment on the OECD Working Group on Bribery's public consultation on the liability of legal persons. ACC is a global bar association of in-house counsel with more than 40,000 members, employed by more than 10,000 organizations in 85 countries. Our Compliance & Ethics Committee has 7,260 attorneys who practice in corporate compliance and ethics matters, including many who specialize in anti-bribery and corruption matters. As in-house lawyers, much of our members' work is focused on ensuring their organizations' compliance with laws and regulations on a preventative basis. In-house counsel also have responsibility for coordinating the defense of a company when compliance systems are not able to prevent the misconduct of a rogue employee. Our members know the benefits of a strong corporate compliance system, and so ACC will focus its comments on those areas of inquiry that address the role of corporate compliance systems in anti-bribery enforcement issues for legal persons (hereinafter corporations).

A. Compliance systems as a means of precluding liability or mitigating sanctions upon a finding of liability

The OECD consultation paper seeks input on the role that corporate compliance systems should play in the application of anti-bribery laws. Issue #10 of the public consultation document asks how corporate liability for foreign bribery offenses has helped sharpen incentives for implementation of effective compliance systems and whether expressly including incentives in the foreign bribery offence itself facilitates or impedes effective enforcement of anti-bribery laws. Issue #11 also asks to what extent the implementation of an effective compliance system should act as a mitigating factor in the imposition of sanctions. Issue #10 and Issue #11 address the different forms of incentives for corporate compliance systems. Rather than debating about the proper form of incentives for corporate compliance, ACC believes it is better to focus efforts on getting all signatories

to the OECD Convention on Combatting Foreign Bribery to offer some mechanism within their anti-bribery laws to incentivize effective corporate compliance, as was recommended by the OECD in 2009.

The benefits of strong corporate compliance systems far outweigh any potential (and as yet unproven) disadvantages to lessening the liability of those corporations that implement effective compliance systems against bribery. Corporate compliance systems fight misconduct and illegal acts through multiple channels – prevention, detection, and remediation. Perhaps equally as important, an effective compliance system promotes an ethical corporate culture by defining what is right and what is wrong. A corporate statement of ethical values and an effective compliance system that implements those values is a signal to employees that misconduct, including offering bribes to foreign officials, will not be tolerated by the corporate entity.

This corporate commitment to an ethical culture is important in combatting bribery and corruption. Governments cannot possibly police all corporate misconduct, and it appears that many governments are not even trying when it comes to foreign bribery offenses. Transparency International's 2015 status report on the OECD Convention on Combatting Foreign Bribery found that 22 of the 41 OECD signatory countries have failed to investigate or prosecute any foreign bribery cases during the last four years. Viewed against this backdrop of lax enforcement, it makes sense for governments to view the private sector as a partner in preventing corruption and uncovering it when it occurs. The primary mechanism through which the private sector prevents and uncovers corruption (as well as other misconduct) is through effective corporate compliance systems.

ACC strongly feels that all jurisdictions should have a mechanism within their anti-bribery regimes that gives corporations with effective compliance systems some measure of leniency with respect to foreign bribery offenses. Such incentives act as a sort of government endorsement of the value of corporate compliance systems. Multi-national enterprises find such endorsements particularly useful when attempting to implement compliance systems in their international subsidiaries. It is easier to marginalize compliance when the government where the subsidiary operates has not made ethics and compliance in corporations a priority. Formal compliance incentives are a helpful tool for the lawyers and compliance officers who must convince executives to make the necessary investments in corporate compliance systems.

ACC is not aware of evidence showing that incorporating compliance incentives into anti-bribery laws impedes effective enforcement of those laws. The OECD Working Group on Bribery's draft report on the liability of legal persons shows that 19 of the signatory countries either offer the ability to defend against the foreign bribery offense itself through the existence of an effective compliance system or to receive mitigation against sanctions for an foreign bribery offense through the existence of such a system (some offer both). This includes the four countries that Transparency International has ranked as most active for anti-bribery enforcement: Germany, Switzerland, the United Kingdom and the United States. Four out of the six countries ranked moderately active by Transparency International also incentivize effective corporate compliance systems

through their anti-bribery laws. While this is not conclusive evidence, it certainly suggests that incentivizing corporate compliance systems does not act as an impediment to anti-bribery enforcement, at least not relative to other countries.

Many countries and public interest groups are currently debating whether compliance systems should be a defense to the foreign bribery offense itself or serve as a mitigating factor during the application of sanctions. Rather than engaging in a global debate about the form of such incentives, ACC believes the more important question is the country's approach to emphasizing the *effectiveness* of corporate compliance systems. When governments include leniency provisions in their anti-bribery regimes, they should clearly lay out the expectations of an "effective" compliance system. The OECD issued its Good Practice Guidance on Internal Controls, Ethics, and Compliance in 2009, and there are other widely accepted guidelines for the establishment of effective corporate compliance systems. OECD should further encourage governments introducing leniency provisions to look to already-existing guidance on corporate compliance to achieve greater harmonization across jurisdictions. In addition to allowing for more efficiency within multi-national corporations, greater harmonization of compliance requirements will also lead to greater pressure on non-compliant entities to bring their compliance systems in line with global standards.

B. The ability to offer settlements in bribery cases enhances corporate efforts to comply with anti-bribery laws

Issue #12 of the public consultation document asks about the use of settlements in the resolution of foreign bribery charges. ACC views the issue of settlements as very much entwined with incentivizing compliance systems and the issue of self-reporting by corporations (see Issue #11c of the consultation document). One of the greatest benefits of an effective corporate compliance system – both for corporations and for governments – is the corporation's ability to uncover and investigate instances of potential wrongdoing by its employees. Once discovered, the corporation is faced with the decision of whether or not to report the suspected wrongdoing to the government and cooperate with any investigation. Allowing the corporation to negotiate a more favorable resolution with the government is further incentive to report the violation and cooperate with the government investigation, and also adds to the value the corporation receives from its compliance system.

ACC recognizes that the concepts of prosecutorial discretion, deferred prosecution and plea bargaining are not common practices in all the signatory countries of the convention. The OECD should encourage the development of similar practices in the countries where they do not currently exist, as well as the use of such procedures in the countries where they already exist. For example, we note that France recently approved a new anti-bribery law that for the first time will allow a company to negotiate a settlement of charges. The lack of such a mechanism had been seen as an impediment to effective enforcement within France. In addition to incentivizing effective corporate compliance systems, settlement mechanisms also avoid the costs associated with a trial. Governments with

limited resources devoted to anti-bribery enforcement may be able to bring more charges against companies if they do not have to commit to taking them through a trial. In this way, settlements can be a great enhancement to the enforcement process itself.

The four "active enforcement" countries identified by Transparency International all use settlement mechanisms to help resolve foreign bribery offenses against corporations. Some public interest groups have questioned whether these settlement procedures are transparent enough – especially those that are not subject to judicial review. Rather than developing an international standard for settlement agreements, the OECD should focus on getting more countries to employ settlement agreements in anti-bribery enforcement efforts. If companies are not encouraged to come forward with the potential violations uncovered by their compliance systems, there is little chance that anti-bribery enforcement rates will increase.

Our members' experience is that the settlement mechanisms that allow for the settlement of charges without a conviction are especially valuable in encouraging their companies to report violations. These arrangements have benefits for the government as well because the corporation's desire to avoid formal charges can give the government significant leverage to demand meaningful sanctions without spending the resources a full trial would require. If a corporation is faced with the prospect of a settlement that includes formal charges, it may be more willing to take the chance of a trial. Lack of pre-trial settlement can also affect the calculus when violations have occurred in more than one jurisdiction, as corporations may decide against self-reporting in one country because no leniency would be offered in the other jurisdictions.

The other valuable characteristic of effective settlement mechanisms is clear guidance regarding what companies stand to gain if they self-report potential violations of foreign bribery laws. Even in countries with well-developed settlement practices and a history of applying leniency to companies that self-report potential violations, there is still enough uncertainty involved in self-reporting that some companies will choose not to do so. If governments want to encourage more self-reporting, they need to develop guidelines that clearly communicate the benefits that can be attained through self-reporting, and such benefits need to be significant enough to actually incentivize the company to come forward.

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Fighting corruption and bribery on a global scale is a big task, and ACC appreciates the OECD's leadership in this area. Through continued focus on encouragement of effective corporate compliance systems, the OECD can assist the signatory countries partner with legal and compliance professionals of the private sector to tackle this important issue.

Sincerely,

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