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Expert Analysis

Lessons from the OECD Foreign Bribery Report

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In December 2014, the Organization for Cooperation and Economic Development (OECD) published its first-ever foreign bribery report. The OECD report compiled and evaluated data from all 41 signatory countries to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, between February 1999, when the OECD convention entered into force, and June 2014.[1] This data covered 467 foreign bribery cases against 164 entities and 263 individuals.

Such a wide scope of anti-bribery enforcement data from across the globe has never before been collected. Below, we discuss the report's key findings regarding global enforcement, who is paying bribes and who is receiving them, as well as how companies should use the findings in evaluating and refining their compliance risk assessments.

Global Enforcement Trends

The OECD report concluded that the United States was the most active enforcer of anti-bribery laws (i.e., the Foreign Corrupt Practices Act or FCPA), imposing sanctions in 128 different foreign bribery schemes since the OECD convention entered into force. Germany was the next highest enforcer, having sanctioned individuals and entities in 26 separate schemes.

While virtually nonexistent between 1999 and 2003, in 2004, the number of global enforcement actions quadrupled and continued to dramatically increase until they hit a peak in 2011. In 2012, enforcement actions fell by nearly half and remained steady in 2013 and 2014. These statistics primarily reflect the U.S. government's increased focus on enforcing the FCPA in the mid-2000s, as well as increased global coordination and enforcement of local anti-bribery laws.

The average duration of foreign bribery cases also steadily climbed between 1999 and 2013. In 1999, the average duration between the last criminal act in a corrupt transaction and the final resolution or sanction was two years; in 2013, the average duration was 7.3 years. Almost half the cases (46 percent) took between five and 10 years to reach a conclusion. The report suggests a few reasons for this increase, including greater sophistication of bribery schemes, which require more resource- and time-intensive investigations, and the fact that more individuals are taking the government to trial rather than settling.

It also could reflect the increasingly complex web of global anti-bribery laws, which subject companies and individuals to multiple enforcement regimes. Alstom, for example, recently resolved a multi-year U.S. Department of Justice FCPA investigation at the same time as the U.K. Serious Fraud Office (SFO) announced that it would be opening a new investigation into the same conduct. Whatever the reason for the increased duration of bribery cases, there is no question that the longer an investigation runs, the more it costs in legal and forensic accounting fees, disrupted productivity, and other collateral consequences.

After investigations are concluded, in 69 percent of cases, sanctions are imposed through settlements (including Non-Prosecution Agreements and Deferred Prosecution Agreements in the U.S. and similar mechanisms elsewhere), and, in 31 percent of cases, sanctions are imposed through convictions. Although more individuals are choosing to fight in court and winning, companies still typically choose to negotiate settlements rather than risk multi-million or (-billion) dollar convictions after trial.

Of the 427 cases studied, 261 resulted in a civil or criminal fine, 82 resulted in confiscation (or disgorgement), and 80 resulted in imprisonment of individuals. Notably, only two cases resulted in debarment from public procurement processes. This is a very low number considering that European Union member countries are required to debar companies that have been found guilty of corruption and that, in 57 percent of cases in the OECD report, the bribes were paid to win public procurement contracts. Having recognized the serious economic impact that debarment can have on companies, however, the Justice Department often rewards self-reporting and cooperation with settlements for violations of the FCPA's accounting provisions, rather than the

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anti-bribery provision, to avoid mandatory debarment issues.

Who Received Bribes and Why

Many people have the perception that bribes are most often paid in Third-World or developing countries. Transparency International's Corruption Perception Index (CPI) bolsters this belief with its annual rankings—most countries in Europe and in North America are ranked low, whereas those in Africa, Asia, and the Middle East are ranked high.

In fact, the OECD report concluded that the majority of bribes were paid to public officials from highly to very-highly developed countries, based on the U.N. Human Development Index. These countries include, for example, 15 members of the G20. The report concluded that this data likely reflects the fact that developed countries have a greater ability to detect and investigate bribery cases, as well as cooperate with other countries around the globe, and therefore those countries have a greater number of reported corruption incidents.

The data from the OECD report that nearly one in two reported incidents of bribery occurred in developed countries could be for any number of reasons that vary depending on a country's history and culture. Some OECD countries such as Germany, for example, institutionalized bribery as a way of doing business—until 1997, a bribe by a German company to a foreign government official was tax-deductible—and that cultural acceptance did not change after the law did.

In other developed countries, it is still common practice to grease the palms of police officers or customs officials. In still other countries, executives face incredible pressure to produce profits each quarter, and consequently, they are incentivized to do whatever is necessary to win business. Regardless of the reason, this finding in the OECD report should steer companies away from primarily relying on Transparency International's CPI in their risk evaluations and due diligence programs. Bribery can, and does, occur anywhere.

The OECD report also revealed the categories of foreign government officials who most often accept bribes: (1) employees of state-owned enterprises (SOEs) (27 percent); (2) customs officials (11 percent); (3) health officials (7 percent); (4) defense officials (6 percent); and (5) heads of state or ministers (5 percent). The role of SOE officials who received bribes ranged from CEOs to low-level employees, and they received 80 percent of total bribes paid. Bribes were rarely paid to high-level, direct representatives (e.g., elected officials) of foreign governments; rather, most bribes were paid to low-level government employees of SOEs or other government agencies who have everyday interactions with companies.

As to the reason for bribes, a majority (57 percent) were paid to obtain public procurement contracts. The next biggest reason was to clear customs procedures (12 percent), followed by to obtain favorable tax (6 percent) or other preferential treatment (7 percent), and to obtain a license or other authorization (6 percent). These areas are where most companies and individuals are forced to interact with foreign government officials in the course of doing business, no matter the country or industry, and consequently, should be the focus of compliance efforts.

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Who Paid or Authorized

From an industry perspective, the OECD report concluded that almost two-thirds of bribery cases involve companies that are concentrated in four industries: (1) extractive (19 percent); (2) construction (15 percent); (3) transportation and storage (15 percent); and (4) information and communication (10 percent). Manufacturing (8 percent), human health (8 percent), and electricity and gas (6 percent) constitute another 22 percent of bribery cases.

Of particular note is the seniority level of those paying bribes. In 41 percent of corporate cases, a management-level employee paid, was aware of, or authorized the corrupt activity. In another 12 percent of cases, the CEO or president was aware of and endorsed the bribery. There is a perception that "rogue employees" are responsible for most corporate bribery, and certain recent FCPA declinations are held up as examples of employees gone wild in the face of responsible corporate compliance; however, this OECD statistic shines light on the fact that many bribery cases involve systematic corruption and internal control weaknesses throughout a company.

Third-Party Liability

The OECD report confirmed that intermediaries pose the single greatest bribery risk for companies, concluding that 75 percent of foreign bribery schemes are executed through an agent or other third party. More specifically, 41 percent of cases involved an "agent," defined as including sales and marketing agents, distributors, and brokers. Another 35 percent involved subsidiaries, local consulting firms, companies located in offshore tax havens, or companies established by the official who received the bribes. Lawyers were used as intermediaries in 6 percent of cases.

Beyond parent-subsidiary liability, many companies do not realize the extent to which they can be liable for actions of third parties such as consultants or distributors down the supply chain. Under the FCPA, for example, a company can be responsible for a third party's violations if the company knew, or should have known (based on "red flags"), that money, or any other form of payment, was being corruptly passed on to foreign government officials. For this reason, due diligence on third parties is absolutely critical.

Due diligence also is critical in the mergers and acquisitions or joint venture context—according to the OECD report, M&A due diligence detected foreign bribery in 28 percent of cases.

How Bribery Is Discovered

In the United States, the Justice Department and the Securities and Exchange Commission take every opportunity to encourage companies and individuals to self-report potential violations of the FCPA and fully cooperate with criminal and civil investigations. In November

2012, they jointly published "A Resource Guide to the U.S. Foreign Corrupt Practices Act," which emphasized that the U.S. government would provide "meaningful credit" to companies that self-reported and cooperated, and included several examples of declinations and the reasons for them. The SFO also strongly encourages self-reporting and offers the carrot of non-prosecution in its "Guidance on Corporate Prosecutions."

The Justice Department and the SEC, additionally, have publicized FCPA settlements in which they rewarded companies for self-reporting and cooperation through significant downward departures from the U.S. Sentencing Guidelines (i.e., lower fines and penalties). For example, Alcoa paid a $384 million fine, which reflected a 55 percent discount from the bottom of the guidelines. The Justice Department and the SEC also have publicized FCPA settlements in which they punished companies for not self-reporting and cooperating. Alstom's alleged initial refusal to cooperate with the Justice Department resulted in fines that fell in the middle of the sentencing guideline range. Alstom ultimately agreed to pay $772 million—the single biggest Justice Department criminal fine in history.

The OECD report reflects that the Justice Department, SEC, and other enforcement agencies have been somewhat successful in convincing companies of the merits of self-reporting: 31 percent of defendants voluntarily disclosed to law enforcement their involvement in foreign bribery. Another 13 percent of cases were discovered directly by law enforcement agencies such as police and customs authorities. An additional 13 percent of cases were discovered in the course of formal and informal mutual legal assistance between countries in connection with related criminal investigations.

Only 2 percent of cases were discovered through whistleblowers' reports to law enforcement. In the United States, the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 required the SEC to establish a program to reward whistleblowers. A whistleblower can be rewarded between 10 percent and 30 percent of the money recovered, and in the case of FCPA enforcement actions, that could mean tens of millions of dollars. In 2014, the SEC received 3,620 tips, an increase of 9 percent over the number of tips it received in 2013. Only 4.4 percent of those tips, however, were related to FCPA allegations.

The report demonstrates that a member of senior management is as likely as a low-level employee to be complicit in a bribery scheme, and internal controls are key to preventing systematic corruption.

Conclusion

The OECD report is the most comprehensive study of bribery cases around the globe since anti-corruption enforcement became a priority for the United States and other countries. Much of the data confirms what U.S. practitioners already know from their experience with the FCPA, but the report also highlights several important areas where companies face risk.

One primary takeaway from the OECD report is that due diligence risk analyses should focus on the circumstances of the transaction and the industry profile rather than rely primarily on geography. As a starting point, companies should ask themselves: (1) Is my business in one of the five industries identified as most susceptible to bribery?; (2) Does the transaction involve a public procurement contract (or another common cause for bribery)?; and (3) Is a third party involved, and if so, what kind? More specific due diligence can narrow the scope and identify red flags for further investigation. Companies should compare their own due diligence programs with the statistically proven risk areas highlighted in the OECD report.

Another key takeaway is that the most common perpetrator of bribery is not the "rogue employee." The report demonstrates that a member of senior management is as likely as a low-level employee to be complicit in a bribery scheme, and internal controls are key to preventing systematic corruption.

The report also demonstrates the enduring risk posed by third-party intermediaries. If a company ascertains that it must use a third party, best practices must be employed at every level: (1) before contracting, conduct risk-based due diligence on the third party's background, reputation, experience, and connections with government officials; (2) during negotiations, insert contractual provisions, including anti-bribery representations and warranties, that protect the company; and (3) after contracting, actively manage the relationship to ensure that the third party is committed to anti-bribery laws and compliance, i.e., do not forget about the third party after the contract is signed.

Finally, an effective compliance program should include more than a stand-alone policy. Compliance includes corporate governance and internal controls, and it should be executed through proven change management practices. A company's legal department, compliance department, internal audit function, human resources, finance, senior management, and board of directors must all work together harmoniously to effectuate the most comprehensive and effective compliance program possible.

1. OECD Foreign Bribery Report, available at http://www.oecd-ilibrary.org/governance/oecd-foreign-bribery-report_9789264226616-en.

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