

INTERNATIONAL CRIMINAL LAW AND ENFORCEMENT

Expert Analysis

## Foreign Corrupt Practices: The Global Trend

In our last column, we wrote about the recent dramatic increase in global antitrust enforcement.<sup>1</sup> In this column, we write about a similar enforcement trend concerning international bribery. In the United States, these investigations are typically carried out pursuant to the Foreign Corrupt Practices Act (FCPA), which essentially imposes U.S. anti-corruption restrictions over actions outside U.S. borders. Foreign jurisdictions, which historically did not even prohibit bribery, are increasingly shifting toward the U.S. enforcement model. But apart from increasing global risks of investigations and prosecution, bribery imposes economic costs that further weigh in favor of anti-bribery vigilance. The combination of economic and enforcement costs means paying foreign bribes is not only illegal, but also a bad business decision.

### Increasing Foreign Interest

The FCPA has been on the books since 1977, but for decades was rarely invoked.<sup>2</sup> Amendments in 1998 extended application of the FCPA's anti-bribery provisions to foreign firms and individuals who cause acts in furtherance of bribes within the United States. But enforcement did not really pick up until the collapse of Enron in 2001 and the passage in 2002 of the Sarbanes-Oxley Act, which ushered in a new era of required public disclosures. In 2000, only one FCPA criminal action was commenced in the United States.

By 2010, the Department of Justice hit a FCPA high-water mark, with 20 criminal cases commenced, about \$1.7 billion in fines imposed, and over 150 ongoing FCPA investigations. In recent years the total amount of FCPA fines imposed by the Justice Department has declined, but the number of investigations and prosecutions has remained relatively steady.<sup>3</sup> Most recently, in January 2015 Federal Bureau of Investigation officials revealed that the FBI this year will triple the number of agents focusing on FCPA investigations.<sup>4</sup>

Historically, foreign jurisdictions greatly lagged the United States in bribery prosecutions, but the rest of the world is catching up.

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In 2003, the U.N. adopted the United Nations Convention against Corruption, and 170 member states have signed it.<sup>5</sup> The Convention requires signatories to criminalize most forms of bribery, although as with any international convention its requirements are more aspirational than actual. Many countries, however, are taking their own steps to criminalize not just bribery of domestic officials, but bribery of foreign officials. In recent years, Brazil, China, Germany, India, Russia, Spain, the United Kingdom and many other countries have all enhanced their anti-bribery laws.

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Practical efforts to increase global anti-bribery enforcement are also being pushed by the Organisation for Economic Co-operation and Development (OECD). The OECD is an international organization that seeks to promote policies that will improve the economic and social well-being of people around the world. Thirty-four countries are members, including major economies such as the United States, Japan and Germany. Russia was in negotiations to join until the OECD suspended talks as result of Russian actions in the Crimea. Fifty non-member countries, including Russia, participate in OECD working groups and programs.

The OECD succeeded in implementing its own international anti-bribery convention back

in 1999—even before the U.N. Convention.<sup>6</sup> The OECD Anti-Bribery Convention, ratified by 41 countries, seeks to reduce public corruption by encouraging sanctions against bribery in international transactions. While the Convention lacks enforcement procedures, it requires signers to criminalize bribery and report regularly on the status of anti-bribery efforts.

### Bribery: Simply Bad Business

The ratification of the OECD Anti-Bribery Convention and continued OECD efforts to ensure compliance indicate that global anti-bribery enforcement is increasing. But data gathered by the OECD reveals that not only does foreign bribery increasingly risk prosecution, it also makes bad business sense. The net negative effect bribery has on international business was recently revealed in stark fashion with the Dec. 2, 2014, release of the OECD Foreign Bribery Report (OECD Report). The OECD Report was an ambitious effort to analyze and assess over 400 international bribery cases concluded since the OECD Anti-Bribery Convention went into effect in 1999.<sup>7</sup>

The OECD Report reveals that an international bribe typically averages 10 percent of the value of a transaction and 35 percent of the profits. Moreover, in almost half of all bribery prosecutions, the fines or penalties totaled over 100 percent to 200 percent of the transaction value. The average duration of bribery investigations and prosecutions has also tripled in length from 1999 to 2013, indicating that fees and costs incurred in defending against these investigations are also increasing.<sup>8</sup>

The expense involved in defending against bribery investigations can be astronomical. The global business community was shocked back in 2008 when it was revealed that German multinational Siemens AG, in addition to paying about \$1.5 billion in fines to resolve joint German and American bribery prosecutions, had also racked up \$850 million in fees and expenses for a resulting internal investigation and compliance review.<sup>9</sup> The internal investigation took two years, and included 1,750 interviews and a review of 82 million documents.<sup>10</sup> Notably, the fines, the defense costs, not to mention the bribes themselves, greatly overwhelmed the value of the contract involved.

Rather than serving as an outlier, the Siemens-type internal investigation has become the norm. Siemens pleaded guilty in the United States, and when the Justice Department's sentencing memorandum labeled Siemens' cooperation and compliance efforts "extraordinary," the bar was set for the level of cooperation expected by multinationals under investigation for bribery. Since then, multinationals under investigation for bribery typically follow the Siemens model and perform elaborate internal investigations and compliance reviews.

The Siemens investigation apparently remains the most expensive, but many corporations have incurred similarly shocking investigative fees and costs. For example, in March 2014, U.S. retail giant Walmart publicly reported that it had spent \$439 million over two years to investigate foreign bribery allegations as part of an FCPA investigation.<sup>11</sup> The matter is not even resolved, and costs will likely continue to average \$200 million per year. Other corporations recently incurring massive FCPA investigative costs include Daimler AG (\$500 million), Avon Products Inc. (\$345 million), Weatherford International (\$130 million) and News Corp. (\$100 million).<sup>12</sup>

### Getting Away With It?

Admittedly, many countries continue to lag the U.S. in bribery enforcement, and in many countries bribery remains a standard business expense. Indeed, the OECD Report notes that while the U.S. sanctioned individuals and entities in 128 separate bribery schemes related to international business transactions during the relevant time period, regulators in other jurisdictions were not nearly as active. During the same time, Germany sanctioned individuals and entities in 26 separate international schemes, South Korea imposed sanctions in 11, and Italy, Switzerland and U.K. in only six.

Other jurisdictions were even less active. Indeed, the OECD Report only includes statistics from the 17 jurisdictions that actually had international bribery prosecutions during the relevant time period, meaning that from 1999 to 2013, numerous countries supposedly participating in OECD anti-bribery efforts simply did not have any international bribery prosecutions.<sup>13</sup>

The OECD Report also highlights how endemic bribery actually is in international business. The report reveals that over 40 percent of bribery prosecutions involved misconduct by management-level employees, with the CEO involved in over 10 percent of prosecutions. About 60 percent of bribery prosecutions involved corporations with more than 250 employees.

Bribery prosecutions involved virtually every type of industry, although extraction, construction and transportation industries accounted for about half of all prosecutions. These were also the industries that tended to have the highest amounts of bribes as a percentage of transaction value, which troublingly suggests that in some industries all market participants must literally "pay to play."<sup>14</sup>

In addition, the statistics only come from schemes that were discovered and prosecuted. A third of all bribery prosecutions resulted from self-reporting (of which 50 percent were discovered during audits or M&A due diligence). About 25 percent of schemes were discovered by authorities, 5 percent were uncovered by the media, and whistleblowers only accounted for 2 percent.<sup>15</sup> The sources of many bribery investigations remain unknown, but it is safe to assume from these statistics that a significant number of bribery schemes go undetected.

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### Conclusions

Unfortunately, the question thus remains whether a corporation, in the absence of a clear obligation to report suspected misconduct, should proactively investigate and report, or should simply hide its head in the sand and hope any misconduct goes undetected. The OECD Report confirms that corporations continue to face situations where "everybody's doing it." Some commentators have also astutely noted that the "benefits" of self-reporting in the FCPA context are so unclear as to call into question whether self-reporting is actually worth it.<sup>16</sup>

FCPA enforcement does not include an amnestied program such as that offered by the Justice Department in antitrust enforcement. And given that self-reporting must now customarily be followed by internal investigations and cooperation that can cost hundreds of millions of dollars, it is understandable why a corporation tasked with maximizing shareholder value would be reluctant to be "high-minded" and seek the greater overall good by erring on the side of aggressive internal investigation and self-reporting.

But the OECD Report and recent investigations suggest that taking the high road is, in fact, a better business decision. Paying bribes increases transaction costs, and resulting penalties may make the entire transaction a net loss. Corporations may "look the other way" and hold out hope that suspicions of misconduct may prove to be unfounded, or that if there is misconduct it may go undetected. But with bribes on average eating up a third of the profits from a transaction, and potential penalties routinely exceeding the entire value of a transaction, is securing business through bribes really worth it?

And if there were any doubt, are bribes worth it if a subsequent investigation alone—before imposition of any penalty—can result in costs measured in the tens or hundreds of millions of dollars? Such investigations also may result in reputational damage even where a corporation is ultimately exonerated. Moreover, on top of any penalties imposed as part of a disposition with regulators, an investigation and prosecution may also result in exclusion from future government contracts.

The answer to the question of whether bribes are worth it should be, and is, no. Corporations involved in international business—particularly those involved in procuring foreign contracts—should incur the costs of imposing and vigorously enforcing anti-bribery controls. They should seek to prevent bribery before it occurs, and before they face a self-reporting decision that amounts to an existential threat. Even if vigorous internal controls fail to prevent bribery, the costs of implementing those controls in the future under threat of prosecution will only be greater.

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1. Nicholas M. De Feis and Philip C. Patterson, "U.S. No Longer has Monopoly on Antitrust Enforcement," NYLJ Oct. 30, 2014, available at <http://www.dorlaw.com/pdfs/070111409-2014-Antitrust-Article.pdf>.

2. See 15 U.S.C. §§78dd-1, et seq.

3. See Justice Department, "Response of the United States, Questions Concerning Phase 3 OECD Working Group on Bribery," Appendix B, May 3, 2010, available at <http://www.justice.gov/criminal/fraud/fcpa/docs/response3-app-b.pdf>; see also Shearman & Sterling, FCPA Digest, July 2014, available at <http://www.shearman.com/~media/Files/NewsInsights/Publications/2014/07/Recent-Trends-and-Patterns-FCPA-Digest-LT-072114.pdf>.

4. See Joel Schectman, "FBI To Bulk Up Foreign Bribery Efforts," WSJ, Jan. 16, 2015, available at <http://blogs.wsj.com/riskandcompliance/2015/01/14/fbi-to-bulk-up-foreign-bribery-efforts/?KEYWORDS=schectman>.

5. United Nations Convention Against Corruption, G.A. Res. 58/14, chs. IV and V, U.N. Doc. A/RES/58/4, pp. 22, 32 (Dec. 11, 2003) (reprinted in 43 I.L.M. 37 (2004)).

6. See OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, available at <http://www.oecd.org/corruption/oecdantibriberyconvention.htm>.

7. See OECD, "Foreign Bribery Report," Dec. 2, 2014, available at <http://www.oecd.org/corruption/oecd-foreign-bribery-report-9789264226616-en.htm>.

8. See OECD Report at 14, 26-28.

9. See David Crawford and Mike Esterel, "Siemens Pays Record Fine in Probe," WSJ Dec. 16, 2008, available at <http://www.wsj.com/articles/SB12293613568097233>.

10. See Debevoise.com, "Debevoise conducted Siemens internal investigation," Dec. 15, 2008, available at <http://www.debevoise.com/insights/news/2008/12/debevoise-conducted-siemens-internal-investigation>.

11. See Wal-Mart Stores Inc. SEC Form 10-K, filed March 21, 2014.

12. See Homer E. Moyer, "Costs of FCPA Investigations—A Board Issue?" NYSE.com, Nov. 9, 2013, available at <https://www.nyse.com/corporate-services/nysegs/hot-topics/board-liability/costs-of-fcpa-investigations>; Nathan Vardi, "How Federal Crackdown on Bribery Hurts Business and Enriches Insiders," Forbes, May 6, 2010, available at <http://www.forbes.com/forbes/2010/0524/business-weatherford-kbr-corruption-bribery-racket.html>.

13. See OECD Report at 7-9.

14. See OECD Report at 21-23.

15. See OECD Report at 15.

16. See Elkan Abramowitz and Jonathan Sack, "Dilemma of Self-Reporting: The FCPA Experience," NYLJ Jan. 8, 2014, available at [http://www.maglaw.com/publications/articles/00356/\\_res/id=Attachments/index=0/Dilemma%20of%20Self-Reporting\\_The%20FCPA%20Experience.pdf](http://www.maglaw.com/publications/articles/00356/_res/id=Attachments/index=0/Dilemma%20of%20Self-Reporting_The%20FCPA%20Experience.pdf).