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A Revitalization of Global Anti-Corruption Enforcement: The OECD Issues New Recommendations Likely to Increase Multijurisdictional Enforcement and Spur Additional Investments in Compliance

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When asked what launched the modern era of global anti-corruption enforcement, experts almost always cite the passage of The OECD Anti-Bribery Convention and an important expansion of the Foreign Corrupt Practices Act in 1998 to ensure United States adherence to the requirements of the OECD Anti-Bribery Convention. The OECD Anti-Bribery Convention is an agreement among 44 countries grouped in the OECD's Working Group on Bribery that creates legally binding obligations to criminalize bribery of foreign public officials in international business. Importantly, the Anti-Bribery Convention is not simply a static agreement to implement legislation similar to the FCPA, but the Working Group on Bribery has quarterly meetings to discuss each country's progress and to coordinate cooperation among law enforcement partners. In 2009, the Working Group issued a recommendation that reinforced each country's efforts to prevent, detect and investigate foreign bribery and was a major factor in the globalization of enforcement. The 2009 Recommendation was an important point ending the era of the United States being essentially the only enforcer and ushering in a new era of multiple countries bringing independent enforcement actions and a rise in global settlements.

On November 26, 2021, the OECD issued an important update that will revitalize global anti-corruption enforcement and as such should be carefully evaluated by companies involved in international business.¹ The 2021 Revised Recommendation builds upon the 2009 Recommendation but updates it to capture important developments and trends of global anti-corruption enforcement:

- **Guidance on Compliance and Incentives for Improved Compliance**: The Revised Recommendation includes important new guidance on enhancing anti-corruption compliance programs and internal controls. While the guidance is nothing surprising for those experts in anti-corruption compliance, it serves as a benchmark of what the international community views as best practices. In addition, the Revised Recommendation urges all countries to incentivize companies to invest in compliance. Companies should carefully evaluate how they

compare with the Working Group's new guidance and take steps to ensure they can match these new standards for internal controls and compliance programs.

- **Prosecuting the Bribe Takers and Seizing the Bribe Money:** The Revised Recommendation includes new sections on the “demand” side of bribery and “sanctions and confiscation” and is a significant shift from the previous enforcement regime that focused only on bribe givers. Going forward, the OECD will evaluate each country’s progress in prosecuting bribe givers and those receiving bribes, as well as the seizure of bribe money. This major shift from the historical focus on the supply side of corruption responds to a long-standing complaint by companies that they have been singled out for international prosecution, and governments have ignored those demanding bribes—the government officials. We expect that this new focus on bribe recipients will lead to an increased scrutiny on financial services companies and other gatekeeper entities (legal, accounting and real estate firms) that are potentially involved in the transfer of bribe money to the bribe takers.
- **More Multijurisdictional Investigations and Increased Cooperation:** Sharing information among law enforcement has increased dramatically arising in part from the quarterly meetings of the Working Group on Bribery. The examples of enhanced cooperation among certain countries has been turned into a formal recommendation to share personnel and expertise (like the secondment of a DOJ FCPA prosecutor within the UK SFO), “spontaneous” transmission of relevant evidence, and increased sharing of financial information through formal and informal mechanisms. The Revised Recommendation also includes guidance on data privacy and how such laws should not hinder anti-corruption investigations. Overall, this enhanced cooperation will likely lead to cases developing more quickly and could lead to more multijurisdictional resolutions as more countries become involved in any single investigation.
- **(Hopefully) More Balanced Multijurisdictional Resolutions:** Given the rise in global enforcement, international companies have raised concerns about follow-on prosecutions arising from the same facts that seem designed to unnecessarily punish the company that resolved an anti-corruption matter. The Revised Recommendation includes new guidance encouraging countries to coordinate investigations early and take steps not to prosecute a defendant for the same conduct in more than one jurisdiction. In addition, the Revised Recommendations include a new section on non-trial resolutions (like DPAs in the U.S. and U.K., and CJIPs in France) that sets the first international standard for countries wanting to establish ways of resolving matters without a full criminal trial. These non-trial resolutions will create legal mechanisms that allow companies to enter into global resolutions and help bring finality to a company seeking to resolve its global liability.
- **Encouraging and Protecting Purported Whistleblowers:** The Revised Recommendation urges all countries to establish additional mechanisms to encourage and protect individuals reporting on potential violations of anti-corruption laws. These new recommendations reflect the growing reality that many current cases arise, at least in part, from personnel within the company. The Revised Recommendations outline broad protections for the “reporting party,” including steps to prevent or punish retaliation against the purported whistleblower. Companies should carefully evaluate their internal reporting processes to adapt to these new trends.

The OECD policy message is clear: countries will be increasing coordination and using all available tools to bring more multijurisdictional cases with potentially increased financial penalties against companies and more prosecutions of all individuals involved in bribery in international business. Companies and their counsel must be aware of these important shifts and adapt accordingly—not only by investing more in compliance to prevent problems from occurring in the first place, but also by appropriately handling any investigation that arises to ensure that the scope of the problems are well understood before interacting with any enforcement agency. Paul Hastings will be doing deeper examinations of these topics in the coming weeks as the U.S. government and global enforcement agencies provide additional commentary and guidance.



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¹ <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0378#mainText>

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