

OECD Releases Important Update to Anti-Bribery Recommendations

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On November 26, 2021, the Organization for Economic Cooperation and Development (the “OECD”) updated its anti-bribery recommendation for the first time in more than a decade. More than 44 countries have ratified the OECD’s 1997 Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the “Convention”), which establishes standards that signatories must meet and steps they must take to combat global corruption. This revised Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions (the “2021 Recommendation”) ¹ updates the 2009 Recommendation for Further Combating Bribery of Foreign Public Officials (the “2009 Recommendation”). While the 2009 Recommendation retains its importance, the OECD explains that “[t]he 2021 Anti-Bribery Recommendation addresses key issues that have emerged or significantly evolved in the global anti-corruption landscape since the adoption of the previous Anti-Bribery Recommendation in 2009.”

SIGNIFICANT ISSUES ADDRESSED BY THE 2021 RECOMMENDATION

A key theme in the 2021 Recommendation is the need for greater cooperation between countries and their enforcement agencies. The OECD emphasizes the increasingly multilateral nature of enforcement actions, where agencies in different countries often work together to identify and investigate corruption and reach a coordinated resolution. The OECD encourages this trend and suggests ways that member countries can continue developing a global anticorruption framework. Nevertheless, the 2021 Recommendation cautions that “[m]ember countries should also pay due attention to the risk of prosecuting the same natural or legal person in different jurisdictions for the same criminal conduct.” This is consistent with earlier policy announcements by the United States Department of Justice discouraging disproportionate enforcement of laws by multiple authorities and highlighting the need to avoid “piling on” by imposing unfair duplicative penalties for the same misconduct. ²

Another focus of the 2021 Recommendation is the “demand side” of bribery (i.e., solicitation of bribes by foreign officials). While the 2009 Recommendation focused on policing the offering and payment of bribes, the 2021

Recommendation urges member countries to publish regulations that govern the solicitation of improper payments, gifts, or expenses by public officials. Member countries are also advised to review laws regarding “facilitation payments” and prohibit or discourage their use.

The U.S. Foreign Corrupt Practices Act (“FCPA”) does not prohibit foreign officials from soliciting or accepting bribes and it contains an exception for facilitation payments, so the OECD’s 2021 Recommendation suggests that modification of the FCPA is warranted. This emphasis on addressing demand-side bribery is consistent with proposals recently made by the Biden Administration.²³ Some degree of bipartisan support also appears to exist in Congress.²⁴

In addition to encouraging more regulation and enforcement, the 2021 Recommendation specifically suggests that signatories develop procedural mechanisms for addressing bribery allegations with a “requirement for the alleged offender to admit facts and/or guilt, where applicable” without the need for trial. Proposed non-trial resolutions might include the use of Deferred Prosecution Agreements or similar agreements, such as those long used in the United States and more recently adopted in the United Kingdom.

Member countries also are encouraged to broadly apply protections to anyone reporting public corruption, so-called “whistleblowing.” The OECD recommends that countries permit anonymous or confidential reporting and enact protections to prevent retaliation. The 2021 Recommendation goes even further by recommending that countries consider providing “incentives” to qualifying reporting persons. This recommendation is consistent with various statutes and programs in the United States offering protection and rewards to whistleblowers. Similarly, the European Union Whistleblowing Directive becomes effective this month, which requires states to implement protections for whistleblowers but does not mandate providing incentives for reporting.

Data protection is another significant issue addressed by the 2021 Recommendation. The OECD addresses the interplay between data protection laws and the increasingly digitized nature of large-scale enforcement actions. To this end, the new recommendations suggest member countries review data protection laws and issue regulations that would “allow for the processing of data in conducting anti-corruption due diligence and internal investigation processes.”

Although some of these recommendations are consistent with member country existing practices, some changes are likely to occur. Companies operating in the international sphere should watch for these changes and revise their internal policies and practices as necessary.

CHANGES TO OECD’S GOOD PRACTICE GUIDANCE

The OECD includes with its recommendations a Good Practice Guidance on Internal Controls, Ethics, and Compliance (the “Guidance”), which it also updated last month (Annex II to the 2021 Recommendation). The Guidance is “addressed to companies, including state-owned enterprises, for establishing and ensuring the effectiveness of internal controls, ethics, and compliance programmes or measures for preventing and detecting the bribery of foreign public officials in their international business transactions . . .”

The 2021 Guidance emphasizes that a compliance program should be tailored to the “individual circumstances of a company,” which “should be regularly monitored, re-assessed, and taken into account as necessary, to determine the allocation of compliance resources and ensure the continued effectiveness” of compliance measures. The Guidance offers a list of good practices to accomplish this; to highlight a few:

- Companies should ensure those overseeing ethics and compliance programs have adequate authority and “autonomy from management and other operational functions.”
- Companies should develop policies that govern third-party relationships and include the following “essential elements”:
 - properly documented risk-based due diligence and regular oversight of business partners;
 - informing business partners of the company’s ethics and compliance programs;

- seek a reciprocal commitment from business partners;
 - implement mechanisms to ensure that contracts specifically describe the services to be performed and have appropriate payment terms commensurate with the services rendered;
 - ensure audit rights for the books and records of business partners; and
 - provide adequate mechanisms to address incidents of foreign bribery by business partners.
- The Guidance alerts companies to “innovative technologies” that can be used “to identify patterns indicative of foreign bribery.”
 - The Guidance further recommends periodic reviews and testing of the internal controls and compliance programs, including training, both regularly and upon specific developments, such as changes in the company’s activity, results of monitoring and auditing, and evolving international and industry standards.

Although the 2021 Recommendation is not binding, it identifies best practices that have received international recognition. Companies should therefore carefully review the new guidance and ensure their compliance programs, controls, and practices incorporate as many suggestions as appropriate based on their respective risk profiles.

If you have any questions about the 2021 Recommendation or would like further information on this or related topics, please feel free to contact the authors of this article, **Christopher Man** (partner, White Collar, Regulatory Defense, and Investigations) and **Kyllan Gilmore** (associate, Complex Commercial Litigation), or your Winston & Strawn relationship attorney.

You can also contact **Abbe Lowell** or **Suzanne Jaffe Bloom**, Co-Chairs of our White Collar, Regulatory Defense, and Government Investigations practice group, or visit our practice group [webpage](#), for more information on this and related subjects.

¹ The 2021 Recommendations can be found here: <https://www.oecd.org/daf/anti-bribery/2021-oecd-anti-bribery-recommendation.htm>.

² Deputy Attorney General Rod Rosenstein Remarks (May 9, 2018), available at <https://www.justice.gov/opa/speech/deputy-attorney-general-rod-rosenstein-delivers-remarks-new-york-city-bar-white-collar>.

³ The White House, United States Strategy on Countering Corruption (December 6, 2021), available at <https://www.whitehouse.gov/wp-content/uploads/2021/12/United-States-Strategy-on-Countering-Corruption.pdf>.

⁴ Earlier this year, a bipartisan group of U.S. House of Representatives Members introduced the Foreign Extortion Prevention Act, a bill addressing foreign officials who demand or accept bribes. *see* H.R. 4737, 117th Cong. (2021). A similar bill was introduced in the U.S. Senate. *see* S. 3137, 117th Cong. (2021).

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