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Meeting (and Exceeding) Our Obligations: Will OECD's Anti-Bribery Convention Cause the Dodd-Frank Act's 'Whistleblower Bounty' Incentives to Go Global?

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On July 21, President Obama signed into law the historic Dodd-Frank Wall Street Reform and Consumer Protection Act (H.R. 4173).[1] The passage of the act signals a significant acceleration of the U.S. government's already intensified Foreign Corrupt Practices Act enforcement efforts. Specifically, the act's unprecedented cash incentives for whistleblowers, in tandem with fortified protections against retaliation, incentivize corporate ''insiders,'' as well as corporate ''outsiders'' possessing relevant information,[2] to come forward with their evidence so that they can collect their promised financial bounty. Early reports, in fact, indicate that the Dodd-Frank Act is having its intended tip-generating effect.[3]

[1] For the Dodd-Frank Act's full text, *see* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h4173enr.txt.pdf.

[2] There are indeed few limitations on who can be a source of information—family members, friends, business associates, and even the actual or intended recipients of bribes all are prime candidates to receive substantial cash rewards if they provide information qualifying under the act's relatively permissive requirements. Section 922 provides the narrow band of individuals excluded from whistleblower award eligibility.

[3] Against a backdrop of some early skepticism, the act appears to be hitting its intended target. *See After Dodd-Frank,*

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By unveiling to the world this innovative evidence-gathering tool, the United States heralds a new phase in its increasingly global anti-bribery enforcement efforts. Moreover, in so doing, the United States reaffirms its ongoing intention to comply with, and dramatically exceed, its treaty obligations under the Organisation for Economic Co-operation and Development's (OECD) 1997 Anti-Bribery Convention, as well as the related 2009 OECD Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions. As U.S.-led political pressures to enhance national anti-bribery efforts continue to grow, the Dodd-Frank Act's novel enforcement mechanisms have the potential to attract international imitators.

U.S. Commitment to Escalating Enforcement Of OECD Anti-Bribery Convention

During his May 31 address to the OECD in Paris, Attorney General Eric Holder made clear the continued U.S. support for the Anti-Bribery Convention.[4] In the month following the attorney general's speech, the U.S. House passed the Dodd-Frank Act's conference report of the bill. Additionally, in his Paris address, Holder announced the United States government's intent to strengthen global anti-bribery efforts through enhanced transnational collaboration and the sharing of ''best practices.'' Holder stated:

> The OECD has been at the forefront of efforts to combat corruption wherever and however it occurs . . . . As Attorney General, I have made combating corruption one of the highest priorities of the Department of Justice . . . . [N]one of the progress the United States has made would have been possible without the long-term cooperation of our law enforcement partners around the globe – cooperation fostered by relationships established through the OECD . . . . I urge the countries [that have not yet achieved criminal convictions in anti-bribery cases] to deepen their commitment to this global effort by dedicating the appropriate resources, such as prosecutors and investigators focused exclusively on foreign bribery cases, and by prioritizing the prosecution of corruption, no matter where the evidence leads.

Holder alludes to the reality that, while some signatories, including the United Kingdom,[5] have diligently complied with the Anti-Bribery Convention, others have not. Indeed, the highly regarded OECD peer-reviewed Working Group on Bribery Monitoring, which ''grades'' signatories' performance and then makes those findings publicly available, found various national efforts seriously wanting.[6] According to Holder, ''it is important to note that many of the 38 OECD member countries have no criminal convictions to date. This is not because bribes are not paid by companies in these OECD countries. It is because investigating and prosecuting corruption is difficult, requiring more will, resources, experience, and effort than most crimes.''

With mounting global pressure (not the least of which originates from the United States) on signatory states to comply with the Anti-Bribery Convention's requirements, currently under-performing countries will likely be looking for efficient and effective ways to demonstrate their earnest intent to live up to their commitments. Given this backdrop, the Dodd-Frank Act's new whistleblower provisions may well stand out as an ideal template for others (who are not culturally or otherwise averse to such rewards) to emulate.

OECD's Anti-Bribery Convention

The 1997 OECD Anti-Bribery Convention, adopted by 38 countries, announced standards criminalizing bribery of foreign public officials in international business transactions.[7] The Anti-Bribery Convention, indeed, represents the first and only such international anti-corruption instrument drafted to stanch the corrosive impact of public corruption by focusing on the ''supply side'' of the bribery transaction.

The convention, which is characterized by its notably broad wording, provides generalized anti-bribery standards, requiring signatories to, among other things,

SEC Getting At Least One FCPA Tip A Day, Wall Street Journal (Sept. 30, 2010) (''The Securities and Exchange Commission has been receiving at least one tip a day about potential foreign bribery violations since a whistleblower bounty program became law in July. . . . The figure is likely to be sobering for international companies that have witnessed an eight-fold increase in enforcement of the Foreign Corrupt Practices Act since 2004, and as multi-million dollar settlements in such cases have become the norm. . . . Experts also predict the law will nudge more companies to self-disclose potential FCPA violations out of fear that a whistleblower will do it first, putting the company on bad terms with Justice and the SEC.'').

[4] For the full text of the attorney general's speech on the Anti-Bribery Convention, *see* http://www.justice.gov/ag/speeches/2010/ag-speech-100531.html.

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[5] Through its Anti-Terrorism, Crime and Security Act of 2001 (*see* https://www.unodc.org/tldb/showDocument.do?documentUid=1541), and the Bribery Act of 2010 (http://www.legislation.gov.uk/ukpga/2010/23/contents).

[6] The Working Group evaluation takes place in phases: Phase 1 evaluates the adequacy of a country's legislation to implement the OECD Convention; Phase 2 assesses whether a country is applying this legislation effectively; and Phase 3 focuses on enforcement of the OECD Convention, the 2009 Anti-Bribery Recommendation, and outstanding recommendations from Phase 2. For country-by-country reports on the implementation of the OECD Anti-Bribery Convention, *see* http://www.oecd.org/document/24/0,3343,en_2649_34859_1933144_1_1_1_1,00.html.

[7] The full text of the convention, *see* http://www.oecd.org/dataoecd/4/18/38028044.pdf.

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criminalize the bribing of foreign officials.[8] Punishment for violations, in turn, must be ''proportionate and dissuasive,''[9] and the ''proceeds of the bribery of a foreign public official [must be] subject to seizure and confiscation.''[10]

Providing some much-needed enforcement specificity, in November 2009 the OECD issued its ''recommendation.''[11] One of the recommendation provisions requires signatories to ensure that ''easily accessible channels are in place for the reporting of suspected acts of bribery.''[12] The recommendation also institutes anti-retaliatory protections to whistleblowers,[13] as well as the adoption of provisions that ''facilitate reporting by public officials.''[14]

The OECD's Good Practice Guidance on Implementing Specific Articles of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions[15] continues the theme of urging signatories to creatively use the spectrum of tools at their disposal to boost national prosecutions of bribery cases. For example, the guidance directs signatory states to encourage ''serious[ ] investigat[ion] of potential bribery cases,'' and to make available to law enforcement adequate ''resources'' so that they can ''effective[ly] investigat[e] and prosecut[e] . . . bribery of foreign public officials.''[16] In terms of internal controls, moreover, the recommendation asks that signatories ''encourage companies to develop and adopt adequate internal controls, ethics and compliance.''[17]

U.S. Implementing Legislation For Anti-Bribery Convention—the FCPA

In terms of foreign anti-bribery efforts, the United States has always been a global leader.[18] Indeed, the United States formally entered the OECD Anti-Bribery Convention on Feb. 15, 1999—more than 20 years *after* the enactment of the FCPA, its primary implementing legislation. Few, if any, countries can boast of such a track record.[19]

U.S. anti-bribery efforts in recent years have gained significant momentum. Since 2006, when the Department of Justice created its dedicated FCPA unit, the government has prosecuted more cases than were prosecuted in the first 28 years of the FCPA's existence combined, and in so doing it collected billions of dollars in criminal and civil penalties. Moreover, in May 2008, the same year the FBI created its International Corruption Unit, DOJ's Criminal Division unveiled its International Anticorruption Strategic Implementation Plan.[20] The plan, in harmony with the OECD's Anti-Bribery Convention, seeks to support anti-corruption efforts around the world as an important component of the Criminal Division's overall mission.

The Dodd-Frank Act's Extraordinary Whistleblower Bounty Incentives

Exceptional whistleblower bounty incentives are contained deep within the 2,253 pages of the ambitious and sweeping Dodd-Frank Act. Indeed, these cash rewards to tipsters symbolize the government's accelerating fight against foreign corruption. At its core, the Dodd-Frank Act's new provisions are likely to fundamentally alter a corporation's self-disclosure calculus in the context of potential FCPA violations.[21]

To better understand the substantial contingency-based pecuniary incentives available to those with ''inside'' FCPA-related information, it is necessary to take a closer look at the Dodd-Frank Act's carefully crafted language, which finds no parallel in the OECD's Anti-Bribery Convention or, for that matter, in the domestic laws of the convention's signatory states.

Most fundamentally, the Dodd-Frank Act promises to use percentage-based cash rewards to transform corporate employees (or anyone else with relevant information) into potential FBI or SEC informants, largely regardless of how, or by whom, the information was obtained. The act specifically entitles tipsters who supply ''original'' violation-related information ''derived from [his or her] independent knowledge or analysis'' to a *minimum* of 10 percent, and a maximum of 30 percent, of *all* monetary recoveries made as a result of the infor-

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[8] *See* convention at Article 1(1) (signatory parties must ''take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business'').

[9] Convention at Article 3(1).

[10] *Id.* at 3(3). Note that the 1997 commentaries on the convention specify that ''proceeds'' means ''profits or other benefits derived by the briber from the transaction or other improper advantage obtained or retained through bribery.''

[11] For the full text, *see* http://www.oecd.org/dataoecd/11/40/44176910.pdf.

[12] Recommendation at IX(i).

[13] *Id.* at IX(iii).

[14] *Id.* at IX(ii).

[15] For the full text, *see* http://www.oecd.org/dataoecd/4/18/38028044.pdf at Annex I.

[16] *See* Good Practice Guidance at (D).

[17] Recommendation at X(c)(i); *see also OECD Guidelines for Multinational Enterprises* and *OECD Good Practice Guidance on Internal Controls, Ethics, and Compliance*.

[18] Consider in this context also pending legislation called the ''Overseas Contractor Reform Act'' (H.R. 5366), which the House Oversight and Government Reform Committee passed July 28. *See* http://thomas.loc.gov/cgi-bin/query/z?c111:H.R.5366 (5 WCR 578, 8/13/10). The bill requires debarment from future government contracts for any person or company found in violation of the FCPA, pursuant to the policy statement that ''no Government contracts or grants should be awarded to individuals or companies who violate the Foreign Corrupt Practices Act of 1977.'' Although the bill has its issues (for example, the bill needs to make explicit that it also covers cases resolved through nonprosecution agreements or deferred prosecution agreements, and should expand its definition of ''person''), it is another indicator of the government's continuing commitment to ongoing anti-bribery efforts.

[19] The United Kingdom, for example, as noted above did not fully modernize its anti-bribery legislation until April 2010.

[20] *See* http://www.justice.gov/criminal/fraud/fcpa/docs/05-28-10oecd-convention.pdf at 5.

[21] *See* T. Markus Funk, *Getting What They Pay For: The Far-Reaching Impact of the Dodd-Frank Act's 'Whistleblower Bounty' Incentives on FCPA Enforcement*, 5 WCR 640 (Sept. 9, 2010).

mation.[22] Provided that the tip results in the ''successful resolution'' of the civil or criminal enforcement action, and the government's total sanctions or recovery—through settlement or otherwise—exceeds $1 million, the tipster is potentially in the money.

As an added encouragement for whistleblowers to come forward, tipsters can opt to remain anonymous (through use of legal counsel) up to the time the award is paid. Moreover, unlike the Sarbanes-Oxley Act and the False Claims Act, the Dodd-Frank Act also explicitly protects whistleblowers employed by subsidiaries, rather than only those employed by the parent company. Rounding out the assemblage of new provisions is a private cause of action for damages to whistleblowers claiming retaliation and an option for whistleblowers to go to federal court to appeal award denials.

The Securities and Exchange Commission has until spring 2011 to issue regulations implementing the Dodd-Frank Act's whistleblower provisions. Once those regulations are in place, individuals who may happen upon, or proactively seek out, evidence of purported FCPA violations—whether employees, their friends, families, or business contacts, or even bribe recipients—will have substantially enhanced financial motivation to come forward with it.

Virtually overnight, the Dodd-Frank Act has provided federal law enforcement with a commanding army of newly ''recruited'' (or, at least, newly incentivized) evidence-gathers, investigators, and informants. There is little doubt that prosecutors, and the federal agents with whom they work, will prize this added firepower in their FCPA enforcement arsenal.

Exporting Dodd-Frank Success?

The U.S. government, as well as the OECD directorate, is in the midst of an unprecedented transnational quest to stem the bribery of government officials. As Holder plainly stated during his address to the OECD, ''Every member of the Working Group, including the United States, can do more to engage in robust international cooperation . . . . Only by working together, across borders and jurisdictions, can we ensure that the ideals set forth in the Anti-Bribery Convention more than a decade ago are realized today and in the future.''

The United States has introduced the world to its newest weapon in this anti-bribery fight, namely, the Dodd-Frank Act's scheme of enhancing law enforcement's evidence-gathering capacity via substantial ''finder's fees'' for successful whistleblowers. In so doing, the United States has once again raised the international anti-corruption enforcement bar. Considering the U.S. leadership position among OECD signatory states, and the OECD working group's assiduous efforts to examine, and publicly review, the effectiveness of each signatory state's effort to comply with the Anti-Bribery Convention, the Dodd-Frank Act—particularly if proven successful—may spawn analogues in other parts of the world.[23] Those with an interest in this area of the law are therefore well-advised to closely monitor the Dodd-Frank Act's near-term (and thus far promising) effectiveness in drawing out tipsters, as well as on how the OECD working group treats this novel law when it drafts its country-by-country reviews and recommendations. Depending at least in part on these two variables, the Dodd-Frank Act's whistleblower bounty provisions may soon have some international company.

[22] *See* Dodd-Frank Act at § 922. Compare these incentives with the pre-Dodd-Frank Act regime, under which the Securities and Exchange Commission's largely unused whistleblower program was limited to insider trading cases, and monetary rewards could not exceed 10 percent of the recovered funds.

[23] That said, given the state of many countries' feeble anti-corruption efforts, skeptics may reasonably question whether the U.S. whistleblower provisions will be broadly or enthusiastically incorporated into national anti-corruption schemes. However, this undeniable sub-par performance has increasingly gained substantial negative attention. To this point, as Transparency International (TI) noted in its ''July Progress Report 2010: Enforcement of the OECD Convention on Combating Bribery of Foreign Public Officials,'' between 2009 and 2010 the number of signatory countries actively enforcing the Anti-Bribery Convention increased from four to seven (representing some 30 percent of world exports). Furthermore, since the mid-2000s, the number of moderately enforcing countries doubled from eight to 16. Although these statistics certainly demonstrate that most signatory countries are falling woefully short of their anti-bribery commitments, the recent uptick in enforcement, moderate as it may be, signals that domestic and international pressures appear to be having at least some of their desired impact.

Denmark, Italy, and the United Kingdom have advanced from moderate to active enforcement. Argentina has advanced to moderate enforcement. On the other hand, Canada, a member of the Group of Eight industrialized nations, has little or no enforcement.

In the six years since TI began reviewing implementation of the OECD ban on foreign bribery, enforcement has doubled from eight to 16 countries. That represents important progress. However, it is disturbing that 20 countries still show little or no enforcement. The difficult economic environment is no excuse for OECD governments to ignore their collective commitment to stop foreign bribery. To the contrary, cleaning up foreign bribery can be regarded as a key part of the reforms needed to overcome the worldwide recession.

For countries looking to boost their anti-bribery enforcement efforts, the Dodd-Frank Act and the FCPA are reasonable places to which to turn.

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