

CLIENT ALERT

OECD Issues First Update to Anti-Bribery Recommendation in Over a Decade

December 8, 2021

AUTHORS

**Martin J. Weinstein | Jeffrey D. Clark | Robert J. Meyer | Bruno Cova
Peter Burrell | Simon Osborn-King | Rita D. Mitchell | Leigh Coutoumanos**

On November 26, 2021, the Organization for Economic Cooperation and Development (the “OECD”) issued a revised Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions (the “2021 Anti-Bribery Recommendation” or the “2021 Recommendation”).

The OECD is an international organization that works to establish international standards for a range of global challenges, including corruption. The organization has 38 member countries, including the United States, the majority of EU countries, and the United Kingdom. In 1997, all 38 member countries, as well as six non-OECD countries, signed the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the “OECD Anti-Bribery Convention” or the “Convention”), which sets forth legally binding standards for the criminalization of bribery of foreign public officials in international business. Upon its entry into force, the Convention established the OECD Working Group on Bribery to monitor and report on the implementation of the Convention’s international obligations by the signatory countries. This peer-review mechanism, particularly its publication of reports and recommendations, gives the Convention a powerful monitoring mechanism, making it one of the more effective international anti-bribery conventions.

In 2009, on the tenth anniversary of the entry into force of the OECD Anti-Bribery Convention, the OECD released its first Recommendation for Further Combating Bribery of Foreign Public Officials (the “2009 Anti-Bribery Recommendation”). The 2009 Anti-Bribery Recommendation focused on key recommendations for preventing, detecting, and investigating allegations of foreign bribery, including, inter alia, undertaking periodic reviews of laws related to the implementation of the Convention, establishing appropriate channels and measures to allow for the reporting of suspected acts of bribery, and

OECD Issues First Update to Anti-Bribery Recommendation in Over a Decade

taking steps to ensure that companies comply with the OECD's principles on accounting requirements, external audit, internal controls, and ethics and compliance.

The 2021 Anti-Bribery Recommendation represents the OECD's first update to its recommendations in over a decade. The recommendations reflect recent trends in anti-bribery and corruption enforcement, urging a more globalized response to bribery and corruption challenges, as the world becomes more interconnected. As with the 2009 Anti-Bribery Recommendation, the 2021 Anti-Bribery Recommendation is not binding on member countries. However, in addition to the peer-review monitoring mechanisms described above, the OECD has also announced that the Working Group on Bribery will report on implementation of the 2021 Anti-Bribery Recommendation every five years.

Key Additions to the 2021 Anti-Bribery Recommendation

Among the key changes as compared with the 2009 Anti-Bribery Recommendation, the OECD added recommendations related to the "Demand Side" of corruption. In the 2021 Recommendation, the OECD recommends that member countries "raise awareness of bribe solicitation risks" and urges countries to publish rules and regulations that govern the solicitation of improper payments, gifts, or expenses by public officials. This recommendation is particularly notable, as the OECD Anti-Bribery Convention and the 2009 Anti-Bribery Recommendation largely focused on the supply side of bribery and corruption, and embodies a recent push towards addressing the demand side of corruption.¹ Embedded within this recommendation, the OECD also calls out the "corrosive effect of small facilitation payments," recommending that member countries review their laws and regulations regarding such payments and encourage companies to "prohibit or discourage the use of small facilitation payments." The U.S. Foreign Corrupt Practices Act is one of a very few international anti-bribery laws that contains an exception for facilitation payments.

Another notable addition to the 2021 Anti-Bribery Recommendation is the focus on "Non-Trial Resolutions." The OECD recommends that "member countries consider using a variety of forms of resolutions" to resolve bribery and corruption allegations, noting that such mechanisms may result in resolution without the need for a full hearing or trial. As part of this recommendation, the OECD specifically calls on member countries to adopt a framework for such resolutions that includes "the requirement for the alleged offender to admit facts and/or guilt, where applicable." The United States, the United Kingdom, and other OECD member countries already employ such mechanisms, where enforcement authorities enter into Deferred Prosecution Agreements or similar agreements with companies and individuals accused of violating anti-bribery and corruption laws. The U.S. Securities and Exchange Commission (the "SEC") has traditionally entered into

¹ In July 2021, a bipartisan group in the U.S. House of Representatives introduced the Foreign Extortion Prevention Act, a bill aimed at targeting foreign officials who demand or accept bribes. See H.R. 4737, 117th Cong. (2021). A similar bill was subsequently introduced in the U.S. Senate in November 2021. See S. 3137, 117th Cong. (2021). Likewise, on December 6, 2021, the Biden administration announced a new anti-corruption strategy that includes a focus on the demand side of bribery. See The White House, United States Strategy on Countering Corruption (December 2021), [here](#).

OECD Issues First Update to Anti-Bribery Recommendation in Over a Decade

non-trial resolutions that do not require an admission of guilt; however, on October 13, 2021, the SEC's Director of the Enforcement Division announced that the agency will require admissions "in cases where heightened accountability and acceptance of public responsibility are in the public interest."² The OECD's recommendation appears intended not only to encourage other member countries to utilize such mechanisms but also to create a uniform framework by which countries implement non-trial resolutions.

A chief concern and focus of the 2021 Recommendation is the need for international cooperation among countries in investigating and prosecuting bribery and corruption matters. Although briefly mentioned in the 2009 Anti-Bribery Recommendation, the 2021 Recommendation elaborates on the OECD's recommendation that member countries make full use of mutual international legal assistance programs, encouraging both formal and informal legal assistance. In addition, the OECD provides more concrete recommendations for enhancing international cooperation among member countries and coordinating concurrent or parallel investigations. This recommendation is particularly timely given that some of the recent, largest anti-corruption enforcement actions have been multilateral actions with cooperation and resolutions in multiple countries, often resulting in fines totaling billions of dollars.

In light of the increased digitalization of enforcement efforts, the OECD has also added a recommendation focused on data protection. Recognizing the impact that data protection laws may have on a country's ability to effectively implement and enforce the Convention, the OECD recommends that member countries ensure that such data protection rules do not adversely impact multilateral investigations and implementation of anti-corruption tools, such as internal controls. Likewise, while noting the need for compliance with data protection rules, the OECD encourages member countries to issue regulations that would "allow for the processing of data in conducting anti-corruption due diligence and internal investigation processes."

Although many of the changes in the 2021 Anti-Bribery Recommendation are in line with existing regulatory practices in many countries, companies should be on the lookout for potential regulatory changes that may result from the issuance of the 2021 Recommendation, and should be alert to the increasing multilateral cooperation in anti-bribery enforcement.

Guidance from the 2021 Anti-Bribery Recommendation

In addition to the changes and additions made in the recommendations, the OECD also updated its Good Practice Guidance on Internal Controls, Ethics and Compliance (the "Guidance"), found in Annex II to the 2021 Recommendation. The Guidance provides important advice and a framework for companies for creating or modifying their anti-bribery and corruption compliance programs.

The Guidance mirrors much of what is already contemplated by the guidance documents released by U.S. and U.K. enforcement authorities and authorities of other countries, including the U.S. Department of Justice's Guidance for

² Gurbir Grewal, Director, Div. of Enf't, U.S. Sec. and Exch. Comm'n, Remarks at SEC Speaks 2021 (Oct. 23, 2021), [here](#).

OECD Issues First Update to Anti-Bribery Recommendation in Over a Decade

Evaluation of Corporate Compliance Programs, the U.S. Department of Justice and Securities and Exchange Commission's Resource Guide to the U.S. Foreign Corrupt Practices Act, and the U.K. Ministry of Justice's Bribery Act of 2010 Guidance. The Guidance in the 2021 Recommendation has been updated since 2009 with several key additions:

- The OECD has included language to make clear that a company's dedication to its internal controls and compliance program should be made clear through "strong, explicit, and visible support and commitment" not only from senior management but also from the company's board of directors or other governing body.
- The revised Guidance also highlights and reinforces the need for autonomy and access to data and resources for boards of directors, senior management, and other independent monitoring bodies that are tasked with overseeing ethics and compliance programs.
- The Guidance provides more comprehensive standards regarding third-party relationships to be implemented in companies' ethics and compliance programs. In this regard, the Guidance contemplates the following to be "essential elements" of an ethics and compliance program:
 - Implementation of mechanisms, such as internal controls, to ensure that contractual terms, including payment terms and descriptions of the work to be performed, are specific and appropriate in light of the services rendered;
 - Inclusion of audit rights in all third-party agreements and that the company makes use of those audit rights; and
 - Inclusion of other appropriate mechanisms for addressing incidents of bribery or corruption by third parties, including contractual termination rights.
- In light of advancements in technology, the Guidance also contemplates that companies will utilize internal controls, including through the application of "innovative technologies," to "identify patterns indicative of foreign bribery."
- The OECD also updated its guidance regarding measures to encourage observance of ethics and compliance programs, noting that companies should also provide "incentives" to its employees. The Guidance notes that such measures should include the integration of ethics and compliance in human resource processes and the implementation of a culture of compliance within the company.
- The Guidance also includes important additions to ensure that individuals who report compliance concerns are not retaliated against. Likewise, the Guidance has been revised to ensure that any reporting framework is

OECD Issues First Update to Anti-Bribery Recommendation in Over a Decade

“confidential” and “anonymous” and includes “clearly defined procedures and visible, accessible, and diversified channels for all reporting persons.”

- The OECD also added guidance governing mergers and acquisitions, noting that companies should undertake comprehensive due diligence and ensure that acquired businesses are promptly incorporated into the company’s internal controls and ethics and compliance programs.
- Finally, the Guidance notes that companies should communicate their commitment to effective ethics and compliance programs externally.

Although the Guidance is not legally binding for companies, it is an internationally recognized best standard. Companies should therefore take note of these key changes and consider what, if any, improvements they should incorporate into their internal controls and compliance programs to ensure that they have effective controls in place for addressing bribery and corruption concerns.

If you have any questions regarding this client alert, please contact the following attorneys or the Willkie attorney with whom you regularly work.

Martin J. Weinstein

202 303 1122
mweinstein@willkie.com

Jeffrey D. Clark

202 303 1139
jdclark@willkie.com

Robert J. Meyer

202 303 1123
rmeyer@willkie.com

Bruno Cova

+39 02 76363 1
bcova@delfinowillkie.com

Peter Burrell

+44 20 3580 4702
pburrell@willkie.com

Simon Osborn-King

+44 20 3580 4712
sosborn-king@willkie.com

Rita D. Mitchell

+44 20 3580 4726
rmitchell@willkie.com

Leigh Coutoumanos

202 303 1263
lcoutoumanos@willkie.com

Copyright © 2021 Willkie Farr & Gallagher LLP.

This alert is provided by Willkie Farr & Gallagher LLP and its affiliates for educational and informational purposes only and is not intended and should not be construed as legal advice. This alert may be considered advertising under applicable state laws.

Willkie Farr & Gallagher LLP is an international law firm with offices in Brussels, Chicago, Frankfurt, Houston, London, Los Angeles, Milan, New York, Palo Alto, Paris, Rome, San Francisco and Washington. The firm is headquartered at 787 Seventh Avenue, New York, NY 10019-6099. Our telephone number is (212) 728-8000 and our fax number is (212) 728-8111. Our website is located at www.willkie.com.