

FCPA Update

A Global Anti-Corruption Newsletter



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DOJ Launches Pilot Program Offering Non-Prosecution Agreements to Individuals Who Self-Report Corporate Criminal Violations

On April 15, 2024, Acting Assistant Attorney General Nicole Argentieri announced that the Criminal Division of the Department of Justice has launched a “Pilot Program on Voluntary Self-Disclosures for Individuals” (the “Program”), offering non-prosecution agreements (“NPAs”) to individuals who report corporate misconduct, including individuals who may themselves be culpable.¹ The Program is the latest in a series of whistleblower and self-disclosure initiatives announced by

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1. Nicole M. Argentieri, “Head of DOJ Criminal Division Announces Voluntary Self-Disclosure Program for Individuals at PCCE’s 10th Anniversary Conference” (Apr. 23, 2024), https://wp.nyu.edu/compliance_enforcement/2024/04/23/head-of-doj-criminal-division-announces-voluntary-self-disclosure-program-for-individuals-at-pcce-10th-anniversary-conference/; see also U.S. Dep’t of Justice, “Criminal Division Pilot Program On Voluntary Self-Disclosures For Individuals” (Apr. 15, 2024), <https://www.justice.gov/criminal/criminal-division-pilot-program-voluntary-self-disclosures-individuals>.

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DOJ in recent months designed to incentivize voluntary disclosure of wrongdoing by corporate insiders, including the Whistleblower Pilot Program highlighted in last month's issue of FCPA Update.² Effective as of April 15, the Program does not have an end date, though DOJ plans to collect data during the next three months to help it determine whether to extend, modify, or end the Program.

In an internal memo released the same day,³ DOJ outlined the core principles and criteria underlying the Program:

- NPAs will be offered to individuals who voluntarily, truthfully, and completely self-disclose corporate criminal conduct; fully cooperate with DOJ; and pay victim compensation, agree to disgorgement of any ill-gotten gains, and pay applicable restitution and forfeiture in full. This includes corporate insiders who took part in the misconduct. However, NPAs will not be available to CEOs or CFOs (or executives who fulfill equivalent roles), high-level foreign government officials, domestic government officials of any level, individuals who were organizers or leaders of the criminal scheme, or individuals with felony convictions or convictions involving fraud or dishonesty.
- DOJ is seeking information related to (i) foreign corruption and bribery, (ii) domestic corruption, (iii) misconduct at financial institutions such as money laundering, and (iv) violations related to financial market integrity, health care fraud, and federal contract fraud. The Program does not extend to information on tax or sanctions violations, as other DOJ components outside of the Criminal Division possess charging authority for such offenses.
- To be eligible for the Program, individuals must provide *original* information—non-public information not previously known to the Criminal Division or any DOJ component. This means that individuals must come forward before any inquiry or demand from DOJ pertaining to the subject matter of the misconduct, in the absence of any government investigation or threat of disclosure to the government or the public. This requirement could also lead to a race between a company and one or more of its employees to be the first to disclose misconduct to DOJ and thereby get credit for providing “original” information.

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2. Debevoise & Plimpton LLP, FCPA Update, Vol. 15, No. 8 (Mar. 2024), <https://www.debevoise.com/insights/publications/2024/03/fcpa-update-march-2024>.

3. U.S. Dep't of Justice, “The Criminal Division’s Pilot Program on Voluntary Self-Disclosures for Individuals” (Apr. 15, 2024), <https://www.justice.gov/media/1347991/dl?inline>.

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This Program is notably different from the Whistleblower Pilot Program announced by DOJ in March, which offers financial incentives to individuals not involved in criminal activity to come forward with information. Here, the focus is on culpable individuals, and thus the reward is not financial; it is the promise of an NPA. The Program, in one sense, formalizes the use of NPAs in cases of corporate misconduct where DOJ has had a longstanding practice of offering such agreements on a case-by-case basis, depending on a number of factors and circumstances.⁴ As acknowledged by DOJ, this new reporting avenue ups the ante for companies to self-report early by increasing the incentives for culpable individuals to come forward.

For companies and their management, it is now more important than ever to ensure the strength of internal compliance and reporting channels, and to consider self-reporting early after learning of potential misconduct. The longer a company waits, the higher the risk that a whistleblower or culpable employee will voluntarily disclose information to DOJ, reducing any benefits of self-disclosure by the company.

“If these pilot programs are shown to increase enforcement activity in areas where DOJ has experienced a marked downturn, such as FCPA enforcement, this may encourage DOJ to continue and even expand the Program, and for other enforcement authorities to follow suit with similar initiatives.”

The Program also comes on the heels of similar pilot programs, announced earlier this year, by the U.S. Attorney’s Offices for the Southern District of New York (“SDNY”) and the Northern District of California (“NDCA”).⁵ All three pilot programs offer NPAs aimed at culpable individuals who come forward with non-public information. It is too early to tell if these pilot programs will be effective in identifying and leading to prosecutions for misconduct that would otherwise go undetected. If these pilot programs are shown to increase enforcement activity in areas where DOJ has experienced a marked downturn, such as FCPA enforcement,

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4. U.S. Dep’t of Justice, Just. Manual § 9-27.220 (2018, updated June 2023) (“Justice Manual”); see also U.S. Dep’t of Justice, Comment to Justice Manual § 9-27.220 (2018, updated June 2023) (“It is left to the judgment of the attorney for the government to determine whether these circumstances exist”).
 5. Debevoise & Plimpton LLP, “SDNY Whistleblower Pilot Program Incentivizes Self-Disclosure and Cooperation” (Jan. 16, 2024), <https://www.debevoise.com/insights/publications/2024/01/sdny-whistleblower-pilot-program-incentivizes>; U.S. Dep’t of Justice, “U.S. Attorney Ismail Ramsey Announces Policies Underlying Whistleblower Pilot Program” (Mar. 18, 2024), <https://www.justice.gov/usao-ndca/pr/us-attorney-ismail-ramsey-announces-policies-underlying-whistleblower-pilot-program>.

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this may encourage DOJ to continue and even expand the Program, and for other enforcement authorities to follow suit with similar initiatives. We will be monitoring further developments closely.

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25 Years of the OECD's Anti-Bribery Convention: Successes and Challenges

This year marks the twenty-fifth anniversary of the Organization for Economic Cooperation and Development (“OECD”) Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions (the “Convention”). The Convention has operated at the forefront of international efforts to combat bribery and remains critical given corruption’s corrosive effects, including undermining efficient markets, economic development, democratic governance, and the rule of law.

In the fight against corruption, the Convention has helped boost public awareness, advance legislative reforms in dozens of countries, reshape corporate conduct, and invigorate civil society. But the Convention also has faced persistent challenges, such as uneven enforcement and political pressures. This article recounts the Convention’s successes and challenges, and highlights its impact on increasing transparency and accountability worldwide.

I. Background

The Convention is a binding international agreement among signatory nations (“Parties”) that agree to prohibit the bribery of foreign public officials and to submit to rigorous peer review of their progress in implementing the Convention. Parties must hold companies and individuals accountable through effective and proportionate sanctions, as well as provide mutual legal assistance to foreign counterparts in bribery cases.¹

At the United States’ urging, the OECD in 1997 adopted the Convention, which took effect in 1999. Before the Convention, the FCPA—enacted in 1977 in the wake of the Watergate scandal—was the only legislation prohibiting foreign bribery. However, DOJ and the SEC have brought many more FCPA enforcement actions since the Convention’s enactment than before, in part due to the earlier perception that prosecuting U.S. companies would unfairly prejudice them relative to non-U.S. companies given widespread acceptance of bribery as a valid business expense.²

The Convention established a valuable infrastructure for developing the global anti-corruption landscape and holding Parties accountable. It has sought to level the playing field for companies in their cross-border transactions and contributed

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1. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, OECD Legal Instruments, <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0293> (last visited Apr. 26, 2024).
 2. Bruce E. Yannett & Kara Brockmeyer, 14 Bus. & Com. Litig. Fed. Cts. § 156:2 (5th ed.) (Nov. 2022).

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significantly to increasing corruption-related investigations, including in previously unexpected places. In particular, the Convention has helped: (1) promote the rule of law, including more transparency, accountability, and integrity in both the private and public sectors; (2) promote fair competition by deterring corrupt practices and incentivizing a culture of compliance; (3) protect human rights and economic development; and (4) foster international cooperation and multilateralism to combat corruption.

The Convention's 46 Parties includes all 38 OECD countries and eight non-OECD countries, encompassing most major economies in the Americas and Europe. However, there is still room for broader adoption. South Africa is the only Party in Africa, and Japan and South Korea are the only Parties in Asia. Although Russia adopted the Convention, the OECD Council suspended its participation in OECD bodies in 2022 after its invasion of Ukraine. Among the G20 countries, only China, India, Indonesia, and Saudi Arabia³ are not Parties.⁴ Notably, over the last 25 years, misconduct committed in these four countries has featured in at least 105 FCPA corporate enforcement actions, representing more than 40% of such actions during this time period.

Parties are invited to serve as representatives to the OECD Working Group on Bribery (the "Working Group"). The Working Group meets quarterly and is responsible for monitoring, through the peer review process, countries' implementation and enforcement of the Convention and providing supplemental recommendations in periodic reports. This monitoring occurs through four successive phases that focus on the design of anti-bribery laws, legislative and practical implementation, enforcement, and tailor-made analysis. As of the Convention's twentieth anniversary, such reports had yielded more than 1,500 recommendations for improving various anti-bribery laws, with most fully or at least partially implemented.⁵

II. Key Achievements

Over the last 25 years, the Convention has been a significant instrument for changing the legal and business norms that accepted bribery as a legitimate cost of doing business.

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3. Saudi Arabia was granted Participant Status in the OECD Anti-Bribery Working Group from 2021 – February 2024. See OECD, The OECD Working Group on Bribery in International Business Transactions: 2022 Annual Report, at 22-23 (2023), <https://www.oecd.org/daf/anti-bribery/oecd-working-group-on-bribery-2022-annual-report.pdf> [hereinafter "OECD 2022 Annual Report"].
 4. See "Convention on Combating Bribery of Foreign Public Officials in International Business Transactions," OECD, <https://www.oecd.org/daf/anti-bribery/oecdantibriberyconvention.htm> (listing signatory countries) (last visited Apr. 26, 2024).
 5. "Fighting the Crime of Foreign Bribery: The Anti-Bribery Convention and the OECD Working Group on Bribery," OECD (Dec. 2018), <https://www.oecd.org/corruption/Fighting-the-crime-of-foreign-bribery.pdf>.

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Among the notable achievements of the Convention are:

- *The proliferation of anti-bribery laws and related legislation:* Far improved from the party of one in 1999, foreign bribery is now prohibited by all 46 Parties. For example, the United Kingdom adopted the Bribery Act in 2010 to comply with the Convention, Brazil passed the Clean Companies Act in 2013, and France adopted Sapin II in 2016, all of which have yielded significant enforcement actions. Likewise, to conform to the Convention, the United States amended the FCPA in 1998 to cover bribery violations committed by U.S. issuers and domestic concerns anywhere in the world, even without any conduct utilizing the U.S. mails or other U.S. means or instrumentalities of interstate commerce. Beyond more classic anti-bribery laws, Parties also have enacted legislation to eliminate the tax deductibility of bribes, create or strengthen corporate liability laws, and introduce or strengthen whistleblower protections.

“The Convention has operated at the forefront of international efforts to combat bribery and remains critical given corruption’s corrosive effects, including undermining efficient markets, economic development, democratic governance, and the rule of law.”

- *Increased transparency and accountability:* Findings and recommendations from the peer review process are reported publicly, in part to incentivize compliance with the Convention and to ensure that monitoring is unbiased. When a Party has inadequately implemented the Convention, it is subject to “Bis” evaluations.⁶ For instance, monitoring of the United Kingdom in 2008 noted “serious concerns” with the country’s foreign bribery regulation and enforcement mechanisms dating back to the Convention’s inception.⁷ However, by the time of its Phase 3 report in 2012, the United Kingdom had enacted the Bribery Act and was lauded for its significant strides towards implementing mechanisms consistent with the Convention. These enhancements included

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6. “Country monitoring of the OECD Anti-Bribery Convention,” OECD, <https://www.oecd.org/corruption/countrymonitoringoftheoecdanti-briberyconvention.htm#:~:text=The%20Parties%20to%20the%20Convention,%E2%80%9Cgold%20standard%E2%80%9D%20of%20monitoring> (last visited Apr. 26, 2024).

7. OECD, United Kingdom: Phase 2bis Monitoring Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions, at 5 (Oct. 16, 2008), <https://www.oecd.org/daf/anti-bribery/anti-briberyconvention/41515077.pdf>.

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provisions for mutual legal assistance and the requirement that offending companies compensate the country of the bribed official.⁸

- *Increase in global anti-bribery enforcement:* The addition of new anti-bribery laws has contributed to an increase in anti-bribery enforcement. Between February 1999 and December 31, 2021, for foreign bribery offenses, Parties collectively sanctioned 687 individuals and 264 companies through criminal proceedings and 88 individuals and 121 companies through civil or administration proceedings. For bribery-related offenses (e.g., money laundering, false accounting, and tax evasion), Parties reported sanctioning 76 individuals and 109 companies through criminal proceedings and 76 individuals and 182 companies through civil/administrative proceedings.⁹ There has also been an increase in the number of headline-catching enforcement actions, particularly resolutions coordinated among different Parties, as discussed below.
- *Greater international cooperation and multilateralism:* Countries have implemented mechanisms to increase cooperation among law enforcement agencies, facilitating the exchange of information, expertise, and evidence in order to investigate and prosecute foreign bribery cases, which, by definition, entail cross-border activity. Law enforcement officials from Parties meet twice a year to share best practices and challenges, enhancing their relationships in ways that promote collaboration and more enforcement activity. For example, between 2016 and 2020, U.S. authorities concluded at least ten multijurisdictional resolutions with counterparts from Brazil, France, the Netherlands, Singapore, Switzerland, and the United Kingdom¹⁰ and, between 2021 and 2024, resolved nearly ten more actions explicitly described as parallel or coordinated with authorities in Brazil, Colombia, South Africa, Switzerland, and the United Kingdom.¹¹ For example, in January 2020, French, U.K., and U.S. authorities coordinated a €3.6 billion resolution with Airbus, settling charges that included alleged bribery of foreign officials and arms export violations. This was the largest-ever foreign bribery-related enforcement action in both France and the United Kingdom.¹²

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8. OECD, Phase 3 Report on Implementing the OECD Anti-Bribery Convention in the United Kingdom, at 6 (Mar. 12, 2012), <https://www.oecd.org/daf/anti-bribery/UnitedKingdomphase3reportEN.pdf>.

9. OECD 2022 Annual Report, *supra* note 3, at 19-20.

10. See OECD, Implementing the OECD Anti-Bribery Convention: United States Phase 4 Report ¶¶ 290-93 (2020), <https://www.oecd.org/corruption/anti-bribery/United-States-Phase-4-Report-ENG.pdf> [hereinafter "U.S. Phase 4 Report"]. Goldman Sachs (2020); Airbus (2020); TechnipFMC (2019); Societe Generale (2018); Telia (2017); Keppel (2017); Rolls-Royce (2016); VimpelCom (2016); Odebrecht (2016); Braskem (2016).

11. See, e.g., Gunvor (2024), SAP (2024), Corficolombiana (2023), Honeywell (2022), ABB (2022), GOL (2022), Glencore (2022), Stericycle (2022), Credit Suisse (2021).

12. See Antoine F. Kirry et al., "Airbus Reaches Record-Breaking Global Settlement," FCPA Update, Vol. 11, No. 7 (Feb. 2020), <https://www.debevoise.com/insights/publications/2020/02/fcpa-update-february-2020>.

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U.S. authorities have also consistently thanked publicly multiple non-U.S. counterparts for their assistance in FCPA investigations and have continued to find new law enforcement partners. For example, in December 2022, the U.S. concluded their first coordinated resolution with South African authorities in an action against Swiss multinational ABB, and in August 2023 the U.S. coordinated its first resolution with Colombian authorities against financial services company Corficolombiana. In a particularly noteworthy example, Goldman Sachs' \$2.9 billion resolution in October 2020 involving bribery charges relating to Malaysia's 1MDB fund featured the largest number of authorities participating in a parallel resolution. DOJ and the SEC thanked at least 17 regulatory or law enforcement agencies and offices for their assistance on this matter, including authorities in Hong Kong, Singapore, the United Kingdom, and elsewhere.¹³

The increase in global anti-bribery coordination since the Convention went into force is also apparent through DOJ's reported increase in the number of MLAT requests it receives.¹⁴

- *More widespread adoption of compliance program enhancements and self-regulation by multinational companies:* Compliance programs implemented in response to recommendations from the Working Group have generated more self-regulation and broader adoption of enhanced corporate compliance programs. Most multinational corporations today are expected to have implemented compliance programs and internal controls designed to address bribery. Perhaps speaking to this trend, there has been a decrease in corporate compliance monitors imposed in connection with FCPA resolutions. Additionally, from October 2020 to 2022, a quarter of FCPA investigations into companies originated through self-reports, which in effect are made possible by compliance programs that adequately detect wrongdoing.¹⁵
- *Additional tools and mechanisms for fighting foreign corruption:* In addition to the enactment of foreign bribery laws, expansion in enforcement, and raised expectations for compliance programs, the Convention has encouraged new tools for company insiders and enforcement authorities, including

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13. Kara Brockmeyer et al, "The Year 2020 in Review: Another Record-Breaking Year of Anti-Corruption Enforcement," at 6, FCPA Update, Vol. 12, No. 6 (Jan. 2021), <https://www.debevoise.com/insights/publications/2021/01/fcpa-update-january-2021>.

14. See, e.g., U.S. Phase 4 Report, *supra* note 10 ¶¶ 285-88 (noting that DOJ announced a 147% increase in incoming MLAT requests related to foreign bribery cases).

15. OECD, Implementing the OECD Anti-Bribery Convention: United States Phase 4 Two-year Follow-up Report, at 6, 10 (Oct. 12, 2022), <https://www.oecd.org/daf/anti-bribery/united-states-phase-4-follow-up-report.pdf> [hereinafter "U.S. Phase 4 Follow-up Report"]. According to DOJ, its Voluntary Self-Disclosure and Corporate Enforcement Policy has successfully incentivized higher levels of self-reporting and cooperation by companies in addition to enhanced compliance programs.

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whistleblower programs and corporate beneficial ownership databases. In 2023, for example, Germany implemented the EU Whistleblower Directive with its own Whistleblower Protection Act.¹⁶ And, in September 2022, France enhanced its whistleblower program to allow whistleblowers to report crimes directly to French authorities rather than reporting through their employers first.¹⁷

In the United States, although FCPA-related reports remain a small fraction of the overall tips received by the SEC's whistleblower program (e.g., between 200 and 258 tips per year, or approximately 1% to 4% of tips received over each of the last five years), the program has grown significantly. In 2023, the SEC received a record number of tips and granted a record-breaking awards sum (\$600 million), including its largest-ever award (\$279 million) to a whistleblower in what was reportedly an FCPA case.¹⁸ And, moving towards addressing recommendations made by the OECD,¹⁹ DOJ recently announced a whistleblower rewards pilot program for individuals not covered by existing disclosure-incentive programs.²⁰

III. Notable Challenges

Despite the Convention's successes over the years, challenges remain to the broad-based adoption of anti-bribery principles, many of which require complex solutions beyond legislation.

- *Incomplete implementation and inadequate enforcement:* Some Parties encounter difficulties fully implementing the Convention and enforcing the ensuing laws due to resource constraints, legal barriers, institutional difficulties, and other societal factors. For example, a Transparency International report in 2022 that measured countries' level of anti-bribery enforcement—as active, moderate, limited, or little/none—categorized only two of the 47 leading global exporters (the United States and Switzerland) as having active enforcement, down from four in 2020. According to this report, since 2020, nine countries dropped in enforcement level, only two improved, and most countries surveyed had limited

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16. See Kara Brockmeyer et al., "The Year 2023 in Review: Steady Enforcement as Laws and Policies Proliferate," at 42-43, FCPA Update, Vol. 15, No. 6 (Jan. 2024), <https://www.debevoise.com/insights/publications/2024/01/fcpa-update-january-2024> [hereinafter "January 2024 FCPA Update"].

17. See "France Beefs Up Whistleblower Protections," Debevoise Update (Mar. 23, 2022), <https://www.debevoise.com/insights/publications/2022/03/france-beefs-up-whistleblower-protections>.

18. See e.g., January 2024 FCPA Update, *supra* note 16, at 26-27.

19. U.S. Phase 4 Follow-up Report, *supra* note 15, at 6 (recommending that the United States "consider how it can enhance protections for whistleblowers who report violations by non-issuers").

20. See "DOJ Announces Whistleblower Rewards Pilot Program," Debevoise Debrief (Mar. 8, 2024), <https://www.debevoise.com/insights/publications/2024/03/doj-announces-whistleblower-rewards-pilot-program>.

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or no enforcement of foreign bribery legislation.²¹ Transparency International's reporting found four countries to be active enforcers in 2014 and seven in 2018, before the declines in 2020 and 2022, which appear at least in part related to the COVID-19 pandemic, which challenged authorities' ability to investigate.²² In the United States, however, we have seen a return to more normal levels of anti-bribery enforcement since the 2021 lows, with increases both in 2022 and 2023, and notable actions thus far in 2024.

Inconsistent regulation and enforcement, including penalty disparities, across the Parties raises the cost of compliance, can undermine the effectiveness of well-intentioned anti-bribery efforts, and may create opportunities for impunity.

“While the Convention has spurred significant progress in implementing and enforcing anti-bribery legislation, challenges remain to ensure consistent enforcement, address evolving forms of corruption, and withstand the influence of political pressures.”

- *Evolving corrupt practices:* Since the Convention's enactment, we have seen the forms and means of foreign bribery evolve from suitcases full of cash to more sophisticated schemes featuring webs of shell companies, offshore accounts, and sundry things of value (e.g., luxury gifts, travel, and entertainment; employment opportunities; and company shares for government officials or their relatives). As markets and technology change, so do the nature and means of engaging in bribery and corruption. Technological enhancements contribute to better tools for compliance programs and law enforcement. However, as the game of cat-and-mouse goes, digital technologies also can facilitate sophisticated bribery schemes, posing new challenges for both corporate compliance and enforcement authorities. For example, the increased use of personal devices and off-channel communications, including ephemeral messaging applications, for business communications can muddy the trail for investigators to follow (and itself result

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21. Gillian Dell & Andrew McDevitt, "Exporting Corruption 2022 Assessing enforcement of the OECD Anti-Bribery Convention," at 4, Transparency Int'l (Oct. 2022), https://images.transparencycdn.org/images/2022_Report-Full_Exporting-Corruption_English.pdf.

22. Gillian Dell, "OECD ANTI-BRIBERY CONVENTION AT 25: TIME TO STEP UP ENFORCEMENT," Transparency Int'l (Mar. 25, 2024), <https://www.transparency.org/en/blog/oecd-anti-bribery-convention-at-25#:~:text=The%2025th%20anniversary%20of%20the%20OECD%20Anti%2DBribery%20Convention%20is,great%20promise%20that%20it%20holds>.

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in significant penalties). The use of cryptocurrency is also likely to feature more prominently in foreign bribery-related investigations going forward.²³

- *Compliance tensions:* Increased globalization and the ubiquity of cross-border business activity has brought other tensions as well. In particular, data privacy and data protection laws in certain jurisdictions can conflict with the anti-bribery efforts of both enforcement authorities and companies attempting to detect and investigate wrongdoing.
- *Political winds affecting anti-bribery enforcement.* Anti-bribery enforcement remains subject to the political winds, rising and falling as different administrations come and go. In Brazil, for example, we have seen some of the successes of *Lava Jato* challenged recently with the 2022 reelection of Lula da Silva as President. The Federal Supreme Court annulled evidence obtained through the \$2.6 billion leniency agreement entered into by Odebrecht after finding that prosecutors unlawfully collaborated with judges on the case, rendering the evidence “unusable,” and several lawsuits called for the suspension of penalties resulting from certain leniency agreements relating to *Lava Jato* on grounds that Brazil’s MPF lacked standing when it entered into those agreements.²⁴ These domestic ebbs and flows can also impact cross-border anti-bribery enforcement by limiting investigative resources and political support, reducing the ability to effectively coordinate with and assist foreign counterparts in their enforcement efforts.

Anti-bribery enforcement can of course also be wielded against political opponents or against companies associated with geopolitical rivals in a way that can undermine the level playing field the Convention seeks to create as well as the perception of such enforcement more generally.

IV. Looking Back and Ahead

By design, when the Convention came into force in 1999, it focused on curtailing the “supply side” of bribery (*i.e.*, individuals and entities paying bribes) by recommending Parties criminalize the act of paying foreign bribes. As part of a 2009 review (the “2009 Recommendations”), the Convention’s Parties agreed that

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23. Separate from the fraud charges on which he was convicted in November 2023, DOJ had also charged FTX founder Samuel Bankman-Fried in a superseding indictment that included an FCPA charge alleging that Bankman-Fried authorized an illicit transfer of approximately \$40 million in cryptocurrency to induce an official in China to unfreeze trading accounts that contained approximately \$1 billion in cryptocurrency. The charges in the superseding indictment had been severed for a second trial pending DOJ’s request for a specialty waiver from The Bahamas consenting to charges added after extradition, but DOJ informed the court that they would not proceed with a second trial because much of the evidence was already offered at the first and could be considered at sentencing. Letter by USA as to Samuel Bankman-Fried, *United States v. Bankman-Fried*, No. 1:22-cr-00673-LAK (S.D.N.Y. Dec. 29, 2023), ECF No. 388, <https://ecf.nysd.uscourts.gov/doc1/127134671822>. Bankman-Fried was sentenced to 25 years in prison in March 2024.

24. See January 2024 FCPA Update, *supra* note 16, at 60-62.

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new measures were necessary to reinforce and fill in the gaps of existing efforts to prevent and detect foreign bribery. The 2009 Recommendations were aimed at combatting small facilitation payments, increasing protections for whistleblowers, and enhancing communications between law enforcement and public officials, and yielded the OECD Good Practice Guidance on Internal Controls, Ethics and Compliance. The 2009 Recommendations also suggested that Parties enact tax, accounting, and audit regulations necessary to prevent practices by companies to facilitate or avoid detection of bribery.²⁵

More recently, in late 2021, the OECD announced new anti-bribery recommendations (the “2021 Recommendations”). As a supplement to the Convention and the 2009 Recommendations, the 2021 Recommendations extended enforcement priorities to include bribery’s “demand side,” which was not previously present in the Convention and laws such as the FCPA, and also endorsed incentivizing companies with reduced sanctions to adopt enhanced compliance programs and to self-report, cooperate, and remediate where wrongdoing is detected. (Roughly two years later, the United States enacted the Foreign Extortion Prevention Act, which criminalizes foreign government officials’ solicitation or acceptance of bribes and is its most significant foreign corruption law since the FCPA.²⁶)

Additionally, the 2021 Recommendations called on Parties to bolster transparency, awareness, and training for public officials regarding bribery risks; take additional action to combat the solicitation and use of small facilitation payments; take a consistent approach to non-trial resolutions (*e.g.*, resolutions through DPA, NPAs); enhance reporting mechanisms and protections for whistleblowers; and address, among other imperatives, increasing the effectiveness of cooperation with other authorities’ anti-bribery investigations and the transparency between law enforcement and businesses, and adapting for changes in technology since the Convention’s enactment.²⁷

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25. Recommendation of the Council for Further Combating Bribery of Public Officials in International Business Transactions, OECD (Nov. 26, 2009), <https://web-archiver.oecd.org/2019-05-10/111174-OECD-Anti-Bribery-Recommendation-ENG.pdf>.

26. See Kara Brockmeyer et al., “Congress Passes Foreign Extortion Prevention Act, Targeting ‘Demand Side’ of Foreign Bribery,” Debevoise Debrief (Dec. 15, 2023), <https://www.debevoise.com/insights/publications/2023/12/congress-passes-foreign-extortion-prevention-act>.

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V. Conclusion

The Convention and its surrounding infrastructure provide vital support for international efforts to combat bribery and corruption and to promote transparency, accountability, and integrity in global markets. While the Convention has spurred significant progress in implementing and enforcing anti-bribery legislation, challenges remain to ensure consistent enforcement, address evolving forms of corruption, and withstand the influence of political pressures. It has been a long road since 1999, and there remains a long and challenging journey ahead, but the Convention's twenty-fifth anniversary provides a worthwhile opportunity to reflect on how far both governments and industry have come on their anti-corruption journey.

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