

Coalition for Integrity

Coalition for Integrity's comments on the Draft Revised Recommendation on Further Combating Bribery of Foreign Public Officials in International Business Transactions

Written contribution to the consultation with external stakeholders

Coalition for Integrity is non-profit organization based in Washington D.C., focused on reducing corruption and increasing transparency and integrity in the public and private sector. As an organization focused on combatting corruption, the Coalition for Integrity ("C4I") is pleased to submit comments to the OECD on the Draft Revised Recommendation on Further Combating Bribery of Foreign Public Officials in International Business Transactions.

Coalition for Integrity participated in an outreach and consultation session in 2019 with members of the U.S. delegation to the OECD Working Group on Bribery and we are pleased to see that many points included in our discussion have been considered. Specifically, we are pleased to see a focus on Addressing the Demand side and, a section on Protection of Reporting Persons. We are also pleased to see that the section on Non-trial Resolutions lays emphasis on the principles of due process, transparency and accountability. Further, in the section on Criminalisation and Enforcement of the Offence of Bribery of Foreign Public Officials, there is an acknowledgement of the role played by anonymous shell companies in foreign bribery cases by recommending that member nations afford access to beneficial ownership information. C4I supports all these important additions.

The Coalition will focus its comments on other issues with which it has also been particularly engaged. In the order discussed below, they are:

- I. Availability of Statistics on Enforcement.
- II. Tax Deductibility of Fines and Penalties
- III. Follow-Up on Institutional Arrangements: Prevailing trends, issues and countermeasures in foreign bribery
- IV. OECD Good Practice Guidance on Internal Controls, Ethics and Compliance



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I. Availability of Statistics on Enforcement.

While we acknowledge that there has been an increase in international cooperation, mutual legal assistance, and enforcement, in half of the Convention countries there is still little or no enforcement.¹

Uneven enforcement of laws prohibiting foreign bribery limits the effectiveness of the anti-bribery regime and distorts international business competition. C4I is of the view that additional transparency regarding the enforcement pipeline would contribute to the overall transparency and credibility of the OECD Anti-Bribery Convention. Similar to the statistics published by the World Bank on an annual basis regarding the work of its Integrity Vice Presidency, we urge all the parties to the OECD Anti-Bribery Convention and the Working Group on Bribery to publish the following summary statistics on an annual basis.²

- Number of complaints received regarding potential foreign bribery violations;
- Number of investigations opened;
- Number of cases closed after a preliminary investigation;
- Number of cases closed without enforcement action;
- Pipeline at the beginning and at the end of the year;
- Number of cases for which informal or formal assistance of a foreign authority was sought, including the name of the foreign authority to which the case was referred;
- Number of cases in which prosecution was declined in favor of the interests of a foreign authority; and
- Number of investigations and declinations for recidivists.

II. Tax Deductibility

In addition to the bribes being non-deductible, any fines or penalties (by whatever name called) associated with anti-bribery resolutions should also not be tax deductible.

III. Follow-Up And Institutional Arrangements

We welcome the fact that section XXVII (Follow up Follow-up and institutional arrangements), para. v instructs the Working Group on Bribery to examine “prevailing trends, issues and counter-measures in foreign bribery.” However, we are concerned that the current language could be read to require examination of only the nature and prevalence of countermeasures. We believe that it is also important to examine their effectiveness. Accordingly, we recommend that this paragraph be revised to require examination of “prevailing trends and issues, as well as the effectiveness of counter-measures, in foreign bribery.” A revision along these lines would make the Recommendation more consistent with the Revised Recommendation of 1997 and the Preamble of the Convention, which call for “effective measures to deter, prevent and combat foreign bribery.” Examination of the effectiveness of countermeasures is also a pre-requisite to identification of the best practices referred to in section XXVII, para iv. The rationale for encouraging states to study the effectiveness of

¹ TRANSPARENCY INTERNATIONAL, *Progress Report 2020: Assessing Enforcement of the OECD Anti-Bribery Convention* at 9, (2020), available at <https://images.transparencycdn.org/images/A-slim-version-of-Exporting-Corruption-2020.pdf>

² WORLD BANK GROUP, *World Bank Group Sanctions System Annual Report FY20 (English)* (2020), available at <https://documents1.worldbank.org/curated/en/861191602141633639/pdf/World-Bank-Group-Sanctions-System-Annual-Report-FY20.pdf>



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countermeasures is similar to the rationale for encouraging firms to engage in periodic testing of ethics and compliance programs or measures as set out in Annex II, paragraph 13.

IV. OECD Good Practice Guidance on Internal Controls, Ethics and Compliance

The Good Practice Guidance contained in Annex II has been an important source of compliance guidance for companies

1. Since compliance has evolved over time, we recommend augmenting Section 13 on periodic reviews and testing of the ethics and compliance programs or measures to include: (a) anti-corruption risk assessment, (b) performing anti-corruption audits using professional with the right experience/skillset.³
2. To maintain effective compliance programs, companies need to be increasingly attentive to data from across the enterprise that is relevant to risk and compliance functions. A 2020 addition to the U.S. Department of Justice’s formal guidance to federal prosecutors on evaluating corporate compliance programs states that prosecutors should inquire into whether compliance and control personnel “have sufficient direct or indirect access to relevant sources of data to allow for timely and effective monitoring and/or testing of policies, controls, and transactions,” and whether “any impediments exist that limit access to relevant sources of data.”⁴ Second, in its 2018 Due Diligence Guidance for Responsible Business Conduct, the Organisation for Economic Co-operation and Development (OECD) stated that systems that collect information at a local level (e.g., supplier assessment data), but then are aggregated at a centralized department (e.g., headquarters or regional office) may help to identify trends more widely and can be used as a basis for sharing lessons learned across the enterprise.⁵ Together, these guidance documents strongly indicate that companies must be prepared to demonstrate that they can and do draw on all relevant data within their enterprise to manage their compliance programs effectively.

Because many companies and financial institutions have large quantities of data that warrant review in anti-corruption risk and compliance functions, many organizations are using various types of data analytics and programming to identify risk and compliance concerns and detect potentially risky transactions and relationships. Data analytics can prove indispensable in combing through massive quantities of financial and non-financial data to identify potential patterns of corrupt conduct and further the detection, and reduction of corruption. The larger the company and the volume of its internal data, however, the greater the potential burden on corporate anti-corruption teams in reviewing data and identifying patterns and anomalies that require further inquiry. Therefore, we recommend that the Good Practice Guidance also provide some guidance on the use of data analytics to manage corruption risks. To assist companies in this process, the Coalition for Integrity has issued a guidance document, *Using Machine Learning for Anti-Corruption Risk and Compliance* that is publicly available.⁶

³ TRANSPARENCY INTERNATIONAL-USA (NOW COALITION FOR INTEGRITY), *Verification of Anti-Corruption Compliance Programs* at 17, (2014), available at https://www.coalitionforintegrity.org/wp-content/uploads/2021/01/TI-USA_2014_verification-report-final.pdf

⁴ CRIMINAL DIVISION, U.S. DEPARTMENT OF JUSTICE, *Evaluation of Corporate Compliance Programs* (2020), available at <https://www.justice.gov/criminal-fraud/page/file/937501/download>

⁵ OECD, *OECD Due Diligence Guidance for Responsible Business Conduct* at 84, (2018), available at <http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf>

⁶ COALITION FOR INTEGRITY, *Using Machine Learning for Anti-Corruption Risk and Compliance* (2021), available at https://www.coalitionforintegrity.org/wp-content/uploads/2021/04/AI_report_2021_postprinting.pdf



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We thank you in advance for your continued action to ensure strong and effective implementation of the OECD Anti-Bribery Convention. Please do not hesitate to contact us at sshah@coalitionforintegrity.org if you have any questions.

Sincerely,

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