

OECD Lauds Past Decade Of FCPA Enforcement, With Caveats

By Stewart Bishop

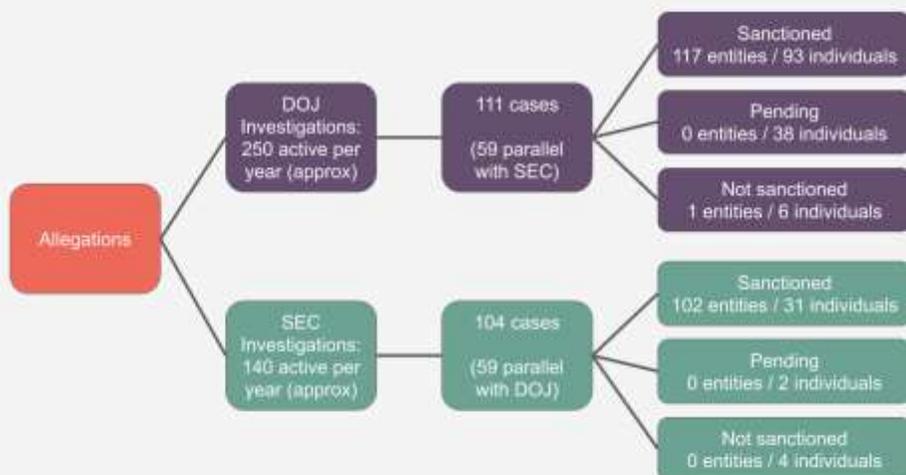
Law360 (November 19, 2020, 11:07 PM EST) -- A wide-ranging new report from an influential intergovernmental organization gives the U.S. high marks for its anti-bribery crackdown over the past decade, while calling out certain reforms that could assist in honing enforcement of the Foreign Corrupt Practices Act.

The Organization for Economic Cooperation and Development commended American enforcers on their efforts to combat foreign bribery in the report, while recommending that the U.S. improve whistleblower protections and increase transparency, in a unique look at the past 10 years of FCPA enforcement.

The exhaustive report, released Tuesday by the OECD Working Group on Bribery, largely covers U.S. enforcement of the act since the OECD's last evaluation in 2010. The report was prepared by experts from Argentina and the U.K., with cooperation from U.S. authorities, and presents findings that paint a picture of a robust enforcement system that has steadily increased its activity over the past two decades.

U.S. FCPA Enforcement and Related Supply-Side Offenses

The OECD says the number of concluded supply-side enforcement actions against individuals, driven largely by the Justice Department, has been on the rise.



Source: OECD

According to the OECD, the U.S. brought 156 cases under the FCPA or alleging related offenses between September 2010 and July 2019. On average, the U.S. brought 37.7 enforcement actions each year, up from 18.75 per year in 2006-2009 and 4.6 per year in 2001-2005.

"This confirms that, among the parties to the [OECD Anti-Bribery Convention], the United States is among the leading enforcers of the foreign bribery offence," the report says. The convention establishes legally binding standards that criminalize bribery of foreign public officials in international business transactions.

Sandra Moser, former chief of the U.S. Department of Justice's Fraud Section, which encompasses the DOJ's FCPA unit, said the report unsurprisingly depicts very strong anti-foreign bribery efforts by U.S. enforcers and regulators, given their top place in the world.

"I think there has been a dramatic uptick and a dramatic growth in attention that is focused on this space," Moser, now a partner at Morgan Lewis & Bockius LLP, told Law360. "And just a real explosion in participation and growth in this space, both from inside and outside the [DOJ] in terms of both how defense attorneys and companies subject to its jurisdiction are viewing anti-corruption as a risk."

Part of the success of the enforcement of the FCPA and related matters can be attributed to the increase in resources invested by the U.S. James Koukios, formerly the senior deputy chief of the Fraud Section, recalled that when he started in the FCPA unit in 2009, he was the third full-time dedicated FCPA prosecutor. Today, there are more than 30 such prosecutors. The U.S. Securities and Exchange Commission's FCPA unit also has 35 members in offices around the country, the report says.

"These folks are getting more resources, and they're dedicated, nonpartisan career enforcement attorneys and prosecutors who are doing this because that's their job and they're committed to doing it right," said Koukios, now a partner of Morrison & Foerster LLP.

The OECD working group, which Koukios said has itself been a huge reason for the sustained success of anti-foreign bribery efforts by the DOJ and SEC, also commended the U.S. for being a driving force in resolving multijurisdictional actions. The OECD said that allows countries to comprehensively wrap up foreign bribery matters, while providing legal certainty to the companies involved.

"You work together with other countries in the OECD working group, you get to share evidence, you work in parallel on these cases," Koukios said. "One of the biggest barriers is evidence and people being outside the U.S. But when you have law enforcement partners around the world, who are actually working with you, that makes your case so much easier to build."

Despite being overwhelmingly positive, the report is not without critiques, notably in the areas of protection against retaliation for whistleblowers and the need for increased transparency. The report lauds the results of the SEC's whistleblower program, established under the Dodd-Frank Act, which since 2012 has issued over \$721 million to 114 whistleblowing individuals, whose identities are kept secret. Since 2012, the report notes, the SEC has seen a 74% increase in the number of reports it received about securities law violations.

But the report notes that the U.S. doesn't have an overarching whistleblower protection law that would cover all whistleblowers who might report foreign bribery misconduct to any competent authority. For example, while a whistleblower who reports to the SEC about potential FCPA violations by an entity that issues securities would be fully protected, it isn't clear if a whistleblower who reports a non-issuer or

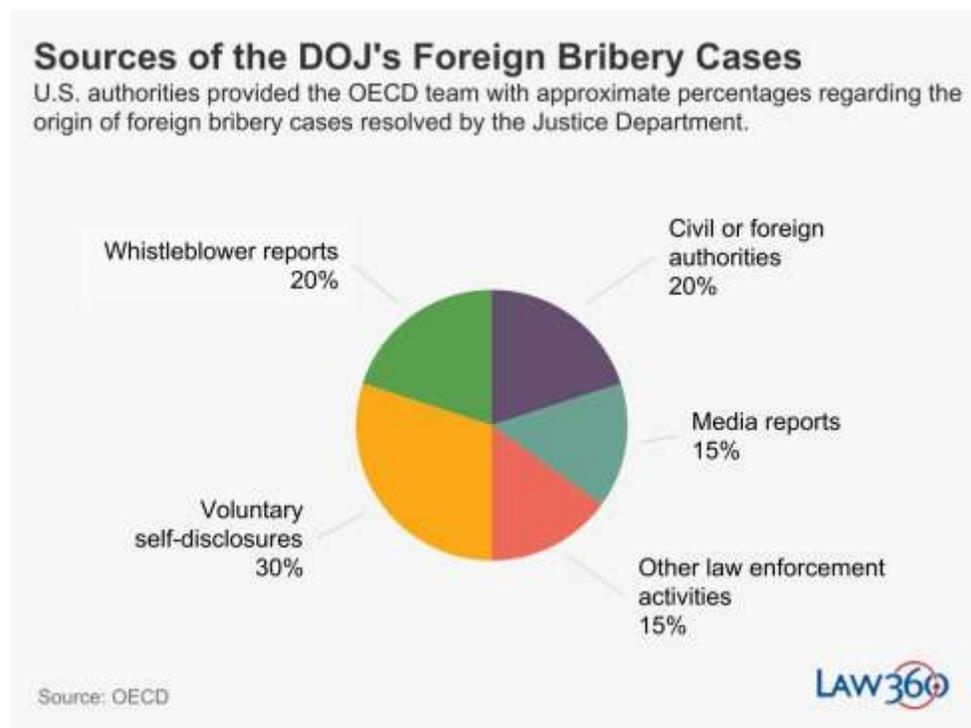
who only reports misconduct to the DOJ would enjoy the same protections, even if those who might retaliate against them are criminally punished.

The working group recommended that the U.S. consider enhancements for whistleblowers who report non-issuers and additional guidance about the protections available to whistleblowers depending on the enforcement agency to which alleged foreign bribery is reported.

Nicola Bonucci, former director of legal affairs for OECD, told Law360 that it was a legitimate critique.

"A lot of people have focused on the reward part of whistleblowing, which the U.S. has put in place over the past few years, which is supposed to be effective," said Bonucci, now a partner at Paul Hastings LLP. "But it is a fact that there is no overarching whistleblower protection."

As for achieving such a result in the U.S. at the federal level, there is only so much that can be done, he said.



Another point the report raises is the need for increased transparency in anti-foreign corruption enforcement. For instance, the OECD group recommended that U.S. law enforcement make public when a deferred prosecution agreement or nonprosecution agreement with an entity in an FCPA action is extended, and the grounds for such an extension. That should include when such an extension is made to allow a company to complete a monitorship, the group said.

The report further recommends that the SEC consider consolidating and publicizing its policy on FCPA enforcement, like the DOJ's FCPA corporate enforcement policy. The report says that some attorneys and company representatives have expressed reluctance to self-report foreign bribery violations to the DOJ, even under its corporate enforcement policy, without knowing how the SEC would treat the same misconduct, since the SEC does not have an FCPA-specific cooperation policy.

Koukios said he fully agrees with the report's recommendation about making the SEC's FCPA cooperation policy more clear. He said it can be difficult to glean from SEC resolutions what benefit there was to self-reporting cooperation and remediation.

"They say they credit it, and I'm sure they're being sincere when they say that, but I think to the outside world it's sometimes difficult to understand what the credit is and what benefit there was, whereas the DOJ is much more explicit," Koukios said.

The OECD's reports can carry a significant amount of weight with authorities in member nations. Bonucci said they are taken seriously because of the amount of work and quality of the evaluation.

"The working group on bribery is balanced in its approach," Bonucci said. "It's careful with a highly technical evaluation. It's not looking to make harsh judgement."

He said reports like these can have a huge impact, noting that past critical reports of the U.K. and France led to significant reforms in those countries and that most of the recommendations from the 2010 report on the U.S. were adopted.

"When they are critical, they are taken seriously, and actions are taken in response to that," Bonucci said.

Moser said the report's importance should be viewed through the lens of the weight given to it by the DOJ and SEC, which really do care about how their efforts — both successes and missteps — are perceived by enforcers around the world.

"When you are the dominant enforcer, and people are modeling to certain degrees their enforcement practices on your best practices ... maintaining that standard of not just volume but the caliber of the work and the professionalism of the people involved is incredibly important to them," Moser said.

--Editing by Aaron Pelc and Breda Lund.