ABSTRACT. Although corruption is ubiquitous, attitudes toward it differ among countries. Until the 1997 OECD Convention, the U.S. had been one of the only two countries with an explicit extraterritorial anti-bribery law, the Foreign Corrupt Practices Act (FCPA) of 1977. The FCPA employs a two-pronged approach to control the supply side of corruption: (1) anti-bribery provisions; and (2) accounting (books and record and internal controls) provisions. I offer evidence, albeit indirect, to show that the FCPA had limited success. The OECD Convention adopts the same two-pronged approach, but, since it is a multilateral treaty, is likely to be more successful provided that enforcement is vigorous enough. The signatory nations effectively form a cartel to reduce the cost of doing business. As with any cartel, however, each multinational corporation has an incentive to deviate. Thus, the mutual enforcement of the agreement is crucial for its success. However, the two-pronged approach is not sufficient, since internal control does not adequately monitor decisions made at the top level. I argue that the two lessons drawn from the U.S. experience are: (1) law enforcement must be credible; and (2) internal controls alone are not sufficient. Stronger and more effective corporate governance within an appropriate regulatory framework is needed to ensure that multinational corporations conduct their business in an ethical manner.

KEY WORDS: bribery, cartel, corruption, corporate governance, FCPA, internal control, OECD convention

Introduction

With the headline “Siemens to pay $1.34 billion in fines,” the New York Times reported on December 15, 2009 that Siemens AG had pleaded guilty to violations of the Foreign Corrupt Practices Act (“FCPA”). Siemens AG agreed to pay $450 million to settle criminal charges brought by the U.S. Department of Justice ("DOJ") and $350 million to settle civil claims brought by the Securities and Exchange Commission ("SEC"). Siemens also agreed to pay roughly $540 million to the German authority, the Munich Public Prosecutor’s Office, in addition to the $290 million Siemens had already agreed to pay a year earlier. The DOJ also charged three wholly owned subsidiaries of Siemens in Argentina, Bangladesh, and Venezuela with conspiracy to violate the FCPA.

The U.S. government has been prosecuting firms that engaged in bribery of foreign public officials since the passage of the FCPA in 1977. Yet, the number of enforcement cases has been modest: for example, Newcomb (2008) lists 61 criminal prosecution cases (by the DOJ) and 46 civil cases (by the SEC) for the period from 1977 through 2007. Until Siemens case, fines had been also modest relative to the size of the business and contracts involved. The largest fine prior to the Siemens case was $44 million imposed on Baker Hughes in 2007. The sheer magnitude of the fines Siemens agreed to pay is unprecedented.

What is interesting about the Siemens AG (Siemens Aktiengesellschaft) case is that it is about a German company. The DOJ’s and SEC’s involvement stems from the fact that Siemens is an SEC registrant and thus an “issuer” in the U.S. The company listed its stock on the New York Stock Exchange in March, 2001. It appears that the Siemens case represents a culmination of efforts made by the authorities in various countries. The Director of the SEC’s Division of Enforcement commented (SEC, 2008a):

Our success in bringing the company to justice is a testament to the close, coordinated working relationship among the SEC, the U.S. Department of Justice, and other U.S. and international law enforcement,
particularly the Office of the Prosecutor General in Munich.

Under the FCPA, the DOJ brought criminal charges against Siemens AG for their ineffective internal controls and fraudulent books and records, while the SEC brought civil actions against the company for bribery of foreign officials. The FCPA was enacted in 1977 to “bring a halt to the bribery of foreign officials” and “to restore public confidence in the integrity of the American business system.” SEC investigations in the mid-1970s found that a large number of U.S. corporations were involved in corrupt practices both within the United States and abroad. After the passage of the FCPA, for over 20 years, the U.S. and Sweden were the only two countries that explicitly prohibited extraterritorial bribery. The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (“OECD Convention”) was signed in 1997, and all OECD nations and several other countries agreed to incorporate anti-bribery provisions into law in their respective countries. Both the FCPA and the OECD Convention are designed to limit the supply side of corruption through extraterritorial anti-bribery laws. Until Germany ratified the OECD Convention in late 1998, Siemens AG, as a German conglomerate company, was able to operate its business without being subject to anti-bribery prohibitions and, moreover, benefited from tax deductibility of any bribe payments.

The business landscape for multinational corporations appears to have changed significantly with the adoption of the OECD Convention. To date, 38 countries have implemented the OECD Convention to put anti-bribery laws into effect. For the U.S. corporations, this may have “leveled the playing field,” because, in principle, companies from the signatory nations would be playing under the same set of rules. How likely is the OECD Convention to succeed and attain its goal of reducing corruption? Is the Siemens case representative of anti-bribery enforcement? An outlier or a harbinger of a trend? Since the U.S., had a 20-year running start in anti-bribery efforts under the FCPA, it is natural to ask whether the U.S. experience offers lessons useful for the effort to promote and ensure the success of the OECD Convention. This article argues affirmatively.

In addition to the anti-bribery provisions, both the FCPA and the OECD Convention include accounting provisions that require companies to keep good books and records as well as to establish and maintain appropriate internal controls. These requirements first came about when the SEC investigations discovered that many American companies masked corrupt practices by unrecorded slush funds and false records. As an amendment to the Securities Exchange Act of 1934, the accounting requirement of the FCPA is applicable to all the companies that report to the SEC regardless of their involvement with foreign business. Good record keeping and internal controls would make it more difficult to conceal illegal or unauthorized payments. Internal control is a tool for top management to solve agency problems within organizations, and it, no doubt, has been an important tool in the U.S. in combating corruption of various types – not just ones involving foreign public officials.

With 30 years of experience in criminalizing the bribery of foreign officials and requiring internal controls, one would expect the U.S. corporations to be relatively free of bribery. On the contrary, the U.S. standing in this respect is surprisingly poor. Transparency International conducted in 2002 the second of its opinion polls as to the propensity of the “multinational corporations to bribe” foreign public officials. The resulting Bribe Payers Index (BPI) ranked the U.S. below average, as the 13th among the 21 leading exporting nations. Moreover, the U.S. ranking had slipped from the ninth since the first survey of 1999. Another survey by Transparency International asked the respondents to name three governments thought to be willing to use various practices (other than bribery) to obtain “unfair” advantage in international trade and investment. The U.S. was selected most frequently: 58% of the respondents chose the U.S., followed by 26% for France. In view of the U.S.’s long history of attempting to reduce bribery through the FCPA and its effort to promote “fair competition” that culminated in the OECD Convention, these perceptions held by the respondents are disappointing and disturbing.

Since the U.S. appears to have achieved limited success with the FCPA, one might wonder whether the OECD Convention would also have a limited impact. There is a distinct difference between the