

BY BEN W. HEINEMAN, JR.

Stop Bribery Everywhere

The time is ripe for U.S. companies to press for global antibribery enforcement.

THE FAILURE OF MANY INDUSTRIALIZED NATIONS to meet their commitments under the 1997 Organisation for Economic Co-Operation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD convention) creates a substantial disadvantage for corporations subject to U.S. jurisdiction because the United States has the world's strongest enforcement program. This disadvantage is especially troubling during

a world recession when there is a desperate scramble for global orders and sales, and when some nations ignore their enforcement obligations under the OECD convention in order to promote trade and protect jobs, allowing companies in those nations to bribe overseas with impunity.

Nonenforcement is, in fact, pernicious protectionism.

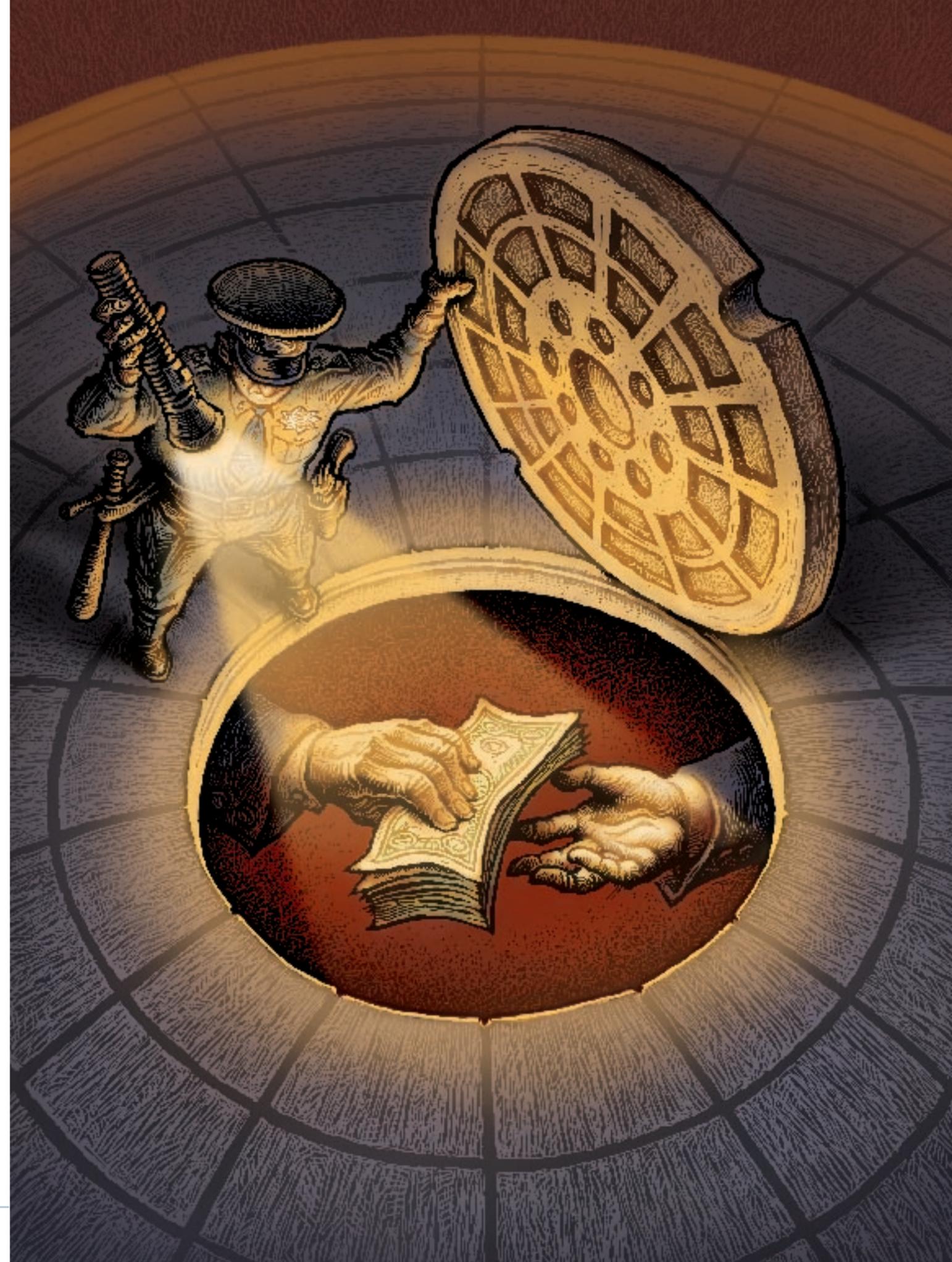
A new administration in Washington, D.C.—committed to transparency, integrity, and fair competition—creates an opportunity to have U.S. business voices heard and acted upon, especially in this time of global turmoil.

When I first became general counsel of General Electric Company in 1987, some in American business sought to water down the Foreign Corrupt Practices Act because it was allegedly hurting U.S. competitiveness. A number of us argued instead that the law should be “leveled up,” not “leveled down.”

Thus began the quest for the OECD convention and the formation of Transparency International, the global anticorruption NGO (disclosure: I was part of that effort and now serve on the board of Transparency International—USA). As discussed below, the “level up,” rather than “level down,” position is as right today as it was then. Then there was the hard problem of putting laws prohibiting foreign bribery on the books in the industrialized world. Today, there is the hard problem of having those laws enforced energetically and uniformly.

MORE:
Experts discuss global FCPA enforcement. A roundtable, page 85.

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THE PROBLEM

Currently, 37 countries have ratified the antibribery OECD convention and have enacted national laws, comparable to the U.S. Foreign Corrupt Practices Act, which prohibit bribery of foreign officials by transnational companies. These nations account for more than two-thirds of world exports. But the efforts to implement the convention at the national level have been mixed at best. The basic problem: The OECD itself has no enforcement powers. It can only monitor efforts of signatory nations through its highly professional Working Group on Bribery and issue reports about member state failings.

According to a 2008 Transparency International report, 18 of the original 34 signatory nations—including the United Kingdom and Japan—have taken little or no action in enforcing the national anti-bribery laws required by the OECD con-

ventions, the British government had stopped dead in its tracks the long-running investigation of bribery allegations involving British Aerospace Systems's lucrative Al Yamamah contracts for sale of British fighter planes to Saudi Arabia ["Mission Critical," December 2008]. This action was of a piece with the U.K.'s poor record under the OECD convention. The U.K. has brought only a single, relatively minor prosecution for foreign bribery. As importantly, it has ignored repeated OECD requests to modernize its foreign bribery laws—and, indeed, has yet to respond concretely and effectively to significant reform recommendations in a recent report by its own Law Commission.

By contrast, late last year Siemens AG agreed to pay a record \$1.3 billion to U.S. and German authorities for accounting and conspiracy offenses resulting from probes that the Munich-

and "extraordinary" efforts at changing the company's culture and behavior.)

If bribery was so pervasive, involving so many geographies and business units, in such an iconic multinational company, then similar behavior almost certainly exists within major exporters elsewhere in Germany, and in other industrialized nations where enforcement is not a meaningful deterrent.

THE RATIONALE

The reasons for energetic and uniform enforcement of foreign anti-bribery laws in the developed world are, in my view, even more powerful today than ten years ago, when the OECD convention was adopted.

■ There has been growing recognition that bribery, extortion, and misappropriation have an insidious impact, particularly on developing nations. Corrup-

tion distorts markets and competition; breeds cynicism among citizens; stymies the rule of law; damages government legitimacy; corrodes the integrity of the private sector; and impairs development and poverty reduction. It also helps perpetuate failed and failing states, which are incubators of terrorism, the narcotics trade, money laundering, human trafficking, and other types of global crime.

■ Although the process of building durable, transparent, and accountable institutions in the highly diverse developing world is very complex and time-consuming, enforcement of anticorruption laws against multinational corporations based in the developed world is a relatively straightforward method of attacking the problem. It will not end corruption, but it is an important concrete step that sends a strong signal about the issue's

importance and the developed world's refusal to be complicit.

■ Developed nations have significant foreign policy, national security, economic, and humanitarian interests in fostering legitimate and accountable institutions in emerging markets. These institutions make possible sustainable growth, societal reform, anticrime efforts, and reductions in poverty.

■ Global companies share these interests in spades in order to reduce risk and increase stability and predictability, which are necessary for sustained economic activity.

■ Inside companies, a strong anticorruption program and culture (not just lofty words in codes of conduct) is vital to high performance with high integrity, the foundational goals of global capitalism. For example, bribery is, among other things, antithetical to the employee values of honesty, candor, fairness, trustworthiness, and reliability upon which any strong corporate culture is built.

THE ACTIONS

Individual U.S. companies need actively to push the U.S. government to take multilateral and bilateral actions that put pressure on OECD member states to live up to their enforcement obligations under the convention. A corporate campaign is under way that provides a ready vehicle—with participation from, among others, the Chamber of Commerce, the AFL-CIO, the National Association of Manufacturers, the National Foreign Trade Council, and the United States Council for International Business, and coordination through Transparency International—USA.

Both the executive branch (U.S. Department of Justice, Department of State, Chamber of Commerce, and National Security Council) and Congress (Senate Committee on Foreign Relations and House Committee on Foreign Affairs) have historically been sympathetic. But now is the time for corporations to ask, not just in Wash-

ington, D.C., but in their home states and districts, for strong action.

At the multilateral level, the U.S. must use its influence with other sympathetic nations at the OECD to:

■ Elevate peer pressure on laggard nations to the ministerial level through active involvement by the secretary-general, the OECD ministerial council, and top-level officials from more active member governments (e.g., France).

■ Issue annual reports from the OECD's Working Group on Bribery that compare and contrast enforcement organizations, resources, and actions; that list prosecutorial results; and that itemize failures to correct deficiencies identified in Working Group reviews—all with the purpose of holding nations more accountable at the bar of world opinion ("naming and shaming").

■ Seek inclusion of major exporters like China, Russia, and India as signatories (completing an effort that is already under way).

The U.S. must also use its multilateral clout in the G8 group of major exporters (Canada, France, Germany, Italy, Japan, Russia, the U.K., and the U.S.) to make anticorruption enforcement a priority at the 2009 summit and to make much more systematic and fact-based in 2009 an "accountability" report issued first in 2008 on how the G8 is meeting its anticorruption commitments.

At the bilateral level, the U.S. must make anticorruption enforcement a priority issue in its relationships with close but nonperforming allies like Japan and the U.K., and not an afterthought at ministerial or heads-of-state meetings. And it must press nations like France, Italy, and Germany to bring major cases to fruition in order not just to deter but to change corporate culture.

Finally, in the United States, the Department of State and the Chamber of Commerce should revive their own annual reports to Congress on the country-by-country level of antibribery enforcement, a practice that ended in 2004 when a congressional mandate expired. Congress should consider hearings that

would ask foreign-headquartered multinationals with significant business in the U.S. to discuss their antibribery programs and their efforts in their home nations to ensure fair and uniform implementation of the OECD convention, so that their U.S. competitors are not disadvantaged in competition around the globe.

Of course, whether OECD member states will enforce their laws against foreign bribery depends heavily on national politics. And U.S. corporations, which have a strong presence in those nations, should seek local corporate and other allies in pressing for strong, consistent action in foreign capitals. For example, an international coalition of companies, led by Siemens AG, could be active in Germany making all the arguments noted above, including the need for fair competition through a level playing field (an argument that now applies to Siemens itself because it is under the surveillance of a court-imposed monitor).

But the most immediate and direct step for U.S. companies is to enlist (and test) the new administration to use its muscle to prevent U.S. business and labor from being disadvantaged by "protectionist" nonenforcement of the international commitment to stop developed-world bribery in other industrialized nations. Such a step follows logically from the G20 meeting in April warning against global protectionism. Let there be no mistake: This is a difficult political task, especially in a global recession. But without intense efforts from corporations—and corporate counsel—the chances of success, so vital in this downturn, are slim.

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vention. By contrast, the U.S. has had 50 percent of the OECD enforcement cases since convention ratification in 1999, although it has only about 10 percent of OECD exports. Even among those nations that have undertaken investigations, there have been only a handful of successful bribery prosecutions or tough settlements, although in some nations the pace of activity is increasing.

Enforcement means more than just punishing offending companies. It involves creating pressure in each jurisdiction for corporations to implement durable antibribery programs and to foster a business culture that fuses high performance and high integrity.

The symbols of this mixed record are the U.K. and Germany. In December 2006 Prime Minister Tony Blair announced that, for national security

based company allegedly paid more than \$1.4 billion in bribes around the world. As a result of newly energized German enforcement beginning in 2006, the payments followed resignations by Siemens's board chairman and chief executive; the payment of more than \$300 million in penalties in other German cases; restatements of more than \$500 million for expenses subsequently disallowed as improper payments; and outlays of more than \$850 million for lawyers and forensic accountants used in the company's internal inquiry. Enforcement authorities described the broad scale and broad geographic reach of the payments, calling them systematic and part of then-standard operating procedure. (They also credited the new Siemens management with transformative leadership